

# WITHOUT FEAR OR FAVOUR

## The Scorpions and the politics of justice

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In May 2008 legislation was tabled in Parliament providing for the dissolution of the Directorate of Special Operations (known as the 'Scorpions'), an investigative unit based in the National Prosecuting Authority. The draft legislation provides that Scorpions members will selectively be incorporated into a new investigative unit located within the SAPS. These developments followed a resolution passed at the African National Congress National Conference in Polokwane in December 2007, calling for the unit to be disbanded. Since December the ANC has been forced to defend its decision in the face of widespread support for the Scorpions. One of the accusations made by the ANC was that the Scorpions were involved in politically motivated targeting of ANC members. This article examines the issue of political manipulation of criminal investigations and argues that doing away with the Scorpions will in fact increase the potential for such manipulation thereby undermining the principle of equality before the law.

The origins of current initiatives to do away with the Scorpions go back several years. In 2001 the National Prosecuting Authority (NPA) approved an investigation into allegations of corruption in the awarding of arms deal contracts. In October 2002 they announced that this probe would be extended to include allegations of bribery against Jacob Zuma, then South Africa's deputy president.

On the 23rd of August 2003 Bulelani Ngcuka, head of the NPA, told a press conference that the NPA had chosen to prosecute Jacob Zuma's financial advisor Schabir Shaik, but

We have concluded that, while there is a prima facie case of corruption against the deputy president, our prospects of success are not strong enough. That means that we are not sure if we have a winnable case.

Accordingly we have decided not to prosecute the deputy president (Mail and Guardian online 2003).

Political commentator, Aubrey Matshiqi has argued that this statement by Ngcuka 'has in some ways overshadowed every action taken in relation to Zuma by the NPA since that point.' Until June 2005, when Zuma was himself brought to court on charges of corruption after being dismissed from his post as deputy president, 'it fuelled suspicions that the NPA wished to tarnish Zuma's name without prosecuting him' (Matshiqi 2007:10).

It was Ngcuka himself who became the first casualty of the statement. In September 2003 a prominent newspaper published allegations that Ngcuka had spied for the apartheid government. These allegations were dismissed by the Hefer

Commission, which was appointed to investigate them. But following a finding by the Public Protector that Ngcuka's August statement was 'unfair and improper', it seemed that Ngcuka felt that his position had become untenable. He resigned in July 2004.

It is necessary to understand the political backdrop to these events. This primarily relates to the emergence of a constituency amongst members of the ANC and its tripartite alliance partners, the Congress of South African Trade Unions (COSATU) and the South African Communist Party (SACP), which wanted to ensure that Jacob Zuma would become South Africa's next president. Since Zuma had been appointed as Thabo Mbeki's deputy president in 1999, he was in some ways his natural successor – but this particular constituency in fact regarded Zuma as a preferable alternative to Mbeki. On a formal level this was primarily because Zuma was seen to be more amenable to the 'left' orientated agenda that they wanted to pursue. However, there were other factors that contributed to support for Zuma, notably his less remote personal and political style.

The intensifying rivalry between these two 'camps' within the ANC has overshadowed South African politics in recent years. At its December 2007 conference, where delegates voted for the dissolution of the Scorpions, the 'Zuma camp' became the dominant force in the ANC, appointing Jacob Zuma as ANC president.

#### **Allegations of political manipulation**

There were therefore already strong suspicions that the Ngcuka statement had been part of a deliberate agenda to prevent Zuma from becoming president by the time of Schabir Shaik's conviction in June 2005. Shaik's conviction in turn was followed by a chorus of allegations that Zuma was the target of a political conspiracy and that agencies of the criminal justice system were being used against him. For instance, shortly after the Shaik judgment, COSATU issued a statement saying:

The events of the past weeks confirm a long held view by COSATU that the trial of Schabir Shaik was nothing but a political trial of the Deputy President in absentia. (COSATU 2005)

But while the outcry following the Shaik judgment included attacks on the judiciary as a whole, the key targets of suspicion remained the NPA and the Scorpions. It was widely believed that they were acting as instruments of Thabo Mbeki and singling out Zuma to be discredited and then prosecuted, while a number of other ANC leaders, who had also been implicated in the arms deal, were ignored.

In retrospect it has emerged that the decision not to prosecute Zuma was probably made with the approval of President Thabo Mbeki (Feinstein 2007:230). Ironically, it therefore appears that Zuma was being protected from prosecution – as was allegedly the case with other beneficiaries of the arms deal within the ANC.

But however the decision was taken, some form of public explanation as to why Shaik, but not Zuma, was being prosecuted, would have been needed from Ngcuka. Therefore it would have been necessary for Ngcuka to address the public as he did on 23 August 2003.

Whether Ngcuka's statement was intended to discredit Zuma (as has consistently been alleged by Zuma's supporters), or whether the trial of Schabir Shaik was intended as a means of implicating Zuma 'in absentia' will perhaps never be clear.<sup>1</sup> However, these are the key, and most credible, allegations of 'political manipulation' of the criminal justice system that have been made by the Zuma camp.

#### **Hostility towards the Scorpions**

Already in April 2005, prior to the conviction of Schabir Shaik, Mbeki appointed the Khampepe Commission in response to pressure from within the ANC to 'relocate' the Scorpions into the SAPS. Once Shaik was convicted, and Jacob Zuma charged with corruption, political mobilisation in support of Zuma strengthened, and animosity against the Scorpions escalated. In essence the hostility against the Scorpions from the ANC is a product of the mobilisation in support of Zuma and represents an effort to protect Zuma's candidacy for president.

It does indeed appear that Mbeki wanted to retain the Scorpions. His appointment of the Khampepe Commission can be seen as a way of trying to

defend them. The destruction of the Scorpions is thus also a key symbolic vehicle for confirming the dominance of the 'Zuma camp' over the 'Mbeki camp' within both the ANC and government. (Though it has taken on this meaning within the ANC, it should nevertheless be emphasised that calls to retain the Scorpions do not necessarily indicate support of or opposition to either of the 'camps' within the ANC.)

But Zuma was not the only ANC leader investigated by the Scorpions in relation to the arms deal. In 2006 former ANC Chief Whip, Tony Yengeni, a respected and popular ANC leader, who like Zuma, had played a prominent role in the struggle against apartheid, was imprisoned after being convicted in 2003 on a charge of having defrauded parliament during the arms deal.

In addition a number of ANC members of parliament and others, who were implicated in what came to be known as the Travelgate saga, were also subject to a Scorpions investigation. In 2006 evidence also started coming to light that appeared to indicate that the SAPS National Commissioner, Jackie Selebi, had received bribes from alleged drug lord Glenn Agliotti. Agliotti was also alleged to have channelled funds to Selebi from murdered mining magnate Brett Kebble. The fact that Selebi himself had been a prominent member of the ANC and that Kebble had been a major benefactor of various ANC members and structures, was interpreted by some as evidence that the Scorpions were targeting the ANC.

It became convenient for the ANC, once the 'Zuma camp' had become dominant at Polokwane, to use these cases to convince itself that the Scorpions had been 'targeting' the ANC. It was also a convenient way for the ANC to avoid confronting corruption within its own ranks. Rather than engaging in a process of self-reflection and self-criticism (something which is said to be one of the strengths of the ANC) the party chose to blame the Scorpions for the fact that several of its members had been implicated in corruption.

#### **Allegations of political bias against the Scorpions**

Several of the allegations made against the

Scorpions by the ANC reflect the belief that the Scorpions were being used to target ANC members.

ANC executive member Sipiwe Nyanda said that the Scorpions were 'used to pursue a political agenda and to target certain people in the ANC to the benefit of sectarian and foreign interests' (Basson 2008). ANC Secretary-General Gwede Mantashe is quoted as having referred to the Scorpions as a 'political unit' that had been 'infiltrated by apartheid 'security branch' members who were 'targeting erstwhile enemies' – the ANC (Omarjee 2008).

Countering this the acting head of the National Prosecuting Authority, Mokotedi Mpshe, has said that 'most, if not all, the members of the Scorpions have joined with good and honourable intentions, to serve in the best interests of the country' (Maughan 2008). On another occasion Mpshe said emphatically that there was no truth to these claims, pointing out that none of these claims had been verified (Hartley 2008). Although former apartheid agents do form part of the rank and file of the Scorpions it does not follow that they have been the guiding force behind the unit.

The Scorpions have been under the authority of officials appointed by the ANC government. Included among its founding core members are investigators involved in bringing apartheid era security force members such as Eugene de Kock to justice. If it is true that the Scorpions have applied a certain zeal in investigating allegations against ANC members this may be seen simply as reflecting a dedication to the organisation's mission to uphold the law without fear or favour. This is consistent with a concern to protect the integrity of the South African state as governed by the Constitution and does not imply an apartheid era inspired hostility towards the ANC. Rather than having any credibility, the allegation that the Scorpions are acting as 'apartheid agents' can better be understood as fitting in with the ANC's need to demonise the unit in order to mobilise public opinion against them.<sup>2</sup>

The only credible allegations (though they have not been proved) that the Scorpions have been used as a political instrument, concern the claim that the

'shield' of impunity that was provided to ANC members in relation to the arms deal was deliberately lifted in order to counter the political threat posed by Jacob Zuma to Thabo Mbeki. It should be emphasised that this is essentially an allegation that the National Director of Public Prosecutions used his authority over the Scorpions to ensure that certain people were protected from justice, but that a decision was made to remove this protection in the case of Schabir Shaik. This is not an allegation that Shaik was wrongfully convicted. Considering that his conviction has been confirmed successively on appeal there cannot be reasonable doubt about his guilt.

The impression that state authority has been used to shield favoured individuals was reinforced in 2007 by the events surrounding the suspension of Ncguka's successor, Vusi Pikoli, after he apparently refused to submit to pressure to prevent him from instituting charges against SAPS National Commissioner Selebi. The matter is the subject of the Ginwala Commission of Inquiry.

If there is evidence of the criminal justice system being manipulated in this way it should provide the basis for action to ensure that no one is deliberately protected from the course of justice by those in positions of power. But dissolving the Scorpions will do nothing to reduce this risk.

The ability to ensure that all people in South Africa can be held legally accountable will be significantly reduced without a diversity of agencies with the capacity to investigate organised crime and corruption of their own initiative.<sup>3</sup> Dissolving the Scorpions will concentrate all crime investigation powers under the SAPS National Commissioner. Since the appointment of Jackie Selebi it has been accepted that the National Commissioner may be a political appointment of the ANC-led government and thus highly susceptible to political influence. The new General Laws Amendment Bill, which provides for the incorporation of the Scorpions into the SAPS, expressly provides that the National Commissioner will have the authority to decide which investigations are dealt with by the envisaged priority crimes investigation unit (see the proposed South African Police Service Act section 16A(12)). This means that

the National Commissioner will be able to veto investigations that do not meet with his approval.

The presence of the Scorpions has also served as a means to ensure the legal accountability of senior SAPS officials. Due to general problems of capacity, the Independent Complaints Directorate (ICD) is not able to carry out the type of sophisticated investigation that led to the charges against Selebi (see the article by Burger and Adonis in this issue of SACQ). Where it investigates cases successfully these are generally cases of a much more straightforward and 'routine' nature. Without the Scorpions there will be no investigative body outside of the SAPS that can subject higher-level officials of the SAPS to substantive investigation. And the fact that the Scorpions could be subject to investigation by the SAPS meant that they too were not above legal scrutiny.

If the legislation is passed and all investigative bodies fall under his authority, the SAPS National Commissioner will be above the law. This means that anyone that he wishes to protect, or who is in a position to pressure or influence him, will also be shielded from justice. Centralising all investigative power in the SAPS therefore undermines South Africa's potential to uphold the principle of equality before the law, which is a key principle of the Constitution. In addition, the monopoly of investigative power within the SAPS may also provide senior SAPS members with the power to manipulate politicians and the political process, thus undermining democracy. Not only will they be above the law, but they will be in a position of power over those in political authority.

### **Conclusion**

One of the issues that has been of concern in South Africa for several years has been the South African government's handling of investigations into the arms deal, and in particular that people associated with irregularities in the deal have been protected from justice (Feinstein 2007).

The concerns of the 'Zuma camp' are however quite distinct from this. Rather than arguing that proper investigations have not been allowed to take their course, they have focused on the idea that,

while some people were apparently protected from investigation and prosecution, Shaik, and following him, Zuma, were not. Rather than endorsing the calls for proper investigations to be conducted they have instead mobilised around the idea that Zuma is a 'political target', and have recently extended this into allegations that the Scorpions were involved in generally targeting the ANC. Political pressure of this kind from leaders of South Africa's governing party is likely to reinforce the situation where powerful individuals are selectively protected from justice. This is a problem that undermines the rule of law and the principle of equality before the law, the principle that criminal justice agencies should operate without fear or favour to those in positions of authority.

But if it is true that investigative mechanisms have been subject to political manipulation, the key problem has then not been that Shaik, Zuma and others have been subjects of investigation, but that high-level political officials obstructed other investigations that should have gone ahead. Unless political leaders and others take a firm stand against this type of practice it is likely to continue and intensify. If the ANC indeed wishes to prevent this type of abuse it should motivate government to adopt and enforce guidelines regulating the relationship between senior political officials and the leadership of investigative and prosecutorial agencies, in order to discourage and prevent this type of political interference.<sup>4</sup>

The dissolution of the Scorpions, and concentration of all investigative powers under the SAPS, will itself do nothing to reduce the risk of this type of abuse. In fact it is likely to accentuate the problem. This is not least because it sends out a powerful signal to investigative personnel that the ANC will punish agencies that dare to subject its senior members to investigation.

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#### Endnotes

- 1 It may be assumed that if the NPA had chosen to prosecute Zuma along with Shaik this would not have been any more satisfactory to Zuma's supporters.
- 2 It is possible that there is a more direct psychological dimension to the ANC tendency to demonise the Scorpions. Being subjected to investigation by the Scorpions may re-evolve the past traumas of being targeted by the security police for some ANC members.
- 3 The distinction is important. The Special Investigating Unit which falls under the department of justice and is responsible for the investigation of corruption only enters into investigations when it is authorised to do so by the State President.
- 4 Examples of legislation of this kind, regulating the relationship between government ministers and the police commissioner, may be found in some Australian states.