

TO PROSECUTE INDEPENDENTLY OR NOT - THAT IS THE QUESTION

By Adv Jacques du Preez, CEO of the FW de Klerk Foundation

Prosecutors play a crucial role in the administration of justice in any country. They contribute to ensuring transparent accountability, fair legal as well as equitable criminal justice processes and the effective protection of citizens against crime. It is imperative that they vigorously protect the public interest and act with objectivity and integrity.

In a country like South Africa, where there is rampant corruption, severe political abuse of power and blatant state capture, the need for a vibrant and independent prosecuting authority is *even greater*.

The National Prosecuting authority (NPA) has been at the heart of SA politics for many years, playing a central role in the saga of corruption. Control of the NPA was a prime objective of the Mbeki, Motlanthe and Zuma presidencies - because controlling the NPA determines who should - and who shouldn't - be prosecuted.

Recently the issue of separating the National Prosecuting Authority (NPA) from the Justice Department was raised by National Director of Public Prosecutions (NDPP) Shamila Batohi when the authority addressed the National Assembly's Justice Committee. It was made clear to the Justice Committee that the NPA should be moved from under the umbrella of the Justice Department in order for it to operate more like a Chapter Nine institution in terms of the Constitution - like the Public Protector or the Auditor-General. Explaining the request NPA spokesperson, Siphon Ngwema, said it was known the NPA did not 'escape the tentacles of state capture' notwithstanding the constitutional, legislative and other guarantees of prosecutorial independence both institutionally and functionally'. Ngwema went further to state that 'clearly, these have not prevented the independence of the NPA from being compromised'.

President Mbeki decided to fire Vusi Pikoli because he insisted on prosecuting Jackie Selebi - despite the recommendations of the Ginwala Commission. After Pikoli was finally fired by President Motlanthe, Mokotedi Mpshe was appointed Acting NDPP. He took the crucial decision not to prosecute Jacob Zuma. That decision was questioned by the courts following litigation.

In December 2007, at Polokwane, the ANC took the crucial decision to disband the Scorpions - which reported to the NDPP - and replaced them with the Hawks - which report to the SAPS and this was the topic of extensive litigation in the Glenister-matter.

Zuma then decided to appoint the thoroughly unacceptable Menzi Simelane and Simelane's appointment was set aside by the courts. Thereafter, in 2013, Zuma appointed Mxolisi Nxasana - but when he showed disturbing signs of independence Zuma took steps to dismiss him and finally bought him off for R17 million - a decision that was also subsequently the subject of litigation.

Nomgcobo Jiba - temporarily Acting NDPP after Simelane, and her associate, Lawrence Mrwebi - were both reportedly very close to Zuma and played leading roles in trying to protect police general Richard Mdluli (who was recently convicted and sentenced to five years in prison). Both Jiba and Mrwebi were dismissed from the NPA after being found to be unfit for office and have lost their respective appeals against that decision.

Zuma then appointed the notoriously compliant Shaun Abrahams. However, Abrahams' appointment was set aside by the courts in 2017 and Deputy President Ramaphosa was instructed to appoint a replacement (because President Zuma was clearly conflicted).

The current NDPP, Shamila Batohi, was appointed in February 2019 and unfortunately her tenure has already, *potentially*, been damaged by what has become known as the 'De Kock Report'.¹

The report documents how top prosecutors at the NPA lied and produced false evidence in an attempt to maliciously prosecute former top Hawk officer, Johan Booysen, the so-called 'Cato Manor death squad' and other diligent law enforcement officials who exposed corruption, nepotism and state capture. The confidential June 2019 report provides startling evidence of how former NDDP advocate Shaun Abrahams, acting NDPP advocate Nomgcobo Jiba, former Director of Public Prosecutions (DPP) in KwaZulu-Natal, advocate Moipone Noko, and Deputy Director, advocate Sello Maema, lied and conspired to charge Booysen and his men.

The report has since then been under close wraps - probably because of the embarrassment it would cause the NPA. The question must be asked: If there is a strong desire to strengthen the NPA's independence, which should in principle be supported, where are the prosecutions and public steps against Noko, Maema and others, despite the damning evidence?

Although the NPA is a creature of the Constitution and forms neither part of the executive or the legislative arms of the state, it falls under the Department of Justice, which controls the budget the authority receives, while its accounting officer is the department's Director General.

Section 179(1)(a) of the Constitution currently states that the National Director of Public Prosecutions, who is the head of the prosecuting authority, is appointed by the President, as head of the national executive.

Added to the above, section 179(5) of the Constitution makes it clear that the NDPP (appointed by the president) must determine - with the concurrence of the Cabinet member responsible for the administration of justice - and after consulting the Directors of Public Prosecutions, *prosecution policy*. This effectively means that the NDPP is unable to determine prosecution policy and/or decisions, ultimately, without final input from the Minister of Justice and Correctional Services.

Should the National Director of Public of Prosecutions (NDPP) continue to be appointed by the president? Should the NDPP of South Africa not be appointed in a similar fashion as judges and by an independent judicial body such as the Judicial Services Commission (JSC) in terms of section 178 of the Constitution? Should the Department of Justice and Constitutional development enjoy oversight of the NPA?

If the NPA is to be more independent in terms of the Constitution, a constitutional amendment might be required - will this be possible and how practical would it be? As we have seen, the NPA is not immune to undue political influence and abuse for political gain. As such, any step to increase its independence must be supported.

The future of the NPA will remain a core topic in the current leadership struggle within the ANC - and the NPA's destiny will probably be determined by the outcome. The big question is why the current NDPP thinks it is necessary, at this stage, to strengthen the NPA's independence.

Could she perhaps be experiencing pressure in this regard - and, if so, from whom?

¹ <https://www.dailymaverick.co.za/article/2020-08-05-confidential-npa-report-exposes-senior-officials-who-lied-about-johan-booyesen-yet-they-are-still-employed/>