



"LoeJ"

OFFICE OF THE DPCI JUDGE  
REPUBLIC OF SOUTH AFRICA

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**STAKEHOLDERS' ENGAGEMENT SESSION ON 07 JUNE 2018 AT ILEMBE BOARDROOM, DEPARTMENT OF PUBLIC WORKS, MAYVILLE, DURBAN: PRESENTATION BY DPCI JUDGE: F DIALE KGOMO**

The Programme Director, the Heads of the DPCI, the IPID, the MEC of Transport, Community Safety & Liaison, the Provincial Heads of SAPS and the Hawks, the Head of PSIRA and other Directorates, the Hawks family, members of the media (the Fourth Estate) and friends, good morning. I wish to thank the pioneer DPCI Judge, retired Judge Thumba Pillay, for accepting my invitation and to recount for us the historical background of the DPCI Judge's Office. Listening to the trials and tribulations he went through and was left in the lurch by the executing authority and, as an unintended consequence Parliament: the provocative question must be asked what was the purpose of creating this institution only to leave it to its own devices and thus to flounder.

1. Today marks the beginning of the 9<sup>th</sup> months into my five year term as Directorate for Priority Crime Investigations (DPCI Judge), a position I assumed on 06 October 2017 when I was appointed by SAPS Minister Mbalula, in Cape Town. It has been an extremely hectic but most interesting period.
2. A convenient starting point in realizing the mandate of the Office of the DPCI Judge has to be the relevant provisions in our Constitution, the supreme law. It decrees in s205 (3) that:  
  
“(3) The objects of the police service are to prevent, combat, and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to protect and to uphold and enforce the law”.  
That sounds pretty obvious, but it is a fundamental and daunting assignment.
3. The Hawks may be an elite serious crime combatting and investigation unit, but they are first and foremost police officers. The need and rationale for the establishment of the DPCI and comprehensive battle against corruption was described as follows in the **Glenister II case (2011 (3) SA 347 (CC) in paras 166 and 167s** by Moseneke DCJ and Cameron J :

“[166] There can be no gainsaying that corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won

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constitutional order. It blatantly undermines the democratic ethos, the institutions of democracy, the rule of law and the foundational values of our nascent constitutional project. It fuels maladministration and public fraudulence and imperils the capacity of the state to fulfil its obligations to respect, protect, promote and fulfil all the rights enshrined in the Bill of Rights. When corruption and organised crime flourish, sustainable development and economic growth are stunted. And in turn, the stability and security of society is put at risk.

**[167]** This deleterious impact of corruption on societies and the pressing need to combat it concretely and effectively is widely recognised in public discourse, in our own legislation, in regional and international conventions and in academic research. **In a statement preceding the text of the United Nations Convention against Corruption [the UN Secretary-General] Kofi Annan observed:**

'This evil phenomenon is found in all countries big and small, rich and poor but it is in the developing world that its effects are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a government's ability to provide basic services, feeding inequality and injustice, and **discouraging foreign investment** and aid. Corruption is a key element in economic under-performance, and a major obstacle to poverty alleviation and development.'

4. It is vital to know the genesis of the Directorate for Priority Crime Investigation (DPCI). **In Glenister II the Constitutional Court pronounced that the Directorate of Special Operations (DSO), also known as the Scorpions, was established in 2001 under s 7(1) of the National Prosecuting Authority Act, 32 of 1998, to supplement the efforts of existing law enforcement agencies in addressing organized crime. When the Scorpions**

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unit was dissolved it was replaced with the DPCI. However, this Directorate was established in terms of s 17A – 17K of the South African Police Service Act, 68 of 1995.

5. The **United Nations Convention** imposes an obligation on each State Party to ensure the existence of a body or bodies tasked with the prevention of corruption (See Article 6(2) thereof). **The ConCourt stated at para 189 of Glenister II:**

“The obligations in these Conventions are clear and they are unequivocal. They impose on the Republic the duty in international law to create an anti-corruption unit that has the necessary independence. That duty exists not only in the international sphere, and is enforceable not only there. Our Constitution appropriates the obligation for itself, and draws it deeply into its heart, by requiring the state to fulfil it in the domestic sphere. In understanding how it does so, the starting point is section 7(2) [of the Constitution], which requires the state to respect, protect, promote and fulfil the rights in the Bill of Rights”.

6. The **Office of the DCPI Judge, colloquially called the “Hawks Ombudsman”, was created in terms of s17L of the SAPS Act.** It consists of only **16 sections.** Pivotal are **subsections 17L (4) and (5).** They record the following:

“(4) The retired Judge may receive complaints in the prescribed form and manner from-

- (a) **Any member of the public who can provide evidence of a serious and unlawful infringement of his or her rights caused by the investigation by the Directorate;**
- (b) **Any member of the Directorate who can provide evidence of any improper influence or interference, whether of a political or any other**

nature, exerted upon him or her regarding the conducting of an investigation.

(5) The retired judge may upon receipt of a complaint investigate such complaint or refer it to be dealt with by, amongst others, the Secretariat, the Independent Complaints Directorate, the National Commissioner, the Head of the Directorate, the relevant Provincial Commissioner, the National Director of Public Prosecutions, the Inspector-General of Intelligence, or any institution mentioned in Chapter 9 of the Constitution of the Republic of South Africa, 1996". Colleagues, as stakeholders, this is why you are here today.

**7. The DPCI Judge has to account in the following manner:**

7.1. He/She is required to report the outcome of "any investigation undertaken or any referral" to the Minister of Police. The reason or purpose suggests itself. The Minister ought to have a comprehensive view of the various Directorates and Institutions falling within his portfolio to enable him/her to discharge his functions properly: (s17L (6)). This *per se* does not detract from the independence of the DPCI Judge. See McBride v/s Minister of Police and Another 2016 (2) SACR 585 (CC) at paras 27 and 28.

7.2. The DPCI Judge is also obliged to **report to Parliament annually** on the performance of his/her Office: (s17L (9)).

8. It is interesting to note that whereas the DPCI Judge may in terms of s17L (5), amongst others, refer a complaint to be dealt with by "the Head of the Directorate", the symbiotic converse is also true because **s17L (10) provides that: "(10) The Head of the Directorate may request the retired Judge to investigate complaints or allegations relating to investigations by the Directorate or alleged interference with such investigations"**.

9. The latter observation brings me squarely to the invitation by the **then Interim Head of the Hawks, Lt-Gen Matakata**, on 19 October 2017, in Nelspruit/Mbombela where a conference of all Provincial Heads of the Hawks was held. The meet and greet occasion broke the ice. We learned a lot from each other in the process. We looked at few groundbreaking cases some of which are referenced below.
10. Between that period **(19/10/2017) and 04 December 2017 we visited all the Provincial Hawks offices** and followed the same system. The feedback reaching me on our travels is positive; in particular that relevant decided cases are now being read more readily by members of the Hawks knowing that they stand on solid ground in discharging their functions.
11. **The institution of the DPCI Judge is fairly recent. As a result, s 17L of the SAPS Act has not received much judicial pronouncement.** The ConCourt had this to say in Glenister II in paras 246 and 247 concerning a DPCI Judge:
- "246: The complaints mechanism, headed by a retired Judge, and backed up by power to refer a complaint for prosecution, operates after the fact. It permits complaints to be made, but does not constitute a hedge in advance against their causes. It also permits a member of the public to complain about infringement of rights caused by an investigation, and permits 'any member of the Directorate who can provide evidence of any improper influence or interference, whether of a political or any other nature, exerted upon him or her regarding the conducting of an investigation' to complain.**
- 247: This in our respectful view deals with history. It does not constitute an effective hedge against interference. What is more, section 17L (7) is clear that in the course of this investigation the retired Judge may request

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information from the NDPP in so far as may be necessary, but the NDPP may on 'reasonable grounds' refuse to accede to such request. That may place a considerable hurdle in the way of the retired judge's investigation. In short, an *ex post facto* review, rather than insisting on a structure that *ab initio* prevents interference, has in our view serious and obvious limitations. In some cases, irreparable harm may have been caused which judicial review and complaints can do little to remedy. More importantly, many acts of interference may go undetected, or unreported, and never reach the judicial review or complaints stage. Only adequate mechanisms designed to prevent interference in the first place would ensure that these never happen. These are signally lacking." However, as Ngcobo CJ stated in the minority judgment, the judicial oversight by the DPCI Judge "is an important legal mechanism to address undue political interference in the investigation".

We have hinted to the Police Portfolio Committee that we would seek legal opinion to remedy certain defects or inadequacies in the legislation concerning the DPCI Judge's mandate and independence: operationally, financially, structurally and most importantly, institutionally. This is an enormous task and comprehensive process which cannot be rushed and must be thought through carefully.

12. The Office of the DPCI Judge still lacks capacity. It only has two investigators for the entire country. **Section 17L(12) of the SAPS Act** states that:

"The Minister **shall** ensure that the retired Judge has sufficient personnel and resources to fulfill his or her functions." Unfortunately, former SAPS Minister Mbalula was redeployed not long after my appointment. I have no doubt that the current SAPS Minister, Mr Cele, will remedy the situation. I am due to meet him with the Secretary General (SG) of the Secretariat, Mr Rapea.

13. However, a priority for the Office of the DPCI Judge is to engage a CEO and a Director at Head Office (Pretoria) and an investigator for the Cape Town office. A third office for the Kwa-Zulu Natal has to be set up during the course of 2019, having regard to the costs implications of an expansion.
14. A synoptic version of the Vision, Mission, Objective and the Values that the Office of the DPCI Judge espouse were furnished to the Police Portfolio Committee during our briefing session to Parliament on 28 November 2017, which Minister Mbalula had sight of prior to its presentation. It was our Fifth Annual Report which covered the period 01 April 2016 to 31 March 2017. It related mainly to the tenure of my late brother Judge Essa Moosa.
15. I have inherited a formidable backlog of complaints that have been investigated and draft reports prepared by the investigators. However, I still had to trawl through the files to satisfy myself whether I concur with the proposed outcome before signing off on each of them. The matters date back roughly from November 2016 when my predecessor became seriously indisposed and passed on in February 2017. Consequently, fast-tracking the employment of a CEO et al will have the beneficial effect of relieving me of the office administration burden to liquidate the backlog more expeditiously and focus on my core responsibilities to deal with incoming complaints. The Chief Investigator would, in turn, also concentrate on his core function of investigating complaints.
16. The first public outreach engagement under my stewardship, which also involved stakeholders, was held on 12 December 2017 in Khayalitsha, Cape Town. A similar outreach programme was held on 06 March 2018 at Floreat Hall in Bloemfontein. I will in the course of time, also meet all Heads of

Directorates and Chapter 9 Institutions listed in section 17L (5) of the SAPS Act. The schedule for the stated engagements will have to allow ample time to liquidate the backlog of investigated complaints alluded to earlier.

### **THE PRONOUNCEMENTS BY THE PRESIDENT, SAPS MINISTER ECT**

17. In his **State of the Nation Address (SONA)** on 16 February 2018 President Cyril Ramaphosa, relevant to today's event, said the following:

17.1. **"Guided by President Mandela's example we will use this year to re-inforce our commitment to ethical behaviour and ethical leadership"**. Let me emphasize ETHICAL and add ETHICAL LEADERSHIP.

17.2. The President went ahead: "We are determined to build a society defined by decency and integrity, that does not tolerate the plunder of public resources, nor the theft by corporate criminals of the hard-earned savings of ordinary people".

17.3. "Tough decisions have to be made to close our fiscal gap, stabilize our debt and restore our state owned enterprises to health". he said.

17.4. "This is the year in which we will turn the tide of corruption in our public institutions. The criminal justice institutions have been taking initiatives that will enable us to deal effectively with corruption".

17.5 In a different context the President continued: "The Commission (headed by Mr Justice Zondo DCJ) should not displace the regular work of the country's law enforcement agencies in investigating and prosecuting any and all acts of corruption.



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We must fight corruption, fraud and collusion in the private sector with the same purpose and intensity. We must remember that every time someone receives a bribe there is someone who is prepared to pay it.

We will make sure that we deal with both in an effective manner. We urge professional bodies and regulatory authorities to take action against members who are found to have acted improperly and unethically. **This requires that we strengthen law enforcement institutions and that we shield them from external interference or manipulations”.**

**18. On the occasion of the inauguration of Lt-Gen Godfrey Lebeya as the Head of the Hawks in Durban on Friday 01 June 2018** the Minister of Police, Mr Cele, had this to say:

“The business of squeezing the space for criminals to zero is intensified. This country will never be turned into a banana republic. The presence of the police will be felt until South Africans say we are safe and we feel safe. General Lebeya and your team your presence in this portfolio must be felt”.

**19. The Chairperson of the Police Oversight (Portfolio) Committee, Mr Francois Beukman, had this to say in a Sunday Times interview of 03 June 2018:** “If there is uncertainty about direction and command and control, things fall apart. That is why we have been saying all along: You must implement the National Development Plan. One of its key recommendations is still on the table. Namely, the National Policing Board which will set the standards for the recruitment, the selection and promotion of appointees. If you don't have scientific criteria, the best people won't get to the management positions”.

20. Mr Beukman's admonition brings me squarely to the following cases concerning appropriate appointments and related matters:

20.1 **In Democratic Alliance v/s The President of the Republic of South Africa & Others (The Menzi Simelane Case) Yacoob ADCJ, writing for the ConCourt, had this to say at para 49:**

"49" The provisions of the Constitution and the Act must be taken together to determine the purpose for which the power was conferred. It is evident that the purpose of the conferral of the power upon the President was to ensure that the person appointed as National Director is **sufficiently conscientious and has the integrity** required to be entrusted with the responsibilities of the office. In particular, to ensure that-

- a. The prosecuting authority performs its functions honestly and without fear, favour or prejudice;
- b. decisions to institute criminal prosecution are taken honestly, fairly and without fear, favour or prejudice;
- c. prosecution policy is determined honestly and is appropriate to the needs of our country;
- d. the criminal justice in so far as it concerns prosecutions is fairly administered;
- e. any improper interference, hindrance or obstruction of the prosecuting authority by any organ of state is not tolerated; and
- f. all Directors of Public Prosecutions carry out their functions honestly and fairly.

It is obvious that dishonesty is inconsistent with the hallmarks of conscientiousness and integrity that are essential prerequisites to the proper execution of the responsibilities of a National Director".

**At paras 88 and 89 the Court concluded:**

**"88** The President too should have been alerted by the adverse findings of the Ginwala Commission against Mr Simelane and ought to have initiated a further investigation for the purpose of determining whether real and important questions had been raised about Mr Simelane's honesty and conscientiousness. This he should have done despite his knowledge of Mr Simelane as a person. There is no rational relationship between the findings of the Ginwala Commission without more and the purpose for which the power had been given.

**"Para 89** The absence of a rational relationship between means and ends in this case is a significant factor precisely because ignoring prima facie indications of dishonesty is wholly inconsistent with the end sought to be achieved, namely the appointment of a National Director who is sufficiently conscientious and has enough credibility to do this important job effectively. The means employed accordingly colour the entire decision which falls to be set aside".

**20.2. In Mthandazo Berning Ntlemeza v/s Helen Suzman Foundation & Freedom Under Law, Navsa JA stated at para 4:**

"The DPCI's functions are set out in s17D of the Act:

- (1) The functions of the Directorate are to prevent, combat and investigate-
  - (a) national priority offences, which in the opinion of the National Head of the Directorate need to be addressed by the Directorate.....
  - (aA) selected offences not limited to offences referred to in Chapter 2 and section 34 of the Prevention and Combating of Corrupt Activities Act 12 of 2004....

As can be seen from all of the above, the National Head of the DPCI occupies a pivotal position within the statutory scheme." said, the Judge and continued at para 45:

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"45 The proper functioning of the foremost corruption busting and crime fighting in our country dictates that it should be free of taint. It is a matter of great importance. The adverse prior crucial pronouncement and the place that the South African Police Service maintains in the constitutional scheme as well as the vital role of the National Head of the DPCI and the public interests at play, are all factors that weighed with the court in its conclusion that there were exceptional circumstances in this case."

**At para 46** the Learned Judge stated: " But given the findings of Matojane J, the submission that being kept out of his office occasions him reputational harm does not withstand scrutiny".

**At para 47** the following: "On the other side of the coin there is the public interest and crucial place that the DPCI enjoys in our young democracy as set out above".

20.3. I wish to bring in some parity of reasoning between the mandate of the Office of the DPCI Judge and that of the IPID. In **McBride v/s Minister of Police & Another 2016 (2) SACR 585 (CC) (Helen Suzman Foundation as Amicus Curiae)** the Concourt (Bosielo AJ writing for the Court) had this say at paras 24-26:

"**24 IPID** is an independent police complaints body established in terms of section 206 (6) of the Constitution. Section (4)(1) of the IPID Act requires it to function independently of SAPS. This is to ensure that IPID is able to investigate cases or complaints against police without any fear, favour or prejudice or undue external influence. Section 4(2) of IPID Act requires that each organ of state assists the Directorate to maintain its impartiality and to perform its functions effectively. Importantly, section 2 of the IPID Act requires IPID to play an oversight role over SAPS and Municipal Police Services. Given the nature, scope and importance of the role played by police in preventing, combating and investigating crime, IPID's

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oversight role is of cardinal importance. This is aimed at ensuring **accountability and transparency** by SAPS and Municipal Police Services in accordance with the principles of the Constitution.

**25** IPID is headed by an Executive Director who is nominated by the Minister in terms of section 6(1) of the IPID Act. This nomination must be either confirmed or rejected by the Parliamentary Committee within a period of 30 parliamentary working days”.

**26** The Executive Director's responsibilities are set out in section 7 of the IPID Act. They include: providing strategic leadership to the Directorate; appointing provincial heads of each province, appointing such staff as may be necessary to enable the Directorate to perform its functions in terms of the Act; giving guidelines concerning the investigation and management of national and provincial offices and the training of staff at national and provincial levels; **referring criminal cases revealed as a result of an investigation to the NPA for criminal prosecution and notifying the Minister of such referral**; ensuring that complaints regarding disciplinary matters are referred to the National Commissioner and where appropriate, the Provincial Commissioner; once a month submitting a summary of disciplinary matters to the Minister and providing the Secretary with a copy thereof; and keeping proper records of all financial transactions, assets and liabilities of the Directorate; ensuring that the Directorate's financial affairs comply with the Public Finance Management Act and preparing an annual report in the manner contemplated in section 32. The Executive Director is also the accounting officer of the Directorate. Evidently, his duties are extensive and wide”.

This pronouncements are ample illustration and evidence that the IPID and the Hawks Ombudsman's Office cannot be collapsed into each other. Which is a

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21. The Commissioner of Police, General Kehla Sitole, stated at a press conference on Monday 04 June 2018 that the SAPS uniform will be confiscated from criminals in the police ranks in exchange for the prison garb. It is hightime.

All the foregoing should not just be platitudes. **There is a Ixi-Tsonga saying: "Mintiro ya bolabola", "Actions speak louder than words". Action. Implementation. Results. Consequences. Accountability.**

22. Finally, I have in my interactions with management and members of the Hawks, and other stakeholders and Directorates emphasized that we honour our Oath of Office; hold up a mirror to ourselves for critical self-assessment or examination when availing ourselves for high-office or when approached by an appointing authority for such office. There is no obligation on anyone to accept the offer when "smallonyana skeletons" are rattling in the cupboard, because when critically scrutinized you may live to regret it as shown herein before.

23. In the words of **Chief Justice Mogoeng Mogoeng** when **swearing in the Deputy President and Cabinet Ministers in February 2018:**

"And may the oath or affirmation judge most brutally any of us who is here for a show, or any of us who will betray the constitutional aspirations of the people of South Africa. I'm just saying.... If, after reflection, you consider yourself disqualified, I'm sure the President won't mind if you pull out".

Thanks for listening.



**F Diale Kgomo**

**DPCI: Judge**

**Date: 07 June 2018**

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