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**PROSECUTORIAL INDEPENDENCE REMAINS THE KEYSTONE OF THE RULE OF LAW**

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***Introduction***

Prosecutors are powerful officials in any country’s criminal justice system. They determine whether to prosecute, whom to prosecute, and for which crimes; whether to seek pretrial detention; whether to divert a case: whether to negotiate and offer concessions to obtain a conviction without a trial, etc. In many systems, prosecutors also lead civil and criminal processes to seize and ultimately forfeit the assets of alleged criminals.

But, as the adage goes, with great power comes great responsibility. We need to be held accountable in terms of how we exercise our powers as prosecutors.

In short, prosecutors lead efforts to uphold the rule of law. And, we need to do so fearlessly and independently (notably from political interference), and particularly, at a time when the rule of law is being stress-tested across the globe. And South Africa is no exception.

Our country is reeling from the effects of at least a decade of what has come to be known as “state capture” - an orchestrated attack against our democracy and economy, where a coterie of political and business elites, undermined the state and its institutions for personal, political and financial gain. State capture not only devastated our economy and development prospects but also, and more importantly, it ripped the heart out of the rule of law, the central ingredient of the social contract holding us together. One of the more pernicious aspects of state capture, is that, it was an attack from the inside - a stealthy and lethal war waged on the rule of law, by the very people whose job it was, and who swore an oath, to protect and promote it – including the past leadership of the NPA and critical parts of the Police.

But South Africa is a resilient nation; the response to state capture, when it came, was trailblazing. We recently completed, a 4-year Judicial Commission of Inquiry, into Allegations of State Capture, Corruption and Fraud, in the public sector, including organs of state, which was chaired by our Chief Justice, R Zondo, (hence known as the “Zondo Commission”). The Commission held more than 400 public hearings, televised live (even the present and former Presidents testified). Approximately 1500 people and entities have been implicated.[[1]](#footnote-1) The President, senior politicians, heads of departments, board members of state-owned companies and entities, as well private companies have been subject to scrutiny, even the National Prosecuting Authority itself.

During the State Capture era, the independence of the NPA was seriously compromised through:

1. political interference, and
2. impropriety by previous senior leaders of the NPA, in particular in their targeting those perceived to be obstructing, or being an inconvenience to the state capture project, including prosecutors themselves, and impropriety in shielding others.
3. also impropriety with regard to their handling of several key, high-profile or politically sensitive cases (including their decisions to prosecute some and failure to prosecute others).

This seriously called into question the integrity and conscientious, of members of the previous NPA leadership, and consequently their ability to exercise their prosecutorial powers independently - to carry out and perform their functions and duties without fear, favour or prejudice, as required by the Constitution and the NPA Act.

The people of South Africa are rightfully outraged. The impact of state capture has been devastating. The people demand accountability for the architects, enablers and supporters of state capture, both within and outside government, and both within and outside the borders of South Africa, and the people demand that ‘we bring back the stolen money’; it is estimated that about a third of the GDP of SA was stolen.

Prosecutorial independence is not only vital for the NPA to prosecute and hold accountable political and private sector architects of corruption, without any interference, and thus reaffirm the rule of law; it is also critical to regain public trust in the NPA, which was captured and deliberately weakened.

.***De jure vs de facto Independence***

While I emphasise the importance of prosecutorial independence, this should not be understood to mean that the NPA enjoys none. The NPA enjoys both elements of *de jure* and *de facto* independence.

Factors contributing to the ***de jure* independence** of the NPA would be the constitutional and legislative prescripts that guarantee the prosecuting authority’s independence, both institutionally and functionally, and criminalises improper interference or obstruction in its work.

Factors contributing to the ***de facto* independence** of the NPA would be the extent to which there IS no improper interference, and also, the degree of the autonomy and financial and administrative independence of the prosecuting authority. Another important aspect that has a bearing on *de facto* prosecutorial independence would be the method of appointment of prosecutors.

This latter aspect could not be more clearly demonstrated with my appointment as the National Director of Public Prosecutions (NDPP).

South Africa’s Constitution and the NPA Act requires the President to appoint an NDPP. There is no prescribed statutory process, on how the President is expected to assess a candidate’s fitness for office; there are no consultation requirements. However, despite there being no legal requirement to do so, President Ramaphosa instituted a panel consisting of reputable independent persons from the legal fraternity, and other experts in the field of justice to evaluate applicants, conduct public interviews which were televised live, and to make recommendations. This process did not divest the President of the power to appoint a NDPP; however the decision of the President was well informed, and based on the panel's recommendations. The process was widely welcomed as promoting the appointment of an independent head of the Proecuting Authority.

***Rebuilding the NPA***

The past 3.5 years we have been working tirelessly to rebuild the NPA and restore public faith and confidence in the NPA.

* **Adoption of IPAC values as a strategic pillar**

In our rebuilding process, in order to support a cultural change within the NPA, we adopted a set of fundamental values, to infuse into everything we do in our quest to be the “lawyers of the people”. The IPAC (I-P-A-C) values represent the character of the institution that we are committed to building, namely, one that is I - independent, P - professional, A - accountable, and C - credible. We have workstreams for each to ensure that in the 5-year strategic period (roughly half-way through) the NPA can be objectively assessed to be independent, professional, accountable, and credible.

An important aspect of this is commitment and buy-in to the new vision. Stability in leadership is key and senior leadership layers have been stabilised. I am also proud that women constitute 65% of these key management positions, far exceeding the prescribed 50% female representation.

* **Office for Ethics and Accountability**

In order to uphold the rule of law, prosecutors need to ensure that our behaviour is beyond reproach. The NPA is establishing an Office for Ethics and Accountability to detect and address any future unethical behaviour by members of the NPA. This office, which will be entrusted with the powers to investigate or deal with allegations of impropriety or misconduct, will serve to enhance accountability of all members of the NPA.

* **Permanence of the Investigating Directorate**

In the interests of advancing independence of the prosecuting authority, we are also advocating for our most valuable tool to fight against state capture and corruption, the Investigating Directorate, a multi-disciplinary investigative and prosecutorial component within the NPA, to be a permanent structure in the NPA. The Directorate is a crisis intervention, established by presidential proclamation. To be fully independent and effective, it needs be a permanent structure, established in the context of a strong legal framework, and not one that can be disbanded at the discretion or whim of a President.

As we continue to rebuild the NPA and strengthen the rule of law, and as we close the taps of corruption by enrolling seminal corruption cases, there is a further complication - we are operating in the midst of a violent and dangerous contestation for political power and patronage, where those who fear justice the most, are ramping up their attacks on the rule of law, and driving the public narrative that prosecutions are being ‘weaponised’ to discredit their political ambitions. In this context of political or “grand” corruption, prosecutorial independence becomes of paramount necessity; it also becomes a target of those wanting to evade accountability. We expect that the NPA leadership and key prosecutors will increasingly come under attack. The importance of witness protection also takes on new heights, and is critical to enforce justice and the rule of law

**Conclusion**

South Africans set the rule of law bar very high. And we should. Our history demands it; our future depends on it. A fearless, independent, and professional prosecution authority is a key component of any sustainable effort to uphold the rule of law. We have made significant progress in building a strategically aligned, capacitated NPA that values and defends its prosecutorial independence. The wheels of justice - grinding at first - are now turning, and will gain momentum; impunity is no longer a given; the rule of law will prevail. I can say with confidence that the people of SA are, cautiously optimistic…but still impatient. We need to do so much more, and time is not on our side.

Prosecutors from across the globe face similar challenges. We carry the enormous burden of expectations on our shoulders. To be sure, it’s a challenging job, and can be stressful. But it’s also a huge honour. The IAP provides a platform for us to prevail together. Not only by sharing experiences and expertise. But also, by drawing on each other’s strength and inspiration in the knowledge that we are a community of prosecutors fighting for justice and accountability together. We know failure is not an option. I therefore feel privileged to be here with all of you as we join hands in this collective fight for the future of the rule of law.

I thank you.

1. #  City Press, “Graphic: Zondo capture commission in numbers”, 5 January 2022,

https://www.news24.com/citypress/News/graphic-zondo-capture-commission-in-numbers-20220105 [↑](#footnote-ref-1)