

## CHAPTER 8

### ISSUES

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Prosecution-lead investigation, which been adopted by the DSO, has implications for the ethics of prosecutors – is this cause for concern? Armed with new legislation and a new way of investigating, the DSO has the potential to be a powerful force. Is it constitutional that the DSO falls under the national director’s office? The national director’s power, relevant also to DSO investigations, lies in the power of veto; what are the implications of this power, and how might pressure be brought to bear on a national director? What are the implications for the democratic principle of the separation of powers? How accountable is the DSO? What possible solutions are there for these problems?

#### **Ethics and prosecution-lead investigations**

One of the main aspects of DSO operation is the idea of “prosecution-lead” investigations (see *Operation*). This is controversial because the danger is that a prosecutor who becomes intimately involved in an investigation, may become ethically compromised:

“The object of a criminal investigation and a criminal prosecution is not to secure a conviction – it is to serve the interests of justice... The prosecutorial role is a role that is distinctive from the investigative role, and the great contribution that the prosecutor brings to the investigation is a professional detachment and objectivity.”<sup>121</sup>

Traditionally, prosecutors do not become involved in criminal investigations. The functions and professional duties of prosecutors and investigators have traditionally been separate. The ethical duty of a prosecutor, as an officer of the court, is primarily to the court, to assist the court in making a just decision. Prosecutors must assist the court to arrive at a just verdict, and not simply secure a conviction at all cost. This includes, for example, divulging possibly exculpatory evidence to the court where it exists, or assisting in putting the version of an unrepresented accused before court.

The national director himself is very aware of the problems raised by prosecution-lead investigation, and presented a paper on the topic at a conference in Durban in 2001<sup>122</sup>. In this paper, he suggests that the need to move from the traditional “detached” way in which prosecutors work, arose because the law had evolved to such an extent that the success of prosecutions, particularly in respect of organised crime, would often be compromised on legal technicalities. Simply involving legal expertise at an earlier stage alleviates the problem. He explains:

“The prosecutor can review the work of the investigator and can avert any potential challenges to the admissibility of evidence early on. When investigative methodologies like interception and monitoring of telecommunications and undercover operations are embarked upon, the investigators have the benefit of the prosecutor’s expert legal advice right from the start ... At a strategic level the prosecutor is able to guide the investigation to ensure that the goal of a successful prosecution is achieved. At a practical level, the prosecutor is also available to assist in making strategic decisions about which witnesses to offer indemnity to and to assess what the impact on an overall investigation will be of accepting a plea in a specific instance.”<sup>123</sup>

He suggests practical ways for the prosecutor involved in prosecution-lead investigation to avoid becoming ethically compromised. Most importantly, the prosecutor must at all costs avoid becoming a witness to facts or incidents, which might later require testimony in court:

“Integration or closer co-operation between the investigator and prosecutor should not be equated with role confusion. The distinction between the role of the investigator and prosecutor should not become blurred. The investigator is still the best person to perform the function of collecting the evidence. The prosecutor can review, advise and direct the investigator, however all the time mindful of the fact that he or she remains an officer of the court with certain ethical obligations. It is important that the prosecutor maintain a healthy distance from the actual gathering of evidence in order to ensure that these ethical obligations are not compromised. The prosecutor is there to guide the investigation not to do the job of the investigator. The prosecutor has to at all times be wary not to end up as a fact witness. There may well be cases where a prosecutor has become so steeped in the investigation that he should not prosecute that particular criminal case. By and large this situation can be avoided and care

should be taken to do so. Failure to do so will result in the prosecutor being called as a witness and therefore precluded from conducting the prosecution, which defeats the purpose behind assigning the prosecutor the case from the onset."<sup>124</sup>

Prosecution-lead investigation is not new in South Africa. In the 1980s prosecutors began to take on a more active investigative role. For example, during the Goldstone Commission<sup>125</sup> the then Attorney-General of the Transvaal, Jan d'Oliveira, was mandated by the State President to investigate allegations of illegal police hit squads with the assistance of carefully selected police officers. More recently, during the early 1990s, the threat of organised crime led to the creation of police units to deal with the problem, and attorneys-general or their staff often assisted these units. Legislation promulgated in 1991 gave senior prosecutors and their staff the power to investigate and prosecute serious economic offences, via the Office for Serious Economic Offences (OSEO)<sup>126</sup> the predecessor of the investigating directorates established by the NPA Act. The DSO is however the first entity in which prosecutors and investigators work together as a team within the same organisation on a continuous basis.

The involvement of the prosecution in the investigation of crime has therefore historically tended to occur where there is a suspect, but admissible evidence (as opposed to intelligence) is required to support a criminal conviction. Traditionally, a police investigation begins with an allegation of a crime, followed by a search for a suspect. Prosecutorial involvement in investigations tends to occur in situations where identified persons (corrupt policemen; known organised crime groups) appear to be involved in crime or appear successfully to have avoided being implicated in a crime, and although suspicion surrounds them, admissible evidence has not yet been obtained. Continuing this trend, the NPA legislation requires that the DSO focus its activities on organised crime,<sup>127</sup> and thus far some of the DSO's work has been "intelligence-based" and "proactive", in that information (as opposed to evidence) supplied by intelligence sources identifies suspects who should be targeted for investigation and prosecution.

## **Under the national director of public prosecutions**

The DSO is directly under the authority of the national director. Although he is not the actual head of the DSO, he has the power of veto over all prosecutions of offences, including those investigated by the DSO, and he is the ultimate authority over the DSO as an entity within the NPA. This section will consider the argument that the DSO under the NPA is unconstitutional. It will

consider the nature of the national director's power over all prosecutions, and the implications for the separation of powers.

### ***The constitutional question***

Some have questioned the constitutionality of the existence of the DSO under the NPA rather than the SAPS, or at all. There may come a time when the issue is tested in court. Until then, it remains a moot point. This monograph does not provide an expert constitutional opinion, but directs the reader, with some discussion, to the constitutional provisions that might be relevant to this question.

At the outset it should be noted that should the DSO be made to fall under any entity other than the NPA, *it would no longer be the DSO as such*. By definition, the DSO is the investigating arm of the NPA. Removing the DSO from the NPA, would remove from it the power to prosecute, which is essential to the operation of the DSO. Therefore the DSO cannot operate as it does anywhere other than in the NPA. Should it be removed from the NPA, it would no longer be the same kind of organisation. The DSO as it has been conceived can only exist in the NPA.

Nevertheless, there is still an argument that the DSO, *as conceived*, is unconstitutional, which must be considered. Those who question the existence of the DSO outside of the SAPS point to the constitutional provision that provides that there must be "a single police service"<sup>128</sup>. At the same time, this section also says, "other than the security services established in terms of the constitution, armed organisations or services may be established only in terms of national legislation"<sup>129</sup>. This provision envisages that Parliament may provide for other armed services, such as the DSO, as long as they don't amount to a police service. What has to be considered, therefore, is whether the DSO is operating as a police force. Assuming that amounting to a police service would require an entity to have objects, powers and functions similar to the SAPS, then it appears that the DSO is not a police service as it is currently operating, save in that it also investigates crime. But investigating crime is only one of the many functions of the SAPS. Should the DSO begin to mirror the operation of the SAPS, by taking on more SAPS-like functions, or should it be argued to be doing so, a problem might indeed arise in respect of this constitutional provision.

The activity of the DSO (as part of the NPA) that is particularly controversial and mirrors the police is that of investigation. Prosecution is obviously not controversial, as that is the main function of the NPA of which the DSO is part.

But investigation is one of the objects of the SAPS. The constitutional provision setting out the objects (aims) of the SAPS covers a broad range of objects, including the investigation of crime. These objects are manifestly not in the domain of the police service only. For example, “securing the inhabitants of the Republic”<sup>130</sup> would also be an object of the SA National Defence Force and the National Intelligence Agency. This would tend to suggest that objects of the SAPS are not exclusive to the SAPS. Consequently, other entities, such as the DSO, may also therefore have the object of investigating crime. Hence it appears the constitution does not exclude other entities, including the NPA and by extension the DSO, from investigating crime. But if the constitution does not prevent the NPA from investigating, does it empower the NPA to investigate?

The constitution provides that the national director has the exclusive power to institute prosecutions on behalf of the state (see *Veto Power*). At the same time, the constitution provides that the national director has the power to carry out any “necessary functions incidental to instituting criminal proceedings”. It could be argued that this includes the further investigation of certain crimes to ensure successful prosecution. Many institutions other than the DSO carry out investigations incidental to their functions – such as the Auditor-General, or the South African Revenue Service.

The investigation of crime is therefore not the exclusive preserve of the SAPS; furthermore, it could be argued that the constitution specifically empowers the NPA and therefore the DSO to carry out investigations incidental to prosecutions.

Indeed, the legislature seems to share this opinion. The legislature obviously envisaged a constitutional challenge to the DSO, and took the unprecedented step of attempting to head that off with its own opinion on the question. The preamble to the NPA amendment act creating the DSO says, “the constitution does not provide that the prevention, combating or investigating of crime is the exclusive function of any single institution” (see *History*).

The source of the discomfort around the DSO’s position in the NPA may lie more with discomfort as to the power held by the national director, the *de facto* head of the DSO (see *History*). The source of the national director’s power lies in the power of veto over all prosecutions, including those undertaken by the DSO. Ironically, the constitutional court has already considered the question of this veto power, and confirmed it in the certification of the constitution. The veto power of the national director will be considered in the next section.

## ***Veto power***

The National Prosecuting Authority Act of 1998 removed the independence of provincial attorneys-general and gave South Africa a single, national, prosecuting authority, as required by the constitution.<sup>131</sup> Once the act was passed, the “national director of public prosecutions” (dubbed by the press the “super-AG”) could veto the decisions of the provincial attorneys-general (termed “directors of public prosecutions”) and indeed of any prosecutor in the NPA, which now of course includes those in the DSO.

This is because the constitution and the NPA Act provide that the national director “may review a decision to prosecute or not to prosecute” after consulting the relevant DPP and taking representations from the accused, the complainant and any other person deemed relevant by the national director.<sup>132</sup> “After consultation” implies that consultation must take place, but there need not be consensus – the phrase “in consultation” implies consensus. This means that ultimately, it is the national director’s decision to take.

Why was the creation of a “super-AG” controversial, even though required by the constitution? The independence of provincial attorneys-general had previously been strengthened by the Prosecution Act of 1992, which made the attorney-general in each province independent of the executive, and accountable to Parliament only. The fear was that the NPA Act was a step backward for the independence of provincial attorneys-general. On the other hand, some commentators felt the 1992 Act had been a reactionary attempt by the old regime to entrench the nine incumbent attorneys-general, some of whom had participated in aggressive prosecutions of political cases during apartheid.

The other fear was that as a tenured presidential appointment, who could only be removed by the president and Parliament, the national director could not be guaranteed to act either impartially, or independently of the interests of the executive. Impartiality is an issue because the NPA Act provides that the president appoints the national director for a non-renewable term of 10 years (and provincial directors of public prosecutions for life): the concern is that an appointee of the executive could be party-political. The president may remove the national director on the grounds of the national director’s continued ill-health, misconduct, incapacity to carry out his duties efficiently, or on the grounds that the national director is no longer a fit and proper person to hold office.<sup>133</sup> This has given rise to the concern that because the appointee’s continuing tenure depends on the president’s continuing good opinion of the appointee, the national director’s

independence may be threatened as there will be pressure not to act contrary to the wishes of the executive.

Then-president Nelson Mandela appointed Bulelani Ngcuka the first national director, in August 1998.<sup>134</sup> The perception that Ngcuka was an ANC insider, fed into concerns about party-political impartiality. He had been a member of the National Council of Provinces for the ANC since 1994, and the ANC's chief whip<sup>135</sup>. From 1990–1994 he had been a member of the ANC's constitutional committee, and he represented the ANC at the Codesa negotiations and the multiparty talks in Kempton Park. Opposition parties at the time of his appointment expressed their concern about Ngcuka's close political affiliations with the ruling party, but noted that his work in Parliament had been commendable.

The first controversy that raised fears about the national director's possible impartiality took place in December 1998. The Transvaal Provincial Division of the High Court refused bail to three cadres of the ANC (known as the 'Eikenhof three')<sup>136</sup> who had been convicted and sentenced in 1994 for the murder of a woman and two children at Eikenhof near Johannesburg, and who now brought an appeal on the basis of new evidence arising from the Truth and Reconciliation Commission. This evidence suggested that members of the Pan Africanist Congress (PAC) might instead have been responsible for the murders.

Prior to the hearing of the appeal, the national director instructed the prosecutor of the case to withdraw his opposition to the bail application, despite the fact that the state had indicated that it would oppose the appeal. However, the Supreme Court of Appeal subsequently set aside the conviction and sentence of the three, appearing to vindicate the national director's position, but said the matter should be retried if the state felt it still had a case against the three. The national director declined to re-prosecute them.<sup>137</sup>

Subsequently, the national director appeared to demonstrate his impartiality when there was no hesitation in the prosecution of ANC stalwarts Winnie Madikizela-Mandela<sup>138</sup>, and more recently, Tony Yengeni<sup>139</sup>.

The investigation into the arms deal by the DSO has raised further interesting questions as to the independence from executive influence of the national director. On the one hand, some commentators perceive him to have acted independently by even allowing an investigation by the DSO into deputy president Jacob Zuma's role, and the media has cast him in opposition to Zuma and ANC loyalists in the matter. (Strictly speaking, the decision to conduct an investigation in the first place should lie with the investigating director and not

the national director (see *Mandate*) although in practice, there is indeed close conferral with the national director on important matters.)<sup>140</sup>

On the other hand, some critics point to the fact that the DSO has not used all the powers (such as those of search and seizure) it could have used in investigating Zuma's role, and that his ultimate decision to veto any prosecution ostensibly on the basis of lack of evidence was therefore disingenuous.

Whatever the truth might be, the arms deal matter has thrown the national director's powerful position into the spotlight (see *History*), as well as his dependence on the president and Parliament for his tenure.<sup>141</sup> Whatever may transpire in respect of the present national director, the issues remain. The position of national director is an extremely powerful one, not least because of the impact that a veto power has on the democratic principle of separation of powers, which will be discussed in the next section.

### ***Separation of powers***

In the modern state, a prosecutor, particularly a national prosecutor, plays a role that inevitably impinges on the principle of separation of powers. The instinctive discomfort many feel around the national director's power, particularly in regard to his decision not to prosecute the deputy president, lies with this principle.

"Separation of powers" refers to the principle of democratic constitutional theory that the business of government should be divided along natural lines into the power to make law (legislative), the power to enforce law (executive), and the power to resolve disputes arising under law, including deciding on whether actions undertaken by the other two branches fall within the law (judicial). The idea is that each branch of government must have the power and the incentive to guard its own sphere and to counter the abuses of the other two.

The position of the prosecution service in any country is interesting in that close analysis reveals that it runs the risk of straddling both the executive and judicial spheres. In South Africa, this risk is exacerbated, because the decision to prosecute is arguably as important as the ultimate decision of the judiciary (guilty or not guilty) in a particular matter. This is because very few reported crimes are prosecuted with a verdict<sup>142</sup> and furthermore, approximately 80% of all crimes which are prosecuted, result in a conviction: in other words, the decision to prosecute or not is of primary importance. (In countries which have automatic prosecution, the prosecution has no such discretion not to prosecute.)

The prosecution therefore in reality has a quasi-judicial function (only those crimes it chooses are prosecuted, and those it chooses have a high probability of resulting in a conviction) yet it is firmly positioned under the executive branch of government. The DSO, as a division of the NPA, is equally firmly under the executive branch; indeed the chain of command goes from the DSO's investigating director to the national director straight to the president. Furthermore, given the success rate of DSO matters prosecuted (more than 90% result in a conviction – see *Performance*) the DSO has an even stronger quasi-judicial function in reality.

How then, are possible abuses by the prosecution in a democracy countered in terms of the theory of separation of powers? It is clear that the decision to prosecute a matter does not pose a problem because whether a conviction is obtained depends in the final analysis on the judiciary; in theory, even a malicious prosecution will not succeed if the judiciary finds there is not enough evidence to prove the charge. However, a decision *not* to prosecute is more problematic, as there is no input into the outcome of such a decision from another branch of government.

In theory, the failure on the part of the prosecution to carry out its obligations, in particular, by declining to pursue allegations of wrongdoing by members of the executive, leaves only recourse to the legislature, to whom the prosecution is accountable.<sup>143</sup> Parliament can therefore call the prosecution to account for the decisions it takes, particularly decisions to prosecute or not to prosecute. Although this is theoretically possible, an academic paper has argued that in political systems where the president is elected by the legislature and therefore by the majority party in Parliament, the probability of Parliament calling the prosecution to account for its failure to prosecute is low.<sup>144</sup> This thesis appears to hold true in South Africa, where the majority party in Parliament effectively elects the president, and Parliament has yet to call the national director to account for his failure to prosecute on any matter, including the arms deal matter and the deputy president's role in that matter.

## Conclusion

It may well be that it is not the mere fact that the DSO falls under the NPA that causes critics to suggest that the DSO should be moved or disbanded. The constitutional position on that point, although not clear, certainly leans towards confirming the view that the DSO may exist under the NPA. Instead, the powerful nature of the national director's position, now enhanced with

the DSO as a powerful tool of investigation armed with organised crime legislation, may be the real cause of discomfort among DSO critics. Ironically, the national director's most important power, the veto power, appears to be constitutionally sanctioned.

The real problem is the lack of appropriate accountability structure for the NPA and DSO, which take account of the separation of powers. Such structures could call the national director to account for his failure to investigate or prosecute a particular matter as well as oversee the conduct of DSO investigations generally. The proper functioning of the NPA and the DSO is at present almost entirely dependent on the integrity of the national director alone. Are there solutions for this problem?

Parliament ordinarily would be the body to call the national director to account for his decisions not to prosecute. However, as we have seen, that is unlikely in a political system such as South Africa's (see *Separation of Powers*). Another option would be for a national director's decision not to prosecute to be reviewed by the judiciary in terms of administrative law – after all, as we have seen, such a decision not to prosecute is quasi-judicial in nature, so it would be appropriate for the judiciary to review such decisions. Ordinarily, such a solution would require a litigant with *locus standi* (an interest in the matter) to bring the matter before the courts. This is not a satisfactory solution, as there will not always be a litigant with both the means and the will to bring a matter before the courts. Private prosecution is also not a useful option, for the same reason. Should reform of the DSO legislation be contemplated, a provision requiring automatic judicial review of any decision not to prosecute in a matter declared and fully investigated by the DSO should be considered for inclusion in any amending legislation, particularly given the large amount of state resources consumed by a single DSO investigation (see *Performance*).

What about decisions to conduct a DSO investigation, and decisions to use the powerful tools contained in the POC Act and the DSO legislation? Again, impartial and appropriate use of these tools is largely dependent on the integrity of the national director. There is international precedent for such laws being abused. In both the USA and Nigeria, forfeiture laws were put to inappropriate use. In Nigeria, forfeiture laws were used disproportionately against a particular ethnic group, the Ibo people living in the former Biafra area of Nigeria. In the US, forfeiture applications were often brought in trivial matters solely as a moneymaking exercise, prior to reform of US forfeiture law. While similar abuses may not yet have occurred in South Africa, and South African

legislation is less prone to abuse, the potential does exist for decisions around choosing where to wield power to be influenced inappropriately. While most such decisions will be routine and uncontroversial, to whom is the DSO or the national director accountable in the event of a dubious decision or series of decisions?

The Ministerial Committee provided for in the DSO legislation that is supposed to “determine procedures” for referral of matters to the DSO consists solely of members of the executive – that is, cabinet ministers (see *Mandate*). Furthermore, it is not clear that the committee is given the power in terms of the legislation to exert a general oversight function over the DSO: oversight is an after-the-fact-function, while mandate is more in the nature of before-the-fact guidelines, or procedures. The Ministerial Committee is therefore not an appropriate body to exercise oversight over the DSO, particularly where the investigation of public figures, especially members of the executive, is concerned. Compare the composition of this committee to that of the UK’s National Crime Squad Service Authority, which exercises oversight over the UK’s National Crime Squad (see *International Comparison*). The UK committee consists largely of independent members (although appointed by the responsible minister) and others from the law enforcement environment. Should reform of the DSO legislation be contemplated, provision for an oversight body consisting to some degree of persons other than the executive, should be considered for inclusion in amending legislation.