



EROSION OF INDEPENDENCE: THE NATIONAL PROSECUTING AUTHORITY OF SOUTH AFRICA 1996 - 2013

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Introduction

The foundation of a stable and prosperous democracy is grounded in its respect and adherence to its Constitution and rule of law. The 1996 South African Constitution laid the groundwork for such a democracy. A major part of a prosperous democracy lies in the country's ability to prosecute criminals properly. This need was enshrined in section 179 of the 1996 Constitution, which required the creation of "a single prosecuting authority", and the *1998 National Prosecuting Authority Act* officially created the Authority. As stated in the *National Prosecuting Authority Act (NPAA)* the "Constitution provides that the national legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice". It is this clause, which highlights that the National Prosecuting Authority was created to be independent and act without bias or prejudice. Unfortunately, the National Prosecuting Authority's ability to act "without fear, favour or prejudice" has increasingly come under threat during the Mbeki and Zuma presidencies. The weakening and erosion of independence in the National Prosecuting Authority undermines the Constitution and threatens the rule of law in South Africa.

The Scorpions

In order to understand the unfortunate direction the NPA has gone in, one must first understand its history and early successes. A major aspect of the early success of the National Prosecuting Authority came from the establishment of the Directorate of Special Operations, more commonly known as The Scorpions.¹

The Directorate of Special Operations was formed at the end of 1999, but officially came into being in January of 2001 as the investigating wing of the National Prosecuting Authority.² During this time Scotland Yard and the FBI gave numerous Directorate of Special Operation (DSO) officials training in order to carry out their objectives of prioritizing, investigating, and prosecuting serious and organized crime.³ Given the nature of the Scorpions work and how they operated outside of the South African Police Service, many political parties and citizens initially were worried about this group becoming the President's personal police force and questioned their ability to be impartial. Much to the relief of the public and opposition politicians, the Scorpions quickly made a name for themselves as South Africa's premier crime-fighting unit.⁴ They were able to claim such a title in large part to their success in the early investigating of the 'Arms Deal' and 'Travelgate'.

¹ Jean Redpath, *The Scorpions: Analysing the Directorate of Special Operations*

² Jean Redpath, *The Scorpions: Analysing the Directorate of Special Operations*, p. 7

³ Jean Redpath, *The Scorpions: Analysing the Directorate of Special Operations*, p. 22

⁴ Jean Redpath, *The Scorpions: Analysing the Directorate of Special Operations*, p. 7



Travelgate

One of the Directorate of Special Operations earliest and highest-profile investigations was when it investigated travel voucher fraud and corruption by members of Parliament in 2004. 'Travelgate', as the press noted it, was the illegal use of parliamentary travel vouchers to pay for exotic trips and holidays by Members of Parliament and their family members. The government gives MPs these travel vouchers in order for them to visit their constituencies throughout the country. Instead of using these vouchers for such work, MPs, with help from corrupt travel agents, took holidays with the vouchers and even gave family members airplane tickets.⁵ The Scorpions investigated some 300 MPs in regards to the travel voucher scandal, which resulted in 38 prosecution cases against members of Parliament.⁶ The exposure of the corrupt MPs and the ensuing investigation by the Scorpions solidified in the public's minds the ability of the DSO and NPA to tackle government corruption without favor or prejudice, as constitutionally mandated.

Jackie Selebi & Vusi Pikoli

Although 'Travelgate' was an embarrassment for the ANC as well as other political parties with guilty MPs, the ANC used the episode to show that it was indeed tough on crime and willing to prosecute its own members if they were guilty.⁷ This 'honeymoon' period where the ANC welcomed investigations into corrupt official did not last long following 'Travelgate'. The beginning of the end for such openness and accountability began when former Special Advisor to the Minister of Justice, Vusumzi Pikoli was appointed head of the National Prosecuting Authority in 2005.

In September of 2007, the National Prosecuting Authority, on the behest of Vusi Pikoli, issued an arrest for former Interpol head and National Commissioner of the South African Police Service Jackie Selebi on corruption, fraud, and racketeering charges. The corruption charges stemmed from Selebi receiving improper payments from drug trafficker and former friend, Glenn Agliotti. Three months prior to the arrest warrant issued for corruption, fraud, and racketeering, the Scorpions were told not to arrest Selebi following intervention from then-President Mbeki. When Mbeki attempted to use the guise of national security as the reason for telling Pikoli to wait two weeks before arresting Selebi, Pikoli said that it was a façade. He noted that, "national security should not be used as an excuse to avoid a criminal investigation where there is evidence of a criminal offence".⁸ Just days prior to the arrest, President Mbeki suspended Vusi Pikoli as head of the NPA in a last ditch attempt to silence the warrant for Selebi. This was a watershed moment in that it showed publically that government officials, in this case the President himself, were now attempting to subvert the independence of the National Prosecuting Authority to protect friends and colleagues.

⁵ Andrew Meldrum, *40 Accused in South African MPs' Fraud Case*, 24 January 2005.
<http://www.guardian.co.uk/world/2005/jan/24/southafrica.andrewmeldrum>

⁶ The Case for Retaining the Scorpions, Democratic Alliance, February 2008

⁷ Andrew Meldrum, *40 Accused in South African MPs' Fraud Case*, 24 January 2005.
<http://www.guardian.co.uk/world/2005/jan/24/southafrica.andrewmeldrum>

⁸ <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page72308?oid=114952&sn=Marketingweb%20detail>, I was suspended over Selebi - Pikoli



Following an unsuccessful appeal of the original conviction, the former Interpol head was sentenced to 15 year in prison for corruption. Judge Meyer Joffe, who convicted Selebi of accepting bribes from drug dealer Glenn Agliotti in exchange for secret police reports, called the former police chief an "embarrassment to South Africa and the police".⁹

Less than a year after arriving in prison, Selebi was released on medical parole in July 2012; essentially dodging the court's ruling and subverting justice. The entire Selebi affair was a humiliation to South Africa both domestically and internationally and exposed the clashes that were to come between the National Prosecuting Authority and government.

Pikoli's Firing and the Polokwane Conference

Following NPA boss Vusi Pikoli's suspension by President Mbeki after the Selebi arrest warrant, an inquiry was held tasked with finding if Pikoli was "fit to hold office as the National Director of Public Prosecutions".¹⁰ During the Ginwala Commission of inquiry, Pikoli's lawyer noted that the suspension came just days after Pikoli issued the arrest warrant for Jackie Selebi, against the wishes of President Mbeki. In addition, Wim Trengrove, Vusi Pikoli's lawyer, told the inquiry that there had never been any complaints made against Pikoli as head of the NPA and that the suspension was "unconstitutional and unlawful" and "a criminal instruction in term of the NPA Act", as outlined in the Constitution.¹¹

The Ginwala Commission of Inquiry into Vusi Pikoli's suspension returned their recommendation that the suspended NDPP ought to be reinstated at the beginning of December 2008. Although the report noted that he should be reinstated, a caveat in the report noted that his conduct in regards to the Selebi Affair held "a real risk of undermining national security". Just days after the Ginwala Commission issued that report, President Motlanthe decided to fire Vusi Pikoli rather than reinstate him. President Motlanthe noted that he was firing Pikoli due to his lack of regard for national security matters and that Motlanthe made the decision himself without outside influence.¹² Opposition parties saw the true reason behind the firing as a way to punish Pikoli for attempting to prosecute Selebi, as well as Jacob Zuma, by President Motlanthe and an attempt to further erode the ability of the NPA to do their constitutionally mandated work. The Democratic Alliance strongly condemned the actions of Motlanthe saying that he "failed his first test of his Presidency which was to put South Africa's interests before the narrow interests of the Zuma faction of the ANC".¹³ DA leader Helen Zille went on to say that "Motlanthe has fired an independently-minded NDPP [Pikoli] to replace him with one who will do the ANC's bidding in respect of the prosecution of Jacob Zuma". This statement furthered the belief

⁹ <http://mg.co.za/article/2010-08-03-selebi-sentenced-to-15-years>

¹⁰ Harsh accusations fly at close of Pikoli inquiry, Jenni O'Grady, Aug. 1st, 2008, <http://mg.co.za/article/2008-08-01-harsh-accusations-fly-at-close-of-pikoli-inquiry>

¹¹ Ibid.

¹² Motlanthe Decides Against Reinstating Pikoli, <http://mg.co.za/article/2008-12-08-motlanthe-decides-against-reinstating-pikoli>

¹³ <http://mg.co.za/article/2008-12-08-da-pikoli-decision-has-the-hallmarks-of-a-coverup>



that Pikoli was fired not because of his lack of regard for national security, but in fact because he was opening corruption and fraud charges against Jacob Zuma as well as his prosecution of Jackie Selebi.

In the midst of the Selebi corruption charges and the suspension of Vusi Pikoli was the 52nd National Conference of the African National Congress, which was held in Polokwane in December 2007. The conference was noted for begin the moment in which Jacob Zuma was elected to the top of the party, ending Thabo Mbeki's rule. Like Mbeki, the effectiveness of the NPA and the Constitution suffered a huge defeat at the Polokwane Conference. During the conference, the ANC quickly passed resolution to disband the Scorpions, the same unit who was investigating Zuma in relation to fraud and corruption.

Disbanding of The Scorpions

The crime-fighting unit, which had just four years prior been described as South Africa's premier crime-fighting unit was gone. The conviction rate for the DSO was between 82% and 94% from 2002 to 2008, with over 617 people arrested in 2006 alone.¹⁴ The South African parliament, with its majority ANC representation, quickly passed the law that officially abolished the Scorpions in October of 2008.

By this time what remained of the Scorpions was merged with the South African Police Service under the title of Directorate of Priority Crime Investigation, or the Hawks. Unfortunately, this was not done to streamline crime-fighting in South Africa, but instead to crush the independence of the Scorpions as well as act as a warning signal to the rest of the NPA not to investigate high ranking ANC members or their politically connected friends. Now placed under the SAPS, the Hawks could be controlled and used by politicians to not only turn a blind eye to crime, but to prosecute perceived rivals.

With Vusi Pikoli sacked, his acting replacement as head of the NPA was Mokotedi Mpshe. Mpshe is originally an advocate, but who has been dogged by controversy over the length of his career. In 1999 he was found guilty of four misconduct charges, but after appeal admitted to being guilty of one of the charges. The charge being he did not show up to represent clients on four separate occasions in 1996.¹⁵ He has been criticized by a number of opposition parties as being too close to the ruling ANC.¹⁶ His checkered history and perceived ties to the ANC would lead one to question just how impartial and competent he could be as head of the independent National Prosecuting Authority.

Mpshe, the Hawks, and Glenister

Mpshe would prove his usefulness to the ANC when he replaced Pikoli as head of the National Prosecuting Authority just as the NPA sought to charge President Zuma with over 700 corruption and fraud charges. Instead of pushing forward with the charges, Mpshe actually dropped all the charges as head of the NPA. Although Jacob Zuma's business

¹⁴ The Case for Retaining the Scorpions, Democratic Alliance, February 2008

¹⁵ Marriage Made in Hell, <http://www.mg.co.za/article/2007-09-27-marriage-made-in-hell>

¹⁶ Ibid.



partner Schabir Shaik had been found guilty of fraud in the same Arms Deal, Zuma would be free to stand for election two weeks following the dropping of the charges and become President. Condemnation of the move by Mpshe was seen across the political landscape with the Democratic Alliance noting that the "NPA had been manipulated by a pro-Zuma faction within the ANC". The Congress of the People Presidential candidate Mvume Dandala said the "behind-the-scenes manipulation in the decision to charge Zuma needed to be tested in a court of law".¹⁷ The dropping of charges has widely been seen as the President not respecting the rule of law and subverting the judiciary.

Following the creation of the Hawks as a part of the South African Police Service, questions sprang up regarding the ability of the unit to be truly independent of political meddling. In 2010, Johannesburg businessman Hugh Glenister brought the *President of the Republic of South Africa & Others* to court regarding the independence of the Hawks. On March 17th, 2011 the Constitutional Court ruled, "The DPCI (the Hawks) does not meet the constitutional requirement of adequate independence. Consequently the impugned legislation does not pass constitutional muster".¹⁸ The Constitutional Court found that the Hawks are not sufficiently insulated from political influence "in its structure and functioning".¹⁹ They ruled as such, because the DPCI's work is overseen and "coordinated by Cabinet", making it vulnerable to political interference in its work.²⁰ The ruling was hailed as a great achievement and Glenister said he hoped, "that South Africans will now start tightening the reins on their politicians at every level, from the municipal to national".²¹ In addition, the ruling was supported by all the major opposition parties who had also objected to the disbanding of the Scorpions such as the Democratic Alliance, Inkatha Freedom Party, Freedom Front Plus, and United Democratic Movement.²²

The verdict allowed Parliament the opportunity to amend "the legislation to provide the Hawks unit with adequate specialization and training, independence from political influence and interference and guaranteed resources".²³ Unfortunately, government has not followed through on the ruling. Glenister, echoing the larger public, is not happy with the lack of progress being made to remedy the Hawks situation and has given government an extension to fix the legislation. He has said that it would be possible for a new chapter nine institution to be created that would deal with corruption while also being outside the influence of the

¹⁷ NPA Drops Corruption Charges Against Zuma, 6th April 2009, <http://mg.co.za/article/2009-04-06-mpa-drops-corruption-charges-against-zuma>

¹⁸ Hawks Not Independent Enough – ConCourt
<http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=226664&sn=Detail&pid=71619>

¹⁹ Ibid.

²⁰ Ibid.

²¹ Disbanding of the Scorpions and Creation of the Hawks Declared Constitutionally Invalid,
<http://www.moneyweb.co.za/moneyweb-south-africa/disbanding-of-the-scorpions-and-creation-of-the-ha?sn=2009%20Detail>

²² Ibid.

²³ Glenister Not Backing Down on Hawks, <http://www.iol.co.za/news/crime-courts/glenister-not-backing-down-on-hawks-1.1433213#.UWaXWiMjGUw>



police.²⁴ At present, the issue remains unresolved and the Hawks remain under the SAPS and open to political influence.

Simelane

Prior to the Constitutional Court case regarding the Hawks in 2010, Jacob Zuma appointed Menzi Simelane to take over for acting-head of the National Prosecuting Authority Mokotedi Mpshe. Immediately, the appointment came under serious scrutiny from politicians as well as the general public, especially considering Menzi Simelane played a major role in the firing of the previous head of the NPA Vusi Pikoli. Not only this, but his actions and testimony at the Ginwala Commission regarding Vusi Pikoli were found to be "inaccurate or without any basis in fact and law". Simelane also attempted to interfere with the National Prosecuting Authority's ability to carry out the arrest of Jackie Selebi. He spoke of being shifted to one of the National Directors of National Prosecutions positions in order to "serve the party [ANC]" and "that part of his task was to implement the ANC's vision of the NPA".²⁵ Since the NPA possess the power to determine who and who will not be prosecuted, it is essential to make sure that the person who heads the National Prosecuting Authority be fit and competent as well as without bias or influence. The attempt to appoint Menzi Simelane to such a position was a clear attempt to not only undermine the effectiveness of the NPA, but to use the National Prosecuting Authority as a pawn of African National Congress.

Finally in October of 2012, the Constitutional Court squashed the last appeal by Menzi Simelane, reinforcing that his appointment was invalid. The Court looked heavily at Simelane's dishonesty at the Ginwala Commission and Justice Yacoob noted the need for the head of the NPA to be a person of credibility and integrity to lead, which Menzi Simelane is not.²⁶ The attempted appointment of Menzi Simelane highlights the overall view that the ANC and Jacob Zuma hold for the constitutionally created National Prosecuting Authority. They view the NPA as a tool, which can be used by their party to attack opponents and shield their own, rather than a nonpolitical, nonbiased prosecuting authority to assist South Africa prosecute crimes "without fear, favour or prejudice".

Mrwebi, Mdluli, and Breytenbach

The most recent incursion into the independence of the National Prosecuting Authority came when Lawrence Mrwebi, head of the specialized commercial crimes unit of the NPA, decided to stop the prosecution of former crime intelligence boss, Richard Mdluli.²⁷ Mdluli was being charged with murder as well as defrauding the secret services account, which is used to finance undercover crime intelligence.²⁸ In addition to the charges being dropped, Glynnis Breytenbach, a senior prosecutor of the NPA who was working on the prosecution of Mdluli, was suspended. Breytenbach was suspended due to her, "handling of criminal fraud

²⁴ Glenister goes back to Concourt over Hawks ,<http://www.peherald.com/news/article/10431>

²⁵ Adv. N de Havilland, November 2009, Appointment of Adv Menzi Simelane as the National Director of Public Prosecutions

²⁶ Yes, Zuma erred on Simelane, <http://www.sundayworld.co.za/news/2012/10/08/concourt-yes-zuma-erred-on-simelane>

²⁷ Breytenbach Hearing Lays Bare Mrwebi's Strategy, <http://www.youtube.com/watch?v=U-lyJnXmZwo>

²⁸ <http://www.iol.co.za/the-star/mdluli-to-face-inquest-1.1306799#.UWvvRSMjGUw>



and forgery complaints laid by Imperial Crown Trading and Kumba Iron Ore in their dispute over mineral rights".²⁹ She has maintained that the real reason for her suspension was done by Mrwebi to protect his friend Mdluli from prosecution. While at her disciplinary hearing regarding her suspension, Glynnis Bretenbach noted that, "prosecutors take an oath to uphold the Constitution and I take it seriously. If we withdrew the matter for no good reason it was not a decision taken without fear, favour or prejudice and it's unlawful". Her statement reiterates the principles of the National Prosecuting Authority as enshrined in the Constitution and how Lawrence Mrwebi has abandoned such principles.

The fact that Mrwebi dropped charges of fraud and corruption against Richard Mdluli shows a blatant disregard for the National Prosecuting Authority's Constitutional duty, which is to prosecute crimes without "fear, favour or prejudice". The dropping of charges and attempts by Mrwebi to silence Bretenbach mirror closely the silencing of Vusi Pikoli's prosecution of President Zuma. The effects that these attacks have on the National Prosecuting Authority and thus the Constitution have far-reaching consequences, in regards to trust in government, the rule of law in South Africa, and similarity to the destruction of the judiciary in Zimbabwe.

Wider Effects

The effects of disbanding the Scorpions in addition to the dropping of charges against Zuma and Mdluli pose a far bigger impact than simply weakened crime fighting and a lack of justice. The 'declawing' of the National Prosecuting Authority by the ruling ANC shows that other areas of the Constitution can be infringed upon.

The way in which the National Prosecuting Authority has rather quickly gone from an unbiased and apolitical body to one that protects those in government is a very worrying trend for the rest of the Constitution. If the government can influence the National Prosecuting Authority to the degree in which they have already, it makes one question which other parts of the Constitution can be altered or disregarded by those in power. Beyond the ability to alter the Constitution, another worrying trend is the loss of civic trust and rule of law.

If the government continues to be allowed to ignore the National Prosecuting Authority and subsequent court rulings regarding the Hawks, this has and will have serious implications for civic trust in government and government officials. Having witnessed the way that Vusi Pikoli was sacked and how Jacob Zuma had his corruption charges dropped, the general population of South Africa is lead to believe that those in government are governed a separate set of laws than the rest of the country. When the President can get away with breaking laws there can be a trickle-down effect, where the rest of the population soon feels that they do not have to obey the law either. This is a very dangerous trend that has enormous social, political, and economic consequences.

²⁹ <http://www.bdlive.co.za/national/2013/01/28/breytenbach-claims-her-mdluli-memo-triggered-suspension>, Breytenbach Claims Her Mdluli Memo 'Triggered' Suspension



For those who question the importance of an independent National Prosecuting Authority and adherence to the rule of law need only to look across the Limpopo to neighboring Zimbabwe to see the damage that can be caused when such independence is lost. Zimbabwe which previously had a very strong legal profession and well-respected judiciary has quickly seen that eroded and lost according to Mark Ellis of the International Bar Association.³⁰ For years the world has seen President Mugabe become intimately involved in the judiciary, harassing judges, not adhering to judgments, and blatantly disregarding the rule of law. One of the watershed moments in the total loss of judicial independence came in 1999 after newspaper editor Mark Chavunduka was illegally detained and tortured, the Supreme Court of Zimbabwe ordered the release of the journalists. Mugabe, not only did not abide by the decision, but decided to tell the judges to resign and said, "they [judges] had no right to instruct him to do anything and that, because of their biased petition, the government could no longer trust them on any case involving the executive".³¹ Although South Africa has not seen that type of blatant dismissal of the legislature, we are seeing the true feelings President Zuma and ANC has for the National Prosecuting Authority with the disbanding of the Scorpions, appointment of Mpshe and attempted appointment of Simelane. Even after the Simelane appointment failed, President Zuma had not appointed a permanent head for the NPA, which weakens the National Prosecuting Authority's abilities to fulfill its constitutionally mandated job. President Zuma is making sure that only those loyal to him and the ANC are leading the National Prosecuting Authority, just as President Mugabe made sure only judges loyal to him were making important judgments in Zimbabwean courts.

Conclusion

The continuous and increasing erosion of independence in the National Prosecuting Authority damages not only the ability for the state to prosecute crime, but also severely hurts the respect for the rule of law and civic trust in government. From the disbanding of the Scorpions, to the firing of Pikoli and dropping of charges against Zuma as well as highly questionable appointments, one must realize that the current government is attacking the National Prosecuting Authority, and thus attacking the Constitution. Although this is a serious issue and the effects of such a loss of the rule of law can be seen in Zimbabwe, there are ways to promote and bolster an independent National Prosecuting Authority. Aware and active citizens are responsible for making sure that government respects the Constitution and the mandate of the National Prosecuting Authority and punishes those who do not by not reelecting them.

³⁰ <http://amlawdaily.typepad.com/amlawdaily/2008/06/mugabe.html>, Mark Ellis IBA

³¹ <http://www.wsws.org/en/articles/1999/02/zim-f26.html>, Zimbabwe: Mugabe Government Abandons the Rule of Law, Feb. 26th 1999