



#### **4.2.7 The Malawian Investigation**

- The Government contends that Adv Pikoli undertook an investigation into matters that belonged to intelligence agencies and failed to inform the Minister of the conspiracy to assassinate the Malawian President.
- The assessment of the evidence reveals that both the DG: Justice as well as the DG: NIA were unable to give evidence of what investigation if any was undertaken by Adv Pikoli or the NPA nor was there evidence of where the investigation was conducted; what shape the investigation took; who participated in the investigation and such relevant information as would assist the enquiry to determine whether or not the investigation went outside the mandate of the NPA. The evidence shows the NPA merely collated information requested by the Malawian DPP and did so at the request of the DG:Justice.
- However, the Enquiry found that Adv Pikoli should have brought to the attention of the Minister that there was a plot to assassinate the Malawian President involving a South African citizen. These are matters of national security which the executive is entitled to know.

#### **4.2.8 Interaction with foreign intelligence services**

- In its complaint that a member of the DSO was engaged in unregulated interaction with foreign intelligence services (FIS) Government relied on the evidence of the DG: National Intelligence Agency("NIA").
- The evidence points to the fact that the DSO member's unregulated interaction with FIS occurred before Adv Pikoli took office as the NDPP, and any further interaction was not sanctioned by Adv Pikoli nor was it specifically brought to Adv Pikoli's attention.
- Adv Pikoli could therefore not be held responsible for these engagements by the DSO member with FIS.

#### **4.2.9 Post-TRC matters**

- The Government alleged that Adv Pikoli's handling of the post-TRC cases did not exhibit the sensitivity to the victims and an appreciation of the public interest issues that the Prosecution Policy requires. Government, however, did not tender any further evidence and did not pursue this complaint before the Enquiry.

#### **4.2.10 Searches at the Union Buildings & Tuynhuys**



- Government complained that the manner in which the search and seizure operations relating to the investigation of former Deputy President Zuma were planned and conducted did not take into account that the Union Buildings and Tuynhuys are national key-points housing classified documents. Furthermore, Adv Pikoli did not inform the Minister prior to obtaining the warrants that the NPA intended carrying out search and seizure operations at the Union Buildings and Tuynhuys.
- Adv Pikoli admits he did not inform the Minister prior to obtaining the warrants and only did so shortly after obtaining them. His failure to do so was viewed by the Enquiry as a dereliction of duty.
- The Enquiry maintains that the NDPP has the responsibility to avoid legal processes in accessing documents that could be obtained through co-operation.
- The Enquiry found that Adv Pikoli failed to ensure that all necessary security measures were taken to prevent any potential breach of security at the Union Buildings and Tuynhuys. Adv Pikoli and the DSO did not obtain the necessary security clearances for the security company that assisted with the search and seizure operation at the Union Buildings.

#### 4.2.11 The Investigation into the National Commissioner of Police

- Government raised two complaints in relation to the manner in which Adv Pikoli pursued the investigation into the National Commissioner of Police, namely:
    - (A) That he did not exhaust the process established by the President to facilitate access to documents and evidence in the possession of SAPS;
    - (B) That he showed a lack of respect for the Minister's responsibilities by failing to inform her prior to obtaining warrants for search and seizure and for the arrest of the National Commissioner.
  - Adv Pikoli responded by alleging that he was suspended to prevent the NPA from prosecuting the National Commissioner.
- (A) Failure to exhaust the Presidential facilitation procedure:
- Due to the difficulties the DSO experienced in accessing information from the SAPS in relation to Operation 'Bad Guys' and the related investigation of the National Commissioner of Police, Adv Pikoli had sought the intervention of the President. The President intervened to assist the DSO to obtain the information in the possession of the SAPS relating to the Police Commissioner. The President requested the DG: Presidency to facilitate access to this



information by the DSO. Despite the efforts of the DG: Presidency the information was not forthcoming from SAPS.

- The assessment of evidence shows 'a patient and elaborate attempt' by the DSO to obtain the documents from the SAPS. The Enquiry could understand the frustration of the DSO and therefore could not find fault with the fact that they ultimately decided that warrants for the search and seizure were the only answer.
- However, there was no reason for Adv Pikoli not to inform the DG: Presidency that his intervention was unsuccessful before proceeding to obtain the warrants.

(B) Failure to Inform the Minister and the President before Proceeding to Obtain Warrants for Search and Seizure and Arrest of Commissioner Selebi.

- Adv Pikoli met with the Minister on 13 occasions and briefed her on the investigation into the National Commissioner and provided two written reports. He also briefed the President on 10 occasions and provided two written reports.

#### Timeline:

- 25 June 2007 the DSO investigating team met with the Minister and the decision to prosecute was conveyed to her. She did not indicate any opposition.
- On 31 August Adv Pikoli gave instructions to the team to obtain the search and seizure and arrest warrants. The arrest warrant was obtained on 10 September 2007.
- On 11 September Adv Pikoli met with the Minister and informed her and asked her to inform the President.
- On 14 September the NPA obtained the search and seizure warrants against the National Commissioner.
- On 15 September Adv Pikoli met the President and DG: Presidency. The President was unaware that SAPS had refused to co-operate. The DG: Presidency then requested a written report to enable the President to apply his mind. Adv Pikoli prepared a report and met with the President and DG: Presidency on 16 September. The President asked for a delay of the execution of the warrants by two weeks to 'enable him to prepare the environment for action against the National Commissioner'. Adv Pikoli indicated that because certain cases were coming before the courts he could delay only for one week.
- On 17 September the President addressed a letter to the Minister requesting that she obtain the necessary information from the NDPP regarding the intended arrest and prosecution of the National Director.



- In response on 18 September the Minister wrote a letter to the NDPP requesting "all the information relied upon by him to take legal steps to affect the arrest of and charges against the National Commissioner. Indicating that the 'public interest' must be served in pursuing the cause of action. Until the Minister was satisfied that sufficient information and evidence does exist "you shall not pursue the route that you have taken steps to pursue".
- On 19 September Adv Pikoli responded and pointed out that if this was an instruction not to pursue the matter it would be unlawful and requested an urgent meeting.
- The Minister responded requesting a full report on the evidence by the end of the day.
- Adv Pikoli responded with a report.
- On 20 September Adv Pikoli requested a meeting with the President and this was scheduled for 23<sup>rd</sup> September.
- On 21 September the Minister sent a letter stating there was nothing in his report that added to what he had already told her and requested a meeting on 23<sup>rd</sup> September. At this meeting Adv Pikoli was asked to resign on the basis that there had been a breakdown of trust. He refused. At the meeting with the President he was also asked to resign. He refused and was then suspended on the basis of an irretrievable breakdown in the working relationship with the Minister of Justice and concerns that he entertained the granting of immunity to members of organised crime syndicates where the prosecution of such people would be in the public interest. The failure to appreciate the nature and extent posed by members of organised crime to national security was in itself a threat to national security.
- On 24 September 2007 the Government issued a public statement explaining the suspension from office of Adv Pikoli.
- On 25 September 2007 the DG: Presidency, in briefing opposition parties in Parliament, explained that the breakdown in the relationship between the Minister and Adv Pikoli was not personal but something had "gone wrong" in the exercise of reporting to the Minister as required by law. This explanation is repeated in the initial submissions that Government made before the Enquiry.
- Adv Pikoli's evidence is that he has throughout the process made available to the Minister all the information relating to the DSO's investigation into the possible criminal conduct of the National Commissioner of Police. He received co-operation of the Minister and President until he obtained the warrants for arrest and search and seizure.
- Adv Pikoli argues that his suspension was intended to put a spoke into the investigation and prosecution of the National Commissioner.
- Although the enquiry was impressed by Adv Pikoli as a man of unimpeachable integrity and credibility, with a passion to execute his constitutional responsibilities without fear or favour,





his suspicions about his suspension were incorrect. The Enquiry noted that the fact that Adv Pikoli had received assistance from the Minister and the President in his investigation into the National Commissioner and the additional factor that the National Commissioner is still facing criminal prosecution were an indication of this.

- Adv Pikoli could not explain why he did not inform the Minister or the President that he had come to a decision to obtain a warrant of arrest for the National Commissioner of Police or why he had not informed the Minister that he was applying for warrants of search and seizure
- In the circumstances of the impending prosecution of a state official as senior as the national commissioner Adv Pikoli was obliged to inform the Minister at every step of the way to allow the Minister to exercise her 'final responsibility' and report to the President and Cabinet on such matters especially if they affect national security
- The request by the President for a delay of two weeks was not unreasonable and Adv Pikoli's response indicates a lack of appreciation for the sensitivities required in respect of matters of national security and illustrates a lack of respect for the President's constitutional obligation to maintain stability and national security.

## 5. Recommendations

- The Government failed to substantiate the reasons given for the suspension.
- Adv Pikoli should be restored to the office of NDPP.
- Adv Pikoli needs to be sensitised to the broader responsibilities of his office; in particular his understanding of the security environment in which that office should function.
- The Constitution and the Act provide for both political accountability through the Minister's final responsibility as well as for prosecutorial independence. Until this relationship is established through practice over time, it will be necessary for any incumbent or incoming Minister and incumbent or incoming NDPP to discuss and try and reach a mutual understanding of their responsibilities and the parameters of their relationship.
- There should be a structured engagement between the Minister and the NDPP to clarify their respective functions and responsibilities and lines of communication. This relationship is key to the proper functioning of the NPA and the office of the NDPP as well as to ensure democratic political oversight over this key organ of state.
- The Ministerial Co-ordinating Committee envisaged under s. 31 of the Act or such similar structure needs to function effectively to ensure that organs of state in the security sector do not come into conflict with each other. The failure to coordinate has inhibited the effectiveness of law enforcement strategies. The constitutional instruction that all organs of state must co-



operate with one another, and must exhaust all measures reasonable to resolve their disputes before litigating with one another, must be respected and adhered to.

- Most of the complaints directed against Adv Pikoli relate to events that took place a long time before his suspension. It is the responsibility of the Minister to ensure that any transgressions are addressed at the time. This would avoid misunderstanding and recurring violations.

## **6. Decision of the President to remove Advocate Pikoli as National Director of Public Prosecutions<sup>9</sup>**

6.1 The Report of the Enquiry was presented to the President by the Chairperson, Dr F Ginwala on the 4th of November 2008.

6.2 It was noted that the Enquiry found that:

- The basis advanced by Government for the suspension of Adv Pikoli had not been established and Advocate Pikoli should be restored to office.
- In the course of the Enquiry certain deficiencies in the capacity and understanding of Adv Pikoli to fully execute the range of responsibilities as NDPP became apparent – more specifically, the lack of understanding on his part of his responsibility to operate within a strict security environment and to ensure that the NPA, and the DSO, operate in a manner that takes into account the community interest and does not compromise national security.
- Advocate Pikoli did not fully appreciate the sensitivities of the political environment in which the NPA operates, and his responsibility to manage this environment.
- Had the evidence tendered by the State – pertaining to the sensitive environment in which the NPA operates – been given as the reason for the suspension, the Enquiry would not have wavered in finding that the reason for the suspension was valid.

6.3 Response of the President having considered the report:

- The Enquiry appears to have confined itself to the determination of whether the communicated reason for the suspension of Advocate Pikoli was legitimate rather than whether he was fit to hold the office of National Director of Public Prosecutions as was stipulated in the terms of reference.
- In order to come to a decision on the recommendations, regard had to be made to the remarks contained in the Report, in particular the adverse findings made against Advocate Pikoli. The gravity

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<sup>9</sup> Press release – 8 December 2008



of these findings has to be viewed against the qualities which the Enquiry deems necessary for one holding the office of NDPP. The Report asserts that: "...the person must possess an understanding of the responsibilities of such an office. There must be 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. To that must be added an appreciation for and sensitivity to matters of national security."

- Advocate Pikoli was invited to make such written representations as he may deem fit, especially with respect to the adverse findings made against him.
- Advocate Pikoli's representations exhibited a failure on his part to acknowledge the serious deficiencies identified by the Enquiry.
- It was necessary to take into account the entirety of the findings of the Enquiry, including in particular the observation that the suspension would have been found valid if the totality of the evidence given by the State had been the basis for the suspension.
- In the end, I was required as President of the Republic to make a final decision in terms of section 12(6) (a) of the NPA Act on whether or not Advocate Pikoli was fit and proper to continue to hold the office of the National Director of Public Prosecutions. Adv Pikoli's professional competence is not in question. However, it should be noted that the requisite skills would, necessarily, include professional competence as well as those outlined by the enquiry, in particular, appreciation for and sensitivity to matters of national security.
- In terms of sections 12(6) (a) (iv) of the National Prosecuting Authority Advocate Pikoli should be relieved of his responsibility as the country's National Director of Public Prosecutions.

## 7. Role of Parliament

### 7.1 The NPA Act<sup>10</sup> gives Parliament the critical function of<sup>11</sup>:

<sup>10</sup> Section 12(6) (b) The removal of the *National Director* or a *Deputy National Director*, the reason therefore and the representations of the *National Director* or *Deputy National Director* (if any) shall be communicated by message to Parliament within 14 days after such removal if Parliament is then in session or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session.

(c) Parliament shall, within 30 days after the message referred to in paragraph (b) has been tabled in Parliament, or as soon thereafter as is reasonably possible, pass a resolution as to whether or not the restoration to his or her office of the *National Director* or *Deputy National Director* so removed, is recommended.

(d) The President shall restore the *National Director* or *Deputy National Director* to his or her office if Parliament so resolves.

(7) The President shall also remove the *National director* or *deputy National Director* from office if an address from each of the respective houses of Parliament in the same session praying for such a removal on any of the grounds referred to in subsection (6)(a), is presented to the President.

<sup>11</sup> IDASA. Suspension and Dismissal of the Head of the NPA: legal framework and process (Political Information and Monitoring Service – PIMS). September 2007.



- 1) verifying the existence of one of the factors set out in section 12 of the Act and
- 2) approving the removal before it can become final.

7.2 It is clear that securing the impartiality of the NPA - a condition required by the Constitution – is paramount. Parliament must verify that there are objective legal grounds for supporting a dismissal resolution and must do so within a prescribed timeframe.

7.3 As the primary body overseeing the administration of justice, Parliament has a crucial role to play in evaluating the case for Mr Pikoli's dismissal and in ensuring that the NPA continues to function independently and effectively and maintains public confidence.

7.4 The President will have to convince Parliament that the arguments raised – are sufficient in terms of the requirements set out in section 12 of the NPA Act.

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## Sources

Ginwala, F. Report of the Enquiry into the Fitness of Advocate VP Pikoli to Hold the Office of National Director of Public Prosecutions. 4 November 2008.

IDASA. Suspension and Dismissal of the Head of the NPA: legal framework and process (Political Information and Monitoring Service – PIMS). September 2007.

President Kgalema Motlanthe. Address to the Nation on the removal of Advocate VP Pikoli from Office as National Director of Public Prosecutions. 8 December 2008.



**Phumelele Sibisi - Meeting**

**From:** "Justin Lewis"  
**To:** "Mr Yunus Carrim MP"  
**Date:** 2009/01/13 11:47 AM  
**Subject:** Meeting  
**CC:** "Mr Yunus Carrim MP" , "Willie A Hofmeyr" , "Adv Malini Govender"

**Chairperson : Yunus Carrim MP**  
**Portfolio committee on Justice**  
**Parliament; Cape Town**  
**13 January 2009**

Dear Sir

Re :

**Submissions to the Ad Hoc Committees on the ratification of President Motlanthe's decision relating to the NPA Chief .**

I refer to the above and my discussions at your offices relating to the meeting facilitated through your offices and that of the NPA's Mr W Hofmeyr with the Regional head of the DSO on the 25<sup>th</sup> of September 2008 which the NPA did not attend. The discussions related to the corruption of the courts and the office of the DSO/NPA, for the purposes of racketeering. Victims of this alleged conduct other than civil society and the Judiciary, through the manipulation of our courts, and the corruption of state authorised investigations, included two financial institutions, FNB and Absa bank whose shareholders were defrauded of millions of rands as a result thereof.

The follow up meetings with the NPA and the DSO did not take place. As a result a complaint was submitted against a Senior Counsel of the Cape Bar (cas: 763/11/2008) for Defeating and or Obstructing the course of Justice. Adv Malini Govender, Deputy Director of Public Prosecutions, Regional Head: Specialised Commercial Crime Unit, Western Cape is attending to the matter although requests for a meeting have also not as yet been successful. This complaint is supported by information uncovered at the Inquiry before the magistrate's court in Stellenbosch approved by the High Court.

As a result of the absence of requested meetings the corruption of the NPA and our legal system by financial institutions is an issue of concern particularly in an election year, I will therefore be arranging a meeting with Mr Cronin in order to discuss a campaign calling for the partial nationalisation of financial institutions (taxation without representation) in order to ensure that this conduct is not allowed to live in civil society and threaten our institutions.

When we last spoke you suggested that I be afforded the opportunity to present our corruption findings to a parliamentary sub committee. As our investigations included Mr Pikoli and Adv McCarthy I respectfully request that I be allowed to make my representations to your newly formed committee as I believe our experiences will assist you in your deliberations in the interests of Justice and the voting public. Your advice would be greatly appreciated

Yours faithfully

Justin Lewis.

(CC : Adv W Hofmeyr: Adv M Govender)

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