

CHAPTER 2 HISTORY

President Thabo Mbeki launched the “Scorpions”³ in Guguletu in the Western Cape on 1 September 1999, soon after assuming the reigns of the presidency in June that year. Journalists at the event shifted between questioning the appropriateness of the name, given that it matched that of a notorious Cape gang, and wondering “But *who* are the Scorpions?” They need only have turned around and looked at the people sitting at the back of the hall; for the staff of the then Western Cape office of the Investigating Directorate on Organised Crime and Public Safety (IDOC) were all there, and it was the staff of these directorates that formed the core of the Scorpions soon after its launch. This tendency to “hide in plain sight” has continued to be a theme of the Scorpions’ operation.

Because the launch of the Scorpions had not been preceded by widespread public debate or debate in Parliament and followed so closely on Mbeki’s assumption of leadership, political opposition parties expressed some doubts on the day of the launch. They pointed to problems and issues which needed to be resolved, some of which seem remarkably prescient when reviewed four years later.

The Inkatha Freedom Party (IFP) welcomed the formation of the Scorpions, but warned there should be no political interference in the functioning of the new unit. IFP safety and security spokesperson, Velapi Ndlovu, said it would be vital that the director of the unit remain free of political interference and not be used as a tool for political harassment: “Our democracy is very new and fragile; if we are to cherish and nurture it, we must be on our guard at all times against the misuse of organs of the state for political purposes,” Ndlovu said.⁴

Graham McIntosh of the then Democratic Party (DP) welcomed the establishment of the “Directorate of Special Investigations”⁵, but said the DP was concerned that the Scorpions would apparently report to Mbeki, and there was no indication whether this meant that Mbeki and his office would essentially be afforded powers to gather information, investigate and prosecute.

Further, there did not appear to be any measures in place which ensured that the Scorpions would be held accountable for the work they undertook. It was also not clear whether the powers and functions of the Scorpions would be set out in legislation, which Parliamentary committee the Scorpions would report to, nor whether functions of the Scorpions would be clearly differentiated from existing law enforcement agencies, such as the National Intelligence Agency. "This differentiation is imperative if rivalry between the various agencies is to be avoided," McIntosh said.⁶

The Pan Africanist Congress (PAC) said it was uneasy as to how the activities of the unit would be monitored. Then-PAC spokesperson Patricia de Lille said she was concerned that the names of the members of the unit would not be public knowledge. She said the PAC believed it was not possible to strengthen democracy when "nameless people" were operating with extensive monetary and technological resources.⁷

From the beginning, one of the motivating factors behind the creation of the Scorpions appeared to be to raise public confidence in the ability of government to fight crime. No matter what efforts had been made since 1994 to transform the South African Police force (SAP) into the South African Police Service (SAPS), the public appeared unconvinced that the police could be trusted and were winning the fight against crime. Hence despite the fact that many of the details around the operation of the Scorpions had not been ironed out – and indeed the legislation creating the "DSO" was not finalised until months later – the Scorpions were launched with all the paraphernalia of a well-managed media campaign, including T-shirts and baseball caps emblazoned with their catchy name and logo. In the public imagination, the Scorpions existed as of 1 September 1999, and close media attention has been a hallmark of their operation ever since.

Even the head-designate of the Scorpions, Frank Dutton, was not yet in the country at the Scorpions' launch, and only arrived in October 1999 from the Hague where he had been on secondment to the United Nations War Crimes Tribunal probing Bosnian war crimes. Dutton was a respected senior policeman hailing from KwaZulu-Natal who had headed investigations into the Trust Feed and KwaMakutha massacres. Percy Sonn,⁸ as head of IDOC (a unit of the NPA which was one of the entities operating as "the Scorpions") became "head of prosecutions", with Dutton acting as "head of investigations", although Dutton was termed the "CEO" of the Scorpions. The immediate work of the Scorpions was in effect to carry on the work which the various investigating directorates within the NPA, established under the provisions of

the NPA Act, had already been doing. Dutton arrived to join the Scorpions in November 1999, but took early retirement in November 2000 for health reasons, after which Sonn effectively lead the Scorpions.

The Scorpions only officially came into legal existence as of 12 January 2001 (16 months after being launched) when the amendments to the NPA Act came into operation.⁹ Those within the Scorpions worked under a great cloud of uncertainty during this initial period before the legislation was passed, as most were seconded to the unit and did not know if they would finally be appointed to the DSO, and nobody knew exactly where the new unit would fall and what its powers and obligations would be.

Exacerbating this uncertainty, Sonn and Dutton became embroiled in controversy in July 2000 when allegations of “unauthorised spending” were levelled against them both in the media. While the press focused on “luxury homes” that were too large and bought without proper approval, the allegations also involved rental of office space and office equipment – sorely needed by the Scorpions in order to do their work. This was an early taste of clashes with government rules around procurement that still have an impact on DSO operation today.

The legislation creating the DSO took months to finalise. Opposition parties continued to express their fears that the DSO would be the “president’s private police force”, and that there would be problems with the police around turf. Fears were also raised about whether such a body would be constitutional, given that the constitution provides for a single national police service.

At first, a draft Directorate of Special Operations Bill was drawn up. This Bill envisaged that the national director would be a member of the DSO, and that a chief investigating officer be the effective head of the organisation. This person need not be a deputy director or be otherwise legally qualified. The Bill also provided that the national director *must* (not may) *in* consultation (not *after* consultation – “in” implies consensus) with the national commissioner of the SAPS determine procedures for the referral of investigations to the DSO. A deputy director of the NPA would also have to be assigned to the DSO by the national director to assist with investigations. The rest of the Bill talked about permanent, seconded and contract members, reflecting a desire to confirm what was already happening in practise.

Members of Parliament complained that the Bill that was eventually passed was confusing and difficult to follow. The final Bill, an amendment to the NPA

Act, placed a deputy national director of the NPA as head of the DSO. The bill makes no provision regarding referral of matters to the DSO, save that the Ministerial Committee provided for in s31, should determine such procedures.¹⁰ At the time of writing, more than four years after the launch of the DSO, the Ministerial Committee has not yet met for that purpose.

Addressing the constitutional question, the Bill takes the unusual measure of noting in the preamble, what is *not* provided for in the constitution:

“AND WHEREAS the Constitution does not provide that the prevention, combating or investigating of crime is the exclusive function of any single institution...”

The Bill was finally passed in December 2000, traditionally the time of year when difficult legislation is passed, and came into effect in January 2001. Meanwhile, the “Scorpions” had already been operating for some 16 months, first under Dutton and Sonn, and then under Sonn only.

Percy Sonn’s management style has been described as “can do” and “shoot from the hip”. He found the bureaucratic procedures required to be followed for just about everything to be done within the NPA very burdensome, and tried to circumvent them whenever he could, he claimed, in order to get the job done. He professed to follow an “open-door” policy and had an “informal” relationship with the people who worked for him: “Pick up the phone and ask me!” he would say.

However, his concurrent responsibility as chairman of the United Cricket Board (UCB) raised eyebrows as to his ability to do justice to either position. The Hansie Cronje cricket match-fixing scandal which broke in April 2000 saw his positions bizarrely seem almost to coincide, given the role of his colleague, then NPA deputy director Shamila Batohi (subsequently regional head of the DSO in KwaZulu-Natal for some time) in the King Commission.¹¹

Sonn resigned from the DSO in July 2002, citing personal reasons. Sonn was subsequently forced to resign from the UCB following a drunken incident at a World Cup cricket match in Paarl in February 2003.

A successor to Sonn was not quickly appointed. Sonn’s “head of operations”, Leonard McCarthy, was appointed investigating director in an acting capacity, resulting in a climate of uncertainty within the DSO over that period, and rumblings within the DSO about the need for a black African, to be made

head of the DSO. The difficulty in being both the head of operations and acting investigating director was only relieved when Geoph Ledwaba was appointed head of operations, and McCarthy himself was permanently appointed in April 2003.

McCarthy's management style is almost completely opposite to that of Sonn's. Methodical and careful, he keeps to the letter of the law and procedure on all matters, and has maintained a very low profile despite the newsworthy nature of his position. His carefulness has also manifested itself in his surrounding himself with advisors and another layer of command at head office between himself and the people who work under him, termed "desk-heads", and his preference for written communication.

It was during McCarthy's quieter and more careful leadership of the DSO that the NPA head, national director Bulelani Ngcuka, began to become conflated in the public mind with the DSO. Although the DSO is a division within the NPA, and as such is ultimately accountable to the national director, it does have its own head, just as the Asset Forfeiture Unit (AFU), Witness Protection Unit (WPU) and Sexual Offences and Community Affairs (SOCA) unit have their own heads. Although the national director appoints the investigating director of the DSO, and has the ultimate say on whether a matter is to be *prosecuted* or not (on all matters, whether they are DSO matters or simply National Prosecuting Service matters) it is the investigating director who authorises preparatory investigations and has the power to declare an investigation in terms of s28 of the NPA Act: in other words, to decide what matters are to be *investigated* by the DSO, including those referred to the DSO by the national director himself. However, in practice, on controversial matters, McCarthy confers closely with the national director and indeed defers to his opinion; both their offices are in the NPA's well-appointed Victoria and Griffiths Mxenge building in Silverton, Pretoria, making this kind of conferring easy to achieve.

It was soon after the DSO's coming into legal operation that the DSO first confirmed, in April 2001, that it was investigating the arms deal¹² matter with a view to carrying out prosecutions for any criminal wrongdoing it might uncover. This investigation by the DSO continued until July 2003, when it transpired that the DSO was also investigating the role of the deputy president, Jacob Zuma, in the arms deal. It was in the furore over this revelation that the original questions about the DSO were again raised: is it constitutional that the DSO falls under the NPA and not the SAPS? To whom is the DSO accountable?

For some time in August 2003 there was speculation in the media over whether either or both of the DSO and the national director would survive the political fallout: his decision not to prosecute Zuma but to allege publicly that there was prima facie evidence against the deputy president attracted much discussion and speculation.

There appeared to be strong public resistance to the idea that there should be any changes to the nature or position of the DSO, despite suggestions from the highest level that the DSO should perhaps fall under the SAPS.¹³ Allegations then emerged linking the national director to spying activities on behalf of the apartheid government prior to 1994. It was at first announced that the DSO Ministerial Committee (see *Mandate*) provided for in s31 of the NPA Act would sit, for the first time, to investigate these allegations against the national director. It is difficult to see exactly how an “investigation” of this nature falls under the competency of this Ministerial Committee which is supposed largely to determine procedures for referral of investigations.¹⁴

However, it was subsequently announced that cabinet had taken a decision to launch a judicial inquiry, to be headed by a retired judge, Judge Joos Hefer, former president of the Supreme Court of Appeal, to uncover whether the national director had been a spy and whether he had consequently abused his position.¹⁵

Many commentators felt that the Hefer Commission was a distraction from the real twin issues of the alleged role of the deputy president in arms deal corruption, as well as the national director’s decision not to prosecute him. Hefer found that the evidence did not support a finding that the national director had been a spy. Hefer felt that consequently, the second leg of the inquiry – whether the national director had abused his position as a result of being a spy – fell away. The debate around the positioning of the DSO died down after the conclusion of the Hefer Commission, possibly also a consequence of the imminent election in April 2004.