

# **AN ANALYSIS OF PROSECUTORIAL DISCRETION**

**BY**

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## ABSTRACT

This research examines the question whether or not the exercise of the prosecutorial discretion is kosher, by which is meant whether its functional integrity is intact and free from interference.

An investigation, with particular reference to various factors that come into play in prosecutorial decision-making, revealed evidence that suggests degree of undue influence in prosecutorial decision-making. The researcher contends that there is sufficient evidence to infer a causal link between the prevailing climate of uncertainty about the questions informing the research and the manifest lack of credibility of this very important function.

There seems to be a lack of recognition for and appreciation of the significant role played by the prosecution service in promoting democracy by ensuring the fair administration of justice.

The fact that the prosecution service seems to be a regular target for political interference despite legislative guarantees of its integrity and independence as laid down in the Constitution and the NPA Act suggests an underlying mentality that fails to appreciate or flouts the essential distinction between party and state. Prosecutors also take an oath of office or affirmation before assuming duties in this capacity and this also does not seem to be sufficient guarantee to make their decision making kosher and to avoid any trace of suspicion.

In the end some remedial legislative and administrative measures are recommended with a view to restoring public confidence in the prosecution service. The suggestion is made to investigate some of the questions raised in the research, for instance questions such as why the interest in the prosecution service and not the judiciary, and why the current mechanisms aimed at guaranteeing its independence seem not to be sufficient.



## DECLARATION

I do hereby declare that the research paper titled “an analysis of the prosecutorial discretion” is my own work and that all sources used and referred to were acknowledged in full.

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**ADV MATRIC LUPHONDO**

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**DATE**

## INDEX

### CHAPTER 1

#### GENERAL INTRODUCTION

1. Introduction.....	8
2. Purpose of the study.....	9
3. Research questions.....	12
4. Research methodology.....	16
5. Conclusion.....	16

### CHAPTER 2

#### THE PROSECUTION PROCESS

1. Introduction.....	17
2. The prosecution and the police.....	17
3. The prosecution and legal ethics.....	21
4. The importance of the role and independence of the prosecution .....	21
5. The docket and the prosecution process.....	26
5.1 Arrest and other means of securing the attendance of an accused at the trial.....	27
5.2 Huge court rolls.....	27
5.3 Representations before decision.....	28
5.4 The cases reviewed.....	29
5.5 The right to a fair trial.....	29
6. Conclusion .....	30

## CHAPTER 3

### THE FIGHT FOR THE INDEPENDENCE OF THE PROSECUTION SERVICE

1. Introduction.....	32
1.1 English roots.....	32
1.2 Early South African history.....	32
2. The struggle for independence.....	34
3. The independence of the prosecution.....	37
4. The prosecution and the post-apartheid period.....	40
5. Conclusion .....	42

## CHAPTER 4

### THE NATIONAL PROSECUTING AUTHORITY AND THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

1. Introduction.....	44
2. The National Prosecuting Authority of South Africa under Advocate Ngcuka.....	44
3. The National Prosecuting Authority of South Africa under Advocate Pikoli.....	47
4. The National Prosecuting Authority of South Africa under Advocate Mpshe SC.....	49
5. The National Prosecuting Authority of South Africa under Advocate Simelane.....	51
6. Conclusion.....	55

## CHAPTER 5

### A LEGAL COMPARATIVE PERSPECTIVE ON THE PROSECUTION SERVICES OF OTHER JURISDICTIONS

1. Introduction.....	57
2. The prosecution service in Canada.....	57
2.1 The mandate of the Public Prosecution Service of Canada.....	58
2.2 The Role of the Prosecutor.....	59
2.3 The Powers, Duties and Functions of the Director of Public Prosecutions.....	60
3. The Office of the Attorney-General in the United States of America.....	61
3.1 Recognition for separation of powers and the power of the United States Attorney.....	62
4. The Office of the Attorney-General in Australia .....	63
4.1 Prosecutions and the Director of Public Prosecutions.....	64
5. Conclusion.....	66

## CHAPTER 6

### CONCLUSION AND RECOMMENDATIONS

1. Introduction.....	67
2. Conclusion and suggestions on the way forward.....	68
3. Limitations of the study.....	73

<b>BIBLIOGRAPHY.....</b>	<b>75</b>
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## CHAPTER ONE

### GENERAL INTRODUCTION

#### 1. Introduction

The advent of the Constitution<sup>1</sup> established a single National Prosecuting Authority for the whole of the Republic. Section 179(4) of the Constitution provides for the creation of national legislation to ensure that the prosecuting authority exercises its functions without fear, favour or prejudice. Pursuant to section 179 of the Constitution, national legislation in the form of the National Prosecuting Authority Act,<sup>2</sup> hereafter referred to as the NPA Act, was enacted which provides for the establishment of a single national prosecuting authority.

The National Prosecuting Authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to the instituting of criminal proceedings and to discontinue criminal proceedings<sup>3</sup>. This entails the exercise of discretion.

In this chapter the purpose of the dissertation in relation to the prosecuting authority will be explained. In addition, both the research questions and the research methodology will be discussed. A brief conclusion will also be offered at the end of the chapter. It should be noted that the lack of academic opinion and case law, among other things, make the research topic more challenging.

It should be noted, further, that the purview of this dissertation extends over the period from 1998 when the National Prosecuting Authority (NPA) was established<sup>4</sup> to January 2011.

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<sup>1</sup> Constitution of the Republic of South Africa Act 108 Of 1996

<sup>2</sup> National Prosecuting Authority Act 32 of 1998, sections 2-7

<sup>3</sup> Constitution of the Republic of South Africa Act 108 of 1996, section 179(2)

<sup>4</sup> National Prosecuting Authority Act 32 of 1998 (date of commencement being 16 October 1998)



The Constitution empowers and directs the National Director of Public Prosecutions (NDPP) to both determine and issue policy directives which must be observed in the prosecution process<sup>5</sup>. Consequently the following discussion will be largely based on the National Prosecuting Authority Policy Manual<sup>6</sup> with particular reference to the policy directives and the Code of Conduct Manual<sup>7</sup> that regulate the official conduct of members of the prosecuting authority. The criteria for the institution of prosecutions are contained in Part 4 of the NPA Policy Manual as laid down in section 179(5) of the Constitution.

## 2. Purpose of the study

As indicated by its title, the purpose of this dissertation is to analyse prosecutorial discretion, highlighting challenges associated with the exercise of said discretion, and to consider ways to allay fears that in certain cases the NPA is influenced politically in its decision making and settle questions concerning the aptness and correctness of prosecutorial discretion as exercised in practice, with particular reference to factors considered in prosecutorial deliberation, including the possible or apparent influence of political pressure or manipulation.

It is clear from the above, that prosecutors have a constitutional obligation to adhere to the policy directives in the exercise of their prosecutorial function. The Constitution and the NPA Act clearly provide that the decision whether or not to prosecute a person arrested for allegedly committing an offence rests with the prosecution service, even in instances where a case docket is presented to the prosecutor as a so-called “decision docket”<sup>8</sup> or where the matter is partly heard.

Section 20(1) of the NPA Act (Act 32 of 1998) enacted in terms of section 179(2) of the Constitution, defines the powers of prosecution as follows:

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<sup>5</sup> Constitution of the RSA Act 108 of 1996, section 179(5) (a) and (b)

<sup>6</sup> National Prosecuting Authority Act 32 of 1998, section 21(1)

<sup>7</sup> National Prosecuting Authority Act 32 of 1998, section 21(6)

<sup>8</sup> National Prosecuting Authority of South Africa Policy Manual, October 1999, Pretoria, pB.6 Refer also to Albert H Y Chen, “*Prosecutorial Discretion, Independence, and Accountability*”, Hong Kong L.J. (1998) p406, “On the other hand, many of the powers exercised by the A-G are quasi-judicial in nature, and it has been well-established that they must be exercised to the exclusion of partisan political interests.”

1. The power, as contemplated in section 179(2) and all other relevant sections of the *Constitution*, to-

- a) institute and conduct criminal proceedings on behalf of the State;
  - b) carry out any necessary functions incidental to instituting and conducting such proceedings; and
  - c) discontinue criminal proceedings,
- vests with the *prosecuting authority* and shall, for all purposes, be exercised on behalf of the *Republic*.

Note that since the powers of prosecution are exclusively exercised on behalf of the Republic, prosecutors are bound to represent the interest of citizens of South Africa. Whilst prosecutorial discretion is the exclusive domain of prosecutors, however, the wronged party and indeed, even certain sections of the community do expect prosecution to be instituted in cases where the alleged conduct of the accused person meets with the definitional elements of the alleged offence.

A prosecutor normally peruses the evidence contained in the police docket and decides either to prosecute and place the matter on the court roll or decline prosecution. The matter at issue remains subject to this discretion even after it has been on the roll for sometime pending further investigation. This is consistent with the prosecutor's portfolio of being "*dominis litis*."

The powers of the prosecution service in South Africa are extensive, particularly when it comes to the exercise of its discretion to institute criminal proceedings, to negotiate plea and sentence agreements and to divert matters from the criminal process. A court cannot prevent a prosecutor from withdrawing a matter or from accepting a specific plea. It is the state that remains *dominis litis*.<sup>9</sup>

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<sup>9</sup> Esther Steyn, "*Plea-bargaining in South Africa: current concerns and future prospects*" SACJ (2007) p215

The Promotion of Administrative Justice Act (PAJA)<sup>10</sup> excludes from the definition of administrative action “a decision to institute or continue a prosecution”. This means that a court may not review a decision of the prosecution to initiate or continue a prosecution.

For a number of reasons, the prosecutor who made the decision to prosecute in the first instance is not necessarily the one to handle the matter on the next appearance and the matter might be withdrawn by this current prosecutor on the same evidence as before. A situation such as this, particularly when the initial decision was to prosecute, is likely to cause discomfort for the complainant who expects the matter to proceed to trial.

A case in point, among others discussed below, is the withdrawal of the corruption charges involving the current President of the RSA.

On 23 August 2003 Advocate Ngcuka, the then NDPP, held a press conference at which he announced the NPA’s decision to prosecute Mr Schabir Shaik and certain corporate entities in which he had interests, as well as the decision not to prosecute Mr Zuma, then Deputy President of the Republic of South Africa. The announcement followed investigations into allegations of corruption levelled against Mr Zuma, Mr Shaik and the said corporate entities. The decision not to prosecute Mr Zuma was taken despite the announcement that there existed a *prima facie* case against him.<sup>11</sup>

On 20 June 2005, after the Shaik trial, Advocate Pikoli, then NDPP, announced the NPA’s decision to charge Mr Zuma, thus creating the appearance that the NPA had made two conflicting decisions on the same case.

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<sup>10</sup> Promotion of Administrative Justice Act 3 of 2000

<sup>11</sup> Mervyn E Bennun, “*The Mushwana report and prosecution policy*”, SACJ 2005 (3) pp279-305

It is trite that after a number of court battles, keenly pursuing the matter against Mr Zuma, the NPA in the person of Advocate Mpshe SC, then acting NDPP, countermanded the decision to prosecute Mr Zuma on 06 April 2009.<sup>12</sup>

This type of contretemps is likely to raise questions about the probity of the prosecutorial process and the reasons for arriving at a particular decision. It also has the potential to damage the NPA's reputation for professional integrity and society's respect and support for the criminal justice system as a whole may therefore be fatally compromised.<sup>13</sup>

Since the prosecution is at the forefront of the criminal justice system (often referred to as the "gatekeeper of the criminal law"), any doubt concerning its ability to discharge its constitutional obligations in a just and fair manner, raises a pivotal issue about the proper functioning of the entire criminal justice system<sup>14</sup>. This very issue has been raised by allegations that prosecutors' decisions have been swayed by political pressure, thus compromising the independence of the prosecution service. Denunciation of such charges is necessarily weakened by the political appointment of the NDPP<sup>15</sup>, hence the charges that the decision by Advocate Mpshe SC to withdraw the case against Mr Zuma was politically motivated. The fact that Advocate Mpshe SC was not promoted in the aftermath unfortunately does not entirely dispose of the possibility of a political factor.<sup>16</sup>

### 3. Research questions

The main research question is whether the functional integrity of the national prosecution service is intact and free from interference?

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<sup>12</sup> Statement by the National Director of Public Prosecutions on the matter of *S v Zuma and others* – 6 April 2009

<sup>13</sup> *S v Zulu* 1990 (1) SA 655 (T) at 663H: "Dit is ook ongetwyfeld so dat aanklaers, soos alle ander mense, feilbare wesens is".

<sup>14</sup> *S v Gibson NO and Others* 1979 (4) SA 115 (D&CLD) at 126F-H: "It is very undesirable indeed for the police force to be regarded with hostility by the general public."

<sup>15</sup> *National Director of Public Prosecutions v Zuma* (Mbeki and another intervening) 2009 (4) BCLR 393 (SCA), paragraph 31

<sup>16</sup> Helen Zille, "Open letter to the acting National Director of Public Prosecutions" dated 27 March 2009; the application was heard in the North-Gauteng High Court on 07 June 2010

The basic conditions for deciding to prosecute are that there must be sufficient evidence under oath or affirmation that establishes the elements of the alleged offence by the accused person<sup>17</sup>. Besides these conditions prosecutors must consider the following factors when exercising their discretion whether or not to prosecute:

- (1) diversion;
- (2) application of the *de minimis non curat lex* rule; and
- (3) the prosecutor's exercise of discretion (for example, to decline prosecution on compassionate grounds).

There are strongly held views among the public that other factors that influence prosecutorial decision-making are public outcry, the personality or character of the prosecutor and political considerations, particularly in high profile matters or matters involving prominent political figures and their associates.

Discretion is the cornerstone of the prosecutor's function. The prosecutor is expected to make a decision on matters where conflicting interests are at stage. In fact, the South African Police Services (an important element in the criminal justice system), would usually concur that a case merits its placement on the court roll. In contrast the prosecutor may, on the evidence and in light of other relevant factors, find that prosecution is not justified. Of utmost importance is the fact that the factors considered by the prosecution during this process are not available for the police in deciding whether or not to arrest.

Keith Hawkins submits: "A decision to prosecute taken within a regulatory agency is the culmination of a series of other decisions made about the desirability of handling a problem by reference to the formal procedures of

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<sup>17</sup> National Prosecuting Authority of South Africa Policy Manual, October 1999, Pretoria, pB.6, Refer also to an article by Darryl K. Brown, "*Prosecutors and Over-criminalization: Thoughts on Political Dynamics and a Doctrinal Response*" Ohio State Journal of Criminal Law 2009 (6) pp453-466: "If every law were enforced vigorously, there would be public backlash." Refer also to Patapan, "*Separation of Powers in Australia*", Australian Journal of Political Science, Haig (1999) 34:3, pp391-407 at 406: "In employing the language of checking and balancing the Court has unintentionally encouraged the executive and Parliament to regard the judiciary as no more than another political institution."

criminal trial”.<sup>18</sup> He further contends that prosecution decision-making constantly compels regulatory officials to grapple with conflicting sets of values.

Unlimited, unguided and unregulated exercise of the discretion, will invariably lead to actual and/or perceived inconsistencies. Good examples hereof are decisions not to prosecute based on so-called “compassionate grounds” or “the public interest.” Whilst compassionate grounds seem to favour the accused, the public interest is more likely to be considered as a factor in deciding whether to prosecute. The approach in reversal is also arguable.

Nevertheless, it is common cause that prosecutorial independence is guaranteed both in the Constitution and the NPA Act.<sup>19</sup> However, the independence of the prosecution has often been questioned following decisions in some high profile matters or matters involving prominent political figures and their associates.

It should be noted that the exercise of prosecutorial discretion is sustained during the course of the trial in that prosecutors must continually review factors that bear on the initial decision to prosecute.

Therefore, in instances where the accused person’s conduct meets with the definitional elements of the crime alleged to have been committed, the decision not to prosecute, due to other considerations, is very likely to leave the complainant with an unpalatable taste.

Closely linked to the main question is whether or not there is appreciation of the significance role of this institution in the fair administration of justice, by people

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<sup>18</sup> Keith Hawkins, *Law as a last resort, "Prosecution Decision-Making in a Regulatory Agency"* 2002

<sup>19</sup> Constitution of the Republic of South Africa Act 108 of 1996, section 179 (4), Refer also to the National Prosecuting Authority Act 32 of 1998, section 32 and *Ex parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744, at paragraph [146], where the court held that “[section] 179 (4) [of the Constitution] provides that the national legislation must ensure that the prosecuting authority exercises its functions, without fear, favour or prejudice. There is accordingly a constitutional guarantee of independence, and any legislative or executive function inconsistent therewith would be subject to constitutional control by the courts).”

within or outside of it? The researcher submits that any misapprehension of the importance of this institution flies in the basic principle of a democratic state. It is generally expected that a prosecution should follow in instances where there is *prima facie* evidence against an accused person.<sup>20</sup>

To answer the main question, the following subsidiary questions need to be addressed:

- (1) Do the considerations above mean that prosecutors have an unfettered discretion?
- (2) Can the exercise of the discretion be regulated so that there is almost certainty about its outcome?
- (3) Is this discretion reviewable or not [refer to paragraphs 8 and 9 of the founding affidavit of the Democratic Alliance in their application for review of the decision of the NPA not to prosecute President Zuma]<sup>21</sup>
- (4) How independent is the NPA's (prosecutors') discretion with respect to prosecutorial decision-making?
- (5) Is there a proper distinction between party and state in the underlying mindset-both within the NPA and the judiciary, and among the South African public at large-towards pivotal institutions like the prosecution service?

Besides the fact that prosecutors take the oath of office, there are policy guidelines in addition to constitutional provisions which must be observed at all relevant times. Prosecutorial independence is therefore constrained by these conditions.

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<sup>20</sup> *Van Vuuren v Esterhuizen NO en 'n Ander* 1996 (4) SA 603 (A) at 616D: "Dit moet onthou word dat die tweede respondent [Prokureur-generaal] 'n plig aan die publiek verskuldig is. Verantwoordelike uitvoering daarvan vereis vervolging waar die beskikbare getuienis 'n strafgeding regverdig, maar weiering om te vervolg waar geen redelike vooruitsigte van 'n skuldigbevinding bestaan nie."

<sup>21</sup> *Shidiack v Union Government* 1912 AD 642 at 651: "If for instance such an officer had acted *mala fide* or from ulterior and improper motives, if he had not applied his mind to the matter or exercised his discretion at all, or if he had disregarded the express provisions of a statute – in such cases the Court might grant relief. But it would be unable to interfere with a due and honest exercise of discretion, even if it considered the decision inequitable or wrong."

#### **4. Research methodology**

The dissertation will be based on the following research methodologies, a historical perspective, a comparative study as well as a literature review. In dealing with the historical perspective a literature review will be presented in which context the author will discuss the prosecutor's profession and status of discretionary powers before and after 1994.

A comparative study of the South African position versus that in other jurisdictions will also be considered. This might assist in shaping our own institution to be the best that it could ever be. Our constitution allows our courts to consider foreign law in their interpretation of the Bill of Rights.<sup>22</sup>

#### **5. Conclusion**

It has been shown above that discretion is the cornerstone of prosecutorial decision. However, there are certain limitations and conditions within which this discretion must be exercised. In the chapters that follow a discussion of some cases which demonstrate the influence of the various factors in decision making, particularly in high profile matters.

An interesting point to consider in the pre-/post-1994 comparison is ministerial control over the NPA. Section 33 of the NPA Act 32 of 1998 provides that "(1) The Minister shall, for purposes of section 179 of the Constitution, this Act or any other law concerning the prosecuting authority, exercise final responsibility over the prosecuting authority in accordance with the provisions of this Act".<sup>23</sup>

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<sup>22</sup> Constitution of the Republic of South Africa Act 108 of 1996, section 39

<sup>23</sup> Supra at note 4



## CHAPTER 2

### THE PROSECUTION PROCESS

#### 1. Introduction

In this chapter a discussion will be provided of the day-to-day prosecution processes as prescribed in the NPA Act 32 of 1998 and the NPA Policy Manual.<sup>24</sup> This chapter will also discuss the provisions of section 22 of the NPA Act, which deals with the powers, duties and functions of the National Director. The author hopes to illustrate the difference in the prosecution processes between the majority of matters that come before prosecutors and the few that come before the NDPP. The NPA Act provides that the same guidelines or criteria for the exercise of prosecutorial discretion apply for both the NDPP and every prosecutor.

#### 2. The prosecution and the police

The Republic of South Africa has a national police force which is an independent department from the prosecution service. Some of the statutory functions of the police are to investigate any alleged crime and to prevent crimes.<sup>25</sup> It is expected that, in some instances, the police would exercise their own discretion particularly with regard to minor cases that are not adequately supported by evidence, which are not referred for prosecution. Whilst there are many cases which police effect arrest and immediately refer to the prosecution before the expiry of the 48 hour period<sup>26</sup> for purposes of placement of such matters on the roll, there are equally many cases which get referred to the prosecution as the so-called decision dockets. In such instances, the prosecution would have sufficient time to peruse the case-dockets and decide whether or not to institute prosecution, mainly through the issuing of summonses.

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<sup>24</sup> National Prosecuting Authority of South Africa Policy Manual, October 1999, Pretoria

<sup>25</sup> Constitution of the Republic of South Africa Act 108 of 1996, section 205

<sup>26</sup> Criminal Procedure Act 51 of 1977, section 50

The separation of functions between police who investigate and the prosecutors who decide whether or not prosecution should be instituted is very critical in the proper functioning of the criminal justice system. It promotes objectivity and provides the criminal justice system with a yardstick to measure the constitutionality and lawfulness of the police investigation. It guarantees the independent evaluation of evidence before the grave step of instituting a prosecution is taken.

South Africa does not, in principle, follow a system of compulsory prosecution. A prosecution will generally follow if there is a *prima facie* case against an accused person. Sometimes the question is asked: Is there a reasonable prospect of successful prosecution? The prosecution, it has been held, does not have to ascertain whether there is a defence but whether there is a reasonable and probable cause for prosecution.<sup>27</sup> In order to secure a conviction during a trial, the prosecution must be able to furnish proof beyond any reasonable doubt.<sup>28</sup>

A distinction must be made between discretionary and discriminatory prosecution. The prosecutors' exercise of their decision must not be exercised to an extent where discretion becomes discriminatory. Section 9 of the Constitution guarantees everyone the right to equal protection and to the benefit of the law.<sup>29</sup>

Prosecution in the public interest may defeat the NPA mission statement to "prosecute without fear, favour or prejudice". The public generally does not have insight into the merits of the case and their views are subjective as they may be based on other considerations than the merits of the case.

Around May/June 2010 at the court appearance of two accused persons for the murder of Mr Eugene Terreblanche it transpired that the large public attendance

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<sup>27</sup> *Becken Strater v Rottcher and Theunissen* 1955 (1) SA 129 (A) at 137, Refer also to *Lubaxa* 2001 (2) SACR 703 (SCA) 707

<sup>28</sup> *S v Van As* 1991 SACR (W)

<sup>29</sup> *Supra* at note 1

at the court represented two distinct groups who were strongly opposed to each other on racial lines.

Whilst the NPA has a policy of “no case, no enrolment”, many cases are withdrawn after they would have been placed on the roll. While some argue that cases with no reasonable prospect of successful prosecution are mistakenly placed on the roll because prosecutors are overworked and therefore prone to such administrative errors such cases may equally be due to discretionary error. Regardless of the reason for erroneous decision making it nonetheless tends to arouse suspicion of corruption or favoritism.

Unfortunately, a wrong decision taken in good faith might affect the integrity of the prosecution profession and result in people losing faith in the entire criminal justice system.

As gatekeepers of the criminal justice system, prosecutors should act in the best interest of accused persons. They should scrutinise the lawfulness of the conduct of police in their investigations and also direct that evidence be obtained which could favour the accused.

In the deciding to place the matter on the roll the prosecutor considers the following factors:<sup>30</sup>

- whether there is sufficient, reliable and admissible evidence;
- made under oath or affirmation;
- that a particular offence has been committed, in other words, the elements of the offence must be established; and whether
- the accused has been positively linked with the commission of the offence in question.

Note that the prosecutors must ascertain that the evidence linking the accused to the commission of an offence is sufficient, reliable and admissible, to which

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<sup>30</sup> National Prosecuting Authority of South Africa Policy Manual, October 1999, Pretoria, pB.6

end the prosecution cannot look at the charge sheet alone. Any evidence in the police case docket favourable to the accused, including his warning statement must be considered.

The decision whether or not sufficient evidence is contained in the case docket against an accused person, and the decision whether or not prosecution should follow has always been an integral part of the prosecution service, otherwise the function of compiling charge-sheets would have been left to the clerks of the court, as that function does not require legal knowledge.

Prosecutorial discretion requires that the prosecutor appreciates considerations that must inform the decision eventually taken in a particular case.

However, a *prima facie* case does not necessarily mean that a conviction will follow. Worse more, people arrested for almost identical crimes committed under similar circumstances might receive different verdicts in their cases. The following will serve to illustrate the point:

Billy Masetlha<sup>31</sup>, former Director General of the National Intelligence Agency, Fune Madlala, former senior official with NIA and Muziwendoda Kunene<sup>32</sup>, an IT specialist, all faced similar charges of withholding information from the Inspector-General of Intelligence. They were charged separately. Madlala and Masetlha were both charged with contravening section 7(8)(a) read with section 7A and Kunene was charged with contravening section 7(8)(c) read with section 7A of Act 40 of 1994<sup>33</sup>. After many months of court appearances Kunene was eventually convicted and Madlala's case was finalised soon after his first appearance, at which he pleaded guilty. However, Masetlha, despite losing his application for a discharge in terms of section 174 of the Criminal Procedure Act, 51 of 1977, was eventually acquitted. Note that the standard required to test whether there is a *prima facie* case is less stringent than the standard of proof required to secure a conviction.

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<sup>31</sup> Hatfield Court case number 222/3511/2006 (unreported)

<sup>32</sup> Pretoria-Central case number M20/00137/2006, Brooklyn Police CAS 190/12/2005 (unreported)

<sup>33</sup> Intelligence Services Oversight Act 40 of 1994

### **3. The prosecution and legal ethics**

The prosecutor has a duty to display the highest degree of fairness and justice to an accused person. This is so because, with great power comes responsibility. The task of the prosecution is not to secure a conviction at all costs, but to assist the court in ascertaining the truth. It is therefore of paramount importance that prosecutors observe and operate within legal ethical limits. The constitutional demand of section 179(4) that the prosecution service functions without fear, favour or prejudice condenses into a single phrase the responsibilities entrusted to those court officials who have at times been described as “ministers of the truth,” tasked with a special duty to see that the truth emerges in court.<sup>34</sup>

Prosecutorial discretion must be exercised with due respect for the individual’s right not to be harassed by a prosecution which has no reasonable prospect of success. This is a valuable safeguard to forestall the possible consequences of prosecution over and above any reality which might follow in a court of law.

### **4. The importance of the role and independence of the prosecution**

Prosecutors are often referred to as “the gatekeepers” of the criminal justice system. In South Africa, prosecutors have branded themselves as “people’s lawyers”, implying that they serve the best interest of the people. They therefore play a significant role in the administration of justice.

Since prosecutors decide which matters to prosecute they decide which of the parties come to court. Shortly after Advocate Mpshe SC announced his decision to discontinue the prosecution of Mr Zuma the Democratic Alliance brought an application before the North Gauteng High Court in Pretoria to have that decision reviewed, in addition to making representations to the NDPP.<sup>35</sup> The Democratic Alliance noted that the NDPP’s decision had been unlawful and unconstitutional, particularly in view of the constitutional provision in section 179

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<sup>34</sup> *Smyth v Ushewokunze and Another* 1998 (2) BCLR 170 (ZS)

<sup>35</sup> *Supra* at note 16

(4) and section 32 (1) (a) of the NPA Act, which obliged the NDPP “to serve impartially and exercise, carry out or perform his ... powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law” and in view of oath of office taken by the NDPP, in terms of section 32 (2) of the NPA Act.

“The prosecution process must be fair, transparent, consistent and predictable. This purports to promote greater consistency in prosecutorial practices nationally. The prosecution policy requires members of the Prosecuting Authority to act impartially and in good faith. They should not allow their judgment to be influenced by factors such as their personal views regarding the nature of the offence or the race, ethnic or national origin, sex, religious beliefs, status, political views or sexual orientation of the victim, witness or the offender.”<sup>36</sup>

The prosecution policy<sup>37</sup> also mentions public interest in which regard the following factors need to be considered:

“the seriousness of the offence, the manner in which it was committed, the motivation for the act and the relationship between the accused and the victim. The nature of the offence, its prevalence and recurrence, and its effect on public order and morale are also factors to be considered.”

The acting NDPP, Advocate Mpshe SC, found that there has been an abuse of process and thereby withdrew the charges against Mr Zuma.<sup>38</sup> Does this mean an abuse of the process in any given case ought to result in the withdrawal of such a matter? It is important to note that the decision continued to confirm that the prosecution authority is and can, in certain instances, be an instrument to score political goals or settle political scores.

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<sup>36</sup> *Zuma v National Director of Public Prosecutions* 2009 (1) BCLR 62 (N), paragraph [97], Refer also to National Prosecuting Authority of South Africa Policy Manual, October 1999, Pretoria, pA.2

<sup>37</sup> National Prosecuting Authority of South Africa Policy Manual, October 1999, Pretoria, pA.5

<sup>38</sup> Supra at note 12

Note that the NDPP's decision not to prosecute Mr Zuma was influenced mainly by alleged abuses of the prosecution processes by the then Head of the DSO and previous NPA Head, Advocate Ngcuka. The Democratic Alliance expressed the view that the NDPP must have acted on the spur of some other motive or at the instance of a person of unknown identity or standing. If this were the case it would be cause for grave concern, especially given the high public profile of the case. The open letter by Helen Zille, Leader of the Democratic Alliance, quoted a passage by Judge Harms when overturning the Pietermaritzburg High Court decision of 2008 (*Zuma v NDPP*): "A prosecution is not wrongful merely because it is brought for an improper purpose. It will only be wrongful if, in addition, reasonable and probable grounds for prosecuting are absent".<sup>39</sup>

The critical implication is that the public, who have to pay for it, cannot rely on this costly and highly specialized (supposedly) service. This means the public are helpless on lookers while unscrupulous people take liberties and rubbish this important service. The problem is that it is more than likely that irresponsibility in the judicial quarter is by no means isolated and that abusers far outweigh those who kill the system. The independence of the prosecution, whilst forming part of the executive branch of government, is important in allowing politically significant cases to go through the court processes.

Though our prosecution service forms part of the executive branch to government its independence is necessary as they have to make decisions in matters involving the executive or members thereof. It is important to note that the prosecution does not or is supposed not to act on behalf of certain groups of people or certain political parties. Prosecutors should not be used to settle political scores and/or to score political points.

The term "independence" means that:

In exercising their discretion prosecutors should be independent of influence, pressure or persuasion from those who have an interest in the

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<sup>39</sup> *Zuma v National Director of Public Prosecutions* 2009 (1) BCLR 62 (N)

outcome of that decision. It is not just Governments, but Police Services, any other Investigative Agency, the Court, and victims or the families of victims from whom the Prosecutor should be not only independent but seen to be independence.<sup>40</sup>

It therefore follows that a prosecution service must function independently of other branches of government. It also means that the prosecution will enforce legal rules in an in an impartial and transparent manner free from influence by external parties.

Prosecutors have to abide guidelines/guiding principles that set up severe structures against making biased decisions. Even the National Director who is a political appointee is bound by the same guidelines. It is critical for the prosecution to demonstrate accountability and transparency as proof of the independence of the prosecutorial function.

Prosecutors not only fulfill the needs of the executive in terms of law enforcement but must endure observance and request for the rule of law. Though being accountable to the executive, their discretion must remain free from any form of influence.

The role of prosecutors is not limited to the exercise of discretion after being placed in possession of the case-docket. The prosecutor plays a significant role in directing the investigations, deciding which charges to prefer and against whom. Where two or more people are charged together, the prosecutor can decide to prosecute one and withdraw against the other. In certain instances the prosecutor can also decide to use one of the co-accused as a witness against the others.<sup>41</sup>

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<sup>40</sup> Mabvuto Herbert Hara (2007), "*The Independence of Prosecuting Authorities: The Malawi Experience*" Draft paper presented at African Network of Constitutional Law conference on Fostering Constitutionalism in Africa, Nairobi April 2007

<sup>41</sup> *Suliman v National Directorate of Special Operators & others* [2006] JOL 21656 (C), Refer also to the Criminal Procedure Act 51 of 1977, section 204



Public Prosecutors should scrutinize the lawfulness of public investigations at the latest when deciding whether a prosecution should commence or continue. In this respect, public prosecutors are obliged to monitor the observance or otherwise of human rights by the police.

In the NDPP instance, he found it compelling that the meddling or manipulation of the process in the Zuma matter outweighed not only the professionalism with which the prosecution team have conducted the matter but also the strength of the case and announced his decision to withdraw the case. It is important to note that the NPA was divided on this decision. In fact, the acting NDPP went public about it when he announced that the prosecution team had recommended that the prosecution should continue despite the correctness or otherwise of the allegations with regard to any meddling or manipulation of the process in the matter.<sup>42</sup>

The question is how far should the manipulation or meddling of the process go to warrant a withdrawal or non-placement on the roll?

In light of the reasons for withdrawing the Mr Zuma case; the question is asked as to the effect of this decision to lower-ranking prosecutors and their decision on their cases? In practice many people are brought to court through arrest as opposed to summons where arrest is unnecessary.

Note that Mr Zuma's prominence as a political figure cannot be a factor in deciding whether to prosecute him since everyone is equal before the law.<sup>43</sup>

Then Head of the Directorate of Special Operations (DSO-formerly known as the Scorpions) in Gauteng, Advocate Gerrie Nel was arrested by a large contingent of heavily armed police when a summons would have sufficed, arousing suspicion that the crude show of force was intended to intimidate in the interest of an extraneous agenda pursued at the expense-not in the service-of a strictly impartial judicial function/cause. The abnormality of the arrest was

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<sup>42</sup> Supra at note 12

<sup>43</sup> Constitution of the Republic of South Africa Act 108 of 1996, section 9

thrown into stark relief by the fact that Advocate Nel was granted unopposed bail. The question of adequate safeguards, if any, against displays of ruthlessness on the part of putative peacekeepers leaps into prominence in this instance.

In their submissions to the Ginwala Commission of Enquiry by the South African Institute for Advanced Constitutional, Public, Human Rights and International Law,<sup>44</sup> the authors state as follows:

- Therefore, the Minister's powers of oversight are confined to those included in the Act. As already discussed, these include the requirement that the Minister approve prosecution policy, and various duties of the NDPP to provide information and submit reports to the Minister. The Act gives no power to the Minister regarding the exercise of prosecutorial discretion in individual cases. As such, individual decisions regarding whether or not to prosecute in a particular case are not within the purview of the Minister's 'final responsibility'. This rests in the exclusive discretion of the prosecuting authority, and ultimately the National Director.

The Centre for Constitutional Rights went on to describe the NDPP's decision to drop the charges against Mr Zuma as a serious blow to the rule of law and the principle of equal protection under the law.<sup>45</sup> It can be inferred from the Article published by the Centre that Mr Zuma was treated as being above the law and that the decision flouted the notion of the supremacy of the Constitution.

## 5. The docket and the prosecution process

When crime is reported the police obtain statements and register a case docket. The evidence, in the form of statements obtained in a particular case is included in the case docket, which is forwarded to the prosecution.

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<sup>44</sup> Hannah Woolaver and Michael Bishop, "South African Institute for Advanced Constitutional, Public, Human Rights and International Law" Published in Advocate August 2008 at p31

<sup>45</sup> N de Havilland (Centre for Constitutional Rights), "The rule of law and the independence of the National Prosecuting Authority", April 2009

## 5.1 Arrest and other means of arraigning an accused person

Arrest is one of the methods used to secure the attendance of an accused person at a trial.<sup>46</sup> However, since it is a drastic curtailment of the rights of an individual, police are urged in terms of the South African Police Service (SAPS) Standing Order (G) 341 to regard arrest as a last resort that may certainly not be used to punish, scare, or harass the accused. Arrest may not be confused with punishment, which may only proceed from a sentence by a court after due legal process. Moreover sentencing cannot be construed as permission to treat the convicted person inhumanely with a view to degrading or humiliating the person. Officials charged with carrying out a sentence have to adhere to the terms of the sentence and cannot therefore decide on their own account how accused or convicted persons should be treated.

Note that correct treatment of accused persons does not detract from the obligation of the law enforcement function to investigate charges brought against such persons and diligently seek to prove the validity of the charges beyond reasonable doubt.

The procedure involved in arraigning a person is as follows: A case docket can be presented to the prosecution for decision either after the accused has been arrested or before arrest in which case summons is issued.

## 5.2 Huge court rolls

The extent to which the huge court rolls currently experienced in many of our courts affect the prosecutor's decision making is a significant factor to be considered. There is no doubt that the South African criminal justice system is burdened with a heavy backlog of cases. Police are overburdened and so are the courts.

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<sup>46</sup> *Ex parte Minister of Safety and Security and Others: In Re: S v Walters and Another* 2002(7) BCLR 663 (CC)

Municipal cases are taken off the main court-streams to allow prosecutors to give attention to the so-called serious cases. Initiatives are currently in place to alleviate the case burden.

### 5.3 Representations before decision

Unlike instances covered by section 22 (2) (c) of the NPA Act<sup>47</sup>, prosecutors routinely enroll cases without affording the accused an opportunity to be heard. The NPA Policy Manual deals with representations and reasons for decision.<sup>48</sup>

In the matter of *Zuma v NDPP*<sup>49</sup> the crux of the dispute was whether the applicant was entitled to make representations to the prosecuting authorities before the decision was taken to prosecute him. This was in terms of the *audi alteram partem* principle which requires that the affected person be informed of the substance of the case which he has to answer.<sup>50</sup>

As pointed out above, not every accused person is afforded this opportunity by the NPA Act. Therefore, the *audi alteram partem* principle in this regard is seen to be applied selectively by the prosecution as section 22 of the NPA Act provides. Those accused persons whose matters require the decision of the NDPP enjoy the benefits of this section which is not available to others.

Prosecutors decide not only whether or not to prosecute, but which charges will be preferred and against whom. A court of law is not entitled to reasons why the prosecutor withdraws a particular case. A prosecutor's exercise of discretion is not even reviewable. However, the NPA Policy Manual<sup>51</sup> provides that prosecutors have to provide reasons for non-prosecution. This demonstrates openness and transparency in decision making<sup>52</sup>, as well as accountability to their principals.

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<sup>47</sup> Supra at note 4

<sup>48</sup> National Prosecuting Authority of South Africa Policy Manual, October 1999, Pretoria, pp B.10 and B.11

<sup>49</sup> Supra at note 39

<sup>50</sup> Constitution of the Republic of South Africa Act 108 of 1996, section 35 (3)

<sup>51</sup> Supra at note 24

<sup>52</sup> Constitution of the Republic of South Africa Act 108 of 1996, section 33(2)

The considerations listed in the Policy Manual allow the prosecutor to decide not to place as many cases as possible on the court roll, thereby, lessening the court roll.

#### **5.4 The cases reviewed**

Shortly after Advocate Simelane's appointment as NDPP, the NPA reviewed some of the cases that had already been decided upon. One such case was that of the *State versus Frans Engelbert Marx*<sup>53</sup>. In this case the decision to review occurred ten (10) years after the decision not to prosecute. Whilst, according to witnesses or complainants, this move will be welcomed and also seen as justice prevailing, the whole truth might not be available to place before court since the defence may have lost valuable evidence in the meantime or the prosecution might no longer have the best evidence available to present its case. The two complainants in the matter, Mr Johannes Thole, 37 years of age and Mr George Nduli, who is 38 years of age were in court on Friday, 21 May 2010 as witnesses in their 1997 assault case.

Briefly, the two men were allegedly assaulted by white farmers, amongst them Mr Frans Engelbert Marx, the only accused in the matter, causing Mr Thole to go blind and Mr Nduli to suffer brain damage. Mr Marx now faces two counts of attempted murder, one count of pointing a firearm and one of defeating the ends of justice. Why would the prosecution arrive at different decisions on the same facts given such a simple and straightforward matter as attempted murder and pointing a firearm?<sup>54</sup>

#### **5.5 The right to a fair trial**

A situation such as the one stated above could present serious difficulties for an accused who would have to prepare a defence for a trial to be held a number of years after the alleged offence. For example, witnesses would have to be called to attest events that can hardly be considered recent any more, thus exposing

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<sup>53</sup> Norman Masungwini, "Lawyer turns on victims' *Sunday World*," 23 May 2010, p7 (unreported)

<sup>54</sup> Supra at note 53

the accused to the risk of being unable to present sufficient evidence to defend the case. The prosecution may find itself in a similar quandary that prevents it from presenting convincing proof of the charge(s). The outcome of the case is therefore less certain than it might have been had the case been heard earlier. Section 35 of the Constitution<sup>55</sup> states in subsection 3 (d) that an arrested, detained and accused person has the right to have their trial begin and concluded without unreasonable delay.

In *Sanderson v A-G, Eastern Cape*<sup>56</sup> the Constitutional Court considered the question of what constitutes a trial within a reasonable time as guaranteed by section 25(3)(a) of the interim Constitution. A little more than five months later it returned to this issue in *Wild v Hoffert NO and Others*.<sup>57</sup>

The accused person's right to trial within a reasonable period is quite obviously includes consideration of a period before the commencement of the proceedings. The right to be tried within a reasonable time was also comprehensively discussed in *Moeketsi v A-G, Bophuthatswana and Another*<sup>58</sup>. The court distilled the following four governing factors from the Canadian and American case law:

- (1) the length of the delay alleged;
- (2) the reasons for the delay;
- (3) any 'clearly and unequivocally' proved 'waiver of time periods'; and
- (4) the degree of prejudice suffered by the accused.

## 6. Conclusion

The independence and important role of the prosecution service is fully acknowledged and taken for granted in the premises or operational tenets of

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<sup>55</sup> Supra at note 1

<sup>56</sup> *Sanderson v A-G, Eastern Cape* 1988 (1) SACR 227, per Kriegler J

<sup>57</sup> *Wild v Hoffert NO and Others* 1997 (7) BCLR 974 (N)

<sup>58</sup> *Moeketsi v A-G, Bophuthatswana and Another* 1996 (1) SACR 675 (B), per Friedman JP

various authorities and most importantly, in the supreme law of this country, namely the Constitution.

There are certain ethical principles that the members of the prosecution service must demonstrably adhere to in the performance of their duties. The prosecution manual contains guidelines to be followed in the prosecution process. The criticisms leveled against Adv Mpshe SC in withdrawing the charges against Mr Zuma could find justification also when one has regard to the provisions of section 35 (5) of the constitution<sup>59</sup>. According to this section unconstitutionally obtained evidence may be admitted in court.

Having mentioned this, decisions made in certain cases still raise questions about the appropriateness of such decisions and, by extension, about the integrity of the prosecution service.

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<sup>59</sup> Supra at note 1

## CHAPTER 3

### THE FIGHT FOR THE INDEPENDENCE OF THE PROSECUTION SERVICE

#### 1. Introduction

As noted repeatedly above, the independence of the prosecution service is crucial to the proper functioning of the entire criminal justice system. This chapter will contain a brief history of the prosecution service and the fight of achieving its independence. The discussion will range over two periods characterised by the dispensations before and after 1994, that is, during and after apartheid with particular reference to perceptions and realities regarding the independence of the prosecution service. The chapter will be concluded with a discussion of the significance of an independent prosecution service.

A literature search has shown that very little coverage is given to the history of the prosecution service. The main reference sources used for this particular discussion will be the work of Martin Schönreich<sup>60</sup>, Nico Horn<sup>61</sup> and, of course, the Attorney-General Acts of 1926 and 1992, the Criminal Procedure Act 51 of 1977 and the Constitution of the Republic of South Africa Act, Act 108 of 1996.

#### 1.1 English roots

South African law has been influenced by English law.<sup>62</sup> Hence at first the public prosecutor used to be known as Attorney-General. This designation, as indicated, has its roots in English tradition.<sup>63</sup>

#### 1.2 Early South African history

Martin Schönreich<sup>64</sup> gives the following brief outline of the early history of the prosecution service in South Africa:

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<sup>60</sup> Martin Schönreich, *Lawyers for the People, The South African Prosecution Service*, published in Monograph No 53, March 2001

<sup>61</sup> Nico Horn, *The independence of the prosecutorial authority of South Africa and Namibia: A comparative study*, pp113-134

<sup>62</sup> Supra at note 60

<sup>63</sup> Supra at note 60



- In the early South African history, when the Netherlands established the Dutch East India Company at the Cape in the year 1652, the Dutch office of a Fiscal was imported to the Cape. The fiscal was responsible for conducting prosecutions as well as investigating crimes and punishing civil servants who were corrupt or neglected to perform their duties.
- In 1688, the Fiscal received the title of “Fiscal independent” and was made directly accountable to the council of seventeen, the directors of the Dutch East India Company. While the fiscal sat on the council of policy, he did not have to account for his actions to the council. The governor at the Cape could neither give him orders nor silence him.
- Before 1783 the executive and the judiciary at the Cape were synonymous in practice. This made an independent bench impossible and negatively impacted upon the independence and credibility of successive fiscals at the time. When the governor gained the support of his senior officials there was no check on the executive.
- With regard to the two Boer republics, the office of the state attorney was established in 1858. The office of the state attorney, responsible for conducting prosecutions was, to a large extent, independent from executive interference. Thus, a law of 1864 stated explicitly that the right and power to prosecute are vested exclusively in the state attorney who alone is responsible for controlling and managing prosecutions. The state attorney was entitled to decline to prosecute anyone against whom there was insufficient evidence.<sup>65</sup>
- In the Orange Free State, the right and power to prosecute were also vested in the position of the state attorney.
- After the second Anglo-Boer War (1899-1902), in the first decade of the 20th century, the four territories that later became the Union of South Africa had Attorneys-General who prosecuted criminals in

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<sup>64</sup> Supra at note 60

<sup>65</sup> Supra at note 60

the name of the English crown. All Attorneys-General were members of the colonial cabinets. Having elected politicians fulfilling the role of chief prosecutors is not without its dangers. The decisions of elected Attorneys-General — who are accountable to the electorate — whether to prosecute or not could be influenced by their desire to increase their popularity in the eyes of the voting public.<sup>66</sup>

## 2. Struggle for independence

When the Union of South Africa was formed in 1910 the post of Minister of Justice was created in the national cabinet. An Attorney-General was at the helm of prosecution in each provincial division of the newly established union-wide Supreme Court. The Attorney-General who had authority to delegate his prosecutorial powers to other people, was responsible for all the prosecutions that took place in his area of jurisdiction, and had control over all the persons who conducted prosecutions on his behalf in this area. The Attorneys-General had the final say over who should be prosecuted (i.e. decisions were not subject to review by the Minister of Justice). In this regard Martin Schönteich<sup>67</sup> comments that the concern for such wide powers in the hands of public officials who were legally free from ministerial constraint and parliamentary responsibility prompted the government to promulgate legislation in 1926 to give the minister of justice "all powers, authorities and functions to the prosecution of crimes and offences."<sup>68</sup> The South African Criminal and Magistrates' Courts Procedure Amendment Act<sup>69</sup> amended section 139 of the South African Act and sections 7(1) and (2) of the Criminal Procedure and Evidence Act of 1917. Sections 1(3) and (4) placed the Attorney-Generals under the control and direction of the Minister. As a result the Attorneys-General lost their independence and their authority to prosecute had to be assigned to them by the Minister of Justice.

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<sup>66</sup> Supra at note 60

<sup>67</sup> Supra at note 60

<sup>68</sup> South African Criminal and Magistrates' Courts Procedure Amendment Act 39 of 1926

<sup>69</sup> Supra at note 68

In this regard Martin Schönreich<sup>70</sup> comments further that Tielman Roos, the Justice Minister at the time, motivated the government's decision to curtail the independence of Attorneys-General as follows:

The chief reason why it is necessary to put this bill [the 1926 legislation] on the statute book is, in my opinion, that there is no authority whatsoever over, and no responsibility of the Attorney-General. Parliamentary responsibility is completely absent. While Roos gave the assurance that the traditional independence of the Attorney-General would be respected, two Attorneys-General resigned to protest the infringement of their independence.

In 1935, the power of prosecution was once again vested in the Attorneys-General, but subject to the control of the Minister of Justice.<sup>71</sup> Thus, while prosecutions were again formally instituted by Attorneys-General, the minister was given the power to issue directions to Attorneys-General to exercise their powers directly in any specific matter. Section 3(5)<sup>72</sup> provided as follows:

An Attorney-General shall exercise his authority and perform his functions under this Act or under any other law subject to the control and directions of the Minister who may reverse any decision arrived at by an attorney-general and may himself in general or in any specific matter exercise any part of such authority and perform any such functions.

With regard to the above, Martin Schönreich<sup>73</sup> made the following observations:

- The essence of this passage in the 1935 legislation was incorporated into later versions of the Criminal Procedure Act. The effect of the 1935 legislation, and the subsequent versions contained in the Criminal Procedure Act until the early 1990s, was that there was no formal or substantive separation of

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<sup>70</sup> Supra at note 60

<sup>71</sup> General Law Amendment Act 46 of 1935

<sup>72</sup> Supra at note 71

<sup>73</sup> Supra at note 60

powers between an Attorney-General and the executive, and that direct or indirect political influence was possible.

- While the minister seldom interfered with the decision of an Attorney-General in practice, this provision in the law ensured that the minister had ultimate control over prosecutions. Attorneys-General and their staff were civil servants and subject to public service laws and regulations. This further impacted upon the independence of these positions as they, as civil servants, were ultimately subjected to ministerial control.<sup>74</sup>

In due course the political situation in South Africa became a significant reason why government tightened control over the prosecution authority. For example, in the aftermath of the 1976 student revolt, the government of John Vorster professed a determination to control all spheres of society with the result that the Criminal Procedure Act was one of a series of oppressive pieces of legislation emanating from that period.<sup>75</sup>

In regard to the above, Nico Horn<sup>76</sup> states:

- In the period following the implementation of political authority and control from South Africa over South West African Attorney-General, the Minister of Justice did not hesitate to use his authority when he deemed it necessary. When the power and authority of the Minister of Justice over the Attorney-General were not adequate to manipulate prosecutions in the territory, the South African authorities used other laws. A case in point is the well-known brutal murder of SWAPO activist Immanuel Shifidi.
- Shifidi was killed by five members of the South African Defence Force (SADF) at a political rally in Windhoek. The Attorney-General for South West Africa instituted criminal proceedings against the five members of the SADF. However, section 103 ter of

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<sup>74</sup> Supra at note 60

<sup>75</sup> Supra at note 60

<sup>76</sup> Supra at note 61

the Defence Act, 1957 (No. 44 of 1957) gave the State President authority to issue a certificate to stop any prosecution against SADF members for acts committed in the operational area. The State President, acting on the recommendation of the Minister of Defence, issued such certificate, after which the Administrator-General of South West Africa issued a separate certificate to halt the prosecution.

In the mid-1980s, Attorneys-General and their staff began to lobby to change their positions from being civil servants and thus to regain some of their lost independence.

The independence of the Attorneys-General in their decision-making was reinstated by the Attorney-General Act 92 of 1992 although the Minister had to co-ordinate their functions and could request them for information or a report on any matter, and they had to submit annual reports to him (section 5).<sup>77</sup> Thus, the 1992 Act granted Attorneys-General a measure of independence they had not enjoyed since 1926.

### **3. Regained independence**

Martin Schönreich<sup>78</sup> has investigated the issue of the independence of the prosecution service and has discovered the following:

- In 1992, the Attorney-General Act was promulgated to remove Attorneys-General from the control of the public service commission and to entrench the non-interference of the minister of justice. The legislature, however, decided to leave deputy Attorneys-General, state Advocates and prosecutors under the control of the public service commission.
- The memorandum on the Attorney-General Bill stated that the community demands that every Attorney-General should function

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<sup>77</sup> National Director of Public Prosecutions v Zuma (Mbeki and another intervening) 2009 (4) BCLR 393 (SCA) at paragraph [30]

<sup>78</sup> Supra at note 60

independently of any possible interference from the executive and that the purpose of the proposed act would be to "meet the need to place the independence of the Attorney-General beyond any doubt.

In terms of the Attorney-General Act 92 of 1992, the authority to institute prosecutions became the sole responsibility of the Attorneys-General and their delegates, free of ministerial interference. Attorneys-General enjoyed absolute independence. They were accountable only to parliament and then only in the limited sense that parliament could question them about their annual reports or dismiss them in very exceptional circumstances.

The Attorney-General Act took away all political control over prosecutions, repealed section 3 of the Criminal Procedure Act<sup>79</sup> and provided in section 5(1) that every attorney-general had the authority to prosecute in any court within his jurisdiction. In his investigation of the subject-matter above, Martin Schönsteich<sup>80</sup> further discovered the following:

- As an Attorney-General at the time put it: The Attorney-General Act of 1992 serves to put [the Attorney-General's] independence beyond doubt. This is a wholesome development reconciling freedom and accountability.
- In terms of the 1992 law, the authority of an Attorney-General was considerable and arguably more extensive than that of the courts. The exercise of an Attorney-General's powers was not delimited by laws and all decisions were left to his unfettered discretion. Moreover, unlike the courts, Attorneys-General were not obliged to provide reasons for their decisions with the result that such reasons could not normally be subjected to public scrutiny and debate, as in the case of the courts, in instances where they declined to prosecute. Obviously, in cases where Attorneys-General elected to prosecute, a safeguard existed in the form of the courts that could acquit accused persons wrongly prosecuted.
- South Africa's new post-1994 ruling party, the African National Congress (ANC), viewed the 1992 Act with suspicion. The reasons for

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<sup>79</sup> Criminal Procedure Act 51 of 1977

<sup>80</sup> Supra at note 60

this were, among others, the unfettered discretion that the 1992 act afforded Attorneys-General and their lack of accountability to parliament. The ANC also regarded the legislation as "an attempt by the old order prosecutors to protect their entrenched positions." Moreover, the ANC, on ideological grounds, favoured a centralised prosecutorial structure to that which was in essence a federal and decentralised one.

- In 1994, the minister of justice at the time, Dulla Omar, set up a national consultative legal forum on the administration of justice to give effect to the government's commitment to the transformation of the legal administration. Speaking at the first meeting of the forum in November 1994, Omar asked to whom the Attorney-General was accountable and said that its office had been an instrument of the apartheid state that had applied repressive legislation with vigour and enthusiasm. In 'the dying days of apartheid', the independence of the office of the Attorney-General was introduced. This, Omar concluded, was not done so much to guarantee independence, but to entrench the status quo.

It is to be noted from the discussions above that the independence of the prosecution had been of concern to both the apartheid regime and the current government.

#### **4. The prosecution and the post-apartheid period**

As previously mentioned, section 179 of the Constitution of the Republic of South Africa Act introduced the notion of National Director of Public Prosecutions with powers of control over the old provincial attorneys-general, who now became Directors of Public Prosecutions.<sup>81</sup> The Structure and Composition of the National Prosecuting Authority is contained in Chapter 2 of the NPA Act.<sup>82</sup>

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<sup>81</sup> Supra at note 4

<sup>82</sup> Supra at note 2

The section contains details on the form that the prosecuting authority would take in the new constitutional order, providing, among others, that:

- A single national prosecuting authority is instituted, structured in terms of an act of parliament.
- The national prosecuting authority must consist of a national director of public prosecutions as head of the prosecuting authority who is appointed by the president, and directors of public prosecutions and prosecutors.
- The prosecuting authority has the power to institute criminal proceedings on behalf of the state.
- National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.
- The national director must determine, with the concurrence of the minister of justice, and after consultation with the directors of public prosecutions, prosecution policy that must be observed in the prosecution process.
- The national director must issue policy directives to be observed in the prosecution process, and the national director may intervene in the prosecution process when policy directives are not complied with.
- The national director may review a decision to prosecute or not to prosecute, after consulting the relevant directors of public prosecutions.
- The minister of justice must exercise final responsibility over the prosecuting authority.

The constitutional provision dealing with the prosecuting authority was highly controversial at the time. Its constitutionality was challenged on the grounds that it impeded the separation of powers between the legislature, executive and judiciary. The Constitutional Court rejected this objection, arguing that the prosecuting authority is not part of the judiciary, and that the appointment of the National Director of Public Prosecutions by the President in itself does not contravene the doctrine of the separation of powers. Moreover, the court noted that the constitutional provision that an act of parliament had to ensure



that the prosecuting authority ‘exercises its functions without fear, favour or prejudice’, was a guarantee of prosecutorial independence.”<sup>83</sup>

However, having said this, it was clear and the ruling party, being the African National Congress, made it very clear that the National Prosecuting Authority needed to be accountable to the government of the day. The Constitutional Court having ruled that the constitutional provision giving the Minister the power to exercise final responsibility over the prosecuting authority was constitutional, it was left to the practical application thereof. The National Prosecuting Authority’s mission statement reads as follows: “guided by the Constitution, we in the prosecuting authority ensure justice for the victims of crimes, by prosecuting without fear, favour or prejudice, and by working with our partners and the public to solve and prevent crime.” This mission statement is very much in line with the Constitution provision referred to above, which was seen by the Constitutional Court as guarantee to prosecutorial independence.<sup>84</sup>

## 5. Conclusion

It is clear from the above, that the prosecution authority and its independence, in particular, were seen by the public at large both during and after apartheid as a key element of the criminal justice system. A look at the history of the prosecution service reveals a pattern of concern about the exercise of authority over it. Over a period of time, various Acts were passed which dealt with the question of overall authority over the prosecution service. The Attorney-General Act 92 of 1992 took away all political control over prosecutions, repealed section 3 of the CPA and provided in section 5(1) that every Attorney-General had the authority to prosecute in any court within his jurisdiction. However, the final

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<sup>83</sup> *In Re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744, at paragraph [146] the Constitutional Court ruled that the constitutional provision giving the Minister the power to exercise final responsibility over the prosecuting authority is constitutional

<sup>84</sup> *National Director of Public Prosecutions v Zuma (Mbeki and another intervening)* 2009 (4) BCLR 393 (SCA) at paragraph [30] where it was stated as follows: “...Although national legislation must ensure that the NPA exercises its functions without fear, favour or prejudice, the Minister must exercise final responsibility over the NPA and the NDPP must determine prosecution policy with the concurrence of the Minister.”

Constitution<sup>85</sup> gave the Minister of Justice some control over the prosecuting authority and, in fact, made it accountable to the executive.

The statement of Dulla Omar, then Justice Minister, read in context with the subsequent repeal of the Attorney-General Act, concedes that the prosecuting authority can be used by politicians to pursue their political ambitions, thus nullifying the constitutional and other legislative guarantees of prosecutorial independence. This observation has been corroborated by actual instances of political and other extraneous interference.

Regrettably, it is such matters that excite public interest and debate that question the independence of the prosecuting authority and the proper functioning of the criminal justice system.

Rather than safeguarding the independence of the prosecution, insistence on its accountability to the Minister of Justice demonstrates the interest that politicians have in the exercise of prosecutorial discretion.

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<sup>85</sup> Supra at note 1

## CHAPTER 4

# THE NATIONAL PROSECUTING AUTHORITY AND THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

### 1. Introduction

In light of the preceding chapters it would be important to look at how beneficial the single prosecuting authority has been to the entire criminal justice system and how independent it has been as well.

Whilst the concern during the apartheid era was the fact that the Attorney-General was an instrument of the apartheid state in its stringent implementation of repressive legislation, the question for the post-apartheid era is how prosecutorial independence should be evaluated in this new context, that is, under the new-found legal independence of the Attorney-General which according to then Justice Minister Omar, was to guarantee prosecutorial independence and not primarily intended to entrench the political status quo.

The following discussion will deal with the Zuma corruption matter and the independent exercise of prosecutorial discretion with specific reference to relevant policy consideration.

### 2. The National Prosecuting Authority under Advocate Ngcuka

Advocate Ngcuka was appointed to a position of high legal prominence as the first National Director of Public Prosecutions in 1998 with the establishment of a single National Prosecuting Authority in South Africa.

The opposition parties opposed his appointment on the grounds that Ngcuka was already too involved in the ruling African National Congress (ANC) to exercise judicial independence.<sup>86</sup>

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<sup>86</sup> <http://www.sahistory.org.za/pages/people/bios/ngcuka-b.htm>

Before his appointment, there were various divisions of the prosecuting authority headed by various Attorney-Generals, each with its own rules, prosecutorial policies and standards. His appointment meant that the various Attorney-Generals (provincial heads of prosecutors) began to report to one National Director of Public Prosecutions, who set similar policy directives for all prosecutors, to be applied equally throughout the country.<sup>87</sup>

The resultant uniformity was met with acclaim but there were reservations about the political appointment of the National Director, which posed a potential threat to the independence of the NPA. This was seen by the political opposition as a stratagem used by the ruling party to protect itself and its members against prosecution.

Advocate Ngcuka's integrity was tested a number of times and was often questioned by members of the ruling party who accused him of singling them out for treatment that was inconsistent with his powers and even that his actions were dictated by outside forces. The accusations may have been no more than malicious rumor-mongering, but they did create a climate of suspicion.

Despite the criticism and skepticism, Advocate Ngcuka pressed corruption charges against high-placed ANC figures, former ANC Chief Whip, Tony Yengeni,<sup>88</sup> Winnie Madikizela-Mandela<sup>89</sup> and Jacob Zuma, then Deputy President of the country,.

Advocate Ngcuka was soon the subject of an enquiry as he was being suspected of having been a spy agent. Many of the parliamentarians who were prosecuted for the so-called travel-scam fraud lodged a grievance against Advocate Ngcuka who was regarded as maliciously inclined to look for victims among high profile politicians regardless of whether "travel gate prosecutions" were justified, whereas in fact many of the accused pleaded guilty in that matter. The indignation of the accused arose, not from outraged innocence but from a

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<sup>87</sup> National Prosecuting Authority of South Africa Policy Manual, October 1999, Pretoria, ppA.1-A.2

<sup>88</sup> *Yengeni v S* [2005] JOL 16068 (T)

<sup>89</sup> *S v Winnie Madikizela Mandela*, case 1342/03 (T) (unreported)

misconception that their status had lifted them beyond the reach of the law that applied to common folk on the ground, which made the charges against them tantamount to lèse majesté in their misguided estimation.

Allegations against the impartiality of Advocate Ngcuka<sup>90</sup> were made by various persons in prominent positions who faced prosecution (e.g. Schabir Shaik, Mac Maharaj and Vusi Mona of the ANC, who claimed that the prosecution service was seeking to undermine the ruling party), with the result that Thabo Mbeki; then president of the Republic of South Africa appointed a commission of enquiry headed by retired Chief Justice Joos Hefer to investigate the allegations against Advocate Ngcuka.

Advocate Ngcuka resigned shortly after the commission reported that the allegations were found to be baseless.

The impression left by the unfortunate career of Advocate Ngcuka as NDPP is that during his tenure there was (and probably still is) a pervasive incapacity in South African society to distinguish effectively between party and state, and that this incapacity was ruthlessly exploited by influential people seeking to deflect attention from their own misdeeds by claiming political influence of the NDPP's function.

It is a moot point whether the misgivings expressed about the impartiality of the prosecution function are attributable to a genuine concern for the integrity of state functions, or whether they have the disingenuous purpose of subverting such functions for nefarious purposes, which is exactly what the prosecution function has been accused of. There may be an underlying belief that ultimately state functions should be subservient to party political interest. Such convictions have in fact been expressed by public figures from public platforms; hence the observations above that there seems to be a pervasive incapacity in South African society to distinguish effectively (and subscribe to the distinction) between party and state.

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<sup>90</sup> Sapa, "Hefer Commission's public hearings postponed," Saturday Star, 12 October 2003

### 3. The National Prosecuting Authority under Advocate Pikoli

Advocate Pikoli was the successor to Advocate Ngcuka. He was the former D-G of the Department of Justice and Constitutional Development and his experience in that capacity was seen as a critical adjunct to the qualifying features needed for appointment as the new head of the NPA.

Although he was held by officialdom tenure to be a man of integrity his tenure was also embattled by controversy over a number of high-profile cases involving prominent political figures, such as the case relating to attempts on Reverend Frank Chikane's life in 1989 and was one of the first prosecutions in terms of the policy and directives since the Truth and Reconciliation Commission completed its work,<sup>91</sup> the corruption cases against Mr Zuma, Mr Shaik<sup>92</sup> and Mr Selebi, the former National Commissioner of Police as well as the cases against Mr Agliotti.<sup>93</sup>

He had been the Director-General for quite some time before his appointment as NPA Head, which was soon to be his quick exit point from government employment. His stay at the helm of the NPA was not to be without any hullabaloo.

Adv Pikoli in his capacity as NDPP had during September 2007 taken legal steps against Mr Selebi, then National Commissioner of Police, to effect his arrest and to institute criminal proceedings against him.<sup>94</sup> This seems not to have gone well with certain highly placed government officials. In fact, the aftermath of his decision resulted in unfortunate incidents to the proper functioning of the criminal justice system. It also affected the relationship between Adv Pikoli as NDPP and Adv Simelane as the Director-General in the Department of Justice and Constitutional Development.

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<sup>91</sup> *S v Van der Merwe, Vlok, Smith, Otto and Van Staden*, case heard in the Transvaal Provincial Division on 17 August 2007 [former General Johan van der Merwe, former Minister Adriaan Vlok and three former security policemen (Smith, Otto and Van Staden) were prosecuted for apartheid-era crimes]

<sup>92</sup> *S v Shaik* 2007 (1) SACR 142 (D)

<sup>93</sup> *S v Agliotti* [2010] JOL 26556 (GSJ), matter finalized after Mr Pikoli had left as NPA Head

<sup>94</sup> *Democratic Alliance v President, RSA and others* [2010] JOL 26495 (GNP) at paragraph [10]

Before coming to a conclusion with regard to the relationship between Adv Pikoli and Adv Simelane and interference with the former's independence as NDPP, reference is made to paragraphs [12] and [43] of the DA matter:<sup>95</sup>

- The Minister, thereupon, on 18 September 2007 addressed a letter (admittedly prepared by Mr Simelane who was then the Director-General of Justice and Constitutional Development) to Mr Pikoli. In this letter the Minister requested Mr Pikoli to provide her with all information on which he relied in taking legal steps against Mr Selebi. The letter then proceeds in the following terms:
- In pursuing your intended course of action and any prosecution, the NPA must do so in the public interest notwithstanding a *prima facie* case. ... Until I have satisfied myself that sufficient information and evidence does exist for the arrest of and preference of charges against the National Commissioner of the police service, you shall not pursue the route that you have taken steps to pursue.
- I must express my displeasure at the conduct of [Mr Simelane] in the preparation of Government's submissions and in his oral testimony which I found in many respects to be inaccurate or without any basis in fact and law. He was forced to concede during cross-examination that the allegations he made against Adv Pikoli were without foundation.

Subsequent to his intended course of action with regard to the then National Commissioner of Police, Adv Pikoli was requested by the then Minister of Justice and Constitutional Development to resign which he refused. Shortly thereafter the then President of the RSA suspended him and called for a commission to enquire into his fitness to hold office as NDPP.

How coincidental could the decision of the then President of the RSA to enquire into Adv Pikoli' fitness to hold office at the time when he was contemplating legal steps against the then National Commissioner of Police?

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<sup>95</sup> *Democratic Alliance v President, RSA and others* [2010] JOL 26495 (GNP)

The observation made is that there was clearly a link between the action of the then Minister of Justice when she enquired from Adv Pikoli about the intended legal action against then National Commissioner of Police, her request that Adv Pikoli resigns and the subsequent decision by the then President of the RSA to suspend Adv Pikoli.

The relationship between Adv Pikoli as then NDPP and Adv Simelane as then D-G: Department of Justice and Constitutional Development was non-existent. We had the Heads of two institutions that are at the centre of the advancement of a democratic RSA whose relationship was non-existent. Was it also by coincidence that Adv Simelane ultimately succeeded Adv Pikoli as NDPP?

The information above reveals that there was no respect or recognition to the independence of the office of the NDPP. It is disturbing to note the source and character that led to this unfortunate state of affairs.

#### **4. The National Prosecuting Authority under Advocate Mpshe SC**

Advocate Mpshe SC was appointed acting NDPP during Advocate Pikoli's suspension.

On 27 December 2007, during Advocate Pikoli's suspension as head of the NPA, Advocate Mpshe SC decided in his capacity as acting NDPP, once again, to indict Mr Zuma on 18 counts of racketeering, corruption, money laundering, tax evasion and fraud. Much of the case was based on the same subject matter that was dealt with in the Schabir Shaik trial except that according to Advocate Mpshe SC the facts and circumstances had changed materially because the evidence against Mr Zuma had become more compelling and the legal impediments to charging him had been reduced.

As already mentioned above, it was Advocate Mpshe SC who withdrew the charges against Mr Zuma. In motivating his decision to discontinue prosecution against Mr Zuma, Adv Mpshe SC relied on, amongst other things, the provision of section 179 (4) of the Constitution which requires of the prosecuting authority



to exercise its functions without fear, favour or prejudice. He went on to quote the following passage from *State v Yengeni*.<sup>96</sup>

- Every member of the authority is obliged to undertake an oath or affirmation prior to the commencement of their service to uphold this provision. The Constitution guarantees the professional independence of the National Director of Public Prosecutions and every member of his staff, with the obvious aim of ensuring their freedom from any interference in their functions by the powerful, the well connected, the rich and the peddlers of political influence. The untrammelled exercise of their powers in the spirit of professional independence is vital to the functioning of the legal system. The independence of the Judiciary is directly related to, and depends upon, the independence of the legal professions and of the National Director of Public Prosecutions. Undermining the freedom from outside influence would lead the entire legal process, including the functioning of the Judiciary, being held hostage to those interests that might be threatened by a fearless, committed and independent search for the truth.

Adv Mpshe SC went on to refer to the following passage which was with regard to the requirement of fearless and unfettered exercise of the powers of the office of the National Director of Public Prosecutions:<sup>97</sup>

- The independence of the office that he held, and the fearless and unfettered exercise of the extensive powers that this office confers, are incompatible with any hint or suggestion that he might lend an ear to politicians who might wish to advance the best interest of a crony rather than the search for the truth and the proper functioning of the criminal and penal process.

Whilst noting that the committed and dedicated team of prosecutors and investigators were not tainted and could not be implicated in any misconduct,

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<sup>96</sup> *State v Yengeni* 2006 (1) SACR 405 at paragraphs [51-53]

<sup>97</sup> *Supra* at note 95 p428 paragraph [g-h]

Adv Mpshe SC found what he referred to as pure abuse of the process by Mr McCarthy, as offending one's sense of justice to render unfair and unjust to continue with the prosecution of Mr Zuma.<sup>98</sup>

Those tasked with the prosecution of Mr Zuma recommended that the prosecution should, Adv Mpshe SC's statement went on.<sup>99</sup>

From the above discussion, it is clear that Adv Mpshe SC was convinced that there was a strong case for Mr Zuma to answer. In addition hereto, the prosecution team shared the same sentiment and was not party to the alleged abuse of the process. It appears from the statement that the reason for Mr McCarthy's conduct was to frustrate Mr Zuma's political career and probably benefit those opposed to him.

In the end Mr Zuma continued his political with a case that was never resolved in a court of law. It is worth-mentioning that it was not clear whether the recordings, handed to the NPA, had been intercepted legally or were legally in the possession of Mr Zuma's defence team. However, the case was withdrawn on the basis thereof. To date, the public has not been informed of progress, if any, on the recommended investigation by Adv Mpshe SC.

In light of the above, the decision by Adv Mpshe SC to discontinue prosecution against Mr Zuma would continue to have far-reaching implications to the prosecutorial exercise of discretion, particularly in high-profile matters and to the factors to be considered as well as the weight to be attached thereto.

## **5. The National Prosecuting Authority under Advocate Simelane**

Advocate Simelane again a former Director-General for the Department of Justice and Constitutional Development was appointed, initially as acting Head of the Prosecution Service, a branch of the National Prosecuting Authority of

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<sup>98</sup> Supra at note 12

<sup>99</sup> Supra at note 12

South Africa. He was appointed to that position in the NPA in October 2009. He was later appointed head of the NPA effective 01 December 2009.

He was a key witness in the Ginwala Commission but Frene Ginwala herself severely criticized his conduct as a witness, which was hostile towards Advocate Pikoli, and besides, according to Frene Ginwala, his testimony was “contradictory and without basis in fact or in law”.<sup>100</sup> A further point held against him was that he failed to disclose that he had been advised in a legal opinion that he had no authority over the NPA.

On announcing Advocate Simelane’s appointment as head of NPA with effect from 01 December 2009, Mr Zuma made a resounding declaration affirming Advocate Simelane’s competence and irreproachable professionalism and probity of character. His appointment was also endorsed by Justice Minister, Jeff Radebe in a media statement dated 30 November 2009.<sup>101</sup>

Shortly after his appointment, Advocate Simelane began to effect changes that involved proposals to restructure the NPA which move was halted by the Minister of Justice.<sup>102</sup> Advocate Simelane had announced the move of AFU and other specialized Units to the provincial DPP’s Offices

In this regard the following was reported by Khadija Bradlow in the CITY PRESS on 18 April 2010:

- The position of current AFU head, Advocate Willie Hofmeyer, is uncertain. The report went on to say that the changes are mooted in the NPA’s draft strategic plan for 2010 to 2015, presented to the National Assembly on Tuesday.

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<sup>100</sup> *Democratic Alliance v President, RSA and others* [2010] JOL 26495 (GNP) at paragraph [43]

<sup>101</sup> Department of Justice and Constitutional Development 2009 “*Simelane fit to hold office*” media statement 30 November 2009

<sup>102</sup> SAPA, “*Asset grab unit stays for now*” Radebe puts Simelane’s controversial plan on hold, while Willie Hofmeyer remains in charge, Pretoria News article, 30 April 2010, p1

- The plan, which still has to be approved by Minister of Justice, Jeff Radebe, outlines several other changes to the operation of the National Prosecuting Authority.
- The NPA's administrative division will now be housed in the justice department, placing it within the executive rather than as an independent structure.
- Analysts warn that the move could have a negative impact on the country's ability to investigate and prosecute complex criminal cases.
- The NPA has rejected suggestions there was anything untoward in the new structure, saying it was merely handing back prosecutorial powers to the DPP's.
- In a similar 'realignment' plan a year ago, the Directorate of Special Operations (DSO), or Scorpions were killed off.
- Concern has been raised that the AFU in its new form would have neither the resources nor the political will to undertake cases involving well-connected people.
- There have been media reports that suggested Advocate Simelane had succumbed to political pressure in abandoning a preservation order against alleged arms deal kingpin Fana Hlongwane-a former adviser to the former minister of defence, Joe Modise, and the man regarded as holding the secrets of who received the arms deal bribe cash. According to Hennie van Vuuren, Director of the Institute for Security Studies the move appeared to be "another attempt to hollow out the capacity" of a well-run, functioning and successful state institution.
- It would be unfortunate to tinker with it simply for short-term political goals, he said.
- The Democratic Alliance, which opposes the 'diminished' role of the special units, has slammed the strategic plan as "a snakes and ladders game in which senior officers in the NPA could be sent slithering down the ladder."

After presenting the above proposals to the National Assembly on 13 April 2010 as the NPA's draft strategic plan for 2010 to 2015 Advocate Simelane began to

implement them without the approval of the Minister of Justice. The public concern was mounting that the NPA was being subjected to unscrupulous political interference through the instrumentality of the NDPP

As was expected, therefore, the Minister of Justice announced on 30 April 2010 that Advocate Simelane's plans were not being implemented. The announcement was met with approval by opposition parties despite considerable sentiment that the Minister should have little, if anything, to do with the affairs of the NPA.

Among the significant measures that were challenged and overturned was the "redeployment" of senior members of the NPA to perform duties in the lower courts<sup>103</sup>.

It seems clear from the above developments that the issue of the NPA's independence, with particular reference to its freedom from political interference, is looming ever larger. It also raises the questions: Whose interests is Advocate Simelane serving? Are the proposed changes merely aimed at giving prosecutorial powers back to the provincial Directors of Public Prosecutions, as stated by Advocate Simelane, or not?

Another controversy in the NPA affairs was the removal of Advocate Nel from the prosecution team against Mr Aggliotti who was accused of the murder of Mr Kebble. Advocate Simelane first denied that he had taken the decision to remove Advocate Nel saying Advocate GS Maema, then acting prosecution provincial head, took the decision.<sup>104</sup> The Mail and Guardian newspaper quoted Advocate Simelane's memorandum to Advocate Maema to read as follows: "I have noted that you have made very little progress in dealing with the above

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<sup>103</sup> The Public Servants Association on behalf of GD Baloyi and H M Meintjes SC-Applicants and The National Director of Public Prosecutions (NDPP)-Respondent, *Case number GPBC 1020/2010, Settlement Agreement* dated 25 May 2010 (unreported)

<sup>104</sup> Adriaan Basson, Jackie Mapiloko & Glynnis Underhill, "Zuma halts NPA changes", Mail and Guardian, 14-20 May 2010, p4

matters. You will recall that I instructed new prosecuting team be appointed. To date I have not been advised of the new team.”<sup>105</sup>

The information above reveals that Adv Simelane’s tenure as the NPA Head is surrounded by controversy. As can be seen from above, he has been involved with the affairs of the NPA long before he was appointed. During the Ginwala Enquiry he expressed his views about the functioning of the office of the NDPP, which is clearly not in line with the correct legal position. However, he was appointed to head the same institution.

## 6. Conclusion

The ultimate decision of the NPA to withdraw the charges against Mr Zuma has left many people questioning the integrity of the NPA and has raised doubts as to the true reasons why the decision was taken. The Zuma matter is one of many similar cases that are controversially withdrawn by prosecutors.

The fact of the matter is that every successive Head of the NPA approached the matter differently, each offering a different rationale. In fact, how does one reconcile the decision by Advocate Ngcuka of having a “*prima facie*” but not winnable case with the two conflicting decisions by Advocate Mpshe SC first claiming compelling evidence to charge Mr Zuma and then deciding against prosecution on grounds of interference with the prosecution thus strengthening grounds for suspicion that the NPA was subject to political interference or influence, and therefore that the independence of the NPA is not guaranteed despite the supposed enshrinement of its independence in the Constitution.

After all, it seems logical to assume that those concerned in embroiling the prosecuting service in controversy would have been more careful with the service if they have taken it more seriously; whereas the alacrity and frequency of attempts to impugn the service point the other way and smack of opportunism

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<sup>105</sup> Supra at note 103

and a lack of appreciation for the dire consequences of abusing such an important institution with such cynical disregard.

These remarks should not be read as an attempt to exonerate the prosecution service by casting aspersions on its critics; instead the object is to point out the grave risk incurred by treating the backbone institutions of democracy with cavalier disregard.

A democracy will fail if its functionaries cannot distinguish or respect the difference between party and state. The recent unfortunate history of the prosecution service as outlined here could be indicative of a situation that may slide into anarchy and/or a repressive regime that could set the country back for many years and ripen it for serious upheaval and civil disorder. Such are the wages of failure to develop and maintain a well-functioning institutional framework.

## **CHAPTER 5**

### **A COMPARATIVE SURVEY OF THE PROSECUTION SERVICES OF OTHER JURISDICTIONS**

#### **1. Introduction**

A survey of the powers, roles and responsibilities, with particular reference to the independence of the prosecution services of other jurisdictions may assist worthwhile conclusions about the independence of the same function in South Africa. Note the currency of the designation “Attorney-General” in comparable jurisdictions.

The term ‘Attorney-General’ has traditionally been used to refer to any person who holds a general power of attorney to represent a principal in all matters. In the common law tradition, anyone who represents the state, especially in criminal prosecutions, is such an attorney. Although a government may designate an official as the permanent Attorney-General, anyone who represents the state in the same way, even if only for a particular case, acts for and on behalf of the Attorney-General. The history of the term dates back to Norman England when many of the French legal terms were imported into English common law. In French, the adjective often comes after the noun and so Attorney-General meant General Attorney.

In most common law jurisdictions, (e.g. Canada) the Attorney-General is the main legal adviser to the government, although in some jurisdictions the incumbent may have additional responsibilities such as law enforcement or, more particularly, public prosecutions.

#### **2. The prosecution service in Canada**

In Canada the offices of Minister of Justice and Attorney-General are held jointly.



Section 3(1) of the Director of Public Prosecutions Act provides for the appointment of the Director of Public Prosecutions<sup>106</sup>, thus creating the Public Prosecution Service of Canada (PPSC). More specifically, the Public Prosecution Service of Canada (PPSC) as a federal government institution was created on December 12, 2006 in virtue of promulgation of the Director of Public Prosecutions Act<sup>107</sup> and Part 3 of the Federal Accountability Act<sup>108</sup>.

The Public Prosecution Service of Canada (PPSC) fulfills the responsibilities of the Attorney-General of Canada in the discharge of its criminal law mandate by prosecuting criminal offences under federal jurisdiction and by contributing to the strengthening of the criminal justice system of Canada.

## **2.1 The mandate of the Public Prosecution Service of Canada**

The Public Prosecution Service of Canada is mandated by the Director of Public Prosecutions Act. The establishment of the Public Prosecution Service of Canada can be seen as ensuring that the prosecution exercises its powers independently and without any influence.

The PPSC reports to parliament through the Attorney-General of Canada. The Director of Public Prosecutions Act provides in section 3 (3) that<sup>109</sup> the Director of Public Prosecutions acts "under and on behalf of the Attorney-General of Canada." The relationship between the Attorney-General and the Director is premised on the principles of respect for the independence of the prosecution function and the need to consult on important matters of general interest.

The Director's independence is safeguarded by the requirement that all instructions from the Attorney-General be in writing and published in the Canada Gazette. The Director of Public Prosecutions initiates and conducts prosecutions on behalf of the Crown, except where the Attorney-General conducts a prosecution under section 15<sup>110</sup> and section 3(b) of the Director of Public

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<sup>106</sup> The Governor in Council shall, on the recommendation of the Attorney-General, appoint a Director of Public Prosecutions (referred to as the Director) in accordance with section 4

<sup>107</sup> S.C. 2006, c. 9, s. 121

<sup>108</sup> S.C. 2006, c. 9

<sup>109</sup> Supra at note 107

<sup>110</sup> Director of Public Prosecutions Act, section 3 (a)

Prosecutions Act provides that the DPP must intervene in any matter of public interest that may affect the conduct of prosecutions or related investigations, except in proceedings where the Attorney-General has decided to intervene under section 14. In turn, the Director must inform the Attorney-General of any prosecution or planned intervention that may raise important questions of general interest, allowing the Attorney-General the opportunity to intervene in, or assume conduct of a case. Additionally, the PPSC must provide the Attorney-General with an annual report to be tabled in Parliament.

## 2.2 The role of the Prosecutor

Prosecutors are expected to discharge their duties with fairness, objectivity, and integrity. They have ethical and constitutional obligations. They must act in the interest of justice and are not primarily obliged to secure convictions in cases they prosecute. As stated by the Supreme Court of Canada in *Boucher v The Queen*<sup>111</sup>:

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel has a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

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<sup>111</sup> *Boucher v The Queen* [1955] S.C.R. 16, at 23-24

### **2.3 The powers, duties and functions of the Director of Public Prosecutions**

The core powers, duties, and functions of the Director of Public Prosecutions are set out in subsection 3(3) of the Director of Public Prosecutions Act<sup>112</sup>. These responsibilities include

- initiating and conducting federal prosecutions;
- intervening in proceedings that raise a question of public interest that may affect the conduct of prosecutions or related investigations;
- issuing guidelines to federal prosecutors;
- advising law enforcement agencies or investigative bodies on general matters relating to prosecutions and on particular investigations that may lead to prosecution;
- communicating with the media and the public on all matters respecting the initiation and conduct of prosecutions;
- exercising the authority of the Attorney-General of Canada in respect of private prosecutions; and
- exercising any other power or carrying out any other duty or function assigned by the Attorney-General that is compatible with the office of the Director.

The DPP carries out these statutory responsibilities in his capacity as the Deputy Attorney-General of Canada<sup>113</sup>. Unless otherwise directed in writing by the Attorney-General, the Director has the power to make binding and final decisions to prosecute offences under federal statutes.

The PPSC is not an investigative agency. It prosecutes when a charge has been laid pursuant to an investigation of a violation of federal law by the Royal Canadian Mounted Police (RCMP) or some other police force or investigative agency. The PPSC provides advice and assistance to investigators at the investigative stage and works closely with them, particularly in matters of

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<sup>112</sup> Supra at note 107

<sup>113</sup> Supra at note 107

terrorism, organised crime and the proceeds of crime, money laundering, market fraud, and cases of exceptional magnitude.

The responsibilities of the PPSC vary somewhat by province and territory.

### **3. The Office of the Attorney-General in the United States of America**

The position of Attorney-General was created by Congress under the Judiciary Act<sup>114</sup>. In June 1870 Congress enacted a law entitled "An Act to Establish the Department of Justice." This Act established the Attorney-General as head of the Department of Justice and gave the Attorney-General direction and control of U.S. Attorneys and all other counsel employed on behalf of the United States. The Act also vested in the Attorney-General supervisory power over the accounts of U.S. Attorneys and U.S. Marshals.

The mission of the Office of the Attorney-General is to supervise and direct the administration and operation of the Department of Justice, including the Federal Bureau of Investigation, Drug Enforcement Administration, Bureau of Alcohol, Tobacco, Firearms and Explosives, Bureau of Prisons, Office of Justice Programs, and the U.S. Attorneys and U.S. Marshals Service, which are all within the Department of Justice.

The United States Attorney-General is the head of the Department of Justice in the United States who is concerned with legal affairs and is the chief law enforcement officer of the government of the United States. The Attorney-General is considered to be the chief lawyer of the U.S. government and also serves as a member of the President's Cabinet.

The Attorney-General is nominated by the President of the United States and takes office after confirmation by the United States Senate. He or she serves at the pleasure of the President and can be removed by the President at any time. The Attorney-General is also subject to impeachment by the House of Representatives and trial in the Senate for "treason, bribery, and other high crimes and misdemeanors."

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<sup>114</sup> Judiciary Act of 1789

The original duties of this officer were "to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinion upon questions of law when required by the President of the US, or when requested by the heads of any of the departments." As recently as 1870, the Department of Justice was established to support the discharge of responsibilities of the Attorney-General.

The principal duties of the Attorney-General are to:

- Represent the United States in legal matters.
- Supervise and direct the administration and operation of the offices, boards, divisions, and bureaux that comprise the Department.
- Furnish advice and opinions, formal and informal, on legal matters to the President and the Cabinet and to the heads of the executive departments and agencies of the government, as provided by law.
- Make recommendations to the President concerning appointments to federal judicial positions and to positions within the Department, including U.S. Attorneys and U.S. Marshals.
- Represent or supervise the representation of the United States Government in the Supreme Court of the United States and all other courts, foreign and domestic, in which the United States is a party or has an interest as may be deemed appropriate.
- Perform or supervise the performance of other duties required by statute or Executive Order.

### **3.1 Recognition for separation of powers and the power of the United States Attorney**

The courts in the USA do recognise the vast powers entrusted to the US Attorney as well as the separation of powers between the executive branch of the federal government (of which the United States Attorney is a part) and the judicial branch (of which the Court is a part); and the fact that both have powers that are subject to limitations.

In the United States District Court, District of Massachusetts, in the matter of the *United States of America versus Andrew M. Sullivan*<sup>115</sup> the facts were briefly that Mr Sullivan was issued with a notice for being in possession of marijuana. On August 26, 2009 the United States Attorney filed a “Dismissal of Complaint” seeking leave to file a dismissal of the Violation Notice issued to Mr Sullivan because “further prosecution of the violation would not be in the interest of justice”.

The issue raised in the instant case was that, in the court’s view, in seeking leave to dismiss the charge against Mr Sullivan, the United States Attorney was not being faithful to a cardinal principle of the legal system, namely that all persons stand equal before the law and are to be treated equally in a court of justice once judicial processes are invoked. It was quite apparent to the court that Mr Sullivan was being treated differently from others who had been charged with the same crime in similar circumstances.

The issue was whether the court could refuse leave if the request was clearly prompted by considerations contrary to the public interest. The law was not particularly clear on this point. It was noted that Mr Sullivan had not been subjected to prosecutorial harassment.

It was found in this instance that fidelity to the law required that the court grant leave to the United States Attorney to dismiss the Violation Notice against Mr Sullivan and the court duly complied by granting leave as required. The court did not need to believe that the end result was just.

#### **4. The office of the Attorney-General in Australia**

The Attorney-General is the chief law officer of the Crown and a member of the Cabinet. The Attorney-General is the minister responsible for legal affairs, national and public security and the Australian Security Intelligence Organization.

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<sup>115</sup> *United States of America versus Andrew M. Sullivan*, Case no. 2009-PO-0476-RBC

Each of the Australian state has an Attorney-General, who is a state minister with responsibilities relating to state law just as the federal minister has responsibilities with respect to federal law.

Functions of the state and federal Attorneys-General include administration of the selection of persons for nomination to judicial posts, and authorising prosecutions. In normal circumstances the prosecutorial powers of the Attorney-General are exercised by the Director of Public Prosecutions and staff; however, the Attorney-General maintains formal control, including the power to initiate and terminate public prosecutions and take over private prosecutions. Statutory criminal law provides that, generally speaking, prosecutions for certain offences require the individual consent of the Attorney-General. This is generally for offences whose illegality is of a somewhat controversial nature, or where it seems reasonable to assume a significant risk that a prosecution may be of politically motivated or influenced. The Attorney-General also generally has the power to issue certificates that are legally conclusive of certain facts (e.g. that the revelation of certain matters in court proceedings might constitute a risk to national security); and such facts are thereby rendered indisputable in law. The Attorney-General also has the power to issue a *nolle prosequi* with respect to a case, which authoritatively determines that the state (in whose name prosecutions are brought) does not wish to prosecute the case, so preventing any person from doing so.

#### **4.1 Prosecutions and the Director of Public Prosecutions**

The Office of the Director of Public Prosecutions was established by the Director of Public Prosecutions Act, Act No. 113 of 1983 as amended.

The Office of the Commonwealth Director of Public Prosecutions is an independent prosecuting service established by the Parliament of Australia to prosecute alleged offences against Commonwealth law and to deprive offenders of the proceeds and benefits of criminal activity. It aims to provide an effective national prosecution service to the Australian community. This Office has no investigative powers.

State and Territory Directors of Public Prosecutions are responsible for the prosecution of alleged offences against State and Territory laws. The practices may vary given that State and Territory laws of procedure apply to the prosecution process.

The prosecution process is laid down in the Prosecution Policy of the Commonwealth. Under the Prosecution Policy, there is a two-stage test that must be satisfied with regard to the decision to prosecute: firstly, there must be sufficient evidence to prosecute; and secondly, it must be evident from the facts of the case as well as all the surrounding circumstances that the prosecution would be in the public interest.

With regard to the first test, besides the existence of a *prima facie* case there must also be a reasonable prospect of obtaining a conviction. The second test involves consideration of the following factors, which may vary from case to case:

- Whether the offence is serious or trivial;
- The staleness of the offence;
- The availability and efficacy of any alternative to prosecution;
- The likely outcome in the event of a finding of guilt; and
- The need for deterrence.

Generally, the more serious the alleged offence is, the more likely it will be that prosecution will be required in the public interest.

More importantly, the decision to prosecute must be made impartially, and must not be influenced by any inappropriate reference to race, religion, sex, national origin or political association and furthermore, the decision to prosecute must not be influenced by the possibility that the government might gain (or lose) any political advantage from the prospective prosecution.



Section 7<sup>116</sup> provides for consultation between the Director of Public Prosecutions and the Attorney-General. The directions and guidelines pertaining to such consultation are contained in section 8<sup>117</sup>. Of particular importance for purposes of this study is section 8(1) which provides that 'In the performance of the Director's functions and in the exercise of the Director's powers, the Director is subject to such directions or guidelines as the Attorney-General, after consultation with the Director, gives or furnishes to the Director by instrument in writing.

Thus here too, as in Canada, the Director's independence is safeguarded in this instance by the requirement contained in section 8(1) that all instructions from the Attorney-General must be in writing.

It is clear from the powers of the Director has more powers with regard to prosecutions in that he can take over or stop prosecutions.

## **5. Conclusion**

The above comparative survey shows that in the jurisdictions covered there is some safeguard for the independence of the prosecution service, in that in some jurisdictions the instructions to the DPP have to be in writing.

There is also no evidence to suggest that the prosecution service's integrity, particularly in decision making, is questioned. There seems to be appreciation for the independence and importance of this institution.

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<sup>116</sup> Director of Public Prosecutions Act 113 of 1983 as amended

<sup>117</sup> Supra at note 116

## **CHAPTER 6**

### **CONCLUSION AND RECOMMENDATIONS**

#### **1. Introduction**

The research has shown that an independent judicial system is a critical condition for the rule of law.

Prosecutors play a major role in developing and maintaining an independent judicial system, provided they are free to exercise their prosecutorial discretion without interference. In fact, a judicial system cannot be independent in the absence of an independent prosecutorial discretion.

A country's democracy cannot succeed without the institutions that form the backbone of democracy. The institutions that are responsible for upholding the rule of law are a critical element of a democratic institutional framework, and they have to operate independently in order to serve a democratic dispensation. The judiciary and the prosecution service in particular, must therefore be free from interference in order to safeguard democracy.<sup>118</sup> Naturally this does not mean that the judiciary, including the prosecution service, can be a law unto itself. The judicial function in itself must respect its own premises and its inherent commitment to upholding democratic values and a democratic dispensation.

Institutions and people can be held accountable for their actions if there are established checks and balances against which their conduct is measured.

The advantages of a well-regulated judiciary and prosecution service are uniform and predictable outcomes which are essential to gain and retain public confidence in the institution. The affairs of the institution must therefore be

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<sup>118</sup> H.P. Lee and V. Morabito, "*Removal of Judges-The Australian Experience*", Singapore Journal of Legal Studies [1992] pp40-55: "The independence of the judiciary from political control is itself an important element of a democratic society..."

transparent in the sense that the institution must be demonstrably independent, fair and consistently reliable.

Even if prosecutors do not take decisions that satisfy everyone because this is an impossible task to expect of them, there should at least be agreement between all prosecutors that the decision made by one prosecutor in a particular case is based on the fact that there is a *prima facie* case, taking into account all relevant considerations. It is worrying that prosecutors would themselves disagree on a particular decision although they are supposedly guided by the same law and principles.

The appreciation for the significant role of the prosecution service must come from people within and outside of the service.

## **2. Conclusion and suggestions for a way forward**

In light of what has been shown in the preceding chapters, it cannot be confidently said that all is above board within the prosecution service. It has also been shown that the prosecution service has often been the target of political influence both during and after the apartheid era. There is a pattern of evidence that suggests that the judiciary in general is untouchable but the prosecution service is not. This evidence calls for further investigation with a view to devising specific remedial measures in order to safeguard the prosecution service and instill public confidence in prosecutorial discretion.

Existing policy guidelines, practices and legislative measures in this regard seem to fall short of gaining public confidence. Could it be that prosecutors are heeding voices other than their professional conscience? Are they immune or impervious to the seductive or coercive power of such “other” voices?

The evidence presented throughout this dissertation indicates the possibility that prosecutors may be subject to undue influence. It can be argued that in the event of incorrect decisions to prosecute the courts are there to safeguard the

interests of the accused and of justice in general. However, there seems to be no safeguard against cases where prosecutors incorrectly decline to prosecute.

A survey of the jurisdictions referred to in the preceding chapter revealed that prosecutorial discretion is a key notion in the surveyed criminal justice systems<sup>119</sup> and there is no indication that the prosecution service in the said jurisdictions is unappreciated or underappreciated.

It is clear, too, that the degree of prosecutorial discretion varies from country to country and from one legal system to another. However, in all instances (i.e. the jurisdictions surveyed) the exercise of discretion is subject to guidelines or criteria that set limits to discretion.

Decisions to prosecute cannot be controlled by rules alone but have to be made to a considerable extent according to the prosecutor's professional judgement, failing which the present discussion would hardly be necessary. This is why it is often emphasised that the prosecutor cannot be given an exhaustive list of factors to consider in deciding whether to prosecute.

In his article "*Prosecutorial Discretion before National Courts and International Tribunals*" Daniel D. Ntanda Nsereko says: '...It calls for an appreciation of a number of factors that must inform the decision. To do that, the prosecutor must have freedom to decide as he sees fit and according to his appreciation of those factors. This is discretion. ...In some countries, prosecutors possess absolute discretion. They are not subject to the direction or control of any person or authority, not even the courts.'<sup>120</sup>

Various authors and numerous prosecution policy documents suggest that the criteria for the exercise of prosecutorial discretion cannot be reduced to a

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<sup>119</sup> Hassan B. Jallow, "*Prosecutorial Discretion and International Criminal Justice*": It also applies at international level; however, while at national level there is a well developed body of precedents or specific legislation that guides the Prosecutors in their activity, at the international level, the situation is radically different, since international criminal courts are of new creation and there are very few precedents to look at.

<sup>120</sup> Daniel D. Ntanda Nsereko, "*Prosecutorial Discretion before National Courts and International Tribunals*"

mathematical formula. The prosecutor must consider the factors that are specifically relevant to each case.

In addition hereto, there is ethical conduct that prosecutors must adhere to and certain roles and responsibilities to fulfill. In this regard, M Watney<sup>121</sup> refers to various authorities as follows:

- Zeitune (*International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors: a Practitioners' Guide* (2004) 70) emphasizes the crucial role prosecutors fulfill in the administration of justice, irrespective of the applicable legal system or prosecutorial model. The requirement of an impartial and objective approach to prosecutorial functions run like a golden thread through his commentary on the role of prosecutors. The *United Nations Guidelines on the Role of Prosecutors* (adopted by the eighth United congress on the prevention of crime and the treatment of offenders, 1990) requires of prosecutors to respect and protect human dignity and uphold human rights and thereby contribute to ensure due process and the smooth functioning of the criminal justice system (12). Prosecutors are further called upon to:
  - 13(a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any kind of discrimination;...

From the above, it is clear that the role and responsibilities of prosecutors, globally, are more or less the same and its independence is very crucial.

Having looked at the incidents in the previous chapters, the following measures can help to address the challenges facing the prosecution service in South Africa and restore confidence in the service:

1. Subject all prosecutorial decisions to review; particularly decisions not to prosecute for those matters that call for greater public

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<sup>121</sup> M Watney (2009), "*Prosecuting without fear, favour or prejudice*" TSAR pp577-589 at [paragraph 3.3.1]

interests or where there is suggestion that an ulterior motive exists for or against the decision whether or not to prosecute.

2. Safeguard the independence of the NPA by removing ministerial control over it. This is not to suggest that the NPA must not account for its decisions, for accountability is very important.<sup>122</sup>
3. Exclude all factors except the existence of a *prima facie* case and interests of justice in prosecution decisions.
4. Reduce factors impinging on prosecutorial decisions by determining 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.
5. With a view to limiting court rolls and premature decisions, allow certain categories of cases to be fully investigated before a decision is made.
6. If the suggestion in (5) above is implemented it follows that many cases will not be placed on the roll until the Head of Detectives at a particular station has certified the sufficiency or otherwise of evidence for prosecution.
7. In cases of disagreement between the police and the prosecution the final decision must rest with the prosecution. However, this is dependent on the prosecuting service holding fast to its values of fairness, impartiality and independence.<sup>123</sup> But, the system might allow for an engagement by the two agencies before a docket is finally closed and stored, especially where a decision is made not to prosecute or there is suggestion of an ulterior motive for the decision to prosecute.<sup>124</sup>

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<sup>122</sup> John McKechnie QC, “*Directors of Public Prosecutions: Independent and Accountable*”, HeinOnline – 26 U.W. Austl. L. Rev. 266 1996, “At the core of that independence I believe that there must be accountability and the two factors, far from being inconsistent, are in fact complementary to the extent that independence without accountability is an illusion. Independent power is entrusted only to those who give an account of its exercise.”

<sup>123</sup> Ken Macdonald, “*Building a modern prosecuting authority*” *International Review of Law*, (2008) 22:1, 1-16

<sup>124</sup> John D. Jackson, “*The effect of legal culture and proof in decisions to prosecute*”, (2004) 3 pp109-131 at 129 “When a case is serious- murder, criminal gang, sex, career criminal-any serious cases where the consequences to the accused are great, the consequences to the community are great, it’s fundamental for a prosecutor to seek the advice of peers or superiors within a hierarchy. Even though I am an experienced prosecutor I will not go on my own to the

8. Establish checks and balances in the form of review mechanisms within the NPA to assist prove that decision-making is transparent. Extend review to the activities of people outside the NPA who are involved with checks and balances. The creation of a stable institutional setting, the introduction of transparent, well formulated and predictable legal norms, the establishment of a system of checks and balances restraining the exercise of political power, have all been the preferred target of policies promoted by international organizations.<sup>125</sup>

Having said all of the above, it appears impossible to erect an impermeable firewall to isolate the prosecution from the executive. The fairness and impartiality, integrity of prosecutors and the oaths of office taken are core to the question whether or not discretion is correctly and fairly exercised, within the prescripts of the law.<sup>126</sup> People will only support the criminal justice system so long as the prosecuting authority makes a bargain to hold fast to values of fairness, impartiality and, as important as any of these, independence”.<sup>127</sup>

The importance of an independent judiciary, including an independent prosecuting authority cannot be over-emphasised. People understand independence in a general sense to mean independence from the agency of any particular person(s) (i.e. that is self sustaining). In the institutional sense, however, particularly where functions within the criminal justice system are concerned, independence means free from undue influence, regardless of the source of such influence. In order that a decision will be seen and accepted as

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grand jury, I will go to some other people in the office higher up than I, and will say, 'Here are my reasons, will you approve?' 'Can I set this up?' "Approval need not come within the prosecutorial hierarchy but may be exercised by independent rather than in-house counsel."

<sup>125</sup> Carlo Guarnieri & Daniela Piana (University of Bologna) "*Which Independence for the Rule of Law? Lessons from Europe*" 1-24

<sup>126</sup> Stephanie A.J. Dangel, "*Is Prosecution a Core Executive Function? Morrison v. Olson and the Framers' Intent*", *The Yale Law Journal*, Volume 99 (5) (Mar., 1990), pp1069-1088: "An analysis of the Framers' writings within their historical context shows that the Framers did not intend prosecution to be a core executive function-in fact, they intend prosecution be executive in the same sense as the Morrison conclusion. ...Hence, they provided that most prosecution would be undertaken by *officials within the executive branch*, but not necessarily executive officials subject to presidential control through appointment, direction, and removal."

<sup>127</sup> MacDonald QC, Ken, "*Building a modern prosecuting authority*", *International Review of Law, Computers & Technology*, (2008) 22:1, 7-16

legitimate by the parties in a case, therefore the prosecutor is expected to make that decision strictly according to the legal rules of the system without expecting any special benefit and without concern about risking ill consequences from any source, including especially any political agency. It goes without saying that the personal independence of the employees of institutions derives critically from the independence of the institution, especially in the judicial context.

The independence of the prosecution authority will also be seen in the transparency of the processes employed in its decision-making, particularly where high-profile matters are concerned. “This lack of transparency may, if made public, have the effect of tainting the prosecution decision on the basis of perceived political interference, particularly where the decision ultimately was taken personally by the Attorney-General.”<sup>128</sup> “Given the NDPP’s appointment by the President, the National Director is part of the executive branch of government rather than the judicial branch. This was recognised by the Constitutional Court in *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996*<sup>129</sup>. ...This political accountability is, however, balanced by guarantees of prosecutorial independence enshrined both in the Constitution and the NPA Act.”<sup>130</sup>

### 3. Limitations of the study

Having said all of the above, it will be important to thoroughly investigate why the existence of the policy documents and guarantees of prosecutorial independence both by the Constitution and the NPA Act<sup>131</sup> do not seem to guarantee and win public confidence on prosecutorial decision making in high profile or cases involving political figures.

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<sup>128</sup> Bruce A. MacFarlane, Q.C. “*Sunlight and Disinfectants: Prosecutorial Accountability and Independence through Public Transparency*”, December 2000 pp1-36

<sup>129</sup> *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744; Refer also to National Prosecuting Authority Act 32 of 1998, section 33

<sup>130</sup> Hannah Woolaver and Michael Bishop, “*Submission to the enquiry into the National Director of Public Prosecutions*” by The South African Institute for Advanced Constitutional, Public, Human Rights and International Law, 1-21

<sup>131</sup> Supra at note 4



It is equally important to investigate and bring evidence to the fore on the reasons why there is insistence of ministerial control over the NPA. Having done this, it follows that there must be measures in place to ensure that the prosecutorial decision-making is above any trace of suspicion.

In conclusion, please note that the selection of cases may attract the charge of disingenuous preference to favour the researcher's personal bias. However, the cases mentioned are land-mark cases and it will be safe to conclude that whatever happens in such cases happens in many more cases not referred to.

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