

NOTES ON THE INVESTIGATORY POWERS OF THE PROSECUTION

1 Introduction

Several South-African statutes provide the prosecution with investigatory powers over and above the authority of the prosecution to institute cases. This has blurred the lines of prosecutorial duties and led to questions being asked regarding the bounds of prosecutorial authority.

In *Shaik v Minister of Justice and Constitutional Development* 2008 1 SACR 1 (CC) it was argued, with regard to the Investigating Directorate in the National Prosecuting Authority Act 32 of 1998 (NPA Act), that the prosecutor had overstepped the barrier between prosecutor and investigator by *inter alia* overseeing search and seizures and assisting various officials. This, it was argued, carried the danger that prosecutorial duties would be made subordinate to the investigative fervour of securing convictions.

In *DPP, Western Cape v Killian* 2008 5 BCLR 496 (SCA), with regard to the Investigation of Serious Economic Offences Act 117 of 1991, the respondent relied on the fact that the enquiry prosecutor was also used at the subsequent criminal trial (this Act was subsequently repealed by the NPA Act enacting similar provisions to those involved here). The respondent argued that this advantaged the state in that the prosecutor with knowledge of the inquiry evidence could shape his cross-examination as far as possible to attack the respondent's credibility and thereby defeat his defence. The court also understood the respondent's argument to include that the prosecutor's role as interrogator at the enquiry robbed him of the impartiality or lack of bias required of a prosecutor.

In this note I investigate the prosecutorial duties of the prosecution as well as the investigatory functions that these statutes provide. I also examine the judgments in the above-mentioned cases and reflect on the contemporary position

under South African case law. I argue that the bounds of the prosecution's powers be made clearer.

2 Prosecutorial duties

The prosecution has a unique and special role. The accepted norms of seeking justice, doing justice, protecting the innocent and convicting the guilty are embedded in South African law (see *Schaik* para 67) and in numerous other legal systems (see eg *Boucher v The Queen* [1995] SCR 16 (110) CCC 263 paras 23–24 under Canadian law and *Berger v United States* 295 US 78 88 (1935) and *State v Warren* 195 P3d 940 Wash 2008 under American law).

The purpose of the prosecution is not to ensure a conviction but to ensure that justice is done. The prosecutor is the representative of the sovereignty, whose obligation is to govern impartially and whose interest is not that it shall win the case, but that justice shall be done. The prosecutor is therefore not in the position of an ordinary advocate (Kuckes "The state of rule 3.8: Prosecutorial ethics reform since 2000" 2009 *Geo J Legal Ethics* 427).

The responsibility of the prosecution includes that the prosecution must take care that procedural justice is done to the accused (American Bar Association *Model rules of professional conduct* R 3.8 cmt 1 (2007)). The prosecution may prosecute with vigour and strike telling blows but he is not at liberty to strike foul ones. It is therefore as much his duty to refrain from improper methods to produce a conviction as it is his duty to use legitimate means to secure a conviction (*Berger supra*).

In this regard section 32 of the NPA Act provides that the prosecution "shall serve impartially and exercise, carry out or perform his or her duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law" (see also para 3 of the "Standards of professional responsibility and statement of the essential duties and rights of prosecutors" adopted by the International Association of Prosecutors on 23 April 1999 and para 13 of the United Nations Guidelines on the Role of Prosecutors. S 22 of the NPA Act dictates that the National Director of Public Prosecutions shall bring the United Nations Guidelines to the attention of prosecutors and promote their respect for and compliance with the principles therein).

With regard to collaboration between the police and the prosecution paragraph 11 of the United Nations Guidelines provide that prosecutors shall play an active role in proceedings, including "where authorized by law or consistent with local practice, in the investigation of crime". Paragraph 4.2 of the standards of professional conduct repeats this principle adding that where the prosecution is authorised to participate in the investigation, it must be done "objectively, impartially and professionally".

With regard to collaboration in prosecutions generally paragraph 8 of the National Prosecution Policy provides as follows:

"Effective co-operation with the police and other investigating agencies from the outset is essential to the efficacy of the prosecution process. If a case is not efficiently prepared initially, it will less likely lead to a prosecution or result in a conviction.

The decision to start an investigation into possible or alleged criminal conduct ordinarily rests with the police. The Prosecuting Authority is usually not involved

in such decisions although it may be called upon to provide legal advice and policy guidance.

In major or very complex investigations, such an involvement may occur at an early stage and be of a fairly continuous nature. If necessary, specific instructions should be issued to the police with which they must comply.

In practice, prosecutors sometimes refer complaints of criminal conduct to the police for investigation. In such instances, they will supervise, direct and coordinate criminal investigations.

Provision is made for Investigating Directors of the Prosecuting Authority to hold inquiries or preparatory investigations in respect of the commission of certain offences brought to their attention.

With regard to the investigation and prosecution of crime, the relationship between prosecutors and police officials should be one of efficient and close co-operation, with mutual respect for the distinct functions and operational independence of each profession”.

3 Investigatory functions

It is understood that investigatory powers have been conferred upon the prosecution in the relevant statutes in order to assist in finding the truth. However, it may just be that the system expects too much of the prosecutor to investigate the crime and to remain impartial in its described function in instituting the prosecution. These duties, while they may frequently compliment and synchronise, may occasionally be at cross-purposes. While a prosecutor may have the duty to seek justice, rather than to convict, a prosecutor who has been part and parcel of the investigation may lose sight of this.

Yet, many jurisdictions provide prosecutors with investigatory powers. In Korea, for example, prosecutors play a significant role in developing cases. They investigate crime and direct and supervise officials in the investigation. In at least one Act, the Punishment Act No 7196, full investigative powers are given to the police officers and the prosecutors (ch II a 6 s 2). However, the police initiate most of the investigations as in South Africa and once the investigation ends all cases are referred to the prosecutors for review (Ji Hye Kim “Korea’s new prostitution policy: Overcoming challenges to effectuate the legislature’s intent to protect prostitutes from abuse” 2007 *Pac Rim L & Pol’y J* 493 quoting Hochul Kim, paper presentation: “The investigative role and function of the prosecution in Korea” January 13, 2006).

Another jurisdiction that provides the prosecution with investigatory powers is the United States of America. I submit that the South African criminal justice system in this regard finds itself in a similar position than the United States. In both jurisdictions the prosecution has assumed an increasingly active investigatory role (here by legislation) without clear legislative or ethical guidelines provided of the extent and boundaries of their investigative powers (see Smith “Re-interpreting the ethical duties of a prosecutor: Y-STR as a model investigatory tool” 2009 *Geo J Legal Ethics* 1073 for the position under American law).

Under American law, rule 3.8 of the ABA *Model rules supra* is the only rule that specifically addresses the duties and conduct of the prosecution. One of the five areas of prosecutorial conduct in rule 3.8 is prosecutors’ exercise of investigative authority. Unfortunately rule 3.8 does not deal adequately with the conduct of prosecutors and the language is vague and open to interpretation (see Davis *Arbitrary trust* (2007) 145). Yet, it has been held that the vast investigative role of the prosecutor under American law includes seeking warrants and grand

jury subpoenas, overseeing undercover operations, ordering surveillance of witnesses, making plea bargains in exchange for investigative assistance or testimony and obtaining non-testimonial items of physical evidence (Little “Proportionality as an ethical precept for prosecutors in their investigative role 1999 *Fordham LR* 723 737).

In South Africa the NPA Act in its preamble provides for the establishment of an Investigative Directorate “with limited investigative capacity, to prioritise and to investigate particularly serious criminal or unlawful conduct committed in an organized fashion . . . with the object of prosecuting such offences or unlawful conduct in the most efficient manner”. To be more specific, section 7(1)(a) of the Act provides for Investigative Directorates while section 7(4)(ii) provides that these Directorates can be assisted in their functions by prosecutors. One of these functions is investigations in terms of section 28. The NPA Act therefore provides that prosecutors may assist in section 28 investigations. Still, the Act does not describe in what actions or conduct the prosecutor may or may not participate.

4 *Schaik and Killian*

I submit that *Schaik* and *Killian* also do not provide a clear picture of what is acceptable investigatory conduct by the prosecution. While the judgments agree on certain aspects, they disagree in other material respects.

In *Schaik* the respondent complained that his fair trial rights were infringed. He argued that the prosecutor had overstepped the line between prosecutor and investigator by overseeing certain search and seizure procedures, assisting officials in preparing an application and in the identification of documents that should be seized, and conducting interrogations of employees of the corporate co-accused in terms of section 28 of the NPA Act (para 51).

The state argued that the prosecutor acted within his authority as envisaged by the NPA Act. The state furthermore argued that the prosecutor did not cross the line when assisting officials and that another person was the lead investigator at all times (para 52). It was also common cause that the prosecutor did not interview any of the accused but questioned witnesses in line with section 28 (para 52).

The court found that the prosecutor did not take over the functions of the investigators and that he kept his distance during the proceedings. The court furthermore found it relevant that the prosecutor did not interview the accused, holding that he only interviewed the people he was permitted to interview in terms of the NPA Act (para 62).

With regard to impartiality the Constitutional Court held that additional knowledge and understanding of the facts did not amount to bias or prejudice (para 66). The court also had no any problem with the fact that the prosecutor received the evidence from the investigator (para 67).

I understand this decision to mean that if a prosecutor takes over the functions of the investigators, or does not keep a proper distance from the investigation, he would be crossing the line, thereby abusing his powers. I also understand the decision to mean that if the same prosecutor interrogates an accused in terms of section 28 and thereafter conducts the criminal trial, the prosecutor would be abusing his powers. However, I would be remiss if I did not point out that there was no allegation before the Constitutional Court that the prosecutor at the trial

interrogated the accused, and the court distinguished the matter from *Killian a quo*.

In *Killian* the Supreme Court of Appeal did not see everything the same way. The court also held that additional knowledge and understanding that a prosecutor obtains in an investigatory position cannot amount to prejudice. However, neither precedent nor principle persuaded the court that a prosecutor's dual role by conducting the enquiry and in prosecuting at the criminal trial created substantive unfairness *per se*. The court held that it was an *ad hoc* issue of fact that did not compel a universal conclusion on procedural law.

5 Discussion

Clearly contemporary legal and ethical rules do not adequately define the investigatory powers bestowed on an Investigating Directorate in the NPA Act.

It has been held under South African law that a prosecutor should not actively take part in any investigative work because a situation should be avoided where the prosecutor becomes a potential witness in a case (Joubert *Criminal procedure* (2007) 60). It is highly undesirable that a prosecutor in a case also testifies on behalf of the state in the same case (*Nakedie* 1942 OPD 162 and *Nigrini* 1948 4 SA 995 (C)). By doing so he compromises his independence and impartiality and puts his credibility at stake (Schmidt and Rademeyer *Law of evidence* (2007) 8–7).

However, the Lesotho High Court has pointed that there is a need for the services of experienced practitioners in the investigative process in complex matters (*R v Sole* 2001 12 BCLR 1305 (Les) 1338Bff). The court found that it is a commonplace practice in complex matters. In this case the court conducted an extensive survey of American, Canadian, English and South African law on the standards demanded of a prosecutor in a criminal case. The court furthermore did not see that examining bank accounts, "settling witness statements", appearing before an examining magistrate and presenting the Crown in two appeal hearings could render the two prosecutors state witnesses. The court could also not see how these activities could affect their impartiality or the fairness of the accused's trial.

The Constitutional Court in *Schaik* seems to indicate that there are limitations to the investigative authority of the prosecution. The prosecution may not take over the function of the investigators, they must keep a proper distance from the investigation and the same prosecutor may not interrogate the accused at the enquiry and prosecute at the trial. This is consistent with the preamble of the NPA Act which provides for the establishment of an investigating directorate with "limited investigative capacity".

The Supreme Court of Appeal in *Killian* seems to indicate that the participation of the prosecution in investigating does not *per se* create substantive unfairness. Whether what the prosecution did was unfair, is an *ad hoc* matter where unfairness would have to be proved. This is consistent with the contents of the NPA Act which provides that prosecutors may assist in section 28 investigations without limiting the prosecutor's conduct. Presumably, the Supreme Court of Appeal did not understand *Schaik* in the same way as it did not consider itself bound to the judgment.

Given the fact that it is also expected of a judicial officer to act impartially and without fear, favour or prejudice (see eg *Van Rooyen v The State (General*

Council of Bar of South Africa intervening 2002 2 SACR 222 (CC) and *S v Le Grange* 2009 1 SACR 125 (SCA) 125) it might be fruitful to investigate what the principles with regard to a judicial officer are in this regard.

In *S v Roberts* 1999 2 SACR 243 (SCA) the court listed the requirements of the test for the appearance of judicial bias as follows: (1) There must be a suspicion that the judicial officer might, not would, be biased. (2) The suspicion must be that of a reasonable person in the position of the accused. (3) The suspicion must be based on reasonable grounds. (4) The suspicion is one which the reasonable person referred to would, not might, have.

In *President of South Africa v South African Rugby Football Union* 1999 7 BCLR 725 (CC) para 48 the court explained the test for recusal as follows:

“The question is whether a reasonable, objective and informed person would on the recorded facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel”.

In *Van Rooyen* the court agreed that an objective test appropriately contextualised is an appropriate test. The court also held that the perception that is relevant for such purposes, was a perception based on a balanced view of all the information. In holding thus the court referred with approval to the following excerpt under American law: “We ask how things appear to the well-informed, thoughtful and objective observer, rather than the hypersensitive, cynical and suspicious person” (*United States v Jordan* 49 F 3d 152 (5th Cir 1995) 156).

Le Grange held that the conduct of the judicial officer must be manifest, especially to the accused. It must therefore not create an impression of enmity or prejudice against the accused.

In Canada the Supreme Court in *R v Valente (No 2)* [1985] 2 SCR (SCC) 673 689 held that:

“Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception” (see also *Mackin v New Brunswick (Minister of Justice)* (2002) 209 DLR (4th) 564 (SCC) par 117 where this excerpt was referred to with approval).

European jurisprudence also supports the principle that appearance must be included when dealing with the independence of courts (*Findley v United Kingdom* (1997) 24 EHRR 221 para 73).

Based on this analysis I submit that we should ask whether the investigatory conduct of the prosecution, for example in assisting investigators or conducting the section 28 enquiry and prosecuting in the criminal trial, appears prejudicial, unfavourable or partial to a reasonable, objective and well-informed observer. We cannot enquire into the perception of the accused in a criminal matter as it is not uncommon for an accused to perceive that the prosecutor is not impartial in any event (see also *S v Du Toit* 2004 1 SACR 47 (T)).

I submit that at least some of the investigatory conduct of the prosecution referred to in this note may well appear prejudicial, unfavourable or biased to a reasonable, objective and well-informed observer. Surely where the same prose-

cutor conducts the investigative enquiry and prosecutes in the criminal trial it would be such an example.

I do not see the answer in allowing any participation by the prosecution in the investigation as the content of the NPA Act with regard to section 28 investigations, and *Killian*, would seem to allow subject to an accused proving that such conduct was unfair. Because of financial constraints the poor will again be the victims and partiality would be difficult to prove in any event.

It is important that individuals and the public must have confidence in the administration of justice. I agree with the court in *Valente* that without that confidence the system cannot command the respect and acceptance that are essential for its effective operation.

6 Final remarks

The ideals of our legal and ethical systems indicate that further regulation is necessary to fill the gaps with regard to the investigative powers of the prosecution. Without this the prosecution's special duty to do justice may be undermined.

A prosecutor owes his allegiance *inter alia* to two opposing constituencies, namely, the general public and the accused. The prosecutor must reconcile this responsibility to protect the general public and at the same time to protect the rights of the accused. This requires some skill. What is required is that the prosecutor acts neutrally towards all constituencies (Corrigan "On prosecutorial ethics" 1086 *Hastings Const LQ* 537). The prosecution must therefore act free from any loyalties and compromising influences such as ideological beliefs (see also *ABA Standards for criminal justice* 3-1.3 cmt 9 (1993)).

If the prosecutor aligns himself too closely with the investigation, the prosecutor may compromise his ability to evaluate the case objectively, to weigh the credibility of the victim and witnesses impartially, to act fairly and dispassionately and to protect the legal rights of the accused. In South Africa where crime is rampant and mostly unchecked, a prosecutor who seeks to fervently protect the public against crime may through the investigation be influenced to believe that the accused is a dangerous criminal and may disregard the right of the accused to be treated fairly.

In addition, there are other factors that may influence the prosecution to attach less value to the rights of an accused. There is, for example, huge pressure from the South African public to prosecute offenders effectively and it is not uncommon for prosecutors' promotions and favourable reviews to depend on their conviction rate (Medwed "The zeal deal: Prosecutorial resistance to post-conviction claims of innocence 2004 *Bu LR* 125 132-137).

I submit that it is too much to ask of the prosecution in the present South African climate where the criminal justice system is failing to act within the spirit of the Constitution and the law where the letter of the law does not prescribe a standard. The prosecution cannot be trusted to stand guard over itself under the circumstances.

I therefore submit that the prosecution needs more guidance in this balancing of conflicting allegiances with regard to their investigative powers. Black-letter law must be introduced indicating exactly what actions the prosecution may or may not take with regard to investigations. This might go some way towards assuring the courts, accused and the public that the conduct of the prosecution is unaffected by loyalties and compromising influences.

WP DE VILLIERS

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