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Key issues in the NPA

Transparency in high-profile corruption matters

Issue Paper 4

by

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1. Introduction

The National Prosecuting Authority (NPA) tends to follow a highly secretive and confidential approach to all prosecutions, even in relation to high-profile corruption cases. The problem with this approach is that it fails to take into account the reasons for confidentiality and secrecy, and whether or not those reasons still pertain in high-profile corruption cases. The approach also fails to appreciate the risks posed by an unnecessarily secretive approach in these kinds of matters. This Issue Paper will consider the special case of high profile corruption and comment on the nature and extent of transparency necessary in such cases.

2. The interrelationship of transparency, accountability and independence

Independence is an essential feature of the proper exercise of prosecutorial discretion.[1] Independence requires that justice be dispensed without 'fear, favour or prejudice.'[2] Independence cannot exist alone: it must co-exist with accountability. Transparency is required to ensure accountability: if no-one is seen to be held accountable for the exercise of prosecutorial discretion, how can the public ever have any assurance that decisions are not tainted or improper?[3]

As an organ of state[4] the NPA is accountable to the public.[5] Prosecutors in democracies accept that they are accountable to the public for the decisions they take, particularly in criminal justice systems which do not have compulsory or mandatory prosecution. Public accountability comprises two linked notions in relation to the exercise of prosecutorial discretion. First, it involves informing and explaining, that is, rendering an account of the

[1] Bellemare, DA, 'Accountability, Independence and Ethics in Prosecution Practice: Public Confidence and Accountability in the Exercise of Prosecutorial Discretion', in *International Society for the Reform of Criminal Law 18th International Conference Montreal* (Quebec Canada, 2004), p. 2
[2] *Section 179(4) Constitution of the Republic of South Africa Act 108 of 1996.*
[3] Bellemare 3.
[4] *Section 239 Constitution of the Republic of South Africa Act 108 of 1996*.
[5] *Section 195(1)(f) Constitution of the Republic of South Africa Act 108 of 1996*.

manner in which prosecutorial responsibilities are being met.[6] Secondly, it involves taking corrective actions where appropriate, and giving an account of these corrective actions.[7]

Clarity and transparency are key to public accountability. Precisely because the exercise of any discretion cannot be capricious or arbitrary, it must be principled, that is, based on sound and reasonable known criteria and rules. Thus, the transparency required of the NPA extends also to ensuring that its policies and directives which guide its decision-making are known and in the public domain.

Policy and directives should therefore be transparently and publicly available in order for there to be meaningful public accountability, as is the case in many democracies. For example, the Public Prosecution Service of Canada Deskbook is a public document[8] and in Australia, such criteria must be published in the Government Gazette.[9] (Such guidance to prosecutors is to be distinguished from Confidential Memoranda providing legal advice to prosecutors.) Policy and directives must be known in order for it to be transparently demonstrated that there is compliance with policy and directives. This will make accounting predictable; another person apply the same policy and directives to the same facts would come to the same decision.

The secrecy of a process will often generate speculation of impropriety. Conversely, transparency will support effective and meaningful public accountability. The more that the exercise of discretion is a matter of public record, the more likely the decision-making process will be seen as responsible and accountable, therefore enhancing trust and public confidence, credibility, and ultimately legitimacy.

[6] Bellemare 2.
[7] Bellemare 3.
[8] Public Prosecution Service of Canada Deskbook' <https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/d-g-eng.pdf> [accessed 31 May 2021]
[9] *Section 8 Director of Public Prosecutions Act 1983, Australia*.

3. The risks posed by lack of transparency in high-profile corruption matters

As explained by the Opinion of the Consultative Council of European Prosecutors on '*The role of prosecutors in fighting corruption and related economic and financial crime*', transparency is a key requirement in prosecution activities, and this is especially true when it comes to a truly sustaining and successful fight against corruption:

> "Transparency in the exercise of prosecutors' functions is a key component of the rule of law, one of the important guarantees of a fair trial, and necessary for ensuring public confidence and trust. Indeed, a positive image of the prosecution service forms an important element of public trust in the proper functioning of the justice system." [10]

How is this to be achieved given prosecutors' default stance in favour of confidentiality and secrecy? The Opinion argues for the widest possible lawful public access to information on the activities of prosecutors[11], which is "especially true when it comes to a 'truly sustainable and successful fight against corruption.'"[12]

Why is the "widest possible lawful access to information" particularly important in relation to corruption, and in particular, the form of corruption broadly described as "state capture" in South Africa? In South Africa, it is generally accepted that state capture would not have been addressed and exposed had it not been exposed by the media.[13]

Institutions of state supporting democracy, including those of the criminal justice system, such as the South African Police Service (SAPS) and the NPA, were themselves subject to "state capture" through the ascendance of persons within these institutions linked to the key

[10] Consultative Council of European Prosecutors (CCPE): "Opinion No. 14 (2019) «The Role of Prosecutors in Fighting Corruption and Related Economic and Financial Crime»' (CCPE) <https://rm.coe.int/opinion-14-ccpe-en/168099399f> [accessed 16 February 2022]
[11] CCPE 45.
[12] CCPE 46.
[13] K Gottschalk, 'State Capture in South Africa: How the Rot Set in and How the Project Was Rumbled', *The Conversation* <https://theconversation.com/state-capture-in-south-africa-how-the-rot-set-in-and-how-the-project-was-rumbled-176481> [accessed 15 February 2022].

players of the state capture narrative. This is widely known and understood in the South African context. Consequently, trust in the police and the NPA have been deeply undermined.

Any failure to be transparent about the institution, progress, and decisions on corruption prosecutions is likely further to undermine trust, which in turn undermines the operation of the criminal justice system, not least by discouraging whistle-blowers and witnesses from co-operating with criminal justice processes.

Transparency is clearly required in at least the situations where:

- Information about an investigation is already in the public domain.
- The NPA has been publicly called upon to respond to an issue or undertake an investigation or prosecution.
- Comment is necessary in order to maintain public confidence that the NPA is fulfilling its responsibility by investigating and prosecuting issues of public concern.
- Comment is necessary for investigation purposes, for example, in order to encourage witnesses to come forward.
- Making a statement could prevent widespread misconduct, or allay public concern.

Transparency in such instances may only be limited to the extent explained and delineated below.

4. Delineating the limits of transparency

There do exist legitimate reasons for confidentiality and secrecy. However, these should not be used to prevent any transparency at all, but should guide the extent of the transparency in the given situation.

Confidentiality and secrecy are ordinarily required for the following reasons:

- To protect the rights of accused or potential accused persons, particularly the presumption of innocence;

- To protect the right to privacy of an accused, so that their reputation is not damaged unnecessarily through the public knowledge of an investigation or prosecution;
- To protect legal professional privilege, also known as attorney-client privilege;
- To protect witnesses and potential witnesses, whose identity may need to be protected if details of an investigation or prosecution are revealed. Whistle-blowers in particular may be at risk of being targeted not only by the accused person but by broader sympathisers with either the accused or the presumed political affiliation of the accused;
- To protect evidence; potential accused persons who are alerted to an investigation or prosecution via public knowledge may seek to destroy evidence which may implicate them;
- To abide by ethical rules relating to the parties to a case and the disclosure of information.

Put more generally:

> "As a matter of principle, prosecution services should provide appropriate information to the media and to the public at all stages of their activities as regards fighting corruption including through their websites. At the same time, this should be done with due respect for legal provisions concerning the protection of personal data, privacy, dignity, the presumption of innocence, ethical rules of relations with other participants in the proceedings, as well as legal provisions precluding or restricting disclosure of certain information, particularly where required to ensure the security and consistency of the investigation".[14]

How might these considerations in favour of confidentiality play out in high-profile corruption matters in South Africa? What risks are potentially faced? This is considered in more detail below. In general, it is the case that in high-profile corruption matters, the risks do not play out in the same way as ordinary cases, mainly because the names of the accused and their alleged crimes are already in the public domain.

[14] CCPE 47.

4.1. The presumption of innocence

According to the United Nations Human Rights Committee (UNHRC), the presumption of innocence is breached where public officials prejudge the outcome of a trial.[15] "Public officials" includes judges, prosecutors, the police, and government officials, all of whom must avoid making public statements of the guilt of an individual prior to a conviction or after an acquittal.

However, the UNHRC is clear that it is nevertheless permissible for the authorities to inform the public of the name of a suspect and that the person has been arrested or has made a confession, as long as the person is not publicly declared guilty.[16]

Consequently, the NPA publicising the fact of an investigation into already-named suspects, and later, a prosecution, would not fall foul of the presumption of innocence, as long as the statement did not amount to a declaration of the guilt of the accused person.

4.2. Attorney-client privilege and attorney-client confidentiality

Legal professional privilege (LPP) or attorney-client privilege is a special case of attorney-client confidentiality. LPP refers to the principle that an accused person must be able to speak freely with her or his attorney without fear that the information that they providing will later be divulged in breach of confidentiality, and used against them in court.

An important exception is that a claim for LPP cannot be made for communications which are made for the purpose of the client committing a crime or fraud. In other words, LPP cannot be claimed in order for an attorney to facilitate the commission of a crime. While it is clear to see how LPP may come into play for an attorney representing an accused person, who may thereby withhold such privileged information from a prosecutor, a prosecutor does not represent an individual client but rather serves the broader interests of the state.

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[15] 'UN Human Rights Committee General Comment No. 13: Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law (Art. 14) : . 04/13/1984' (OHCHR) <https://www.legislationline.org/download/id/4093/file/UN_Equality_before_courts_General_Comment_13_1984.pdf>.

[16] See the European Court of Human Rights case of Worm v. Austria, application no. 83/1996/702/894, paragraph 52, 1997.

As the prosecution is notionally independent of direct state control, it is difficult to imagine a scenario where LPP may prevent a prosecutor from being transparent regarding a matter, unless she or he has had irregular access to material under an attorney's LPP, which, in any event, the prosecution would not be able to use in court. Such material should remain confidential even if it has come into the hands of a prosecutor by whatever means.

4.3. Criminal and civil defamation

A person identified as a suspect of an investigation who is ultimately not prosecuted, might in some instances be entitled to claim her or his reputation has suffered damage as a result of a public statement.

The statement must be wrongful, intentional, published and defamatory. Three defences are available in South African law: truth in the public interest; fair comment (the statement was one of opinion and not fact); and privilege.

Conceivably, those responsible for revealing the identity of a previously unknown suspect would be at risk of a civil and even a criminal defamation suit (criminal defamation remains on South Africa's statutes despite a Bill to remove the offence tabled in 2016, although prosecutions are rare).

In the case of high-profile corruption matters in South Africa, it is the case that the majority of suspects have already suffered reputational damage via being implicated in the hearing of evidence, for example, at the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State (the Zondo Commission).

Others may have been implicated in court in matters being heard in other cases, such as matters brought by the Asset Forfeiture Unit (AFU), or the Special Investigating Unit (SIU).

Indeed, the Zondo Commission has in many instances explicitly directed that an investigation or prosecution proceed against named suspects. Consequently, it is difficult to see how the NPA announcing that it has opened such an investigation or prosecution against such a person will, in the opinion of the reasonable person, have the tendency to undermine, subvert, or impair a person's good name, reputation, or esteem in the community, more than has already occurred via information already in the public domain.

Indeed, prosecution in these instances represents an opportunity to clear one's name. Furthermore, the failure to announce any actions by the NPA after these directions have been made serves deeply to undermine the credibility of the NPA.

4.4. Malicious prosecution

Malicious prosecution is a civil claim alleging the wrongful and intentional assault on the dignity of a person encompassing her or his good name and privacy. To succeed with this claim, a claimant must allege and prove that:

- The defendant set the law in motion (instigated or instituted the proceedings);
- The defendant acted without reasonable and probable cause;
- The defendant acted with malice (or *animo injuriandi* - the wrongful intention to defame or injure another's reputation or personality); and
- The prosecution failed.[17]

Theoretically, the NPA could itself be subject to such a claim (i.e., be a defendant in a malicious prosecution claim brought by an accused). However, to succeed, the claimant must show an "absence of reasonable and probable cause".

Given the abundance of evidence supporting "reasonable and probable cause" for a prosecution in corruption cases, such a claim is unlikely to succeed. Indeed, in most instances an investigating agency has recommended prosecution.

Concerns regarding possible malicious prosecution claims do not impinge on transparency and are likely to be similar whether or not the prosecution is transparent regarding particular matters.

4.5. Protection of witnesses

The Witness Protection Act 112 of 1998 defines a witness as any person who is or may be required to give evidence, or who has given evidence in any proceedings. Protection is only

[17] K Oosthuizen, 'The Requirements for a Successful Malicious Prosecution Claim', *Lexology*, 1 December 2015 <https://www.lexology.com/library/detail.aspx?g=c1160b5a-88b4-4fc9-aa6a-97dda7beb72b> [accessed 15 February 2022]; Magwabeni v Liomba (198/13) [2015] ZASCA 117, 2015.

available to witnesses who make application for protection, or where an interested party makes application on their behalf.[18]

The availability of protection appears to be contingent on a subjective feeling of vulnerability, rather than a proactive threat assessment by the state. Presiding officers are obliged to make an order prohibiting the publication of any information regarding a protected witness. [19] Witnesses cannot be asked to answer questions which may reveal such information.[20]

In making public statements regarding a public case, the NPA should clearly avoid revealing the identity or location of witnesses. It is possible to be sufficiently transparent and to refer in general terms about an investigation without placing witnesses at risk. The "protection of witnesses" would seldom be a sufficient excuse preventing the publication of any information at all regarding a public case.

4.6. Protection of evidence

The NPA in making transparent statements regarding a public case should avoid referring to evidence which has not already been secured. This is to protect such evidence from possible destruction to avoid its use in a trial.

5. Discussion

Taking the above into account, the Investigating Directorate of the NPA, and prosecutors guiding investigations by other agencies, should comment on investigations under its control when it is in the public interest to do so.

This includes but is not limited to situation where the matter is already in the public domain or in which the NPA has been publicly called upon to take action, such as in the Zondo Commission reports or through referrals from other agencies.

[18] *Witness Protection Act 112 of 1998, S7.*
[19] *Witness Protection Act 112 of 1998, S18.*
[20] *Witness Protection Act 112 of 1998, S19*.

Initially, the NPA should confirm the existence of an investigation being opened; sometimes this will be necessary or useful in seeking information relevant to an investigation.

Updates on the progress of the investigation should be given when it is in the public interest to do so, especially when the matter being investigated continues to be of extensive public comment and debate.

The NPA should make a statement on the conclusion of an investigation, to report on the outcome. The NPA must in fact come to a decision, and should not indefinitely delay coming to a decision.

5.1. Decision not to prosecute

The NPA should publicise the decision on whether or not to institute a prosecution relating to an already-public investigation by issuing a media release, which should be factually accurate and provide reasons where the decision is not to prosecute.

Such reasons should provide sufficient detail to support the decision not to prosecute, and should refer to publicly available policy and directives. It will ordinarily not be sufficient to simply say there is no prima facie case, there are no reasonable prospects of success, or that it is not in the public interest. The reasons for the lack of prima facie case, for lack of prospects of success, and the public interest being served, must be explained.

Such a decision should demonstrably be in line with known Prosecution Policy and Directives, which ideally should also previously have been publicised transparently.

5.2. Decision to prosecute

A decision to prosecute should not be publicised before the actions commencing the prosecution have occurred. This may include an arrest, preferably with a warrant, summons or notice (lower courts only) or indictment (High Court only).

An arrest is not the only method of securing the attendance of an accused in court, and should not be used to frighten or harass the accused.[21] The decision to prosecute should only be

[21] S v Totsi (2) SACR 273 (E), 2004.

publicised after the first court appearance of the accused. The NPA need not provide detailed reasons for the decision to prosecute, as these will be apparent in court.

5.3. Outcomes

Where the institution of criminal proceedings has been publicised, the outcome of those proceeding should be publicised by media release, where there is a successful prosecution or an acquittal. If a matter is appealed, the fact of the appeal and its outcome should also be publicised.

6. Conclusion

It is perhaps pertinent to close this Issue Paper with a comment from United States' Human Rights attorneys Sarah Geraghty & Melanie Velez:

> "In our years of litigating civil rights cases on behalf of people entangled in the criminal justice system in the South, a few truths have become evident. First, no good comes from permitting government officials to perform their duties in secret. Second, officials who have become accustomed to operating without accountability are loath to relinquish the power that comes from conducting their business without public scrutiny. Third, when public officials resist efforts to shine a light on their activities, there is often something to hide. Fourth, public scrutiny is often a prerequisite for changing harmful, entrenched practices."[22]

While the above quote relates to instances of police misconduct in the United States of America, it is generalisable to the South African context of the prosecution of corruption. Our democracy is unlikely to be able to withstand protracted corruptions investigations carried out in secret, with no clear reasons provided for decisions, unsupported by available policy and directives.

It is only with transparency that the NPA can be accountable, and is so doing, clearly demonstrate its independence and that is does indeed act without fear, favour or prejudice.

[22] https://law.stanford.edu/wp-content/uploads/2018/03/geraghty_velez.pdf