

COUNTERING CORRUPTION IN SOUTH AFRICA

The rise and fall of the Scorpions and Hawks

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*In 1999 a new directorate of the National Prosecuting Authority was launched to ‘complement and, in some respects, supplement the efforts of existing law enforcement agencies in fighting national priority crimes’.¹ Over the following seven years the Directorate of Special Operations, nicknamed the ‘Scorpions’, gained public favour; however, they were accused of, amongst other things, exceeding their jurisdiction by performing functions that fell outside their mandate. During the African National Congress conference of 2007, delegates took a decision that the Scorpions should be disbanded. In 2008, Parliament passed the South African Police Service Amendment Bill that replaced the Scorpions with the Directorate for Priority Crime Investigation, located within the South African Police Service. In 2010 this move was challenged in *Hugh Glenister v President of the Republic of South Africa & Others* [CCT 48/10]. The key question in this case was whether the national legislation that created the Directorate for Priority Crime Investigation, known as the Hawks (DPCI), and disbanded the Scorpions, was constitutionally valid. In March 2011 the Constitutional Court ruled that the legislation establishing the Hawks was unconstitutional and ‘invalid to the extent that it fails to secure an adequate degree of independence for the Directorate for Priority Crime Investigation.’ The Court gave the government 18 months to rectify the situation. This article provides an overview of the decisions that led to the formation and closure of the Scorpions, and the formation of the Hawks.*

In June 1999 former president Thabo Mbeki announced that ‘a special and adequately staffed and equipped investigative unit will be established urgently, to deal with all national priority crime, including police corruption.’² In September 1999 the Directorate of Special Operations (DSO or ‘Scorpions’) was set up. Jean Redpath has argued that ‘one of the motivating factors behind the

creation of the Scorpions appeared to be to raise public confidence in the ability of the government to fight crime.’³

Shortly after the establishment of the DSO the Scorpions confirmed that they would undertake an investigation into the arms procurement process (hereafter ‘the arms deal’) that had been concluded in 1999 to the value of R43,8 billion and which had been the subject of allegations of corruption by high profile ANC members of government.⁴ The Scorpions soon became

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notorious for their raids of houses of high-ranking politicians within the ANC, including the homes of then Deputy President Jacob Zuma, former Transport Minister Mac Maharaj and Durban businessman Schabir Shaik. It was the investigation by the Scorpions into the role played by Zuma in the arms deal that ultimately led to questions being raised about the Directorate's accountability and location within the National Prosecuting Unit, rather than the SAPS.⁵ Indeed, it could be argued that it was this investigation that led to the downfall of the unit.

In this article we provide an overview of the DSO, and an assessment of the allegations against the unit that served as justification for its closure and replacement with a directorate located in the SAPS.

WHY THE DSO WAS ESTABLISHED

The Directorate of Special Operations was launched in September 1999 and came into legal operation in January 2001. The Directorate had the mandate to investigate particularly serious organised crime, with the objective of prosecuting such offences. Indeed, the formation of the Scorpions coincided with the signing of the International Convention Against Transnational Organised Crime in Palermo in 2000.⁶ Also, the directorate was formed shortly after the passing of the Prevention of Organised Crime Act (Act 121 of 1998). Redpath has argued that it was 'clear from the way the POC Act and the DSO's legislation was drafted, that the DSO was intended to be the primary agency to enforce the racketeering and criminal gang provisions contained in the POC Act, while the Asset Forfeiture Unit would make use of the criminal and civil asset forfeiture provisions, in conjunction with the DSO and SAPS.'⁷

At the time South Africa was characterised in the media both at home and abroad as a place where levels of serious violent crime, as well as crimes committed by organised criminal networks, were rapidly on the increase.⁸ It has been argued that, partly as a result of a general liberalisation that came with democratisation in 1994, South Africa

increasingly became a target for international drug syndicates, both as a market and as a conduit for onward distribution. The inability on the part of law enforcement to deal with the upsurge in criminal activity provided fertile ground for vigilante groups to fill the gap.⁹ The role and rapid expansion of organised crime, both in South Africa and other emerging democracies, has been well documented. Suffice to say that the conventional approach to law enforcement has been notably ineffective in dealing with these developments.¹⁰ This is at least partly what motivated the establishment of a prosecution-led investigation unit within the NPA.

Once the DSO had been established, the National Prosecuting Authority housed the National Prosecuting Services (NPS), the Directorate Special Operations (DSO), the Witness Protection Programme, the Asset Forfeiture Unit (AFU) and specialised units such as the Sexual Offences and Community Affairs Unit and the Specialised Commercial Crime Unit.

The Scorpions were governed by the National Prosecuting Authority Act, 32 of 1998, which provided the Directorate with investigative powers. The DSO was headed by a Deputy National Director of Public Prosecutions. It had two main directorates, namely Strategic and Investigative Support, and Operations.

The DSO had both a legislative and operational mandate. The broad legislative mandate of the DSO was to 'do anything necessary for criminal proceedings on offences committed in an organised fashion, or relating to any other offences proclaimed by the President in the Gazette.'¹¹ Such a broad mandate was intended to enable the Scorpions to investigate almost any matter, and to avoid jurisdiction battles between itself and the SAPS with regard to policing and investigative powers.¹² In terms of section 7 of the National Prosecuting Authority Act,¹³ the Directorate had 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 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.

The operational mandate was envisaged as being somewhat narrower, and negotiated. It was envisaged that the DSO would discuss and negotiate the kinds of cases it would take on, both with the Minister of Justice and the SAPS. Redpath quoted a highly placed interviewee on the matter as saying that '[t]he DSO must engage with the police and everyone involved; everyone must be on board, there must be buy-in at every level, from the politicians, the police, to intelligence... the DSO must be careful of doing *ad hoc* "sexy things"; there must be a set programme.'¹⁴

Already at that stage then there was awareness about the potential for conflict between the police and the DSO about which cases the DSO could or should take on. This conflict manifested quickly, partly as a consequence of the change in SAPS leadership from George Fivaz (in 2000) to Jackie Selebi, who was less open to the DSO than his predecessor. This was not helped when the DSO, rather than the Independent Complaints Directorate or the SAPS, was asked to investigate police brutality after a video was released showing a police dog attacking an illegal immigrant.¹⁵

DSO METHOD OF OPERATION

The Directorate of Special Operations was a multidisciplinary agency that investigated and prosecuted organised crime and corruption.¹⁶ Its staff of 536 consisted of some of the best police, financial, forensic and intelligence experts in the country. It also recruited a number of new young staff members who received training in the US and UK; something that had both advantages and drawbacks for the Scorpions.¹⁸

The methodology used by the Directorate of Special Operations was based on the *troika*

principle, which integrated analysis/intelligence, investigation and prosecution.¹⁹ A DSO investigative team consisted of investigators, prosecutors and analysts who collected intelligence information. After completing an investigation, investigators would refer a case to court and the prosecutor who was involved in the initial stage of the investigation would lead the prosecution. This approach was often criticised because it was believed that the involvement of prosecutors who were part of the investigation team compromised the separation of powers.²⁰

The South African Constitution prescribes the separation of powers into legislative, executive and the judiciary. According to Du Toit and Van der Waldt²¹ the legislative authority formulates and adopts policy, whilst the executive authority is responsible for the execution of policy. The judicial authority passes judgment in all cases before the courts. Since the directorate's investigation teams consisted of prosecutors, investigators and intelligence gatherers, the Minister of Justice and Constitutional Development would later argue that this compromised the separation of powers, creating a 'player' that was also 'referee' and thereby compromising the doctrine of separation of powers.²²

However, with the DSO's success in high-profile cases, public confidence grew in its ability to impact on organised crime. In 2004, money laundering and racketeering were added to its priorities and the DSO succeeded in obtaining the first-ever convictions for racketeering in South Africa.²³ By February 2004, the DSO had completed 653 cases, comprising 273 investigations and 380 prosecutions.²⁴ Of the 380 prosecutions 349 resulted in convictions, representing an average conviction rate of 93,1%.

This apparent success also led to criticism of the DSO. Almost as soon as successful Directorate of Special Operation cases began to be publicised, accusations of the Directorate's 'cherry-picking' arose. Specifically, the Directorate was accused of choosing to investigate and prosecute only matters that they were sure to win.²⁵ Sometimes these accusations went further to suggest that the

Directorate had a tendency to take over cases already substantially investigated by the South African Police Service, taking all the credit for the subsequent successful conclusion of the matter.²⁶ These accusations were easily justified because the legislation creating the Directorate had provided a broad mandate that did not specify which cases were to be investigated by the police and which by the Directorate.²⁷

Yet, Redpath, in describing how the DSO set about defining the scope of its work and, in the stringent process that was followed, how to determine which cases it would take on and which it would not, presents a strong argument to support the counter view. Rather than taking on cases that were 'easy' to investigate and that would improve its record and strengthen public opinion in its favour, the unit chose the more difficult cases that came before it.²⁸

THE DOWNFALL OF THE DSO

During the course of the investigation into the arms deal that started in 2001, the DSO uncovered irregularities in the award of tenders by the Department of Defence. Among those who benefited from these irregular deals was Schabir Shaik, then Deputy President Jacob Zuma's financial adviser and confidante for many years. The DSO investigation led to Shaik being charged on two counts of corruption and one of fraud relating to bribes involving Zuma.

In the *S v Shaik & Others*,²⁹ the accused, Schabir Shaik, was found guilty of corruption and fraud and was sentenced to fifteen years in jail. The court found that he had contravened the Corruption Act 94 of 1992.³⁰ The first charge related to 238 payments into the account of a politician holding high political office (i.e. fraud). The second charge related to incorrect journal entries in the financial statements of the accused's companies, and the third charge related to the soliciting of a bribe by the accused.

Throughout the trial, which lasted from 21 January 2002 to 17 February 2005,³¹ Shaik's relationship with then Deputy President, Jacob

Zuma, was in question, yet Zuma was never called to testify either for the state or the accused. This led to questions being raised in the media about why Zuma was not charged jointly with Shaik. In 2005, when Shaik was found guilty and convicted, President Thabo Mbeki dismissed Zuma as deputy president, a move that led to enormous political tension in the ANC and amongst its alliance partners, as Zuma was the preferred successor of Mbeki for COSATU, the ANC Youth League and others within the ruling party.³² The conviction of Shaik did not signal the end of the Scorpions' investigation and shortly thereafter, on 18 August 2005, the Scorpions raided Shaik's house, this time searching for evidence against Zuma. These raids were heavily criticised by the union federation COSATU, who accused the NPA and the judicial system of being manipulated and influenced to take biased political decisions and actions.

This case and the DSO's handling of it was arguably the single most important factor leading to its downfall, not least because during the course of the DSO's investigations several mistakes were made. One of these was to violate the principle of attorney/client privilege. Section 14 of the Constitution³³ provides for the right of an individual to refuse to disclose admissible evidence.³⁴ This means that any confidential communication made directly between a client and his/her legal advisor, or made by means of an agent, is privileged and a person cannot be compelled to disclose such communication.³⁵ Neither is s/he compelled to disclose any communication that was obtained with a view to litigation.

In 2006 the Directorate of Special Operations had also raided the offices of Zuma's lawyers and seized documents for the purpose of an investigation into the alleged corruption charges. Zuma brought a case against the DSO for violating attorney client privilege that was upheld by the court.³⁶ The court ruled that the actions of the Directorate of Special Operations were a direct violation of section 201 of the Criminal Procedure Act³⁷ and section 35 (3) (h) of the Constitution.³⁸

With the DSO having taken on such high profile political cases so early in its existence it was almost

inevitable that it would attract strong criticism, at least from those who saw it as meddling in power broking in the ruling party. Criticism focused on the location and mandate of the Directorate, prompting President Thabo Mbeki in 2005 to establish an independent commission of inquiry to look into these matters, headed by Judge Sisi Khampepe.

THE KHAMPEPE COMMISSION OF INQUIRY

It was the Commission's express mandate to obtain clarity in respect of the location, mandate and operation of the DSO vis-à-vis other relevant government departments or institutions, and to make findings, report on and make recommendations regarding the accountability, effectiveness, efficiency and oversight in respect of the intelligence operations of the directorate.³⁹

After almost one year of deliberations and research, the Khampepe Commission Report⁴⁰ was finalised. The Commission found that while the Directorate of Special Operations as a structure was not unconstitutional, it did not have a legal basis to collect intelligence. According to Kanyegirire,⁴¹ the Commission found that, although the DSO was mandated to gather, keep and analyse information in terms of section 7(1) (a) (ii) of the NPA Act, the evidence adduced before the Commission as well as the onsite visits to the DSO tended to show that the DSO had established intelligence gathering capabilities. As a result, the Commission found that this was in serious violation of sections 1, 2 and 3 of the National Strategic Intelligence Act 39 of 1994.⁴²

The Khampepe Commission also found that the Directorate lacked oversight. Section 43 of the National Prosecution Act 32 of 1998⁴³ made provision for the establishment of a Ministerial Coordinating Committee to develop regulations and standard operating procedures (SOP) for the members of the DSO. However, the same section did not make provision for the establishment of a structure or institution to oversee the DSO, which the Ministerial Committee was not expected to do.

Furthermore, Kanyegirire⁴⁴ states that the Commission found that neither the Minister of Safety and Security (now Police) nor the Minister of Justice and Constitutional Development exercised practical or effective oversight over the DSO. It is also noted that while the NPA Act made provision for the Minister to exercise oversight over the DSO, such provision was not extended to the Inspector General of Intelligence. Section 7(7) of the Intelligence Services Oversight Act⁴⁵ makes provision for the establishment of an Inspector General for intelligence, whose primary role and functions are to *inter alia* monitor and review the intelligence and counter-intelligence activities of any service.

So far it has been shown that mistakes by the Scorpions themselves, the failure of the law and executive to determine appropriate oversight over the unit, as well as intense political pressure as a consequence of pursuing investigations that involved high level politicians, all contributed to the downfall of the DSO.

REPLACING THE SCORPIONS WITH THE HAWKS

During December 2007, the African National Congress held its 52nd National Policy Conference, where it was resolved that the Directorate of Special Operations should be incorporated into the South African Police Service.⁴⁶

The resolution led to the tabling of the General Law Amendment Bill⁴⁷ and the National Prosecuting Authority Amendment Bill⁴⁸ before Parliament. During the second sitting of Parliament in 2008, the National Assembly approved the dissolution of the Directorate of Special Operations and its incorporation into the South African Police Service's Directorate of Priority Crime Investigation. The dissolution of the unit was decried by the media, organised business, and opposition parties, who argued that the state's ability to investigate and counter corruption had been severely compromised by the closure of the unit. The Democratic Alliance accused the ANC of merging the Scorpions with

the South African Police Service in order to subvert investigations into the police and protect corrupt ANC officials.⁴⁹ However, the ANC felt vindicated when, on the 16th of April 2009, after years of legal wrangling, the Acting Head of the National Prosecuting Authority, Advocate Mokotedi Mpshe, addressed the media and announced the withdrawal of corruption charges against Zuma.

According to Mpshe, the National Prosecuting Authority could not proceed with the charges against Zuma because tape recordings of conversations between Bulelani Ngcuka and Leonard McCarthy recorded by the National Intelligence Agency, and which were submitted by Zuma's attorney, showed 'evidence of political interference and abuse of power by the former head of the Directorate of Special Operations, Advocate Leonard McCarthy'.⁵⁰ The NPA's decision was made after Zuma made a representation for a permanent stay of prosecution.

Mpshe argued that it was neither possible nor desirable for the National Prosecuting Authority to continue with Zuma's prosecution.⁵¹ At the time Mpshe said the decision was one of the most difficult he ever had to make. He was reported in the media as saying:

Using one's sense of justice and propriety as a yardstick by which McCarthy's abuse of the process is measured, an intolerable abuse has occurred which compels a discontinuation of the prosecution. In the light of the above, I have come to the difficult conclusion that it is neither possible nor desirable for the NPA to continue with the prosecution of Mr Zuma. It is a difficult decision because the NPA has expended considerable resources on this matter, and it has been conducted by a committed and dedicated team of prosecutors and investigators who have handled a difficult case with utmost professionalism.⁵²

Zuma's access to the tapes also raised questions about abuse of power by the ruling party, as he had obtained access to intelligence gathered by

the National Intelligence Agency while not a member of the government.

The DPCI, dubbed the Hawks, was established on the 6th of July 2009 and was mandated to prevent, combat and investigate national priority offences as well as any other offence or category of offences referred to the Directorate by the National Commissioner.⁵³ The DPCI was composed of a Commercial Crime Unit, Financial Investigation and Assets Forfeiture Unit, Organised Crime Unit, the Priority Crime Management Centre, and Support Services. It drew its personnel from the Commercial Crime Unit, the former Hi-Tech Project Centre, the Organised Crime Unit and the former Directorate for Special Operations (DSO).

The Hawks had however only been in existence for a very short time before there was a legal challenge to their location in the SAPS, resulting in the Constitutional Court judgment on 17 March 2011 that ruled that Chapter 6A of the South African Police Service Act,⁵⁴ as amended, was inconsistent with the Constitution and invalid to the extent that it failed to secure an adequate degree of independence for the DPCI.⁵⁵ The Court made two key findings. First, it held that the Constitution imposed an obligation on the state to establish and maintain an independent body to combat corruption and organised crime. While the Constitution did not in express terms command that a corruption fighting unit should be established, it imposed a pressing duty on the state to set up a concrete, effective and independent mechanism to prevent and root out corruption. This obligation is sourced in the Constitution and the international law agreements that are binding on the state.⁵⁶ The Court also pointed out that corruption undermines the rights in the Bill of Rights, and imperils our democracy. Section 7(2) of the Constitution⁵⁷ imposes a duty on the state to 'respect, protect, promote and fulfil' the rights in the Bill of Rights.

Secondly, the Court found that the DPCI did not meet the constitutional requirement of adequate independence. Consequently the legislation establishing the Hawks did not pass constitutional

muster. The main reason for this conclusion was that the DPCI was insufficiently insulated from political influence in its structure and functioning. This is because the DPCI's activities must be coordinated by a Ministerial Committee, and ultimately, Cabinet. This form of oversight makes the unit vulnerable to political interference.

Further, the Court held that the safeguards that the provisions created were inadequate to save the DPCI from a significant risk of political influence and interference. This comment referred to independence and freedom to operate without fear of political interference.

Ironically, according to these standards, the DSO was probably also not sufficiently independent. Section 31 of the National Prosecuting Authority Act⁵⁸ held the NPA accountable to the Minister of Justice and Constitutional Development. Nevertheless, the finding of the Constitutional Court requires the government to amend the legislation relevant to the Hawks to guarantee its independence, amongst other things.

CONCLUSION

It is clear from the above discussion that the demise of the Directorate of Special Operations was a result of a series of mistakes by the DSO as well as a consequence of political interference. In view of the Glenister case, it is clear that the government is duty bound to ensure that an agency responsible for investigating corruption should be sufficiently independent to prevent political interference in the cases it investigates. In March 2012, in response to the judgment, the South African Police Service Bill [B7] of 2012⁵⁹ was published. This Bill will no doubt be the subject of tremendous debate and advocacy in the months to come.



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