



## SUMMARY OF REPORT OF THE ENQUIRY INTO THE FITNESS OF ADVOCATE VP PIKOLI TO HOLD THE OFFICE OF NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

### 1. Introduction

1.1 The National Prosecuting Authority (NPA) was created by section 179 of the Constitution, 1996 and must exercise its functions "without fear, favour or prejudice".

1.2 The mandate, powers, appointment and dismissal procedures relating to the NPA are set out in the National Prosecuting Authority Act 32 of 1998 ("the Act").

1.3 The Act limits the power of the President to suspend the National Director of Public Prosecutions (NDPP) or to remove him or her from office. This safeguard is aimed at ensuring that the NPA, which is tasked with prosecuting crime and corruption, may operate "without fear or favour".

1.4 The Act is clear. The NDPP may be provisionally suspended pending an enquiry into his fitness to hold office. Dismissal can only be effected, however, if one or more of the four factors set out in the Act are objectively present: a) misconduct, b) incapacity, c) continued ill health, or d) failing to be a fit and proper person.<sup>1</sup>

### 2. Background to the Ginwala Enquiry

2.1 Adv Vusi Pikoli was provisionally suspended from office as the NDPP on 23 September 2007.

2.2 The letter of suspension handed to Adv Pikoli on 23 September 2007 provided two reasons for his suspension, namely:

<sup>1</sup> Section 12 (6) (a) The President may provisionally suspend the *National Director* or a *Deputy National Director* from his or her office, pending such enquiry into his or her fitness to hold such office as the President deems fit and, subject to the provisions of this subsection, may thereupon remove him or her from office—

(i) for misconduct;

(ii) on account of continued ill-health;

(iii) on account of incapacity to carry out his or her duties of office efficiently; or

(iv) on account thereof that he or she is no longer a fit and proper person to hold the office concerned.



- The granting of immunity to members of organised crime syndicates where the prosecution of those alleged offenders would be in the public interest;
- A breakdown in the working relationship between the NDPP and the Justice Minister.

2.3. Dr Frene Ginwala was appointed on 28 September 2007 to head the Enquiry and its terms of reference were:

2.3.1 To determine the fitness of Advocate V Pikoli, to hold the office of National Director and whether he;

2.3.1.1 in exercising his discretion to prosecute offenders, had sufficient regard to the nature and extent of the threat posed by organised crime to the national security of the Republic;

2.3.1.2 in taking decisions to grant immunity from prosecution to or enter into plea bargaining arrangements with persons who are allegedly involved in illegal activities which constitute organised crime, as contemplated in the Act, took due regard to the public interest and the national security interests of the Republic, as contemplated in section 198 of the Constitution, as well as the Prosecution Policy.

2.3.1.3 Whether the relationship between the National Director and the Minister has irretrievably broken down. In particular,

- Whether he failed to appreciate the nature and extent of the Constitutional and legal oversight powers of the Minister over the prosecuting authority;

"and such other matters as may relate to the fitness and propriety of the National Director to hold office."

2.4. In considering the allegations and complaints against Adv Pikoli, the Enquiry had to consider what was meant by the term "a fit and proper person". The Enquiry was of the view that it was necessary to consider the qualities required of the NDPP<sup>2</sup> including whether he possessed:

- An appreciation of the significance of the role a prosecuting authority plays in a constitutional democracy.

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<sup>2</sup> 9. (1) Any person to be appointed as *National Director, Deputy National Director or Director* must—

(a) possess legal qualifications that would entitle him or her to practise in all courts in the *Republic*; and  
(b) be a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned.



- Awareness of the broader public interest and national security concerns in the exercise of the functions of the office.
- Awareness of the ramifications of the actions of the NPA, particularly where the conduct of the NPA would impact on other organs of state in their execution.
- The concepts of the final responsibility of the Minister and its relationship with the prosecutorial independence of the NDPP.
- The imperative of co-operative government within the context of South Africa's constitutional dispensation, as contained in s.41 of the Constitution.

2.6 This was the first enquiry of its nature in terms of the Act. The Act provides no guidance on the nature of the enquiry.<sup>3</sup> The rules and procedures were determined by Dr Ginwala, after consultation with the parties. Written documentation was submitted by both parties and hearings were held to allow for oral evidence

### 3. Ginwala Report<sup>4</sup>

3.1 The findings of the Enquiry are as follows:

	Government Allegations	Enquiry findings
1	The relationship between the Minister and Adv Pikoli had broken down irretrievably.	Government failed to prove this allegation.
2	Adv Pikoli should not have authorised plea and sentence agreements with the persons implicated in the alleged murder of Mr Brett Kebble and should have prosecuted all suspects.	Government failed to show that Adv Pikoli, in exercising his discretion of whether or not to prosecute had not taken heed of the threat posed by organised crime to national security.
3	Adv Pikoli should not have concluded plea and sentence agreements with some of the alleged Equatorial Guinea mercenaries, and should not have authorised the	Government failed to produce evidence to show that the cases of plea and sentence agreements it cited had contravened the prosecution policy.

<sup>3</sup> This was not an enquiry governed by the Commissions Act 8 of 1947 nor was it a judicial enquiry or a disciplinary hearing.

<sup>4</sup> In the report where reference is made to the President, it is a reference to former President Thabo Mbeki; reference to the Minister of Justice is to former minister Brigitte Mabandla and to the Minister of Safety and Security is former Minister Charles Nqakula.



	prosecution of the other alleged Equatorial Guinea mercenaries. It was alleged that the plea and sentence agreements with Mr Agliotti and Mr Nassif did not take due account of the prosecution policy and particularly the public interest and the national security interests of the Republic.	
4	Adv Pikoli sought to pursue the listing of the DSO as a public entity under the Public Finance Management Act ("PFMA") despite the Minister's concerns that it was a policy matter that required discussion by Cabinet.	Adv Pikoli was legally obliged to inform Treasury that the DSO was not listed as a public entity, but he should have informed the Minister before doing so.
5	Adv Pikoli failed to account to the Director General of the Department of Justice and Constitutional Development, and thereby prevented the latter from executing his accounting responsibilities.	Adv Pikoli was not obliged to account to the DG: Justice in the manner alleged by Government.
6	Adv Pikoli failed to inform the Minister of the information that came into the possession of the DSO and led to the preparation of the Browse Mole Report, and also that he failed to stop the DSO from pursuing a matter that was outside its mandate.	Adv Pikoli was obliged to inform the Minister of the information that emerged from the Browse Mole investigation in March 2006, and he should have ordered the DSO to stop any further involvement in the matter.
7	Adv Pikoli failed to inform the Minister of the alleged conspiracy to assassinate the Malawian President, and that the involvement of the DSO in the Malawian investigation constituted intelligence gathering and fell outside its mandate.	Adv Pikoli was obliged to inform the Minister of the plot to assassinate the Malawian President as soon as he became aware of it. However, the NPA dealt with the matter in terms of the law, and did not investigate an intelligence matter outside its mandate.
8	Adv Pikoli did not prevent a member of the DSO from engaging in unregulated contact with foreign intelligence services.	Adv Pikoli could not be held responsible for interaction by members of the DSO with foreign intelligence services that occurred before he took office or of which he was





		unaware through no fault on his part.
9	Adv Pikoli should have informed the Minister before applying for search and seizure warrants at the Union Buildings and Tuynhuys, and should have ensured that adequate measures were in place to prevent any security breaches during the execution of the warrants.	Adv Pikoli failed to inform the Minister and the President prior to applying for the search and seizure warrants at the Union Buildings and Tuynhuys in August 2005, and failed to ensure that proper security measures were followed during this operation.
10	Adv Pikoli failed to inform the Minister and the President prior to applying for the warrants of arrest and search and seizure against the National Commissioner of Police, and he failed to exhaust the options for accessing information from the SAPS put in place by the Presidency, which information was required by the DSO for its investigation of Operation "Bad Guys".	Adv Pikoli should have informed the Minister before applying for arrest and search and seizure warrants against the National Commissioner of Police. He also failed to exhaust all the options available through the facilitation of the Presidency to access information held by SAPS.

### 3.2 Conclusions

3.2.1 The Report concluded that Government failed to substantiate the reasons given for the suspension:

- The grounds advanced by Government for the suspension of Adv Pikoli were not established.
- There was no concrete evidence placed before the Enquiry of an irretrievable breakdown in the relationship between the Minister and Adv Pikoli.
- The conduct of the DG: Justice left much to be desired. His testimony was contradictory and without basis in fact or in law.
- The DG: Justice was responsible for preparing Government's original submission to the Enquiry and his failure to include all the relevant material was not in line with the responsibilities of a senior state official providing information to an investigative enquiry established by the President. He had a duty to place all relevant information before the Enquiry. His testimony before the Enquiry was also not helpful; his evidence was contradictory, inaccurate or without any basis in fact or law; he was forced to retract several allegations and he was found to be arrogant and condescending in his attitude towards Adv Pikoli.



- It was the DG: Justice who prepared the letter dated 18 September 2007 from the Minister to Adv Pikoli which required Adv Pikoli to supply her with all information he had relied upon to effect the arrest of and charges against the National Commissioner. This letter did not conform to the request from the President to the Minister on 17 September. This letter implies that Adv Pikoli was to stop any plan to arrest and prosecute the National Commissioner until the Minister was satisfied there was sufficient evidence to do so. The Minister indicated by affidavit that it was not her intention to stop Adv Pikoli from discharging his duties as NDPP. The contents of this letter were tantamount to executive interference in the prosecutorial independence of the NDPP.

3.2.2 The Report identified certain deficiencies in the capacity and understanding of Adv Pikoli to fully execute the range of responsibilities required of a NDPP. Specifically that:

- Adv Pikoli lacked an understanding of his responsibility to operate within a strict security environment and to ensure that the NPA, and the DSO, operate in a way that takes into account the community interest and does not compromise national security. The report identified Adv Pikoli's failure to:
  - Timeously inform the Minister and the President prior to resorting to the courts to obtain warrants in cases that could have an impact on national security.
  - Recognise that the integrity of official documents could only be maintained through strict compliance with the Minimum Information Security Standards (MISS).
  - Ensure that all DSO investigators and other relevant NPA staff had the requisite security clearances, and that renewal of such security status is conducted regularly.
  - Ensure that third party service providers, especially private security companies were vetted.
- Adv Pikoli did not fully appreciate the sensitivities of the political environment in which the NPA needs to operate, and his responsibility to manage this environment.
- Adv Pikoli needed to recognise the final responsibility of the Minister and should have proactively made her aware of all matters of a sensitive nature that the NPA became aware of in the course of its functions, and fully and regularly briefed her on the progress of high profile investigations and prosecutions.
- In respect of the issuing of the warrants for search/seizure and then arrest of the National Commissioner Adv Pikoli did not give due consideration to the actions the President might need to defuse a potential security crisis and to preserve the country's international reputation. He did not take seriously the President's concerns about the mood of the SAPS and their possible reaction to the arrest of the National Commissioner; and even challenged



the President's assessment of the time he would require to manage the situation. Had these facts been presented as the reason for the suspension, when the conduct would have held a real risk of undermining national security, the Enquiry indicated that it would not have hesitated to find the reason to be legitimate. However, these were not the reasons put forward by Government.

#### 4. Contents of the Report

4.1. Before reporting on the allegations against Adv Pikoli the Enquiry considered the following:

##### 4.1.1 Prosecutorial independence & ministerial oversight

- The President cannot remove the NDPP from office without the concurrence of Parliament. The Constitution and the Act protect the NDPP from political or corrupting influence or manipulation.
- The NPA is part of the executive and while it has autonomy it does not have the independence of the judiciary or Chapter Nine institutions. Section 179(6) of the Constitution provides that *"the Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority"*.<sup>5</sup>
- However, the notion of 'final responsibility' is not defined in the Act. It is clear, however, that the Minister cannot interfere with the specific prosecutorial decisions of the NDPP. The challenge is to reconcile prosecutorial independence with the constitutional provision that a Cabinet Minister must *"exercise final responsibility over the prosecuting authority"*.
- How does the Minister exercise this responsibility without infringing on the constitutionally guaranteed independence of the prosecutorial authority? Information exchanged between the NDPP and the Minister must enhance the constitutional goal of enabling the prosecuting

##### <sup>5</sup> Minister's final responsibility over prosecuting authority

33. (1) The Minister shall, for purposes of section 179 of the Constitution, this Act or any other law concerning the prosecuting authority, exercise final responsibility over the prosecuting authority in accordance with the provisions of this Act.

(2) To enable the Minister to exercise his or her final responsibility over the prosecuting authority, as contemplated in section 179 of the Constitution, the National Director shall, at the request of the Minister—  
(a) furnish the Minister with information or a report with regard to any case, matter or subject dealt with by the National Director or a Director in the exercise of their powers, the carrying out of their duties and the performance of their functions;

(b) provide the Minister with reasons for any decision taken by a Director in the exercise of his or her powers, the carrying out of his or her duties or the performance of his or her functions;

(c) furnish the Minister with information with regard to the prosecution policy referred to in section 21(1)(a);

(d) furnish the Minister with information with regard to the policy directives referred to in section 21(1)(b);

(e) submit the reports contemplated in section 34 to the Minister; and

(f) arrange meetings between the Minister and members of the prosecuting authority.



authority to achieve its mandate to institute criminal proceedings on behalf of the state and for the Minister to exercise final responsibility over the prosecuting authority within the policy guidelines.

#### **4.1.2 Fit and proper person**

- The NDPP must have appropriate legal qualifications, be a South African citizen, and be a fit and proper person.
- The NDPP must possess:
  - Managerial and leadership skills and an understanding of the socio-political climate.
  - Experience, conscientiousness (thoroughness, care and diligence) and integrity (honesty, reliability and truthfulness).
  - An understanding of the responsibilities of such an office and therefore an appreciation of the significance of the role a prosecuting authority plays in a constitutional democracy, the moral authority that the prosecuting authority must enjoy and the public confidence that must repose in the decisions of such an authority.
  - An appreciation for and sensitivity to matters of national security. Through, for instance, the diligent application of the security standards set out in the Minimum Information Security Statement in respect of information security.

#### **4.1.3 Principles of co-operative government<sup>6</sup>**

- The evidence of the tension between the DSO and the SAPS relating to the documents that the DSO needed for its investigations could have been largely resolved by the Ministerial Co-ordinating Committee whose function it was to address these matters. There was no evidence before the Enquiry that this was done or even attempted. It is regrettable that this Committee has not functioned as contemplated in the Act.
- There is a responsibility on the NPA to assist and support other areas of state. The Enquiry was of the view that the nature of the work done by the NPA, as part of the Executive, must entail a co-operative approach with all other state institutions and especially those that fall within the security cluster.

#### **4.2 The Enquiry considered and made findings on the following allegations:**

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<sup>6</sup> Chapter 3 of the Constitution, 1996





#### 4.2.1 Irretrievable breakdown of the relationship between the Minister and Advocate Pikoli

- The Minister pointed to differences between herself and Adv Pikoli on the role and status of the NPA and maintained these were so serious they impeded her ability to exercise her final responsibility. She alleged he wished to keep an 'operational distance.'
- The Minister did not provide specific examples, nor at any meeting with Adv Pikoli did she express any dissatisfaction to him.
- No oral evidence from the Minister on these issues.
- Adv Pikoli contended that he had a 'cordial relationship' with the Minister. He was subject to cross-examination and impressed the Enquiry as a person of unimpeachable integrity who gave his evidence honestly. There is no reason to reject his version.
- Any differences in opinion over the status of the NPA and its relationship with the Department of Justice and Constitutional Development were primarily with the DG: Justice.
- The DG: Justice had an incorrect understanding of his role in relation to the NPA resulting in constant conflict with Adv Pikoli and officials in the NPA. These conflicts were undoubtedly referred to in the DG: Justice's reports to the Minister and to some extent would have given rise to the Minister's misplaced concerns.
- There is no evidence of an irretrievable breakdown in the relationship.

#### 4.2.2 Failure to prosecute certain offences

- Government alleged that Adv Pikoli, in the exercise of his discretion to prosecute offenders, did not take adequate account of the nature and extent of the threat posed by organised crime to the national security of the Republic. Examples included the prosecution of some of the mercenaries involved in the attempted *coup d'état* in Equatorial Guinea, and the alleged failure to prosecute some of the suspects in the murder of the late Mr Brett Kebble.
- Government did not lead sufficient evidence in respect of either of these cases to cause the enquiry to make an adverse finding against Adv Pikoli.
- Furthermore, any assessment of the NDPP's decisions would encroach on the constitutionally guaranteed independence of the NPA to determine whether or not to prosecute matters.
- The Enquiry declined to investigate the allegation that Adv Pikoli did not take into account the threat posed by organised crime to the national security of SA believing this would have risked undermining pending criminal trials.
- The complaint by Government was not substantiated.



#### **4.2.3 Immunity and plea bargains**

- The Enquiry had to determine whether Adv Pikoli in taking decisions to grant immunity from prosecution or to enter into plea bargaining arrangements with persons allegedly involved in illegal activities which constitute organised crime had due regard to the public interest and national security interests as set out in Section 198 of the Constitution<sup>7</sup> and the Prosecution Policy. Matters relating to Mr Agliotti, Mr Nassif were raised.
- Mr Agliotti and Mr Nassif concluded plea and sentence agreements in relation to the charge of dealing in drugs. These agreements were concluded after the suspension of Adv Pikoli and he can therefore not be held responsible for them. Government did not produce any evidence to show that the plea and sentence agreements that were concluded violated the Prosecution Policy.
- The Government failed to establish that the NDPP was unfit for office by reason of the decision to grant immunity from prosecution or enter into plea bargaining agreements or that he had failed to take due regard to the public interest and the national security interests of the Republic.

#### **4.2.4 Failure to account to the DG: Justice**

- Government complained that Adv Pikoli failed to comply with his obligations under the Public Service Regulations and the Public Finance Management Act<sup>8</sup> (PFMA), and prevented the DG: Justice from accounting and reporting to the Minister.
- The NPA and DG have as far as accounting areas are concerned distinctly separate areas. The Act provides that the NPA is accountable to Parliament.
- The DG: Justice had an incorrect understanding of his accounting responsibilities under the PFMA, despite having obtained legal opinions from senior counsel stating that he had limited accounting responsibilities over the NPA. He withheld these opinions allowing the Minister to continue with an incorrect understanding of the responsibilities of the NDPP.

#### **4.2.5 The listing of the DSO**

<sup>7</sup> Section 198. the following principles govern national security in the Republic

- (a) National security must reflect the resolve of all South Africans as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life.
- (b) The resolve to live in peace and harmony precludes any South African from participating in armed conflict, nationally or internationally, except as provided for in the Constitution or national legislation.
- (c) National security must be pursued in compliance with law.
- (d) National security is subject to the authority of Parliament and the national executive.

<sup>8</sup> Section 47(2)



- The Minister complained that Adv Pikoli sought to have the DSO listed as a public entity within the meaning of the PFMA, despite the Minister's view that it was a policy matter that needed to be discussed by Cabinet.
- The Enquiry acknowledged that Adv Pikoli had consulted extensively with the Minister on this and the related matter of the listing of the NPA as a constitutional body. In heeding one of the Minister's concerns, Adv Pikoli refrained from pursuing the listing of the NPA as a constitutional body. However, he went ahead and advised the Treasury that the DSO was not listed as a public entity in the schedule to the PFMA as he was statutorily obliged to do so under the PFMA.
- The Enquiry found that Adv Pikoli should have informed the Minister that he was going to advise the Treasury that the DSO was not listed as a public entity. Why, however, was it never raised as a complaint until the enquiry?

#### 4.2.6 The Browse Mole Report

- Government alleged that Adv Pikoli is unfit to hold office due to the manner in which he handled the Browse Mole Report. Following a briefing by the head of the DSO about the investigation and being presented with a preliminary report in March 2006:
  - Adv Pikoli should have advised the Minister of the seriousness of the information that had emerged.
  - In addition, as the matter was outside the legal mandate of the DSO, he should have ordered that any further involvement by the DSO cease immediately.
  - He should also have alerted the intelligence agencies to the information that the DSO had received. He only informed the intelligence agencies after he received the final Browse Mole Report in July 2006.
- It was also claimed by Government that Adv Pikoli should have done more to ensure that the head of the DSO fully co-operated with the Task Team set up by the President to look into the circumstances around the Browse Mole report. However, as the Head of the DSO is appointed by the President the ability of the NDPP to take disciplinary action against the Head of the DSO is limited. The Enquiry still maintained that Adv Pikoli should have reprimanded the DSO.
- Adv Pikoli should have informed the Minister in March 2006 of the information gleaned as a result of the Browse Mole Report and stopped any further work by the DSO.
- The Enquiry found the behaviour of Adv Pikoli in dealing with the Browse Mole Report was indicative of his lack of sensitivity in dealing with matters of national security.