

NDPP TALKING POINTS

27th IAP Annual Conference, 26 September 2022

PROSECUTORIAL INDEPENDENCE REMAINS THE KEYSTONE OF THE RULE OF LAW

Introduction

Prosecutors are powerful officials in any country's criminal justice system. They determine whether to prosecute, whom to prosecute and whether to divert a case and for which crimes; whether to seek pretrial detention; and whether to negotiate and offer concessions to obtain a conviction without a trial. 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 this power comes immense responsibility. We need to be accountable in how we exercise it.

In short, prosecutors lead efforts to uphold the rule of law. And we need to do so fearlessly and independently, particularly at a time when the rule of law is being stress-tested across the globe.

And South Africa is no exception. The country is reeling from the effects of at least a decade of what has come to be known as "state capture" - a orchestrated attack against our democracy and economy where a coterie of political and business allies 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, which is 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 but lethal war waged on the rule of law by the very people who were supposed to protect and promote it – including the past leadership of the NPA and critical parts of the Police. This is not a recent phenomenon as some might want to believe, and it involves many actors, from government and the private sector - both local and multinational.

But South Africa is a resilient nation and 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 (known as the "Zondo Commission"), chaired by the Chief Justice of the Republic, R Zondo. The Commission held more than 400 hearings of evidence and procedural hearings, which have implicated

approximately 1500 people and entities.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.

It is estimated that about a third of the GDP of SA was stolen; a substantial portion having left the shores of SA. The impact of state capture has been devastating - When corruption flourishes there can be no meaningful economic growth, no sustainable development, no significant investment, and no effective service delivery. In the end all South Africans suffer, especially the poor who rely on state services – such as health care, education, basic infrastructure, roads; water and sanitation, for their wellbeing and survival.

Rightfully outraged over the large-scale looting of state resources, the people of South Africa are demanding accountability for the architects, enablers and supporters of state capture, both within and outside government and that 'we bring back the money'. Prosecutorial independence is not only vital for the NPA to prosecute political architects of corruption without any interference and thus reaffirm the rule of law, but also to regain public trust in the NPA as an institution since it did not escape the clutches of capture and was deliberately weakened.

The recent history of the NPA witnessed its independence being compromised through (i) political interference – or the failure by the former President to institute an enquiry into the fitness to hold office of senior members of the prosecuting authority on account of reported serious misconduct and impropriety – and (ii) impropriety by previous senior leaders of the NPA in their handling of several key, high-profile or politically sensitive cases (including their failure to prosecute), which called into question their integrity and conscientiousness and consequently their ability to exercise their prosecutorial powers and carry out and perform their functions and duties without fear, favour or prejudice, as required by the Constitution and the NPA Act.

Moreover, as the NPA continues to rebuild itself, and assists in closing the taps of corruption by enrolling seminal corruption cases, it has to operate 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 instil the public perception that prosecutions are being

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>

'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.

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 precepts that guarantee the institution's independence, both institutionally and functionally. For instance, the Constitution of the Republic establishes the NPA as the single entity with the power to institute criminal proceedings on behalf of the state. It also requires national legislation, given effect by the adoption of the NPA Act, to ensure that the prosecuting authority exercises its functions without fear, favour or prejudice. Section 32(1)(b) of the NPA Act further safeguards the independence of the NPA by stating that no organ of state and no member or employee of an organ of state nor any other person shall improperly interfere with, hinder or obstruct the prosecuting authority or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions. Section 41(1) makes it a criminal offence if any person contravenes these provisions. Lastly, the NPA's Code of Conduct states that prosecutorial discretion should be free from political, public and judicial interference

Factors contributing to the ***de facto* independence** of the NPA would be the extent to which the constitutional and legislative requirements and strictures appertaining the institution's independence are implemented or carried out. That is to say, the degree to which there is no improper interference in the powers, functions and duties of the prosecuting authority, and the degree of the autonomy and financial and administrative independence of the prosecuting authority. Further aspects that have a bearing on *de facto* prosecutorial independence would be the method of appointment and promotion process of prosecutors, their tenure, reasonable conditions of service, adequate remuneration and resources, removal, transfer and security, and the reduction or declining of an adequate budget or financial and human resources which can hamper or render impotent the mandate of the prosecuting authority.

There are areas where the institution can be strengthened to minimize the risk of capture from happening again. Over the past three and a half years as National Director, we have implemented a **turn-around strategy** to rebuild the NPA into a trusted, independent and effective organisation that pursues justice for all. There is still work to be done – and I will mention those aspects shortly – but let me first give you a summary of some of the key initiatives that have been implemented to rebuild a fit-for-purpose independent organisation to deliver accountability and uphold the rule of law.

NPA initiatives instituted thus far

- **Open, transparent and deliberative process for the appointment of the NDPP**

South Africa's constitution and the NPA Act requires the President to appoint a National Director of Public Prosecutions (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 not being required by law, to appoint the current NDPP, President Ramaphosa called on organisations and public institutions to assist in identifying suitable candidates for the post and instituted a panel consisting of reputable independent persons from the legal fraternity, and other experts in the field of justice to evaluate applicants, conduct interviews and make recommendations. This process did not divest the President of the power, as head of the national executive, to appoint a NDPP. 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 NDPP. It engendered confidence in the integrity of the process, and confidence in the selection of a candidate objectively suited to serve in the position of the NDPP. Discussions with the Executive will commence soon to entrench such an appointment practice through legislation; both for the NDPP and senior NPA leaders, since at present, it depends on the discretion of the President.

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

In order to support a cultural change within the NPA, we adopted a set of fundamental values to infuse everything we do in our quest to be the lawyers of the people. The IPAC values represent

the character of the institution that we are committed to building, namely, one that is independent, professional, accountable and credible (IPAC). 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.

- **Capacitating the NPA**

International standards and guidelines indicate that a lack of adequate resources and infrastructure for the prosecution service is a fundamental challenge that may affect the capacity of prosecutors to perform their functions in an independent and impartial manner. After many years of financial neglect, in the early months of my tenure we embarked on an aggressive budget advocacy drive. The new administration was committed to rebuilding the NPA and the rule of law and the NPA was allocated an increase in budget which enabled it to enhance its human resource and technological capacity. Our people are our strongest asset. Over the past three years we have recruited more than a thousand five hundred employees, created much needed capacity in critical areas and expanded the Aspirant Prosecutor Programme. 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.

We have strengthened our skills development focus, with extensive specialised training and bespoke capacity development initiatives. A key focus is on inculcating a culture of courage in decision making. We need courageous prosecutors who are not afraid to do the right thing. We are partnering with Oxford University on a programme focused on building courageous leaders and have established partnerships with private sector actors to provide specialist skills and training..

- **Office for Ethics and Accountability**

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. This office will also enable prosecutors to raise concerns about independence and integrity (i.e. undue pressure). The draft legislative amendments for the establishment of this office have been submitted to the Minister of Justice and Correctional Services, and the office should be launched in the 2022/23 financial year.

Work to be done

Enhancing the financial independence of the NPA

- The NPA is not financially independent from the Department of Justice (DOJ). The Director-General of the DOJ is presently the Accounting Officer ("AO") of the NPA. To further strengthen and enhance the independence of the NPA as a constitutional institution, it is preferable for the NPA to be delinked from the DOJ. The NPA must be able to determine and be responsible for its own budget and to have its own chief executive officer ("CEO") who is also the Accounting Officer.

Enhancing the permanence of the Investigating Directorate

- The NPA's most valuable tool to fight against state capture and corruption is its Investigating Directorate, which has been established by presidential proclamation. However, for the ID to be fully independent and effective, it should become a permanent structure, with a permanent staff complement and the necessary investigative powers, that cannot be de-established at the discretion or whim of a President.

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 in our country. We have made significant progress in building a strategically aligned, capacitated NPA that values and defends its prosecutorial independence. But we need to do more, and time is not on our side. The NPA is now in the phase of impactful action and accountability. The wheels of justice are turning; impunity is no longer a given; those most responsible for corruption and state capture will be held accountable; and the rule of law will prevail.

Prosecutors from across the globe face similar challenges. We carry the enormous burden of expectations on our shoulders. To be sure, it's a stressful job. 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.