

# Reflections on Prosecutorial Independence and Impartiality in South Africa: The Recent Jurisprudence of the Courts

**Ntombizozuko Dyani-Mhango**

Professor, Department of Jurisprudence, University of Pretoria  
Ntombizozuko.Dyani-Mhango@up.ac.za

## Abstract

Prosecutorial independence and prosecutorial impartiality are important for the effective administration of criminal justice in South Africa. These two concepts are interconnected and yet they are distinct, and distinguishable from judicial independence and judicial impartiality. In the past decade or so, controversy has surrounded and allegations have been made of political interference with prosecutorial independence and impartiality in South Africa. This article reflects on recent developments in the exercise of prosecutorial independence and impartiality in South Africa. The interest was sparked by recent constitutional jurisprudence in developing the law on prosecutorial independence and impartiality. In its analysis of the courts' jurisprudence on prosecutorial independence, the article further demonstrates that this jurisprudence has had an influence in determining the independence of other institutions responsible for the administration of criminal justice.

**Keywords:** National Director of Prosecutions; National Prosecuting Authority; independence; impartiality; political interference; administration of justice

## Introduction

The Constitution of the Republic of South Africa, 1996 requires ‘a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament.’ The National Prosecuting Authority (NPA) is headed by a National Director of Public Prosecutions (NDPP).<sup>1</sup> The NDPP is expected to be independent and to act without undue influence in order to advance the administration of justice effectively.<sup>2</sup> There has also been uncertainty in the office of the NDPP, which was a cause for concern and threatened the independence and impartiality of the NDPP. No occupier of the office of the NDPP has ever completed their term of office of ten years<sup>3</sup> since its inception in 1998.<sup>4</sup> The office has had five permanent NDPPs, all of whom have left office for different reasons prior to the end of their term.<sup>5</sup> Furthermore, there are two judgments of the Constitutional Court that effectively removed the incumbent NDPPs from office.<sup>6</sup>

---

1 Section 179(1)(a) of the Constitution, 1996.

2 See s 179(4) of the Constitution and s 32(2)(1)(a) of the NPA Act. See also *Corruption Watch NPC & Others v President of the Republic of South Africa & Others*; *Nxasana v Corruption Watch NPC & Others* [2018] ZACC 23 (13 August 2018) (*Corruption Watch NPC*) para 18, confirming that ‘[t]he importance of the office of NDPP in the administration of justice is underscored and amplified by no less an instrument than the Constitution itself’; and UNGA ‘Report of the Special Rapporteur on the Independence of Judges and Lawyers’ (7 June 2012) A/HRC/20/19, para 93, where it is stated that: ‘Prosecutors are the essential agents of the administration of justice, and as such should respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system. Prosecutors also play a key role in protecting society from a culture of impunity and function as gatekeepers to the judiciary.’

3 Section 12(1) of the NPA stipulates that the NDPP occupies the office for a non-renewable period of ten years.

4 For a historical discussion of the office of the Attorney-General, see Mabona Thomas Mokoena, ‘Taming Prosecutorial Beast: Of Independence, Discretion and Accountability’ (2012) Stellenbosch LR 297 at 298–299. See also, generally, Martin Schönteich, ‘A Story of Trial and Tribulations: The National Prosecuting Authority, 1998–2014’ (2014) 50 SA Crime Quarterly 5.

5 The permanent NDPPs were Bulelani Ngcuka, who resigned; Vusi Pikoli (who was suspended and later reached a settlement with the president—see, generally, Vusi Pikoli and Mandy Wiener, *My Second Initiation: The Memoir of Vusi Pikoli* (Picador Africa 2013), where Vusi Pikoli gives an account of what led to his suspension as NDPP); Menzi Simelane (who was removed from office after the court’s judgment—see *Democratic Alliance v President of South Africa* 2013 (1) SA 248 (CC) (*Simelane*)); Mxolisi Nxasana (who was suspended and later reached a settlement with the president, which was invalidated by the court’s judgment—see *Corruption Watch NPC* (n 2)) and, most recently, Shaun Abrahams, who was removed from office after the court’s judgment—see *Corruption Watch NPC* (n 2). See, for example, Sam Sole, ‘Public Prosecutions: The Poisoned-chalice Job’ (*Mail & Guardian*, 29 May 2014) <<https://mg.co.za/article/2014-05-29-public-prosecutions-the-poisoned-chalice-job>> accessed 26 August 2018; Ilse de Lange, ‘Timeline of Woeful Presidential Moves that Paralysed the NPA’ (*The Citizen*, 9 December 2017) <<https://citizen.co.za/news/south-africa/1753924/timeline-of-woeful-presidential-moves-that-paralysed-the-nda/>> accessed 26 August 2018; Claudi Mailovich, ‘President Picks Silas Ramaite to Hold Fort at NPA Again’ (*Business Day*, 14 August 2018) <<https://www.businesslive.co.za/bd/national/2018-08-14-breaking-silas-ramaite-appointed-acting-ndpp/>> accessed 26 August 2018.

6 See *Simelane* (n 5); and *Corruption Watch NPC* (n 2).

In addition, in the past decade or so, new constitutional jurisprudence has emerged in South Africa regarding the requirement of independence that should characterise independent institutions such as the NPA. There had been questions about whether the NDPP enjoys independence from their political heads such as the Minister of Justice and the president or whether there has been political interference in deciding whether to institute criminal proceedings against high-profile individuals.<sup>7</sup> It is against this background that this article reflects on the developments in the exercise of prosecutorial independence and impartiality in the constitutional jurisprudence of South Africa. The interest was sparked by this recent constitutional jurisprudence in developing the law on prosecutorial independence and impartiality. In its analysis of the courts' jurisprudence on prosecutorial independence, the article will further demonstrate that this jurisprudence has had an influence in determining the independence of other institutions relevant to the administration of criminal justice.

The Constitution does not expressly require prosecutorial independence, but it does require national legislation to 'ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.'<sup>8</sup> As will be presented later in the article, this provision has been interpreted by the courts also to mean prosecutorial independence. However, this article proceeds on the understanding that prosecutorial independence differs from prosecutorial impartiality. It is, therefore, important to ascertain the distinct and separate meanings of these two terms. This distinction is inferred from case law that differentiates between judicial independence and judicial impartiality. Although the discussion in this article is not about the judicial independence or impartiality of the courts, the definition of these two expressions in the context of the exercise of judicial power or authority is more than helpful in determining what prosecutorial independence and impartiality entails. It will be shown below that the court in *Corruption Watch NPC*, for example, has used judicial independence as an analogy to determine prosecutorial independence.<sup>9</sup> Although the mention of independence—to wit, judicial independence—tends to be accompanied by the term impartiality, in wording such as 'independent and impartial tribunal or forum' in section

---

7 See, for example, Phillip C Stenning, 'Discretion, Politics, and the Public Interest in "High-Profile" Criminal Investigations and Prosecutions' (2009) 24(3) *Canadian Journal of Law and Society* 337, especially 350–359, (discussing the South African instances such as the investigations that led to the prosecution of Jackie Selebi, the former Commissioner of Police, and criminal investigations against former President Zuma, where the independence of the NDPP was questioned). See also Lovell Fernandez, 'The National Director of Public Prosecutions in South Africa: Independent Boss or Parry Politician?' (2007) 21 *Speculum Juris* 129 (also discussing the political interference in the *Zuma* case).

8 Section 179(4) of the Constitution.

9 See *Corruption Watch NPC* (n 2) para 42, quoting *Justice Alliance of South Africa v President of the Republic of South Africa* 2011 (5) SA 388 (CC) (*Justice Alliance of South Africa*). *Justice Alliance of South Africa* dealt with the independence of the judiciary in relation to Chief Justice Ngcobo's extension of term of office. See also *Corruption Watch NPC* (n 2) para 26, where the court makes a distinction between prosecutorial independence and judicial independence.

34 of the Constitution<sup>10</sup>—they are distinct values conveying separate meanings and implications in the administration of justice. The Canadian Supreme Court has provided a universal definition of these terms in *Valente*<sup>11</sup> and explained the differences as follows:

Although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word ‘impartial’ ... connotes absence of bias, actual or perceived. The word ‘independence’ ... reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly the Executive branch of government that rests on objective conditions or guarantees.<sup>12</sup>

This passage was later cited with approval by the court in *De Lange v Smuts NO* in its determination of judicial independence in South Africa.<sup>13</sup> This article will demonstrate through an analysis of the courts’ jurisprudence that prosecutorial independence is, indeed, about the relationship between the NDPP and the executive branch of government; prosecutorial impartiality is about the state of mind of the prosecutor in the exercise of their duties, if they are to exercise those duties without fear or favour. It is to those issues that this article now turns.

## The Court on Prosecutorial Independence

This part of the article analyses the court’s jurisprudence on prosecutorial independence in order to determine the meaning of this concept in the South African context. The article will further demonstrate that this jurisprudence has had an influence on determining the independence of other institutions relevant to the administration of criminal justice.

Section 179(2) of the Constitution stipulates that ‘the prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.’ Therefore, the independence of the prosecutor is significant: a prosecutor who lacks independence may make a mockery of the criminal justice system. As the court has explained in *Corruption Watch NPC, per Madlanga J*:

---

10 See also s 165(2) of the Constitution, which stipulates that ‘[t]he courts are *independent* and subject only to the Constitution and the law, which they must apply *impartially* and without fear, favour or prejudice’ [emphasis added].

11 *Valente v The Queen* [1985] 2 RCS 673.

12 *Valente* (n 11) 685. See also *The Queen v Beauregard* [1986] 2 SCR 56 at 70, citing *Valente* with approval.

13 See *De Lange v Smuts NO* 1998 (3) SA 785 para 71.

The NPA plays a pivotal role in the administration of criminal justice. With a malleable, corrupt or dysfunctional prosecuting authority, many criminals – especially those holding positions of influence – will rarely, if ever, answer for their criminal deeds. Equally, functionaries within that prosecuting authority may ... ‘be pressured ... into pursuing prosecutions to advance a political agenda’. All this is antithetical to the rule of law, a founding value of the Republic.<sup>14</sup>

As explained earlier, the Constitution does not expressly state that the NDPP or the NPA ought to be independent but enjoins the legislature to adopt legislation that ‘must ensure that the [NPA] exercises its functions without fear, favour or prejudice.’ The court in the *First Certification Case* interpreted this provision to mean that

there is ... a constitutional guarantee of independence and any legislation or executive action inconsistent therewith would be subject to constitutional control by the courts.<sup>15</sup>

Furthermore, although the court was not dealing with prosecutorial independence in *Simelane* but with the exercise of executive power in the appointment of the NDPP, it held that the combined object of the empowering provisions of section 179 of the Constitution and section 9 of the NPA Act<sup>16</sup> was to safeguard the independence of the NDPP. Therefore, the appointee to that position must be above reproach, independent and ready to serve without fear, favour or prejudice. In order to make an appointment to that position, the president must be satisfied that the candidate possesses the qualities of ‘experience, consciousness and integrity’<sup>17</sup> required by section 9(1)(b) of the NPA Act. These qualities are jurisdictional facts that must be objectively assessed to exist before an appointment can be made, and the president is at the very least required to have regard to the relevant factors that were brought to his attention or which could reasonably be ascertained by him. And in exercising those powers, the president needs not have preconceived views regarding the fitness of a candidate or rely on personal knowledge of the candidate, nor should the president disregard relevant evidence as to their fitness for office.<sup>18</sup> In the court’s view, failure by the president to undertake a

---

14 *Corruption Watch NPC* (n 2) para 19.

15 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) para 146. See also Jean Redpath, ‘Failing to Prosecute? Assessing the State of the National Prosecuting Authority in South Africa’ (2012) Issue 186, June 2012, Institute for Security Studies Monographs 5–6.

16 Section 9 of the NPA Act stipulates that:

(1) Any person to be appointed as National Director, Deputy National Director or Director must-  
(a) possess legal qualifications that would entitle him or her to practise in all courts in the Republic;  
and

(b) be a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned.

(2) Any person to be appointed as the National Director must be a South African citizen.

17 *Simelane* (n 5) para 49.

18 *Simelane* (n 5) paras 107–109. See also Ntombizozuko Dyani-Mhango, ‘No, Its not Up for Public Debate ...’ (*The Sunday Independent*, 26 August 2018) <<https://www.pressreader.com/south->

proper enquiry whether the candidate satisfied the objective requirements of section 9(1)(b) of the NPA Act would render the resulting appointment subject to annulment by the courts.<sup>19</sup>

Prosecutorial independence also includes security of tenure for the NDDP, which is a non-renewable term of ten years; safeguards against unconstitutional dismissal; and a right to leave office voluntarily. In this regard, the court in *Corruption Watch NPC* recently pronounced that:

The NPA Act has two other salient features that help shield the NPA from improper interference, namely: the non-renewability of the 10-year term of office of the NDPP; and certain safeguards on the removal of the NDPP from office. Section 12(8) provides for the voluntary vacation of office by an NDPP. This section is of some significance. It must be read in the context of the constitutional guarantee that the office of NDPP be independent and, indeed, in the context of all the provisions of the NPA Act that seek to give content to the provisions of section 179(4) of the Constitution. Any act or conduct that purports to be a voluntary vacation of office but which compromises or has the potential to compromise the independence of the NDPP is constitutionally invalid.<sup>20</sup>

There is another allied issue of the independence of the NDPP which has arisen in past legal debates with much controversy. It relates to the proper interpretation of section 179(6) of the Constitution. This section provides that '[t]he Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority.' The question that has been raised is whether this provision is in conflict with the independence of the NPA. In dealing this question, some commentators have argued that:

the Minister's powers of oversight are confined to those included in the Act. As already discussed, these include the requirement that the Minister approves prosecution policy, and various duties of the NDPP to provide information and submit reports to the Minister. The [NPA] 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 [NDPP].<sup>21</sup>

---

[africa/the-sunday-independent/20180826/282827897005890](https://www.africa/the-sunday-independent/20180826/282827897005890)> accessed 23 July 2020, discussing the process of appointing the NDPP and arguing that the president does not have unfettered powers when appointing the NDPP, because he is guided by the provisions of the Constitution and the NPA Act.

19 *Simelane* (n 5) para 112.

20 *Corruption Watch NPC* (n 2) para 23.

21 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 (SAIFAC)' (2008) 21(2) *Advocate* 30.

In his analysis of prosecutorial independence in *Zuma v National Director of Public Prosecutions*,<sup>22</sup> Nicholson J cited the above argument with approval. The judge further explained that

[t]he independence of the prosecuting authority is vital to the independence of the whole legal process. If one political faction or sectional interest gains a monopoly over its inner workings, the judiciary will cease to be independent and will become part of a political process of the persecution of one particular targeted political enemy.<sup>23</sup>

Equally, the SCA agreed with the High Court on appeal and noted that even though ‘[t]hese provisions may appear to conflict ... they are not incompatible.’<sup>24</sup> In its view, the SCA pronounced that:

although the Minister may not instruct the NPA to prosecute or to decline to prosecute or terminate a pending prosecution, the Minister is entitled to be kept informed in respect of all the prosecutions initiated or to be initiated which might arouse public interest or involve important aspects of legal or prosecutorial authority.<sup>25</sup>

The SCA further stated that the ‘NDPP must be able to make prosecutorial decisions without regard to political considerations and his prosecutorial discretion must not be subject to the authority of the government.’<sup>26</sup> However, it disagreed with Nicholson J’s holding that ‘there should be no relationship [between the NPA and] the Minister of Justice.’<sup>27</sup> Instead, the SCA held that the minister’s responsibility over the NPA needs to be contextualised.<sup>28</sup> The SCA reasoned that even courts interfere with the NPA’s decisions to prosecute ‘where the prosecuting authorities had given an undertaking not to prosecute or had made a representation to that effect in exchange for a plea or for cooperation.’<sup>29</sup> What is clear from the SCA’s interpretation of section 179(6) is that the

---

22 2009 (1) BCLR 62 (N) paras 89 and 90 (*Zuma v NDPP*).

23 *Zuma v NDPP* (n 22) para 94.

24 *Zuma v NDPP* 2009 (2) SA 277 (SCA) para 32 (*Zuma v NDPP* (SCA)).

25 *ibid.* See also *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) (*Glenister*) para 122, *per* Ngcobo CJ, where he confirmed that:

‘[t]here are those legal systems, like ours, where the executive is assigned final responsibility over the functioning of police or the prosecution, as the case may be. Even with the administration of justice. This is a special feature of our constitutional democracy. The Cabinet Minister responsible for the police is required by our Constitution to take final responsibility for the functioning of the police, including all crime fighting units located within the police. The same is true of the Minister for Justice with regard to the NPA.’

The majority judgment penned by Moseneke DCJ and Cameron J agreed with Ngcobo CJ’s assessment and said at para 244, ‘we also accept that our legal system requires some level of executive involvement in any area of functioning. We do not cavil with some measure of executive involvement.’

26 *Zuma v NDPP* (SCA) para 28.

27 *Zuma v NDPP* (SCA) para 37.

28 *ibid.*

29 *Zuma v NDPP* (SCA) para 39.

minister's final responsibility over the NPA is constitutional. However, it does not empower the minister to intervene in the day-to-day affairs of the prosecutor but requires that the minister be informed about prosecutorial matters and decisions.<sup>30</sup> What remains unclear is what the minister must do with such information. An interesting view that this article agrees with is by Mokoena, who argues that section 179(6) of the Constitution is linked to the NDPP's accountability, because such 'accountability is inferred from the "final responsibility" which the minister is supposed to exercise over the prosecuting authority.'<sup>31</sup> He further maintains that

[u]nfettered prosecutorial independence, if left unchecked by regulation, may be susceptible to bureaucratic, and institutional abuse and institutional abuse and misuse, which, may by implication, potentially erode entrenched constitutional and legislative protection and guarantees.<sup>32</sup>

Prosecutorial independence received considerable attention in *Corruption Watch NPC*, where the appointment of the NDPP terminated by a settlement agreement with the president and the Minister of Justice was under review. In this case, the former NDPP, Mr Nxasana, entered into a settlement agreement with the president and the Minister of Justice in terms of article 28(1)(a)(ii) of the NPA Act in order to vacate his office.<sup>33</sup> One of the issues brought before the court, and which is relevant to this article, was whether 'the settlement agreement and, therefore, Mr Nxasana's vacation of the office of NDPP are constitutionally valid.'<sup>34</sup> In answering this question, Madlanga J made it clear that the settlement agreement to vacate the office of the NDPP was linked to the concept of

---

30 See also, *Kaunda & Others v President of the Republic of South Africa* 2005 (4) SA 235 (CC), para 83, where Chaskalson CJ explained:

'In terms of the Constitution the prosecuting authority, headed by the [NDPP], 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. This would include applying for extradition where this is necessary. The powers of the prosecuting authority, for which the Minister of Justice and Constitutional Affairs assumes final responsibility, must be exercised by the prosecuting authority without fear, favour, or prejudice. Decisions to institute prosecutions may raise policy issues which are far from easy to determine where, as in the present case, the events are already the subject matter of criminal proceedings in another country.' [footnotes omitted].

31 Mokoena (n 4) 303. See also Dirk Van Zyl Smit and Esther Steyn, 'Prosecuting Authority in the New South Africa' (2000) 8 *CIJL Yearbook* 137 at 150 arguing that '[i]n practice this means that the Minister of Justice has to answer to Parliament and through it to the public for the operation of the prosecuting authority', and that 'in principle, it is desirable that government ministers take responsibility for the operations of all aspects of the executive.'

32 Mokoena (n 4) 303.

33 Section 12(8)(a) of the NPA Act provides that:

(a) The President may allow the National Director or a Deputy National Director at his or her request, to vacate his or her office –

(i) on account of continued ill-health; or

(ii) for any other reason which the President deems sufficient.

34 *Corruption Watch NPC* (n 2) para 16(a).



prosecutorial independence, especially since it transpired that the president wanted Mr Nxasana out of office by all means necessary.<sup>35</sup> Madlanga J concluded that the president's conduct 'compromise[d] the independence of the NDPP' because the settlement amount in the agreement fell outside the benefits contemplated in section 12(8) of the NPA Act.<sup>36</sup> In other words, the amount paid to Mr Nxasana as part of the settlement agreement for him to vacate his office 'far exceeded what Mr Nxasana's financial entitlement would have been had his office been lawfully vacated in terms of section 12(8)(a)(ii) of the NPA Act.'<sup>37</sup>

The *Corruption Watch NPC* judgment also dealt with two other issues that relate to the independence of the NDPP. The first issue was the constitutionality of section 12(4) of the NPA Act. This section gave power to the president to extend the NDPP's term of office beyond the retirement age of 65.<sup>38</sup> In this regard, Madlanga J quickly disposed of this issue and held that the enabling provision to extend the NDPP's term of office undermines the independence of the NDPP.<sup>39</sup> His reasons were predicated on the previous judgments of the court, including *Justice Alliance of South Africa*, where it held that:

In approaching this question it must be borne in mind that the extension of a term of office, particularly one conferred by the Executive or by Parliament, may be seen as a benefit. The judge or judges upon whom the benefit is conferred may be seen as favoured by it. While it is true, as counsel for the President emphasised, that the

---

35 See *Corruption Watch NPC* (n 2) para 25, where Madlanga J gives a summary of what transpired: 'The facts set out above point to one thing and one thing only: former President Zuma was bent on getting rid of Mr Nxasana by whatever means he could muster. His was an approach that kept on mutating: it was first a stick; then a carrot; a stick once more; and eventually a carrot. There was first the notification that Mr Nxasana would be subjected to an inquiry with a view to establishing whether he was still a fit and proper person to hold office. Concomitantly, there was a threat of suspension pending finalisation of the inquiry, *albeit* with full pay. This was followed by former President Zuma's proposal that there be mediation. When there was no progress on this, the inquiry was instituted. Whilst the inquiry was in its preliminary stages, the former President pursued a parallel process in which Mr Nxasana was first offered—in a draft settlement agreement—R10 million. As indicated earlier, he did not accept it. What plainly evinces how desperate former President Zuma was to get rid of Mr Nxasana is that this was followed by a draft settlement in which the amount was left blank. Mr Nxasana was being told to pick whatever figure.'

36 *Corruption Watch NPC* (n 2) para 28.

37 *Corruption Watch NPC* (n 2) para 26.

38 Section 12(4) of the NPA Act stipulates:

(4) If the President is of the opinion that it is in the public interest to retain a National Director or a Deputy National Director in his or her office beyond the age of 65 years, and –  
(a) the National Director or Deputy National Director wishes to continue to serve in such office; and  
(b) the mental and physical health of the person concerned enable him or her so to continue,  
the President may from time to time direct that he or she be so retained, but not for a period which exceeds, or periods which in the aggregate exceed, two years: Provided that a National Director's term of office shall not exceed 10 years.

39 *Corruption Watch NPC* (n 2) para 42.

possibility of far-fetched perceptions should not dominate the interpretive process, it is not unreasonable for the public to assume that extension may operate as a favour that may influence those judges seeking it. The power of extension in section 176(1) must therefore, on general principle, be construed so far as possible to minimise the risk that its conferral could be seen as impairing the precious-won institutional attribute of impartiality and the public confidence that goes with it.<sup>40</sup>

Consequently, the court confirmed the High Court's declaration of the unconstitutionality of this provision.<sup>41</sup>

The second issue was whether an indefinite suspension of the NDPP in terms of article 12(6) of the NPA Act affected prosecutorial independence.<sup>42</sup> The problem for the court was the fact that the president had the power to suspend the NDPP with or without pay and for an indefinite period. Above all, suspension without pay was a default position.<sup>43</sup> In this respect, Madlanga J's concern was the fact that the legislation did not provide

---

40 *Justice Alliance of South Africa* (n 9) para 75 as quoted in *Corruption Watch NPC* (n 2) para 42. Madlanga J, in para 43, also relied on reasoning in *Helen Suzman Foundation v President of the Republic of South Africa* 2015 (2) SA 1 (CC) (*Helen Suzman Foundation*) para 81, which held: Renewal invites a favour-seeking disposition from the incumbent whose age and situation might point to the likelihood of renewal. It beckons to the official to adjust her approach to the enormous and sensitive responsibilities of her office with regard to the preferences of the one who wields the discretionary power to renew or not to renew the term of office. No holder of this position of high responsibility should be exposed to the temptation to 'behave' herself in anticipation of renewal.

41 *Corruption Watch NPC* (n 2) para 44.

42 Section 12(6) of the NPA states:

(6)(a) The President may provisionally suspend the National Director or a Deputy National Director from his or her office, pending such enquiry into his or her fitness to hold such office as the President deems fit and, subject to the provisions of this subsection, may thereupon remove him or her from office –

(i) for misconduct;

(ii) on account of continued ill-health;

(iii) on account of incapacity to carry out his or her duties of office efficiently; or

(iv) on account thereof that he or she is no longer a fit and proper person to hold the office concerned.

(b) The removal of the National Director or a Deputy National Director, the reason therefor and the representations of the National Director or Deputy National Director (if any) shall be communicated by message to Parliament within 14 days after such removal if Parliament is then in session or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session.

(c) Parliament shall, within 30 days after the message referred to in paragraph (b) has been tabled in Parliament, or as soon thereafter as is reasonably possible, pass a resolution as to whether or not the restoration to his or her office of the National Director or Deputy National Director so removed, is recommended.

(d) The President shall restore the National Director or Deputy National Director to his or her office if Parliament so resolves.

(e) The National Director or a Deputy National Director provisionally suspended from office shall receive, for the duration of such suspension, no salary or such salary as may be determined by the President.

43 *Corruption Watch NPC* (n 2) para 45.

any guidance concerning the president's exercise of discretion under it when it comes to the circumstances under which a payment would be made. Madlanga J found this exercise of discretion is not one to be made available to the executive as it may lead to abuse.<sup>44</sup> Accordingly, Madlanga J held that the exercise of such presidential discretion 'has the potential to undermine the independence and integrity of the offices of NDPP and Deputy NDPP and, indeed, that of the NPA itself.'<sup>45</sup>

It is clear from the above discussion that the independence of the prosecutor is important in the exercise of their duties. However, this article argues that the oversight of the Minister of Justice is aligned to holding the prosecutor accountable for preventing 'institutional abuse and misuse' if the minister does not overstep their boundaries. This oversight does not interfere with prosecutorial independence, as confirmed in *Valente* on what constitutes independence, and by the SCA in *Zuma v National Director of Public Prosecutions* and the court in *Kaunda*, and in *Glenister* on the relationship between the NDPP and the executive branch of government. The question that follows is whether prosecutorial independence is the same as judicial independence. This article argues that the two are not the same.

It is important to emphasise that even though the court relied on authorities which dealt with issues of judicial independence to pronounce on prosecutorial independence in the *Corruption Watch NPC*, the two concepts are distinct. Justice Yacoob in the *Simelane* case conceded this difference when he declared that 'it is true that the functions of the [NDPP] are not judicial in character.'<sup>46</sup> Nevertheless, Justice Yacoob recognised that because the functions performed by the NDPP

are ... fundamental to our democracy. The office must be non-political and non-partisan and is closely related to the function of the judiciary broadly to achieve justice and is located at the core of delivering criminal justice.<sup>47</sup>

In his critical study of a proposed 2013 constitutional amendment to the provisions governing the NPA, Mhango correctly argued that 'the latter point [by Justice Yacoob] should not be read as suggesting that the NDPP deserves the same level of independence that the Constitution expects' from the judiciary.<sup>48</sup>

---

44 *ibid.*

45 *ibid.*

46 *Simelane* (n 5) para 26.

47 *ibid.*

48 Mtendeweka Mhango, 'Constitutional Eighteenth Amendment Bill: An Unnecessary Amendment to the South African Constitution?' (2013) 35(1) *Statute Law Review* 19 at 26, discussing *Simelane* and the differences between the level of appointment expected for the NDPP and judiciary.

In addition, the court has reiterated this difference in *Glenister*<sup>49</sup> and *Helen Suzman Foundation*, where, in dealing with the issue of public confidence in the context of determining the level of independence of the Directorate of Priority Crime Investigation (DPCI), the court stated that

the appearance or perception of independence plays an important role in evaluating whether independence in fact exists ... By applying this criterion, we do not mean to impose on Parliament the obligation to create an agency with a measure of independence appropriate to the judiciary.<sup>50</sup>

Accordingly, under South African constitutional law, a line is drawn between judicial and prosecutorial independence.

The jurisprudence of our courts relating to prosecutorial independence has had an influence on the interpretation of other constitutional and legislative provisions relating to the independence of other institutions whose tasks are linked to the administration of justice. The following section deals with the independence of the DPCI and the Independent Police Investigative Directorate (IPID) in order to demonstrate this influence.

### On the Independence of the DPCI and the IPID: The *Glenister* and *McBride*<sup>51</sup> Judgments

As previously stated, in the past decade or so, new constitutional jurisprudence has emerged in South Africa regarding the requirement of independence that should characterise independent institutions such as the NPA. One of the important judgments that has emerged from this jurisprudence is that of *Glenister*, where the independence of the then newly created DPCI established by virtue of the South African Police Services Act 68 of 1995 (SAPS Act) was at issue. As stated in its Preamble, the objective of the impugned SAPS Act was to enhance the investigative capacity of the police services in relation to national priority crimes and other crimes, by establishing a DPCI to combat them. The question that arose in *Glenister* was whether the Constitution imposes an obligation on the state to establish and maintain an independent body to combat corruption and organised crime; and, if so, whether the DPCI established under the impugned provisions of the SAPS Act met the requirements of independence.<sup>52</sup> The majority of the court held that the Constitution does impose this obligation on the state.<sup>53</sup>

---

49 See, *Glenister* (n 25) para 207.

50 *Glenister* (n 25) para 207 and *Helen Suzman Foundation* (n 40) para 31.

51 *McBride v Minister of Police* 2016 (2) SACR 585 (CC) (*McBride*).

52 *Glenister* (n 25) para 163.

53 *ibid*.

And on whether the DPCI met the requirements of independence, the court found that it did not. Accordingly, the provisions of the SAPS Act were declared unconstitutional.

The court's reasoning, from which this article draws an analogy for the purposes of analysing prosecutorial independence, was that the obligation to establish an anti-corruption body emanated from international law and was enforceable through sections 7(2) and 8 of the Constitution.<sup>54</sup> In addition, the court reasoned that the state's obligations in section 7(2) of the Constitution to 'respect, protect, promote and fulfil the rights in the Bill of Rights' requires that an anti-corruption body must be reasonable, that is to say, it must be adequately independent.<sup>55</sup> After examining the relevant provisions of the SAPS Act relative to the DPCI, the court concluded that:

the absence of specially secured conditions of employment, the imposition of oversight by a committee of political executives, and the subordination of the DPCI's power to investigate at the hands of members of the executive, who control the DPCI's policy guidelines, are inimical to the degree of independence that is required.<sup>56</sup>

Accordingly, the impugned legislation was constitutionally invalid to the extent that it did not secure adequate independence for the DPCI.<sup>57</sup>

Similarly, in *McBride*, the court was presented with an opportunity to define and delineate the contours of independence as it pertains to the IPID, a police complaints body. The question of IPID's independence arose because the High Court declared several provisions of the IPID Act unconstitutional. And for this declaration to have legal effect, it must be confirmed by the court pursuant to section 172 of the Constitution. In resolving this question, the court focused on two aspects of independence of the IPID. The first aspect concerned the subjugation of the IPID executive director to the laws governing the public service. On this aspect, the court found that the provisions of the IPID Act<sup>58</sup> undermined the independence of the executive director. The court reasoned that:

It is axiomatic that public servants are government employees. They are beholden to government. They operate under government instructions and control. The authority to discipline and dismiss them vests in the relevant executive authority. This does not require parliamentary oversight. To subject the Executive Director of IPID to the same regime is to undermine or subvert his independence. It is not congruent with the Constitution.<sup>59</sup>

---

54 *Glenister* (n 25) paras 189–194.

55 *Glenister* (n 25) para 194.

56 *Glenister* (n 25) para 248.

57 *Glenister* (n 25) para 251.

58 Sections 6(3), 16A (1), 16B and 17(1) of the IPID Act 1 of 2011.

59 *McBride* (n 51) para 30.

The second aspect of independence dealt with the removal powers of the Minister of the Police. Before dealing with this aspect, the court cited with approval the minority judgment by Chief Justice Ngcobo in *Glenister*, where he established the criterion—which was agreed to by the majority—for determining adequate independence of independent institutions. Ngcobo CJ stated that ‘[u]ltimately therefore, the question is whether the anti-corruption agency enjoys sufficient structural and operational autonomy so as to shield it from undue political influence.’<sup>60</sup> Relying on this principle, the court in *McBride* reasoned that section 6 of the IPID Act, which gave the minister enormous political power and control over the executive director, including removal power without parliamentary oversight, is antithetical to the entrenched independence of the IPID contemplated by the Constitution.<sup>61</sup> According to the court, this was tantamount to impermissible political management of IPID by the minister.<sup>62</sup> In addition, the court reasoned that:

To my mind, this state of affairs creates room for the Minister to invoke partisan political influence to appoint someone who is likely to pander to his whims or who is sympathetic to the Minister’s political orientation. This might lead to IPID becoming politicised and being manipulated.<sup>63</sup>

There was another pressing rationale for the court’s conclusion in this case, which was phrased as follows:

To subject the Executive Director of IPID, which the Constitution demands to be independent, to the laws governing the public service – to the extent that they empower the Minister to unilaterally interfere with the Executive Director’s tenure – is subversive of IPID’s institutional and functional independence, as it turns the Executive Director into a public servant subject to the political control of the Minister.<sup>64</sup>

Therefore, the impugned provisions of the IPID Act did not pass constitutional muster and, as consequence, the order of constitutional invalidity by the High Court was confirmed. Simply put, it was inconsistent with section 206(6) of the Constitution<sup>65</sup> and was set aside.<sup>66</sup>

As demonstrated, the principles governing prosecutorial independence as outlined in the *Corruption Watch NPC* judgment above are applicable to other independent institutions

---

60 *Glenister* (n 25) para 121.

61 *McBride* (n 51) para 38.

62 *ibid.*

63 *ibid.*

64 *McBride* (n 51) para 39.

65 Section 206(6) of the Constitution stipulates that; ‘On receipt of a complaint lodged by a provincial executive, an independent police complaints body established by national legislation must investigate any alleged misconduct of, or offence committed by, a member of the police service in the province.’

66 *McBride* (n 51) para 40.

such as the IPID<sup>67</sup> and the DPCI because of their involvement in the administration of justice. The court has been at pains to emphasise that '[a]t the centre of any functioning constitutional democracy is a well-functioning ... justice system.'<sup>68</sup>

The next section deals with prosecutorial impartiality in South Africa.

## Prosecutorial Impartiality in South Africa

As explained earlier, associated with the independence of the prosecutor in exercising official duties, but certainly a self-standing requirement, is the requirement of impartiality. Because a prosecutor is an officer of the court, they are required to discharge prosecutorial duties not only independently but also impartially. What has become a seminal quotation of common-law apex courts on the impartiality of prosecutors emanates from the dictum of the Canadian Supreme Court delivered by Rand J in *Boucher v The Queen*<sup>69</sup> some six decades ago:

It cannot be over-emphasised 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 have 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 dignity, seriousness and the justness of judicial proceedings.<sup>70</sup>

This statement of law has not only been repeatedly cited by the Supreme Court of Canada in the leading cases involving prosecutors,<sup>71</sup> but it has also been relied upon by courts beyond Canada's borders.<sup>72</sup> In South Africa, Cloete JA not only referred to it in *S v Van der Westhuizen*, but also referred to those cases from the Commonwealth and other common-law jurisdictions where it has been both cited and followed.<sup>73</sup>

---

67 *McBride* (n 51) para 31, where the Constitutional Court stated that the independence of the IPID included 'the method of appointment, the method of reporting, disciplinary proceedings and method of removal of the Executive Director from office, and security of tenure.'

68 *Corruption Watch NPC* (n 2) para 20.

69 [1955] SCR 16.

70 *Boucher* (n 69) 23–24.

71 *Nelles v Ontario* [1989] 2 SCR 170; *Canadian Oxy Chemicals Ltd v Canada (Attorney General)* [1999] 1 SCR 743 para 25; *R v Stinchcombe* [1991] 3 SCR 326 at 10; *Proulx v Quebec (Attorney General)* (2001) 206 DLR (4th) 1 (SCC) para 41.

72 See, for example, *R v H* [2004] 1 All ER 1269 (HL); *Randall v The Queen* [2002] 1 WLR 2237 (PC); *R v Puddick* (1865) 4 F & F 497; *R v Banks* [1916] 2 KB 621; *Libke v R* (2007) 235 ALR 517; *Whitehorn v The Queen* (1983) 152 CLR 657 (HCA); and *DO v DPP* [2006] IESC 12.

73 *S v Van der Westhuizen* 2011 (2) SACR 26 (SCA) paras 10–13.

Similarly, the court invoked *Boucher* in *S v Shaik*.<sup>74</sup> In this case, the applicants had argued before the court that the prosecutor did not adhere to his constitutional duty to remain impartial and to execute his functions without fear, favour or prejudice. Although they did not show any proof or the basis for the alleged bias, they only averred that the prosecutor, Mr Downer, while wearing the hat of investigator, came into possession of information that would only have been available to him as a prosecutor.<sup>75</sup> But as the court held, additional knowledge and understanding of the facts do not amount to bias or prejudice. It was not alleged that the prosecutor waged a personal vendetta,<sup>76</sup> impaired the conduct of the proceedings and the dignity of the court,<sup>77</sup> or used the same office as the assessors.<sup>78</sup> Indeed, the applicants made it clear that they were not attacking the ethics of Mr Downer's conduct.<sup>79</sup>

The court further questioned what the purpose of an investigator was if not to hand over to the prosecutor as much evidence as can be lawfully obtained. According to the court, it is in the best interests of all, even those of the accused, for the prosecutor to have as much evidence as possible available in their position as truth-seeker. Referring with approval to Rand J's dictum in *Boucher*, the court concluded this aspect of its judgment by holding that none of Mr Downer's actions fell short of his role as a prosecutor as set out in the NPA Act or the Constitution. In effect, the applicant's submissions on the alleged unfairness of the trial, whether based on the failure to charge other parties or on the alleged prosecutorial misconduct, revealed no prospects of success on appeal.<sup>80</sup> It is clear that *Boucher* has influenced in the South African jurisprudence on prosecutorial impartiality. But what exactly does 'prosecutorial impartiality' mean in South Africa?

As alluded to earlier in this article, the Constitution enjoins the legislature to adopt legislation which ensures that the NPA exercises its function 'without fear or favour'.<sup>81</sup> Indeed, the NPA Act has been found to incorporate the duty to act impartially.<sup>82</sup> In this regard, there are at least four provisions in the NPA Act which give effect to the principle of impartiality. First, section 32, aptly titled '[i]mpartiality of, and oath or affirmation by members of prosecuting authority,' requires prosecutors 'to serve impartially and exercise, carry out or perform his or her powers, duties and functions in

---

74 2008 (2) SA 208 (CC) para 67.

75 *S v Shaik* (n 74) para 65.

76 *Smith v Ushewokunze* 1998 (3) SA 1125 (SZ) 1130H-I.

77 *Jesse v Pratt NO* 2001 (8) BCLR 810 (Z) 816F-I.

78 *S v Jaipal* 2005 (4) SA 581 (CC) para 5.

79 *S v Shaik* (n 74) para 66.

80 *S v Shaik* (n 74) paras 67-68.

81 Section 179(4) of the Constitution.

82 See *S v Van der Westhuizen* (n 73) para 9.



good faith and without fear, favour or prejudice, and subject only to the Constitution and the law.’<sup>83</sup>

Secondly, the NPA Act bars any organ of state or its member or employee, or any other person, from improperly interfering with the NPA or its members ‘in the exercise, carrying out or performance of its, his or her powers, duties and functions.’<sup>84</sup>

Thirdly, section 32(2)(a) of the NPA Act goes further to provide for an oath of affirmation which every NDPP, Deputy NDPP or prosecutor must swear to uphold and protect the Constitution and the entrenched fundamental rights and to

enforce the law of the Republic without fear, favour or prejudice and, as the circumstances of any particular case may require, in accordance with the Constitution and the law.

Fourthly, section 22(6)(a) of the NPA Act provides that:

the [NDPP] shall, in consultation with the minister and after consultation with the Deputy [NDPP] and the Directors, frame a code of conduct which shall be complied with by members of the prosecuting authority.

The Code of Conduct for Members of the National Prosecuting Authority<sup>85</sup> identifies, in its item C, nine different factors that will enhance the performance of prosecutorial duties, being issues that are capable of keeping them out of the realm of corruption, ensuring impartiality in the performance of their prosecutorial duties, if they strictly abide by them. These include the commands that they should:

- (a) Carry out their functions impartially and not become personally, as opposed to professionally, involved in any matter;
- (b) Avoid taking decisions or involving themselves in matters where a conflict of interest exists or might possibly exist;
- (c) Take into consideration the public interest as distinct from media or partisan interests and concerns, however vociferous these may be presented;
- (d) Avoid participation in political or other activities which may prejudice or be perceived to prejudice their independence and impartiality;

---

83 Section 32(1)(a).

84 Section 32(1)(b).

85 GG 33907 (29 December 2010) GN R1257.

- (e) Not seek or receive gifts, donations, favours or sponsorships that may compromise, or may be perceived to compromise, their professional integrity;
- (f) Act with objectivity and pay due attention to the constitutional right to equality;
- (g) Take into account all relevant circumstances and ensure that reasonable enquiries are made about evidence, irrespective of whether these enquiries are to the advantage or disadvantage of the alleged offender;
- (h) Be sensitive to the needs of victims and do justice between the victim, the accused and the community, according to the law and the dictates of fairness and equity; and
- (i) Assist the court to arrive at a just verdict and, in the event of a conviction, an appropriate sentence based on the evidence presented.<sup>86</sup>

To complement the above provisions, the SCA in *Van der Westhuizen* established a principle that the duty of a prosecutor to act impartially is part of the more general duty to act without fear, favour or prejudice.<sup>87</sup> Indeed, under an adversarial system, the prosecutor's function is essentially to discredit the defence's evidence for the purposes of obtaining a conviction. In this respect, it is not the function of a prosecutor to bring evidence forward which is destructive of the state's case, or which advances the case of the accused. Instead, the duty of a prosecutor is to see that all available legal proof of the facts is presented and is discharged by making the evidence available to the accused's legal representatives; the prosecutor's obligation is not to put the information before the court.<sup>88</sup> Therefore, the SCA found that there was no substance in the appellant's argument that he had not received a fair trial because the state had called some witnesses and not others. Nor did the prosecutor simply make state witnesses who had not been called by the state available to the defence: the prosecutor placed on record that he would help the defence to locate and consult with such witnesses. And if the

---

86 The International Codes contain clauses on prosecutorial independence and impartiality and the role of prosecutors in criminal proceedings which are not dissimilar to those in the South African Code designed and adopted pursuant to art 10 of the UN Declaration of Human Rights 1948; art 14 of the International Covenant on Civil and Political Rights 1966; and art 15(a) of the International Covenant on the Elimination of all Forms of Racial Discrimination 1966. They include: the UN Guidelines on the Role of Prosecutions adopted by the 8th UN Congress on the Prevention of Crime and Treatment of Offenders, in Havana 27 August to 7 September 1990; and the Standards of Professional Responsibility and Statements of the Essential Duties and Rights of Prosecutors of the International Association of Prosecutors adopted in Amsterdam, April 1999.

87 *Van der Westhuizen* (n 73) para 9.

88 *Van der Westhuizen* (n 73) paras 12–13.

appellant's attorney did not insist that subpoenas issued at the suit of the defence be enforced, that cannot be laid at the door of the prosecution.<sup>89</sup>

Again, and as demonstrated in the discussion on prosecutorial independence, South African courts draw a distinction between prosecutorial impartiality and judicial impartiality. For example, the SCA recently emphasised in *Maharaj v Mandag Centre for Investigative Journalism NPC*<sup>90</sup> that the NDPP is no ordinary litigant;<sup>91</sup> that the NDPP is an officer of the court, who is duty-bound to take the court into her confidence and fully explain the facts so that an informed decision can be taken.<sup>92</sup> The role and function of the prosecution in the criminal justice system is no doubt important and although the prosecutor is regarded as an officer of the court, their functions and responsibilities are different from those of a magistrate or a judge. Therefore, a prosecutor's role should not be equated to that of the judicial officer such that the prosecutor's impartiality could not be measured with the same scale as that of a judicial officer in a matter such as recusal on the ground of bias.

It is not surprising that, based on the above proposition, the SCA held in *Porritt v NDPP*<sup>93</sup> that the trial court had erred in applying the test enunciated in *President of the Republic of South Africa v South Africa Rugby Football Union (SARFU 3)*<sup>94</sup> for the recusal of a judicial officer on the ground of apprehension of bias to recuse two prosecutors in that case. Rather, the applicable test of recusal to the circumstances of prosecutors is that formulated in *Director of Public Prosecutions, Western Cape v Killian*,<sup>95</sup> where the crux of the complaint was that the prosecutor played the role of an investigator and later acted as prosecutor in the same case. The court described the test for the recusal of a prosecutor as follows:

The question remains whether the prosecutor's dual role in this case created a substantive unfairness per se. Neither precedent nor principle persuades that it did. Whether fulfilment of that dual role does involve or bring about substantive unfairness in an ensuing criminal trial will be a matter to be decided on the facts of each case by the trial court. Unfairness does not flow axiomatically from a prosecutor having had that dual role.<sup>96</sup>

---

89 *Van der Westhuizen* (n 73) para 14.

90 2018 (1) SACR 253 (SCA) para 24.

91 *Democratic Alliance v President of the RSA* 2012 (1) SA 417 (SCA); *Zuma v Democratic Alliance* [2014] 4 All SA 35 (SCA).

92 *NDDP v Freedom Under Law* 2014 (4) SA 298 (SCA); *Kalil NO v Magaung Metropolitan Municipality* 2014 (5) SA 123 (SCA) para 30.

93 2015 (1) SACR 533 (SCA) paras 20–21.

94 1999 (4) SA 147 (CC) para 48.

95 2008 (1) SACR 247 (SCA).

96 *ibid* para 28.

In this regard, prosecutors cannot be subjected to the same standard applied to the recusal of judges in that the prosecutor had earlier been involved in the case without allegations of impropriety on his part in the course of the previous litigation or during the course of the present proceedings. The prosecutors in the present case could not be removed from carrying out their prosecuting function simply because they were not independent of the complainant, which in the present case was the state.<sup>97</sup>

The previous section has demonstrated that prosecutorial impartiality is equally as important as prosecutorial independence for the effective administration of the criminal justice system. In this respect, there are measures put in place to ensure that a prosecutor exercises their powers without fear or favour such as by taking an oath of office pledging to be bound by the Constitution and the law. In order to safeguard their impartiality, the Constitution and the NPA Act also bar anyone from interfering with the duties of the prosecutor.

## Conclusion

This article began by highlighting that there had been some controversies that were caused in particular by high-profile and politically charged criminal investigations which led to the questioning of the NDPP's independence; and by stressing the fact that no incumbent of the Office of NDPP has ever served full term since its inception. Since the appointment of the new NDPP, Shamila Batohi,<sup>98</sup> there have not been any high-profile criminal investigations that implicate those currently in political power. However, the law remains the same and it remains to be seen whether there will be any controversy in future should the NDPP attempt to investigate those in power. This article has analysed the courts' jurisprudence and demonstrated that prosecutorial independence and prosecutorial impartiality are settled concepts in South Africa, as seen in the courts' jurisprudence. These concepts are interconnected and yet distinct, but they are distinguishable from judicial independence and judicial impartiality. Consequently, it seems that the controversy is likely to arise in questions relating to prosecutorial independence rather than prosecutorial impartiality, especially in relation to high-profile cases. This is because the prosecutorial independence relates to the close relationship the NDPP has with the executive branch of government. The article further established that the jurisprudence on prosecutorial independence has had an influence on other institutions such as the DPCI and the IPID, because they form an integral part of the

---

97 This decision does not in any way contradict the institutional independence which the NPA enjoys in terms of the Constitution and the NPA Act. See *DA v Acting NDPP* 2012 (3) SA 486 (SCA) para 45, where the court stated: 'It is of fundamental importance to our democracy that an institution such as the NPA, which is integral to the rule of law, acts in a manner consistent with constitutional precepts and within its powers, as set out in the [NPA Act].'

98 See, for example, Pelane Phakgadi, 'Batohi's Appointment as NDPP Welcomed Across the Board' (*Mail & Guardian*, 4 December 2018) <<https://mg.co.za/article/2018-12-04-batohis-appointment-as-ndpp-welcomed-across-the-board/>> accessed 23 July 2020.

administration of criminal justice. Equally, courts' jurisprudence on prosecutorial impartiality shows that an impartial prosecutor is important for administering the criminal justice system effectively. One cannot fail to see the imperative that a prosecutor must exercise their powers without fear or favour.

## References

- Code of Conduct for Members of the National Prosecuting Authority under Section 22(6) of the National Prosecuting Authority Act, 1998, GN R1257 (29 December 2010) GG 33907 <<https://www.npa.gov.za/sites/default/files/Library/Code%20of%20Conduct%20published%2029%20December%202010.pdf>> accessed 1 November 2019.
- De Lange I, 'Timeline of Woeful Presidential Moves that Paralysed the NPA' (*The Citizen*, 9 December 2017) <<https://citizen.co.za/news/south-africa/1753924/timeline-of-woeful-presidential-moves-that-paralysed-the-npa/>> accessed 1 November 2019.
- Dyani-Mhango N, 'No, It's Not Up for Public Debate ...' (*The Sunday Independent*, 26 August 2018) <<https://www.pressreader.com/south-africa/the-sunday-independent/20180826/282827897005890>> accessed 23 July 2020.
- Fernandez L, 'The National Director of Public Prosecutions in South Africa: Independent Boss or Party Politician?' (2007) 21 *Speculum Juris*.
- Mailovich C, 'President Picks Silas Ramaite to Hold Fort at NPA again' (*Business Day*, 14 August 2018) <<https://www.businesslive.co.za/bd/national/2018-08-14-breaking-silas-ramaite-appointed-acting-ndpp/>> accessed 1 November 2019.
- Mhango M, 'Constitutional Eighteenth Amendment Bill: An Unnecessary Amendment to the South African Constitution?' (2013) 35(1) *Statute Law Review*.
- Mokoena MT, 'Taming Prosecutorial Beast: Of Independence, Discretion and Accountability' (2012) *Stellenbosch Law Review*.
- Phakgadi P, 'Batohi's Appointment as NDPP Welcomed Across the Board' (*Mail & Guardian*, 4 December 2018) <<https://mg.co.za/article/2018-12-04-batohis-appointment-as-ndpp-welcomed-across-the-board/>> accessed 23 July 2020.
- Pikoli V and Wiener M, *My Second Initiation: The Memoir of Vusi Pikoli* (Picardo Africa 2013).
- Redpath J, 'Failing to Prosecute? Assessing the State of the National Prosecuting Authority in South Africa' (2012) 186(June) *Institute for Security Studies Monographs*.
- Schönteich M, 'A Story of Trial and Tribulations: The National Prosecuting Authority, 1998–2014' (2014) 50 *South African Crime Quarterly*.
- Sole S, 'Public Prosecutions: The Poisoned-chalice Job' (*Mail & Guardian*, 29 May 2014) <<https://mg.co.za/article/2014-05-29-public-prosecutions-the-poisoned-chalice-job>> accessed 26 August 2018.

Standards of Professional Responsibility and Statements of the Essential Duties and Rights of Prosecutors of the International Association of Prosecutors adopted by the International Association of Prosecutors in Amsterdam, April 1999 <<https://www.icj.org/wp-content/uploads/2014/03/IAP-Standards-of-professional-responsibility-duties-rights-prosecutors-instruments-1999-eng.pdf>> accessed 1 November 2019.

Stenning PC, 'Discretion, Politics, and the Public Interest in "High-Profile" Criminal Investigations and Prosecutions' (2009) 24(3) Canadian Journal of Law and Society.

UN General Assembly, Gabriela Knaul, 'Report of the Special Rapporteur on the Independence of Judges and Lawyers' (7 June 2012) A/HRC/20/19 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/138/14/PDF/G1213814.pdf?OpenElement>> accessed 1 November 2019.

UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, Vol 660 <<https://www.refworld.org/docid/3ae6b3940.html>> accessed 1 November 2019.

UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, Vol 999 <<https://www.refworld.org/docid/3ae6b3aa0.html>> accessed 1 November 2019.

UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III) <<https://www.refworld.org/docid/3ae6b3712c.html>> accessed 1 November 2019.

UN Guidelines on the Role of Prosecutions adopted by the 8th UN Congress on the Prevention of Crime and Treatment of Offenders, in Havana 27 August to 7 September 1990 <<https://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx>> accessed 1 November 2019.

Van Zyl Smit D and Steyn E, 'Prosecuting Authority in the New South Africa' (2000) 8 CIJL Yearbook.

Woolaver H and Bishop M, '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 (SAIFAC)' (2008) 21(2) Advocate.

## Cases

*Boucher v The Queen* [1955] SCR 16.

*Canadian Oxy Chemicals Ltd v Canada (Attorney General)* [1999] 1 SCR 743.

*Corruption Watch NPC & Others v President of the Republic of South Africa & Others; Nxasana v Corruption Watch NPC & Others* [2018] ZACC 23 (13 August 2018).

*De Lange v Smuts NO* 1998 (3) SA 785.

*Democratic Alliance v Acting National Director of Public Prosecutions* 2012 (3) SA 486 (SCA).

*Democratic Alliance v President of South Africa* 2013 (1) SA 248 (CC).

*Democratic Alliance v President of the RSA* 2012 (1) SA 417 (SCA).

*DO v DPP* [2006] IESC 12.

*Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC).

*Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC).

*Helen Suzman Foundation v President of the Republic of South Africa* 2015 (2) SA 1 (CC).

*Jesse v Pratt NO* 2001 (8) BCLR 810 (Z).

*Justice Alliance of South Africa v President of the Republic of South Africa* 2011 (5) SA 388 (CC).

*Kalil NO v Magaung Metropolitan Municipality* 2014 (5) SA 123 (SCA).

*Kaunda & Others v President of the Republic of South Africa* 2005 (4) SA 235 (CC).

*Libke v R* (2007) 235 ALR 517.

*Maharaj & Others v Mandag Centre of Investigative Journalism NPC & Others* 2018 (1) SACR 253 (SCA).

*McBride v Minister of Police* 2016 (2) SACR 585 (CC).

*National Deputy Director of Public Prosecutions v Freedom Under Law* 2014 (4) SA 298 (SCA).

*Nelles v Ontario* [1989] 2 SCR 170.

*Porritt & Another v National Director of Public Prosecutions & Others* 2015 (1) SACR 533 (SCA).

*President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 1999 (4) SA 147 (CC).

*Proulx v Quebec (Attorney General)* (2001) 206 DLR (4th) 1 (SCC).



*R v Banks* [1916] 2 KB 621.

*R v H* [2004] 1 All ER 1269 (HL).

*R v Puddick* (1865) 4 F & F 497.

*R v Stinchcombe* [1991] 3 SCR 326.

*Randall v The Queen* [2002] 1 WLR 2237 (PC).

*S v Jaipal* 2005 (4) SA 581 (CC).

*S v Shaik & Others* 2008 (1) SACR 247 (SCA).

*S v Shaik & Others* 2008 (2) SA 208 (CC).

*S v Van der Westhuizen* 2011 (2) SACR 26 (SCA).

*Smith v Ushewokunze* 1998 (3) SA 1125 (SZ).

*The Queen v Beaugard* [1986] 2 SCR 56.

*Valente v The Queen* [1985] 2 RCS 673.

*Whitehorn v The Queen* (1983) 152 CLR 657 (HCA).

*Zuma v Democratic Alliance* [2014] 4 All SA 35 (SCA).

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

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

## Legislation

Constitution of the Republic of South Africa, 1996.

Independent Police Investigative Directorate Act 1 of 2011.

National Prosecuting Authority Act 32 of 1998.