FORUM

Submission to the Enquiry into the National Director of Public Prosecutions*

By The South African Institute for Advanced Constitutional, Public, Human Rights and International Law
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1. INTRODUCTION

This submission focuses on the theoretical aspects of the Enquiry. Because we do not have access to the detailed allegations, we cannot make meaningful submissions on the facts of the particular case. We hope, however, that this submission will help the Enquiry to consider the facts in the correct legal setting.

We first consider two general questions that relate to the two more specific points raised in the invitation for submissions. First, we look at the general role and status of the National Director of Public Prosecutions (NDPP) in the constitutional framework. Second, we examine the meaning of the phrase 'a fit and proper person' as it appears in s 12 of the National Prosecuting Authority Act (NPAA). These two issues are, in our view, central to the consideration of the allegations against the NDPP.

Thereafter, we consider the two specific questions raised in the invitation: (a) the discretion of the NDPP to bargain with people suspected of organized crime; and (b) the nature of the relationship between the Minister of Justice and Constitutional Development (the Minister) and the NDPP.

2. GENERAL OUTLINE OF THE ROLE OF THE NPA AND THE NDPP

The NDPP is appointed by the President as the head of the National Executive (s. 179(1)(a) Final Constitution; s. 10 National Prosecuting Authority Act, 'NPAA'). As the official charged with the effective functioning of the NPA, the NDPP is vested with powers including: the determination of prosecution policy, the issuing of policy directives which have to be observed in the prosecution process, the power to intervene in the prosecution process when policy directives are not complied with and the ability to review a decision to prosecute or not to prosecute.[1]

Given the NDPP's appointment by the President, the National Director is part of the executive branch of government rather than the judicial branch. This was recognised by the Constitutional Court in *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996.*[2] As such, the Constitution and the NPAA provide for political accountability of the NDPP. This manifests itself in three ways. First, the Minister of Justice must exercise 'final responsibility' over the NDPP.[3] Second, the President can remove the National Director on the basis of four enumerated, exclusive grounds[4], subject to ratification by Parliament.[5] Finally, Parliament itself can have the NDPP removed, if both Houses of Parliament make such an address to the President, on the basis of one of the listed grounds for dismissal.6

This political accountability is, however, balanced by guarantees of prosecutorial independence enshrined both in the Constitution and the NPAA. Section 179(4) of the Final Constitution states the prosecuting authority must exercise its functions "without fear, favour or prejudice", and mandates the creation of national legislation to ensure as much. Accordingly, s. 32 NPAA guarantees:

(1) *(a)* A member of the prosecuting authority shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law.
(b) Subject to the Constitution and this Act, 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

2.1 The Distinction between Policy-making and Individual Prosecutorial Decisions

The Constitutional and legislative framework necessitates drawing a distinction between the setting of prosecutorial policy and exercise of prosecutorial discretion in individual cases.

As will be discussed further, at 5.1, the National Director must formulate prosecutorial policy with the concurrence of the Minister of Justice, and after consultation with the provincial Directors of Public Prosecutions.[7] The exercise of prosecutorial discretion is a matter solely for the National Director.

The term 'with the concurrence of' means that the National Director must obtain the approval of the Minister of Justice for the National Prosecution Policy. As such, the Minister has the power of veto. By way of contrast, the requirement that the National Director set the policy 'after consultation with' the provincial Directors means that the National Director must seek advice from the provincial Directors on the draft Policy, but can ultimately proceed without their approval.

The National Director is bound to make prosecutorial decisions in line with the National Prosecution Policy. However, the obligation on the National Director to obtain the approval of the Minister of Justice is confined to the realm of policy-making. There is no power in the Constitution or the NPAA enabling the Minster of Justice, or any other elected politician or individual, to intervene in individual prosecutorial decisions. Indeed, the Constitution and the NPAA guarantee prosecutorial independence in the making of such decisions.

2.2 Prosecutorial Independence

When the National Director is deciding whether or not, in accordance with the policy guidelines established with the consent of the Minister of Justice, to pursue prosecution in an individual case, he or she must act with strict independence. Section 179(4) of the Final Constitution and s.32 NPAA, quoted above, ensure protection for the National Director's strict independence in the making of individual prosecutorial decisions. Every member of the prosecuting authority must make an oath to uphold these provisions.[8] If political interference in individual decisions were to be undertaken, these important provisions would be violated.

According to academic commentary, had the Minister of Justice been given legislative powers to intervene in individual exercises of prosecutorial discretion, this "would have destroyed any notional independence of the prosecutorial authority".[9]

Further protection for prosecutorial independence is found in NPAA s 22(4)

* The submission has not been edited according to *Advocate's* house style. It is published in the format submitted to the Enquiry into the National Director of Public Prosecutions.

(f), which requires the NDPP to bring the United Nations Guidelines on the Role of the Prosecutors to the attention of all prosecutors and to 'promote their respect for and compliance with [the Guidelines] within the framework of national legislation'. These Guidelines mandate that

[i]n performance of their duties, prosecutors shall …[p]rotect the public interest, act with objectivity, take proper account of the position of the suspect and the victim and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect…[10]

Relying, inter alia, on this provision, Ackermann and Goldstone JJ stated in *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)*, 'prosecutors have always owed a duty to carry out their public functions independently and in the interests of the public'.[11]

This strict prosecutorial independence is supported by statements of the Constitutional Court and the High Court.

During the hearings on the confirmation of the Final Constitution, a challenge was made to the Constitutional framework establishing the National Prosecuting Authority. This challenge relied on an argument that the appointment of the NDPP by the President without involvement of the Judicial Services Commission violated Constitutional Principle VI, requiring a separation of powers between the Executive and Judiciary. The Constitutional Court held that the NDPP was not part of the Judiciary, and as such Constitutional Principle VI was inapplicable to this office. Nonetheless, the Court held that s 179(4), providing that national legislation must ensure that the prosecuting authority exercise its functions 'without fear, favour or prejudice', amounted to 'a constitutional guarantee of independence'. The Court further noted that 'any legislation or executive action inconsistent therewith would be subject to constitutional control by the courts'[12]. Any attempt by the Minister of Justice to influence prosecutorial discretion in individual cases would therefore be contrary to the Constitution.

The constitutional guarantee of prosecutorial independence was relied on by the High Court in the case of *S v Yengeni*.[13] In that case, the appellant, the former Chief Whip of the ANC, was contesting a 4-year custodial sentence for fraud convictions. His appeal rested largely on a plea agreement that had been reached that he would be given a non-custodial sentence if he pleaded guilty to 'watered-down' charges. This agreement was reached as a result of a meeting held at the home of the Minister of Justice, with the Minister in attendance along with the then NDPP and the appellant.

The Court held that this meeting was highly improper, given the constitutional and legislative provisions guaranteeing prosecutorial independence. As stated by Bertelsmann and Preller JJ:

[I]t was indubitably ill-advised for the former National Director of Public Prosecutions to be seen to participate in a discussion with the Minister and the appellant. The independence of the office that he held, and the fearless and unfettered exercise of the extensive powers that this office confers, are incompatible with any hint or suggestion that he might have lent an ear to politicians who might wish to advance the best interests of a crony rather than the search for the truth and the proper functioning of the criminal and penal process.[14]

The Court further censured the Minister's involvement in the discussion, saying it was 'unwise … precisely because it might create the perception that he was exerting improper political pressure on the [NDPP]'.[15]

As such, it is clear that the Court felt that any intervention by the Minister regarding an individual case being pursued by the prosecuting authority would create an appearance of improper interference. If the prosecuting authority is to be able to exercise its functions 'without fear, favour or prejudice' there can be no risk, or appearance of a risk, that the decision whether or not to prosecute an individual case is being made on the basis of political favour or advantage. The NDPP must be able to institute criminal proceedings against anyone, regardless of their position or influence, in order to defend and uphold the rule of law. This is not possible if the Minister of Justice is able to influence the exercise of prosecutorial discretion in individual cases.

3. THE MEANING OF 'FIT AND PROPER'

The National Director can be removed from office only on the basis of one of four enumerated grounds listed in NPAA s 12(6). The National Director can be removed:

(1) for misconduct;
(2) on account of continued ill-health;
(3) on account of incapacity to carry out his or her duties of office efficiently; or
(4) on account thereof that he or she is no longer a fit and proper person to hold the office concerned.

The only ground relied upon in the Terms of Reference is that Mr Pikoli is no longer a 'fit and proper person' to hold his office. This submission therefore considers the meaning of that phrase.

3.1 A question of fact or law?

There is some debate in the case law as to whether the determination of whether a person is 'fit and proper' is a question of fact or of law. The traditional position is that it is purely a factual question. However, in the context of an application to strike an attorney from the roll for not being a fit and proper person, the Supreme Court of Appeal has held that the inquiry requires 'a weighing up of the conduct complained of against the conduct expected of an attorney and, to this extent, a value judgment.'[16] This seems correct: It is impossible to determine the relevance of facts unless one already has a standard of conduct against which the facts can be judged.

The importance of an underlying value-system can best be demonstrated by the history of Bram Fischer's status as a 'fit and proper person' to be an advocate. Fischer was struck from the roll of advocates for failing to appear at his trial because he had gone underground to fight apartheid.[17] He eloquently explained that he had acted 'not because of a desire to be immoral, but because to act otherwise would, for him, be immoral.'[18] The High Court rejected this argument, finding instead that '[i]t would be inconsistent with that duty for the Court to allow an advocate to remain on the roll when he is defying these laws and instigating others to defy these laws.'[19] Nearly forty years later, the same court re-instated Fischer's name to the roll.[20] It argued that 'Abram Fischer recognised, as did Plato, that "temperance and justice are beautiful but hard and troublesome, whilst their opposite are pleasant and easy of attainment."'[21]

Whichever idea of a 'fit and proper person' one adopts (we concur with the latter), the differing decisions indicate that our conception of what is fit and proper must be informed by our legal climate. The decision to strike Fischer from the roll was informed by ideas of professional conduct that required, indeed expected, advocates to act with disregard for the terrible injustice of apartheid. In contrast, the decision to restore his name to the roll rested on the recognition that the wrongs that Fischer fought against were much greater than any he committed in the process. The irony, as the Court noted, was that 'it was the integrity of Bram Fischer and the fact that he was a most honourable and trustworthy member of the Bar which led to his being struck off the roll of advocates.'[22]

While the context is certainly different, it is important that this Commission judge Mr Pikoli's conduct not according to standards of blind obedience to political masters that may have been appropriate for prosecutors in earlier decades or may be appropriate in other countries. His conduct must be judged according to the constitutional system that prizes prosecutorial independence and places it at the centre of the criminal justice system.

3.2 Conscientiousness and Integrity

But what are the standards or values against which the NDPP's character must be judged?

The term 'fit and proper' is not defined in the NPAA. However, s 9 of the NPAA lists the qualifications that a person must have to be appointed as the NDPP. NPAA s 9(1)(b) requires that the candidate 'be a fit and proper person, with due regard to his or her *experience, conscientiousness and integrity*, to be entrusted with the responsibilities of the office concerned.' (Our emphasis.) This section identifies three primary areas in which the NDPP's 'fitness and propriety' for his position should be judged: (a) experience; (b) conscientiousness; and (c) integrity. None of the allegations against Mr Pikoli relate to his experience, but both could, potentially, impact on his conscientiousness or integrity. These two elements of a person's character correspond to the statement of the then Appellate Division that 'fit and proper', in the context of the advocate's profession, requires that a person 'is generally a person of integrity and reliability.'[23]

But what do 'conscientiousness' and 'integrity' require in practice? We could find no South African case law on the use of the term with regard to prosecutors. There is, however, ample case law concerning advocates and attorneys. While we are well aware that the meaning of fit and proper depends on the context in which it is used,[24] the case law relating to attorneys and advocates does give us some idea of what conscientiousness and integrity might require in the quite different realm of the NDPP. The similarity between the requirements for 'fit and proper' in s 9(1)(b) of the NPAA and the requirements laid down in the case law also suggest that the case law will be useful.[25]

Let us then briefly consider some of those cases. Firstly, both attorneys and advocates will ordinarily be found not to be fit and proper if they are convicted of a crime, or if they express an intention to continue to commit crime.[26] However, even if a person is convicted she can still be admitted or remain on the roll if there are special circumstances or if she can show that she has reformed her character.[27]

Attorneys are most commonly removed from the roll for the mishandling or misappropriation of trust funds.[28] This can be the result either of blatant dishonesty or of simple inattention. While dishonesty is undoubtedly worse, carelessness alone can be sufficient to find that a person is not 'fit and proper'. Advocates on the other hand are most commonly found not to be fit and proper for lying to the courts or for unprofessional conduct.[29] They may also be found wanting for failure to comply with the ethical rules of the profession such as not taking briefs directly from clients.[30] Because courts rely so heavily on the trustworthiness of advocates in coming to their decisions, any hint of dishonesty or deceit in and advocate's character can render him or her unfit to continue practice.

Conscientiousness can be said to mean professionalism – the willingness and ability to perform with the required skill and the necessary diligence. Integrity is remaining honest – not lying, stealing or otherwise acting corruptly.

4. PLEA BARGAINING

(i) *The exercise of discretion by the NDPP to prosecute offenders, enter into plea bargain arrangements or grant immunity from prosecution to suspects allegedly involved in organized crime, with particular regard to the public interest and the national security interests of the Republic*.

4.1 The Nature of Plea Bargaining in South Africa

Plea bargaining is sanctioned by s 105A of the Criminal Procedure Act (CPA).[31] The CPA allows prosecutors who have been approved by the

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NDPP to conclude agreements with accused to determine which charges will be brought and what sentence will be recommended. Whenever he concludes such an agreement, a prosecutor must consider, at least, the –

(a) nature of and circumstances relating to the offence;
(b) personal circumstances of the accused;
(c) previous convictions of the accused, if any; and
(d) interests of the community.[32]

It is also vital to note that all plea agreements are strictly considered by the courts. The court will first consider whether the person is indeed guilty of the crime to which the agreement relates.[33] More importantly, the court must also consider whether the sentence agreed upon is just. If the court is not of the opinion that the sentence is just, the prosecutor and the accused must either: (a) accept the sentence that the judge believes is just; or (b) abandon the agreement and start the trial anew.[34] The import of this procedure is that sentences following plea agreements are not in the hands of the prosecutor. They rest, as they should, in the hands of the court. Any concern as to the actions of the prosecutor must, therefore, be directed at the prosecutor's decision with respect to the crimes with which to charge the accused. That decision is not open for judicial review.

A grant of immunity from prosecution is really a sub-category of plea bargaining.[35] It is regulated by CPA s 204 and occurs when a witness is called by the prosecution to answer questions that may incriminate him in the commission of a crime or crimes specified by the prosecutor. The person is granted immunity on the condition that he answers all questions truthfully. Importantly, it is up to the court, not the prosecutor, to determine whether the witness has met the condition.[36] The only power that rests with the prosecutor is to give a suspect the opportunity to clear himself and to determine for which crimes that opportunity applies.

4.2 The Importance of Plea Bargaining

Plea bargaining is not an uncontroversial subject. In the US there have been repeated calls for the abolition of plea bargaining because it acts to deny accused persons the right to a proper trial. These detractors argue that 'there is something dirty about plea bargaining, something corruptive or potentially corruptive in negotiating with criminals for punishment less than could be levied if the full force of the law were used.'[37] However, plea bargaining can be defended because of the tremendous assistance it offers the prosecution. In the context of organized crime the two major benefits are that it allows the NPA to spend less resources on small criminals to go after the big criminals and it makes it easier to bring down the big criminals by offering a carrot to turn their former henchmen against them.

This is illustrated by the judgment in *Mohunram v National Director of Public Prosecutions & Another (Law Review Project as Amicus Curiae)* where Sachs J, writing for a plurality, noted in the context of the forfeiture of assets involved in organized crime that

if [the Asset Forfeiture Unit] is to accomplish the important functions attributed to it, it should not unduly disperse the resources it has at its command. Its manifest function as defined by statute is to serve as a strongly empowered law enforcement agency going after powerful crooks and their multitude of covert or overt subalterns. *The danger exists that if the AFU spreads its net too widely so as to catch the small fry, it will make it easier for the big fish and their surrounding shoal of predators to elude the law. This would frustrate rather than further the objectives of POCA.*[38]

The same applies to plea bargaining. If the NDPP were to prosecute every person whom he suspected of being involved in organized crime he would not have the resources to prosecute the people at the top of the organized crime pyramid. As Justice Sachs noted, the whole purpose of POCA was to make it easier to target the 'big fish' rather than the 'small fry' by making it possible to forfeit the assets of people who cannot be convicted and by creating crimes that do not require proof of direct involvement in criminal activity. In addition, plea bargaining – particularly in the form of granting immunity – is a potent weapon that allows a prosecutor to secure testimony of accomplices in order to bring down POCA's real targets – the organized crime kingpins.

4.3 Can Plea Bargaining Affect the NDPP's 'Fitness and Propriety'?

The power to decide how to exercise the power is vested, by the Constitution, the NPAA and the CPA in the NDPP and his team of prosecutors. The President may well disagree with a specific decision. He may feel that a particular accused should have been prosecuted or that a different accused should not have been. But the President's opinion is irrelevant because the discretion to prosecute, bargain or offer immunity vested entirely in the NPA. The only way that the President's concern might justify dismissing Mr Pikoli would be if it is supported by facts that indicate that Mr Pikoli, in deciding with whom and on what terms to plea bargain, acted unconscientiously or without integrity and so rendered him no longer 'fit and proper' to serve as NDPP.

4.3.1 Conscientiousness

Because we are not aware of the evidentiary basis for the allegations levelled against Mr Pikoli, the best way to explain what would qualify as a lack of conscientiousness is by example. The following scenarios *might justify* a finding that the NDPP was not acting conscientiously:

(a) He no longer supervised the work of his subordinates so that he had no idea whether their decisions to enter into plea agreements were justified;
(b) He approved plea agreements without an understanding of the facts of the case or of the broader scheme of criminal activity that the case concerned;
(c) The contents of plea agreements he approved indicated that he did not understand the scheme of crimes created by POCA or other legislation;
(d) The agreements, when considered in light of other related investigations, evinced a failure to comprehend the gravity of crimes.

It is necessary to stress two points with relation to these hypothetical situations. Firstly, not every slight mistake or error of judgement by the NDPP would justify a finding that he was not a fit and proper person. There would have to be very serious mistakes or repeated failures. Secondly, the errors must relate to competency or work ethic, not to differences of strategy. One may disagree vehemently with the NDPP's decision to negotiate with an accused but still know that it is based on a full consideration of the case and see how it might serve to curb organized crime. There can be no allegation of a lack of conscientiousness in such a case.

4.3.2 Integrity

Maintaining police and prosecution integrity in the fight against organized crime is vital. Because of the wealth and influence of those often involved in these activities, law enforcement officials may be more susceptible to interference in these cases than in those of other crimes. Plea agreements operate in an area where prosecutors are particularly vulnerable to corruption by organized criminals. Jeff Palmer, in arguing for the complete abolition of plea bargaining, has contended that

[s]o long as the negotiation of pleas is permitted, it will continue, in actual effect,

. . . to hide corruption of public officials by wealthy and powerful kingpins of organized crime, and to serve as an escape hatch for the affluent or politically powerful violators of our criminal laws.[39]

We need not go as far as Palmer to recognise the inherent danger of plea bargains in these situations. Again, in understanding what would render the NDPP no longer 'fit and proper' it might be useful to proceed by way of examples:

(a) The NDPP receives money from a person accused of organized crime in return for concluding a favourable plea bargain;
(b) The NDPP concludes a plea bargain with a family member or close friend on different terms than he would if he did not know the person;
(c) The NDPP concludes a plea bargain with (or decides to prosecute) a person whose financial future will have an impact upon the NDPP's financial future.

These are just a few examples all of which would seriously call into question the NDPP's integrity and would justify a finding that he was no longer a fit and proper person. However, a mere difference of opinion, even if it relates to 'national security'[40] or 'the public interest', is not a ground to find that the NDPP is no longer fit and proper. The Constitution and the NPAA assign to the NDPP the responsibility to determine how to prosecute in the public interest and in the interest of national security. The only control that the President and the Minister are given is to attempt to influence prosecution policy; not to interfere in particular decisions.

4.3.3 Prosecution Policy

A final possibility that should be considered is the situation where the NDPP acts contrary to the prosecution policy as determined by himself in consultation with the Minister. This need not bring into question either his integrity or his conscientiousness: He may meticulously apply his mind to a case and be uninfluenced by outside forces and still decide to deviate from the policy. A deviation from the prosecution policy, however serious or prolonged, cannot, without more, render the NDPP no longer a fit and proper person to hold his office. It may amount to misconduct, but that is not part of the terms of reference for this Commission.

5. THE RELATIONSHIP BETWEEN THE NDPP AND THE MINISTER

(ii) The role and status of the National Prosecuting Authority and the National Director of Public Prosecutions, and the relationship between the Minister of Justice and Constitutional Development and the National Director of Public Prosecutions, in the context of the legislative and constitutional obligations placed on the Minister and the National Director of Public Prosecutions

The appropriate constitutional balance between the NDPP's political accountability and his or her prosecutorial independence lies at the heart of this enquiry. The remainder of this submission examines this issue in more detail. First, we consider the place of policy formulation. Second, we look at the meaning of the requirement that the Minister exercise 'final responsibility' over the NPA.

5.1 Policy Formulation

The National Director must, with the concurrence of the Minister of Justice, and after consultation with provincial Directors of Public Prosecutions, determine prosecution policy.[41] It is clear, therefore, that in setting such policy, the approval of the Minister of Justice is needed, while the NDPP may ignore objections of the provincial Directors, as discussed above. Given the centralisation of prosecuting authority in the NDPP, national priorities for criminal prosecution can be established, in cooperation with the Minister of Justice.

This policy must be observed during the prosecution process, and the NDPP must exercise his powers and perform his functions in respect of this policy.[42] As such, in making a decision whether or not to prosecute in individual cases, the National Director along with the rest of the prosecuting authority is bound to act in accordance with this published policy. There is therefore a clear constitutional and legislative obligation on the National Director to obtain the approval of the Minister of Justice in setting national prosecutorial policy.

5.2 The Minister's Final Responsibility

There is also a constitutional requirement that the Minister must exercise 'final responsibility' over the prosecuting authority.[43] As such, the Minister must answer to Parliament and the public for the operation of the prosecuting authority.

This responsibility is more fully articulated in s 33 of the NPAA, which states:

The Minister shall, for purposes of section 179 of the Constitution, this Act or any other law concerning the prosecuting authority, exercise final responsibility over the prosecuting authority in accordance with the provisions of this Act.

Further, NPAA s 33 requires the NDPP to carry out a number of duties, at the request of the Minister, in order to enable the Minister to exercise this responsibility. These duties are:

(1) Furnish the Minister with information or a report with regard to any case, matter or subject dealt with by the National Director or a Director in the exercise of their powers, the carrying out of their duties and the performance of their functions;
(2) Provide the Minister with reasons for any decision taken by a Director in the exercise of his or her powers, the carrying out of his or her duties or the performance of his or her function;
(3) Furnish the Minister with information with regard to the prosecution policy;
(4) Furnish the Minister with information with regard to the policy directives;
(5) Submit the reports contemplated in section 34 to the Minister; and
(6) Arrange meetings between the Minister and members of the prosecuting authority.

The wording of s 33 is crucial to the delimitation of the Minister's responsibility over the prosecuting authority. As quoted above, the NPAA states that the Minister shall exercise his or her final responsibility over the prosecuting authority "in accordance with the provisions of this Act". Therefore, the Minster's powers of oversight are confined to those included in the Act. As already discussed, these include the requirement that the Minister approve prosecution policy, and various duties on the National Director to provide information and submit reports to the Minister. The Act gives no power to the Minister regarding the exercise of prosecutorial discretion in individual cases. As such, individual decisions regarding whether or not to prosecute in a particular case are not within the purview of the Minister's 'final responsibility'. These rest in the exclusive discretion of the prosecuting authority, and ultimately the National Director.

5.3 A Ground for Removal?

As noted earlier, the NDPP can be removed only on the grounds listed in NPAA s 12. These restrictive grounds bolster the National Director's professional independence. Clearly, the NDPP must comply with the constitutional and legislative obligations imposed on him or her, discussed above. A failure to do so may amount to misconduct sufficient to justify his or her removal from office. However, as long as the Director satisfies these obligations, for instance acquiring the approval of the Minister of Justice in formulating prosecution policy, and submitting the information and reports requested by the Minister, his or her working relationship with the Minister is irrelevant. Otherwise, prosecutorial independence would be jeopardised.

This position can be contrasted with the relationship between the President and the Director-General of the National Intelligence Agency. In *Masetlha v President of the Republic of South Africa and Another*[44], the Constitutional Court upheld the dismissal of the former Director-General of the NIA by the President on the basis of an irretrievable breakdown in the relationship of trust. As stated by Moseneke DCJ in the majority judgment:

In my view, a relationship of trust between a President and the head of an intelligence service is indispensable. Trust goes to the very root of the special arrangement between a President, as head of State and of the national executive, and the head of an intelligence agency, without which the interest of national security cannot be best served. If anything, national security would be severely prejudiced.[45]

Such a relationship is not necessary between the Minister of Justice or the President and the National Director. There are significant textual differences in the Constitution between the two positions. Firstly, the NDPP's independence is, as we described above, guaranteed in both the Constitution and the NPAA while there is no similar guarantee of the independence of the Head of the NIA. Secondly, although there is no clear procedure for the dismissal of the Head of the NIA, the Constitutional Court interpreted s 209(2) of the Constitution to vest the sole power to dismiss in the President. The NDPP on the other hand can only be dismissed for the reasons listed in NPAA s 12 and after following the procedure described therein.

These textual differences indicate that the relationship between the NDPP and the President is very different from the President's relationship with the Head of the NIA. While both may at times be concerned with matters of national security, the NDPP's primary function – unlike that of the head of the NIA – is to prosecute without fear, favour or prejudice; not to protect national security. In fact, a close relationship of the kind described by the Deputy Chief Justice would be inappropriate in the context of the National Director of Public Prosecutions, as it would likely compromise the Director's ability to act with the strict independence necessary if faced with the possibility of prosecuting members of the government. The only 'trust' that must exist is trust that the NDPP is acting conscientiously and with integrity. But that is an entirely different type of trust to what was contemplated in *Masetlha*.

6. CONCLUSION

The independence of the National Director of Public Prosecutions is a vital element of the constitutional scheme. It ensures that the executive is not able to influence the criminal process either to protect its friends or to attack its enemies. Prosecutorial independence ensures that people are treated equally based on the circumstances of their case, not the influence of their friends. This Commission should therefore act against Mr Pikoli only if there is real evidence that he has failed to act conscientiously or with integrity. Disagreements with the executive on how to proceed in specific cases are not sufficient reason to dismiss. Nor is the breakdown of the relationship between the NDPP and the Minister or the NDPP and the President.

Endnotes

[1] FC s 179(5).

[2] 1996 (4) SA 744 (CC).

[3] FC s 179(6); NPAA s 33.

[4] FC s 12(5). These grounds are listed in NPAA s 12(6)(a): (i) for misconduct; (ii) on account of continued ill health; (iii) on account of incapacity to carry out his or her duties of office efficiently; or (iv) on account thereof that he or she is no longer a fit and proper person to hold the office concerned.

[5] NPAA s 12(6)(c), (d).

[6] NPAA s 12(7).

[7] FC s 179(5); NPAA s 21.

[8] NPAA s 32.

[9] Van Zyl Smit & Steyn, 'Prosecuting Authority in the New South Africa' *CIJL Yearbook* Vol. VIII (Jan. 2000) at 153.

[10] *United Nations Guidelines on the Role of Prosecutors* Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba (27 August to 7 September 1990) s 13(b).

[11] 2002 (1) SACR 79 (CC) at para 72 at 105 d-e.

[12] *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) at para 146.

[13] 2006 (1) SACR 405 (T).

[14] *S v Yengeni* 2006 (1) SACR 405 (T) at para 56.

[15] As above.

[16] *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA) at para 10.

[17] *Society of Advocates SA (Witwatersrand Division) v Fischer* 1966 (1) SA 133 (T).

[18] As above at 135.

[19] As above at 137.

[20] *Rice & Another v Society of Advocates of South Africa (Witwatersrand Division)* 2004 (5) SA 537 (T).

[21] As above at para 17.

[22] As above at para 16.

[23] *S v Mkhise; S v Mosia; S v Jones; S v Le Roux* 1988 (2) SA 868 (A) at 875D, cited with approval in *In Re Chickweche* 1995 (4) SA 284 (ZS) at 291.

[24] *Kaplan v Incorporated Law Society, Transvaal* 1981 (2) SA 762 (T) at 782.

[25] One obvious difference is that the decision with regard to advocates and attorneys rests with a court while as the NDPP's fate rests with the President, this Commission and Parliament. However, that does not make the substantive guidance any less useful.

[26] *Prince v President, Cape Law Society, & Others* 2002 (2) SA 794 (CC).

[27] *Ex Parte Ngwenya: In re Ngwenya v Society of Advocates, Pretoria & Another* 2006 (2) SA 88 (W) at paras 4.2 and 5.2.

[28] See, for example, *Holmes v Law Society of the Cape of Good Hope and Another* 2006 (2) SA 139 (C); *Law Society, Cape v Koch* 1985 (4) SA 379 (C); *Cape Law Society v Parker* 2000 (1) SA 582 (C).

[29] See, for example, *General Council of the Bar of South Africa v Matthys* 2002 (5) SA 1 (E) (The advocate in this case was guilty of all the abovementioned sins and more); *Kekana v Society of Advocates of South Africa* 1998 (4) SA 649 (SCA)(The applicant had submitted inflated accounts and then, more damningly, had committed perjury when confronted with these allegations).

[30] *General Council of the Bar of South Africa v Van der Spuy* 1999 (1) SA 577 (T).

[31] Act 51 of 1977.

[32] CPA s 105A(1)(b)(ii).

[33] CPA s 105A(6).

[34] CPA s 105A(9).

[35] We do not understand the term 'immunity from prosecution' to mean a simple decision by the prosecutor not to prosecute. However, even if that is the intended meaning, we believe the same principles outlined below would apply.

[36] CPA s 204(2).

[37] Newman 'Reshape the Deal' (May/June 1973) 9 *Trial Magazine* 11 as reprinted in Miller, Dawson, Dix & Parnas Prosecution and Adjudication (5th Edition, 2000) at 951.

[38] 2007 (4) SA 222 (CC) at para 155 (our emphasis).

[39] J Palmer 'Abolishing Plea Bargaining: An End to the Same old Song and Dance' (1999) 26 *American Journal of Criminal Law* 505 at 536.

[40] We should not that the reference to FC s 198 in the Terms of Reference is out of place. Section 198 lays down governing principles for the Security Services. It does not purport to provide guidelines for the exercise of prosecutorial discretion. There is nothing in the Constitution, the NPAA or POCA that suggests that national security concerns justify interference with prosecutorial independence.

[41] FC s 179(5)(a); NPAA s 21.

[42] NPAA s 21.

[43] FC s 179(6).

[44] (CCT 01/07) [2007] ZACC 20 (3 October 2007)

[45] As above at para 89.