

UNIVERSITY OF THE WESTERN CAPE
FACULTY OF LAW

**ASSESSING THE INDEPENDENCE AND CREDIBILITY OF THE NATIONAL
PROSECUTING AUTHORITY**

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(Mini-thesis submitted in partial fulfilment of the requirements for the award of the LLM degree)

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DATE: 27 August 2019



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DECLARATION

I declare that Assessing the Independence and Credibility of the National Prosecuting Authority is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Signed:

SR

Date: 27 August 2019



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I hereby express unreserved appreciation for the contributions of all who made the writing of this mini-thesis possible. Too Professor Muntingh and Professor Mezmur, I would like to thank you for giving me a chance to prove myself. I wish to acknowledge the moral support of my entire family, encouragement and time contributed to the production of this mini-thesis. A huge thank you to my mother (Eileen Williams), without your support and care my goal would not have been possible.



KEYWORDS

Attorney-General

Constitution

Credibility

Criminal justice system

Executive

National Director of Public Prosecutions

National Prosecuting Authority

National Prosecuting Authority Act

Prosecutorial authority

Prosecutorial independence



ABSTRACT

Members of the National Prosecuting Authority (NPA) are required to be dedicated to the rule of law. Yet, recent and past decision-making has caused instability in the functioning of the NPA. The decision to prosecute or not to prosecute involves the exercise of discretion. The NPAs use of this discretion has been called into question on numerous occasions which has resulted in the erosion of its independence and credibility. There are constitutional and legislative provisions in place to guide prosecutors in the decision-making process which allows for a measure of accountability. However, the link between prosecutorial independence and accountability for decision-making is not clear when looking at recent and past decisions by the National Directors of Public Prosecutions. Therefore, an evaluation of the instability in the office of the National Director of Public Prosecutions during the period of 1998-2018 will be discussed. The research discusses the unwarranted intrusion on prosecutorial decision-making. Furthermore, external interfering has resulted in the loss of public confidence in the functioning of the NPA. The administrative duties of prosecutors are guided by constitutional and legislative procedures. Hence, the research will identify whether these procedures are efficient for the effective administration of the NPA. Key to the already mentioned will be providing recommendations on how to create stability in an institution that has been surrounded by instability for the past 20 years.

ABBREVIATIONS

ANC	African National Congress
CC	Constitutional Court of South Africa
DA	Democratic Alliance
GCB	General Council of the Bar
JSC	Judicial Service Commission
NDPP	National Director of Public Prosecutions
NPA	National Prosecuting Authority
NPA Act	National Prosecuting Authority Act
PAJA	Promotion of Administrative Justice Act
SAPS	South African Police Service

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TABLE OF CONTENTS

DECLARATION	i
ACKNOWLEDGEMENTS	ii
KEYWORDS	iii
ABSTRACT	iv
ABBREVIATIONS	v
TABLE OF CONTENTS	vi

CHAPTER 1

INTRODUCTION

1.1 Introduction	1
1.2 Literature review	1
1.3 Aim of the research	2
1.4 Research problem	3
1.5 Research questions	3
1.6 Background to the study	4
1.7 Research methodology	5
1.8 Limitations of the study	5
1.9 Chapter outline	5

CHAPTER 2

DEVELOPMENT OF THE SOUTH AFRICAN PROSECUTORIAL AUTHORITY

2.1 Introduction	7
2.2 Legislative history	7
2.3 Post-Apartheid Era	10
2.3.1 The National Prosecuting Authority Act	12
2.4 Structure of the NPA	13

2.5 The role and independence of the prosecution authority	14
2.6 Prosecutor's duty and decision to prosecute	15
2.7 Assessment of the statutory structure	16
2.8 Conclusion	18

CHAPTER 3

COMPETENCE AND INDEPENDENCE OF THE NPA

3.1 Introduction	21
3.2 Instability in the office of the NDPP	21
3.3 Does the NPA have independence?	23
3.3.1 The NPA and the accountability of decision-making	25
3.4 Executive appointment of the NDPP	26
3.4.1 Powers, duties and functions of the NDPP	27
3.4.2 Dismissal of the NDPP	29
3.5 Fit and Proper persons	30
3.6 Executive's abuse of appointing powers	34
3.7 Shortcomings in the appointment procedure	39
3.8 A move towards a transparent procedure	40
3.9 Quality of persons in the NPA	41
3.9.1 Mokotedi Mpshe	41
3.9.2 Menzi Simelane	42
3.9.3 Nomgcobo Jiba and Lawrence Mrwebi	42
3.9.4 Shaun Abrahams	45
3.9.5 Ramaphosa Acts	45
3.10 Selective resource mobilisation of the NPA	49
3.11 Trust in the NPA	50

3.11.1 How is success measured?	50
3.11.2 Decrease in number of convictions	53
3.12 Capacity of the NPA	54
3.12.1 Alternative Dispute Resolution Mechanism (ADRM)	56
3.12.2 Improving investigations by NPA	58
3.12.3 Public Trust in the NPA	59
3.13 Conclusion	61

CHAPTER 4

CONCLUSION AND RECOMMENDATIONS

4.1 Introduction	63
4.2 Conclusion	63
4.3 Recommendations	64
4.3.1 Improving the credibility of the appointment procedure	64
4.3.1.1 Appointment criteria	64
4.3.1.2 Amending the appointment process of the NDPP	66
4.4 Legislative guarantees aimed at protecting the independence of the NPA	67
4.4.1 Legislative amendments	67
4.4.2 Preventing decisions by the NDPP being influenced	67
4.4.3 Preventing external pressure on the NDPP	69
4.5 Improving the performance of the NPA	70
4.5.1 Consultation on ADRM	70
4.5.2 Internal incentives for performance	70
4.6 Concluding remarks	71
5. Bibliography	73

CHAPTER 1

INTRODUCTION

1.1 Introduction

The Constitution of the Republic of South Africa¹ and the National Prosecuting Act (NPA Act)² provides the structural framework for the allocation of the powers and functions of the functionaries charged with prosecutions. However, in South Africa the National Director of Public Prosecutions (NDPP) has been subject to limited oversight due to interference by the executive.³ It is therefore hard to strike an effective balance between independence and accountability.⁴ For that reason the research analyses the independence and credibility of the NPA and measures in place to ensure credibility and independence.

1.2 Literature review

The democratic dispensation of South Africa resulted in a single prosecution authority. The single prosecution authority would be unified under the NPA.⁵ Scholars have expressed similar views with regards to the independence and credibility of the NPA. Schönteich, outlines the controversies of the NPA from its early negotiation period up to its establishment. Schönteich discusses how the NPA has been subject to various degrees of external influences. The research contains the challenges a newly elected NDPP in a constitutional dispensation had to encounter. More importantly Schönteich discusses how the NPA was politicized and questionable decision-making began to take prominence.⁶ An occurring theme throughout the literature is the interfering in high-profile cases by the executive. Redpath illustrates the aforementioned by discussing various questionable decisions on whether or not to prosecute and how these decisions have caused the NPA to be

¹ Constitution of the Republic of South Africa, 1996.

² National Prosecuting Authority Act 32 of 1998.

³ Muntingh L, Redpath J and Petersen K 'An Assessment of the National Prosecuting Authority: A Controversial Past and Recommendations for the Future' (2017) African Criminal Justice Report 7.

⁴ Muntingh L, Redpath J and Petersen K (2017) 8.

⁵ Constitution of the Republic of South Africa, 1996 s 179 (1).

⁶ Schönteich M 'A story of trials and tribulations: The National Prosecuting Authority, 1994-2014' ISS SA Crime Quarterly 50 (2014).

seen as an institution which lacks credibility and independence.⁷ Numerous court decisions have substantiated the need for a change in the decision-making process of prosecutors with accountability towards the public imperative.⁸

Fernandez discusses the relationship between the executive and the prosecution authority in its centralised form. Fernandez is of the view that although the legislative framework is in place to guide prosecutors the executive still has sway in the prosecutorial authority. Thus, allowing for a perceived lack of independence in the decision-making process. The independent identity of the NPA is discussed with aspects such as budgetary constraints forming part of the link to prosecutorial independence.⁹ Muntingh, Redpath and Petersen, look at the substantive problems surrounding the NPA, such as, the accountability and effectiveness of the prosecuting authority. The authors, discuss interference by the executive in the work of the NPA, such as the meddling in cases that are deemed high profile or of a sensitive nature.¹⁰ Furthermore, it is recommended by Muntingh, Redpath and Petersen, that the NPA be strengthened by amending the NPA Act to include judicial review and to reform the selection criteria for the appointment of the NDPP, with transparency being of paramount importance.¹¹

The NPA has increasingly been a subject of media and public debate. Developing case law and statutory considerations allow for the critique and expansion of the developing topic of prosecutorial independence and credibility. The views of the already mentioned scholars are critiqued and expanded upon together with continuing judicial and constitutional developments.

1.3 Aim of the research

The NPA is at the forefront of the criminal justice system. Therefore, any doubt about the NPAs ability to act without fear, favour or prejudice raises pivotal issues with

⁷ Redpath J 'Failing to prosecute? Assessing the state of the National Prosecuting Authority in South Africa' (2012) 186 ISS Monograph.

⁸ Over the years the NPA has been plagued by political meddling. Therefore, various court decisions, reaction by civil society and members of the NPA will be relied upon and discussed.

⁹ Fernandez L 'The National director of Public Prosecutions in South Africa: Independent Boss or Party Politician?' (2007) 1 *Speculum Juris*.

¹⁰ Muntingh L, Redpath J and Petersen K (2017) 12-3.

¹¹ Muntingh L, Redpath J and Petersen K (2017) 36-7.

regards to the proper functioning of the criminal justice system.¹² The need to cultivate a culture of accountability is essential in setting up an effective criminal justice system in which the quality of justice should be held in the highest regard.¹³ Thus, the prosecutorial decision-making process must be transparent and place prosecutorial decision-making functions out of the reach of any undue influence.¹⁴ Hence the research assesses the independence of the NPA in decision-making as well as explores the credibility challenges facing the NPA.

1.4 Research problem

The NPA has a constitutional obligation to carry out functions without fear, favour or prejudice.¹⁵ Once it allows external interfering with its prosecutorial function, it runs the risk of being subject to external forces and losing its credibility towards the public.¹⁶ Recent history has shown the NPA taking decisions that would raise questions about its independence. The aforementioned has caused considerable doubt in the running of the NPA and therefore it is imperative to explore the cause that has led the institution to its current position. The research, therefore, investigates the extent to which the alleged interferences have impacted the credibility of the NPA. Furthermore, it discusses case law which gives examples of questionable decision-making by incumbent NDPPs.

1.5 Research questions

1.5.1 The primary question that the mini-thesis seeks to answer is:

- How sufficient are legislative guarantees aimed at protecting the independence of the NPA?

1.5.2 Sub-questions:

- How can the appointment procedure of the NDPP be improved, with a view to ensure/improve its independence?

¹² *Zuma v National Director of Public Prosecutions* 2009 (1) BCLR 62 (N) para 97.

¹³ Muntingh L, Redpath J and Petersen K (2017) 8.

¹⁴ Van Zyl Smit D, Steyn E 'Prosecuting Authority in the New South Africa' (2000) 8 *CIJL* 147-8.

¹⁵ Constitution of the Republic of South Africa, 1996 s 179(4).

¹⁶ Van Zyl Smit D, Steyn E (2000) 152-3.

- How can the position of the NDPP be influenced by external factors and what are the legislative and other measures to protect it from such influence?

1.6 Background to the study

The decision to prosecute or not prosecute involves the exercise of discretion, and it is in the interest of justice that prosecuting authorities exercise that discretion freely, impartially and independently of any influence or interference.

To safeguard the independence of the prosecution authority, the NPA Act states that neither organ of State, nor any other person shall improperly interfere with, hinder or obstruct the prosecuting authority in the exercise of its duties and functions.¹⁷ Furthermore, the Constitution 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.¹⁸

Prosecutors have a constitutional obligation to adhere to the policy directives in the exercise of their prosecutorial function.¹⁹ The Constitution and the NPA Act clearly provide that the decision to prosecute a person arrested for allegedly committing an offence rests with the prosecution service.²⁰ In addition, it is the prosecutor who decides whom to charge, what evidence to present, which witnesses to call, and whether or not to enter into a plea and sentence agreement.²¹ These powers derive from the doctrine of separation of powers, and in South Africa, courts are hesitant, to interfere with prosecutorial discretion.²² Thus, the independence of the judiciary is linked to the independence of the prosecutors of the NPA as well as the NDPP.²³ Therefore, undermining the freedom from external factors would lead to the judiciary and the prosecutorial authority being held captive by interests that might be

¹⁷ Act 32 of 1998 s 32(1) (b).

¹⁸ Constitution of the Republic of South Africa, 1996 s 179(4).

¹⁹ Prosecution Policy Directives-Policy Directives issued by the National Director of Public Prosecutions (2014) 11.

²⁰ *S v Snyman* [1980] SACC 313 para 314.

²¹ *Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (AD) para 137.

²² Daugherty D 'The Separation of Powers and Abuses in Prosecutorial Discretion' (1988) 79 *Journal of Criminal Law and Criminology* 971.

²³ *State v Yengeni* 2006 (1) SACR 405 para 52-3.

threatened by an independent search for the truth.²⁴ However, there has been suspicion of external interference with the discretionary powers of prosecutors and the NDPP. As a result it is necessary to inquire into the legal framework that regulates the role and function of the prosecution and the NDPP in the administration of criminal justice.

1.7 Research methodology

The mini-thesis analyses the legislative guarantees aimed at protecting the NPAs independence and credibility of its leaders. It also examines the functional independence of the NPA, considering the circumstances that prompted the NDPP to make certain decisions in cases involving high-profile persons. The study relies on the facts of, and judgments in, court cases, and on articles written by scholars and legal researchers. In addition, the study also draws on the experience of other countries, to derive guidance from their good practice. Desktop research will also be used.

1.8 Limitations of the study

The mini-thesis relies mainly on data from available literature in the public domain. Furthermore, the research question to be answered is a current one and therefore recent case law updates, as well as developments reported in the media and political spheres will be relied upon. In addition, the research includes developments that occurred up to the appointment of Shamila Batohi as the NDPP.

1.9 Chapter outline

Chapter 1 outlines the background to this study.

Chapter 2 deals with the development of the office of the prosecutor under the Union of South Africa in 1910, and from then until 1992. The chapter deals with the NPA as a centralised prosecuting authority. It discusses the legal framework establishing the NPA and its significance in a democratic state based on the rule of law. The adoption

²⁴ 2006 (1) SACR 405 para 52-3.

of the Constitution in 1996 brought about changes in the administration of criminal justice in South Africa. The Constitution made provision for one criminal justice system and a single prosecution authority. This chapter evaluates the relevant sections of the South African Constitution and the NPA Act pertaining to the independence of the single prosecution authority.

Chapter 3 deals with the independence of the NPA. There is a discussion of the appointment procedure for the NDPP and of the influence of the executive. The chapter takes account of the Constitution and the NPA Act and considers the prosecutorial decision-making function regarding high-profile cases. Furthermore, the chapter incorporates the NDPPs who have led the NPA, having regard to their credibility or obstacles they faced during their respective tenures. The chapter looks at the challenges facing the NPA. In addition, there is a discussion of the measures that have, and ought to have, been taken to address these challenges. The chapter contains a discussion of the concept 'fit and proper' and the views of the courts regarding the concept. Public perceptions of the NPA are examined in the light of how recent and past judicial decisions have impacted on the public credibility of the NPA.

Chapter 4, the final chapter, ties together all the preceding chapters, highlighting areas of concern regarding the South African prosecutorial authority and suggesting recommendations. The chapter aims to assert why the NPA must be independent of all internal and external factors and should always act without fear, favour or prejudice.

CHAPTER 2

DEVELOPMENT OF THE SOUTH AFRICAN PROSECUTORIAL AUTHORITY

2.1 Introduction

This chapter covers the historical development of the South African prosecution authority. The discussion ranges over two periods illustrated by the period before and after 1994. Furthermore, the chapter discusses the legislative measures in place and how these measures have developed during the different periods to ensure prosecutorial independence at present. The chapter illustrates the South African prosecution authorities historical development into a structured and centralised system. An evaluation of the legislative framework will also be discussed.

2.2 Legislative history

South Africa has been subject to various degrees of prosecutorial independence.²⁵ The post of Minister of Justice was created in the national cabinet with the formation of the Union of South Africa in 1910.²⁶ Furthermore, the Union-Wide Supreme Court had an Attorney-General appointed in each Provincial Division with the authority to prosecute.²⁷ In the Union of South Africa, the independence of the Attorney-General was confirmed in the Criminal Procedure and Evidence Act of 1917.²⁸ Each Attorney-General had the power to delegate his or her authority. The Attorney-General was an independent civil servant with the responsibility to prosecute all crimes within their jurisdiction.²⁹

Although the administration of justice was vested in the Minister of Justice, the prosecution process was within the exclusive ambit of the Attorney-General.³⁰ This, however, changed with concerns regarding the far-reaching power of the Attorney-General.³¹ This led to the amendment of the Criminal Procedure Act in 1926.³² The

²⁵Schönteich M 'Lawyers for the People: The South African Prosecution Service' (2001) 53 ISS Monograph 16-8.

²⁶ Van Zyl Smit D, and Steyn E (2000) 138.

²⁷ Van Zyl Smit D and Steyn E (2000) 138.

²⁸ Criminal Procedure and Evidence Act 31 of 1917 s 11(1).

²⁹ Mokoena M 'Taming the Prosecutorial Beast: of Independence, Discretion and Accountability' *Stellenbosch Law Review* 23 (2012) 298.

³⁰ Mokoena M (2012) 298.

³¹ Schönteich M (2001) 31.

amendment resulted in the Minister of Justice being given powers to institute prosecutions and delegate some of these powers to the Attorney-General.³³ The reason for the amendment of the legislation, in the Minister of Justice's view, was that it allowed for Parliament to be the ultimate power in prosecutorial decisions.³⁴ However, Schönteich is of the opinion that it was due to having public officials legally free from ministerial constraint, and Parliamentary responsibility, that encouraged the amendment of the legislation.³⁵ The then Minister of Justice, Tielman Roos, stated that the reason for the amendment was to ensure that there was responsibility over the Attorneys-General as there was none at the time.³⁶ Subsequently, due to the change in legislation, the Attorney-General lost a significant amount of independence. The authority to prosecute could only be delegated by the Minister of Justice.³⁷ The amendment resulted in the removal of the power and independence of the Attorney-General.

In 1935, the power of prosecution was relocated to the Attorney-General due to the excessive workload on the Minister of Justice. Legislative amendments by the government of Prime Minister JBM Hertzog placed the Attorney-General under ministerial control.³⁸ The power to institute prosecution was, however, subject to the Minister of Justice in terms of the General Law Amendment Act.³⁹ The General Law Amendment Act went a step further by stating that the Minister of Justice had the right to reverse any decision made by an Attorney-General and could exercise any prosecutorial decision.⁴⁰ Thus, the power to intervene was left to the Minister of Justice alone. There was no formal or substantive separation of powers between the Attorneys-General and the Minister of Justice, who represented the executive.⁴¹ From 1935-1990 the prosecution service formed part of the Ministry of Justice. During this period, the Minister of Justice had the legal right to take over the function of the Attorneys-General as well as that of the Solicitor-General at his or her own

³² Criminal and Magistrate Court Procedure (amendment) Act 39 of 1926.

³³ Act 39 of 1926 s 1 (3).

³⁴ Van Zyl Smit D and Steyn E (2000) 139.

³⁵ Schönteich M (2001) 32.

³⁶ Schönteich M (2001) 32.

³⁷ Schönteich M (2001) 32.

³⁸ Redpath J (2012) 9.

³⁹ General law Amendment Act 46 1935 s 1.

⁴⁰ Act 46 1935 s3 (5).

⁴¹ Schönteich M (2001) 31.

discretion.⁴² During the aforementioned period no separation of powers between the executive and the Attorneys-General existed.⁴³

In 1992 the position of the Attorney-General underwent change. The government of then-President F.W de Klerk removed the Minister's power to interfere in the decision-making of the Attorneys-General.⁴⁴ The Attorney-General Act of 1992⁴⁵ reinstated the decision-making function of the Attorney-General, although the Minister of Justice could request information or a report on any matter. Additionally, Annual Reports had to be submitted to the Minister of Justice.⁴⁶ The discretion to prosecute now resided solely with the Attorneys-General and their subordinates.⁴⁷

The Attorney-General Act of 1992 strengthened the authority of the Attorneys-General and made each division independent of the executive. Measures, such as, the security of tenure, guaranteed remuneration, and removal on selective grounds, were introduced to strengthen the office of the Attorney-General.⁴⁸ The Attorney-General Act of 1992 did away with the control model⁴⁹ and provided for an indirect form of accountability, as the amendment removed the Minister of Justice's power to interfere in the decision-making process of the Attorneys-General.⁵⁰ Thus, the Attorneys-General were only accountable to Parliament. Parliament had limited power, in the form of questioning the Attorneys-General about Annual Reports or dismissing the Attorneys-General when exceptional circumstances arose.⁵¹

At the time the African National Congress (ANC) was of the view that the amendment to the Attorney-General Act of 1992 was to secure the position of present Attorneys-General.⁵² The 1992 Attorney-General Act was enacted at a time

⁴² Redpath J (2012) 9.

⁴³ Redpath J (2012) 9-10.

⁴⁴ Redpath J (2012) 10.

⁴⁵ The Attorney-General Act 92 of 1992.

⁴⁶ *National Director of Public Prosecutions v Zuma (Mbeki and another intervening)* 2009(4) BCLR 393 (SCA) para 30.

⁴⁷ Act 92 of 1992 repealed s 3(5) of the Criminal Procedure Act 51 of 1977, whereby the Minister of Justice could reverse any decision arrived at by an Attorneys-General.

⁴⁸ Act 92 of 1992 s 3 and s 4.

⁴⁹ *Ex parte Attorney-General, Namibia: In Re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General* 1995 8 BCLR 1070 (NMS) para 1081D.

⁵⁰ Act 92 of 1992 s 5(5).

⁵¹ Van Zyl Smit D and Steyn E (2000) 142.

⁵² Redpath J (2012) 10.

when the new democratic government came into power.⁵³ As a result, the provisions that were introduced were not seen as a measure to protect the independence of the prosecution authority, but rather to protect the outgoing government. The ANC believed that some of the Attorneys-General played a major role in the prosecution of political cases during apartheid and could not retain their positions.⁵⁴

The Interim Constitution⁵⁵ passed in 1993 was the result of negotiations leading to the transition to democracy.⁵⁶ This Constitution contained constitutional principles on which the 'Final' Constitution was to be based.⁵⁷ Furthermore, under the 1993 Interim Constitution⁵⁸ the position of the Attorneys-General remained unaltered as it vested power in the Attorney-General and not the Minister of Justice.⁵⁹ However, the ANC as the majority party in the Constitutional Assembly the body responsible for drawing up the 1996 Constitution, successfully pushed for the introduction of a section in the 1996 Constitution⁶⁰ which would provide the form the prosecuting authority would take.⁶¹

2.3 Post-Apartheid Era

The introduction of section 179 in the 1996 Constitution resulted in the integration of the prosecution authority into the rest of the criminal justice system and provided for the establishment of a single prosecuting authority.

The Constitution provided for a single prosecuting authority with the NDPP as its head. Furthermore, section 179 (1) (a) provides that the NDPP be appointed by the President. The NPA as the prosecuting authority has the power to institute criminal

⁵³ Redpath J (2012) 10.

⁵⁴ Schönreich M 'Court Room Warriors for Justice: History of the South African Prosecution Service' (2002) 27 *Journal for Contemporary History* 90-1.

⁵⁵ Constitution of the Republic of South Africa, Act 200 of 1993, assented to 25 January 1994, came into force 27 April 1994.

⁵⁶ Redpath J (2012) 4.

⁵⁷ Constitution of the Republic of South Africa, Act 200 of 1993 schedule 4.

⁵⁸ Constitution of the Republic of South Africa, Act 200 of 1993.

⁵⁹ In terms of s 108 of the Constitution of the Republic of South Africa, Act 200 of 1993, the authority to institute criminal prosecutions on behalf of the State shall vest in the Attorneys-General of the Republic. The area of jurisdiction, powers and functions of an Attorney-General shall be as prescribed by or under law. Furthermore, no person shall be appointed as an Attorney-General unless he or she is appropriately qualified in terms of a law regulating the appointment of Attorneys-General in the Republic.

⁶⁰ Constitution of the Republic of South Africa, 1996.

⁶¹ Schönreich M (2002) 91.

proceedings on behalf of the State.⁶² The prosecuting authority must exercise its duties without fear, favour or prejudice.⁶³ The NDPP in consultation with the Minister of Justice and Directors of Public Prosecutions must determine the prosecution policy that has to be observed in the prosecuting process.⁶⁴ Furthermore, the NDPP has the responsibility of issuing policy directives.⁶⁵ In addition, the NDPP has the right to intervene in the prosecution process when policy directives have not been fulfilled.⁶⁶ The NDPP has the power of review and may review a decision to prosecute or not to prosecute.⁶⁷

The new constitutional provisions did not go unchallenged. The then newly-established Constitutional Court (CC) was empowered by the 1993 Constitution to test the validity of the Constitution and whether the Constitution complied with constitutional principles.⁶⁸ In *Ex parte Chairperson of the Constitutional Assembly, in re certification of the Constitution of the Republic of South Africa (Certification judgment)*⁶⁹, the constitutionality of section 179 of the Constitution was challenged on the basis that the section encroached on the principle of separation of powers.⁷⁰ The basis for the challenge was in terms of section 179(1) the President as head of the executive appoints the NDPP.⁷¹ The CC was satisfied that the appointment of the NDPP by the President did not compromise the doctrine of separation of powers.⁷² The CC noted that the NPA was not part of the judiciary. Therefore, a provision such as section 179(4) of the Constitution ensures that the NPA acts with independence.⁷³

⁶² Constitution of the Republic of South Africa, 1996 s 179(2).

⁶³ Constitution of the Republic of South Africa, 1996 s 179 (4).

⁶⁴ Constitution of the Republic of South Africa, 1996 s 179 (5) (a).

⁶⁵ Constitution of the Republic of South Africa, 1996 s 179 (5) (b).

⁶⁶ Constitution of the Republic of South Africa, 1996 s 179 (5) (c).

⁶⁷ Constitution of the Republic of South Africa, 1996 s 179 (5) (d).

⁶⁸ Van Zyl Smit and Steyn E (2000) 144.

⁶⁹ *Ex parte Chairperson of the Constitutional Assembly, in re certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC).

⁷⁰ Schedule 4, Constitutional Principle VI: 'There shall be a separation of powers between the legislative, executive and judiciary with appropriate checks and balances to ensure accountability, responsiveness and openness'.

⁷¹ 1996 (4) SA 744 (CC) para 141.

⁷² 1996 (4) SA 744 (CC) para 141.

⁷³ 1996 (4) SA 744 (CC) para 141.

The CC noted that section 179(4) which provides for the exercise of prosecutorial duty without fear, favour or prejudice, was a constitutional guarantee that enshrines prosecutorial independence.⁷⁴ Thus, there was no breach of Constitutional Principle VI as no breach of the principle of separation of powers took place, as the prosecuting authority finds itself situated between the judiciary and the executive. Still if the prosecuting authority formed part of the judiciary, the fact that the head of the NPA is appointed by the President does not itself breach the doctrine of separation of powers.⁷⁵

2.3.1 The National Prosecuting Authority Act

In 1998 Parliament fulfilled its constitutional obligation and enacted national legislation that stipulated the details of the new prosecutorial system for South Africa.⁷⁶ The NPA Act provides for the appointment, remuneration and terms of service of the NPA members.⁷⁷ The NPA Act further determines the powers, duties and functions of its members.⁷⁸ Furthermore, chapter six of the NPA Act contains provisions on the impartiality of prosecutors and final responsibility over the prosecuting authority by the Minister. Chapter six additionally contains the accountability of the NPA to Parliament⁷⁹

With regards to international policy framework prosecutors should be guided by the United Nations Guidelines on the Role of Prosecutors (United Nation Guidelines).⁸⁰ The United Nation Guidelines were formulated to assist the Member States in their task of promoting the effectiveness and impartiality of prosecutors in criminal proceedings within the framework of a States national legislation.⁸¹ The NDPP is required to alert all prosecutors that the performance of their duties should be in line

⁷⁴ 1996 (4) SA 744 (CC) para 146.

⁷⁵ 1996 (4) SA 744 (CC) para 141.

⁷⁶ Act 32 of 1998 was passed to regulate a centralised prosecuting authority.

⁷⁷ Act 32 of 1998 Chapter 3 and Chapter 4.

⁷⁸ Act 32 of 1998 Chapter 3 and Chapter 4.

⁷⁹ Act 32 of 1998 Chapter 6.

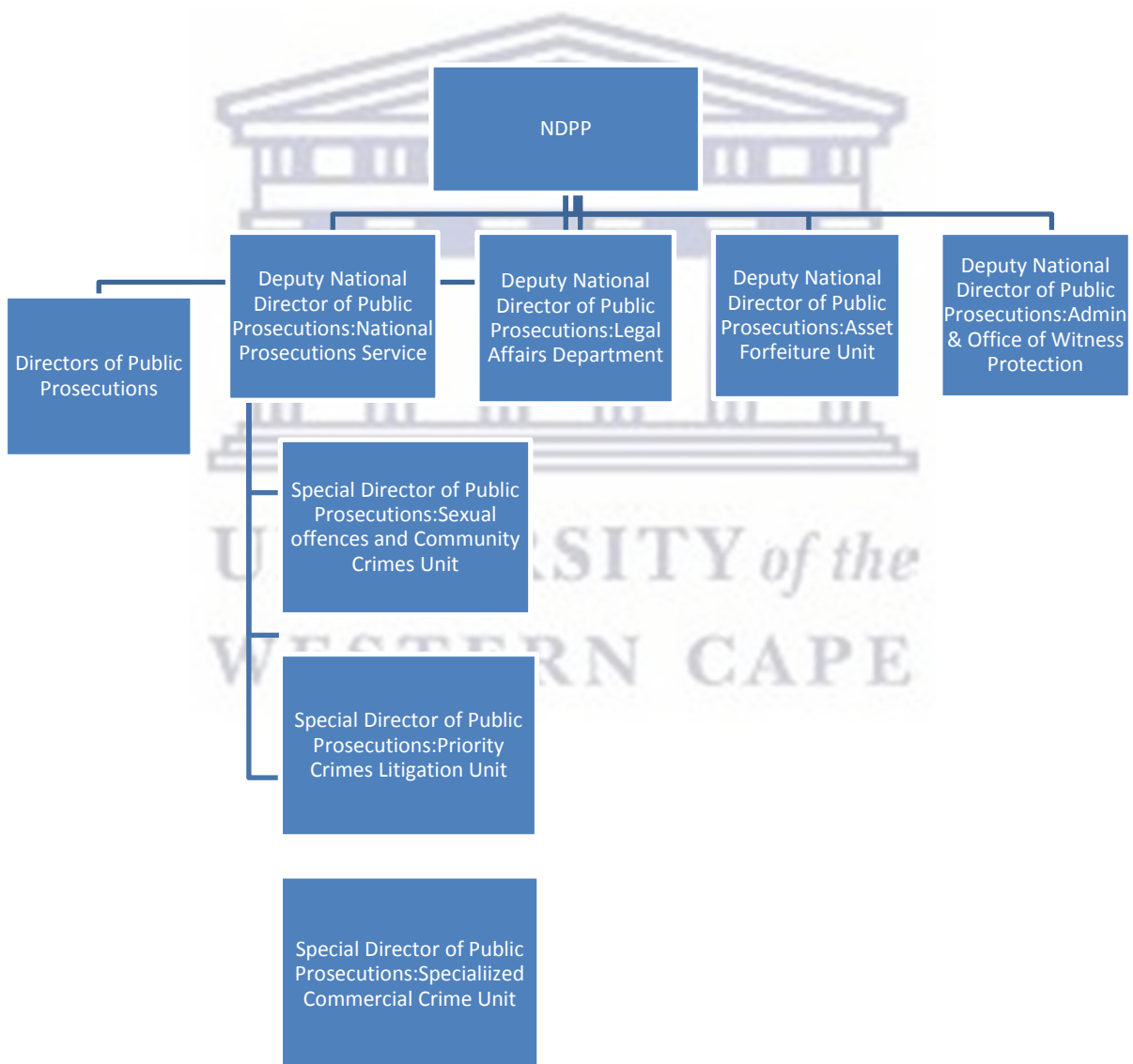
⁸⁰ United Nations Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. The United Nations Guidelines assist prosecutors and is a form of soft law that is not binding but is essential for prosecutors in the performance of their duties. The guidelines suggest that prosecutors should perform an active role in criminal proceedings.

⁸¹ United Nations Guidelines on the Role of Prosecutors Preamble.

with the United Nations Guidelines.⁸² Furthermore, in *Carmichele v Minister of Safety and Security and Another*⁸³ it was emphasized that section 13 (b) of the United Nations Guidelines is of particular importance to South African prosecutors as prosecutors are there to act objectively and take all matters into account.⁸⁴

2.4 Structure of the NPA

The following diagram illustrates the structure of the NPA:



⁸² Act 32 of 1998 s 22 (4) (f).

⁸³ *Carmichele v Minister of Safety and Security and Another* 2001 (10) BCLR 995 (CC) at 1012A-C.

⁸⁴ 2001 (10) BCLR 995 (CC) at 1012A-C.

The NPA is headed by the office of the NDPP, four Deputy National Directors and several Special Directors report to the NDPP. The NPA is divided into seven core business units, all supported by a Corporate Services unit.⁸⁵ The business units are:

- National Prosecutions Service
- Integrity Management Unit
- Asset Forfeiture Unit Sexual Offences and Community Affairs
- Specialised Commercial Crime Unit
- Witness Protection Unit
- Priority Crimes Litigation Unit

Of these units, the National Prosecutions Service, managed by a Deputy National Director and nine provincial Directors of Public Prosecutions, is responsible for prosecutions in both the high and lower courts of South Africa.⁸⁶

2.5 The role and independence of the prosecution authority

The primary function of a prosecutor is assisting the court to arrive at an impartial verdict.⁸⁷ The prosecution process must be fair, transparent, and predictable.⁸⁸ This intends to promote greater consistency in prosecutorial practices. The prosecution policy requires members of the prosecuting authority to act impartially and in good faith.⁸⁹ Prosecutors should not allow their judgment to be influenced by any external factors. In theory prosecutors are to account to the community, in the taking of decisions or if representing the community in criminal matters. However, the public, the NPA is said to represent holds little or no authority over it. Although prosecutors are public servants they account to the NPA.⁹⁰ In spite of this, in exercising their

⁸⁵ Mathews I 'National Prosecuting Authority' *Saferspaces* available at http://www.saferspaces.org.za/uploads/files/CICH_5.pdf (accessed 8 December 2018).

⁸⁶ Redpath (2012) 72-3.

⁸⁷ *S v Jija* [1991] (2) SA 52 (E) para 671.

⁸⁸ 2009 (1) BCLR 62 (N) para 97.

⁸⁹ Prosecution Policy (2014) 11.

⁹⁰ Prosecution Policy (2014) 11.

prosecutorial duty prosecutors should be independent of persuasion from all influences this includes within the NPA.⁹¹

2.6 Prosecutor's duty and decision to prosecute

A member of the NPA is obliged to '...serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and subject only to the Constitution and the law'.⁹² Prosecutors must take an oath or make an affirmation to this effect.⁹³ No one may interfere with or obstruct the work of the prosecuting authority.⁹⁴ Generally individual prosecutors are not criminally or civilly liable for anything they do in good faith in the performance of their duties.⁹⁵ However, if prosecutors were to be negligent in their duties, the State would be liable as the prosecutor is an employee of the State.⁹⁶

In South Africa, a prosecutor's main function is to assist the court in ascertaining the truth.⁹⁷ A prosecutor also has a duty to prosecute if there is a *prima facie* case and there is no compelling reason for a refusal to prosecute.⁹⁸ Furthermore, it has been held that the prosecution does not have to ascertain whether there is a defence, but whether there is a reasonable and probable cause for prosecution.⁹⁹ There is no closed list of persuasive reasons not to prosecute. However, in *S v Snyman*¹⁰⁰ it was established that where the offence is trivial, the accused is very old or very young, or where there are tragic personal circumstances of the accused, this may amount to a persuasive reason that justifies a decision not to prosecute.¹⁰¹ Prosecutors in all their decisions must act impartially and in good faith. The NPA and individual prosecutors

⁹⁰ Prosecution Policy (2014) 11.

⁹¹ European Commission for Democracy Through Law *Report on standards as regards the independence of the judicial system: Part II – The Prosecution Service, Adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010)* para 30.

⁹² Act 32 of 1998 s 32(1) (a).

⁹³ Act 32 of 1998 s 32(2) (a).

⁹⁴ Act 32 of 1998 s 32(1) (b).

⁹⁵ Act 32 of 1998 s 42.

⁹⁶ State Liability Act 20 of 1957 s 1.

⁹⁷ [1991] (2) SA 52 (E) para 671-61B.

⁹⁸ 1955 (1) SA 129 (AD) para 137.

⁹⁹ 1955 (1) SA 129 (AD) para 137.

¹⁰⁰ *S v Snyman* [1980] SACC 313.

¹⁰¹ [1980] SACC 313 para 314.

are to exercise this discretion to make the prosecution process more fair, transparent, consistent and predictable.¹⁰²

The independence and credibility of the office of the NDPP is crucial to the advancement and accessibility of the NPA. Public perceptions of the NPA and decision-making by its prosecutors are of utmost importance. Members of the NPA must be impartial and not subject to political or financial pressures.¹⁰³ As a result, independence is accompanied by ranked accountability, whereby junior staff members are answerable to their immediate supervisors who in turn are accountable to the NDPP for all prosecutorial decisions.¹⁰⁴ Prosecutions are initiated on behalf of the State and not the government. Though the executive could to a degree be involved in the prosecuting authority. The prosecutorial discretion of the NDPP is not an executive act of State but an act performed independently of the executive.¹⁰⁵

2.7 Assessment of the statutory structure

With the establishment of a single prosecuting authority in 1998, the legislative framework can be seen as a move by the national government to enable the establishment of national priorities.¹⁰⁶ A centralised prosecution authority allows for the implementation of policies that can be co-ordinated as one and allows for all criminal justice organisations to be on a similar footing. However, in the centralised system all prosecutors are made to be subordinate to the NDPP. Therefore, direct and indirect interference by the NDPP is possible in decision-making by Directors of Public Prosecutions.¹⁰⁷

The Minister of Justice must exercise final responsibility over the prosecuting authority.¹⁰⁸ However, the concept of final responsibility on the Minister of Justice's

¹⁰² Prosecution Policy (2014) 11.

¹⁰³ Prosecution Policy (2014) 11.

¹⁰⁴ Brubacher MR 'Prosecutorial Discretion within the International Court' (2004) 2 *J Int'l Crim Just* 71.

¹⁰⁵ Hoexter Commission *Final Report* 534 para 1.6 describes prosecutorial discretion as '*sui generis*'.

¹⁰⁶ Van Zyl Smit D and Steyn E (2000) 149.

¹⁰⁷ Redpath J (2012) 48-9.

¹⁰⁸ Constitution of the Republic of South Africa, 1996 s 179(6).

part seems to be unclear. Nonetheless, this concept appeared to be illustrated in *Kaunda v President of the Republic of South Africa*¹⁰⁹ where the court stated that although the NDPP has the power to institute criminal proceedings on behalf of the State, the final responsibility rests with the Minister of Justice.¹¹⁰ This view was reiterated in *National Prosecuting Authority v Zuma*¹¹¹ in which the court explained that the Minister of Justice may not instruct the NPA to prosecute, but is, however, entitled to be kept informed in respect of prosecutions which might produce public interest or important aspects.¹¹² Therefore, the NPA regardless of the persons that might be affected by the final responsibility of the Minister of Justice must exercise their duties without fear, favour or prejudice.¹¹³

During the drafting process of the NPA Act it was argued that the NDPP be selected by the Judicial Service Commission (JSC), which would in turn then nominate candidates for the position of NDPP to the President.¹¹⁴ Furthermore, Sarkin and Cowen are of the opinion that while it is appropriate for the President, as head of the executive, to exercise formal power in appointing the NDPP, a prior procedure should take place in selecting candidates for the position of NDPP.¹¹⁵ The opinion of Sarkin and Cowen was stated 21 years ago and it can therefore be inferred that they anticipated the problems that could and have currently resulted, from the President as head of the executive being able to appoint the NDPP without consultation. Parliament, however, has debated the issue of the selection and appointment process of the NDPP and the ambit of the President's powers.¹¹⁶ None-the-less Parliament is no closer to moving towards a process like that required by the Constitution for the appointment of judges.¹¹⁷

¹⁰⁹ *Kaunda v President of the Republic of South Africa* 2004 10 BCLR 1009 (CC).

¹¹⁰ 2004 10 BCLR 1009 (CC) para 83.

¹¹¹ *National Prosecuting Authority v Zuma* 2009 2 SA 277 (SCA).

¹¹² 2009 2 SA 277 (SCA) para 32.

¹¹³ 2004 10 BCLR 1009 (CC) para 83.

¹¹⁴ Sarkin J and Cowen S 'The Draft National Prosecuting Authority Bill 1997: A Critique' (1997) 10 *South African Criminal Journal of Criminal Justice* 64.

¹¹⁵ Sarkin J and Cowen S (1997) 68.

¹¹⁶ Breytenbach G 'Parliament agrees to debate the politicisation of the NPA' available at <http://www.politicsweb.co.za/politics/parliament-agrees-to-debate-the-politicisation-of-> (accessed 2 October 2018).

¹¹⁷ Constitution of the Republic of South Africa, 1996 s 174. The appointment of judicial officers has a clear structure and forms the criteria to be considered for a judicial position.

The requirement that the NDPP must, with the concurrence of the Minister of Justice and after consulting the Director of Public Prosecutions, determine prosecution policy is a crucial element.¹¹⁸ The provision in essence means that the NDPP needs the Minister of Justice's approval.¹¹⁹ On the other hand, if the wording was to state 'after consultation', it would mean that the NDPP could go ahead and determine the prosecution policy, without the express approval of the Minister of Justice.¹²⁰ Thus, there is still an element of external influences. The Minister of Justice may still reject policy proposals that the NDPP presents. However, it does allow for a measure of accountability.¹²¹

2.8 Conclusion

The chapter dealt with the way in which the prosecuting authority evolved from the Union of South Africa in 1910 until the constitutional democracy in 1994. The development and different degrees of prosecutorial independence were illustrated and showed how South Africa had Attorneys-General with various degrees of independence during different periods. These Attorneys-General acted independently of each other. There was no single prosecuting authority. The Interim Constitution retained the Attorneys-General. The Final Constitution empowered by section 179 created a single prosecuting authority.¹²² The history of the prosecuting authority has shown that each period of prosecuting authority developed in relation to the administration of the government at that time. The aforementioned is illustrated in that prior to 1926 there was complete independence. Then in the period of 1935-1992 decisions of the Attorneys-General could be reversed by the Minister of Justice. In 1998 the establishment of a single prosecuting authority took place. Nonetheless it at the same time allowed for the President as head of the executive to appoint the NDPP.

The different degrees of prosecutorial independence show that effectiveness and independence were not at the forefront of the thinking when developing the

¹¹⁸ Van Zyl Smit D and Steyn E (2000) 147.

¹¹⁹ Van Zyl Smit D and Steyn E (2000) 147.

¹²⁰ Van Zyl Smit D and Steyn E (2000) 148.

¹²¹ Sarkin J, Cowen S (1997) 71-2.

¹²² Constitution of the Republic of South Africa, 1996.

prosecuting authority: each of the different degrees of prosecutorial independence rather reflects the regime of that time. The historical overview of the prosecuting authority has shown that where the prosecution heads are aligned to the executive or where the line between the exercise of the prosecutorial function and performance of the executive duties overlaps, independence becomes distorted. The constitutional dispensation sought to implement its own form of prosecutorial independence, and brought the executive back into the fold. The President has the prerogative of appointing the NDPP, with Parliament only playing a role in the dismissal of the NDPP.

The NPA does not form part of the judiciary, but rather sits between the executive and the judiciary.¹²³ With the NDPP being accountable to Parliament, it is therefore more associated with the executive.¹²⁴ Correspondingly, the *Certification judgment*¹²⁵ provides a constitutional guarantee of the independence of the NPA by giving recognition to section 179 of the Constitution.¹²⁶ However, in dealing with the issues of independence and the separation of powers, the CC failed to take a step back and realise that the 1996 Constitution was still new at the time. The 1996 Constitution had not been stress tested concerning issues of independence or separation of powers. What would become apparent in numerous court cases is that the 1996 Constitution was not stress-tested for bad incumbents in the office of the NDPP. In addition to increased political influence that would occur with the establishment of the single prosecuting authority.¹²⁷ The Constitution and NPA Act provide that members of the prosecutorial authority shall perform their duties without fear, favour or prejudice.¹²⁸ In spite of this, since prosecutors are subordinates of the NDPP, the power of review held by the NDPP bears the risk of undermining the independence and credibility of the NPA, if the NDPP himself or herself is not seen as independent or subject to undue influences.¹²⁹ For that reason, what can be derived from the

¹²³ Muntingh L, Redpath J and Petersen K (2017) 11.

¹²⁴ Muntingh L, Redpath J and Petersen K (2017) 11.

¹²⁵ Van Zyl Smit D and Steyn E (2000) 150.

¹²⁶ 1996 (4) SA 744 (CC) para 146.

¹²⁷ The court cases and political influences will be discussed in Chapter 3 of the mini- thesis.

¹²⁸ Act 32 of 1998 s 4.

¹²⁹ Horn N 'The Independence of the prosecutorial authority of South Africa and Namibia: A comparative study' (2008)

assessment of the Constitution and NPA Act is that formal independence does not guarantee fairness; neither does the absence thereof suggest partiality.

The following chapter consists of a thematic discussion on the functional independence of the NPA, specifically centring on the NDPPs that have led the prosecutorial body.



CHAPTER 3

COMPETENCE AND INDEPENDENCE OF THE NPA

3.1 Introduction

Following from the preceding chapter, it is important to look at how constructive the single prosecuting authority has been to the criminal justice system. This chapter examines the NPA and, in particular, the position of the NDPP, by looking at the appointment procedure, duties and functions of NDPP, and the impact they have on the credibility and independence of the NPA. In addition, the appointments of NDPPs and acting NDPPs during the period 1998-2018 form part of the discussion. The phrase 'fit and proper' and the jurisprudence on the concept will be discussed. In summation, the measures that have, and ought to have, been adopted to meet the challenges confronted by the NPA are discussed. Public perceptions of the NPA are also dealt with, with a view on how recent and past judicial decisions have affected the credibility of the NPA.

3.2 Instability in the office of the NDPP

The position of the NDPP has emerged since 1998 as one of the most unstable positions in government.¹³⁰ This can to a large degree be attributed to how appointments and dismissals are made. Instability at the top of the NPA and several acting NDPPs gives credibility to claims of political interference. Not one NDPP has served the full term of ten years.¹³¹

¹³⁰ Is it criminal to pay our head prosecutor to resign? available at <https://accountabilitynow.org.za/wp-content/uploads/2016/11/Is-it-criminal-to-pay-the-NDPP-to-resign.pdf> (accessed 12 December 2018).

¹³¹ Is it criminal to pay our head prosecutor to resign? available at <https://accountabilitynow.org.za/wp-content/uploads/2016/11/Is-it-criminal-to-pay-the-NDPP-to-resign.pdf> (accessed 12 December 2018).

The following table illustrates the instability in the office of the NDPP over the past twenty years.

Table 1: NDPP's 1998-2018:

NDPP	Period	Reason for departure
Bulelani Ngcuka	1998-2004	Resigned, received pressure from Zuma allies, accused of not being impartial.
Silas Ramaite	2004-2005	Acting NDPP, implicated in a sex scandal. ¹³²
Vusi Pikoli	2005-2007	Dismissed, after a disagreement with the executive.
Mokotedi Mpshe	2007-2009	Acting NDPP withdrew charges against Zuma.
Menzi Simelane	2009-2012	Appointment as NDPP found to be irrational by the CC, was found not to be fit and proper for the position of NDPP.
Nomgcobo Jiba	2012 -2013	Acting NDPP, involved in the arrest of Johan Booyesen and suspension of Gleynis Breytenbach. Supreme Court of Appeal stated as acting NDPP she had a total disregard for the office.
Mxolisi Nxasana	2013-2015	Resigned, after a disagreement with the executive. Constitutional Court found his removal as NDPP invalid.
Shaun Abrahams	2015-2018	Reinstated criminal charges against Zuma, failed attempt in trying to prosecute Pravin Gordhan. Resigned after appointment found to be unlawful by CC.
Silas Ramaite	August 2018-December 2018	Acting NDPP.

¹³² NPA mum on reports of Silas Ramaite sex tape *Eyewitness News* available at <http://www.ewn.co.za/2018/11/05/npa-mum-on-reports-of-silas-ramaite-sex-tape> (accessed 9 December 2018).

Shamila Batohi	2018-current	Appointed on 4 December 2018 Batohi is a former state prosecutor from KwaZulu-Natal and served as a senior legal advisor to the prosecutor of the International Criminal Court. ¹³³
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The above table highlights the vulnerability the office of the NDPP finds itself in the last two decades. Central to the NDPPs vulnerability is the perceived executive influence in the decision-making functions of the NDPP which undermines the independence and credibility of the NDPP. Furthermore, the fact that the NDPP is appointed and dismissed by the President, with the concurrence of Parliament adds to the instability of NPA.¹³⁴ This is considered in detail in the discussion below.

3.3 Does the NPA have independence?

The executive is often the first thought which comes to mind when discussing prosecutorial independence. This is due to the historical background of South Africa with regards to political prosecutions under the apartheid regime.¹³⁵ However, prosecutorial independence can be influenced by members of civil society, politicians and the media. In addition despite the *Certification judgment*¹³⁶ stating that there is no contravening of the doctrine of separation of powers the NPA is still accountable to the executive as it needs approval in terms of budget allocations from departments it is required to monitor.¹³⁷ The already mentioned according to Corder,

¹³³ Shamila Batohi named new NPA boss *Timeslive* available at <https://www.timeslive.co.za/politics/2018-12-06-shamila-batohi-named-as-new-npa-boss/> (accessed 6 December 2018).

¹³⁴ *Corruption Watch and Another v President of the Republic of South Africa and Others* [2018] ZACC 23 para 45.

¹³⁵ Simpson G 'A Brief Evaluation of South Africa's Truth and Reconciliation Commission: Some lessons for societies in transition' available at <https://www.csvr.org.za/publications/1724-a-brief-evaluation-of-south-africas-truth-and-reconciliation-commission-some-lessons-for-societies-in-transition> (accessed 8 August 2019).

¹³⁶ 1996 (4) SA 744 (CC).

¹³⁷ Corder H, Jagwanth S and Soltau F 'Report on Parliamentary Oversight and Accountability', Faculty of Law, University of Cape Town available at <http://www.casac.org.za/wp-content/uploads/2015/07/Report-on-Parliamentary-Oversight-and-Accountability.pdf> (accessed 8 August 2019) at para 7.2.

Jagwanth and Soltau ‘...is, thus inconsistent with independence...’.¹³⁸ Institutions such as the Office of the Public Protector and the Auditor-General enjoy independence in terms of the language in section 181 of the Constitution.¹³⁹ However, no such language is contained in the legislative provisions of the NPA.¹⁴⁰ The word ‘independent’ is also absent from the legislative provisions. This compared to Chapter Nine Institutions has less of a degree of independence.¹⁴¹

Independence cannot merely entail that a prosecutor act without fear, favour or prejudice there must be a move away from the impression of total autonomy.¹⁴² Independence must be linked to accountability as all members of the NPA must be held accountable when making decisions. Without accountability there is a risk of decisions being made without the interest of justice and public interest being taken into account.¹⁴³ Similarly inserting the word ‘independent’ in the legislative provisions would not provide for absolute independence.¹⁴⁴ Thus, accountability implies a relationship and duty to explain why certain decisions are taken and to provide justification for the decision.¹⁴⁵ Although the need for prosecutorial independence and accountability are fundamental for the proper functioning of the criminal justice system it has not been shown in the NPA for the past 20 years. Since 1998, all five NDPPs have at some stage been involved in national and party politics be it with regards to stopping prosecutions or infighting when decisions not to prosecute are questioned.

¹³⁸ Corder H, Jagwanth S and Soltau F available at <http://www.casac.org.za/wp-content/uploads/2015/07/Report-on-Parliamentary-Oversight-and-Accountability.pdf> (accessed 8 August 2019) at para 7.2.

¹³⁹ Constitution of the Republic of South Africa, 1996 s 181 (2) specifies that the institutions in s 181 (1) are independent and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.

¹⁴⁰ Selabe B *The Independence of the National Prosecuting Authority of South Africa: Fact or Fiction?* (LLM Thesis, 2015) 50.

¹⁴¹ Selabe B (2015) 50.

¹⁴² du Toit PG and Ferreira GM ‘Reasons For Prosecutorial Decisions’ (2015) 5 *PER/PELJ* 1514.

¹⁴³ Corder H, Jagwanth S and Soltau F available at <http://www.casac.org.za/wp-content/uploads/2015/07/Report-on-Parliamentary-Oversight-and-Accountability.pdf> (accessed 8 August 2019) at para 7.2.

¹⁴⁴ Selabe B (2015) 52.

¹⁴⁵ Corder H, Jagwanth S and Soltau F available at <http://www.casac.org.za/wp-content/uploads/2015/07/Report-on-Parliamentary-Oversight-and-Accountability.pdf> (accessed 8 August 2019).

3.3.1 The NPA and the accountability of decision-making

The executive has shown to have interpreted the functioning of the NPA as being part of their administrative function.¹⁴⁶ This is evident by the Minister of Justice exercising final responsibility over the prosecuting authority as well as, the need for concurrence when determining prosecution policies.¹⁴⁷ This has resulted in undue influence with regards to the criminal justice function of the NPA. Presidents in the past have interpreted the NPA as being part of the executive. For example President Mbeki wrote to the justice minister about the pending arrest and prosecution of the then Police Commissioner Jackie Selebi and declared it a matter of national security.¹⁴⁸ The President by declaring the pending matter a subject of national security placed it under his authority. Mbeki defended the suspension of Vusi Pikoli as NDPP with the contention that there was no working relationship between Pikoli and then Minister of Justice Bridget Mabandla.¹⁴⁹ Mbeki erred in this regard as section 6 of the NPA Act does not provide for such removal.¹⁵⁰ The suspension could not occur with regards to a NDPP.¹⁵¹

The selective nature of prosecutorial decisions provides for misconceptions in criminal proceedings.¹⁵² Furthermore, the courts are of the view that the power to decide whether or not to prosecute is not an administrative function.¹⁵³ However, centralised and hierarchical nature of the relationship and the fact that the prosecuting authority reports at the final level to a cabinet minister, as in the case of the NPA, presents a risk of interference.¹⁵⁴ Additionally, where the President uses his or her power of appointment to influence or delay certain prosecution decisions is worrying. Former President Zuma is quoted as saying that the NPA must report to the government as their decisions have 'implications'.¹⁵⁵ The view held by Zuma was

¹⁴⁶ Horn N (2008) 129.

¹⁴⁷ Horn N (2008) 130.

¹⁴⁸ Ginwala Commission of Inquiry into fitness of Advocate Pikoli para 61.

¹⁴⁹ Ginwala Commission of Inquiry into fitness of Advocate Pikoli para 61.

¹⁵⁰ Act 32 of 1998 s 6(a) (i) to (iv).

¹⁵¹ Wolf L 'Pre-And Post-Trial Equality in Criminal Justice in the Context of the Separation of Powers' (2011) 14 *PER/PELJ* 83-4.

¹⁵² Selabe B (2015) 55.

¹⁵³ Wolf L (2011) 98.

¹⁵⁴ *Glenister v the President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6 para 120.

¹⁵⁵ Government is NPA's boss Zuma *News24* available at <http://www.news24.com/SouthAfrica/News/Government-is-NPAs-boss-Zuma-20091214> (accessed 10 November 2018).

expressed in 2009 and nine years on the NPA has suffered considerable instability, as Zuma used his power as head of the executive to appoint and dismiss numerous NDPPs.¹⁵⁶

3.4 Executive appointment of the NDPP

The appointment procedure of the NDPP is governed by the Constitution and NPA Act.¹⁵⁷ Section 9 of the NPA Act states that the person to be appointed as NDPP must have legal qualifications that would allow him or her to practise in all courts within South Africa.¹⁵⁸ The appointment of the NDPP must be determined objectively, this means that the President's subjective opinion is insufficient.¹⁵⁹ In addition, the office of the NDPP must be vacated at the age of 65.¹⁶⁰ Additionally, NDPPs are paid the same salary as a High Court judge.¹⁶¹ The NDPP must be legally qualified and a 'fit and proper' South African citizen, and he or she serves for a non-renewable term of ten years.¹⁶² The President, as head of the national executive, appoints the NDPP.¹⁶³

In *Democratic Alliance v President of the Republic of South Africa and others*¹⁶⁴ the invalidity of Menzi Simelane's appointment was confirmed.¹⁶⁵ The Court found that the Minister of Justice and the President's decision to ignore the Ginwala Inquiry findings was regrettable. The Court was of the view that the material was relevant and that the President must take all information into consideration when making the appointment.¹⁶⁶ It was held that the requirement in section 9 (1) (b) of the NPA Act¹⁶⁷

¹⁵⁶ The interference by President Zuma as head of the executive and other senior figures had on the NPA will be illustrated in section 3.6.

¹⁵⁷ Act 32 of 1998 s 10.

¹⁵⁸ Act 32 of 1998, s 9.

¹⁵⁹ *Democratic Alliance v President of the Republic of South Africa and Others* 2013 (1) SA 248 (CC) para 102.

¹⁶⁰ Act 32 of 1998, s 12.

¹⁶¹ Act 32 of 1998, s 17 (1) (a).

¹⁶² Act 32 of 1998, s 12.

¹⁶³ Act 32 of 1998, s 10 read with s 179 (1) (a) of the Constitution of the Republic of South Africa, 1996.

¹⁶⁴ *Democratic Alliance v President of South Africa and Others* (CCT 122/11) [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC).

¹⁶⁵ [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) para 92.

¹⁶⁶ [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) para 86.

¹⁶⁷ Act 32 of 1998 s 9 (1) (b) states the NDPP or deputy NDPP be a fit and proper person with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned.

was an objective jurisdictional fact, when read in its proper constitutional setting.¹⁶⁸ As a result, any interpretation that the President could subjectively determine the NDPP's qualifications would be inconsistent with section 179(4) of the Constitution.¹⁶⁹ Furthermore, the court was of the opinion that ignoring *prima facie* indications of dishonesty was a major factor in relation to the appointment of the NDPP.¹⁷⁰ In addition, the ad hoc committee that dealt with the suspension and dismissal of Pikoli as NDPP was of the view that section 12 of the NPA Act does not provide for Parliament to play a role in the appointment of the NDPP.¹⁷¹ However, Parliament has the final say in the removal of the NDPP. Thus, a review of the legislation should consider whether Parliament should play a role in the appointment of the NDPP.¹⁷²

The President has the sole prerogative regarding the appointment of the NDPP, the deputies and other Directors of Public Prosecutions.¹⁷³ What is concerning about this is that the President, a member of the executive and a politician from the ruling party, is not expected to be guided by anything regarding whom he as the President should appoint. Thus, nothing in the Constitution or the NPA Act precludes the President from appointing a character or characters amenable to political, social or economic views. These views may prove themselves handy or problematic when certain prosecutorial decisions with political ramifications must be taken.¹⁷⁴

3.4.1 Powers, duties and functions of the NDPP

The powers, duties and functions of the NDPP are set out in section 22 of the NPA Act. In terms of section 22 (1) of the NPA Act the NDPP, as the head of the NPA, shall have authority over the exercise of all powers and performance of all duties and

¹⁶⁸ [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) (122/11) [2012] para 86.

¹⁶⁹ [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) (122/11) [2012] para 24.

¹⁷⁰ [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) (122/11) [2012] para 89.

¹⁷¹ Ad Hoc Joint Committee to consider matters in terms of section 12 of the National Prosecuting Act, 1998 (Act 32 of 1998) Annexure 1 para 7 available at <https://pmg.org/committee/80> (accessed 8 October 2018).

¹⁷² Ad Hoc Joint Committee to consider matters in terms of section 12 of the National Prosecuting Act, 1998 (Act 32 of 1998) Annexure 1 para 77 available at <https://pmg.org/committee/80> (accessed 8 October 2018).

¹⁷³ Act 32 of 1998, s 5, s 11 and s 13.

¹⁷⁴ The mini-thesis will discuss decisions taken by NDDPs and the influence these decisions had on the prosecutorial body in section 3.9.

functions.¹⁷⁵ The Constitution gives the NDPP the power to intervene in prosecutions when policy directives are not followed and to review a decision to prosecute or not to prosecute.¹⁷⁶ The function of review is seen as ‘...giving teeth to the office of the National Director of Public Prosecutions.’¹⁷⁷ Furthermore, the function of the NDPP to review a decision is of utmost importance in ensuring prosecutorial impartiality.¹⁷⁸ However, the power of review opens the NDPP to external influence as the NDPP could be pressured into reviewing decisions to prosecute against persons with political connections.¹⁷⁹

In respect of certain offences, such as, genocide and crimes against humanity, the written authorisation of the NDPP is required before these crimes can be prosecuted.¹⁸⁰ The NDPP, or a person designated by him or her in writing, may authorise any competent person in the employ of the public service or local authority to conduct prosecutions, subject to the control and directions of the NDPP.¹⁸¹ The NDPP will have the power to institute and conduct proceedings in any court within South Africa.¹⁸²

Although legislation guarantees the independence of the office of the NDPP there have been cases where the NDPP has abused his or her power.¹⁸³ For example, Mokotedi Mpshe was the NDPP when deciding that there was a *prima facie* case against Jacob Zuma, and then at a later stage deciding to withdraw the charges. The reasoning used by Mpshe for the withdrawal of the charges did not put the NDPP in a good light either.¹⁸⁴ Jiba as acting NDPP suspending Glynnis Breytenbach who at the time was a prosecutor in the Specialised Commercial Unit for challenging NPA

¹⁷⁵ Act 32 of 1998 s 22 (1).

¹⁷⁶ du Toit PG and Ferreira GM (2015) 1507.

¹⁷⁷ Sarkin J, Cowen S (1997) 70.

¹⁷⁸ Sarkin J, Cowen S (1997) 70.

¹⁷⁹ du Toit PG and Ferreira GM (2015) 1519.

¹⁸⁰ Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 s 5 (1).

¹⁸¹ Act 32 of 1998, s 22 (8) (b).

¹⁸² Act 32 of 1998, s 22 (9).

¹⁸³ Matters such as the suspension of senior prosecutors, selective mobilisation of resources and the delaying of instituting of charges against high profile persons will be discussed in section 3.10.

¹⁸⁴ *Zuma v DA (771/2016); ANDPP V DA (1170/2016)* [2017] ZASCA 146 para 84.

decisions.¹⁸⁵ Shaun Abrahams not taking responsibility for instituting and withdrawing charges against then Finance Minister Pravin Gordhan in 2016. Abrahams further stating that as he was not a party to the decision as NDPP and was not accountable.¹⁸⁶ The author is of the view that a required aspect of an efficient prosecuting authority is to show that prosecutors do not agree with all decisions made, but question how the decisions are made. This will allow for critical thinking in the organisation. The NDPP cannot avoid accountability for decisions made, as the NDPP is mandated by the Constitution to intervene or review prosecutorial decisions.¹⁸⁷

3.4.2 Dismissal of the NDPP

Subject to Parliamentary approval, the President may remove the NDPP from office on the limited grounds of ill health, incapacity or impropriety.¹⁸⁸ The removal of the NDPP accompanied by the reasons for dismissal including representations by the NDPP shall be communicated within 14 days of removal if Parliament is in session, if not then it will be communicated after the commencement of the next session.¹⁸⁹ Furthermore, once the reasons for dismissal have been tabled, Parliament shall within a period of 30 days, or as soon thereafter as is reasonably possible pass a resolution on whether or not the reinstatement of the NDPP should be recommended.¹⁹⁰ The President shall restore the NDPP to his or her position if Parliament so resolves.¹⁹¹ Section 12 of the NPA Act was declared unconstitutional in *Corruption Watch NPC and Others v President of the Republic of South Africa and Others (Corruption Watch case)*¹⁹² the CC found section 12(6) (d) of the NPA Act unconstitutional and that an NDPP or Deputy National Director of Public Prosecutions (DNDPP) should receive a salary while on suspension or awaiting the

¹⁸⁵ Breytenbach challenged the decision to drop charges against former Crime Intelligence head Richard Mdluli.

¹⁸⁶ PMG Report on the meeting of the Portfolio Committee on Justice and Correctional Services of 4 November 2016, available at <https://pmg.org.za/committee-meeting/23596/> (accessed 14 October 2018).

¹⁸⁷ Constitution of the Republic of South Africa, 1996 s 179 (5) (c) and (d).

¹⁸⁸ Act 32 of 1998, s 12 (6) (a).

¹⁸⁹ Act 32 of 1998, s 12 (6) (b).

¹⁹⁰ Act 32 of 1998, s 12 (6) (c).

¹⁹¹ Act 32 of 1998, s 12 (6) (d).

¹⁹² [2018] ZACC 23.

outcome of an inquiry into his or her fitness.¹⁹³ Additionally, the Directors of Public Prosecutions are also appointed by the President and their removal from office is subject to a procedure similar to that provided for removing the NDPP.¹⁹⁴

The *Corruption Watch* case showed several additional flaws in the appointment, suspension and removal of the NDPP from office. The President has broad discretion to appoint the NDPP. If the person has the legal qualifications that would entitle him or her to practice in all courts in South Africa and is fit and proper.¹⁹⁵ Additionally, public and civil society groups have no opportunity to submit comments on the qualities of the shortlisted candidate. Neither are candidates subjected to publicly viewed interviews.¹⁹⁶

3.5 Fit and Proper persons

Given the nature of a criminal case and the power prosecutors hold, it is evident that they need to exhibit certain qualities of character to prevent the abuse of power.¹⁹⁷ A prosecutor must act to a higher standard than that of a litigant in a civil matter.¹⁹⁸ The qualities of a prosecutor are similar to those of a judge, and the process of their appointment ought to be as serious.¹⁹⁹

In the light of section 179 of the Constitution²⁰⁰ the NPA Act ought to be interpreted to comply with the letter and the spirit of the Constitution. Section 179(4) of the Constitution states that '[n]ational legislation must ensure that the prosecuting

¹⁹³ [2018] ZACC 23.

¹⁹⁴ Act 32 of 1998, s 12 (8) (a).

¹⁹⁵ de Vos P 'Constitutional Court strikes a blow for criminal justice system' *News24* 14 August 2018 available at <http://www.news24.com/Analysis/constitutional-court-strikes-a-blow-for-criminal-justice-system-20180814> (accessed on 16 August 2018).

¹⁹⁶ de Vos P available at <http://www.news24.com/Analysis/constitutional-court-strikes-a-blow-for-criminal-justice-system-20180814> (accessed on 16 August 2018).

¹⁹⁷ A Practical Guide to the Ethical Code of Conduct for Members of the National Prosecuting Authority available at <http://www.npa.gov.za/sites/default/files/resources/public-awareness/Ethics-final.pdf> (accessed 30 October 2018).

¹⁹⁸ *Venice Commission Report on European standards as regards the independence of the judicial system: Part II – The Prosecution Service*, Adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010) CDL-Ad (2010) 040, para 14.

¹⁹⁹ *Venice Commission Report on European standards as regards the independence of the judicial system: Part II* para 18.

²⁰⁰ Constitution of the Republic of South Africa, 1996 s 179.

authority exercises its functions without fear, favour or prejudice'.²⁰¹ Furthermore, section 9 of the NPA Act states that an NDPP must be a 'fit and proper person', with due regard to his or her experience, conscientiousness and integrity to be entrusted with the responsibilities of the office concerned.²⁰² This seems to suggest that to be a 'fit and proper person' the NDPP must first be capable of acting independently.²⁰³ In other words, the NDPP must not subside under political pressure and should make decisions independently and as transparent as possible.²⁰⁴

The importance of prosecutorial independence was articulated in *S v Yengeni* (*Yengeni*)²⁰⁵ it was held that any hint or suggestion of a lent ear to external influences who wish to advance their personal interests instead of the interests of truth and proper functioning of the criminal justice system is incompatible with an independent prosecutorial body.²⁰⁶ As such, it is clear that the court in *Yengeni*²⁰⁷ was of the view that undue influence put on the NPA or NDPP would create an appearance of improper influence. Therefore, if the NPA is to be able to exercise its functions without fear or favour, there can be no risk or appearance of a risk that a decision on whether or not to prosecute persons is made based on political favour or advantage.²⁰⁸

The power held by prosecutors and the use thereof requires certain characteristics to prevent circumstances of misuse. In the context of striking an attorney from the roll for not being a 'fit and proper person', the Supreme Court of Appeal²⁰⁹ has held that the inquiry requires a weighing up of the conduct complained of against the conduct expected of an attorney, and to this extent is a value judgment. In addition, the

²⁰¹ Constitution of the Republic of South Africa, 1996 s 179 (4).

²⁰² Act 32 of 1998 s 9 (1) (b).

²⁰³ de Vos P 'Parliament Neither Fit Nor Proper' Constitutionally Speaking 12 February 2009 available at <http://www.constitutionallyspeaking.co.za/parliament-neither-fit-nor-proper/> (accessed on 16 August 2018).

²⁰⁴ de Vos P available at <http://www.constitutionallyspeaking.co.za/parliament-neither-fit-nor-proper/> (accessed on 16 August 2018).

²⁰⁵ *S v Yengeni* 2006 (1) SACR 405 (T).

²⁰⁶ 2006 (1) SACR 405 (T) para 56.

²⁰⁷ 2006 (1) SACR 405 (T) para 56.

²⁰⁸ 2006 (1) SACR 405 (T) para 56.

²⁰⁹ *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA) para 10.

Ginwala Inquiry²¹⁰ was of the view that the definition of 'fit and proper' contained in the NPA Act needs to expand to appreciate the significance of the office that an appointee would assume.²¹¹ Numerous factors, such as, public confidence, responsibility, and sensitive political matters, are all issues that the office of the NDPP would have to deal with.²¹² It is important that the conduct not be judged according to standards of blind obedience to external factors. The conduct of a prosecutor or NDPP must be in line with a constitutional value system that embraces prosecutorial independence as the foundation of the criminal justice system.²¹³

The lack of clarity in the meaning and in the application, of the term 'fit and proper' with regards to the NDPP has largely been clarified in *Democratic Alliance v The President of the Republic of South Africa & others*.²¹⁴ The initial application for the review of Simelane's appointment was instituted in the North Gauteng High Court. The Democratic Alliance (DA) contested the appointment of Simelane on the basis that he was not a 'fit and proper person'. Furthermore, the DA was critical of the fact that President Zuma failed to give due regard to Simelane's experience, conscientiousness and integrity when making the appointment. The North Gauteng High Court was subsequently unable to find that the President had acted irrationally in appointing Simelane, as there was no prescribed process. The bid by the DA to have Simelane removed was struck down by the North Gauteng High Court in December 2009.²¹⁵

The DA, however, brought the matter before the Supreme Court of Appeal in 2011. The issues the DA wanted the Court to decide were whether Simelane was a 'fit and

²¹⁰ Frene Ginwala, a former speaker of the National Assembly, was appointed by President Mbeki to conduct a one-person enquiry into Pikoli's fitness to hold office. That was shortly after Pikoli's suspension.

²¹¹ Ginwala Commission of Inquiry into fitness of Advocate Pikoli para 72.

²¹² Ginwala Commission of Inquiry into fitness of Advocate Pikoli para 72.

²¹³ Schönsteich M (2014) 11.

²¹⁴ *Democratic Alliance v President of the Republic of South Africa and others* (263/11) [2011] ZASCA.

²¹⁵ Tolsi N 'Concourt confirms Menzi Simelane's appointment invalid' *Mail & Guardian* 5 October 2012 available at <http://www.mg.co.za/article/2012-10-05-59-menzi-simelanes-appointment-ruled-invalid> (accessed 14 August 2018).

proper person' and whether his appointment was of an objective nature.²¹⁶ The Supreme Court of Appeal, in reviewing the appointment of Simelane looked at section 179 of the Constitution and was of the view that the NDPP must have the required qualifications and integrity.²¹⁷ The Court was of the view that the accusations made by Simelane to the Ginwala Inquiry should have been considered by whoever was involved in his appointment as NDPP. In addition, the Minister of Justice ignored reports on Simelane and advised the President to do the same; this rendered the appointment of Simelane irrational.²¹⁸

What can be derived from the judgment of the Supreme Court of Appeal is that the President disregarded the findings of the Ginwala Inquiry, as the investigation was not about Simelane. The Public Service Commission recommended that disciplinary proceedings be instituted against Simelane. However, when President Zuma succeeded President Motlanthe in 2009, the new Minister of Justice, Jeff Radebe, referred the matter back to the Public Service Commission. Therefore, both the President and Minister of Justice made material errors of law and fact in appointing Simelane.²¹⁹

Simelane appealed to the CC and sought to challenge the decision of the Supreme Court of Appeal that his appointment was irrational and unconstitutional.²²⁰ The CC found that the Minister of Justice and the President's decision to ignore the Ginwala Inquiries findings was regrettable. The Court was of the view that the material was relevant and that '[t]he President's decision to ignore it was of a kind that coloured the rationality of the entire process, and thus rendered the...decision irrational'.²²¹ The CC confirmed that the appointment of the NDPP requires an objective assessment. Furthermore, it held that the 'fit and proper' requirement does entail a value judgment, '...[b]ut does not follow from this that the decision and evaluation

²¹⁶ (263/11) [2011] ZASCA para 13.

²¹⁷ (263/11) [2011] ZASCA para 69.

²¹⁸ (263/11) [2011] ZASCA para 109-111.

²¹⁹ (263/11) [2011] ZASCA para 112.

²²⁰ *Democratic Alliance v The President of the Republic of South Africa & others* (122/11) [2012] ZACC

²²¹ (122/11) [2012] ZACC para 86.

lies within the sole and subjective preserve of the Presidents'.²²² Though value judgements are involved in practically every decision of an executive member, it does not mean that the executive is not required to make decisions in accordance with objective requirements.²²³

The tenure of Nxasana as NDPP during 2013 - 2015 ended with questions regarding his suitability as a 'fit and proper person'. It would emerge that Nxasana was not properly vetted for the appropriate security clearance. Furthermore, he had two convictions for assault and had complaints of misconduct laid against him at the KwaZulu-Natal Law Society.²²⁴ Nxasana's acceptance of an R17 million settlement is questionable as at the time he was extremely vocal in wanting to suspend Nomgcobo Jiba a former acting NDPP, Lawrence Mrewbi who held the position of Special Director of Public Prosecutions and head of the Specialised Commercial Crime Unit and Sibongile Mzinyathi who held the position of Director of Public Prosecutions in North Gauteng. The aforementioned persons will be discussed when dealing with the quality of persons in the NPA.

The Ginwala Inquiry brought uncertainty to the 'fit and proper' requirement as it deemed that the NDPP must be sensitive to national security measures. However, the court in *Democratic Alliance v The President of the Republic of South Africa & others*²²⁵ showed that identifying a 'fit and proper person' is not straightforward. The task requires the President to apply his or her mind.²²⁶ Thus, the President must not make the decision alone.

3.6 Executive's abuse of appointing powers

The office of the NDPP has been the subject of controversy over the past 18 years, with the appointment and subsequent removal of six directors. Recent as well as past decisions have raised questions about the lack of oversight concerning

²²² (122/11) [2012] ZACC para 23.

²²³ (122/11) [2012] ZACC para 23.

²²⁴ Muntingh L, Redpath J and Petersen K (2017) 18.

²²⁵ (122/11) [2012] ZACC.

²²⁶ (122/11) [2012] ZACC.

decisions made by the NPA.²²⁷ The motives surrounding the decisions and, in some circumstances, their timing, have raised concerns about the fact that the President is responsible for key appointments.²²⁸

The instability of key personnel in the NPA is worrying, for it undermines the strategic direction of the institution. The instability is an indication of how the NPA has become involved in external factors which has in turn affected the institution's public credibility.²²⁹ Additionally, the security of tenure provided for in the NPA Act is not enough to preserve the independence and credibility of the NDPP and other senior officials within the NPA.²³⁰ Where an individual is not appointed for a fixed term they may be perceived as unprotected and willing to make decisions to secure the permanent job, instead of making decisions without fear, favour or prejudice.²³¹ Any individual who 'acts' in a position does not enjoy the same protection as a confirmed NDPP.²³² An acting position allows for susceptibility to undue influences as there is no need to follow the removal procedure prescribed by the NPA Act.²³³ An extended duration of an acting position in the office of the NDPP is not recommended as it allows for the removal of the NDPP without needing to provide lawful reasons.²³⁴

Mpshe was appointed acting NDPP during the suspension of Vusi Pikoli. Mpshe decided to institute criminal charges against Jacob Zuma stating that the material facts in the case had changed as more compelling evidence had been introduced and the legal barriers to charging Zuma had been reduced.²³⁵ However, with the resignation of President Mbeki in September 2008 the political landscape changed. South Africa now had a new president in Kgellama Motlante. This, according to Redpath '...formed the background to Mpshe's... [decision] not to prosecute Jacob

²²⁷ Muntingh L, Redpath J and Petersen K (2017) 18

²²⁸ Muntingh L, Redpath J and Petersen K (2017) 12.

²²⁹ Redpath (2012) 7.

²³⁰ du Toit PG and Ferreira GM (2015) 1517-8.

²³¹ du Toit PG and Ferreira GM (2015) 1517-8.

²³² Siyo L and Mubangizi JC 'The Independence of South African Judges: A Constitutional and Legislative Perspective' *PER/PELJ* 18 (2015) 835-4.

²³³ Siyo L and Mubangizi JC (2015) 85-4.

²³⁴ Daugherty D 'The Separation of Powers and Abuses in Prosecutorial Discretion' (1988) 79 *Journal of Criminal Law and Criminology* 994-5.

²³⁵ Statement by the National Director of Public Prosecutions on the matter of *S v Zuma* and others available at <https://serve.mg.co.za/uploads/2009/04/06/statement.pfd> (accessed 8 August 2018).

Zuma...'.²³⁶ This was due to allegations of abuse of process due to the timing of the decision to prosecute Zuma.

Simelane vacated the office of NDPP in October 2012 following a CC ruling that his appointment as NDPP was invalid. This resulted in yet another delay in appointing a permanent NDPP. A striking example of how then-President Zuma placed individual consideration before national concerns. Zuma further ignored the constitutional necessity articulated in section 237 of the Constitution that it is imperative for all constitution commitments to be performed without postponement.²³⁷ Upon Simelane vacating the office of NDPP Nomgcobo Jiba was brought in as acting NDPP. Jiba served from December 2011 until August 2013. Her appointment was controversial, as she had formerly been suspended for her role in the illegal arrest of Gerrie Nel. Nel at the time of his arrest was prosecuting former police chief Jackie Selebi.²³⁸

Soon after taking up her new position, Jiba was confronted with a court order compelling the NPA to hand over the spy tapes and associated records within 14 days. Her response was an affidavit arguing that the spy tapes are subject to attorney-client privilege and that the DA can have them only if President Zuma's lawyers agree.²³⁹ The Supreme Court of Appeal in *Zuma v Democratic Alliance and Others*²⁴⁰ concluded that Jiba should have adopted a position, and not have left the decision in President Zuma's hands.²⁴¹ In addition, it was stated that '[s]uch conduct undermines the esteem in which [her office] ought to be held by citizens of this country'.²⁴² Jiba, in her time as acting NDPP authorized the arrest of General Johan Booyesen. At the time of his arrest, Booyesen was the Head of the KwaZulu-Natal Directorate for Priority Crimes Investigations. Booyesen was alleged to be involved in the Cato Manor death squad matter.²⁴³ In her affidavits stating reasons why she

²³⁶ Redpath J (2012) 16.

²³⁷ Constitution of the Republic of South Africa, 1996 s 237.

²³⁸ Tamukamoyo H (2013) 16-7.

²³⁹ *Zuma v Democratic Alliance and Others* [2014] 4 ALL SA 35 (SCA) para 41.

²⁴⁰ [2014] 4 ALL SA 35 (SCA).

²⁴¹ [2014] 4 ALL SA 35 (SCA) para 41.

²⁴² [2014] 4 ALL SA 35 (SCA) para 41.

²⁴³ Underhill G 'Hawks boss: I was 'set up' to silence corruption investigations' *Mail & Guardian* available at <http://mg.co.za/article/2015-4-29-hawk-boss-i-was-set-up> (accessed 5 November 2018). Cato Manor was an organised crime unit. Members of the unit were charged with the unlawful killing

instituted proceedings against Booysen, it was found that one of the affidavits on which she based her decision for the arrest of Booysen was dated two weeks after Booysen's arrest, and devoid of direct accusations against Booysen, while a second affidavit by Jiba was neither signed nor dated.²⁴⁴ Booysen claimed that the reason he was arrested was due to him refusing a bribe.²⁴⁵

It can be articulated from the discussion that there is a contradiction in the reasoning by Zuma for setting in motion the appointment of Simelane whilst the legal action between Pikoli and the State was still in progress.²⁴⁶ Zuma was of the opinion that an acting NDPP should not be performing the duties of the NDPP.²⁴⁷ On the other hand, Jiba was allowed to act as NDPP for a period of almost 30 months.

Mxolisi Nxasana served a mere 18 months. Nxasana was appointed by President Zuma as the NDPP, effective from 1 October 2013. Nxasana submitted an explanatory affidavit, in which he alleged that President Zuma lied under oath about the reasons for him vacating his office as NDPP.²⁴⁸ He further stated that he never made a request to the President to leave office in terms of section 12(8) of the NPA Act and informed both the President and Minister of Justice that he did not wish to vacate the NDPP position.²⁴⁹ The High Court found that the termination of former NDPP Nxasana's contract was invalid. Absent a request from Nxasana, the President had no legal authority to allow the NDPP to vacate his office or to pay him any sum of money. Nxasana was persuaded to vacate the office by the unlawful payment of an amount of money substantially greater than that permitted by law.²⁵⁰ Therefore, it was unconstitutional and invalid for former President Zuma to allow Nxasana to vacate office without a request from Nxasana himself. The CC on 18

of taxi operators, ATM bombers and armed robbers, and Booysen was accused of being in control of the operation.

²⁴⁴ *Freedom Under Law (RF) NPC v NDPP* 89849/2015 para 50.

²⁴⁵ Masuku S 'Cato Manor 'death squad' trial adjourned for another year' IOL available at <http://www.iol.co.za/dailynews/cato-manor-death-squad-trial-adjourned-for-another-year-17397096> (accessed 9 October 2018).

²⁴⁶ *Pikoli v President of the Republic and others* CASE NO: 8550/09 (11/08/2009). In 2009 Pikoli launched an application in the North Gauteng High Court seeking an order to review and set aside the President's decision to remove him as NDPP.

²⁴⁷ 8550/09 (11/08/2009) para 13.

²⁴⁸ Nxasana and others (affidavit) 62470/15 para 45.

²⁴⁹ (affidavit) 62470/15 para 32.

²⁵⁰ [2018] ZACC 23 para 85.

August 2018 confirmed the High Court ruling that the attempt by former President Zuma to terminate the appointment of Nxasana was invalid.²⁵¹ The CC further ruled that former President Zuma had abused his power by offering what is known as a golden handshake to Nxasana to leave office.²⁵²

The Nxasana matter is a clear example of how the executive abused the appointment procedure of the NDPP. On the contrary Jiba was able to survive numerous questionable decisions as acting NDPP. However, Nxasana was forced out at the first sign of wanting to act without fear or favour. The length to which the executive was willing to go to have Nxasana removed is worrying. Similarly, Pikoli was not reinstated in his position even though the Ginwala Inquiry found that although Pikoli lacked an appreciation of the sensitivities of the political environment, he was none the less fit and proper to hold office.²⁵³ However, Pikoli was removed from his position permanently by President Kgalema Motlanthe in 2008. The differences in approach by the executive with regards to the NDPP show that, when acting without fear, favour or prejudice, one can be subjected to utmost scrutiny as evidenced by Pikoli and the Ginwala Inquiry. However, if the NDPP does his or her job subject to the prerogative of the executive as was shown by Mpshe, Simelane and Jiba one can get away with numerous highly irregular decisions.²⁵⁴

Acting appointments are problematic for practical as well as principled reasons. The credibility of an institution such as the NPA has been severely affected by long-term acting NDPPs. This is so because the security of tenure protects the NDPP against possible political interference.²⁵⁵ As has been illustrated, the reluctance by President Zuma to appoint a permanent NDPP leads to the impression that the executive wanted to keep South Africa's criminal investigations under its scrutiny.²⁵⁶ Mpshe served as acting NDPP for a period of nearly two years. Similarly, Jiba served in the acting position for nearly two and a half years. Inevitably a perception would arise

²⁵¹ [2018] ZACC 23.

²⁵² [2018] ZACC 23 para 94.

²⁵³ Ginwala Commission of Inquiry into fitness of Advocate Pikoli.

²⁵⁴ Muntingh L, Redpath J and Petersen K (2017) 18.

²⁵⁵ (CCT 48/10) [2011] ZACC 6 para 225-7.

²⁵⁶ Bruce D 'Without Fear or Favour: The Scorpions and the Politics of Justice' 24 (2008) ISS SA Crime Quarterly 13-4.

that the positions were left open for such long periods to erode the independence and credibility of the NPA. An acting appointment does not enjoy the security that would allow a person to act fearlessly and to resist any political interference.²⁵⁷ Decisions might be based on securing the permanent job instead of making decisions without fear, favour or prejudice.²⁵⁸

3.7 Shortcomings in the appointment procedure

It is clear that the President as head of the executive holds the power of appointment. Parliament is only required when the dismissal of an NDPP is contemplated. The need for the NDPP to be impartial, credible and independent requires that the appointment procedure accord with the constitutional imperatives of transparency, independence and impartiality.²⁵⁹

It is noted that the actual practice of independence and credibility may vary from NDPP to NDPP. Furthermore, the Constitution merely stipulates that the NDPP be appointed by the President as head of the executive²⁶⁰ and therefore does not preclude the establishment of oversight bodies from playing a more active involvement in the appointment procedure of the NDPP. However, section 10 of the NPA Act merely states that the President is obligated to appoint an NDPP. The section does not dictate the specific period within which appointments must be made.²⁶¹ This as shown in the above is problematic as the president may decide to appoint an acting head for an indefinite period with the excuse of not being able to find a suitable candidate for the position.

The drafters of the Constitution could not have envisioned the power of the NDPP being abused by the head of the executive. When Zuma first became President in 2009, Mpshe was Acting NDPP. Mpshe was appointed to his position by Zuma's predecessor Kgalema Motlanthe. Mpshe was the NDPP that took the controversial decision, in April 2009, to drop corruption charges against Jacob Zuma. Later in the

²⁵⁷ Bruce D (2008) 13-4.

²⁵⁸ Bruce D (2008) 13-4.

²⁵⁹ Currie I and de Waal J *The New Constitutional and Administrative Law* (2001) 91.

²⁶⁰ Constitution of the Republic of South Africa, 1996 s 179.

²⁶¹ Act 32 of 1998, s 10.

same year, Zuma appointed Simelane as the permanent NDPP. Simelane was followed by Jiba, who was in turn succeeded by Nxasana. Nxasana was forced out of office in 2015, after which followed the appointment of Shaun Abrahams. The already mentioned actions show a clear disregard by the executive for the office of the NDPP. The President's autonomous preference in the choice of the appointee is a rather serious flaw in the process that is supposed to secure the NPAs independence and credibility.²⁶²

3.8 A move towards a transparent procedure

Upon the CC ruling in the *Corruption Watch* case. President Ramaphosa had been given 90 days by the CC to appoint a permanent NDPP.²⁶³ President Ramaphosa appointed Silas Ramaite as acting NDPP to fill the position until a permanent appointment. President Ramaphosa decided to distance himself from the selection process of the NDPP by setting up an advisory panel. The purpose of the advisory panel was to identify, and conduct interviews with, individuals worthy of consideration to occupy the position of NDPP.²⁶⁴

There is no dispute that the President has both the prerogative and the authority to appoint the NDPP. Although the advisory panel would identify suitable candidates President Ramaphosa would have the final say with regards to the appointment. The selection process was also open to the public. However, this was only due to civil rights group Right2Know applying to the North Gauteng High Court to allow the media to have access to the decision-making process. President Ramaphosa had the opportunity to demonstrate his good judgement by appointing a 'fit and proper person' recommended by the panel. The unprecedented step by President Ramaphosa led the way to a transparent and credible appointment process.²⁶⁵ At the time of writing Shamila Batohi was appointed as the NDPP on 4 December 2018.

²⁶² Siyo L and Mubangizi JC (2015) 822-8.

²⁶³ [2018] ZACC 23 para 92.

²⁶⁴ NDPP Selection Advisory Panel Holds first meeting available at <http://www.thepresidency.gov.za/press-statements/ndpp-selection-advisory-panel-holds-first-meeting> (accessed 1 November 2018).

²⁶⁵ NDPP Selection Advisory Panel Holds first meeting available at <http://www.thepresidency.gov.za/press-statements/ndpp-selection-advisory-panel-holds-first-meeting> (accessed 1 November 2018).

3.9 Quality of persons in the NPA

The quality of persons in the NPA is of great concern.²⁶⁶ Furthermore, the 'fit and proper' requirement does not only apply to the NDPP, but also to senior prosecutors. Leaving the appointment of NDPPs and Directors of Public Prosecutions to the executive has caused numerous problems.²⁶⁷

3.9.1 Mokotedi Mpshe

Mpshe was acting NDPP at the time of instituting charges against Zuma in 2009 was accused of being under pressure to come to a decision concerning the Zuma charges. The case against Zuma was subsequently withdrawn by Mpshe. A review application was instituted by the DA. The High Court and Supreme Court of Appeal declared the decision by Mpshe to be irrational.²⁶⁸ Some of the criticism of Mpshe was that he relied heavily on international legal authority and appeared to plagiarise from the Hong Kong High Court judgment in *HKSAR*, not noting that the judgment was successfully appealed and was inapplicable to the matter that he dealt with.²⁶⁹ Former NDPP and Mpshe's predecessor, Vusi Pikoli, was of the opinion that the decision by Mpshe was an error in law as the evidence presented by the prosecution team was not manufactured and there was no conspiracy theory against Zuma.²⁷⁰ Pikoli further argues that the decision not to institute criminal proceedings against Zuma was a political solution with the law as its justification.²⁷¹ The political scenario is clear: Zuma was well on his way to becoming the President and Mpshe used his power as NDPP to clear the final obstacles, which were the pending corruption charges against Zuma.

²⁶⁶ Numerous questionable decisions have been taken by incumbents of the office of the NDPP and will be illustrated in section 3.9.

²⁶⁷ During Jacob Zuma's tenure as President he appointed 3 NDPP's and one Acting NDPP, effectively using his power as the head of the executive to cause instability in the NPA.

²⁶⁸ 2016 (2) SACR 1 (GP) and (1170/2016) [2017] ZASCA 146.

²⁶⁹ (1170/2016) [2017] ZASCA para 84.

²⁷⁰ Advocate Vusi Pikoli's submission available at <http://pmg.org.za/committee-meeting/9795/> (accessed 9 October 2018).

²⁷¹ Advocate Vusi Pikoli's submission available at <http://pmg.org.za/committee-meeting/9795/> (accessed 9 October 2018).

3.9.2 Menzi Simelane

Vusi Pikoli withdrew his application for nullification of his dismissal as NDPP. This allowed Zuma to appoint Simelane as NDPP in November 2009. However, the credibility of the appointment procedure of the NDPP was questioned in both the Supreme Court of Appeal and CC.²⁷² The CC held Simelane's appointment was irrational and that he misunderstood the accountability relationship between the NDPP and the Director-General of the Department of Justice. Another example of poor leadership in the NPA and the executive. As discussed in section 3.5 the CC agreed that the President ignored the information regarding Simelane's character and conduct. The Simelane appointment showed that where the executive wants to make an appointment it does not need to follow any directives, regardless of the need for concurrence by Parliament. According to the CC in the Simelane case, the President had all the facts necessary to apply his mind correctly to the appointment of Simelane. However, the President failed to do so. The President in appointing Simelane chose to accept the findings of the Ginwala Inquiry, only as far as they related to Vusi Pikoli.²⁷³ Furthermore, the CC believed ignoring *prima facie* indications of dishonesty played a major role in the appointment of the NDPP.²⁷⁴

3.9.3 Nomgcobo Jiba and Lawrence Mrwebi

Jiba, a former acting NDPP, as well as former head of the Specialised Commercial Unit Lawrence Mrwebi, were struck from the roll of advocates in September 2016 after Legodi J found that they were not fit and proper persons to be advocates. Jiba and Mrwebi were involved in several high-profile cases.²⁷⁵ Furthermore, Jiba failed to hand over the alleged spy tapes relating to the decision to withdraw fraud and corruption charges against President Zuma.²⁷⁶ Legodi J in dealing with the matter stated that '[a]n important requirement for admission as a...advocate is to be a fit

²⁷² (122/11) [2012] ZACC 24.

²⁷³ (122/11) [2012] ZACC 24 para 89.

²⁷⁴ (122/11) [2012] ZACC 24 para 89.

²⁷⁵ *Democratic Alliance v Acting National Director of Public Prosecutions* [2013] 4 All SA 610 (GNP), *Zuma v Democratic Alliance and Others* [2014] 4 SA 35 (SCA), *Booyesen v Acting National Director of Public Prosecutions and Others* [2013] 3 All SA 391 KZD, *Freedom Under Law v National Director of Public Prosecutions and Others* 2014 (1) SA 254 254 (GNP), and *National Director of Public Prosecutions v Freedom Under Law* 2014 (4) SA 298 (SCA).

²⁷⁶ *General Council of the Bar of South Africa v Jiba and Others* 2017 (1) SACR 47 (GP) 2017 (2) SA 122 (GP) para 24.

and proper person'.²⁷⁷ It can be agreed with the learned Judge's subjective interpretation of the law, as what can be derived from the facts of the case was that, Jiba and Mrwebi acted improperly and used the NPA as a weapon for their own purposes and for the politically connected. It was further held that Jiba acted contrary to the oath that she took when she was admitted as an advocate and flouted the requirements of her position as Deputy NDPP.²⁷⁸

Retired Judge Zak Yacoob was appointed by the NPA at the end of July 2014 to conduct a preliminary fact-finding investigation into alleged wrongdoing within the NPA.²⁷⁹ Jiba and Mrwebi refused to co-operate with Yacoob's initial fact-finding committee. Jiba questioned the committee's mandate and lawfulness. Jiba refused to subject herself to questioning as she deemed the committee unlawful.²⁸⁰ The findings of the committee in February 2015 confirmed the ruling by the courts that Jiba failed in her role as acting NDPP and that she failed in her decision-making in the withdrawal of fraud and corruption charges against then Crime Intelligence head Richard Mdluli. Turning to the Mdluli case, Yacoob, having looked at the dockets, was convinced that there was at the very least a *prima facie* case against Mdluli on the fraud and corruption charges. Yacoob further noted that there was a *prima facie* case against Jiba.²⁸¹ Additionally Mxolisi Nxasana was the NDPP at the time that the court decisions regarding Jiba and Mrwebi were made. Nxasana sought legal opinion on the way to proceed. The subsequent legal opinion recommended that Jiba and Mrwebi be suspended pending an inquiry into their fitness to hold office.²⁸²

What is unfortunate about the aforementioned is that then-President Zuma instead of following the recommendations made by the Yacoob commission to suspend Jiba

²⁷⁷ 2017 (1) SACR 47 (GP) 2017 (2) SA 122 (GP) para 1.

²⁷⁸ 2017 (1) SACR 47 (GP) 2017 (2) SA 122 (GP) para 1, acting NDPP Jiba flouted her constitutional obligation to act without fear, favour or prejudice.

²⁷⁹ NDPP studying Yacoob report News24 available at

<https://www.news24.com/SouthAfrica/News/NDPP-studying-Yacoob-report-20141102> (accessed 15 October 2018).

²⁸⁰ Sole S 'National Prosecuting Authority: Zak Yacoob, Nomgcobo, Jiba Mxolisi, Nxasana, Lawrence Mrwebi' *Mail & Guardian* available at <http://mg.co.za/tag/national-prosecuting-authority> (accessed 2 October 2018).

²⁸¹ Sole S available at <http://mg.co.za/tag/national-prosecuting-authority> (accessed 2 October 2018).

²⁸² [2018] ZACC.

and Mrwebi and set up an inquiry into the running of the NPA and the fitness of Nxasana to as the NDPP.²⁸³ Furthermore, rather than resigning from their positions, Jiba and Mrwebi were placed on special leave in September 2016 pending the outcome of their appeal against the High Court decision. However, the author is of the opinion that President Zuma failed in his duty as head of the executive. President Zuma had a major opportunity to make an example of Jiba and Mrwebi and show that there are consequences for abusing their positions.

Following an appeal, the Supreme Court of Appeal with regards to Jiba found that the General Council of the Bar (GCB) failed to establish misconduct on her part regarding the handling of the case of Richard Mduli. The Supreme Court of Appeal found discrepancies with regards to the reasons why the High Court decided to disbar Jiba and the reasons presented by GCB, and as such, it found no misconduct on the part of Jiba.²⁸⁴ The complaints against Jiba related to the Booyesen case and her handling of the spy tapes case. However, the main reason, in the High Court's view, why Jiba was not fit and proper to remain on the roll of advocates was her handling of the Mduli case. The majority judgment considered the complaint against Jiba together with Jiba's answers and explanation in the context of her position as acting NDPP and the fact that Jiba was cited as a litigant.²⁸⁵ The majority judgment further held that the High Court materially misdirected itself in striking Jiba and Mrwebi from the roll of advocates.²⁸⁶ On the contrary, the dissenting judgment by Van der Merwe JA held that the appeals of Jiba and Mrwebi should fail.²⁸⁷ Van der Merwe JA found that the GCB is there to ensure that practitioners meet the high standards of integrity. However, Jiba instead of recognising the importance of the function of the GCB sought to berate and discredit the GCB. Thus, Van der Merwe

²⁸³ Sole S available at <http://mg.co.za/tag/national-prosecuting-authority> (accessed 2 October 2018).

²⁸⁴ *Jiba & another v The General Council of the Bar of South Africa and Mrwebi v The General Council of the Bar of South Africa* (141/17 and 180/17) [2018] ZASCA 103 para 58.

²⁸⁵ (141/17 and 180/17) [2018] ZASCA 103 para 27-9.

²⁸⁶ (141/17 and 180/17) [2018] ZASCA 103 para 27-9.

²⁸⁷ Van der Merwe JA went on to explain that the guidelines for removing an advocate from the roll, namely proven misconduct, the discretionary view that he or she is not fit to practice in the profession and whether the suspension would suffice.

JA found that Jiba did not meet the high standards of integrity expected of a practising advocate.²⁸⁸

3.9.4 Shaun Abrahams

Abrahams while NDPP received increased critique from the DA, with DA leader Mmusi Miamane writing a letter to former President Zuma demanding the suspension of Abrahams.²⁸⁹ The main points articulated in the letter were that Abrahams had contributed to the politicisation of the NPA and enhanced the culture of selective prosecution.²⁹⁰ It was further stated that his silence on acts of State capture showed that Abrahams was unfit to lead the NPA. He was also heavily criticized for not pursuing charges against President Zuma for using public funds to have upgrades done to his Nkandla home.²⁹¹

3.9.5 Ramaphosa Acts

In August 2018 President Ramaphosa asked Jiba and Mrwebi to submit reasons why they should not be suspended. On 25 October 2018 the Presidency announced that NPA senior officials Nomgcobo Jiba and Lawrence Mrwebi would be suspended, pending the outcome of an enquiry into their fitness for office. Presidency spokesperson Khusela Diko stated, that upon receiving submissions President Ramaphosa felt that an enquiry was necessary in order to restore public confidence in the NPA. Furthermore, Diko stated that ‘... [t]he NPA Act holds the leaders of the NPA to a very high standard. It is not enough that they are just advocates but they are people who are supposed to have integrity.’²⁹²

²⁸⁸ (141/17 and 180/17) [2018] ZASCA 103 para 57.

²⁸⁹ Miamane M ‘Shaun Abrahams must be axed for protecting corrupt cronies’ available at <http://www.da.org.za/2017/07/shaun-abrahams-must-axed-protecting-corrupt-cronies/> (accessed 4 July 2018).

²⁹⁰ Miamane M available at <http://www.da.org.za/2017/07/shaun-abrahams-must-axed-protecting-corrupt-cronies/> (accessed 4 July 2018).

²⁹¹ Miamane M available at <http://www.da.org.za/2017/07/shaun-must-axed-protecting-corrupt-cronies/> (accessed 4 July 2018).

²⁹² ‘Ramaphosa takes ‘bold steps’ as he suspends Nomgcobo Jiba and Lawrence Mrwebi’ *Cape Talk* 567 available at <http://www.capetalk.co.za/articles/342522/ramaphosa-takes-bold-steps-as-he-suspends-nomgcobo-jiba-and-lawrence-mrwebi> (accessed 5 November 2018).

The terms of reference of the enquiry were set out by President Ramaphosa in the Government Gazette of 9 November 2018. The enquiry into whether the NPAs Jiba and Mrwebi are fit to hold office probed whether they fulfilled their responsibilities as senior officials and complied with the Constitution and the NPA Act. In the terms of reference released in the Government Gazette, Ramaphosa wanted the enquiry to probe whether Jiba properly exercised her discretion in relation to instituting and conducting criminal proceedings on behalf of the State.²⁹³ President Ramaphosa instructed the enquiry to probe whether Jiba duly respected court processes and proceedings as required by applicable prescripts and as a senior member of the NPA.²⁹⁴ Additionally, the enquiry probed whether Jiba in any way brought the NPA into disrepute by any of her actions or omissions. The enquiry would probe whether Mrwebi fulfilled his responsibility in his position and if he acted at all times without fear, favour or prejudice.²⁹⁵

The Mokgoro enquiry report was completed in April 2019 and recommended the removal of Jiba and Mrwebi from their positions. The panel looked at prosecutorial decisions taken by Jiba and Mrwebi in highly-sensitive matters such as, the dropping of charges against Mduli and the spy types saga.²⁹⁶ It was found that Jiba and Mrwebi failed to introspect on issues which beset the NPA with their involvement.²⁹⁷ Furthermore, the consistent litigation battles in Mrwebi and Jiba's personal and official capacity showed a lack of competence in the offices they held and inefficiency in completing the duties of their respective offices.²⁹⁸ Further noted in the enquiry and of great concern is the link between the appealing of the spy types which led the fraud and corruption charges being dismissed against Zuma in April 2009. Jiba's husband was in jail at the time but was granted a presidential pardon by then-President Zuma at around the same time the appeal of the spy types took

²⁹³ Government Gazette No. 42029 (2018) Enquiry in terms of section 12(6) of the National Prosecuting Authority Act 32 of 1998, into the fitness of Advocate Nomgcobo Jiba and Advocate Lawrence Sithembiso Mrwebi 6.

²⁹⁴ Government Gazette No. 42029 (2018) 7.

²⁹⁵ Government Gazette No. 42029 (2018) 7.

²⁹⁶ Enquiry in terms of section 12(6) of the National Prosecuting Authority Act 32 of 1998 1 April 2019 38-50.

²⁹⁷ Enquiry in terms of section 12(6) of the National Prosecuting Authority Act 112-5.

²⁹⁸ Enquiry in terms of section 12(6) of the National Prosecuting Authority Act 136.

place.²⁹⁹ The enquiry found the involvement of Jiba in the Zuma case and her husband's presidential pardon raised concern.³⁰⁰ The already mentioned showed how Jiba lacked the credibility and independence that her office required in order to mitigate perceptions of non-independence. Thus, she was found to be unfit to be an NDPP, DNDPP or Director of Public Prosecutions.³⁰¹

The Mokgoro enquiry emphasized the importance of a credible and independent NPA which performs its duties in accordance with the law and spirit of the Constitution.³⁰² The report highlighted the principles that all prosecutors are expected to follow and uphold. Anything less weakens the rule of law and undermines the social contract that binds the NPA and the South African public.³⁰³ The Mokgoro enquiry finding Jiba and Mrwebi unfit for office paved the way for President Ramaphosa to dismiss the pair based on the recommendations of the enquiry report.³⁰⁴

At its annual general meeting in July 2018 the GCB had taken the decision to appeal the Supreme Court of Appeal judgment ruling that Jiba and Mrwebi remain on the roll of advocates. It would base the appeal on the significant judicial decisions that Jiba and Mrwebi acted dishonestly.³⁰⁵ On 27 June 2019 the CC decided on whether the GCB had raised a constitutional issue in deciding whether Jiba and Mrwebi should remain on the roll of advocates. A unanimous judgment by Justice Jafta held, the GCB had not established that the application for leave to appeal fell within the CC jurisdiction.³⁰⁶ Although dishonesty had taken place and been established in the Supreme Court of Appeal it does not in itself raise a constitutional matter. The

²⁹⁹ Enquiry in terms of section 12(6) of the National Prosecuting Authority Act 118-9.

³⁰⁰ Enquiry in terms of section 12(6) of the National Prosecuting Authority Act 119.

³⁰¹ Enquiry in terms of section 12(6) of the National Prosecuting Authority Act 136.

³⁰² Mailovich C 'Shamila Batochi says firing Jiba and Mrwebi sets NPA on new path' *Business Day* 26 April 2019 available at <https://www.businesslive.co.za/bd/national/2019-04-26-shamila-batochi-says-firing-jiba-and-mrwebi-sets-mpa-on-new-path/> (accessed 5 May 2019).

³⁰³ Mailovich C available at <https://www.businesslive.co.za/bd/national/2019-04-26-shamila-batochi-says-firing-jiba-and-mrwebi-sets-mpa-on-new-path/> (accessed 5 May 2019).

³⁰⁴ Enquiry in terms of section 12(6) of the National Prosecuting Authority Act 136.

³⁰⁵ Chabalala J 'Decision to appeal Jiba ruling not racist-General Council of the Bar' *Mail & Guardian* available at <http://mg.co.za/article/2018-07-18-decision-to-appeal-jiba-ruling-not-racist-general-council-of-the-bar> (accessed 12 October 2018).

³⁰⁶ *General Council of the Bar of South Africa v Jiba and Others* [2019] ZACC 23 para 44-8.

interpretation of section 7 of the Admission of Advocates Act which the GCB relied on did not trigger a right with regards to the Bill of Rights.³⁰⁷ Furthermore, the reliance on false statements, suppressing of evidence and abuse of the office of the NDPP did not amount to a constitutional issue.³⁰⁸ The GCB had failed to raise a constitutional issue and the appeal was dismissed.³⁰⁹ Despite the finding by the CC President Ramaphosa has said that his decision to dismiss Jiba and Mrwebi still stands as the Mokgoro enquiry was based on their fitness to hold their respective positions in the NPA.³¹⁰

At the time of writing Jiba applied to the Western Cape High Court to have the Mokgoro enquiry report reviewed. Jiba is of the opinion that the report contains gross errors of judgment and argues that the terms of reference for the enquiry into her fitness to hold office, be reviewed and set aside on the basis that it amounts to an unconstitutional investigation.³¹¹

A comprehensive and open process may have prevented the appointment of the officials discussed in section 3.9. Not involving Parliament and leaving the President to appoint senior NPA members has led to considerable reputational damage to the NPA.³¹² It is also evident that officials such as Jiba and Mrwebi were shielded by then-President Zuma. Moreover a more rigorous appointment process may have identified the flaws in their characters.³¹³

³⁰⁷ [2019] ZACC 23 para 44-8.

³⁰⁸ [2019] ZACC 23 para 43-4.

³⁰⁹ [2019] ZACC 23 para 69.

³¹⁰ Hunter Q 'Decision to axe Jiba and Mrwebi still stands, says Ramaphosa' *TimesLive* 27 June 2019 available at <https://www.timeslive.co.za/politics/2019-06-27-decision-to-axe-jiba-and-mrwebi-still-stands-says-ramaphosa/> (accessed 28 June 2019).

³¹¹ Jiba challenges Mokgoro report in court *Politicsweb* 8 August 2019 available at <https://www.politicsweb.co.za/news-and-analysis/jiba-challenges-mokgoro-report-in-court> (accessed 13 August 2019).

³¹² Muntingh L, Redpath J and Petersen K (2017) 18-9.

³¹³ Muntingh L, Redpath J and Petersen K (2017) 20.

3.10 Selective resource mobilisation of the NPA

Prosecuting the powerful for serious offences is one of the strongest prosecutorial imperatives.³¹⁴ It allows prosecutors to be seen as credible and beyond reproach. The resources of the NPA, it would seem, have been used more in certain circumstances than others. For example, the North Gauteng High Court ruled that Jacob Zuma should face charges of fraud and corruption. However, soon after the announcement the NDPP at the time, Shaun Abrahams, announced that a decision had been taken to appeal the High Court decision. The appeal, however, was unsuccessful.³¹⁵

Two notable characters that have always seemed to be linked to questionable prosecutorial decisions are Shaun Abrahams and Nomgcobo Jiba. Jiba, for example, dropped charges of murder and corruption against former crime intelligence head Richard Mdluli but tried without success to institute charges against Johan Booysen.³¹⁶ She received criticism from the Supreme Court of Appeal for her handling of the 'spy tapes' which resulted in a six-year delay in instituting charges against the alleged perpetrators.³¹⁷ All of the aforementioned did not result in the dismissal of Jiba she was rather placed on special leave. On the contrary, another matter involving Jiba was dealt with swiftly, Jiba suspended senior prosecutor Glynnis Breytenbacht citing that she was suspended due to her questioning the dropping of charges against Mdluli. Similar is the executive decision to suspend Vusi Pikoli when he opted to prosecute Jackie Selebi. What this shows is that with the required influence one can evade certain aspects of accountability.

In 2016 the NPA was of the view that it had a strong case against Pravin Gordhan. However, Abrahams stated that upon consultation he had decided to withdraw the

³¹⁴ Kumaralingam A 'Prosecutorial Discretion and Prosecution Guidelines' 2013 *Singapore Journal of Legal Studies* 57-8.

³¹⁵ Abrahams ready to announce decision on Zuma prosecution *Mail & Guardian* available at <https://mg.co.za/article/2018-02-26-abrahams-ready-to-announce-decision-on-zuma-prosecution> (accessed 12 October 2018).

³¹⁶ Chabalala J 'Mokogoro inquiry: 10 damning findings against Nomgcobo Jiba & Lawrence Mrwebi' *News24* available at <http://www.news24.com/SouthAfrica/News/mokgoro-inquiry-10-damning-findings-against-nomgcobo-jiba-lawrence-mrwebi-20190425> (accessed on 26 April 2019).

³¹⁷ (141/17 and 180/17) [2018] ZASCA 103 para 11-2.

charges.³¹⁸ During the tenure of Abrahams evidence of State capture had been in the public domain, but the NPA is yet to institute charges against the alleged perpetrators. At a Parliamentary briefing in September 2017 Abrahams stated that the delay was due to the bribery allegations by former deputy Finance Minister Mcebisi Jonas being investigated.³¹⁹ The NPA has so far only acted on the bribery allegations of Jonas and the Estina dairy farm case. The slow progress in the prosecution of State capture cases is in contrast to the fast manner in which the NPA acted when dealing with the case of Gordhan.

Abrahams has denied that the NPA has delayed proceedings related to State capture. He further stated that the State capture prosecuting team was not satisfied a *prima facie* case could be made against the identified suspects, and that, more investigations were necessary.³²⁰ Abraham's reasoning creates a perception that certain high-profile persons are either immune from prosecution or have their cases delayed. In spite of this, the NPA insists that it does not participate in selective prosecutions.³²¹ The NPAs handling of high profile matters is a matter of concern. The concern is that future prosecutions might be contaminated by the NPAs incompetence and deliberate attempts to delay cases.³²²

3.11 Trust in the NPA

3.11.1 How is success measured?

The prosecution policy provides that where there is evidence on the face of it and if the prospects of success are reasonable the prosecutor should prosecute.³²³ Thus, by looking at previous conviction rates the prosecutor is provided with a measure of

³¹⁸ Thamm M 'Gordhan charges backtrack:Shaun Abrahams hoist with Zuma's petard' *Daily Maverick* available at <http://www.dailymaverick.co.za/article/2016-10-31-gordhan-charges-backtrack-shaun-abrahams-hoist-with-zumas-petard/> (accessed 10 November 2018).

³¹⁹ NPA performance: Briefing by National Director available at <http://pmg.org.za/page/National%20Prosecuting?via=homepage-feature-card> (accessed 10 November 2018).

³²⁰ <http://pmg.org.za/page/National%20Prosecuting?via=homepage-feature-card> (accessed 10 November 2018).

³²¹ <http://pmg.org.za/page/National%20Prosecuting?via=homepage-feature-card> (accessed 10 November 2018).

³²² Department of Justice & Constitutional Development & National Prosecuting Authority: Quarterly Meeting available at <http://pmg.org.za/committee-meeting/11809/> (accessed 20 November 2018).

³²³ Prosecution Policy (2014) 13.

the possibility of success in the prosecution.³²⁴ The NPA uses the conviction rate as a measure of performance. The NPA only prosecutes cases it is likely to win. This does not create a reliable measure to determine the success of the NPA.³²⁵

The conviction rate figures cited by the NPA and Department of Justice and Constitutional Development are exceptional: for example 91 per cent in High Courts, 93.8 per cent in organised crime cases, and 72.7 per cent in sexual offences prosecutions.³²⁶ According to the NPA, conviction rates for trio crimes (car hijackings, business robberies and house robberies) stand at 82.9 per cent.³²⁷ At first glance, the numbers look like a remarkable achievement. However, the NPA defines a conviction rate as the percentage of cases finalised with a guilty verdict divided by the number of cases finalised with a verdict.³²⁸ Conviction rates provide an easy measure of what the prospects of success have been for the prosecution.³²⁹ The conviction rate in High Courts has increased slowly from 89.9 per cent in 2015/16 to 91.7 per cent in 2017/18. Similarly, Regional Courts have increased by 1.8 per cent from 89.9 per cent in 2015/16 to 91.7 per cent 2017/18.³³⁰ The steady increase in conviction rates is important for the NPA as the institution is seen by some as being effective and efficient.³³¹

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³²⁴ South African Law Commission Research Paper 18 (Project 82) *Conviction rates and other outcomes of crimes reported in eight South African police areas* (2000) 3.

³²⁵ South African Law Commission Research Paper 18 (Project 82) *Conviction rates and other outcomes of crimes reported in eight South African police areas* (2000) 3.

³²⁶ Annual Report National Director of Public Prosecutions 2017/18 in terms of the NPA Act 32 of 1998 41.

³²⁷ Annual Report National Director of Public Prosecutions 2017/18 41.

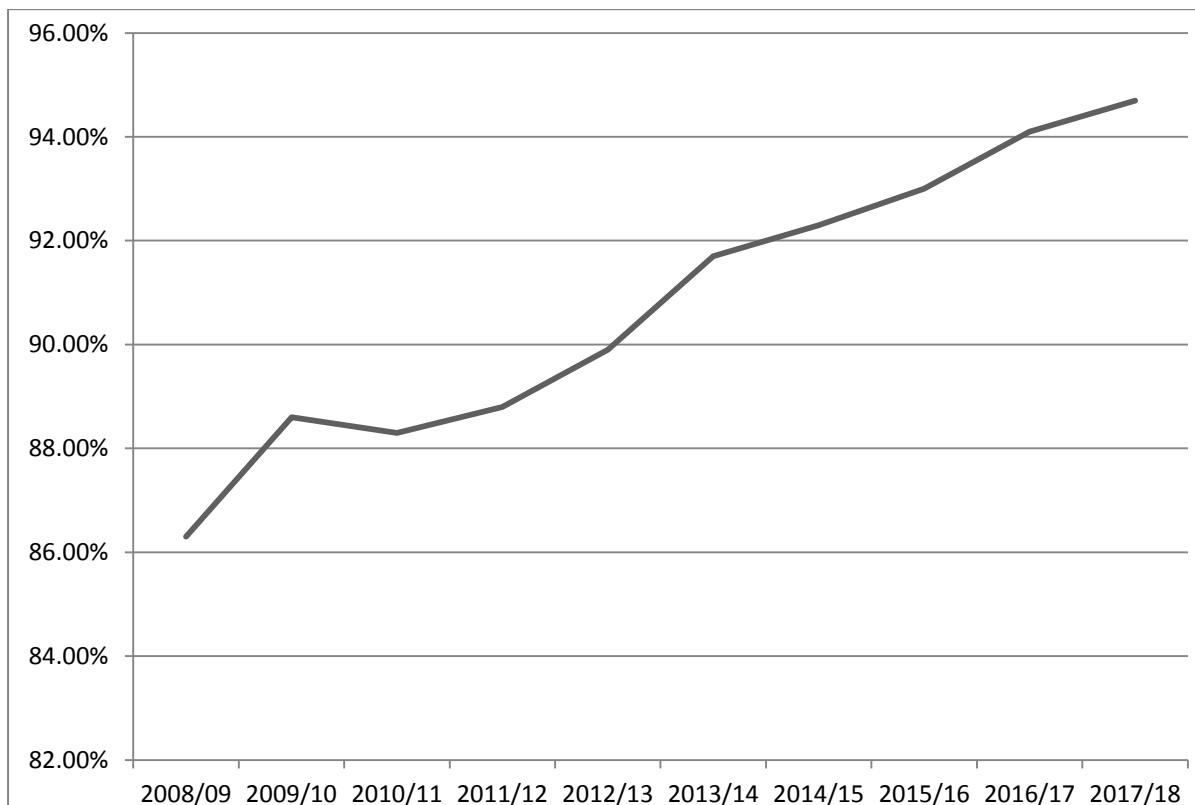
³²⁸ Redpath (2012) 26-7.

³²⁹ Muntingh, Redpath and Petersen 27.

³³⁰ Annual Report National Director of Public Prosecutions 2017/18 37.

³³¹ Annual Report National Director of Public Prosecutions 2017/18 37.

Figure 1: Conviction rate 2008/09 to 2017/18



Source: NPA Annual Reports

The rate of convictions over a 10-year period has increased from 86 per cent in 2008/09 to 94.7 per cent in 2017/18, an overall increase of 8.7 per cent. Figure 1 suggests that the NPA is an effective institution that reaches its targets. The high conviction rate reported by the NPA would be impressive if it had also been associated with an increase in the number of convictions obtained, and if serious violent crime comprised the majority of convictions.³³² Unfortunately, this is not the case as shown in the following section.

³³² African Criminal Justice Reform 'ACJR Factsheet 8-Performance of the NPA' available at <https://acjr.org.za/resource-centre/npa-performance-nov-2018.pdf> (accessed 8 December 2018).

3.11.2 Decrease in the number of convictions

Regarding persons being prosecuted, there is an indication that fewer people are being prosecuted. Convictions reported by the NPA dropped from 332 544 in 2002/3 to a low in 2007/8 of 254 828 a dramatic decline.³³³ The examples given show that the measuring of conviction rate as a measure for success is not accurate as it does not take into account prosecuted cases and its steady decline.

The drop is not due to a decline of referrals by the South African Police Service (SAPS). According to the SAPS Annual Report there has been an increase in arrests.³³⁴ According to the SAPS Annual Report serious crime arrests in 2002/3 were 444 738 compared to 1123 968 in 2017/18.³³⁵ However, the increase in arrests has not resulted in more convictions. Fewer convictions could be viewed positively if they involved more serious convictions.³³⁶ Serious crimes show a decrease in the number of convictions. Common assaults, assault with intent to commit grievous bodily harm, and malicious damage to property have all shown reductions of 66 per cent, 63 per cent and 58 per cent over a 10-year period.³³⁷ This was despite reported crime not dropping to a similar percentage. Reductions in reported crimes were 21 per cent, 16 per cent and 15 per cent over a 10-year period.³³⁸

The NPA argues that accusations that conviction rates are distorted are unfair and misleading. It is argued that conviction rates are internationally viewed as an indicator of success in prosecution.³³⁹ The NPA only prosecutes cases it thinks it has

³³³ African Criminal Justice Reform 'ACJR Factsheet 8-Performance of the NPA' available at <https://acjr.org.za/resource-centre/npa-performance-nov-2018.pdf> (accessed 8 December 2018).

³³⁴ African Criminal Justice Reform available at <https://acjr.org.za/resource-centre/npa-performance-nov-2018.pdf> (accessed 8 December 2018).

³³⁵ African Criminal Justice Reform available at <https://acjr.org.za/resource-centre/npa-performance-nov-2018.pdf> (accessed 8 December 2018).

³³⁶ African Criminal Justice Reform available at <https://acjr.org.za/resource-centre/npa-performance-nov-2018.pdf> (accessed 8 December 2018).

³³⁷ African Criminal Justice Reform available at <https://acjr.org.za/resource-centre/npa-performance-nov-2018.pdf> (accessed 8 December 2018).

³³⁸ African Criminal Justice Reform available at <https://acjr.org.za/resource-centre/npa-performance-nov-2018.pdf> (accessed 8 December 2018).

³³⁹ Department of Justice & Constitutional Development & National Prosecuting Authority: Quarterly Meeting available at <http://pmg.org.za/committee-meeting/11809/> (accessed 19 October 2018).

a reasonable chance of winning.³⁴⁰ Instead of measuring its success in terms of the already mentioned a more sensible measure of performance is suggested. The NPA could compare the number of successful convictions and the number of crimes reported crimes on a yearly basis.³⁴¹ Using these indicators might display a different view of success.

Prosecutors have wide discretion to decide which cases have reasonable prospects of success.³⁴² In addition, a prosecutor must apply his or her mind and use discretion when deciding whether to prosecute or not.³⁴³ On the contrary, conviction rate figures are not a reliable means of measuring the success of the NPA.³⁴⁴ The emphasis on a high conviction rate means that prosecutors are likely to avoid difficult cases and pursue only those where there is an extremely high probability of success.³⁴⁵ A high conviction rate is not a sign that the NPA is tough on offenders. Alternatively it shows that the NPA might be taking the easy route in prosecuting cases with a reasonable prospect of success.³⁴⁶

3.12 Capacity of the NPA

Prosecutors need to spend more of their time on their core function which is prosecuting.³⁴⁷ The NPA has received a staff increase in 2016/17 there was an increase of 67 per cent to 3232 prosecutors and 4841 employees.³⁴⁸ While in 2017/18 there were 3626 prosecutors post of which 3084 were filled from a total post establishment of 5591.³⁴⁹ The number of prosecutors has increased by 60 per cent even though, the rate of staff leaving the NPA since the 2016/17 Annual Report

³⁴⁰ Department of Justice & Constitutional Development & National Prosecuting Authority: Quarterly Meeting available at <http://pmg.org.za/committee-meeting/11809/> (accessed 19 October 2018).

³⁴¹ Garside R and McMahon W 'Does criminal justice work? The Right for the wrong reasons' debate 39 (2006) Monograph 74-5.

³⁴² *Nundalal v Director of Public Prosecutions KZN and Others* (AR723/2014) [2015] ZAKZPHC 25 para 23.

³⁴³ (AR723/2014) [2015] ZAKZPHC 25 para 24.

³⁴⁴ Redpath (2012) 26.

³⁴⁵ Sklansky D 'The Problems with Prosecutors' 2018 *Annual Review of Criminology* 457.

³⁴⁶ Redpath (2012) 27.

³⁴⁷ Annual Report National Director of Public Prosecutions 2017/18 118, the high workload is aggravated by the fact that there is not enough support staff to help prosecutors. In this context, the high vacancy rate of 29 per cent is a matter of concern.

³⁴⁸ Annual Report National Director of Public Prosecutions 2017/18 118-120.

³⁴⁹ Annual Report National Director of Public Prosecutions 2017/18 120.

appears to have increased with a further 55 staff leaving in the first three months of the current financial year (2017/18).³⁵⁰

The Budget Vote for the NPA in March 2018 was R3 .6 billion of which 81 per cent was for general prosecutions.³⁵¹ However, the Aspirant Prosecutor Programme has been suspended since 2015.³⁵² The Aspirant Prosecutor Programme was to provide a gateway for legal graduates to enter the field of prosecution. This would allow for a cycle of promotion within the NPA. The halting of the programme for the past three years should be a major concern to the NPA as no new prosecutors have entered the prosecuting body.³⁵³ This results in an increasing burden on the existing prosecutorial workforce. Shaun Abrahams indicated at the launch of the 2017/18 Annual Report that a National Public Prosecutor Academy would be opened on 1 April 2018.³⁵⁴ The purpose of the Academy would be to train staff and would include the Aspirant Prosecuting Programme. At the time of writing, there has been no opening of a new NPA Academy or Aspirant Prosecuting Programme.

The loss of experience in the prosecution service is a central contributor to the inadequate performance of the prosecution service.³⁵⁵ In 2017 the NPA lost one of its most senior prosecutors, Gerrie Nel. Nel a State Advocate for 36 years, stated his desire to ensure equality before the law as the reason for his resignation.³⁵⁶ Further factors, such as, dismissals, better job opportunities or early retirement, are some of the other contributing factors resulting in inadequate performance. In addition, the 2017/18 Annual Report stated that there is a 29 per cent vacancy rate with regards to administrative staff.³⁵⁷ Furthermore, the legal administrative support staff has a

³⁵⁰ Annual Report National Director of Public Prosecutions 2017/18 80-3.

³⁵¹ Estimates of National Expenditure 2018-National Treasury Budget vote Table 21.12 available at <http://www.treasury.gov.za/documents/national%20budget/2018/ene/FULLENE.pdf> (accessed 11 December 2018).

³⁵² Aspirant Programme available at <https://www.npa.gov.za/aspirant> (accessed 12 June 2018) and Annual Report of Public Prosecutions 2017/18 23.

³⁵³ Aspirant Programme available at <https://www.npa.gov.za/aspirant> (accessed 12 June 2018).

³⁵⁴ Annual Report National Director of Public Prosecutions 2017/18.

³⁵⁵ Schönsteich M (2001) 77.

³⁵⁶ 'Gerrie Nel leaves NPA to ensure equality before the law' *News24* available at <https://www.news24.com/SouthAfrica/News/live-gerrie-nel-explains-his-move-20170131> (accessed 12 September 2018).

³⁵⁷ Annual Report National Director of Public Prosecutions 2017/18 118.

vacancy rate of 21 per cent.³⁵⁸ The vacancies in administrative departments have an effect on the performance of the NPA. The shortage of staff leads to workloads being increased for existing staff or assigned to persons who are not equipped to deal with specific tasks.

The departure of senior prosecutors and the vacant administrative posts are an illustration of the disarray in which the NPA finds itself. A contributing factor to the loss of prosecutors could be the tarnished reputation the NPA has gained over the past decade. For example, every NDPP has either been suspended, fired or handsomely compensated. Furthermore, public faith has been lost, with numerous high-profile cases³⁵⁹ either being drawn out or dropped.

3.12.1 Alternative Dispute Resolution Mechanism (ADRM)

It is argued that part of the reasons for the drop in finalised court cases is due to the increase in resolutions outside the court.³⁶⁰ The ADRM encompasses diversion and informal mediation as methods of resolution of disputes between the parties. The bulk of ADRM matters are dealt with by district courts, which deal with 98.5 per cent of ADRM matters.³⁶¹

The ADRM should only occur where there is a *prima facie* case; if no such case exists then there should be no mediation.³⁶² The ADRM is preferred to being convicted and sent to prison. However, the ADRM process is largely informal mediation. The ADRM could help alleviate the increased workload on prosecutors. The 2017/18 Annual Report of the NPA indicates 3803 more cases were diverted after enrolment. A further 4643 were diverted after enrolment and 18 562 cases were

³⁵⁸ Annual Report National Director of Public Prosecutions 2017/18 118.

³⁵⁹ *Democratic Alliance v President of South Africa and Others* (122/11) [2012] ZACC 24, *Zuma v DA* (771/2016); *ANDPP V DA* (1170/2016) [2017] ZASCA 146, *Jiba & another v The General Council of the Bar of South Africa and Mrwebi v The General Council of the Bar of South Africa* (141/17 and 180/17) and *Corruption Watch NPC and Others v President of the Republic of South Africa and Others* [2018] ZACC 23.

³⁶⁰ Redpath J 'Decline in convictions could be down to preference for informal mediation' available at <http://www.businesslive.co.za/bd/opinion/2016-11-21-decline-convictions-could-be-down-to-preference-for-informal-mediation/> (accessed 20 November 2018).

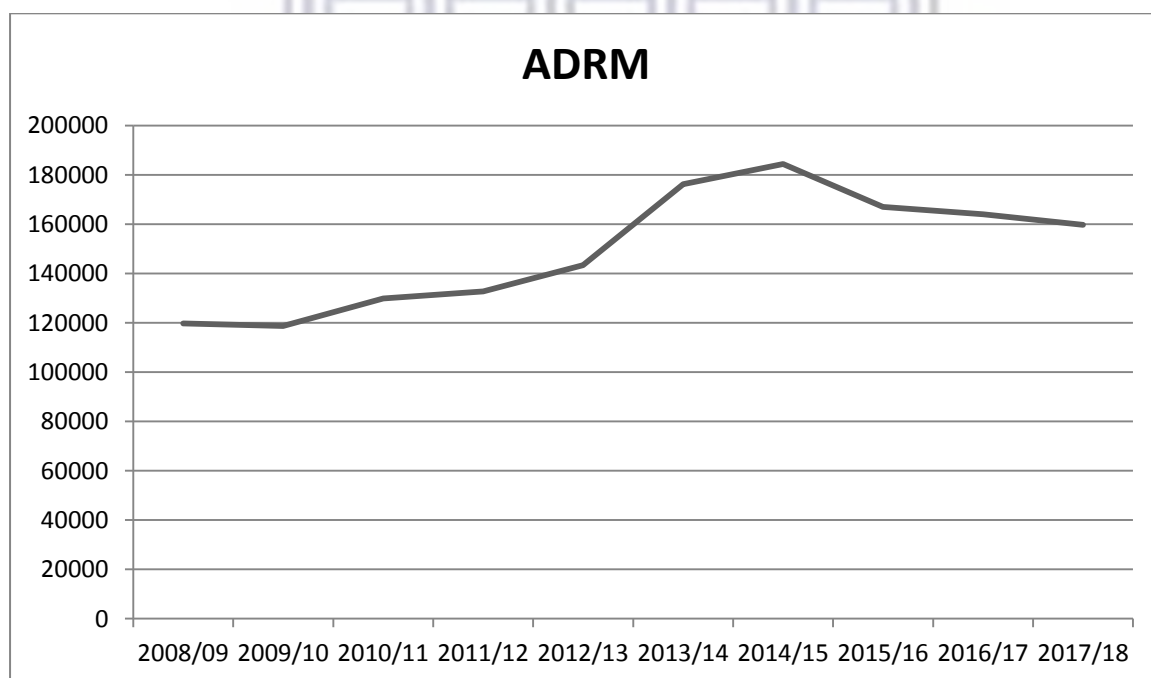
³⁶¹ Annual Report National Director of Public Prosecutions 2017/18 65.

³⁶² Redpath J available at <http://www.businesslive.co.za/bd/opinion/2016-11-21-decline-convictions-could-be-down-to-preference-for-informal-mediation/> (accessed 20 November 2018).

successfully mediated.³⁶³ These figures show that prosecutors are using informal mediation as an exercise of their prosecutorial discretion.

However, it is worrying as it seems that prosecutors are using a wide discretion as, the majority of the ADRM cases consist of informal mediation. Prosecutors finalised 159 654 cases through the ADRM in 2017/18.³⁶⁴ Furthermore, informal mediation constituted 70 per cent of the ADRM process in 2016/17 and 68 per cent in 2017/18.³⁶⁵ The Court is not involved in the negotiations, nor is there a central database of informal mediations to determine whether a person has previously benefitted from informal mediation.³⁶⁶ Furthermore, no data is available in the NPA Annual Report on the nature of cases which do not have a direct complainant (for example drug offences and firearm offences).³⁶⁷

Figure 2: The ADRM used by the NPA 2008/09 to 2017/18



Source: NPA Annual Reports

³⁶³ Annual Report National Director of Public Prosecutions 2017/18 66.

³⁶⁴ Annual Report National Director of Public Prosecutions 2017/18 65.

³⁶⁵ Annual Report National Director of Public Prosecutions 2017/18 66.

³⁶⁶ African Criminal Justice Reform available at <https://acjr.org.za/resource-centre/npa-performance-nov-2018.pdf> (accessed 8 December 2018).

³⁶⁷ African Criminal Justice Reform available at <https://acjr.org.za/resource-centre/npa-performance-nov-2018.pdf> (accessed 8 December 2018).

The trend is worrying as there is significant growth in unmonitored use of prosecutorial discretion.³⁶⁸ In addition, it is not clear whether informal mediation involves the participation of both the victim and the accused. The process could be abused in that if compensation is involved victims might always lean towards settling through informal mediation.³⁶⁹ This could result in many criminals escaping the criminal justice system.

3.12.2 Improving investigations by NPA

The legal environment in which prosecutors work constantly changes: new jurisprudence, types of crime and the techniques of criminals are evolving.³⁷⁰ Special attention should therefore be given to co-operation with the SAPS, as new forensic methods appear and open new ways of combatting crime.³⁷¹

By collaborating with the SAPS, prosecutors will be able to sharpen their skills in examining the evidence given by investigating officers and be able to avoid errors.³⁷² Prosecutors are expected to assist the SAPS to ensure that investigating practices support their cases. Declining experience levels within the Detective Service and inadequate training have resulted in a greater burden on prosecutors to guide investigations by providing specific instructions.³⁷³ If SAPS detectives are inadequately trained, it could result in a time-consuming process of prosecutors having to screen through dockets to ensure that only trial-ready matters are enrolled.³⁷⁴

³⁶⁸ Muntingh L, Redpath J and Petersen K (2017) 32.

³⁶⁹ Redpath J 'Trends in the exercise of prosecutorial discretion: Armchair discussion on the National Prosecuting Authority' available at <http://acjr.org.za/resource-centre/npa-2016.pdf> (accessed 20 November 2018).

³⁷⁰ Schönteich M (2001) 88.

³⁷¹ Redpath J available at <http://acjr.org.za/resource-centre/npa-2016.pdf> (accessed 20 November 2018).

³⁷² Fernandez L 'Profile of a Vague Figure: The South African public prosecutor' 10 (1993) *South African Law Journal* 203.

³⁷³ Annual Report National Director of Public Prosecutions 2016/17 34.

³⁷⁴ Undetected docket analysis and structure: SAPA briefing, PCEM project follow-up with SAPS & DPCI on their 2014/15 Annual Report available at <http://pmg.org.za/committee-meeting/2190/> (accessed 21 November 2018).

3.12.3 Public Trust in the NPA

The NPA must carry out its functions independently and in the public interest.³⁷⁵ Therefore, increased openness and accountability is necessary to ensure that the credibility of the NPA is restored.³⁷⁶ However, trust in the NPA has declined. Accountability in respect of prosecutorial authority in a democratic State is not necessarily an unqualified good.³⁷⁷ Yet, the increased number of court cases and uncertainty within the NPA has led to a loss of prosecutorial credibility. The influence high-ranking politicians, government officials and the former head of the executive, Jacob Zuma, had on the NPA are very worrying. The public perceptions of prosecuting cannot be a positive one when there are conflicts and uncertainty concerning the prerogative and mandate of the NPA, with regards to high profile cases.³⁷⁸

A transparent approach towards reasons for decisions would help the broader public in understanding why certain prosecutorial decisions are taken.³⁷⁹ The duty to give reasons can also improve the quality of decisions, as well as public perception.³⁸⁰ Prosecutors are required by the prosecution directives: to give reasons for declining to prosecute a matter; to furnish reasons for the exercise of their prosecutorial discretion; and in the interests of accountability and transparency give reasons upon request.³⁸¹ A prosecutor who knows that he or she must give reasons will take greater care not to make an arbitrary or unreasonable decision.³⁸² In addition, providing reasons to explain a decision to prosecute or not to prosecute may be vital to maintaining confidence in the administration of justice.³⁸³

³⁷⁵ Prosecution Policy (2014) 13.

³⁷⁶ Schönreich M 'Strengthening Prosecutorial Accountability in South Africa' (2014) ISS Paper 2-3.

³⁷⁷ Schönreich M (2014) 2-3.

³⁷⁸ Constitution of the Republic of South Africa, 1994 s 179(4).

³⁷⁹ The Department of Justice 'Code of good administrative conduct' 26 available at <http://www.justice.gov.za/paja/docs/unit/PAJA-Code-draft-v2-2006.pdf> (accessed 14 November 2018).

³⁸⁰ The Department of Justice 'Code of good administrative conduct' 26 available at <http://www.justice.gov.za/paja/docs/unit/PAJA-Code-draft-v2-2006.pdf> (accessed 14 November 2018).

³⁸¹ Prosecution Policy Directive (2014) 19.

³⁸² Public Prosecution Service of Canada *Deskbook* para 3.5.

³⁸³ Yang K 'Public Accounting of Public Prosecutions' (2013) 20 *Murdoch University Law Review* 23.

The decision to prosecute or not to prosecute is an important and sensitive step in criminal proceedings that could affect the public at large, especially when dealing with highly sensitive cases.³⁸⁴ Furthermore, interested parties must be able to question the nature of the charges instituted. For example Pravin Gordhan case resulted in a huge public debate on the validity of the charges. Therefore, questionable decisions must be able to be challenged by the public in order to secure accountability.

In Canada with regards prosecution directions prosecutors are not legally required to give reasons for their core decision-making.³⁸⁵ However, it is advisable in certain circumstances to offer an explanation for decisions taken in order to maintain public confidence. Furthermore, in *R v Gill* it was stated that by offering an explanation, the prosecutor enhances the transparency of his or her decision-making process.³⁸⁶ Linked to the issues of accountability and transparency is the argument that a policy of giving reasons for decisions would enhance the fairness and efficiency with which prosecutorial decisions are made, in that prosecutors will be more inclined to ensure that decisions are seen to be fair.³⁸⁷ If a prosecutor or any other official in the NPA knows that the reasons for the decision will be made known to the public, he or she will be particularly careful to set out the reasons clearly and logically in a manner which can be defended.³⁸⁸ This was not present in Mphse's decision not to prosecute Zuma, as well as, Abrahams decision to institute criminal proceedings against Gordhan and his co-accused and then giving reasons on the withdrawal of the charges.³⁸⁹

Performance and perceived corruption are contributing factors to the drop in public trust. A survey conducted by Afroborometer in 2015, showed that citizens had the view that government officials were corrupt and positively associated it with the

³⁸⁴ Wolf L (2011) 97.

³⁸⁵ du Toit PG and Ferreira GM (2015) 1515-6.

³⁸⁶ du Toit PG and Ferreira GM (2015) 1516.

³⁸⁷ Munzhedzi P 'Fostering public accountability in South Africa: A reflection on challenges and success' 12 (2016) *The Journal for Transdisciplinary Research in Southern Africa* 1820.

³⁸⁸ Munzhedzi P (2016) 1820.

³⁸⁹ Mpshe based his decision on foreign law which the High Court and Supreme Court of Appeal dismissed, Abrahams during a Parliamentary briefing stated; he did not have the final responsibility on instituting charges against Zuma.

perceived performance of leaders and institutions.³⁹⁰ At the time the NPA was considering whether to institute charges against Zuma for upgrades to his Nkandla home. Additionally, 14 per cent of citizens stated that they did not know how much they trusted the NPA. Trust in institutions has been of various degrees: in 2006 there was an increase in the trust of institutions, such as the NPA but declined in 2008. It is not surprising that public trust declined in 2008 as it was the start of the Zuma corruption charges debacle and, as shown, that year marked the start of considerable instability within the NPA. From 2001 to 2015 there was a 10 per cent drop in trust in the courts, due to the perception that high-profile individuals were treated differently.³⁹¹

Too many decisions taken by the acting NDPPs and the NDPPs have been called into question, be it by the media, legal commentators or the judiciary. Events such as: the 2007 Pikoli suspension; and 2008 charging and then dropping of corruption charges against Zuma, and the 2009 appointment of Simelane who the CC³⁹² in 2012 declared was not a 'fit and proper person' to hold the office of NDPP; the charging and withdrawal of charges against Gordhan, by Shaun Abrahams in 2016; and the 2018 CC judgement where the court brought finality to the position of the NDPP and declared Shaun Abraham's appointment as NDPP invalid, have all led to a direct decline in the public perception of prosecutorial independence and the credibility of its leaders.³⁹³

3.13 Conclusion

The above discussion has highlighted how the office of the NDPP is vulnerable to external influence. There is a need to ensure that measures are put in place to guarantee its independence and credibility. Furthermore, it has shown that over the past ten years the NPA has effectively been turned into an executive pawn. However, it appears that the CC has realised that the independence of the NPA and the credibility of its leaders has been under constant threat. The CC has brought

³⁹⁰ Afrobarometer 'In South Africa, citizens trust in president, political institutions drops sharply' Dispatch No. 90 (2016) 2-5.

³⁹¹ Afrobarometer 'In South Africa, citizens' trust in president, political institutions drops sharply' Dispatch No. 90 (2016) 8.

³⁹² (122/11) [2012] ZACC 24.

³⁹³ [2018] ZACC 23.

clarity to what is considered as a 'fit and proper person', acknowledging that while the 'fit and proper' requirement does involve a value judgement, it does not mean that the decision lies within the sole prerogative of the President.³⁹⁴ Furthermore, the term 'integrity' is an objective requirement existing in law guiding the determination of 'fit and proper person'.³⁹⁵ It is a concern that the independence and credibility of the NPA was compromised to such an extent as shown in chapter 3. This could occur again if proper provisions are not put in place. Based on South African developments since 1998 to date, it is submitted that irrespective of laws or structures in place in South Africa, principles of prosecutorial independence and credibility cannot solely depend on the integrity of the NDPP.

It is therefore important to continue to be vigilant and critical of the misuse of office even when the misuse threatens to be a matter that is taken for granted. The measurement of success for the NPA shows that the institution is more than efficient. However, the ADRM figures show that numerous cases are being dealt with before going to trial. Furthermore, without a centralised register it is impossible to know which offences are being dealt with through the ADRM process. The quality of characters in the NPA has caused public trust to decline indecision by the NPA in certain matters results in the public not trusting the institution. The continuous and increasing loss of credibility in the NPA damages not only the ability for the State to prosecute crime, but also severely hurts the respect for the rule of law and public trust in the executive.³⁹⁶ It is clear that constitutional provisions were never tested for the possibility of a bad incumbent in the office of the NDPP. Numerous court decisions³⁹⁷ have continued to state the constitutional principles supporting the office of the NDPP and the NPA which are imperative for the rule of law in a democratic country. The following section will conclude the above discussion and suggest recommendations for the NPA.

³⁹⁴ (CCT 122/11) [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) (5 October 2012) para. 23.

³⁹⁵ (263/11) [2011] ZASCA 241; 2012 (1) SA 417 (SCA); [2012] 1 All SA 243 (SCA); 2012 (3) BCLR 291 (SCA) para 116.

³⁹⁶ Wolf L (2011) 81-2.

³⁹⁷ *Democratic Alliance v President of South Africa and Others* (CCT 122/11) [2012] ZACC 24, *Zuma v DA* (771/2016); *ANDPP V DA* (1170/2016) [2017] ZASCA 146 , *Jiba & another v The General Council of the Bar of South Africa and Mrwebi v The General Council of the Bar of South Africa* (141/17 and 180/17) [2018] , *Corruption Watch NPC and Others v President of the Republic of South Africa and Others* [2018] ZACC 23 para 94.

CHAPTER 4

CONCLUSION AND RECOMMENDATIONS

4.1 Introduction

This chapter concludes the discussion and incorporates recommendations for the NPA. The discussion includes recommendations on how to strengthen the appointment criteria of the NDPP and measures on how to improve the performance of the NPA. The chapter will conclude with a view of the NDPP appointment process used by President Ramaphosa.

4.2 Conclusion

Numerous aspects have influenced the decision-making of the NDPPs that have held office. The decision-making process has not been clear at times with high profile cases being delayed on numerous occasions.³⁹⁸ The interest of justice and the key prosecutorial duty to prosecute without fear, favour or prejudice has been absent when considering these high profile cases. Decisions such as: the withdrawal of charges against Zuma when a *prima facie* case was present in 2009; the placing of Jiba and Mrwebi on special leave in 2016 after the High Court ruled that the two had acted improperly; the charging and then dropping of charges against Pravin Gordhan and his co-accused in 2016; and the removal of Nxasana as NDPP in 2015 and the 2018 CC judgement ruling the removal of Nxasana invalid. These are but a fraction of the cases that have exposed the regretful state of the NPA.

The NPA is an institution that is responsible for upholding the rule of law and a critical element of a democratic framework. Thus, the Constitution³⁹⁹ and the NPA Act⁴⁰⁰ supplemented by policy documents, form the framework in which the NPA should operate independently to serve a democratic government. However, this does

³⁹⁸ Selabe (2015) 105.

³⁹⁹ Constitution of the Republic of South Africa, 1996.

⁴⁰⁰ Act 32 of 1998.

not entail that the NPA can be a law unto itself. The NPA as a criminal justice institution must itself respect its own premise and the institution's inherent commitment to upholding democratic values in a democratic society.⁴⁰¹ The advantages of a structured prosecution authority are consistency, credibility and accountability.⁴⁰² These outcomes are essential in retaining public trust in the NPA. Unfortunately, numerous prosecutorial decisions have been questionable or result in appeals or reviews by the courts due to prosecutors not following the correct procedures or due diligence.

The appreciation for the significant role of the prosecution service must come from people within and outside of the institution. It is worrying that prosecutors and NDPPs would themselves disagree with a decision although guided by the Constitution and NPA Act. This was illustrated in the 2009 case of Zuma in the withdrawal of fraud and corruption charges although a *prima facie* case existed. The decision took 9 years, numerous court cases and NDPPs for the eventual decision by Shaun Abrahams to reinstate the charges. However, Abrahams was under increased pressure from the public and civil society groups to come to the decision. The NPA has not shown to be transparent nor has it demonstrated independence and credibility in its decision-making.

4.3 Recommendations

4.3.1 Improving the credibility of the appointment procedure

4.3.1.1 Appointment criteria

Much of the controversy and problems of the NPA stems from the appointment process. The absence of proper consultation with Parliament, and civil society have

⁴⁰¹ Africa Criminal Justice Reform 'NPA Accountability, trust and public interest' available at <http://www.acjr.org.za/resource/npa-accountability-trust-public-interest.pdf> (accessed 20 November 2018).

⁴⁰² Africa Criminal Justice Reform available at <http://www.acjr.org.za/resource/npa-accountability-trust-public-interest.pdf> (accessed 20 November 2018).

led to several poor appointments. This can be seen in the quality of character of some appointments and the leadership instability that the NPA has experienced.

The requirements for the NDPP are minor when compared sectors such as the Public Protector or Auditor-General of South Africa (AGSA). The NDPP is merely required to be 'fit and proper' and hold a legal qualification to practice in all courts in South Africa.⁴⁰³ There is no requirement of special knowledge in the field of law or a certain number of years of experience. Thus, a structure identifying the suitable candidate of NDPP must be established and can draw from sectors such as the Public Protector and AGSA.⁴⁰⁴ Taking lessons from the two sectors one can draw a number of guidelines. For example, in both the Public Protector and the AGSA the positions are advertised, and the appointment made by the President on the recommendation of the National Assembly.⁴⁰⁵ In addition to a candidate being 'fit and proper', it should be a requirement that the applicant has specialist knowledge in their required field.⁴⁰⁶ It is required of the AGSA to have specialised knowledge in auditing and public administration.⁴⁰⁷ This a key consideration when appointing an AGSA. A certain number of years of experience in a particular field may be a set requirement, as in the case of the Public Protector who must have ten years of specialist knowledge.⁴⁰⁸

Clear from the requirements for the position of AGSA and Public Protector is that the drafters of the Constitution sought to avoid unsuitable candidates by at least requiring a certain amount of experience or specialised knowledge in the required field.⁴⁰⁹ There are no such specific requirements with regards to the NDPP.⁴¹⁰ The important guidelines drawn from the appointment criteria of the Public Protector and AGSA are experience, specialisation in the required field and the process of

⁴⁰³ Act 32 of 1998 s 9(1).

⁴⁰⁴ Africa Criminal Justice Reform available at <http://www.acjr.org.za/resource/npa-accountability-trust-public-interest.pdf> (accessed 20 November 2018).

⁴⁰⁵ Constitution of the Republic of South Africa, 1996 s 193 (4).

⁴⁰⁶ Africa Criminal Justice Reform available at <http://www.acjr.org.za/resource/npa-accountability-trust-public-interest.pdf> (accessed 20 November 2018).

⁴⁰⁷ Constitution of the Republic of South Africa, 1996 s 193(3).

⁴⁰⁸ Public Protector Act 23 of 1994 s 1A (3).

⁴⁰⁹ Constitution of the Republic of South Africa, 1996 s 193 (2) and (3).

⁴¹⁰ Act 32 of 1998 s 9(1).

identification of candidates.⁴¹¹ Thus, it is recommended that such structured selection criteria will assist the executive when appointing the NDPP and might help to clear out unsuitable applicants.

4.3.1.2 Amending the appointment process of the NDPP

The quality of character of the NDPP has been shown to be a variable of great uncertainty and risk. This risk can be mitigated by strengthening the appointment process. The Constitution could be amended to avoid ministerial control. However, amending the Constitution is by no means an easy process; therefore, the first step would be to try to make the appointment process more transparent. If the President, as head of the executive, still has the final decision on the appointment of the NDPP, then Parliament and the JSC should be involved.⁴¹²

The JSC could identify a suitable candidate for the President to appoint.⁴¹³ The composition of the JSC with regards to the appointment of judges consists of 23 to 25 persons.⁴¹⁴ A further positive aspect of the JSC is that the appointment of persons to the JSC is not of the exclusive discretion of the President. The diversity of the membership of the JSC ensures that candidates are thoroughly questioned, with the views of the possible candidates made public through live broadcasts.⁴¹⁵ Additionally, the appointment process of judges are open to the public. This is of utmost importance as the public has a vested interest in persons appointed as judges.⁴¹⁶ Involving the JSC in the appointment procedure of the NDPP could prevent the perception that the appointment of the NDPP is subjective and does not meet the principles of transparency.⁴¹⁷ Central to the appointment procedure is that it

⁴¹¹ Muntingh L, Redpath J and Petersen K (2017) 37.

⁴¹² Muntingh L, Redpath J and Petersen K (2017) 38.

⁴¹³ Shamila Batohi named new NPA boss *Timeslive* available at <https://www.timeslive.co.za/politics/2018-12-06-shamila-batohi-named-as-new-npa-boss/> (accessed 6 December 2018).

⁴¹⁴ Constitution of the Republic of South Africa, 1996 s 178 (1).

⁴¹⁵ Muntingh L, Redpath J and Petersen K (2017) 39.

⁴¹⁶ (263/11) [2011] ZASCA 241 para 66.

⁴¹⁷ (CCT 122/11) [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) para 92.

should move away from being the Presidents sole discretion and that the process is transparent, credible and independent.⁴¹⁸

4.4 Legislative guarantees aimed at protecting the independence of the NPA

4.4.1 Legislative amendments

The NDPP is protected in law from unwarranted influences. However, political heads or the executive have found little wrong in influencing how the NDPP performs its functions.⁴¹⁹ The NPA Act conveys the expectations of the Minister of Justice with regards to information requests.⁴²⁰ Therefore, the Minister is clear on what to expect from the NDPP in terms of information requests.⁴²¹ However, the CC found that the Minister in giving instructions to then NDPP Pikoli to hold off on the arrest of Jackie Selebi until the Minister had given approval violated section 32 (1) (b) of the NPA Act.⁴²² A solution could possibly lay not in amending the NPA Act but rather the Criminal Procedure Act to require, on request, that when decisions not to prosecute or when prosecutions appear to be motivated by external influences, the NPA must account for these decisions before the courts. The reasons and evidence given for the decision or failure to take a decision would be in camera.⁴²³

4.4.2 Preventing decisions by the NDPP being influenced

The CC took the opportunity in *Van Rooyen & Others v The State & Others (Van Rooyen case)*⁴²⁴ challenge, to lay down the basic rules regarding judicial independence and the application of these principles to the facts of the case before it. It was held that the constitutional protection of the core values of judicial independence accorded to all courts by the Constitution means that all courts are entitled to, and have, the basic protection that is required.⁴²⁵ Furthermore, section

⁴¹⁸ Africa Criminal Justice Reform available at <http://www.acjr.org.za/resource/npa-accountability-trust-public-interest.pdf> (accessed 20 November 2018).

⁴¹⁹ Muntingh L, Redpath J and Petersen K (2017).

⁴²⁰ Act 32 of 1998 s 33 (2).

⁴²¹ Act 32 of 1998 s 33 (2).

⁴²² (CCT 122/11) [2012] ZACC 24;2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) para 56.

⁴²³ Redpath J (2012) 53-4.

⁴²⁴ *Van Rooyen & Others v The State & Others* 2002 5 SA 246 CC: 269E-70D/E.

⁴²⁵ 2002 5 SA 246 CC: 269E-70D/E para 22-3 and 28.

165 (2) the Constitution pointedly states that the courts are independent.⁴²⁶ Implicit in this is the recognition that the courts and their structure ought to be independent. The judgment suggests that the judiciary is secure, but it would seem that the same does not apply to the NPA. It is, however, noted that the prosecutors do not form part of the judiciary, however, a strong stance such as the one articulated in the *Van Rooyen case* would only serve as a solid basis on which the NPA can strengthen its independence.

The discussion throughout the mini-thesis indicates the possibility of unwarranted influences that officials in the NPA may be exposed to. The research suggests prosecutorial decisions which call for greater public interest or where there is a suggestion that an ulterior motive exists could be subjected to review. This will allow the courts to safeguard the interest of the accused and of justice in general in the event of incorrect decisions. However, the decision to prosecute cannot be controlled by rules alone but must be made to a considerable extent according to the prosecutor's professional judgment.⁴²⁷ Prosecutors must have the freedom to decide as he or she sees fit and according to his or her appreciation of the factors, that he or she is dealing with.⁴²⁸ Hence, the prosecutors must consider the factors that are specifically relevant to each case. In addition, there is ethical conduct that prosecutors must adhere to and fulfil.⁴²⁹

There are instances where the exercise of discretion by a Director of Public Prosecutions can be reviewed by the courts based on ordinary administrative law grounds of review, such as bad faith.⁴³⁰ The Promotion of Administrative Justice Act⁴³¹ (PAJA) provides for the judicial review of administrative action.⁴³² The PAJA excludes a decision to institute or continue a prosecution from the definition of

⁴²⁶ Constitution of the Republic of South Africa, 1996 s 165 (2).

⁴²⁷ Ntanda Nsereko D 'Prosecutorial Discretion before National Courts and International Tribunals' available at <https://doi.org/10.1093/jicj/3.1.124> (accessed 11 October 2018).

⁴²⁸ Ntanda Nsereko D available at <https://doi.org/10.1093/jicj/3.1.124> (accessed 11 October 2018).

⁴²⁹ Ntanda Nsereko D available at <https://doi.org/10.1093/jicj/3.1.124> (accessed 11 October 2018).

⁴³⁰ Redpath J (2012) 53.

⁴³¹ The Promotion of Administrative Justice Act 3 of 2000.

⁴³² Act 3 of 2000 s 6.

administrative action.⁴³³ In *National Director of Public Prosecutions v Freedom Under Law*⁴³⁴ the Supreme Court of Appeal held that decisions to prosecute and those not to prosecute are of the same class and that, although on the purely literal interpretation the exclusion in the PAJA is limited to the former, it must be understood to incorporate the latter as well.⁴³⁵ However, the independence of the prosecuting authority must be safeguarded by limiting the extent to which its decisions can be brought before a court for review.⁴³⁶ If decisions to prosecute and decisions not to prosecute are excluded from a review in terms of the PAJA, the question arises whether prosecutors are then obliged to give reasons.⁴³⁷ It could be suggested that the obligation to give reasons, if called upon to do so, is implied in the constitutional duty of the NPA to exercise its powers in a way that is not irrational and by the fact that the NPA is bound to the constitutional values of transparency and accountability.⁴³⁸ By reducing factors impinging on prosecutorial decisions, it determines that, unless a matter is diverted or dealt with through other legal processes, it should be prosecuted once a *prima facie* case has been established.

4.4.3 Preventing external pressure on the NDPP

There has been a real problem of pressure being put on certain political cases resulting in prosecutors feeling the undue pressure of influence with regards to prosecutions. To avoid interference by the executive it is suggested that a separate special prosecuting unit should be established which deals specifically with political cases.⁴³⁹ The Chief Justice or Parliament who in turn would decide when a matter would require the appointment of a special prosecutor could directly appoint the special prosecutor or unit. The appointment of a specialized prosecutor or unit would by no means completely remove the potential for interference but would ensure that it was minimised to some extent.⁴⁴⁰ The unit would allow the NDPP to focus solely

⁴³³ Act 3 of 2000 s 1 (ff).

⁴³⁴ *National Director of Public Prosecutions v Freedom Under Law* 2014 2 SACR 107 (SCA).

⁴³⁵ 2014 2 SACR 107 (SCA) para 27.

⁴³⁶ *National Director of Public Prosecutions v Zuma* 2009 2 SA 277 (SCA) para 25.

⁴³⁷ du Toit PG and Ferreira GM (2015) 1521.

⁴³⁸ du Toit PG and Ferreira GM (2015) 1521.

⁴³⁹ Omar J 'The Conversation' available at <http://www.theconversation.com/how-south-africa-can-stop-political-interference-in-who-gets-prosecuted-79442> (accessed 9 October 2018).

⁴⁴⁰ Omar J available at <http://www.theconversation.com/how-south-africa-can-stop-political-interference-in-who-gets-prosecuted-79442> (accessed 9 October 2018).

on the core aspects of his or her office, which should be to increase the overall effectiveness of the NPA and increase public confidence in the abilities of the NPA. Furthermore, the NDPP could be subjected to some degree of control by the Minister of Justice. This would allow for the reducing of political pressure on a single individual.⁴⁴¹

4.5 Improving the performance of the NPA

4.5.1 Consultation on ADRM

The process of using ADRM before cases go to trial is of great concern. There is no searchable central record available and therefore a clear record of the number of cases or circumstances ADRM has been used is unclear.⁴⁴² The prosecution policy directives indicate that no crimes of murder, rape or aggravated robbery may be subjected to informed mediation, however, prosecutors are able to obtain authorisation for informal mediation in these cases.⁴⁴³ It is suggested that the prosecution policy directives be amended to ensure a broader range of interested parties are able to give input into policy directives.⁴⁴⁴ The amendments should take a closer look at the role prosecutor's play in crime prevention by removing serious prolific offenders.⁴⁴⁵ Additionally, formal guidelines on ADRM and informal mediation should be finalised, with a central record keeper of utmost importance.

4.5.2 Internal incentives for performance

There is little in place to reward and foster good performance within the NPA.⁴⁴⁶ Nor is there a system in place to deal with bad performance.⁴⁴⁷ A performance-based salary model for the NPA could be created to incentivise aspiration and capability of prosecutors.⁴⁴⁸ This concept should include performance targets for each

⁴⁴¹ Muntingh L, Redpath J and Petersen K (2017) 36.

⁴⁴² Muntingh L, Redpath J and Petersen K (2017) 36.

⁴⁴³ Muntingh L, Redpath J and Petersen K (2017) 36 and 41.

⁴⁴⁴ Prosecution Policy Directive (2014).

⁴⁴⁵ Muntingh L, Redpath J and Petersen K (2017) 41.

⁴⁴⁶ Muntingh L, Redpath J and Petersen K 42.

⁴⁴⁷ Muntingh L, Redpath J and Petersen K 42.

⁴⁴⁸ Schönteich M (2001) 152-5.

prosecutor. It should take the prosecutors qualifications, abilities and types of crimes the prosecutor is prosecuting into account. Similarly, a system for failure to perform can include aspects, such as, receiving feedback from the public, presiding officers and fellow prosecutors.⁴⁴⁹

4.6 Concluding remarks

It is evident from the research that it is impossible to separate the executive from the prosecution service in its current form. The fairness, credibility and integrity of the NPA coupled with its constitutional obligations is core to the functionality of the NPA. Independence and credibility are at the heart of these values. Public perception of the NPA will only be improved if it is shown that these core values are being adhered to. Independence is required by all members of the NPA from the most junior to the most senior must be free from undue influences regardless of the source of such influence.

Declaring both the resignation of Nxasana as NDPP, as well as the subsequent appointment of Abrahams to the position, invalid, the CC looked critically at aspects of the NPA Act that had the potential to threaten the independence and credibility of the NPA. Specifically, the CC scrapped section 12(4) of the NPA Act, in terms of which the President had the discretion to allow an NDPP to stay on in his position past retirement age.⁴⁵⁰ The court further directed Parliament to effect changes to section 12(6) of the NPA Act⁴⁵¹, which allowed the President to suspend an NDPP for an indefinite period with no pay. The CC in doing so sought to remove provisions that had the potential to persuade an NDPP to tailor his or her actions to gain favour with the President, either out of fear of being suspended for an undetermined period with no income. These are important amendments by the CC that will help to protect future NDPPs from being unduly pressured and influenced by the President or members of the executive.

⁴⁴⁹ Muntingh L, Redpath J and Petersen K (2017) 42.

⁴⁵⁰ Act 32 of 1998 s 12 (4).

⁴⁵¹ Act 32 of 1998 s 12 (6).

It is a fitting time to reconsider the functioning of the NPA. To a certain degree, Shamila Bathoi was appointed as the new NDPP through a transparent process. This is an unprecedented and important modification to an appointment process which was previously rather unclear. However, it must be mentioned that it was only through the intervention by civil society that the interviews were held in public. Yet the decision to appoint a panel to conduct interviews for the NDPP should be commended. On the other hand, a concern arising is that this may very well be a once-off arrangement as there is no guarantee that future appointments will be made using a similar process. President Ramaphosa can set in motion a path to restructure the appointment process of the NPA and provide for a well-functioning institutional framework. The President empowered by section 179 of the Constitution⁴⁵² should adopt a transparent and competitive recruitment process. Both the recent and past events illustrated in the mini-thesis could be indicative of a situation that may slide into disorder if not corrected. A clear structure within which to work would allow prosecutors and the NDPP to carry out their duties in an open, credible and transparent manner.

(24 723 words including footnotes).



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⁴⁵² Constitution of the Republic of South Africa, 1996 s 179.

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