

**ENQUIRY INTO THE SOUTH GAUTENG DIRECTOR OF
PUBLIC PROSECUTIONS' FITNESS TO HOLD OFFICE**

HELD AT

**SALU BUILDING, 316 THABO SEHUME STREET,
DEPARTMENT OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT**

19 NOVEMBER 2025

DAY 3



**ENQUIRY INTO THE
SOUTH GAUTENG
DIRECTOR OF PUBLIC
PROSECUTIONS'
FITNESS TO HOLD OFFICE**

PROCEEDINGS ON 19 NOVEMBER 2025

CHAIRPERSON: Good morning, everybody, good morning, Advocate Chauke, good morning, madam. I am looking around, I had hoped to see Advocate Batohi here to greet her properly, but I am sure she will come later in the day. We apologise for the disruption. I think you all know that we are load-shedded in Tshwane this morning, and we needed to attend to a few structural challenges and housekeeping issues with the builder and the coordinator. Thank you for making it to the venue, despite this challenge with the electricity. We are going to start, Advocate Mohlamonyane, are you ready?

ADV MOHLAMONYANE SC: Thank you, Madam Chair. We are ready to proceed with the evidence of Advocate Shamila Batohi, but before we could do that, allow me to, with your permission, to do some internal housekeeping. Thank you, Madam Chair. I deem it appropriate to do what I colloquially call housekeeping for purposes of the smooth running of these proceedings, particularly with reference to bundles.

Had it been in a high Court, we would have prepared a practice note that would inform a judge or whoever is reading as to what is it that is expected of the parties. I wish to draw your attention firstly to a supplementary affidavit which was filed, the supplementary affidavit of Advocate Batohi. In the bundle, you will find it...

CHAIRPERSON: Counsel, we have it in our bundles.

ADV MOHLAMONYANE SC: Yes, I just wanted to draw your attention to that and the purpose for which it was filed. The purpose was to introduce an annexure which is referred to as Annexure 12, an annexure referred to as NJ5, was supposed to have accompanied Advocate Batohi's main affidavit, but was inadvertently omitted, and instead a document referred to in paragraph 9 as NJ1 was the one that was attached to her affidavit and it emerged later that NJ1 was not relevant for our purposes and it has been replaced by Annexure NJ5.

May I also draw your attention, Madam Chair ...[intervenes]

CHAIRPERSON: NJ1 is headed Monetary and Non-Monetary Awards.

ADV MOHLAMONYANE SC: That is the one, Madam Chair.

CHAIRPERSON: That entire document?

ADV MOHLAMONYANE SC: That entire document is irrelevant for our purposes and instead it has been replaced by NJ5, but I need to draw your attention to the fact that NJ2 to NJ5 are collectively referred to as SB... can on confer with my...

CHAIRPERSON: Yes.

ADV MOHLAMONYANE SC: I am reminded that it is SB1, SB1 is an annexure which collectively refers to NJ2 to NJ5.

CHAIRPERSON: Now you have SB1A083. Does it start

there?

ADV MOHLAMONYANE SC: Indeed.

CHAIRPERSON: SB1A083.

ADV MOHLAMONYANE SC: It should start at 8-2.

CHAIRPERSON: SB1A082 is your NJ1?

ADV MOHLAMONYANE SC: Which we say was inadvertently put in the bundle.

CHAIRPERSON: Yes. So it can start at SB1A082 because that very same 082 is your NJ1, it is marked NJ1. In other words, if we remove SB1A082 which is an Annexure NJ1, we start at SB1A083.

ADV MOHLAMONYANE SC: It will start at 1B, Madam Chair. If you may look at the amended index, SB1B is NJ2 statement by Colonel RS Ayer which will be on page 088. SB1C would refer to NJ3. SB1D would refer to NJ4.

CHAIRPERSON: I am getting confused. Should we not take a short adjournment for our clerks to help us to mark this document according to your file and to confer with Advocate Chauke's team?

ADV MOHLAMONYANE SC: Maybe we should do that, madam.

CHAIRPERSON: Because, what you are referring us to, that document that is marked monetary and non-monetary awards is your NJ1.

ADV MOHLAMONYANE SC: And SB1A in the amended

index, it should reflect...

CHAIRPERSON: No, let us not go to the index. Let us talk about that page because that is where the confusion is. I think we should adjourn so that you look at these documents. We will request our clerk to come and help us. I am getting more confused the more you try to explain.

ADV MOHLAMONYANE SC: Thank you.

CHAIRPERSON: Therefore, we will take a short adjournment and once you have these documents properly paginated or indexed, then we will come back.

ADV MOHLAMONYANE SC: Thank you, Madam Chair.

CHAIRPERSON: How long will it take to sort this problem out?

ADV MOHLAMONYANE SC: It should be not more than 10 minutes.

CHAIRPERSON: Not more than 10 minutes.

ADV MOHLAMONYANE SC: Not more than 10 minutes.

CHAIRPERSON: It is five past and we can reconvene at quarter past.

ADV MOHLAMONYANE SC: Indeed.

CHAIRPERSON: We adjourn. Thank you.

ENQUIRY ADJOURNS

ENQUIRY RESUMES

CHAIRPERSON: Yes, thank you

ADV MOHLAMONYANE SC: Thank you, Madam Chair,

thanks for the indulgence.

CHAIRPERSON: Advocate Mohlamonyane, we are really taken aback by the fact that despite the fact that you have such a big team, the record remains confusing. I would really expect that From the MPA side we should be given a proper record, at least the pagination should be properly done. Look, we have expended about 30 minutes trying to correct what ought to have been corrected even before? Advocate Hulley you have a junior who should be assisting Advocate Mohlamonyane and you with thoughts basic things, such as pagination and indexing. At least as far as I remember from my days of practice, that is what a junior does.

ADV HULLEY SC: Thank you, Madam Chair. Madam Chair, this particular mistake arose out of having to work very late at night, I think it was close to midnight, where there was a mistake in adding a particular document. What ought to, with respect, what should have been a fairly simple matter of just explaining it, because it is a fairly simple matter to explain with respect. But the mistake happened.

What we could not do is to simply remove documents without actually explaining to the tribunal how that mistake happened and what it is that we want to achieve. But unfortunately mistakes do happen, but we do apologise for it. Madam Commissioner, if I could try and explain, because NJ1 ...[intervenes]

CHAIRPERSON: Let us not explain it. The fact of the matter is that the bundle is incorrectly paginated. And you do have a junior, who should have done this job to assist the evidence leader, particularly because this is the bundle that comes from the NPA. You may, madam.

ADV BALOYI-MERE SC: Thank you, Chair. To the evidence leader and the NPA team, one would have expected that the junior would sit next to the evidence leader and assist him. For him to page through the file endlessly, shows a lack of cooperation and I, from a professional perspective, Advocate Lekgetho, I expect more from you. Advocate Mohlamonyane should not be paging through the file without assistance. Thank you.

CHAIRPERSON: Thank you, counsel. I think we now understand one another. Let us begin. Let us begin.

ADV MOHLAMONYANE SC: If I may take it further and explain, because it is not only the document NJ1 vis-à-vis NJ5 where there was a mistake. There was also an omission about the last page of SB3, which is a memorandum from Advocate de Kock, which begins from 132 through to 228, as it appears on the amended index. The mistake that was done was the last page, which was signed by Advocate de Kock, was erroneously left out, and it was later discovered that this was done.

But it is explained in the supplementary affidavit. It

is now attached as SB12. SB12, which appears on page 283 of the paginated bundles, Madam Chair. I hope I am not confusing.

CHAIRPERSON: 283 of the bolded letters?

ADV MOHLAMONYANE SC: Indeed. On the extreme top right-hand side, where it says NPA summary 1531, well, that is their markings there.

CHAIRPERSON: That is KBR63?

ADV MOHLAMONYANE SC: Yes. Whatever it is called. But I would prefer it be called SB12-283 to avoid further confusion. Now, maybe something that needs to be clarified at this stage before we proceed any further, Madam Chair. The bundles that have been electronically filed by the NPA are massive, and they have been marked. They have been given tokens. If on a bundle the panel sees LO followed by a number, LO shall mean Legal Opinions. It is a bundle called legal opinions.

If you see one that is PD with a number, 00, three zeros and a number, it will be referring to policies and directives. In other words, it contains the prosecution policies and directives with a Code of Conduct there. CL shall refer to the one that contains case law. ZC shall be the Zondo Commission bundle. RM will be the Mdluli bundle. I asked what R means, they said Richard Mdluli.

CHAIRPERSON: You are too fast.

ADV MOHLAMONYANE SC: I am sorry. I am sorry. I beg your pardon. I beg your pardon. Let me repeat myself. LO, legal opinions bundle. PD, policies and directives, which also contains the Code of Conduct. CL, case law. ZC, Zondo Commission.

CHAIRPERSON: Yes?

ADV MOHLAMONYANE SC: RM, Mdluli bundle, with reference to Richard Mdluli, Lieutenant Mdluli. B, Booyesen bundle. That is all, Madam Chair.

CHAIRPERSON: CL, case law?

ADV MOHLAMONYANE SC: CL, case law.

CHAIRPERSON: M?

ADV MOHLAMONYANE SC: RM.

CHAIRPERSON: RM.

ADV MOHLAMONYANE SC: Mdluli bundle. R, Richard Mdluli.

CHAIRPERSON: And NJ, as I see you are referring NJ.

ADV MOHLAMONYANE SC: Ja, let me explain NJ. NJ1, 2, 3, to 5, were annexures to Advocate Nomgcobo Jiba's annexures in her answering affidavit. It must have been the review application that was brought in the Pietermaritzburg High Court where Gorven J delivered the judgment. Nomgcobo, N for Nomgcobo, J for Jiba.

CHAIRPERSON: Thank you.

ADV MOHLAMONYANE SC: That then completes the

explanation. Thank you. Then we may proceed with the evidence.

CHAIRPERSON: You may proceed, counsel.

ADV MOHLAMONYANE SC: Can I then ask that someone call Advocate Batohi, please?

CHAIRPERSON: Good morning, Advocate Batohi.

ADV BATOHI: Good morning, Judge. Good morning to the panel. Good morning to Advocate Chauke and his team. Thank you, Judge.

CHAIRPERSON: We must apologise to you that you were here the whole day yesterday, but we were unable to start with your testimony for reasons that are now obvious to you. And this morning also, because of some challenges, we are starting late. We apologise. Do you wish to take oath or to affirm?

ADV BATOHI: I am happy to take the oath, Judge, Chairperson.

CHAIRPERSON: You are happy to take the oath. Do you swear that the evidence that you are about to give will be the truth and nothing else but the truth? If so, raise up your right hand and say, so help me God.

ADV BATOHI: I do, so help me God.

EVIDENCE FOR THE NPA

ADVOCATE SHAMILA BATOHI (duly sworn states)

CHAIRPERSON: You may proceed, counsel.

EXAMINATION BY ADV MOHLAMONYANE SC: Thank you, Madam Chair. Good morning, Advocate Batohi.

ADV BATOHI: Good morning, counsel.

ADV MOHLAMONYANE SC: You deposed to a statement which we usually call an affidavit, and the affidavit is in front of you. Is that correct?

ADV BATOHI: That is correct.

ADV MOHLAMONYANE SC: The last page of the affidavit has been signed, and it was attested to on the 14th day of November 2025. Do you see that? On page 81, the last page of the affidavit.

ADV BATOHI: Yes, that is correct.

ADV MOHLAMONYANE SC: You confirm that the signature appearing thereon is your signature?

ADV BATOHI: It is.

ADV MOHLAMONYANE SC: Under deponent?

ADV BATOHI: Yes, that is correct.

ADV MOHLAMONYANE SC: You take responsibility of this affidavit?

ADV BATOHI: I do.

ADV MOHLAMONYANE SC: You adopt it as yours?

ADV BATOHI: Yes, I do.

ADV MOHLAMONYANE SC: In your opening remarks, is there anything that you would like to put before this tribunal as an opening remark?

ADV BATOHI: Thank you, counsel. By way of some introductory remarks, Chair, if I may. Thank you, Chair. Firstly, I would like to say to this panel that it is not easy to refer a senior colleague to an enquiry of this sort, and giving evidence before this enquiry is not something I relish. Advocate Chauke is a colleague that I have known for a long time, with whom I have always had a professional and cordial relationship. I have discussed the subject of these allegations with him, not in any detail, but just explaining to him that as a National Director, there is a duty that I have in certain circumstances, and I do believe that a full and transparent hearing like this will be in the interest of Advocate Chauke, as well as in the interest of the National Prosecuting Authority, to ensure that a fair and final decision in this matter is reached.

Chair, very, very briefly, the Constitution and the National Prosecuting Authority Act, it requires all of us as prosecutors, including the National Director, to serve the people of South Africa only, impartially, in good faith, without fear, without favour, without prejudice. These are not just words, they mean a lot, and our prosecutorial independence is not a theoretical ideal, it is really a constitutional imperative. Very briefly again, because I will be testifying more about this, section 9 of the NPA Act requires that a National Director, a Deputy National Director, a DPP, be a fit

and proper person with due regard, and this is the Act, to the experience, conscientiousness, integrity, to be entrusted with the responsibilities of the office concerned.

It requires persons to be objectively honest, upright, always seeking the truth. In other words, they, in fact we, must be persons of the utmost integrity who will act as the Constitution requires, without fear, favour or prejudice. That is the very fabric of what we are as prosecutors. Prosecutors in any country, Honourable Chair, are powerful officials in a criminal justice system. They carry immense discretionary power, whether in determining to prosecute, who to prosecute, for which crimes, and in the circumstances, across the world, there is always a risk that outside actors will try to improperly influence us. We must never succumb to this as prosecutors.

The NPA cannot, we cannot fulfil our constitutional mandate if our decisions are vulnerable to pressure, direction, influence from external actors, be it from politicians, from the rich, from the powerful, from the private sector, the media or civil society. As prosecutors, we must vigorously withstand such influence at all times. The decisions we take as prosecutors touch the lives, the liberty, the dignity of ordinary people. Every decision we make to prosecute or not can alter the course of a person's life, be it a person falsely accused or a victim deprived of justice. This

is the reason why prosecutorial powers and functions must be exercised diligently, fearlessly, impartially, independent by every single prosecutor in this country and hopefully across the world.

We need efforts to uphold the rule of law. And any perception that there may be, and I repeat, any perception that prosecutions are politically motivated, selectively pursued or not, or improperly abandoned, they erode the legitimacy of and the trust and confidence in the entire system. So given the important work of prosecutors, it is why there are various instruments, which I will deal with in detail, that regulate and guide the functions and behaviour of prosecutors. Start with the Constitution, the NPA Act, the NPA Prosecution Policy, Directives, Code of Conduct, the United Nations Guidelines on the Role of Prosecutors, the International Association of Prosecutors, Standards of Professional Responsibility, and their Statement of Essential Duties and the Rights of Prosecutors.

These instruments, together with judicial pronouncements and the common law, emphasise that prosecutorial conduct must adhere to the requisite standards of integrity, of honesty, and we must be fiercely independent, especially from political or public influence, proceeding only, and I repeat only, where the evidence meets the required threshold, and maintaining public confidence through

consistent, rational decision-making. This is the context within which the present case sits. I do want to deal with one issue that Advocate Ngcukaitobi mentioned yesterday. He said that the case is legally defective and dangerously, I repeat dangerously, seeks to punish a prosecutor for exercising lawful prosecutorial decision.

Chairperson, members of the panel, this cannot be further from the truth in this matter. This is about prosecutions that the testimony will reveal, were politically, it appears politically motivated with, I want to say, no evidence. I think carefully about it because I do think there was no evidence to support one of the charges, or perhaps at the lowest level, if anything, but there was no evidence, in my view, to support one of the charges. And in the other case, it appears to protect someone from being prosecuted when there was strong evidence in the matter. And so this is the context within which this matter is being dealt with, Chairperson. Thank you.

ADV MOHLAMONYANE SC: Let me refer you to the affidavit.

Go to paragraph 3 thereof. You state there that:

“The facts contained in this affidavit are:

1. Based on documents within my possession or under my control.”

Which suppose, which presuppose that some of the facts that you stated in this affidavit were not within your personal

knowledge. If you may explain the context.

ADV BATOHI: That is correct, Chairperson, members of the panel. All of these events that took place were before I took office. I was out of the country for almost ten years. And so I have no personal knowledge of any of the matters that are referred to or the subject of this particular enquiry.

ADV MOHLAMONYANE SC: Are there any facts to which you have personal knowledge?

ADV BATOHI: I will have to think carefully about that. Most of the facts happened before I was here. I am not sure if there is anything that I have personal knowledge of in this case.

ADV MOHLAMONYANE SC: But let us put it this way. There were encounters. You have had encounters with Advocate Chauke, not so?

ADV BATOHI: Oh, yes, we have been working together for the past six years.

ADV MOHLAMONYANE SC: So as far as your encounters with him are concerned, would you say you have personal knowledge of what was happening vis-à-vis his work?

ADV BATOHI: From the time I took office, yes.

ADV MOHLAMONYANE SC: Yes, okay. Now, you mentioned that you were in The Hague for about ten years.

ADV BATOHI: That is correct.

ADV MOHLAMONYANE SC: What had you been doing there,

if you may?

ADV BATOHI: Yes, sure. This year is my fourth year in prosecution, as a prosecutor. Most of the time has been served in South Africa. I was appointed as the Senior Legal Advisor to the Chief Prosecutor of the International Criminal Court in The Hague in 2009 and served there until I returned to South Africa to take up the post of National Director on the 1st of February, 2019.

ADV MOHLAMONYANE SC: By referring to The Hague, are you referring to the International Criminal Court of Justice?

ADV BATOHI: No, not the International Criminal Court.

ADV MOHLAMONYANE SC: The International Criminal Court.

ADV BATOHI: Yes, not the ICJ.

ADV MOHLAMONYANE SC: Okay. Let us go back to your affidavit. You say in paragraph 5.1 on page 2 thereof, in paragraph 5 to be specific, actually, that you have structured your affidavit in a certain pattern, which appears in paragraphs 5.1, 5.2, up to 5.3.

ADV BATOHI: That is correct.

ADV MOHLAMONYANE SC: For the moment, you may wish to begin with a mandate, which is where your affidavit begins. The mandate, the powers and functions of the National Prosecuting Authority and its functionaries, without being seen to be repetitive. You have already briefly touched on

that subject, but we deem it important that it has to be emphasised as to exactly what is the mandate of the Prosecuting Authority and what are the powers, functions of prosecutors, specifically DPPs, in the position of Advocate Chauke.

ADV BATOHI: Yes, thank you, counsel. I will start with the mandate. As I mentioned previously, Chairperson and members of the panel, prosecutors play an extremely important role in the criminal justice system. In fact, as prosecutors, we are gatekeepers of the criminal justice system because without the intervention of prosecutors, the matters cannot proceed to trial. Firstly, section 179 of the Constitution, read with the NPA Act, actually deals, establishes, firstly, a single prosecuting authority in South Africa.

If we deal briefly with section 179(5) and section 22 of the NPA Act, which is in paragraph 12 of my affidavit, the NPA, it determines and delineates, well these Acts, the Constitution and the NPA Act, sets out the powers of a National Director, and in the main these are, firstly, the NDPP must determine prosecution policy, issue policy directives, as contemplated in section 21 of the NPA Act, which are to be observed in the prosecution process. The NDPP may intervene in any prosecution process when policy directives are not complied with, and a National Director may review a

decision to prosecute or not prosecute in certain circumstances.

Those are broadly the powers of the National Director, and there are various sections in the Act that further detail the functioning of the National Prosecuting Authority.

ADV MOHLAMONYANE SC: May I interpose there, ma'am, whilst you are still there? I deem it important that the powers, duties and functions of National Director should be read into the record as they appear in the NPA Act.

ADV BATOHI: Can you refer me to the section, please?

ADV MOHLAMONYANE SC: Section 22. Section 22 deals with the powers, duties and functions of National Director. I may read it into the record.

ADV BATOHI: I am trying to find my Act [indistinct] ...[intervenes]

ADV MOHLAMONYANE SC: I will read it into the record. Relax, Advocate. I will read it into the record whilst you are finding your copy. With your permission, Madam Chair.

CHAIRPERSON: Advocate Mohlamonyane, if I may interpose, should you not look at section 20(1)(c) first, rather?

ADV MOHLAMONYANE SC: 21(c).

CHAIRPERSON: 20(1)(c), which deals with the powers to continue criminal proceedings. 20(1)(c).

ADV MOHLAMONYANE SC: It should be 22(c), Madam

Chair.

CHAIRPERSON: 22(c).

ADV MOHLAMONYANE SC: I believe... 20...

CHAIRPERSON: Do you have the Act there?

ADV MOHLAMONYANE SC: I have the Act here. 22(1) powers, duties and functions of National Director. 22(2)(c), it is where a Director may review a decision to prosecute or not.

CHAIRPERSON: Does section 20(1)(c) not specifically deal with the power to discontinue criminal proceedings?

ADV MOHLAMONYANE SC: Section 21, Madam Chair, does not have a subsection C. What has a subsection C is 22.2.

CHAIRPERSON: It is 20(1)(c).

ADV MOHLAMONYANE SC: 21(c).

CHAIRPERSON: 2-0-(1)-(c).

ADV MOHLAMONYANE SC: 20 in brackets 1. I was hearing it as 21.

CHAIRPERSON: Well, it appears in the affidavit in 8.3.

ADV MOHLAMONYANE SC: 8.3.

CHAIRPERSON: That is where I thought you should start. Just to lay the foundation to the legislative framework. I thought so.

ADV MOHLAMONYANE SC: Let me hasten to do that. I agree. Section 20 contains the power, deals with the power to institute and conduct criminal proceedings. And I will read

it into the record. It reads, subsection 1 reads as follows, and I quote:

“The power, as contemplated in section 179(2), and all other relevant sections of the constitution, to:

- a. Institute and conduct criminal proceedings on behalf of the state;
- b. Carry out any necessary functions incidental to instituting and conducting such criminal proceedings; and
- c. Discontinue criminal proceedings vested in the prosecuting authority and shall, for all purposes, be exercised on behalf of the Republic.”

May I then proceed to read into the record, Madam Chair, section 22?

CHAIRPERSON: Yes. You see, I raise it because Advocate Batohi deals with that section at 8.3.

ADV MOHLAMONYANE SC: I see that.

CHAIRPERSON: And it seems very relevant as a founding provision for our purpose.

ADV MOHLAMONYANE SC: Indeed, because...

CHAIRPERSON: Let me just, my sister is ascertaining whether Advocate Batohi has the Act in front ...[intervenes]

ADV BATOHI: I now do, thank you, Chair.

CHAIRPERSON: You do have it?

ADV BATOHI: Yes. It is not in the bundle. I have my own copy, but it is fine for now. Thank you.

CHAIRPERSON: Advocate Mohlamonyane, you have your style of leading. My sister is suggesting that perhaps you should be the one reading into the record. What do you plan to read into the record? Because she is the one who is speaking to her affidavit. That seems to be correct.

ADV MOHLAMONYANE SC: That I should read into the...

CHAIRPERSON: She must read into the record her provisions.

ADV MOHLAMONYANE SC: Indeed.

CHAIRPERSON: The provisions that she refers to.

ADV MOHLAMONYANE SC: Indeed.

CHAIRPERSON: Because she relies on them. So you can lead her and then refer her to those provisions. Then she can read the contents of those provisions she relies on into the record.

ADV MOHLAMONYANE SC: In fact, I was going to do that as advised by my junior here. She has just advised me to rather not get into the fray. Perhaps I was getting into the fray.

CHAIRPERSON: Yes, madam, you are correct.

ADV MOHLAMONYANE SC: Unintentionally, unintentionally.

CHAIRPERSON: Yes, thank you. No problem, commissions of enquiries are not like Court proceedings.

ADV MOHLAMONYANE SC: Indeed.

CHAIRPERSON: We are all learning.

ADV MOHLAMONYANE SC: Indeed.

CHAIRPERSON: See how we should do our best in executing our tasks. And for that, we are indebted to you, madam Junior Counsel, and to my sister for reminding me. Do that so that she is speaking to her affidavit.

ADV MOHLAMONYANE SC: Thank you, Madam Chair. You have now located your copy of the NPA Act. And I will request you to proceed and read into the record section 22, which contains the powers, duties, and functions of the National Director. Please do so.

ADV BATOHI: Thank you, certainly. Perhaps section 22 deals with the National Director. But if I may, through you, Chair, perhaps we should, given the direction and the guidance from the Chair, perhaps deal with section 20 and briefly 21 before we go to 22. The counsel has read section 20 into the record. Does the Chair require that I do that again, Chair?

CHAIRPERSON: No, it is already on the record.

ADV BATOHI: Okay, sure, thank you, Chair.

CHAIRPERSON: You can read section [indistinct – 0:34:54]

ADV BATOHI: Thank you, Chair. Chair, so section 21 was

read into the record. I will then deal with section 23, which we will deal with in more detail later.

“Subject to the provisions of the Constitution and this Act, any Director (referring to a Director of Public Prosecutions), shall, subject to the control and directions of the National Director, exercise the powers referred to in subsection 1 in respect of:

a. The area of jurisdiction for which he or she is appointed;...”

This is important, and any offences; and

b. “Any offences which have not expressly been excluded.

Let me read it as it is in the Act.

“Any offences which have not been expressly excluded from his or her jurisdiction, either generally or in a specific case, by the National Director.”

subsection 5 of 21 is also relevant in this regard.

“Any prosecutor shall be competent to exercise any of the powers referred to in subsection 1 to the extent that he or she has been authorised thereto in writing by the National Director or a person designated by the National Director.

The written authorisation referred to shall set out the area of jurisdiction, the offences and the Courts.”

Section 21 deals with the prosecution policy and the issuing of policy directives:

“The National Director shall, in accordance with section 179(5)(a) and (b) and any other relevant section of the Constitution:

- a. With the concurrence of the Minister and after consulting with Directors, determine prosecution policy; and
- b. Issue policy directives which must be observed in the prosecution process and shall exercise such powers and perform such functions in respect of the prosecution policy as determined in this Act or any other law.”

The next relevant section I suppose to highlight, I am not sure that there is anything more in section 21 that I need to highlight, it deals with the issuance of directives by the National Director and then section 22 deals with the powers, duties and functions of a National Director. Section 22(1):

“The National Director, as the head of the prosecuting authority, shall have authority over exercising of all of the powers and the

performance of all of the duties and functions conferred or imposed on or assigned to any member of the prosecuting authority by the Constitution, this Act or any other law.”

And then I did deal with the next part of it. I did read that into the record. So I will not reread subsection 2 of section 22 into the record. I think those would be the relevant parts of section 22 for the current purposes. Counsel, I am not sure if there is any other section you would like me, or subsection of 22 you would like me to read into the record for these purposes.

ADV MOHLAMONYANE SC: Yes, Advocate Batohi. If you look at section 22(2)(c), it is also important to be read into the record.

ADV BATOHI: Perhaps for the sake of clarity, read section 22(2) in completely again. Well, not just this part of it.

“In accordance with section 179 of the Constitution, the National Director:

- a. Must determine prosecution policy and issue policy directives as contemplated in section 21;
- b. May intervene in a prosecution process when policy directives are not complied with; and

- c. May review a decision to prosecute or not prosecute after consulting with the relevant Director and after taking representations within the period specified by the National Director of the accused person, the complainant, and any other person or party whom the National Director considers to be relevant.”

ADV MOHLAMONYANE SC: Now, under what circumstances, Advocate Batohi, would you as the National Director of Public Prosecutions review a decision to prosecute or not to prosecute? In practice, how would you go about it?

ADV BATOHI: If, there is, I think it is section 20, I am just trying to find the section that deals with the review, and I would rather read that into the record. It specifically sets out the instances when a National Director may review a decision. If I could be directed to that. Is it 24?

CHAIRPERSON: Section 22(2)(c).

ADV BATOHI: 22. Which I have read into the record, Chairperson.

ADV MOHLAMONYANE SC: Yes, you have already read it into the record, Advocate Batohi. You have already read it into the record.

ADV BATOHI: Yes, that is correct. If counsel can please repeat the question.

ADV MOHLAMONYANE SC: My enquiry is, in practice, as a National Director of Public Prosecutions in the Republic, how would you go about reviewing a decision to prosecute or not to prosecute?

ADV BATOHI: A National Director can decide to review a matter if a representation is made by any party to the National Director to review a matter, and the NDPP can review a matter if there is contravention of prosecution policy. And those are generally, that is generally the way the powers of a National Director in respect of review are triggered.

ADV MOHLAMONYANE SC: I would like to take you to paragraph 13 of your affidavit, which deals with section 22, where you deal with section 22 of the NPA Act. You are referring in this paragraph to additional powers, which are contained in subsections 3 and 4 of section 22. Would we take the liberty, therefore, for purposes of completeness, to read into the record section 22 subsection 3 of the NPA Act, and then thereafter deal with those additional powers as you deal with them in practice, as they pertain to your duties?

ADV BATOHI: So section ...[intervenes]

CHAIRPERSON: Counsel, may I please interpose? It would be helpful if you refer to a paragraph in the affidavit itself, so that we can all zoom into that paragraph, and it will also

assist the witness. I know for this purpose you are referring to paragraph 13.

ADV MOHLAMONYANE SC: Indeed, Madam Chair.

CHAIRPERSON: It would be helpful if you can do that step by step, so that we can all follow where you are on the affidavit.

ADV MOHLAMONYANE SC: I take that, I was still on paragraph 13.

CHAIRPERSON: Did you refer her to paragraph 13?

ADV MOHLAMONYANE SC: 13, 1-3.

CHAIRPERSON: 1-3.

ADV MOHLAMONYANE SC: Yes, and where she deals with ...[intervenes]

CHAIRPERSON: Additional powers.

ADV MOHLAMONYANE SC: ...additional powers, and I asked her to read, for purposes of completeness and clarity of mind, subsection 3 of section 22.

CHAIRPERSON: It is my mistake. I thought that you simply referred to the words without saying that it is in paragraph 13.

ADV MOHLAMONYANE SC: Paragraph 13, yes, I did.

ADV BATOHI: If I may.

ADV MOHLAMONYANE SC: May you proceed, therefore, to read into the record, Advocate Batohi, subsection 3 of section 22. You do not necessarily have to start with the main

section, but subsection 3, and thereafter you will also read subsection 4 of the same section. Please do so.

ADV BATOHI: Subsection 3 of section 22 reads as follows:

“Where the National Director or a Deputy National Director authorised thereto in writing by the National Director deems it in the interest of the administration of justice that an offence committed as a whole or partially within the area of jurisdiction of one Director be investigated and tried within the area of jurisdiction of another Director, he or she may, subject to the provisions of section 111 of the Criminal Procedure Act 51 of 1977, in writing, direct that the investigation and criminal proceedings in respect of such offence be conducted and commenced within the area of jurisdiction of such other Director.”

And did you say 4 as well, counsel?

ADV MOHLAMONYANE SC: I said 4 as well, and you will then revert back to 3 after you shall have read 4 into the record.

ADV BATOHI: Subparagraph 4, subsection 4 of section 22 reads as follows:

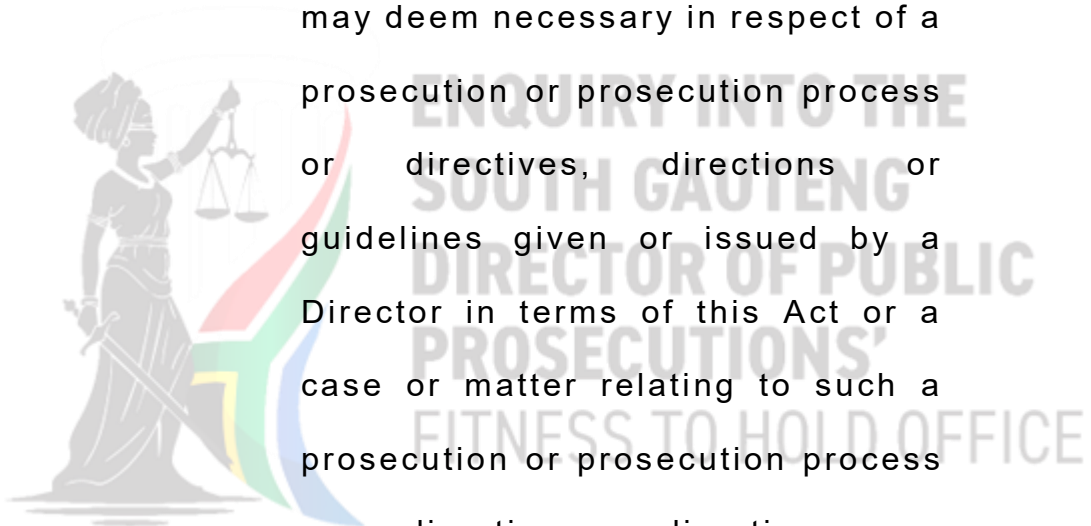
“In addition to any other powers, duties and

functions conferred or imposed on or assigned to the National Director by section 179 or any other provision of the Constitution, this Act or any other law, the National Director is the head of the prosecuting authority:

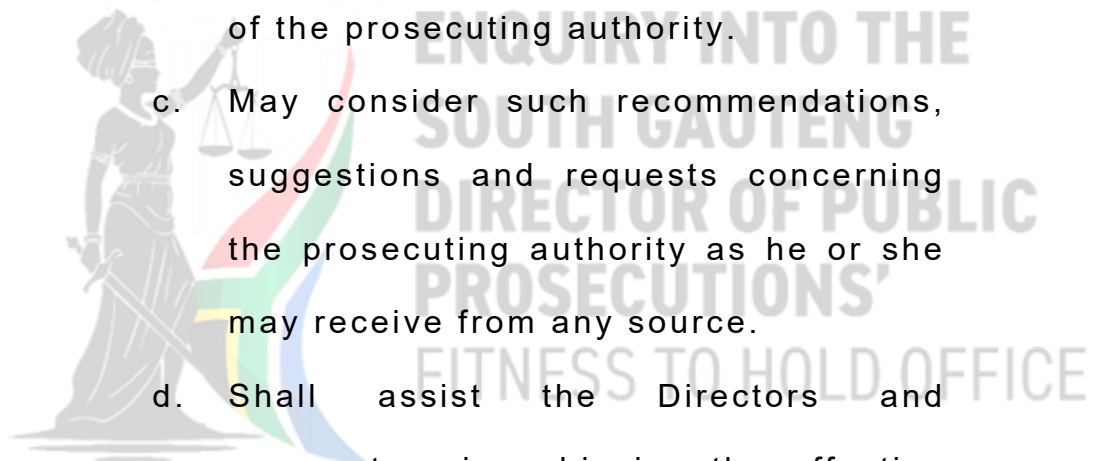
a. With a view to exercising his or her powers in terms of subsection 2 may:

i. Conduct any investigation he or she may deem necessary in respect of a prosecution or prosecution process or directives, directions or guidelines given or issued by a Director in terms of this Act or a case or matter relating to such a prosecution or prosecution process or directives, directions or guidelines;

ii. Direct the submission of and receive reports or interim reports from a Director in respect of a case, a matter, a prosecution or prosecution process or directions or guidelines given or issued by a Director in terms of this Act;



- iii. Advise the Minister on all matters relating to the administration of criminal justice.
- b. Shall maintain close liaison with the Deputy National Directors and Directors, the prosecutors, the legal profession and legal institutions in order to foster common policies and practices and to promote cooperation in relation to the handling of complaints in respect of the prosecuting authority.
- c. May consider such recommendations, suggestions and requests concerning the prosecuting authority as he or she may receive from any source.
- d. Shall assist the Directors and prosecutors in achieving the effective and fair administration of criminal justice.
- e. Shall assist the Deputy National Directors, Directors and prosecutors in representing their professional interests.
- f. Shall bring the United Nations guidelines on the role of prosecutors to



the attention of the Directors and prosecutors and promote their respect for and compliance with the above mentioned principles within the framework of national legislation.

g. Shall prepare a comprehensive report in respect of the operations of the prosecuting authority which shall include reporting on:

i. The activities of the National Director, Deputy National Directors, Directors and the prosecuting authority as a whole.

ii. ...[intervenes]"

ADV MOHLAMONYANE SC: Allow me to interpose. You may exclude 2, 3, 5 and Roman 6. No, no, include Roman 6. I beg your pardon. Exclude 3.

ADV BATOHI: So, this report shall include reporting on the personnel position of the prosecuting authority. 4 would be, excluding 3, 4 would be any recommendations or suggestions in respect of the prosecuting authority. 5 is information relating to training programmes of prosecutor and 6 any other information which the National Director deems necessary.

“h. May have administrative work connected with the exercise of his or her

powers, the performance of his or her functions or the carrying out of his or her duties carried out by persons referred to in section 37 of this Act.”

And I may make recommendations to the Minister with regard to the prosecuting authority or administration of justice as a whole.

ADV MOHLAMONYANE SC: Omit 5. Go to 6.

ADV BATOHI: Subsection 6(a):

- “a. The National Director in consultation with the Minister and after consultation with the Deputy National Directors and Directors shall frame a Code of Conduct which shall be complied with by members of the prosecuting authority.
- b. The Code of Conduct may from time to time be amended and must be published in the Gazette for general information.”

7, should I proceed with 7, sub 7?

ADV MOHLAMONYANE SC: For the moment, you may leave

7. Go to 8.

ADV BATOHI: 8.

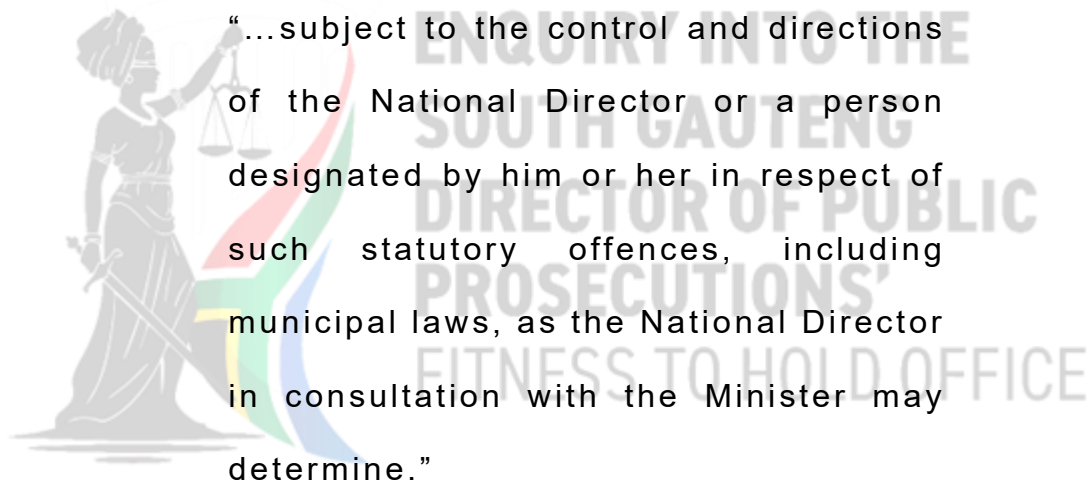
“The National Director or a person designated by him or her in writing may:

- a. If no other member of the prosecuting

authority is available, authorise in writing any suitable person to act as a prosecutor for the purpose of postponing any criminal case or cases.

- b. Authorise any competent person in the employ of the public service or local authority to conduct prosecutions subject to..."

I do not think this applies in this matter, but for the sake of completeness I continue:



"...subject to the control and directions of the National Director or a person designated by him or her in respect of such statutory offences, including municipal laws, as the National Director in consultation with the Minister may determine."

ADV MOHLAMONYANE SC: 9.

ADV BATOHI: Subparagraph 9:

9. The National Director or any Deputy National Director designated by the National Director shall have the power to institute and conduct a prosecution in any Court in the republic in person."

ADV MOHLAMONYANE SC: For the moment that will be all.

Let us go back to section 22 in brackets 2, sub paragraph C. And I earlier indicated to you that I would like you to explain under what circumstances as a National Director of Public Prosecutions would you review a decision to prosecute or not to prosecute in broad general terms. We may revisit this topic later on in your testimony, but for the moment would you explain in broad outline how you go about reviewing.

ADV BATOHI: So once a matter is referred to the National Director for a review, there is a section in the NPA, a unit, a business unit in the NPA called the National Prosecution Service which is headed up by a Deputy National Director of Public Prosecutions. This is not in my affidavit, anywhere in my affidavit. This particular unit is responsible for all general prosecutions across the country.

So the Directors of Public Prosecutions would report to the National Director, but through the Deputy National Director who is the head of the National Prosecution Service. And the DNDPP, as I will refer to the Deputy National Director of the NPS, has delegated power to deal with representations in terms of the Act. But all representations and reviews are processed through this office.

And they would obtain statements from interested persons, affected persons, the DPP concerned, and they would then submit the file to the National Director and then the NDPP will then consider the matter. That is basically how

the process of reviews are dealt with in the office. If necessary, in some instances, I would as the National Director, I have appointed panels to assist in the review process whereby the case will be presented to a panel and that would happen on occasion. If the matter is particularly complex.

CHAIRPERSON: If I may counsel, and that would be for the purpose of deciding whether to prosecute or not to prosecute.

ADV BATOHI: Generally, it is a representation that we receive mainly from accused persons, mainly. So once we get it, the accused would be requesting the National Director to review and to withdraw charges. So the process would be to review it and to establish whether there is sufficient evidence to sustain a prosecution or not.

So if the National Director finds that perhaps there is merit in the representation, then it is possible that a decision could be made to withdraw the charges. On the other hand, if the National Director finds that there is sufficient evidence to sustain a prosecution, then the decision would be that the prosecution must continue.

ADV MOHLAMONYANE SC: I see the provision 22(2)(c) speaks of to prosecute or not to prosecute. And you speak of a request to withdraw the charges. If you can assist me to understand these concepts within the framework of prosecution itself. I am not sure whether withdrawal could be

synonymous to non-prosecution.

ADV BATOHI: Thank you, Chairperson. I will deal with that. They are different. Non-prosecution is what we use a term called decline to prosecute. And that would be in instances where a docket is handed to a prosecutor for a decision. And if the prosecutor finds that there is insufficient evidence to meet the standard, which is reasonable prospects of a successful prosecution, then the prosecutor will decline to prosecute. And in that instance, the matter is not even enrolled in Court. So that is decline to prosecute.

But if a matter is enrolled in Court, and then the prosecutor decides not to proceed with the matter before plea, and I emphasise before plea is taken, then the charges can be withdrawn. If for whatever reason, there may be representations, that is a withdrawal of a charge. But it has already been enrolled. If the trial has started and the accused person has pleaded already, then that requires a stopping of the prosecution. And that is very rare that that happens.

And my understanding is it requires the authority of a DPP to actually stop a prosecution. So a prosecutor in the Courts cannot stop a prosecution. They can certainly withdraw matters, but they cannot stop a prosecution. They require the authorisation of the DPP. So those are the three phases when a prosecution might not continue for various

reasons.

CHAIRPERSON: Also, just to clear my mind, in the case of a withdrawal before pleading, when the matter is withdrawn, in that instance, does it mean that it can be reinstated?

ADV BATOHI: That is correct, Chair. It can be reinstated. In those circumstances.

CHAIRPERSON: At the practical level, withdrawals will happen, I suppose, where there could be insufficiency of evidence at that stage, before the pleading stage, am I right?

ADV BATOHI: That is possible, Chairperson.

CHAIRPERSON: It could also happen in instances where a prosecutor seeks to obtain certain information. Say, for instance, like in this case, and if I am wrong, do tell me, where the prosecutor decides, I would like to refer the matter first for inquest, so that I can have a holistic picture regarding this aspect, maybe, of murder?

ADV BATOHI: Yes, absolutely, Chairperson. I want to hasten to add that later on I will explain why that decision was perhaps not the best in the circumstances, but that will be dealt with in a lot of detail. But to answer your question, yes, that is possible.

CHAIRPERSON: It is one of those, maybe, numerous instances where there could be a withdrawal before the pleading stage.

ADV BATOHI: That is correct, Chairperson.

CHAIRPERSON: Which then means, for instance, in the case where the evidence was considered to be insufficient, and later becomes sufficient, a prosecutor could then reinstate the matter.

ADV BATOHI: Yes, if the evidence is indeed considered to be insufficient, can withdraw, and then at a later stage reinstate. Correct.

CHAIRPERSON: Thank you very much, counsellor. I am sorry to interpose.

ADV MOHLAMONYANE SC: You are at liberty, Madam Chair.

CHAIRPERSON: Criminal prosecution is complex.

ADV MOHLAMONYANE SC: It is very complex. You are at liberty to interpose at any moment that you would like to clarify your mind. I am amenable to that situation. Thank you, Madam Chair.

CHAIRPERSON: Ja, I think at the time when you were asked questions, you were at a point when you were dealing with the issues of review. Review by the National Prosecutor. And through delegations, this responsibility, as you have stated, is granted to the Deputy National Directors under that particular business unit. And you have also stated that over and above these business units, you also have the panels that are established for the purpose of dealing with reviews, especially in cases that are regarded as complex. Now, what

is the position? I would like to draw a parallel between the business unit that is headed by the deputies as against the panel that is brought in whenever – I do not know whether it is whenever a case is seen as being complex.

ADV BATOHI: Yes, certainly I can explain that.

CHAIRPERSON: Yes, please do explain that.

ADV BATOHI: Let me explain that the panels, if a matter is – I am viewing a matter. And as I said, it is particularly complex or sometimes very high profile. So the reputational risk to the NPA is high, and we need to make sure we get the decisions right. As a National Director, I would request that a panel be set up. The panel is actually an internal panel that is made up of very experienced prosecutors from wherever in the country, that would sit as a panel and then consider the matter and make a recommendation to me in some circumstances. So that is essentially how – while they would almost always make a recommendation, it would be very rare that they would not, because that is the whole purpose of a panel. But it is an internal mechanism that I have put in place to assist in dealing with some of the more complex or high-profile matters.

CHAIRPERSON: Right. A follow-up to that. This decision whether to bring in the panels as against the business unit, does it lie solely with yourself? Is it within your discretion as the head of the institution, or what is the position?

ADV BATOHI: If I am reviewing – as a National Director, I am reviewing it, then of course I will request a panel to deal with it.

CHAIRPERSON: When this panel is constituted, is it constituted also with the participation of the Deputy Directors of Public Prosecutions? Or is it – when you constitute it, you do not even consider taking members that one can see, for lack of a better word, automatically qualify by virtue of being in this business unit. Would you also rope them in, into this panel that you constitute, or you have a choice whether to do it or not? And if you have a choice, what are you inclined to do? Do you normally also rope them in, or is it – does it become something that is dealt with exclusively by this panel that you have constituted, on your understanding that the matter is either high-profile or it is complex?

ADV BATOHI: We do not have a hard-and-fast rule about that. Of course, I will consult with my Deputy, and we will talk about it. Sometimes the Deputy will sit in, and sometimes not. So it depends. There is no hard-and-fast rule about it.

CHAIRPERSON: In your view, do you think that – I am trying to understand as to what informs this decision of involving the panel. In your view, would you do this because you suspect that there may be some deficit of competency in the business unit that would then bring about a need to constitute the panel? And if your answer is no, then maybe just bring

us in to understand as to what comes – what thinking brings about the establishment of the panel.

ADV BATOHI: Sure. To answer your question, it is definitely not because of a deficit of competency at all. It is merely because, as I said, when a matter is particularly complex or high-profile, it is better to have more experience and heads considering a matter than one. So that is the reason for having a panel of experienced prosecutors. It might be a very highly complex corruption, money-laundering matter, and then I look for prosecutors in the NPA, together with my Deputy, of course.

Generally, they set up the panels with prosecutors that have particularly vast experience in these types of cases and then get them on the panel so that they can consider the evidence and advise the National Director. So that is the thinking beyond it. Because it is also, with very high-profile and complex matters, you want to minimise the risk of getting things wrong. So it is trying to get more heads together to consider a matter. And of course, ultimately, it is the National Director's decision. So the National Director has got to consider it and take a decision on the basis of the evidence. So that is basically the reason for having this panel.

And I suppose I should say that it is a kind of practice that I – one of the good practices that I picked up from my time at the International Criminal Court, where whenever a

case was involved and was going to be enrolled or various, there would be a Review Committee set up where the experienced prosecutors in the office would sit together, team would present, just to consider the matter and to assist with gaps and things like that. So it was a similar – it was that kind of thinking that I thought that would be a good idea to bring forward.

And so we have tried to sort of institutionalise that kind of practice. So we also – and we have done it – I have spoken to you about it in the context of a review, but some DPPs also do it in their divisions where they have very complicated matters. They would hold a kind of review team where the team would present to the experienced prosecutors and where these prosecutors would guide them and say to them, you know, this is – you have gaps here. Let us look at this angle. And so that as a team, as a collective, you really make sure that you have a solid case when the matter does go to Court, but that is at a different level.

So we try to institutionalise that practice where we really harness the good experience and make sure we get the decisions right.

CHAIRPERSON: And just this last one. Over the period that you have served in the seat that you are currently occupying, has it ever happened that the personnel in the business unit would, once given a case to consider for review, they would

then approach you to say that we think we need assistance. We cannot do it on our own and finalise. And we recommend that you beef us up as the business unit. Has it ever happened over the period?

ADV BATOHI: Yes, we have certainly strengthened teams in the NPA.

CHAIRPERSON: But did you hear the question? The question is, have you ever had a time where you would be approached by the business unit to say, we think we need to be supplemented or augmented so we do not feel that on our own only we can carry this task because we have identified that this task is quite complex or it would be in the best interest of justice that you beef us up because the case that you have referred us to or that we are dealing with is a high profile case. Has that happened? Basically on the request coming from the unit. Thank you.

ADV BATOHI: Thank you. That is understood. Yes, it has happened. That has been the case and we will consider, because one of the functions of a National Director is to support the DPPs in the divisions. And there have been instances when that happens, we look at how we can support the teams. We have also resorted to the appointment of outside counsel in terms of section 38 of the NPA Act to assist in a number of complex cases where they have come forward and said for various reasons the DPPs request that they

require assistance and then we have made lots of section 38 appointments as we call them. So that has happened and we do of course want to try to support the teams as much as possible. So we do try to give them the support that they need.

CHAIRPERSON: Thank you.

ADV MOHLAMONYANE SC: Thank you, Madam Chair.

CHAIRPERSON: Proceed, sir.

ADV MOHLAMONYANE SC: Thank you, Madam Chair.

Advocate Batohi, a few moments ago Madam Chair was asking you about a withdrawal which you dealt with because she wanted to clarify her mind. She wanted to understand under what circumstances a prosecutor can withdraw and you explained it. But there is also what is called provisional withdrawal. Can you explain that? As against perhaps a permanent withdrawal, if I may use that pun, it may not be used in prosecutorial circles.

ADV BATOHI: Yes, sure. Look, the practical impact of a withdrawal or a provisional withdrawal is zero. There is no practical impact because any withdrawal can be reinstated at a later stage. And so in instances where a prosecutor understands that there is a likelihood that I am going to get more evidence and you are clear at that point that there is some investigations outstanding and then you know that there is a good chance you are going to reinstate it, you would

actually say it is a provisional withdrawal.

But in instances even where a prosecutor withdraws a case, the point I am trying to make is that once a matter is withdrawn, it can always be reinstated for any reason. Sometimes you may withdraw a case because the witnesses are not at Court and the matter has proceeded for a while and the prosecutor decides I am not going to get another adjournment, realises, so you withdraw a charge and then you try to get the witnesses and whatever happens and then you reinstate it at a later stage.

So that is the point I want to make is that there is no practical implications that are different, but you will provisionally withdraw in circumstances where you feel, and I am repeating myself, that there is a strong possibility that you will reinstate if certain investigations or other requirements are met, for want of a better word.

ADV MOHLAMONYANE SC: Let us proceed and deal with paragraphs 15 for now and 16, perhaps a portion of 17. In paragraph 15 of your affidavit, you deal with section 22(6), which you have already read into the record where you are enjoined to draft a Code of Conduct, to frame a Code of Conduct and policy. There is a Code of Conduct in existence, not so?

ADV BATOHI: That is correct.

ADV MOHLAMONYANE SC: It is currently applicable to all

the prosecutors and binding on them.

ADV BATOHI: That is correct.

ADV MOHLAMONYANE SC: As well as a Code of Conduct.

ADV BATOHI: Yes, that is correct. As you will notice in terms of, in paragraph 15, in terms of section 22(6) of the Act, the NPA Act, the NDPP is required to frame a Code of Conduct and this was done. It was drafted and gazetted in 2010. In fact, I was fortunate to be part of a team before that, before I left, well, in the early development of the Code of Conduct, I was, of course, out of the country by 2010. And according to the preamble of the Code of Conduct, due regard was had to the United Nations guidelines on the role of prosecutors and the standards of professional responsibility and statement of the essential duties and rights of prosecutors, which I mentioned earlier on as well. And, ja, so there is a Code of Conduct in existence and it is binding on all prosecutors, including the National Director.

ADV MOHLAMONYANE SC: You also mentioned in these paragraphs, the UN guidelines, United Nations guidelines on the role of prosecutors, which the law, the NPA Act, obligates you to bring to the attention of all prosecutors.

ADV BATOHI: That is correct.

ADV MOHLAMONYANE SC: Was that done?

ADV BATOHI: It has been done in the context of the Code of Conduct. It has been incorporated into that.

ADV MOHLAMONYANE SC: Maybe I should rephrase. Let me take you to F22, section 22(4)(f). Are you there?

ADV BATOHI: Yes, I see that.

ADV MOHLAMONYANE SC: It says, shall bring. The National Director, as the head of the prosecuting authority, shall bring the United Nations guidelines on the role of prosecutors to the attention of the Directors and prosecutors.

ADV BATOHI: I see that. And that has been incorporated into the Code of Conduct, which has been brought to the attention of all prosecutors and they are bound to comply with it. So in that way, this has been complied with as it is incorporated into the Code of Conduct.

ADV MOHLAMONYANE SC: The Code of Conduct, as you set out in paragraph 15, is in the bundle policies and directives.

ADV BATOHI: That is correct.

ADV MOHLAMONYANE SC: It also contains the prosecutorial policies, not so. It is a Code of Conduct.

ADV BATOHI: Sorry, I do not understand that.

ADV MOHLAMONYANE SC: I am saying in the bundle policies and directives, it contains the Code of Conduct as well as the prosecutorial policies, not so? Prosecution policies.

ADV BATOHI: I understand it does.

ADV MOHLAMONYANE SC: Let us then proceed to

paragraph 27.

ADV BATOHI: Counsel, if I may ask, before we proceed there, if I could just emphasise something from paragraph 15 on the Code of Conduct before we move off that.

ADV MOHLAMONYANE SC: Well and good.

ADV BATOHI: It is on page 8, about five lines down.

“The Code of Conduct emphasises the professional conduct, independence, impartiality, and objectivity required of prosecutors in exercising their powers and carrying out their duties and functions.

It emphasises the role of prosecutors in the administration of justice and also the role of prosecutors in ensuring the fairness and effectiveness of the prosecution process.”

And then it goes on to deal with other aspects of cooperation with various partners. So I just wanted to highlight that aspect. Yes, thank you, you were saying, counsel?

ADV MOHLAMONYANE SC: Ja. It also mentions independence, which we will deal with later.

ADV BATOHI: Yes, that is correct.

ADV MOHLAMONYANE SC: Independence of a prosecutor.

ADV BATOHI: Absolutely, and that is critical.

CHAIRPERSON: Counsel, if I may, the policies and directions that you refer to that are mentioned in paragraphs

15, 16, and 17 are contained in a bundle, the index to folder marked policies and directives. Should we not mark these bundles?

ADV MOHLAMONYANE SC: I beg your pardon, Madam Chair?

CHAIRPERSON: Should we not mark the bundles? We have bundles that you refer to us in your index. Now, at one stage, somebody is going to have to look for those documents, and those documents, the bundles that you see behind us are not marked. I am asking you that whether it is not appropriate at this stage, as you refer to them, to mark them appropriately.

ADV MOHLAMONYANE SC: In other words, if I understand Madam Chair clearly, to be marked and also properly paginated.

CHAIRPERSON: I do not know about the pagination. I have my bundles, but this bundle does not have a name. It has a name, policies, and directives. Now, if anybody reads the record is going to look for this bundle, should we not mark this bundle, perhaps refer to it as bundle A?

ADV MOHLAMONYANE SC: Give it a name, a tag. I agree.

CHAIRPERSON: It does not matter what you call it, but what do you call it? You may suggest to us. What do you refer to this bundle of policies and directions?

ADV MOHLAMONYANE SC: May I confer with my junior? She draws my attention to the fact that it is marked. It is

given a name.

CHAIRPERSON: Just tell me what the name is.

ADV MOHLAMONYANE SC: PD.

CHAIRPERSON: I beg your pardon?

ADV MOHLAMONYANE SC: PD. Whatever PD stands for.

CHAIRPERSON: PD.

ADV MOHLAMONYANE SC: Yes, PD.

ADV BATOHI: Policies and directives.

ADV MOHLAMONYANE SC: Policies and directives.

CHAIRPERSON: So we must mark it PD.

ADV MOHLAMONYANE SC: Yes.

CHAIRPERSON: PD.

ADV BATOHI: Chair, at the end of, to help, if I may, page 8, and I know junior counsel might know better than I do, but at the end of paragraph 15 it says marked, forms part of the record under bundles, policies and directives, PD00011 to PD16. And these are these particular ones. I am not sure if that helps, Chairperson.

CHAIRPERSON: It does help. But the actual document, you see what I have, and these bundles and bundles behind us are not marked. I am saying, should not we then mark them according to the affidavit? You understand what I am saying, counsel? The affidavit refers to this name.

ADV MOHLAMONYANE SC: SPD.

CHAIRPERSON: Yes. SPD0001 to PD0016. I am now

suggesting to you whether we should not mark them accordingly. And I think as the evidence leader you should then direct us or suggest to us that let us mark them accordingly because we are going to mark other bundles. So this one of policies and directives of the PD0011 to PD0016, which one, how do we mark this one? Should we mark it PD001, policy directions?

ADV MOHLAMONYANE SC: I must give it a thought. I must give it a thought before I say it must be marked.

CHAIRPERSON: Please confer with your junior. You can switch off your mics so long.

ADV HULLEY SC: Madam Chair?

ADV BALOYI-MERE SC: Counsel, I see that you were conversing with your junior. And, you know, whenever we see problems, we do not just ask. At times we also try to assist to the resolution of the problem. Now, I notice from this batch, the batch of the PDs, the ones that are marked PDs, there are two batches. Am I correct? There are two batches? Now, you will have the first batch as 1 up to 68. And that would become PD1. And then when you go to the next batch, in the series of the PDs, it becomes a PD2. So it is very easy to identify that from a distance.

But if we are going to have these very many numbers, 1 to 68 and so forth, it is confusing. But to mark it there, up there, with a marking pen to say, this is PD1, and the next

one then will be PD2. And I know that you are going to deal with even many others where you have the LO, LCs, and what have you. But it is just some advice. You are better suited to do it in a manner that you must be mindful of the panel, because at the end, we have to draw the report. So whatever manner that you choose, I see the Chair still wants to say something.

CHAIRPERSON: We are also experiencing problems, we are also experiencing problems here. But for our purpose, to my question, back to my question, we can mark your PD as PD1 to name this bundle. You are naming this bundle as PD1. You can even say PD1 and dash PD to 0, PD0068 up to that page. Then we know that that page is complete. I see your junior counsel is nodding. So may we mark it that way?

ADV MOHLAMONYANE SC: In fact, Madam Chair, there was a suggestion that it be PDA. But we will go with PD1, 2, 3, and 4, et cetera, et cetera.

ADV MOHLAMONYANE SC: Do you suggest that we use numerals or letters of alphabet?

ADV MOHLAMONYANE SC: Numerals.

CHAIRPERSON: Numerals. I beg your pardon. Let me finish first with counsel, madam.

ADV MOHLAMONYANE SC: Numerals, 1, 2, 3, 4, and so on and so on.

CHAIRPERSON: Yes. I think for our purpose, let us mark

this document PD1. This is the policies and directions.

ADV MOHLAMONYANE SC: Thank you, Madam Chair.

CHAIRPERSON: Thank you, madam. Thank you, Advocate Batohi.

ADV BATOHI: Chair, sorry, you seem to have taken a decision on PD1. And I do not want to confuse things more. My only concern is that these are page numbers. And you obviously got a PD1 somewhere, a PD2, a PD3, which are page numbers. So I would be inclined to propose, Chairperson, that we do in fact use the alphabet. And the first one is A, the first bundle. So it is PD1 to 6 of bundle, the PDA bundle. And the other one will be the PDB bundle. It is only a proposal. There are colleagues that have been working with these bundles, I have not been, and I would expect that they would be able to guide better. But my concern is that if we use numbers, we might confuse it with the page numbers, which have a PD before it. That is my only concern. Thank you, Chairperson.

CHAIRPERSON: Actually not, counsel, because the numbers are 0001, 0002, et cetera. So you will say 1, then 0001. So I think the numbering, as we suggested, should then follow. So you will have your policies and directions marked bundle, marked PD1. And we know what PD1 is. We took a long time to clarify this thing, but at least we know now. Advocate Mohlamonyane, let this happen also with the

other bundles, because it is going to confuse us when we are in the middle of this hearing, when people go back and forth, referring to documents, because there are quite a lot and lots of records.

ADV MOHLAMONYANE SC: I take it, Madam Chair.

CHAIRPERSON: Before you proceed, Advocate Mohlamonyane, I see Advocate Batohi, did you want to say something, madam?

ADV BATOHI: No, no. Thank you, Chairperson, not at all.

CHAIRPERSON: Thank you. I see it is half past one. Counsel, it is half past one. We propose to take a break for 30 minutes. That should be our lunch break. We will then proceed at 2 o'clock.

ADV MOHLAMONYANE SC: Thank you, Chair. We will do that.

CHAIRPERSON: I hope it is not disrupting the structure of your evidence.

ADV MOHLAMONYANE SC: Not at all.

CHAIRPERSON: But we need to break.

ADV MOHLAMONYANE SC: Not at all. I need a break as well. Not at all.

ADV BATOHI: Chairperson, can I ask that whoever is in charge of the air con tries to strike a balance between keeping this place cool and not having it blowing really on the witness very hard. I am freezing at this spot. Thank you,

Chairperson.

CHAIRPERSON: Thank you very much, counsel. We will try to attend to that. They should get it right. I am sorry for that, I am sorry for that. I think the coordinator is here. She is going to attend to that immediately when we leave this chamber.

ENQUIRY ADJOURNS

ENQUIRY RESUMES

CHAIRPERSON: Thank you, Counsel, you may continue.

ADV MOHLAMONYANE SC: Thank you, Madam Chair. Advocate Batohi, I now direct your attention to paragraph 23 in which you deal with the Prosecution Policy and you tie that with paragraph 24 and 25 and in broad terms please elaborate.

ADV BATOHI: Thank you, Counsel. So the Prosecution Policy in the NPA broadly deals with the prosecution process, including the essential role of the Prosecutor and reviewing of cases. The purpose of this policy is to guide the Prosecutors in terms of how they should exercise their powers, carry out their duties and perform their functions.

Further in the paragraph, the policy directives, I suppose may I should just outline the policy itself, the idea is to make the prosecution process fair, to make it transparent, consistent, predictable and it is important that you know, prosecution processes are dealt with in this way.

It is also, you know, we want to promote greater consistency in the prosecutorial practices nationally. The policy directives are intended to set uniform norms and standards in prosecutorial practices and they deal with the professional duties of Prosecutors and operational matters affecting Prosecutors and the other incidental functions and not only dealing with purely administrative matters.

The next paragraph deals, we know, with, including with factors to be considered when taking a decision to prosecute and this is really important. So a decision to prosecute or not must be made in accordance with the NPA policy and the policy directives. The Prosecution Policy prescribes various factors that must be considered by a Prosecutor, but applying equally also to senior members of the NPA, that is the NDPP, DNDPP's and DPP's, and these must be applied when we are deciding whether to prosecute or not to prosecute.

And in essence, a Prosecutor must have regard to the contents of the docket, that is, you know, whether there is *prima facie* evidence and statements contained in the docket. We must also have consideration for any version proffered by the accused in what is termed a warning statement that is taken by the Police or any confessions or any other statements made by the accused.

We must as Prosecutors evaluate the evidence, take

into account all relevant factors, including how strong the case for the State is, whether evidence is admissible, the credibility of state witnesses, the reliability of evidence and availability of evidence and of course making the assessment at the end of the day on how strong the case is as a whole.

On paragraph 25 we said the, we referred to the standard. In terms of the Prosecuting Policy, in deciding whether or not to institute criminal proceedings against an accused person, a Prosecutor must assess whether there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution and that is an important standard. The Prosecution Policy provides that there must indeed be a reasonable prospect of a conviction, otherwise the prosecution should not be commenced.

The policy moreover stipulates that once a Prosecutor is satisfied that there is sufficient evidence to provide a reasonable prospect of a conviction, a prosecution should normally follow and that is important, unless public interest demands otherwise. And of course in determining the public interest, there are various factors that guide this determination, including the nature and seriousness of the offence, the interest of the victim, the broader community and the circumstances of the offender as well. So that is as far as the policy and policy directives broadly are concerned.

ADV MOHLAMONYANE SC: Thank you. May I take you back

to paragraph 24 where you mentioned that a Prosecutor must evaluate evidence, gathered evidence. Now in his or her evaluation of evidence would a Prosecutor use a discretion after such evaluation?

ADV BATOHI: Absolutely. That is one of the most important aspects of prosecutorial functions is the exercise of prosecutorial decision-making and of course a Prosecutor's discretion in that process.

ADV MOHLAMONYANE SC: How is such discretion in the normal course of events used by Prosecutors?

ADV BATOHI: Well, it is exactly when you are taking a decision to prosecute, it requires you to exercise prosecutorial decision-making and in this process you have got to take into account as I mentioned the various factors and it is how you assess, how you give weight to the various factors and then at the end of the day decide and that is where the Prosecutor's decision-making comes in and there is an element of prosecutorial discretion at that point as well in terms of weighing the evidence when you assess credibility of a witness, you may consult with witnesses, etcetera. All of that, there are various factors that come into at the end of the day applying your discretion and making a prosecutorial decision on the basis of the strength of the case before you.

ADV MOHLAMONYANE SC: In the exercise of such a discretion, the Prosecutor uses his or her mind, reasoning

which is usually referred to as rational or irrational, not so?

Does it come into play?

ADV BATOHI: Absolutely.

ADV MOHLAMONYANE SC: Does rationality or irrationality come into play in the exercise of such a discretion?

ADV BATOHI: Absolutely. In order to, when one looking at whether a decision is rational or not, and there is caselaw on that, I do not have it in front of me at the moment, but of course if you have a case where there is a very strong case against an accused and the Prosecutor in applying his or her discretion in the assessment of the evidence comes to the conclusion that there should not be a prosecution, that will be an irrational decision.

And conversely, in the case of having a case where there is very little evidence or no evidence or evidence that does not meet the standard, the one could then say that that is also irrational. But I must hasten to add that when assessing a case as a Prosecutor there would be instances where reasonable minds could differ and a Prosecutor might take a view on the evidence, another Prosecutor might have a different view.

In that case it would not amount to irrationality as such. Sometimes in cases Judges take different views from Prosecutors. You have Benches that disagree. So it does not mean that it is irrational decision-making. It means

reasonable minds can differ. But when it becomes irrational is when it goes completely against the available evidence and a reasonable Prosecutor would not have acted in that manner. That is when the issue of irrationality comes in.

ADV MOHLAMONYANE SC: Thank you. Let us proceed to paragraph 27 on page 15 where you make mention of the constitutional mandate of the NPA to prosecute, which carries with it an obligation.

ADV BATOHI: Sorry, what paragraph, Counsel?

ADV MOHLAMONYANE SC: 27 on page 15 of the affidavit. Can you in a nutshell elaborate on this obligation, because it tells, it talks about obligation, a constitutional obligation, but at the same time a Prosecutor has a discretion. Can you in a nutshell describe this obligation.

ADV BATOHI: Yes, as I indicate in paragraph 27 there is a constitutional mandate, the NPA and Prosecutors have a constitutional mandate to prosecute cases and with it carries an obligation which, and there has been legal precedent on this as well, is that when the standard is met we as Prosecutors are obliged to prosecute these matters and so unless there is good reason not to do so, and as I indicate on paragraph 28 there must be compelling reasons to withdraw a criminal charge, given our obligation as Prosecutors to prosecute.

There must be compelling reasons to withdraw

charges when there is formidable evidence or when the standard is met with regard to pursuing a case. So in that sense we have a constitutional obligation to prosecute unless there are exceptional circumstances to do otherwise.

My apologies, Chair, it seems like they have switched the aircon off completely, so now I think they should try to strike a balance, Chair, through you to having it a bit lower, but now it is really hot in here. Thank you. My apologies.

CHAIRPERSON: It is a bit of a problem ...[intervenes].

ADV BATOHI: I think they have left the remote with me, so I have the power. Let me work this out.

CHAIRPERSON: Yes.

ADV BATOHI: Thank you, Chair.

CHAIRPERSON: Got it right? Hopefully. Yes, thank you. Might I take you – are you done with paragraph 27?

ADV MOHLAMONYANE SC: I am done with paragraph 27, Madam Chair.

CHAIRPERSON: Yes, might I just take you back to 26.

ADV MOHLAMONYANE SC: 26.

CHAIRPERSON: It speaks of the Prosecutor being satisfied that there is sufficient evidence and it is expected that when there is sufficient evidence, then there will be reasonable prospects of conviction, meaning that then the Prosecutor will prosecute. And the paragraph then continues to say “unless

the public interests demands otherwise”. That is the aspect that I am interested in, unless the public interests demands otherwise. What will be such circumstances which will fall within the ambit of the public interest that will negates the need to prosecute?

ADV BATOHI: That is an interesting question, Chairperson. There are various factors that a Prosecutor might consider when deciding not to prosecute in the face of evidence that meets the required standard. There would be instances for example where there is a motor vehicle accident and a father is driving the car, makes an accident and his child dies in the accident and he is negligent. So do you prosecute the father who has really suffered a lot already and there is not you know a lot of damage to the other vehicle. You look at those factors and you think on humanitarian grounds this is a case that you do not prosecute, even though on the face of it he was clearly negligent and should be prosecuted.

There might be an instance where you know, a victim or an accused person might be extremely ill and you would decide that, or very old or very young and you decide that you would not prosecute. So there is that, those kinds of you know, factors that a Prosecutor would consider. I must say that although this issue does not fall into prosecution, public interest matters, that you know, given the various constraints that we have with resource and things like that, it is literally

impossible to prosecute every case and so you sometimes have to prioritize matters and decides which cases to take on first, but that is, you know, generally when a case is serious and you know, we would certainly not prioritize other matters, it is more the less serious matters that would kind of fall at the bottom of the inbox so to speak in terms of attention, but it is a factor you have to consider, but it is not strictly speaking public interest issue. Well, it is not a public interest issue at all. Thank you, Chair.

CHAIRPERSON: Thank you, Counsel, that helps.

MS RAMAGAGA: Just glancing, I am actually made to ask a question because of your answer where you were trying to explain as to what could constitute public interest and then you went further to talk about prioritizing cases. Now prioritizing cases cannot be an equivalent of deciding whether to prosecute or not, am I correct?

All what you are saying is that you know depending on what we see or the importance of cases, others may end, may find themselves ending up just being pushed lower and lower in the cycle, but how far to you go with that, because every day there will be cases that you will see, criminal cases that we see as very important, but, and they will also be those that are seen as being, you know, just light, light offences. So up to how far do you then keep pushing these ones that are seen as just none important cases?

ADV BATOHI: So let me be clear you know, it is less serious, but not necessary not important. You know, every victim or complainant wants his or her justice.

MS RAMAGAGA: Yes.

ADV BATOHI: Even for the smallest of cases. And we have to be as, you know, victims of crime are, we are lawyers for the people as Prosecutors and we defend the rights of victims and primarily but of course we must make sure that you know, there is a fair trial and all of that ensues, but, so we got to strike that balance between, and look, the lower courts are full of those kinds of cases. It is not like we do not prosecute cases, the less serious cases. The district courts are full of them.

So at the different levels you know, for example the more serious matters you may decide to choose, prioritize a matter for, because of the high profile nature you know, because of potential reputation, high impact matters, the matter than can, is, the reduction of harm issues that is also considered, so there are various factors that we consider in prioritizing. But it is not like there is a decision not to prosecute as you correctly said because of that prioritization. It is just that others will be prioritized over others. Thank you.

MS RAMAGAGA: Thank you.

ADV MOHLAMONYANE SC: Thank you, Madam Ramagaga.

CHAIRPERSON: Yes, thank you, Counsel, you may proceed.

ADV MOHLAMONYANE SC: Thank you, Madam Chair. Advocate Batohi, I now direct your attention to paragraphs 32, 33, 34, we will deal with that later. In paragraph 32 you say, and that emanates from the provisions of section 179 of the Constitution. I do not think it is necessary for you to read into the record section 179(4) of the Constitution, unless you deem it necessary. I think ...[incomplete].

ADV BATOHI: If we have the, I do not have the Constitution in front of me, but I am happy to read it into the record.

CHAIRPERSON: [Indistinct]... [microphone off]

ADV BATOHI: Thank you.

CHAIRPERSON: You can read into the record. Remember, we are here for the public and for the record.

ADV MOHLAMONYANE SC: Should we proceed?

CHAIRPERSON: You proceed, sir.

ADV MOHLAMONYANE SC: Advocate Batohi ...[intervenes].

ADV BATOHI: I am just finding section 179. Okay, may I proceed, Chairperson?

ADV MOHLAMONYANE SC: Proceed, please, to read it into the record.

ADV BATOHI: Thank you.

ADV MOHLAMONYANE SC: Just 179(4).

ADV BATOHI: So section 179 is the part of the Constitution, it is headed “The Prosecuting Authority” and so section

179(1) for the purpose of completeness, as the Judge said we are speaking to the public as well, creates a single National Prosecuting Authority as I mentioned earlier on and it deals with the structure in terms of the NDPP and DPP's.

179(2) is also important, because it sets out the power.

“The Prosecuting Authority has the power to institute criminal proceedings on behalf of the State and to carry out necessary functions incidental to instituting criminal proceedings.”

Sub-paragraph, sub-section (3) states that:

“National legislation must ensure that the Directors of Public Prosecutions are appropriately qualified and are responsible for prosecutions in specific jurisdictions subject to sub-section (5).”

Then sub-section (4) reads:

“National Legislation must ensure that the Prosecuting Authority ...”

This is the important section you wanted me to go to, Counsel.

“National Legislation must ensure that the Prosecuting Authority exercise its function without fear, favour or

prejudice.”

Sub-section (5) then deals with the NDPP’s function to determine with the concurrence of the Minister and after consultation with DPP’s, the Prosecution Policy which we talked about, and sub-section (5)(b) talks, the NDPP must issue policy directives which must be observed in the prosecution process. Going to (5)(c), it states that the NDPP may intervene, and this, in the review process, and this was the section that I was thinking about earlier on. It is section 179(5)(c) of the Constitution which gives the NDPP the power to intervene in the prosecution process when policy directives are not complied with.

And (d):

“May review a decision to prosecute or not to prosecute after consulting with the DPP and taking representations within a specific time from the following persons, the accused, the complainant, any other person or party whom the National Director considers to be relevant.”

Should I continue with the other sub-paragraphs? And the National Legislation referred to in this section is of course the National Prosecuting Authority Act.

ADV MOHLAMONYANE SC: I want us to place our utmost

attention to the terms used in sub-section (4) of section 179, which you referred to in these paragraphs, at least in the two that has been referred to, that is 32 and 33, wherein it is required of a Prosecutor to exercise his or her discretion or when executing his or her functions to act without fear, favour or prejudice.

ADV BATOHI: So as I indicated, section 179(4) of the Constitution provides that the NPA must exercise its functions without fear, favour or prejudice and the Constitutional Court has held that in terms of this provision there is a constitutional guarantee of the independence of the Prosecuting Authority and any legislation or executive action, inconsistent with this would be subject to constitutional control by the courts.

Section 32(1)(a) then of the NPA Act carries this obligation forward and provides that:

“All members of the NPA must serve impartially and exercise, carry out or perform their powers, duties and functions in good faith without fear, favour or prejudice and subject only to the Constitution and the law.”

And taking this further, sub-section (b) of section, (1)(b) of section 32 further states that:

“Subject to the Constitution and the Act

- the NPA Act - no organ of State and no member or employee of an organ of State, nor any other person shall improperly interfere with, hinder or obstruct the Prosecuting Authority or any member thereof in the exercise, carrying out or performance of his or her powers, functions and duties.”

And in the NPA Act, section 41(1) in fact prescribes the contravention of this section and as I said, these provisions give effect to section 179(4) of the Constitution in terms of guaranteeing the NPA’s independence.

ADV MOHLAMONYANE SC: These phrases, fear, favour or prejudice reverberates throughout the NPA Act as contained in the Constitution. Can you put them within context, what is fear? When can we say a Prosecutor fears? When can we say a Prosecutor favours? When can we say a Prosecutor is prejudiced?

ADV BATOHI: So I think the latter two are a bit easier to deal with. Favour is of course where you do not prosecute someone for, because you know the person for whatever reason. You know, it could be a friend, it could be a colleague, you favour that person. It could be a member of the Executive. So that is, it is not prosecuting without favour.

Prejudice of course would be the opposite. If you

prosecute persons that you should not be, that would clearly cause prejudice to the persons concerned. The aspect of fear is of course it is meant to, it is meant to convey that in making all prosecutorial decisions we should be fearful of nothing. You should not be fearful of the fact that you might be targeted for any reason, the fact that you know, a member of the Executive might victimize you.

You have to do your job and base your decision on the evidence that is before you. Having said that, I must say although Prosecutors still, I certainly hope that the majority of Prosecutors in the NPA do exactly that and understand their oath of office to do this, an oath that we take in terms of the Code of Conduct.

I must say that the circumstances in South Africa they lead many people to become fearful for the work that they do because of attacks on Prosecutors, witnesses, etcetera. But the concept of fear in the context of the Constitution is as I indicated earlier that we base our decisions only on the evidence in front of us in the docket and we do not allow any fears that we may have for some of the consequences that I spoke about earlier to affect our decision to prosecute.

In fact, if a Prosecutor is fearful for any reason, and it is not unthinkable that may happen, then the Prosecutor should inform the supervisor and withdraw from the case, but

not take a decision that might be influenced by this fear in any way. Thank you.

CHAIRPERSON: Does it not follow then that if the Prosecutor is fearful, he or she is not fit to hold the office?

ADV BATOHI: Fearful in the context of the consequences I first mentioned, I would certainly agree with that, but the conditions that we are working on, if they are fearful because of threats on their lives, then of course it does not mean that they are not fit to do their jobs. We have to look at security, they might be really good Prosecutors that are threatened. But if a Prosecutor is fearful in the first context and then takes a decision on it, I fully agree they should, they are not fit to hold office.

CHAIRPERSON: Proceed, Counsel.

ADV MOHLAMONYANE SC: Thank you, Madam Chair. Let us now focus our attention on the sub-topic contained on page 19 of your affidavit where you deal with the structure, the structure of the NPA. Briefly just explain it in accordance with what is contained in section 179(1) and (3) of the Constitution, just in brief.

ADV BATOHI: Yes, thank you, Counsel. So in terms of the Constitution and that section 179(1) and (3) and the NPA Act, section 5 and 6, the structure of the Prosecuting Authority is essentially as it says there are two offices. You have the office of the National Director and then you have the office of

the DPP in the provinces.

ADV MOHLAMONYANE SC: Hold it there. Let me interject you. Let us explain fully what a DPP is.

ADV BATOHI: Yes, so there is a Director of Public Prosecution and, Chairperson, you will note in section, in paragraph 36 I referred to section, and S section 6 DPP and that is specifically mentioned, because the section 6 DPP is what will be the Provincial Head in the structure. But there are other special DPP's, special Directors of Public Prosecutions that are appointed and they are generally based at the head office and they have a specific area of work, for example we have a special DPP in charge of specialised commercial crime units, we have a special DPP that deals with priority crimes, for example the TRC matters, well no, not the TRC anymore, that has been removed from this particular unit, but looking at terrorism matters, looking at international crimes, there is a special Director of Public Prosecutions.

So that, the, and of course we have the Investigating Directorate now who is also at a DPP level, but is the Head of the Investigating Directorate against corruption. So the section 6 DPP's is, it is dealt specifically with in paragraph 38. Perhaps I will just deal with the national office of the NDPP to start off with.

This office is at the head office, on paragraph 37, is

at the head office and provides that the office of the National Director consists of the National Director, the Deputy National Directors, the Investigating Director, and Special Directors that I mentioned, other members of the Prosecuting Authority, for example Deputies, Senior State Advocates, Prosecutors, all at the national office, as well as an administrative component.

And then in paragraph 38 we move on to the office of the DPP which is established at the seat of the High Court ...[intervenes].

ADV MOHLAMONYANE SC: Allow me to interject. It will follow therefore that Adv Chauke falls under the category of a section 6 DPP.

ADV BATOHI: Yes, that is correct, because he is the Head of a province, so he is a section 6 DPP, South Gauteng Division. And so each, a DPP office is established at the seat of the High Court, the provincial divisions of the High Court and local divisions of the High Court and as I say, they may be referred to as section 6 DPP's.

So the section 6(2) of the Act provides that the DPP office consist of the following, the head of the office who is either a DPP or a Deputy DPP, and maybe I should just explain the Deputy DPP aspect. For example, in KwaZulu Natal you have a DPP, a DPP in Pietermaritzburg, the seat of the provincial division of the High Court, and you have a local

division. You also have a DPP office, but it is at the local division and the Head of that office is a Deputy DPP, but of course who will report to the DPP in Pietermaritzburg.

ADV MOHLAMONYANE SC: Whilst you are on that, Advocate Batohi, you mention that Advocate Chauke heads the South Gauteng ...[intervenes].

ADV BATOHI: That is correct.

ADV MOHLAMONYANE SC: Division in Johannesburg.

ADV BATOHI: That is correct.

ADV MOHLAMONYANE SC: That is the North Gauteng, in other words.

ADV BATOHI: That is correct, that is in Pretoria.

ADV MOHLAMONYANE SC: You may proceed.

ADV BATOHI: So the office of the DPP, section 6 DPP, consist of course the Head of the office, Deputy DPP's, Prosecutors, Senior State Advocates, Junior State Advocates, and the DPP also has jurisdiction over all of the Prosecutors in the lower courts that falls within the DPP's area of jurisdiction and we refer to section 24 of the NPA Act.

CHAIRPERSON: Excuse me, Advocate Batohi, I think you are leaving us behind. I am a bit confused about the, Advocate Chauke being a section 6 DPP, South Gauteng, meaning Johannesburg. Does it, and then Pretoria jumped in. Can you assist.

ADV MOHLAMONYANE SC: Ja, Gauteng Province has two

divisions, one in Johannesburg which is referred to as a local division, not so?

ADV BATOHI: That is correct.

ADV MOHLAMONYANE SC: There is a provincial division whose seat is in Pretoria.

ADV BATOHI: That is correct.

ADV MOHLAMONYANE SC: It also has its own section 6 DPP.

ADV BATOHI: That is correct. So can I explain further. Maybe I can just try to clarify. This is one of the few provinces that has got two DPP's. It used to be the same in Eastern Cape where there was a DPP seated in Mthatha and another DPP seat, so in Eastern, well, both in Eastern Cape, one in Mthatha, one in Grahamstown. And that is historic. I think it is also historic that Gauteng has two DPP's as Counsel has explained.

So the, in Eastern Cape at the moment now we have, we have amalgamated and we have one DPP, but the same has not happened in Gauteng, but I suppose the demarcation process will deal with that, but for now I do not think there is any, I am not aware of any plans to have one DPP in the Gauteng division.

CHAIRPERSON: But is the position not occasioned by the fact that we have two seats of the High Court in Gauteng?

ADV BATOHI: That is also, we do have two seats of the High

Court.

CHAIRPERSON: You will therefore have a DPP, South Gauteng and a DPP, North Gauteng.

ADV BATOHI: That is correct, Chairperson.

CHAIRPERSON: And if I am correct, Advocate Chauke will be a DPP for the South Gauteng division.

ADV BATOHI: That is correct, Chairperson, and the office is situated in Johannesburg, but the division of course is much broader.

MS RAMAGAGA: Just again just a follow up. So in the case of Gauteng we have two DPP's, Pretoria seat and the Johannesburg seat. Now in respect of KZN, do we have two DPP's or do you have a DPP and an NDPP?

ADV BATOHI: Not an NDPP, you have a DPP in Pietermaritzburg, which is a provincial division, and in the local division in Durban you have a Deputy as a head of that office. There is no two DPP's in KZN.

MS RAMAGAGA: Okay, so ...[intervenes].

ADV BATOHI: It is one DPP for the KZN province.

MS RAMAGAGA: Right, thank you.

CHAIRPERSON: Proceed, sir.

ADV MOHLAMONYANE SC: Thanks, Madam Chair. Let us now leap over to page 21.

ADV BATOHI: I should maybe, sorry, Counsel, if I may just before ...[intervenes].

ADV MOHLAMONYANE SC: Yes, you may.

ADV BATOHI: I was dealing with section 38 with the office. I want to point out section 38, in terms of section 38 we can also, and we could go to the section 38 of the Act, which I have the NPA Act, if I may refer to that quickly, Chairperson. I was asked, requested earlier about additional support and just to bring to the attention of the panel that section 38 of the NPA Act allows for the appointment of outside Counsel where the need arises. The NDPP may in consultation with the Minister, Deputy, that is 38(1), or Director engage under agreements in writing, persons having suitable qualifications and experience to perform specific services in specific cases. So just to explain that that is where external Counsel are appointed in terms of that section and of course the DPP's office also has an administrative component, which consists of HR, Finance, Security and Risk, Communications, and other related administrative sections.

ADV MOHLAMONYANE SC: Are you fine with that? Let us leap over to paragraph 42 where you deal with the National Director of Public Prosecutions. Let us go to the Act before we get into this one. Let us go to the Act. Section, I will tell you, 24. I will ask you to read into the record section 24, section 24(1)(a), (b), (c), (d), (2), yes, up to (2) for current purposes.

ADV BATOHI: So section 24 is headed "Powers, Duties and

Functions of Directors and Deputy Directors of Public Prosecutions”. It relates to the functions of DPP’s and Deputy DPP’s. Sub-section (1) of section 24 state:

“Subject to the provisions of section 179 and any other relevant section of the Constitution, this Act, or any other law, a Director referred to in section 13(1)(a) has in respect of the area for which he or she has been appointed the power to institute and conduct criminal proceedings and to carry out functions incident thereto as contemplated in section 23.”

(b):

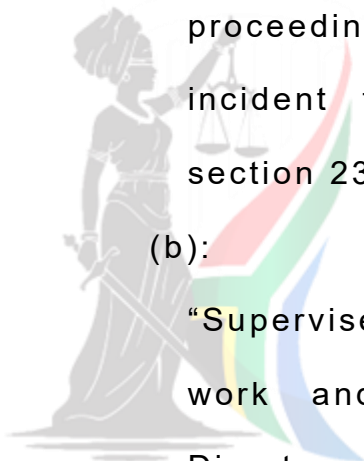
“Supervise, direct and coordinate the work and activities of all Deputy Directors and Prosecutors in the office of which he or she is the head.”

(c):

“Supervise, direct and coordinate specific investigations.”

And (d):

“Carry out all duties and perform all functions and exercise all powers conferred or imposed on, or assigned to



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him or her under any law which is in accordance with the provision of this Act.”

Sub-section (2) of section 24 reads:

“In addition to the powers, duties and functions conferred or imposed on, or assigned to an investigating director ...”

Well, I am not sure sub-section (2) is relevant, unless the Chairperson wants me to read it, because that deals specifically to the IDAC which is not the subject of this enquiry.

ADV MOHLAMONYANE SC: I agree. I am with you. Just skip it.

ADV BATOHI: Sub-section (3) deals with the special DPP's that I mentioned as well.

ADV MOHLAMONYANE SC: Yes.

ADV BATOHI: Earlier on. Perhaps sub-section (4):

“In addition to any other powers, duties and functions conferred or imposed on, or assigned to him or her by section 179 of the Constitution this Act or any other law, a Director referred to in section 13(1):

(a) shall at the request of the National Director submit reports to the National

Director or assist the National Director in connection with the matter referred to in section 22(4)(a)(ii);

(b) shall submit annual reports to the National Director pertaining to matters referred to in section 22(4)(g);

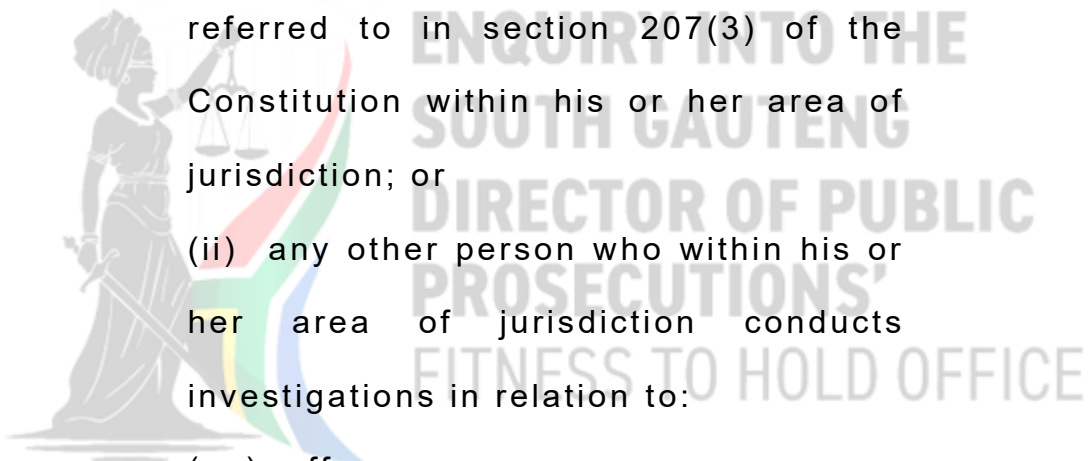
(c) may in the case of a Director referred to in section 13(1)(a) give written directions or furnish guidelines to the Provincial Commissioner of Police referred to in section 207(3) of the Constitution within his or her area of jurisdiction; or

(ii) any other person who within his or her area of jurisdiction conducts investigations in relation to:

(aa) offences; or

(bb) other than a private Prosecutor institutes or carries on prosecutions for offences;

(d) shall, subject to the directions of the National Director be responsible for the day to day management of the Deputy Directors and Prosecutors under his or her control.”



Should I read sub-section (5)?

ADV MOHLAMONYANE SC: For the moment you may skip sub-section (5) and (6). Jump over to (8), sub-section (8).

ADV BATOHI: Sub-section (8) of section 24 reads:

“The powers conferred upon a Director under section 21 shall include the authority to prosecute in any court any appeal arising from criminal proceedings.”

ADV MOHLAMONYANE SC: I want to take you back, Advocate Batohi, to section 24.

CHAIRPERSON: To which section, 24?

ADV MOHLAMONYANE SC: 24. Not in its entirety, but 24(1). I want you for the benefit not only of the panel, but for the benefit of anyone who interprets this section to clearly understand what it entails, and I will refer you to the phrase that I want our attention to be directed to. After section 13(1)(a) in sub-section (1) there is a word there that says “hers”, and there is a comma. It says, after the comma it says:

“In respect of the area for which he or she has been appointed.”

That is crucial, it is important and one must, when one reads this, must read it with an eye of a hawk and with caution. Can you comment?

ADV BATOHI: Yes, so, Chairperson, this section 24(1) makes it clear that a DPP must exercise his powers and, or her powers and functions in respect of your area of jurisdiction. So the words in sub-section (1) which says “in respect of the area for which he or she has been appointed”, a section 6 DPP is appointed to a particular jurisdiction. For example, it would be KwaZulu Natal or the Free State and that DPP is able to exercise, has the power to exercise functions and duties with regard to that particular area of jurisdiction. You can do all of the things below that, that are listed in sub-section (1)(a), (b), (c) and (d) of section 24, provided that it is in respect of the area for which the DPP has been appointed. So that is a very important jurisdictional issue. You have no power to do that in another area or a case that is in another jurisdiction.

ADV MOHLAMONYANE SC: Thank you. We know that in law for every rule, for every general rule there are exceptions. Are there exceptions in this instance? If any, can you explain them how they come into play?

ADV BATOHI: No, I am not aware of a DPP, I am not aware of a DPP of one jurisdiction exercising powers in another jurisdiction. In fact, if I am not mistaken, Mokgoro Commission as well specifically dealt with this matter, indicating that a DPP has no power or authority in another jurisdiction and I am not aware that this has happened.

I do want to say that special DPP's that is not a section 6 DPP, the SDPP's who I mentioned earlier who are, have, like we have an SDPP in charge of the Sexual Offences Unit, they have jurisdiction over the entire country and they can assist the DPP's in any part of the country, but that is not a section 6 DPP, that is a distinction.

ADV MOHLAMONYANE SC: Advocate Batohi, will there be circumstances for instance where a section 6 DPP would get into an area of another section 6 DPP, in other words, in another jurisdiction and perform prosecutorial duties there?

ADV BATOHI: Not if you have not been properly appointed as such.

ADV MOHLAMONYANE SC: Explain it how and when can it happen.

ADV BATOHI: If a DPP of one division is also appointed for example to act in another division, that is an appointment, so it is a section 6 DPP, but of course there will be, have to be someone in that, the region where the DPP comes from, to be appointed to act there as well. But it is not, the instance of a DPP appointed in a specific area it has, there has been a case when a DPP of, for example, Northern Cape, can exercise jurisdiction over the Free State.

So let me also say when there is a case that is centralized, right, I think I should bring this – there is a section in the Act that allows the National Director to

centralize cases. So let us assume there is a matter that starts off in KwaZulu Natal and then there is some case, charges that are in Johannesburg, in Gauteng, then the DPP of KZN and the DPP of Johannesburg, or South Gauteng, will then confer and say look, in the interest of centralizing this case, because there are legs in different, in our different divisions, we will agree that this case will be prosecuted in one of the two divisions and that is the instance where both DPP's agree that the matter will be heard in a particular jurisdiction. But in those instances then that matter will once it is transferred, resort under the jurisdiction of the DPP of the division where the matter is being heard.

ADV MOHLAMONYANE SC: You are referring to centralization.

ADV BATOHI: That is correct, that is a DPP's function. It is one of the prosecutorial functions of a DPP.

ADV MOHLAMONYANE SC: Which is authorized in accordance with section 111 of the Criminal Procedure Act.

ADV BATOHI: Is it section 111 of the CPA?

ADV MOHLAMONYANE SC: Yes, 111.

ADV BATOHI: The NPA Act also dealt with it at some, somewhere. I need to find it.

ADV MOHLAMONYANE SC: Yes, it does, but it is read with section 111 of the Criminal Procedure Act. We do not necessarily have to go into, for the moment, to go into the

provisions of section 111.

CHAIRPERSON: Perhaps you should find out whether the Advocate has a copy of that provision.

ADV MOHLAMONYANE SC: She indicated earlier ...[intervenes].

ADV BATOHI: I do not have a copy of the provision, section 101 of the Criminal Procedure Act.

CHAIRPERSON: I think you may have this copy for now. Let us make it easier.

ADV BATOHI: Thank you, Chair.

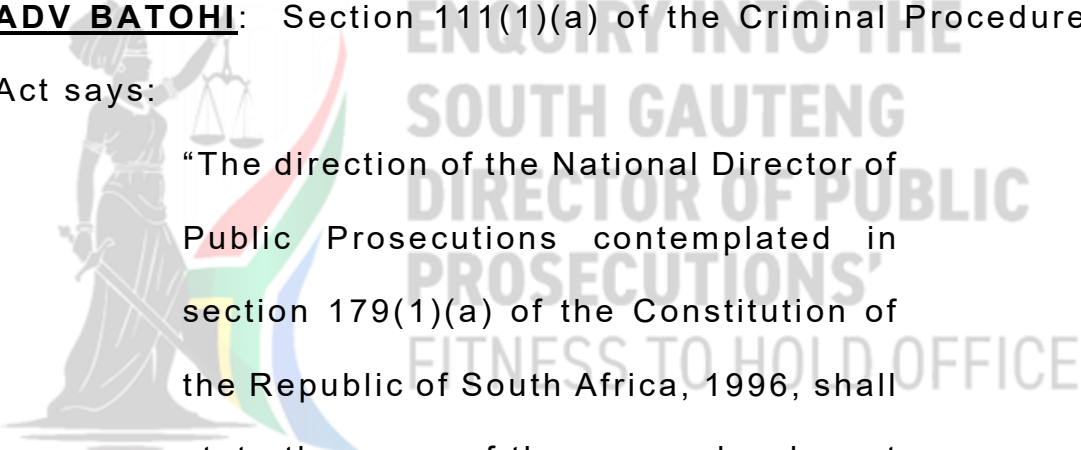
ADV MOHLAMONYANE SC: I am advised, Advocate Batohi, that the provision that we are talking about in the NPA Act is 23, 22(3), yes, 22(3). So if you centralize, it is centralized in terms of section 22(3) of the NPA Act read with section 111 of the Criminal Procedure Act of 1977.

ADV BATOHI: Yes, that is correct. If you look at section 111 of the NPA Act, of the Criminal Procedure Act, that act has been amended to now reflect (1)(a) as the NDPP having this power, but it seems like the heading in this section has not been amended, because it talks about the Minister may remove trial to a jurisdiction of another Attorney General. So that was pre the formation of the NPA Act in 1998, or the single prosecuting authority where we had Attorneys General that headed up each of the provinces. There was no National Prosecuting Authority and no NDPP.

There was a Minister of, there was a Department Justice and a Minister, so at that point it appears that the Minister was able to move a case from one jurisdiction to another. But now section 3 of the, section 22(3) of the NPA Act gives the NDPP the ability to centralize. And if you look at the rest of the content of section 111 of the Criminal Procedure Act, it is aligned to the NPA Act, but it seems like they just have not amended the heading.

ADV MOHLAMONYANE SC: Do you want to read it into the record? Perhaps you should do so, section 111.

ADV BATOHI: Section 111(1)(a) of the Criminal Procedure Act says:



“The direction of the National Director of Public Prosecutions contemplated in section 179(1)(a) of the Constitution of the Republic of South Africa, 1996, shall state the name of the accused, relevant offence, the place at which, if known, and the Director in whose jurisdiction the relevant investigation and criminal proceedings shall be conducted and commenced.”

Should I, is that sufficient?

ADV MOHLAMONYANE SC: It is sufficient for the moment, Advocate Batohi, but I want to take you one step or two steps

backwards when you were dealing with centralization. Maybe to make it clear, to make it more clearer, it is when an offence is committed in one jurisdiction and another offence is committed in another jurisdiction and you ...[intervenes].

ADV BATOHI: That is correct.

ADV MOHLAMONYANE SC: And you deal with it in terms of section 111 for convenience, am I correct?

ADV BATOHI: That is correct. It could be more than one jurisdiction, or two, it could be three.

ADV MOHLAMONYANE SC: It could be ...[intervenes].

ADV BATOHI: But you have legs in different parts of the country and then the DPP's would confer and decide that for convenience ...[intervenes].

ADV MOHLAMONYANE SC: Yes.

ADV BATOHI: It should be in one division.

ADV MOHLAMONYANE SC: Some of us did not understand the legs in different parts.

ADV BATOHI: Oh, sorry.

ADV MOHLAMONYANE SC: I wanted you to be clearer there.

ADV BATOHI: Different charges and offences committed ...[intervenes].

ADV MOHLAMONYANE SC: Offences committed ...[intervenes].

ADV BATOHI: My apologies. Offences committed in different provinces.

ADV MOHLAMONYANE SC: Thank you.

ADV BATOHI: Thank you.

ADV MOHLAMONYANE SC: Now let us go to 42 itself.

ADV BATOHI: I beg your pardon?

ADV MOHLAMONYANE SC: I am saying let us go to paragraph 42 itself. You may not deal with that. Go to paragraph 46 on page 24.

CHAIRPERSON: Which paragraph, 24?

ADV MOHLAMONYANE SC: 46 on page 24, Madam Justice, Madam Chair. Are you there, Advocate Batohi?

ADV BATOHI: I am.

ADV MOHLAMONYANE SC: Ja, as a matter of introduction, you are appointed by the President.

ADV BATOHI: That is correct, as the National Director of Public Prosecutions.

ADV MOHLAMONYANE SC: The DPP is he or she appointed by the President and if so, in terms of what section of the Act, the NPA Act?

ADV BATOHI: That is correct, the NDPP is appointed by the President as well as the DPP's which I think is in terms of section 13. I need to check that. Yes, section 13, appointment of Directors and Acting Directors.

ADV MOHLAMONYANE SC: It follows therefore that Advocate Chauke was appointed by the President of the Republic of South Africa.

ADV BATOHI: That is correct.

ADV MOHLAMONYANE SC: In the position that he is holding now.

ADV BATOHI: That is correct.

ADV MOHLAMONYANE SC: Briefly go to paragraph 49 and just in passing and in a nutshell just explain those powers that you have in terms of section 22(1) over the DNPP's, the DP's, SDP's, just briefly, and to also explain this oversight of the NPA.

ADV BATOHI: So ...[intervenes].

ADV MOHLAMONYANE SC: Oversight of the NDPP rather, excuse me.

ADV BATOHI: So we have read section 22(1) into the record. The National Director in terms of the section has authority over, it is the entire NPA, so it would be DPP's, well, the Deputy National Directors, the DPP's, Special Directors, ID, the Deputies in the divisions or in head office, the Deputy DPP's, Prosecutors and now the IDAC and they, all of the functionaries are ultimately accountable to the National Director in terms of carrying out their duties and executing their powers under the Act.

I want to, maybe before I deal with that point, just to mention that the oversight of the National Director is over the entire institution is to ensure that as the Prosecuting Authority of the Republic it functions optimally, effectively,

efficiently and in doing so, every member of the Prosecuting Authority upholds the Constitution and the rule of law in carrying out our core powers, functions and in terms of the mandate and that is instituting criminal proceedings.

I do want to mention at this point, or explain that the DPP's in the division, and I am not sure if it is carried, I think it is dealt with in a section that does come through under the Directors of Public Prosecutions which is from paragraph 68 on page 30, but very briefly to mention at this point that although a National Director has overall accountability and is the head of the National Prosecuting Authority, the power to decide, to make decisions to prosecute, the original power to do so lies in the Directors of Public Prosecutions who are the heads of each of the provincial divisions and that is very important to understand, because sometimes it is misconceived that the National Director decides on prosecutions.

The DPP's in each province are the ones that have that power and the National Director cannot and should not instruct DPP's on which cases to prosecute or not prosecute, save for when they relate to priority areas. If there is a focus of corruption then we can say that is a priority and we can check to make sure that those cases are being dealt with. But in respect of each case, Chairperson, the DPP decides on whether to prosecute or not to prosecute and the National

Director is a review authority.

ADV MOHLAMONYANE SC: Madam Chair, you seem to have wanted to address an issue with her.

CHAIRPERSON: [Indistinct]... [microphone off]

ADV MOHLAMONYANE SC: Okay.

ADV BATOHI: I thought you were indicating to me as well, and I thought I was being rude by continuing. My apologies, Chair. I am glad to hear I was not being rude.

CHAIRPERSON: No, proceed, sir.

ADV MOHLAMONYANE SC: Thank you, Madam Chair. What you have just spelled out, Advocate Batohi, is autonomy of the section 6 DPP's, not so?

ADV BATOHI: Autonomy insofar as decisions to prosecute are concerned, that is correct.

ADV MOHLAMONYANE SC: Yes, which autonomy you are dealing with in paragraph 51 of your affidavit on page 25.

ADV BATOHI: Yes, that is correct. I, sorry, let me understand your question before I say it is correct.

ADV MOHLAMONYANE SC: Line 3 you are saying such DPP's are not autonomous but are subject to oversight.

ADV BATOHI: Yes, let me explain that. Autonomous in the sense that they are not a law unto themselves. You know, they fall under the control and the Act in fact says you operate under the control and direction of the National Director, but insofar as the decisions to prosecute, they have the original

power to decide to prosecute. But of course they are part of a Prosecuting Authority and they are ultimately accountable to the National Director for the performance and you know, a whole range of issues.

They are required to report to the National Director and ensure that there is this accountability, clear accountability line to the National Director. But I emphasize in respect of decisions to prosecute they are autonomous in the sense that they have the original power to decide on whether to prosecute, who to prosecute, for what charges.

ADV MOHLAMONYANE SC: So such autonomy that you referred to is therefore within certain defined boundaries.

ADV BATOHI: Yes, they work under the subject and control of the National Director and there is a section that, I think it comes, we deal with it in paragraph 58, which we will come to, which deals precisely with this issue.

ADV MOHLAMONYANE SC: Tie it now, let us leap over to it ...[intervenes].

ADV BATOHI: Well, it is ...[intervenes].

ADV MOHLAMONYANE SC: Let us hasten to go to it, tie it with the issue of autonomy so that it can be put into perspective.

ADV BATOHI: Yes, so it starts with, maybe I could just get to section 55, but dealing with the issue of the NDPP's oversight ...[intervenes].

ADV MOHLAMONYANE SC: Yes.

ADV BATOHI: It also relates to, as I mentioned in paragraph 51, they are required to submit reports in respect of various aspects of the work in the division and there is at section 24(4)(a) deals, of the NPA Act, deals with this aspect as well in order to ensure that the NDPP can exercise his or her oversight powers. It will also, you know, apply in respect of operational, administrative, financial aspects of the division.

And then if we move on to paragraph 55, referring to section 23 of the Act, which provides ...[intervenes].

ADV MOHLAMONYANE SC: Page 27, Madam.

ADV BATOHI: Yes, page 27. Section 23 of the Act provides that section 6 DPP's are to exercise and carry out their general prosecutorial functions, powers and functions and I quote:

“Subject to the control and directions of
the National Director.”

And a similar provision is contained in section 24(3) of the NPA Act in respect of SDPP's, which is not applicable in this case. So then we move on to section 56 which then seeks to unpack what the control and direction of the NDPP means ...[intervenes].

ADV MOHLAMONYANE SC: I beg your pardon, it must have been a slip of the mind. It is section 56.

ADV BATOHI: Oh, it is paragraph 56 ...[intervenes].

ADV MOHLAMONYANE SC: It is paragraph 56.

ADV BATOHI: My apologies.

ADV MOHLAMONYANE SC: Yes.

ADV BATOHI: So paragraph 56 relates to, begins to deal with the issue of what does subject to the control and direction of the NDPP mean in relation to the prosecutorial powers and functions of DPP's. And then it outlines in the following paragraphs what this, firstly it does not mean, and that is clear in section, paragraph 57, it does not mean that an NDPP can instruct a DPP to prosecute or not prosecute in a given case.

But of course, you know, an NDPP is required, may ask for reports, etcetera, with regard to cases and in terms of the review process an NDPP can overturn a decision of a DPP to prosecute or not to prosecute, which we dealt with earlier today. And we then deal with, just continuing with the oversight ...[intervenes].

CHAIRPERSON: Perhaps before you proceed on the oversight aspect, Counsel.

ADV BATOHI: Yes.

CHAIRPERSON: Paragraph 52 and 53, before I ask the question, of what relevance are they to our purpose?

ADV BATOHI: Chairperson, I think it just deals with the structure.

CHAIRPERSON: Structure.

ADV BATOHI: That is correct. It is not particularly relevant, but explains the structure of the NPA.

CHAIRPERSON: What is ONDPP?

ADV BATOHI: Oh, my apologies, Chairperson. That is the office of the NDPP. So let me explain that, Chairperson. We talked about the different business units in the NPA, or we talked about one business unit. So let me explain the structure, Chairperson.

You have a National Director. There are four Deputy National Directors of Public Prosecutions in the NPA. The Deputy National, DNDPP is Deputy National Director. The Deputy National Director in terms of the NPS referred to in 52 is the National Prosecuting Service. That is the DNDPP, that Deputy is the one that all the DPP's report to, report to the National Director through this Deputy. So this Deputy sort of manages all the general prosecutions. The DPP's in all the provinces, the direct supervisor is the Deputy, DNDPP for NPS.

Then the next business unit, there is four DNDPP's. Just for understanding, it is not pertinent to this case, but the other Deputies are a DNDPP that heads up the Asset Forfeiture Unit, a DNDPP that heads up the Strategy Operations and Compliance Unit, and at the moment we just have three DNDPP's. There was another DNDPP who has retired and was heading up the Legal Affairs Division, but at

the moment there are three. So those are the three. And ONDPP is the office of the NDPP.

CHAIRPERSON: You earlier on dealt with the question of autonomy in relation to the exercise of discretion, whether to prosecute or not to prosecute. In paragraph 53, the third, or the second line, you deal with a matter that seems to be touching on that issue of autonomy of a DPP. Would you explain what that last sentence means, starting from what this entails?

ADV BATOHI: Certainly, Chairperson. What this entails is that DPP's may institute – Chairperson, this was an explanation of the structure of the NPS, that is the National Prosecuting Service and what was being explained there is, what is set out in that paragraph is what I was explaining a short while ago is that the DPP's in the provinces they carry out their functions subject to the control and directions of the Deputy National Director who is responsible for NPS. So they report to the NDPP through the DNDPP NPS who is the head of that business unit.

CHAIRPERSON: [Indistinct]... [microphone off]

ADV BATOHI: Service, that is correct, the NPS. All general prosecutions are conducted in the NPS. The IDAC now is outside of the NPS, but for all intents and purposes now all prosecutions, except for the IDAC prosecutions, resort under the NPS and the others are more specialized units, Asset

Forfeiture and Strategy and Operations and Compliance.

CHAIRPERSON: [Indistinct]... [microphone off]

ADV BATOHI: That is not correct, Chairperson. He is, the decision to prosecute or not prosecute is the DPP's. The original power is the DPP. It is more a managerial function and oversight that resorts in the Deputy National Director who is, of course, has the delegated authority. A DNDPP can act as a National Director in terms of the Act and has the same powers, functions, but it depends on what a National Director decides will be a specific area for a DNDPP. So to be clear, they are not able to direct or instruct a DPP with regard to the prosecutorial, the decisions to prosecute or not to prosecute.

CHAIRPERSON: I suppose the problem may be emanating from the fact that we have only a portion of the Mokgoro report reflected on that paragraph ...[intervenes].

ADV BATOHI: Yes.

CHAIRPERSON: And it is confusing.

ADV BATOHI: And the context perhaps is not clear.

CHAIRPERSON: And the context is not there.

ADV BATOHI: Yes.

CHAIRPERSON: Because if this is correct, that seems to go against what you earlier said about the independence of the DPP.

ADV BATOHI: Let me read this carefully again, Chair. I am

not, I did not think that it said that. Just a moment.

CHAIRPERSON: Let me just read it aloud. So what this entails is that:

“DPP’s may institute or discontinue criminal proceedings and carry out any related functions in their area of jurisdiction subject to the control and directions of the DNDPP.”

ADV BATOHI: Chairperson, that is correct. If you consider this, the exact same language applies to a National Director. The DPP’s conduct their functions, all their functions subject, if you look at the Act, the DPP’s Act under the control and directions of the NDPP. Maybe we should just go to the section. It is section 23, which says that:

“Section 6 DPP’s are to exercise and carry out their general prosecutorial ...”

That is paragraph 55.

“Their general prosecutorial powers and functions subject to the control and directions of a National Director.”

So that is the same language that we use in paragraph 53 with regard to their relationship to the Deputy National Director in charge of that business unit. But we then go on to explain what subject to control and directions mean and maybe I should in the first section, paragraph 57 it is

mentioned that it does not, what does it not mean, and the same would apply to it does not mean this in relation to their relationship with the DNDPP as set out in paragraph 53.

It does not mean that if an NDPP exercises his or her review powers, let me just continue, review powers of a decision to prosecute or not to prosecute, that he or she acting in terms of these provisions and complying with the procedure or process as prescribed therein, may overturn the decision of a DPP to prosecute or not prosecute – let me read it properly, Chair. I am skipping parts of it and it is not helping anyone of us.

CHAIRPERSON: I will tell you what my concern is there. It talks to the autonomy of the DPP.

ADV BATOHI: That is right.

CHAIRPERSON: Insofar as the exercise of his or her discretion is concerned.

ADV BATOHI: Prosecutorial discretion, that is correct. And the point made here, Chairperson, is that it does not, firstly, in the first paragraph it does not mean that, that is 57, it does not mean that an NDPP can instruct a DPP to prosecute or not to prosecute any given case. And if you read section 58, if the converse was true, that subject to the control and directions of the NDPP means that the NDPP can outside the scope of section 179(5) of the Constitution, and section 22(2) of the Act, NPA Act, instruct a DPP or Prosecutor, and the

same would apply for a DNDPP, instruct a DPP or a Prosecutor to prosecute or not to prosecute, this would render nugatory or undercut the NDPP's review powers over such decisions which the Legislature could not have intended.

It would also be inconsistent with the constitutionally enshrined principle that DPP's are responsible for prosecutions in their respective areas of jurisdiction. And we come to the DPP's powers in paragraph 68 in two pages, which will clarify maybe this, what appears to be a lack of clarity.

CHAIRPERSON: [Indistinct]... [microphone off]

ADV BATOHI: From paragraph ...[intervenes].

CHAIRPERSON: Before you proceed, Advocate, please put my mind at rest that wherever you go and you are going to help us understand what is contained in paragraph 56 of your affidavit, especially in quotation marks where you say subject to the control and direction of the NDPP and as opposed to the autonomy that should be enjoyed by the DPP so that you clear the confusion and the misunderstanding.

ADV BATOHI: Sure. In order to do that I think we first need to go to perhaps section 23, section 24 read with section 23 of the NPA Act, if I can just go there. So section 24, and then let me look at section 23 so that I can deal with them properly. If you look at, section 20 deals generally with the powers of

members of the prosecuting authority to institute and conduct criminal proceedings. Section 23 reads:

“Subject to the provisions of the Constitution and this Act, subject to the provisions, any Director shall, subject to the control and directions of the National Director, exercise the powers referred to in sub-section (1) in respect of the area or jurisdiction for which he or she has been appointed.”

And of course, the powers in sub-section (1) are set out. Now if you read section 24 which deals with the powers and duties and functions of Directors, it reads:

“Subject to the provisions of section 179 and any other relevant section of the Constitution, this Act or any other law, a Director referred to in section 13 has in respect of the area for which he or she has been appointed, the power to institute and conduct criminal proceedings.”

So this power, the original power to do this is given to the DPP of a division, not to the NDPP and so the power of the National Director, or let me say the control and direction of a National Director must be read in conjunction

with this section which gives the DPP the original power to conduct and institute criminal proceedings.

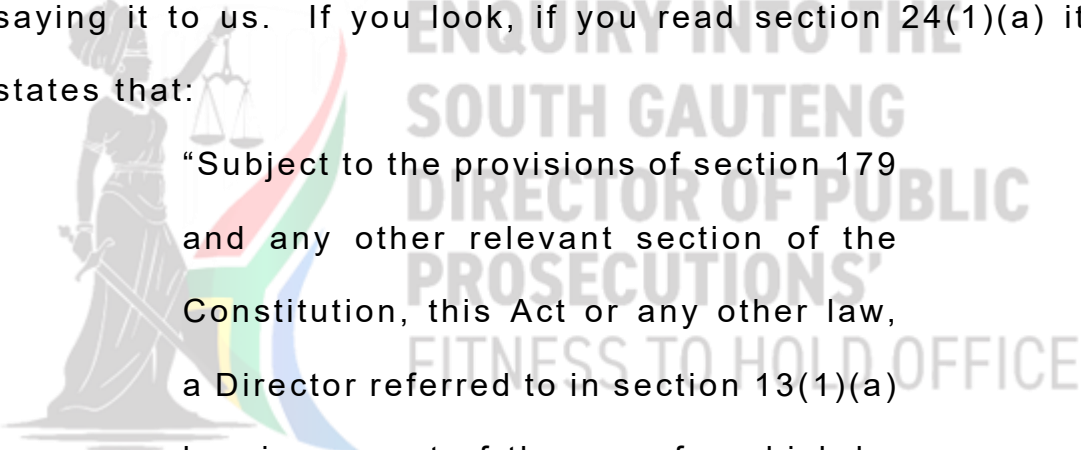
And as I say in paragraph 58 that this is the case, because the National Director is a review authority and so the National Director in order to be a review authority, it would, if the National Director is actually involved in the decisions to prosecute, then of course, you would not be able to conduct your functions as a review authority. So it has got to be, the control and direction of an NDPP extends over various aspects of management of the entire Prosecuting Authority, so you know, the DPP can submit reports with regard to cases. The National Director can query the pace of cases, whether any additional support is needed for cases, what the, look at the performance of the division, look at issues relating to HR, Finance, administrative functions, but the function of the DPP insofar as the power to institute prosecutions is clearly set out in section 24(1)(a) which gives the DPP that authority and it gives, the Act gives the NDPP review powers over a DPP's decision. So ...[intervenes].

CHAIRPERSON: [Indistinct]... [microphone off] it is the language in paragraph 53 that is creating the problem there when you deal with, when you subject the exercise of that discretion under the control and direction of the DNDPP and that is why I asked what is the impact of this on the independence of the DPP then?

ADV BATOHI: I accept, Chairperson, that the way it is structured could create that confusion and my apologies for that, but hopefully it has been clarified.

CHAIRPERSON: I have a follow up question. The provisions of section 24(1), the powers conferred on the DPP, are they exclusive, because from the reading of the section I do not see exclusivity and it takes me back to the issue of autonomy. Is it you interpreting the provisions of the Act, or is it the Act explicitly saying that to us?

ADV BATOHI: Chairperson, it is the Act that is explicitly saying it to us. If you look, if you read section 24(1)(a) it states that:



“Subject to the provisions of section 179 and any other relevant section of the Constitution, this Act or any other law, a Director referred to in section 13(1)(a) has in respect of the area for which he or she has been appointed the power to institute and conduct criminal proceedings.”

So it is explicitly mentioned that that power vests in the DPP.

CHAIRPERSON: Thank you, Counsel. You may proceed, Counsel.

ADV MOHLAMONYANE SC: Thank you, Madam Chair.

CHAIRPERSON: In fact, I think you can tie up this section, because we are going to adjourn at 4 o'clock, in a few minutes' time.

ADV MOHLAMONYANE SC: Let me do so, thank you, Madam Chair. Now you explained the autonomy of an NDPP. His powers, his or her powers as set out in section 24, but I want us to take it just one step forward. If you read section 24, you have to read it with section 20. Section 24(1) you have to read it with section 20, the ...[indistinct] to institute and conduct criminal proceedings where a Prosecutor or a section 6 DPP can institute and conduct criminal proceedings and even discontinue criminal proceedings. Am I correct?

ADV BATOHI: That is correct.

ADV MOHLAMONYANE SC: I will leave it at that, Madam Chair, for today at least.

CHAIRPERSON: Thank you. Thank you, Counsel. Thank you, Advocate Batohi.

ADV BATOHI: Thank you, Chairperson.

CHAIRPERSON: We are going to adjourn until tomorrow morning at 10 o'clock. Counsel, you will continue from where you left now.

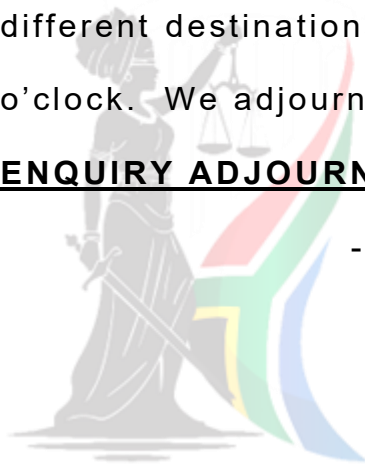
ADV MOHLAMONYANE SC: Yes, Madam Chair, I will do that.

CHAIRPERSON: And before we adjourn, may I just address the issue of transcription. I know Counsel raised it yesterday and we learned when we adjourned that we had the record

yesterday when we adjourned, but there were some errors. I suppose that was brought to your attention when you arrived at the offices. But we will have a continue or running transcription every day, meaning that you will get it the following day. Is that clear?

And I suppose with all records, sometimes we find names being incorrectly spelled. I have already seen my name is very badly spelled somewhere, but it is okay, we know that who I am. To that extent I think let us take an adjournment to make it possible for all of us to travel to our different destinations timeously and tomorrow we start at 10 o'clock. We adjourn.

ENQUIRY ADJOURNS UNTIL 20 NOVEMBER 2025



ENQUIRY INTO THE
SOUTH GAUTENG
DIRECTOR OF PUBLIC
PROSECUTIONS'
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I, the undersigned, hereby certify that **so far as it is audible to me**, the foregoing is a true and correct transcript of the proceedings recorded by means of a digital recorder in the matter between:

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PROBLEMS EXPERIENCED WITH RECORDING

1. Verbatim transcript, no syntax or grammar alterations effected.
2. Unknown names spelled phonetically.
3. Microphone not always switched on.

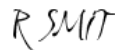
NB: Transcriber can only transcribe what is recorded and clearly audible.

DATE COMPLETED: 19/11/2025

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