

## Between Commissions of Enquiry and Direct Prosecution: Quo Vadis, South Africa?

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**Abstract:** *South Africa has had its fair share of allegations of corrupt activities within the public sector. Consequently, numerous commissions of enquiries have been established to investigate matters of public interest. The most recent is the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State (hereinafter the “Zondo Commission”) established in 2018 with investigative powers. R1 billion later, the Commission completed and compiled its findings in 2022/23 which contained a plethora of evidence. Despite the enormous evidence gathered by the Commission as with other Commissions before it, prosecution and conviction have been minimal. However, some of the Commission’s findings have been challenged or subjected to judicial review. The huge costs of these commissions, the sluggish nature of prosecution and convictions, and the high ratio of challenges to their findings invite the question of their effectiveness and necessity. Against this backdrop, the article argues that the government needs to redirect the resources it invests in these commissions of enquiry into strengthening the existing investigating institutions and the prosecuting authority. It is argued that the ultimate effect of any investigation into any wrongdoing should be the vindication of those who have been wronged and the restoration of what has been lost. This can be best achieved when the country has a capacitated prosecuting authority, that can thoroughly investigate and an independent judiciary which is the ultimate guardian of South Africa’s constitutional democracy. It is hoped that this paper will contribute to the advocacy for the strengthening of institutions that are designed to uphold the rule of law in South Africa.*

**Key Words:** *Rule of Law; Commission of Enquiry; Prosecuting Authority; Institutional Independence; Political Interference; Judiciary; South Africa.*

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## Introduction

The Constitution of the Republic of South Africa<sup>1</sup> embraces a government that is characterised by checks and balances, an incident of separation of powers between the different actors of government. Central to the South African constitutional system is the rule of law as envisaged in the founding provisions of the Constitution.<sup>2</sup> Some of the dictates of the rule of law and constitutional supremacy are the prevention of arbitrary exercise of state power and the demand that all government actions must conform to the Constitution.<sup>3</sup> Governance in the Republic is trilateral in nature and is divided between the legislature, the executive and the judiciary, and the Constitution envisages a government that ensures accountability, responsiveness and openness.<sup>4</sup> The legislative authority is vested in parliament.<sup>5</sup> The executive authority is vested in the President and the cabinet.<sup>6</sup> Judicial authority is vested in courts and their decisions are binding to all persons or organs of state to which they apply.<sup>7</sup> The President is both the Head of State and the Executive<sup>8</sup> and, consequently, he is vested with a wide range of powers that are central to the governance of the Republic. These powers, among other things, include the appointment of the commissions of enquiries (the commissions).<sup>9</sup> The functions of these commissions are generally administrative in nature even though they are usually headed by members of the judiciary, in that theirs is to investigate and make recommendations.

Commissions of enquiries are established in terms of the Commissions Act<sup>10</sup> for the purpose of investigating matters of public concern and for gathering information that is deemed necessary for policy formula-

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<sup>1</sup> See *Constitution of the Republic of South Africa* [1996] (hereinafter referred to as the "Constitution").

<sup>2</sup> The Founding provisions [of the Constitution] are in Chapter 1 and section 1 provides, among other things that "the Republic of South Africa is one, sovereign, democratic state founded on the following values: [...] (c) supremacy of the Constitution and the rule of law".

<sup>3</sup> See section 1(c) read with section 2 of the Constitution.

<sup>4</sup> See section 1(d) of the Constitution.

<sup>5</sup> See section 42 of the Constitution states that Parliament consists of the National Assembly and the National Council of Provinces. Section 44 of the Constitution provides for National Legislative Authority.

<sup>6</sup> See section 85 of the Constitution provides for the executive authority of the Republic.

<sup>7</sup> See section 165 of the Constitution provides for Judicial Authority.

<sup>8</sup> See section 85(1) of the Constitution.

<sup>9</sup> See section 84(2)(f) of the Constitution.

<sup>10</sup> See *Commissions Act No. 8* [1947].

tion.<sup>11</sup> These commissions have become the most pursued tool by the government to respond to an imminent crisis. The period between February to November 2018, the President of the Country appointed no less than four commissions of inquiry: the Zondo Commission, the Nugent Commission into tax administration and governance by the South African Revenue Service; the Mpati Commission into allegations of impropriety regarding the Public Investment Corporation and the Mokgoro Enquiry into the fitness of the deputy National Director of Public Prosecutions, Nomgcobo Jiba, and the special director of public prosecutions, Lawrence Mrwebi, to hold office.<sup>12</sup>

The National Prosecuting Authority<sup>13</sup> has the power to prosecute crimes and derives its constitutional mandate from section 179 of the Constitution. It is placed in Chapter 8 of the Constitution which entrenches the mandates of the judiciary and the entire administration of justice in South Africa.<sup>14</sup>

“(1) There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of –

(a) National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive; and

(b) Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament.

(2) The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.”<sup>15</sup>

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<sup>11</sup> See *Case of Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v. Zuma* [2021-01-28]. Judgement of the Constitutional Court of South Africa, 2021, CCT 295/20, para 2.

<sup>12</sup> See PETÉ, S. A. Commissions of Inquiry as a Response to Crisis: The Role of the Jali Commission in Creating Public Awareness of Corruption (Part 1). *Obiter* [online]. 2020, vol. 41, no. 4, p. 905 [cit. 2023-12-08]. ISSN 2709-555X. Available at: <https://doi.org/10.17159/obiter.v41i4.10493>.

<sup>13</sup> See National Prosecuting Authority (NPA) and section 179 of the Constitution.

<sup>14</sup> See KOHN, L. The National Prosecuting Authority as Part of South Africa's Integrity and Accountability Branch and the Related Case for an Anti-Corruption Redress System. *Constitutional Court Review* [online]. 2022, vol. 12, no. 1, p. 48 [cit. 2023-12-08]. ISSN 2521-5183. Available at: <https://doi.org/10.2989/ccr.2022.0001>.

<sup>15</sup> See section 179(1)(a), (b) and (2) of the Constitution.

Pursuant to the demands of section 179 of the Constitution, the National Prosecuting Authority Act<sup>16</sup> was enacted. Among other things, the Act purports to ensure that the prosecuting authority exercises its functions without fear, favour, or prejudice.<sup>17</sup>

Courts, as the judicial authority of the Republic, are constitutionally obligated to interpret and apply the law impartially, without fear or prejudice subject only to the law and the Constitution.<sup>18</sup> No person or organ of the state shall interfere with the functions of the judiciary.<sup>19</sup> Organs of state must at all costs protect the independence and dignity of the courts. Decisions and orders issued by courts are binding to all persons or organs of state to which they apply.<sup>20</sup>

The Zondo Commission was established on the 8<sup>th</sup> of February 2018 by the President in terms of section 1 of the Commissions Act 8 of 1947 read with see section 84(2)(f) of the Constitution for the purpose of investigating the alleged state capture, corruption and fraud in the public sector including organs of state.<sup>21</sup>

“The purpose of the Commission was to investigate allegations of state capture and malfeasance. Guided by the report of the public protector, the Commission was to inquire into, make findings, report on and make a recommendation concerning whether and to what extent and by whom attempts were made through any form of inducement of any gain whatsoever nature to influence members of the national executive office bearers and/or functionaries employed by or office bearers of any state institution or organ of state or directors of any boards of state owned enterprises (SOE’s).”<sup>22</sup>

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<sup>16</sup> See *National Prosecuting Authority Act No. 32* [1998] (hereinafter referred to as the “National Prosecuting Authority Act”).

<sup>17</sup> See the preamble of the National Prosecuting Authority Act.

<sup>18</sup> See section 165(2) of the Constitution.

<sup>19</sup> See section 165(3) of the Constitution.

<sup>20</sup> See section 165 of the constitution provides for Judicial Authority.

<sup>21</sup> See PETĚ, S. A. *Commissions of Inquiry as a Response to Crisis: The Role of the Jali Commission in Creating Public Awareness of Corruption (Part 1)*. *Obiter* [online]. 2020, vol. 41, no. 4, p. 905 [cit. 2023-12-08]. ISSN 2709-555X. Available at: <https://doi.org/10.17159/obiter.v41i4.10493>.

<sup>22</sup> See *Case of Korabie v. Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State and Others* [2022-09-20]. Judgement of the High Court of South Africa, 2022, 9946/2022, para 2.

The Zondo Commission was conducted openly and live on television, as a result, it aroused public interest. The commission concluded its work and compiled a six-part report with each part containing numerous volumes of information.<sup>23</sup> Many hoped it would culminate in the prosecution of the alleged perpetrators and the reversal of benefits that were unduly obtained by those who perpetuated acts of fraud and corruption. This, unfortunately, has not been the case so far. At best, the commission makes recommendations for, among other things, further investigation, and possible prosecution. However, these recommendations may or may not be accepted or acted upon.<sup>24</sup> The uncertainty in the actualization of justice from the findings of the Zondo Commissions and others before it, engages the curiosity of this paper.

In satisfying such curiosity this paper will be divided into six parts with the first part being the introduction. The second part discusses and analyses the effectiveness of the commissions of enquiries. This is followed by an assessment of the prosecuting authority and the subsequent checks and balances implicit in the National Prosecuting Authority. This is then followed by an assessment of the investigative directorates as a means of strengthening the institution of the National Prosecuting Authority. The paper concludes with recommendations through which the Prosecuting Authority of the state can be reinforced. This includes the strengthening and preservation of the integrity of the National Prosecuting Authority.

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<sup>23</sup> See *Commissions Act (8/1947): Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State* [1947]. Government Gazette of the Republic of South Africa, 2018, No. 41436; and ZONDO, R. M. M. Judicial Commission of Inquiry into State Capture Report. In: *The Presidency* [online]. 2022 [cit. 2023-12-08]. Available at: <https://www.thepresidency.gov.za/judicial-commission-inquiry-state-capture-report>.

<sup>24</sup> See *Case of Korabie v. Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State and Others* [2022-09-20]. Judgement of the High Court of South Africa, 2022, 9946/2022, para 50, *Case of Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v. Zuma* [2021-01-28]. Judgement of the Constitutional Court of South Africa, 2021, CCT 295/20, para 4, see also *Case of President of the Republic of South Africa and Others v. South African Rugby Football Union and Others* [1999-09-10]. Judgement of the Constitutional Court of South Africa, 1999, CCT 16/98, para 146.

## 1 The effectiveness of the commissions of enquiry

South Africa is a Republic of laws, where the Constitution is supreme; an infringement of its law is a direct attack on the rule of law which is one of the underlying values of the Constitution.<sup>25</sup> The Constitutional Court shared this assertion when it was called upon to intervene when the then-president was resisting the summonses issued in terms of section 3 of the Commissions Act. President Zuma was summoned as a witness and required to give his version of events upon being implicated in the allegations of corruption and fraud by other witnesses who gave evidence in the Zondo Commission.

“These terms of reference place the former President at the centre of the investigation. They seek to establish whether he abdicated his constitutional power to appoint Cabinet members to a private family and whether he had acted unlawfully. [...] Sight must not be lost of the fact that it was he who was the subject of the investigation and who drew up the terms of reference that placed him at the heart of the investigation.”<sup>26</sup>

The Constitutional Court ordered that the former President must attend the Commission and give evidence as he does not enjoy the right to silence as a witness.<sup>27</sup> The Court held that it is vested with wide remedial powers when deciding constitutional matters in terms of section 172(1)(b) of the Constitution and deemed it just and equitable to issue such as an order.<sup>28</sup> This case may have been the beginning of more challenges to come and the questioning of the legitimacy of the Zondo Commission, at the hands of the same office bearer who established it and drew its terms of reference.

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<sup>25</sup> See *Case of Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v. Zuma* [2021-01-28]. Judgement of the Constitutional Court of South Africa, 2021, CCT 295/20, para 87.

<sup>26</sup> See *Case of Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v. Zuma* [2021-01-28]. Judgement of the Constitutional Court of South Africa, 2021, CCT 295/20, paras 21 and 22.

<sup>27</sup> See *Case of Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v. Zuma* [2021-01-28]. Judgement of the Constitutional Court of South Africa, 2021, CCT 295/20, para 90.

<sup>28</sup> See *Case of Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v. Zuma* [2021-01-28]. Judgement of the Constitutional Court of South Africa, 2021, CCT 295/20, paras 110 and 111.

The commission continued with its mandate, concluded and handed the last report in June 2022.<sup>29</sup> The reports revealed a systematic entrenchment of widespread corruption, where corrupt elites took control of the key institutions of the country. This power abuse was characterised by strategic appointments of certain individuals who were complicit in the corruption and dismissals or harassment of the individuals who resisted the corrupt activities that occurred in the key institutions of the country.<sup>30</sup> The Zondo Commission report provides examples of such appointments, for example the appointments of Tom Moyane to the South African Revenue Service (SARS), various appointments to the National Prosecuting Authority (NPA), and to various boards of directors at State-Owned Enterprises (SOEs).<sup>31</sup> Some of the alleged appointments to the National Prosecuting Authority were a subject of judicial review which escalated all the way to the Constitutional Court. In *Mncwabe v. President of the Republic of South Africa and Others; Mathenjwa v. President of the Republic of South Africa and Others*,<sup>32</sup> the Constitutional Court was approached by aggrieved applicants who wanted the Court to review and set aside President Ramaphosa's decisions to fill some vacancies in the National Prosecuting Authority. These applicants among other things, were contesting the appointees of the President to the NPA, as they were convinced that the former president had appointed them but resigned before announcing such an appointment publicly.

“During the early part of 2018, prior to his resignation from office, former President Zuma took steps to appoint five senior National Prosecuting Authority members as either DPPs or Special DPPs in various National Prosecuting Authority offices. The ap-

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<sup>29</sup> See MOSALA, I. Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State: Media Statement. In: *Commission of Inquiry into Allegations of State Capture* [online]. 2022-06-18 [cit. 2023-12-08]. Available at: <https://www.statecapture.org.za/site/files/announcements/658>.

<sup>30</sup> See SINGH, K. and T. PILLAY. What to Do with the Offenders? Unpacking South Africa's State Capture Amnesty Debate. *New Agenda* [online]. 2022, vol. 86, no. 1, p. 21 [cit. 2023-12-08]. ISSN 1607-2820. Available at: <https://www.ajol.info/index.php/na/article/view/252783>.

<sup>31</sup> See SINGH, K. and T. PILLAY. What to Do with the Offenders? Unpacking South Africa's State Capture Amnesty Debate. *New Agenda* [online]. 2022, vol. 86, no. 1, p. 21 [cit. 2023-12-08]. ISSN 1607-2820. Available at: <https://www.ajol.info/index.php/na/article/view/252783>.

<sup>32</sup> See *Case of Mncwabe v. President of the Republic of South Africa and Others; Mathenjwa v. President of the Republic of South Africa and Others* [2023-08-24]. Judgement of the Constitutional Court of South Africa, 2023, CCT 102/22; CCT 120/22.

pointments were recorded in official Presidential Minutes, all dated 1 February 2018. The news appears to have reached certain appointees, but, [...], not directly through former President Zuma or his office. The appointments were not announced to the public. On 14 February 2018, former President Zuma resigned from office and President Ramaphosa assumed office. [...] During March 2019, [...], President Ramaphosa decided to revoke, amongst others, these two appointments.”<sup>33</sup>

The alleged appointments had reached the aggrieved parties through unsolicited advice from the then National Director of Public Prosecutions (NDPP), Mr Shaun Abrahams.<sup>34</sup> It is worth noting that Mr Abraham’s own appointment was also under judicial review and was subsequently declared invalid by the Constitutional Court in *Nxasana v. Corruption Watch NPC and Others*<sup>35</sup> in August 2018. The premature notification to the alleged appointees to the NPA by Mr Abrahams was held to be invalid for the lack of the *functus officio* doctrine, which would have a binding effect on President Ramaphosa as the Successor of the former president.<sup>36</sup> This is but one of the illustrations of malicious efforts to control key state institutions by certain individuals. The Zondo Commission concluded its chapter, made evidence available to the public and made recommendations. However, such information’s rigour and effectiveness leave much to be desired as the country hopelessly awaits justice. The implementation of some of the Zondo Commission recommendations seems to be very sluggish. This may be attributed to the fact that the existing anti-corruption strategies in South Africa are inadequate and therefore exten-

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<sup>33</sup> See *Case of Mncwabe v. President of the Republic of South Africa and Others; Mathenjwa v. President of the Republic of South Africa and Others* [2023-08-24]. Judgement of the Constitutional Court of South Africa, 2023, CCT 102/22; CCT 120/22, paras 6 and 7.

<sup>34</sup> See *Case of Mncwabe v. President of the Republic of South Africa and Others; Mathenjwa v. President of the Republic of South Africa and Others* [2023-08-24]. Judgement of the Constitutional Court of South Africa, 2023, CCT 102/22; CCT 120/22, paras 13 to 16.

<sup>35</sup> See *Case of Nxasana v. Corruption Watch NPC and Others* [2018-08-13]. Judgement of the Constitutional Court of South Africa, 2018, CCT 13/18, para 93. See also *Case of Mncwabe v. President of the Republic of South Africa and Others; Mathenjwa v. President of the Republic of South Africa and Others* [2023-08-24]. Judgement of the Constitutional Court of South Africa, 2023, CCT 102/22; CCT 120/22, para 14.

<sup>36</sup> See *Case of Mncwabe v. President of the Republic of South Africa and Others; Mathenjwa v. President of the Republic of South Africa and Others* [2023-08-24]. Judgement of the Constitutional Court of South Africa, 2023, CCT 102/22; CCT 120/22, paras 66, 67, 75, 95, 118, 128 and 129.



sive and urgent reforms are necessary.<sup>37</sup> It is rather unfortunate that the government does not seem to be registering progress that would culminate in justice being served against those who profited from the abuse of power and state capture.<sup>38</sup>

## 2 Prosecution

The prosecution of crimes in the Republic is done by the National Prosecuting Authority (NPA) in terms of section 179 of the Constitution and the National Prosecuting Authority Act.<sup>39</sup> The Act gives effect to the Constitution which demands that “there is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament” and which shall discharge its mandate without fear, favour or prejudice.<sup>40</sup> “The National Prosecuting Authority (NPA) is a special constitutional body that exercises significant public powers in South Africa’s democracy but does not fit comfortably within either the judicial or the executive branch of state.”<sup>41</sup> South Africans were optimistic that after the findings of the Zondo Commission, the NPA would have registered some successes in holding those who perpetuated activities of state capture responsible. This, however, is yet to be witnessed.

Lauren Kohn, writing for the 2022 Constitutional Court Review, proposes what she terms an “urgent need for a comprehensive, constitutionally informed redress mechanism” to remedy the effects of state capture

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<sup>37</sup> See PIENAAR, G. and N. BOHLER-MULLER. Implementation of the State Capture Commission Recommendations: An Institutional Perspective on Ethics and Accountability. *New Agenda* [online]. 2023, vol. 90, no. 1, p. 11 [cit. 2023-12-08]. ISSN 1607-2820. Available at: <https://www.ajol.info/index.php/na/article/view/257373>, see also Post Zondo – The Future of Democracy Colloquium. In: *HSRC – Human Sciences Research Council* [online]. 2023 [cit. 2023-12-08]. Available at: <https://hsrc.ac.za/post-zondo-the-future-of-democracy-colloquium/>.

<sup>38</sup> See PIENAAR, G. and N. BOHLER-MULLER. Implementation of the State Capture Commission Recommendations: An Institutional Perspective on Ethics and Accountability. *New Agenda* [online]. 2023, vol. 90, no. 1, pp. 11-20 [cit. 2023-12-08]. ISSN 1607-2820. Available at: <https://www.ajol.info/index.php/na/article/view/257373>.

<sup>39</sup> See the National Prosecuting Authority Act. These prosecution powers are conferred in terms of section 179(1) of the Constitution read with section 2 of the National Prosecuting Authority Act.

<sup>40</sup> See section 179(1)(a) and (4) of the Constitution.

<sup>41</sup> See KOHN, L. The National Prosecuting Authority as Part of South Africa’s Integrity and Accountability Branch and the Related Case for an Anti-Corruption Redress System. *Constitutional Court Review* [online]. 2022, vol. 12, no. 1, p. 1 [cit. 2023-12-08]. ISSN 2521-5183. Available at: <https://doi.org/10.2989/ccr.2022.0001>.

in South Africa.<sup>42</sup> This redress mechanism includes a possible establishment of a “fourth branch of state” that would promote accountability and openness as envisaged in the founding provisions of the Constitution.<sup>43</sup> She envisages political reforms, such as an amendment to the National Prosecuting Authority Act, that would create non-trial resolutions (NTRs).<sup>44</sup> This would require significant forms of backing, including civil society backing, political backing and ultimately constitutional amendment as South Africa is still “in a phase of responsive and ‘experimental constitutionalism’.”<sup>45</sup> The NTRs are acclaimed as the best administrative international practices that are an alternative to long criminal trial processes and will assist in recovering fraudulently obtained benefits from corrupt individuals. These NTRs may include deferred trial agreements and would advance accountability for corrupt activities such the state capture.<sup>46</sup> Proposals and ideas such as these are good ways to begin the legislative journey toward an effective prosecution of crimes in the country.

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<sup>42</sup> See KOHN, L. The National Prosecuting Authority as Part of South Africa’s Integrity and Accountability Branch and the Related Case for an Anti-Corruption Redress System. *Constitutional Court Review* [online]. 2022, vol. 12, no. 1, p. 3 [cit. 2023-12-08]. ISSN 2521-5183. Available at: <https://doi.org/10.2989/ccr.2022.0001>.

<sup>43</sup> See section 1(d) of the Constitution.

<sup>44</sup> See KOHN, L. The National Prosecuting Authority as Part of South Africa’s Integrity and Accountability Branch and the Related Case for an Anti-Corruption Redress System. *Constitutional Court Review* [online]. 2022, vol. 12, no. 1, p. 1 [cit. 2023-12-08]. ISSN 2521-5183. Available at: <https://doi.org/10.2989/ccr.2022.0001>.

<sup>45</sup> See KOHN, L. The National Prosecuting Authority as Part of South Africa’s Integrity and Accountability Branch and the Related Case for an Anti-Corruption Redress System. *Constitutional Court Review* [online]. 2022, vol. 12, no. 1, pp. 11-12 [cit. 2023-12-08]. ISSN 2521-5183. Available at: <https://doi.org/10.2989/ccr.2022.0001>.

<sup>46</sup> “For a general definition that covers the expanse of the DPA (as a broad species of non-trial resolution) in the American context see, for example, F. Mazzacuva ‘Justifications and Purposes of Negotiated Justice for Corporate Offenders and Non-Prosecution Agreements in the UK and US Systems of Criminal Justice’ (2014) 78 *Journal of Criminal Law* 249, 250: A DPA is a deal between the government and a target corporation [or entity, including a state entity], whereby the former agrees to dismiss a criminal charge, after a given period of time, if the latter fulfils its obligations, which might be, for example: to cooperate with public authorities in their investigations of culpable individuals; to accept its responsibility by acknowledging the acts of its employees; to undertake internal reforms including the introduction of effective compliance programmes and independent monitors; punitive measures (such as penalties, restitution and surrender of ill-gotten financial gains), etc.” See KOHN, L. The National Prosecuting Authority as Part of South Africa’s Integrity and Accountability Branch and the Related Case for an Anti-Corruption Redress System. *Constitutional Court Review* [online]. 2022, vol. 12, no. 1, p. 9 [cit. 2023-12-08]. ISSN 2521-5183. Available at: <https://doi.org/10.2989/ccr.2022.0001>.

The prosecution of crimes in South Africa currently depends on the efficacy of the National Prosecuting Authority, functioning alongside an independent judiciary. For an effective prosecution of crimes, such as those perpetuated under state capture, the NPA must be well-capacitated, strengthened and afforded the institutional integrity it deserves. The role of the National Prosecuting Authority is immense, and it is incumbent upon South Africans to ensure effective mechanisms that guarantee accountability whilst protecting the independence of this institution.<sup>47</sup> Section 20 of the National Prosecuting Authority Act confers authority on the NPA to institute and conduct prosecution of crimes on behalf of the state. Section 30 further provides that members of the prosecuting authority must exercise their duties without fear, favour or prejudice and no organ of state or any person shall improperly interfere with or obstruct the functioning of this institution.<sup>48</sup> Notwithstanding these legislative and constitutional promises, interference, and various challenges to the functioning of the NPA have to an extent compromised the integrity of this institution.<sup>49</sup>

The current status of the NPA exposes it to interference in its functions and compromises its independence and institutional integrity. This may be due to the fact that its national head, the National Director of Public Prosecution (NDPP) is appointed by the President<sup>50</sup> and power is given to the cabinet minister responsible for the administration of justice to exercise final responsibility over that National Prosecuting of Authority.<sup>51</sup> The status quo is detrimental to the mandate of the NPA and therefore, a fourth branch of government in the form of a National Prosecuting

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<sup>47</sup> See OMAR, J. The NPA's Limited Independence and How to Mitigate Political Interference in High-Profile Cases. *Southern African Public Law* [online]. 2020, vol. 35, no. 2, p. 3 [cit. 2023-12-08]. ISSN 2522-6800. Available at: <https://doi.org/10.25159/2522-6800/7343>.

<sup>48</sup> See OMAR, J. The NPA's Limited Independence and How to Mitigate Political Interference in High-Profile Cases. *Southern African Public Law* [online]. 2020, vol. 35, no. 2, p. 7 [cit. 2023-12-08]. ISSN 2522-6800. Available at: <https://doi.org/10.25159/2522-6800/7343>, see also section 179 of the Constitution.

<sup>49</sup> See *Case of Mncwabe v. President of the Republic of South Africa and Others; Mathenjwa v. President of the Republic of South Africa and Others* [2023-08-24]. Judgement of the Constitutional Court of South Africa, 2023, CCT 102/22; CCT 120/22; and *Case of Nxasana v. Corruption Watch NPC and Others* [2018-08-13]. Judgement of the Constitutional Court of South Africa, 2018, CCT 13/18.

<sup>50</sup> "There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of (a) a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive." See section 179(1)(a) of the Constitution.

<sup>51</sup> See section 179(6) of the Constitution.

Authority that is free from executive control is warranted; a branch that will report directly to parliament through its independent head. This would ensure its functional independence and integrity. This may be the best time to consider the necessary amendments to some parts of section 179 of the Constitution and subsequently to the National Prosecuting Authority Act so as to guarantee an independent prosecuting authority; one that is free of encroachment from members of the executive arm of state.

### 3 The National Prosecuting Authority with checks and balances

The doctrine of separation of powers with checks and balances is implicit in our constitutional structure. It divides power between the legislature, the executive, and the judiciary. All these three institutions have a clear mandate and independence, subject to the necessary checks and balances. The legislative and executive powers are infused in terms of section 91 of the Constitution, in that members of the executive must be elected from the legislature and no more than two outside the legislature.<sup>52</sup> These two arms of state are political and interdependent in nature. The third arm, on the other hand, which is the judiciary is an independent non-political institution that must perform its functions impartially without fear, favour or prejudice, subject only to the law and the Constitution.<sup>53</sup> This is the Constitutional guarantee for the independence of the judicial authority, subject to some checks and balances entailed in the appointments, security of tenure and removal of judicial officers in terms of the Constitution.<sup>54</sup> No person or organ of state shall interfere with its functioning,<sup>55</sup> judicial decisions are final and bind all those to whom they apply.<sup>56</sup> The Chief Justice is an independent head of this third arm of government and is responsible for all judicial functions of the Republic.<sup>57</sup>

The institutional independence of the judiciary culminates in the functional independence of this vital branch of government. This is necessary, for the functional independence and integrity of the National Prosecuting Authority. A fourth branch of government designated for the NPA is long overdue. The phrase that “the prosecuting authority exercis-

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<sup>52</sup> See section 91 of the Constitution.

<sup>53</sup> See section 165(2) of the Constitution.

<sup>54</sup> See sections 174 and 175 which provide for the appointment of judges, section 176 provides for the term of office and remuneration of judges and section 177 provides for removal of judges.

<sup>55</sup> See section 165(3) of the Constitution.

<sup>56</sup> See section 165(5) of the Constitution.

<sup>57</sup> See section 165(6) of the Constitution.

es its functions without fear, favour or prejudice”, echoed in both section 179 of the Constitution and section 32 of the National Prosecuting Authority Act is not supported by proper institutional independence assuring mechanisms. This is because of the so-called “inward approach” towards the independence of the NPA, in that the people who prosecute must exercise this function independently and according to their code of conduct. This renders the institutional independence of the NPA possible only if an individual prosecutor acts with integrity.<sup>58</sup> The current status quo does not guarantee the independence and functional integrity of the NPA that South Africa needs to effectively prosecute crime without fear, favour or prejudice as envisaged in the Constitution.<sup>59</sup>

It has been noted that the NPA’s role is quasi-judicial, in that they decide which matters must come to court and this requires the level of independence that is granted to the judiciary as the third arm of state. Therefore, internal accountability measures through the NDPP’s office are necessary for an effective implementation of checks and balances that would curtail arbitrary exercise of power within the NPA.<sup>60</sup> The current

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<sup>58</sup> See OMAR, J. The NPA’s Limited Independence and How to Mitigate Political Interference in High-Profile Cases. *Southern African Public Law* [online]. 2020, vol. 35, no. 2, p. 9 [cit. 2023-12-08]. ISSN 2522-6800. Available at: <https://doi.org/10.25159/2522-6800/7343>.

<sup>59</sup> “The Court, in *re: Certification of the Constitution of the RSA, 1996*, had an opportunity to evaluate whether the NPA was sufficiently independent. The challenge brought before the Court was whether the presidential power to appoint the NDPP impacted negatively on institutional independence and infringed the doctrine of separation of powers. The Court was, however, satisfied that the appointment of the NDPP by the President did not compromise the doctrine of separation of powers. The Court found that section 179(4) was tantamount to a ‘constitutional guarantee of independence’. Furthermore, the Court noted that the NPA was not part of the judiciary and therefore a strict separation of powers was not required to ensure institutional independence. I argue that a duty to act ‘without fear, favour and prejudice’ was confused with structural independence. The Court overstated the duty to act without ‘fear, favour or prejudice’ as signifying the intention to create an independent institution.” See OMAR, J. The NPA’s Limited Independence and How to Mitigate Political Interference in High-Profile Cases. *Southern African Public Law* [online]. 2020, vol. 35, no. 2, p. 9 [cit. 2023-12-08]. ISSN 2522-6800. Available at: <https://doi.org/10.25159/2522-6800/7343>.

<sup>60</sup> “In *Democratic Alliance v. President of the Republic of South Africa and Others*, the Court confirmed that the Constitution requires the NPA to act independently from the executive and that, as such, the NDPP must be viewed as a ‘non-political chief executive officer directly appointed by the President’. The office of the NDPP must be ‘non-political’ and ‘non-partisan’ and its role is closely related to the function of the judiciary. Yet it lacks the independence clearly provided to the judiciary. Section 165(2) of the Constitution provides that ‘[t]he courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.’ In my view, a failure to mandate structural independence for the NPA has an impact on individual

constitutional arrangement, as far as it relates to the exercise of power by the minister responsible for the administration of justice, compromises the institutional independence and integrity of the NPA.<sup>61</sup> The political arms of government should not have influence, either directly or indirectly, on the decision-making of the National Prosecuting Authority. This is so because “the independence in prosecutorial discretion stems from the fact that the decision should be made based on pure legal criteria”.<sup>62</sup> It is only the will of law that can be applied fairly and to everyone.<sup>63</sup>

“Thus, there are structural problems, including those related to appointment, removal, ministerial interference, and budgetary constraints, that may allow for political interference in the proper functioning of the NPA. This political interference has manifested in the alleged lack of willingness to prosecute apartheid crimes and the NPA’s seeming inertia in prosecuting offences associated with state capture.”<sup>64</sup>

The National Prosecuting Authority needs structural strengthening through unequivocal legislative mechanisms that will guarantee its independence from political interference.

The status quo at the National Prosecuting Authority leaves a lot to be desired. This is more so with regards to the prosecution of state capture cases as the country is yet to witness such prosecutions. One of the prominent figures accused of state capture crimes Mr Matshela Koko’s

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prosecutors’ ability to perform their functions professionally.” See OMAR, J. The NPA’s Limited Independence and How to Mitigate Political Interference in High-Profile Cases. *Southern African Public Law* [online]. 2020, vol. 35, no. 2, p. 11 [cit. 2023-12-08]. ISSN 2522-6800. Available at: <https://doi.org/10.25159/2522-6800/7343>.

<sup>61</sup> See OMAR, J. The NPA’s Limited Independence and How to Mitigate Political Interference in High-Profile Cases. *Southern African Public Law* [online]. 2020, vol. 35, no. 2, p. 17 [cit. 2023-12-08]. ISSN 2522-6800. Available at: <https://doi.org/10.25159/2522-6800/7343>, see also *Case of Pikoli v. President of the Republic of South Africa and Others* [2009-08-11]. Judgement of the High Court of South Africa, 2009, 8550/09.

<sup>62</sup> See OMAR, J. The NPA’s Limited Independence and How to Mitigate Political Interference in High-Profile Cases. *Southern African Public Law* [online]. 2020, vol. 35, no. 2, p. 18 [cit. 2023-12-08]. ISSN 2522-6800. Available at: <https://doi.org/10.25159/2522-6800/7343>.

<sup>63</sup> See OMAR, J. The NPA’s Limited Independence and How to Mitigate Political Interference in High-Profile Cases. *Southern African Public Law* [online]. 2020, vol. 35, no. 2, p. 18 [cit. 2023-12-08]. ISSN 2522-6800. Available at: <https://doi.org/10.25159/2522-6800/7343>.

<sup>64</sup> See OMAR, J. The NPA’s Limited Independence and How to Mitigate Political Interference in High-Profile Cases. *Southern African Public Law* [online]. 2020, vol. 35, no. 2, p. 20 [cit. 2023-12-08]. ISSN 2522-6800. Available at: <https://doi.org/10.25159/2522-6800/7343>.

case was struck off from the roll due to unreasonable delays.<sup>65</sup> This shows how sluggish the nature of these prosecutions has been so far.

#### 4 Investigative Directorates

Section 7 of the National Prosecuting Authority Act provides for the establishment of investigative directorates for the investigation of certain categories of crimes.<sup>66</sup> The mandate of this section has, however, been tried and tested in South Africa with very disappointing outcomes. From this mandate, the Office for Serious Economic Offences as well as the Investigating Directorate of Serious Economic Offences were established as investigative units within the NPA but due to excessive red tape, they were not much of a success.<sup>67</sup> Due to this, the National Prosecuting Authority Amendment Act 61 of 2000 was promulgated and established the Directorate of Special Operations, famously known as “*the Scorpions*”.<sup>68</sup> The Scorpions were hard at work, however, they faced a lot of criticism.

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<sup>65</sup> “Former Eskom interim CEO Matshela Koko, his family and others accused of corruption are breathing a little easier after the Kusile corruption case was struck off the roll, but the National Prosecuting Authority could reinstate charges.” See HAWKER, D. NPA’s Bungled Matshela Koko Kusile Corruption Case Sounds Alarm Bells over Directorate’s Preparedness to Prosecute. In: *Daily Maverick* [online]. 2023-11-25 [cit. 2023-12-08]. Available at: <https://www.dailymaverick.co.za/article/2023-11-25-npas-bungled-matshela-koko-kusile-corruption-case-sounds-alarm-bells-over-directorates-preparedness-to-prosecute/>.

<sup>66</sup> See MONTESH, M. and J. BERNING. A Need for a Single Anti-Corruption Agency in South Africa: A Comparative Study. *Acta Criminologica*. 2012, vol. 2012, no. 1, p. 118. ISSN 1012-8093.

<sup>67</sup> See MONTESH, M. and J. BERNING. A Need for a Single Anti-Corruption Agency in South Africa: A Comparative Study. *Acta Criminologica*. 2012, vol. 2012, no. 1, p. 119. ISSN 1012-8093.

<sup>68</sup> “The Directorate of Special Operations was established in terms of section 7 and 43a of the National Prosecuting Authority Act, read with section 2 of the National Prosecuting Authority Amendment Act 61 of 2000. In terms of section 7 of the National Prosecuting Authority Act, the Directorate was given the power to “investigate, gather, keep and analyse information, institute criminal proceedings related to offences committed in an organised fashion and categories of offences determined by the State President by proclamation”. Furthermore, the Directorate had the powers to investigate and carry out any functions incidental to “investigations, gather, keep and analyse information and where appropriate, institute criminal proceedings and carry out any necessary functions incidental to instituting criminal proceedings”. In terms of section 30 of the National Prosecuting Authority Act, read with section 14 of the National Prosecuting Authority Amendment Act, the special investigators of the Directorate had the powers as provided for in the Criminal Procedure Act 51 of 1977.” See MONTESH, M. and J. BERNING. A Need for a Single Anti-Corruption Agency in South Africa: A Comparative Study. *Acta Criminologica*. 2012, vol. 2012, no. 1, p. 119. ISSN 1012-8093.

They were, among other things, criticised for allegedly exceeding their mandate, and political interference in their work and were subjected to investigations. The ultimate investigation was the Khampepe Commission of Inquiry in 2005 which was appointed to investigate, amongst others, the mandate and location of the Directorate of Special Operations.<sup>69</sup> The Khampepe Commission found, among other things that the Scorpions were constitutional and properly located, however, they exceeded their mandate with the collection of intelligence and there was a lack of oversight over their operations.<sup>70</sup> In 2008 the Scorpions were dissolved and incorporated into the South African Police Service (SAPS).<sup>71</sup>

The incorporation of the Scorpions into the South African Police Service marked a significant departure from locating investigative directorates within the National Prosecuting Authority to SAPS. After the dissolution of the Scorpions, the Directorate for Priority Crime Investigation (DPCI) famously known as the “Hawks” was established in 2009.<sup>72</sup> In *Glenister v. President of the Republic of South Africa and Others*,<sup>73</sup> the Constitutional Court declared legislation that created the Hawks unconstitutional to the extent that it failed to establish the independence of the Hawks. This lack of independence offends the constitutional require-

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<sup>69</sup> See MONTESH, M. and J. BERNING. A Need for a Single Anti-Corruption Agency in South Africa: A Comparative Study. *Acta Criminologica*. 2012, vol. 2012, no. 1, p. 121. ISSN 1012-8093, see also KANYEGIRIRE, A. Investigating the Investigators: A Summary of the Khampepe Commission of Inquiry. *SA Crime Quarterly* [online]. 2008, no. 24, pp. 35-40 [cit. 2023-12-08]. ISSN 2413-3108. Available at: <https://doi.org/10.17159/2413-3108/2008/v0i24a953>.

<sup>70</sup> See MONTESH, M. and J. BERNING. A Need for a Single Anti-Corruption Agency in South Africa: A Comparative Study. *Acta Criminologica*. 2012, vol. 2012, no. 1, p. 122. ISSN 1012-8093.

<sup>71</sup> See MONTESH, M. and J. BERNING. A Need for a Single Anti-Corruption Agency in South Africa: A Comparative Study. *Acta Criminologica*. 2012, vol. 2012, no. 1, p. 125. ISSN 1012-8093.

<sup>72</sup> “This was done in terms of the National Prosecuting Authority Amendment Bill of 2008 as well as the South African Police Service Amendment Bill of 2008.” See MONTESH, M. and J. BERNING. A Need for a Single Anti-Corruption Agency in South Africa: A Comparative Study. *Acta Criminologica*. 2012, vol. 2012, no. 1, p. 125. ISSN 1012-8093.

<sup>73</sup> See *Case of Glenister v. President of the Republic of South Africa and Others* [2011-03-17]. Judgement of the Constitutional Court of South Africa, 2011, CCT 48/10 (hereinafter referred to as “Glenister”) cited in MONTESH, M. and J. BERNING. A Need for a Single Anti-Corruption Agency in South Africa: A Comparative Study. *Acta Criminologica*. 2012, vol. 2012, no. 1, p. 125. ISSN 1012-8093.



ments and renders the Hawks vulnerable to political interference.<sup>74</sup> The legislature needs to go back to the drawing board and amend the Constitution and the National Prosecuting Authority Act to enable an investigative directorate that is properly located within the NPA and given powers to investigate, collect and analyse intelligence and prosecute crimes independently, without fear, favour, or prejudice.

## Conclusions

The South African constitutional democracy needs protection now more than ever before. This will be best achieved through the strengthening of the state institutions that are responsible for upholding the rule of law of the Republic. The National Prosecuting Authority is one such institution and is at the heart of protecting our democracy. The country was headed to the correct path when the scorpions were established but a lot can be learnt from its shortcomings to create a directorate of the same nature with properly defined parameters and oversight. There is a great need for a multidisciplinary prosecutor-orientated investigation that is properly housed within the NPA that would successfully prosecute crimes of such magnitude as those identified in the state capture investigation.

The country has put an emphasis on the commissions of enquiry for far too long and, these commissions, at best, serve as sources of public awareness about matters that infringe on public interests, such as the state capture and corrupt activities that have been taking place in the country. The over-dependence on commissions of enquiry has proven detrimental to our constitutional democracy as the general public seems to be losing hope in the current crime-fighting mechanisms. South Africans need to see justice being done; there needs to be prosecution of crimes such as those perpetuated under the auspice of state capture. This duty lies in the hands of a capable prosecuting authority that will diligently investigate, institute prosecution, and successfully prosecute such crimes.

The judiciary, as the “ultimate guardian of the Constitution”,<sup>75</sup> needs to work alongside a functional prosecuting authority in order for it to de-

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<sup>74</sup> See MONTESH, M. and J. BERNING. A Need for a Single Anti-Corruption Agency in South Africa: A Comparative Study. *Acta Criminologica*. 2012, vol. 2012, no. 1, p. 125. ISSN 1012-8093.

<sup>75</sup> See *Case of Doctors for Life International v. Speaker of the National Assembly and Others* [2006-08-17]. Judgement of the Constitutional Court of South Africa, 2006, CCT 12/05, para 38.

liver justice to the people. It may be easy for the NPA to charge or institute criminal proceedings but to successfully prosecute them is a tough mountain to climb when such cases have been poorly investigated. This is often the case in matters of state capture, people are arraigned in court, but their cases are eventually struck off from the roll for flimsy reasons.

The writers are of the view that South Africa needs a prosecutor-orientated investigation as was the case during the times of the scorpions. The best way to achieve this is to amend the National Prosecuting Authority Act to establish an investigative directorate that would be placed within the NPA with clearly defined powers and limitations. This may be attributed to the need for “multi-disciplinary structures, that is, having prosecutors, intelligence operatives or analysts as well as investigators in a team” as envisaged by the Khampepe Commission of Enquiry.<sup>76</sup> An arrangement such as this would be better placed in a unique fourth branch of government in the form of the National Prosecuting Authority which is headed by the National Directorate of Public Prosecution and reports directly to Parliament. This would guarantee institutional independence for the NPA and exempt it from unwarranted political interference that the prosecuting authority is currently subjected to. The writers do not take away the important work that the Hawks are doing within the South African Police Service, however, their efforts cannot be adequate for the rampant corrupt activities that have been exposed in the Zondo Commission. This inadequacy may also be owing to the lack of political independence as was pointed out by the Constitutional Court in *Glenister*. Hence the need for a carefully legislated investigative directorate within the NPA is a necessity for justice to prevail amid critical cases such as those contained in the state capture report.

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