



The FW de Klerk Foundation
CENTRE FOR CONSTITUTIONAL RIGHTS

Upholding South Africa's Constitutional Accord

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25 July 2008

Dear Sirs

**RE: National Prosecuting Authority Amendment Bill [B23 - 2008];
South African Police Services Amendment Bill [B30 -2008]**

1. Overview:

The Centre for Constitutional Rights welcomes the opportunity to make submissions to your respective portfolio committees, as the Centre is deeply concerned about the impact that the proposed legislation will have on fundamental constitutional issues. At bedrock, the Centre's submissions go to the fact that the dissolution the Directorate of Special Operations (DSO) or the Scorpions as they are popularly known as, is neither constitutional, nor rational. Neither is it reasonable, or fair, or lawful. Moreover the Centre believes that the disestablishment of the DSO is not either in the public interest and that for all these reasons the proposed legislation should be abandoned.

2. Background to establishment:

2.1 The constitutional basis for the establishment of the DSO lies in section 179 (2) in terms of which "The prosecuting authority has the power to institute criminal

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proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceeding” and in terms of section 179(4) which makes provision for national legislation to ensure that the NPA can exercise its functions “without fear, favour or prejudice.” The DSO’s purpose is precisely to carry out functions that are necessary for the institution of criminal proceedings in terms of section 179(2). Given the seriousness of the challenge presented by organized crime, it was also essential that the unit should be staffed by the most expert and best trained personnel available and that it should be adequately equipped to carry its important responsibilities. The manifest absence of any such capability within the SAPS was one of the reasons for its establishment. It was also essential for the NPA to have its own investigative capability to ensure that it would be in a position to exercise its functions in terms of section 179 (4) “without fear, favour or prejudice.” The NPA’s ability to comply with this section would clearly be unconstitutionally compromised were it to be solely dependent on investigative resources more directly answerable to political authorities - particularly with regard to the investigation and prosecution of crimes involving politicians and employees of the state.

2.2 It was the challenges posed to our fledgling democracy by organized crime which gave rise to the formation of the DSO less than ten years ago. At the time of its inception there was an imperative need for the National Prosecuting Authority (NPA) and police to deal effectively with the scourge of organised and pervasive crime. The need to deal with organized crime effectively has regrettably not diminished as is evidenced by the plethora of investigations such as those dubbed travelgate, oilgate, those into the arms deal and more recently into alleged bribes involving the National Commissioner of Police.

3. Rationale for disestablishment

3.1 The ostensible central justification advanced for the dissolution of the Scorpions is premised on a very narrow interpretation of the term ‘single’ as it appears in section 199(1) of the Constitution. This section prescribes that:

“The security services of the Republic consist of a single defence force, a single police service and any intelligence services established in terms of the Constitution.”

3.2 However, this line of reasoning was dismissed by the Constitutional Court six years ago in *Minister of Defence v Potsane* 2002(1) SA 1 (CC). In that case the Court had to determine the meaning of the term ‘single’ in section 199 (1) of the Constitution. Kriegler J, writing a unanimous judgment, found that:

“s 179, when speaking of a 'single' authority, does not intend to say 'exclusive' or 'only' but means to denote the singular, 'one'. Where there used to be many, there will now be a single authority. That is consistent with the historical context as well as with the corresponding provisions of the Constitution where the diffused powers of State under the previous dispensation were to be brought under one single umbrella.”

3.3 This fallacious argument was again raised by National Police Commissioner Jackie Selebi at the Khampepe Commission’s hearings into the future role and function of the Scorpions, only to be rejected by Judge Sisi Khampepe in her report as being without legal or constitutional merit. Their simplistic and literal reading of this section led them to urge that the ‘separate’ existence of the Scorpions, which fulfill certain policing functions, was therefore unconstitutional. However, Judge Khampepe, adopting a more contextual and purposive approach to interpreting the provision, disagreed, reasoning that there was indeed nothing unconstitutional in the situation in which the Scorpions, conveniently and independently housed in the NPA, for whom they do investigations, share a mandate with the South African Police Service (SAPS). In her report she explains that:

"The meaning of ‘single’ used in the relevant section conveys no more than the fact that various police forces that used to form part of the formerly ‘independent’ homelands... would be amalgamated into one single force. The word single does not therefore connote ‘exclusive’."

3.4 The actual reason for the decision to disband the Scorpions lies in a decision taken by the ANC's 52nd National Conference at Polokwane in December, 2007. The decision cannot be divorced from the resoluteness and impartiality with which the Scorpions investigated criminal offences committed by members of parliament involved in the Travelgate scandal and corruption surrounding armaments contracts. These activities led to widespread criticism that the Scorpions had been manipulated to promote the agenda of one faction within the ruling coalition against another.

3.5 The Scorpions have in fact performed a sterling service to the public in combating all forms of organised crime. The vast majority of their cases have not involved ANC politicians, but, in the nature of their mandate, investigation of organised crime. It is therefore erroneous to allege that the Scorpions allowed themselves to be abused for political purposes by targeting certain senior members of the ANC. The reality is that in the case involving Mr Jacob Zuma they were faithfully carrying out their mandate in the light of a) prima facie evidence that had already been established by the courts and b) the clear relevance of apparently massive corruption involving arms contracts to their mandate. The NPA's determination to carry out its mandate independent of the wishes of the political leadership of the country is clearly reflected in its decision to proceed with the arrest of the Commissioner of the SAPS against the express and illegal instructions of the President and the Minister of Justice.

4 Lawfulness

Against this background, it is clear that the real reason for the dissolution of the Scorpions is not bona fides and is not premised on a constitutionally compliant interpretation of s 179. Rather, the main reason for wanting to disbandon the Scorpions appears to be to halt certain investigations into senior Police Officers and members of the Government. Its aim is essentially to protect certain politicians, who now find themselves in the ascendancy in the ANC, from penetrating investigations. This means that the dissolution is proposed as the result of mala fides or at least for no legally acceptable rational purpose. As such, since no legitimate purpose of government is or can be served by disestablishing the Scorpions, the decision is irrational and arbitrary

5. Constitutionality

5.1 The Scorpions are, in what they do professionally, fulfilling a statutory and constitutional mandate derived from section 179(2) by carrying out the necessary incidental functions which enable the prosecutors to score a well above average conviction rate.

5.2 They are also constitutionally compliant in terms of section 179(4) in that they were established by national legislation that is essential to ensure that the NPA is able to exercise its functions "without fear, favour or prejudice"

6. Reasonableness

It is unreasonable to dissolve the most professional and effective crime fighting unit ever to tackle organised crime in our country. In regard to the notion of reasonableness, we respectfully refer the members of the committees to *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* 2004 (4) SA 490 (CC) and *Rail Commuters Action Group & others v Transnet t/a Metrorail & others* 2005 (2) SA 359 (CC).

7. Fairness

It is unfair, in the labour law context, to subject individual members of the Scorpions to restructuring which on the face of it amounts to an unfair labour practice

8. Public Interest

It is clearly against the public interest to dissolve a unit with proven capability to combat organized crime and to root out corruption in the state, the SAPS and the public sector. It is clearly not either in the public interest to give one single police force a monopoly on investigative powers as this would effectively mean that senior personnel within the SAPS would be placed above the law. Effective crime prevention is essential for the preservation of democracy, a founding value intrinsic to the constitution. It is accordingly also not in the public interest to disbanden the proven most effective unit capable of ensuring the continued preservation of democracy.

9. Human Rights

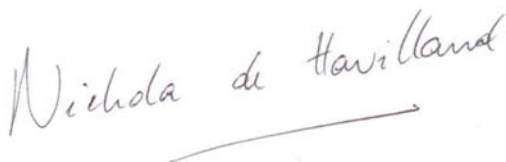
As far as human rights are concerned, the members of the committees are respectfully referred to the evidential evidence placed before the court in the *Glenister Hugh v The President of the Republic of South Africa & 6 others* (WLD case No14386/2008 28 May 2008).

10. Conclusions

For the above reasons, we submit that the National Assembly would be in breach of its duty to uphold the Constitution as is prescribed by section 8 of the Constitution and its duty to respect, protect and promote all the rights contained in the Bill of Rights as it is enjoined to do in terms of section 7(2), if it were to persist with the proposed dissolution of the Scorpions.

The Centre values the opportunity to make written submissions and would be happy to supplement these with oral submissions should the portfolio committees so require.

Yours faithfully

A handwritten signature in cursive script that reads "Nichola de Havilland". A horizontal line is drawn underneath the signature, extending from the left towards the right.

Adv Nichola de Havilland
Deputy Director
Centre for Constitutional Rights