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RESEARCH TOPIC:

An analysis of the legality of the prosecutorial powers of the Special Anti-Corruption Unit.

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The undersigned certify that they have read, signed and recommended to the Midlands State University for acceptance, a research project entitled: **‘AN ANALYSIS OF THE LEGALITY OF THE PROSECUTORIAL POWERS OF THE SPECIAL ANTI- CORRUPTION UNIT’**. The project was submitted by, **SHANTEL ELLINAH NDEBELE**, Student Registration Number **R169788Q**, in partial fulfilment of the requirements of a Bachelor of Laws (Honours) Degree in the Faculty of Law at **Midlands State University**.

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DECLARATION

I, **SHANTEL ELLINAH NDEBELE (R169788Q)** do hereby declare that this dissertation entitled '**AN ANALYSIS OF THE LEGALITY OF THE PROSECUTORIAL POWERS OF THE SPECIAL ANTI CORRUPTION UNIT**' is my own work and a result of my own investigation and research, save to the extent indicated in the references included in the body of the research, and that to the best of my knowledge, it has not been submitted either wholly or in part thereof for any other degree or examination at any other university.

.....

STUDENT'S SIGNATURE

...../...../.....

DATE

DEDICATION

To all the public prosecutors in Zimbabwe who have dedicated themselves to earnestly fighting crime despite the unfavourable working conditions, this one is for you.

ACKNOWLEDGEMENTS

'Psalms 127 v 1 Unless the Lord builds the house, they labour in vain that build it.'

Many praises to the Almighty God, who has guided me from the day I first walked into law school, and up to the completion of this degree. Without God, all my life's work would be meaningless.

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ABSTRACT

This study examines the role played by prosecutors in the fight against corruption in Zimbabwe. The main objective of the research is to analyse the legality of the Special Anti-Corruption Unit's power to prosecute corruption matters. The research argues that the Special Anti-Corruption Unit has no legal justification because its powers conflict with those of the National Prosecuting Authority and it also lacks the independence required of prosecutors. To clearly define the role of prosecutors, the study explores the regional and international best practices on the duties and functions of the prosecutors. The study further gives a comparative analysis of the exclusive role of the National Prosecuting Authority in South Africa and the importance of preserving constitutional independence of prosecutors. A desktop research study is used. The key findings are that for any prosecuting authority to be effective, it must be independent, impartial and must carry out its mandate without influence from the executive. The study concludes by giving recommendations on how to remedy the conflict between powers of the Special Anti-Corruption Unit and those of the National Prosecuting Authority.

ABBREVIATIONS

ACA	Anti-Corruption Agency
ACHPR	Africa Charter on Human and Peoples Rights
AG	Attorney General
APA	Africa Prosecutors Association
AUCCPC	African Union Convention on Corruption Prevention and Combating Crime
CPA	Criminal Procedure Act
CP& E Act	Criminal Procedure & Evidence Act
DPP	Director of Public Prosecutions
IAP	International Association of Prosecutors
NEMA	National Environmental Management Act
NPA	National Prosecuting Authority
NDPP	National Director of Public Prosecutions
PG	Prosecutor General
PIEUOLA	Prevention of illegal Eviction and Unlawful Occupation of Land Act
SACU	Special Anti-Corruption Unit
SAPS	South African Police Service
UN	United Nations
UNCAC	United Nations Convention against Corruption
UNGRP	United Nations Guidelines on the Role of Prosecutors
ZACC	Zimbabwe Anti-Corruption Commission

ZRP

Zimbabwe Republic Police

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CHAPTER 1

1.0 Introduction

Corruption has become a worldwide plague,¹ which threatens to fracture economic and social development. It is the culprit behind most struggling economies in Africa, Zimbabwe included.² In the last decade, Zimbabwe has introduced various mechanisms with the aim of effectively eliminating all forms of corruption. These mechanisms include the establishment of Anti-Corruption Agencies (ACAs) such as the Zimbabwe Anti-Corruption Commission (ZACC) and the Special Anti-Corruption Unit (SACU) *inter alia*. The success of these ACAs has unfortunately remained diminutive. The low success rates are attributable to various factors among which is the overlapping and dual functions of the ACAs.³ The purpose of this study therefore is to interrogate the legality of the SACU, in particular its powers to prosecute corruption related offenses on behalf of the state.

1.1 Background of Study

As at 2016, Zimbabwe scored 22 on the global corruption scale according to Corruption Perception Index.⁴ This places Zimbabwe among the most corrupt states in Africa.⁵ In the same year, it was reported that a projected US\$1, 8 billion is lost per annum as a result of various forms of corruption.⁶

In Zimbabwe corruption frequently reveals itself in numerous ways which include trivial, bureaucratic or political corruption.⁷ These alarming levels of corruption have seen the establishment of various ACAs such as SACU. The efforts to fight corruption are reliant on the efficiency of these ACAs who have the collective mandate to receive complaints, investigate, manage corruption cases and finally

¹ A K Thompson 'Does Anti-Corruption legislation work' (2013) Vol 16 *International Trade and Business Law Review* pp 99-135

² A O Nathaniel 'Corruption and underdevelopment in Africa: A discourse approach'(2014) Vol 11 Issue 10 *International Journal of Economics, Commerce and Management* pp 1-14

³ Transparency International Zimbabwe (2020) 'The Success of The National Anti-Corruption Strategy Requires A Coordinated Approach in The Fight Against Corruption' available at www.tizim.org (Accessed 16 April 2021)

⁴ Transparency International Corruption Perception Index (2016) available at www.transparency.org (Accessed 16 April 2021)

⁵ M Kronester & E Buchner 'A Comparative Analysis of Anti-Corruption Machinery of State' (2017)12 *The Institute for Accountability in Southern Africa* pp 1-39

⁶ Transparency International *Country Study Report* (2016) Final Report: Zimbabwe

⁷ E Dimant & G Tosato 'Causes and Effects of corruption: What has past decade's empirical research taught us? A Survey' (2018) Vol 32 *Journal of Economic Surveys* pp 335-336

bring perpetrators to the courts for prosecutions.⁸ In achieving their mandate ACAs work in conjunction with the National Prosecuting Authority (NPA) which is responsible for all public prosecutions in Zimbabwe.⁹

1.2 Problem Statement

The power to institute and undertake criminal prosecutions for and on behalf of the state in Zimbabwe is vested in the NPA.¹⁰ The NPA has exclusive power to prosecute corruption related offences. Where it seeks to delegate such powers, this must be done through an Act of Parliament.¹¹ Currently, the law recognizes limited circumstances where such powers may be delegated and this is in the instance of private prosecutions.¹²

The legal problem identified is that the formation of the SACU as an independent body established to prosecute corruption matters is not only a duplication of the role of the NPA but also raises questions on its legality. It is an ACA that has not been established under any statute and its prosecutorial powers have not been delegated by the NPA.¹³ The study therefore seeks to assess the legality or otherwise, of role of SACU in the prosecution of crime.

1.3 Research Objectives

The main research objective is to analyze the legality of the prosecutorial powers of the SACU. The following sub objectives will assist in achieving the main research objective:

- To illustrate the international legal framework and best practices on the role of prosecutors in fighting corruption.
- To establish the Zimbabwean perspective on the role of prosecutors in combating corruption.
- To do a comparative analysis of the exclusive role of the NPA in the prosecution of crime in South Africa.

⁸ Available at www.tizim.org (note 3 above)

⁹ Constitution of Zimbabwe Amendment(No.20) Act, 2013, Section 258

¹⁰ Constitution of Zimbabwe, Section 258

¹¹ Constitution of Zimbabwe, Section 263

¹² Criminal Procedure and Evidence Act [Chapter 9:07], Section 13

¹³ A T Magaisa 'The trouble with ED's anti-corruption unit' *The Big Saturday Read* available at www.bigsr.co.uk (assessed 27 January 2021)

- To come up with observations and recommendations.

1.4 Research Methodology

The research study will rely on a qualitative method of research which relies on the methodical gathering, description and analysis of written, verbal or visual information.¹⁴ This differs from the quantitative research method which uses quantifiable data to generate facts.¹⁵

The study will rely on the primary sources of law, that is, legislation, common law and international treaties. Secondary sources of law such as case law, legal texts and journal articles will also be used.

1.5 Delimitations of Study

The study will focus on various legislation governing the powers of prosecutors in Zimbabwe such as the Constitution, the NPA Act, the Criminal Procedure and Evidence Act, *inter alia*. For a comparative analysis, the study will interrogate legislation from South Africa.

1.6 Limitations of Study

The research study will rely on the use of journals, e-books and internet sources as the physical library could not be accessed due to the Covid 19 pandemic, national lockdown and closure of learning institutions. The study is limited in scope as it relies on the limited material that is accessible online. Another limitation is the scarcity of academic literature particularly on SACU.

1.7 Chapter Synopsis

Chapter One

This is the introductory chapter which sets out the basis of the study.

Chapter Two

This Chapter will illustrate the international legal framework and best practices on the role of prosecutors in fighting corruption.

¹⁴ K Hammarberg, M Kirkman & S De Lacey (2016) Vol 31 'Qualitative research methods: when to use them and how to judge them' *Human Reproduction* pp 498–501

¹⁵ R B Johnson & L Christensen *EDUCATIONAL RESEARCH quantitative, qualitative and mixed approaches* (2008)8

Chapter Three

This Chapter will establish the Zimbabwean perspective on the role of prosecutors in combating corruption.

Chapter Four

This Chapter will analyze the exclusive role of the NPA in South Africa.

Chapter Five

This Chapter will summarize the challenges, measures and provide recommendations.

CHAPTER 2: International legal framework and best practices on the role of prosecutors in fighting corruption.

2.0 Introduction

The previous Chapter introduced the study. This Chapter will examine the international legal framework on the role of prosecutors in the criminal justice system and predominantly in the efforts to combat corruption. Particular attention will be given to international and regional treaties, the majority of which have been signed and ratified in Zimbabwe and are legally binding. Focus will also be given to other international instruments, recommendations and guidelines which although not binding in the legal sense, are a source of minimum standards which every state must strive to attain.

2.1 Relationship between Prosecutors and Corruption

Corruption is a severe crime which has devastating effects on economic, political and social development.¹⁶ It is the biggest instigator of underdevelopment in developing countries.¹⁷ For this reason, prosecutors play a distinguished role in fighting corruption,¹⁸ as their duty is to represent the state in all criminal proceedings.¹⁹

In some jurisdictions, the prosecutor is known as a 'public interest' lawyer who represents the public to vindicate its rights where an individual has broken the law.²⁰ Federico defines prosecutors as the gate keepers of the criminal justice system.²¹ This is because they are *dominus litis* in all criminal proceedings as they have the discretion on which criminal rules to submit in court.²²

¹⁶ U Myint 'Corruption: Causes, Consequences and Cures' (2000) Vol 7 *Asia-Pacific Development Journal* pp 33-58

¹⁷ M Szeftel 'Between Governance & Underdevelopment: Accumulation and Africa's catastrophic corruption' (2000) VOL 84 *Review of African Political Economy* pp 287-306

¹⁸ DWM Broughton 'South African Prosecutor in the face of adverse pre-trial publicity' (2020) VOL 23 *PER/PELJ* Pg 2

¹⁹ *Porrirt v National Director of Public Prosecutions* 2015 1 SACR 533 (SCA) para 13

²⁰ A Vinegrad 'The role of the Prosecutor: Serving interests of all people' (2000) Vol 28 *Hofstra Law Review* pp 895-903

²¹ G Di Federico 'Prosecutorial independence and the democratic requirement of accountability in Italy: Analysis of a Deviant Case in a Comparative Perspective' (1998) Vol 38 *The British Journal of Criminology* pp 371-387

²² Ardyansyah, Dahlan & Mahfud 'The Application of the Principles of Dominus Litis by the Prosecutor in the Narcotics Criminal Act' (2020) VOL 25 *IOSR Journal Of Humanities And Social Science (IOSR-JHSS)* pp 31-35

Although prosecutorial power is ordinarily vested in NPAs, this power may be delegated to ACAs to promote anti-corruption specialization by prosecutors. Engelbert states that the powers vested in ACAs vary from jurisdiction to jurisdiction and may be delegated in full, partially, or not delegated at all.²³ The prosecution of crime may therefore be done by ACAs under clear and express conditions.

2.2 International framework on the role of prosecutors in corruption

2.2.1 United Nations Guidelines on the role of Prosecutors (UNGRP)

Historically, outlining the role of Prosecutors was a matter that was left in the exclusive purview of states.²⁴ There were no international benchmarks which defined the powers and duties of prosecutors; hence states were at liberty to formulate their own standards without interference. In this regard, the UNGRP may be viewed as the first international endeavor at defining the role and duties of prosecutors.²⁵

The UNGRP were adopted in 1990 and are a code of professional conduct which uniformly applies to both public prosecutors and prosecutors appointed on an *ad hoc* basis.²⁶ Article 11 underscores the role of prosecutors as agents of public interest.²⁷ Additionally, Article 15 calls upon prosecutors to pay particular attention to corruption, mainly corruption committed by public officials.²⁸ This is because public officials are the most difficult to prosecute due to their power, status and influence.

Mmbando submits that the UNGRP must be brought to the attention of every prosecutor to ensure impartiality and fairness in all criminal proceedings.²⁹ It is clear that independence, impartiality and fairness are the essential tenets of any well-functioning prosecuting authority.

²³ A Engelbert 'The role of Anti-Corruption Agencies in the investigation and prosecution of procurement related corruption cases' (2014) Vol 209 *IEE Working Paper* available at www.development-research.org (assessed 18 April 2021)

²⁴ H Varney, S De Silva & A Raleigh (2019) 'Guiding and Protecting Prosecutors: Comparative Overview of Policies Guiding Decisions to Prosecute' available at www.ictj.org (assessed 18 April 2021)

²⁵ Available at www.ictj.org (note 24 above)

²⁶ United Nations Guidelines on the role of Prosecutors, Preamble

²⁷ United Nations Guidelines on the role of Prosecutors, Article 11

²⁸ United Nations Guidelines on the role of Prosecutors, Article 15

²⁹ C J Mmbando 'International Standards governing the role of public prosecutors and their relevance to Tanzania' (2010) Issue 1 *National Prosecutions Service Journal* pp 1-14

2.2.2 United Nations Convention against Corruption (UNCAC)

The UNCAC pioneered anti-corruption cooperation among states on a global level and its principles apply to the investigation and prosecution of corruption.³⁰ Article 11 of the UNCAC places an obligation on states to adopt measures to prevent opportunities for corruption amongst members of the prosecutorial services.³¹ This is because corruption within prosecutorial services perpetuates corrupt dealings between prosecutors and criminals, results in the improper exercise of prosecutorial discretion, as well as favour and prejudice.

The UNCAC also obligates states to promote cooperation through legislative measures, between public authorities and authorities responsible for prosecuting corruption.³² John proposes that states may comply with the UNCAC either through the crafting of new laws or amending existing ones.³³ It is submitted that one way in which states may stimulate cooperation between public authorities and prosecuting authorities is to create laws that construct a clear separation of powers.

2. 3 Regional Framework on the role of prosecutors in corruption

2.3.1 African Union Convention on Preventing and Combating Corruption (AUCPCC)

In addition to international instruments, various instruments have been adopted at regional level as a measure to combat corruption.³⁴ Among these is the AUCPCC which places an obligation on states to establish and maintain ACAs.³⁵ The AUCPCC also requires states to ensure that Prosecuting Authorities are allowed independence and autonomy to enable them to effectively perform their duties.³⁶

³⁰ United Nations Convention against Corruption, Article 3

³¹ United Nations Convention against Corruption, Article 11(2)

³² United Nations Convention against Corruption, Article 38

³³ S John 'Global Corruption and the universal approach of the United Nations Convention against Corruption' (2015) Vol 53 *Osgoode Hall Law Journal* pp 7-30

³⁴ WT Mugadza 'Combating corruption in public procurement in developing countries: A legal analysis' North-West University P48

³⁵ African Union Convention on Corruption Prevention and Combating Crime, Article 5

³⁶ African Union Convention on Corruption Prevention and Combating Crime, Article 20

Section F Part (f) of the African Union Guidelines and Principles on the right to fair trial and legal assistance in Africa also calls upon states to keep Prosecutorial Authorities separate from the Judiciary so as to ensure independence and autonomy.

Olaniyan hails the AUCPCC as a significant reform in the efforts to curb corruption in Africa but criticizes its massive use of claw back clauses.³⁷ This is because claw back clauses give states unfettered discretion as to the implementation of certain clauses.

2.3.2 African Charter on Human and Peoples' Rights (ACHPR)

The right to fair trial is a basic human right.³⁸ It has attained the status of international customary law.³⁹ Article 7 of the ACHPR guarantees the right of every person to fair trial.⁴⁰ It is apparent that the right to fair trial is a right that prosecutors must respect as it is an integral part of every criminal justice system.

Gittleman describes the ACHPR as a human rights instrument which is a historic step in the protection of human rights in Africa.⁴¹ It is unique in its conception of human rights as it is specific to African conditions.⁴² The ACHPR is therefore a practical guide for the African prosecutor on the conduct of trial and respect for human rights.

2.4 International Best Practices on the role of Prosecutors in fighting corruption.

2.4.1 International Association of Prosecutors (IAP)

The IAP is an international organization responsible for harmonizing standards of professional conduct of prosecutors.⁴³ The IAP is responsible for constructing the Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors (IAP Standards).⁴⁴ Article 4 of the IAP Standards calls upon

³⁷ K Olaniyan 'African Union Convention on Preventing and Combating Crime: A Critical Appraisal' (2004) 4 *African Human Rights Law Journal* pp 74-92

³⁸ T van der Walt & S de la Harpe 'The right to Pre Trial Silence as part of the right to free and fair trial: An overview' (2005) VOL 5 *African Human Rights Law Journal* pp 70-88

³⁹ J Dugard *International law-A South African perspective 2nd Edition* (2001) 234

⁴⁰ African Charter on Human and Peoples' Rights, Article 7

The Dakar Declaration on the right to fair trial in Africa is similar to the ACHPR as it consolidates standards of fair trial under the ACHPR

⁴¹ R Gittleman 'The African Charter on Human and Peoples' Rights: A legal Analysis' (1982) Vol 22 *Virginia Journal of International Law* pp 667-714

⁴² N S Rembe 'The system of protection of human rights under the African Charter on Human and Peoples Rights: Problems and Prospects' (1991) Vol 3 *Human & Peoples' Rights Monograph Series* pp 1-53

⁴³ International Association of Prosecutors 'Standards of professional responsibility and statement of the essential duties and rights of prosecutors' (1999) available at <https://www.iap-association.org> Available at <https://www.iap-association.org> (note 64 above)

⁴⁴ Available at <https://www.iap-association.org> (note 43 above)

prosecutors to make well founded decisions, considering the available evidence, on whether to institute criminal proceedings.⁴⁵

The IAP Standards also instruct prosecutors to perform their duties independently and free from political influence.⁴⁶ Prosecutorial discretion is a core feature of every Prosecuting Authority, hence where prosecutors are affiliated with political parties, this discretion may be detrimentally used to suppress and oppress political opponents.

Kjelby stresses the importance of IAP Standards which he terms an embodiment of the international legal stance on the role and functions of prosecutors.⁴⁷ It must be mentioned that IAP standards are however not binding on states but are merely guidelines for professional conduct which states may adopt.

2.4.2 Africa Prosecutors Association (APA)

Although corruption is a widespread problem, there are challenges that are unique to African Prosecutors.⁴⁸ Kaplan yields that African countries often face innumerable challenges which include immense human rights abuses.⁴⁹

The APA is therefore a regional organization which is responsible for promoting the highest standards of professional ethics among African prosecutors.⁵⁰ It was created to address transnational criminal undertakings across Africa.⁵¹ The APA also convenes annual general meetings of member organizations to address challenges faced by prosecutors.⁵²

Mmbando states that the IAP and APA standards are not legally binding but are benchmarks for the professional conduct of prosecutors, crafted with the confidence

(Assessed 16 April 2021)

⁴⁵ IAP Standards, Article 4.2 (c)

⁴⁶ Available at <https://www.iap-association.org> (note 43 above)

⁴⁷ G J Kjelby 'Some aspects of and perspectives on the public prosecutor's objectivity according to the ECtHR case law' (2015) Vol 3 Issue 1 *Bergen Journal of Criminal law and Criminal justice* pg 61-83

⁴⁸ R Kaplan 'The Coming Anarchy' (1994) Vol 2 *Atlantic Monthly*, pp 44-76

⁴⁹ R Kaplan (note 48 above)

⁵⁰ 13th Africa Prosecutors Association Conference available at <http://apamauritiu.govmu.org/> (assessed 15 April 2021)

⁵¹ Institute for Security Studies 'Event Report: African Prosecutors Association 7th AGM and Conference' available at <https://issafrica.org> (assessed 16 April 2021)

⁵² Available at <http://apamauritiu.govmu.org> (note 50 above)

of influencing states to adopt similar standards in domestic law.⁵³ African states are therefore not mandated to adopt the APA standards but it is encouraged that they do so.

2.4 Conclusion

This Chapter analyzed the role of Prosecutors in the efforts to combat crime. International conventions, treaties and best practices on the ethical and professional conduct of prosecutors were also discussed. The international treaties and best practices which constitute both hard and soft law are minimum standards which must be adhered to by all states and must reflect in their domestic law.

⁵³C J Mmbando (note 29 above) 9

CHAPTER 3: Zimbabwean legal framework on Prosecutors and corruption.

3.0 Introduction

The preceding Chapter dealt with the regional, international legal framework and best practices which outline the role of prosecutors in the fight against corruption. This Chapter will dissect the role played by prosecutors in Zimbabwe in the efforts to combat corruption. This will include an analysis of the roles of both the NPA as well as prosecutors working under the SACU. This chapter will also interrogate the relationship between the NPA and the SACU paying particular attention to the exclusive mandate of the NPA in the prosecution of crime.

3.1 Constitutional Framework

Section 258 of the Constitution establishes the NPA which is the institution primarily responsible for undertaking the prosecution of all criminal proceedings for and on behalf of the State.⁵⁴ The NPA is headed by the Prosecutor General (PG) who is appointed as such by the President on the advice of the Judicial Service Commission.⁵⁵ Although the office of the PG is a public office, it is not part of the civil service so as to guarantee its autonomy.⁵⁶ To further promote prosecutorial independence, the PG is only answerable to parliament, to whom he/she must submit annual reports on the undertakings of the NPA.⁵⁷

Section 260 of the Constitution further accentuates the independence of the NPA as it specifies that the PG must exercise his duties without fear, favour or prejudice and must act autonomously without control or direction from anyone.⁵⁸ Additionally,

⁵⁴ Constitution of Zimbabwe, Section 258

⁵⁵ Constitution of Zimbabwe, Section 259(3)

⁵⁶ *Zimbabwe Law Officers Association & Another vs National Prosecuting Authority & Others* CCZ1/19 at 9 See also T T Mutevedzi 'Case note on Zimbabwe law officers Association vs National Prosecuting Authorities & Others CCZ 1/19' available at www.zimllii.org (assessed 15 August 2021)

⁵⁷ Constitution of Zimbabwe, Section 262

⁵⁸ Constitution of Zimbabwe, Section 260

members of the NPA must act in a non-partisan fashion and must not seek to further the interests of any political party.⁵⁹

The independence of the PG is however subject to the Constitution.⁶⁰ In *Telecel Zimbabwe (pvt) Ltd vs Attorney General*, the court stressed the importance of respecting the PG's independence and discretion in criminal proceedings.⁶¹ The same sentiments were echoed in *In Re: Prosecutor General of Zimbabwe on his Constitutional Independence and protection from direction and control* which involved an inquiry into whether the PG has discretion to refuse to grant a *nolle prosequi* certificate.⁶²

In this case, the court held that although the PG has full discretion in criminal matters, such discretion is limited to the question on whether to prosecute or not.⁶³ Once the PG had declined prosecution, he has no further discretion and is obliged to issue a *nolle prosequi* certificate to a party who has demonstrated a substantial and peculiar interest in the matter.⁶⁴ It is therefore clear that the PG must be independent in the exercise of discretionary powers relating to criminal proceedings, which discretion must not be interfered with. However, where such discretion has not been exercised within the bounds of the law, the courts are enjoined to interfere.

3.2 STATUTORY FRAMEWORK

3.2.1 The National Prosecuting Authority Act [Chapter 7:20]

The Act of Parliament that is envisaged by the Constitution is the National Prosecuting Authority Act ('the NPA Act').⁶⁵ This is the Act which provides for greater specificity as to the powers of the NPA. Section 12 of the NPA Act provides for the

⁵⁹ Constitution of Zimbabwe, Section 261(2)

⁶⁰ Constitution of Zimbabwe, Section 261(1)

⁶¹ *Telecel Zimbabwe (pvt) Ltd vs Attorney General of Zimbabwe N.O SC 1/14*

⁶² *In Re: Prosecutor General of Zimbabwe on his Constitutional Independence and Protection from Direction and Control CCZ 13/17*

⁶³ *In Re: Prosecutor General of Zimbabwe on his Constitutional Independence and Protection from Direction and Control CCZ 13/17*

⁶⁴ *Maramwidze vs Commissioner General Zimbabwe Republic Police & Another HH 208/14*

⁶⁵ [Chapter 7:20]

power of the PG to institute and discontinue criminal proceedings as well as to carry out any other functions incidental to prosecution.⁶⁶

In *The Prosecutor General of Zimbabwe vs Klein* the court held that the discretion to institute or discontinue criminal proceedings is one of the most important canons of prosecutorial power.⁶⁷ Therefore, for the NPA to maintain its integrity, this discretion must be exercised independently and without fear, favour or prejudice.

The NPA Act provides that the PG shall issue a *nolle prosequi* certificate to private persons in terms of the CP&E Act where he declines to prosecute.⁶⁸ Subsequently Section 13 of the CP&E Act states that in all cases where the PG has declined to prosecute, a private prosecutor may prosecute provided that they can demonstrate a substantial and peculiar interest in the matter arising out of some injury suffered.⁶⁹ The mere possession of a *nolle prosequi* certificate by the private prosecutor on its own is not sufficient.⁷⁰ The courts will generally inquire into whether the private prosecutor has a substantial and peculiar interest in the matter to avoid unwarranted interference with the PG's discretion and independence.

Section 16(3) of the CP&E Act further states that where the PG declines to prosecute, he shall at the request of the private prosecutor, grant the certificate required.⁷¹ In the case of *In Re: Prosecutor General of Zimbabwe on his Constitutional Independence and protection from direction and control*, the court held that Section 16 of the CP&E Act is peremptory and once the PG declines to prosecute he/she is obliged to issue out a certificate.⁷² Essentially there is a limit to the PG's discretion on whether to institute criminal proceedings or not, once he has declined prosecution, he/she no longer has the discretion to refuse to grant a *nolle prosequi* certificate.

⁶⁶ National Prosecuting Authority Act, Section 12(1)(a)

⁶⁷ HH 74/18

⁶⁸ National Prosecuting Authority Act, Section 12(1) (d)

⁶⁹ Criminal Procedure & Evidence Act, Section 13

For the requirements of private prosecution see also *Levy vs Benatar* 1987(1) ZLR 120 (S)

⁷⁰ J D Mudjuzi 'Private Prosecutions in Zimbabwe: Victim Participation in the justice system' (2016) Vol 56 SA *Crime Quarterly* pp 37-44

⁷¹ Criminal Procedure & Evidence Act, Section 1 6(3)

⁷² CCZ 13/17

3.3 Role of the National Prosecuting Authority in Corruption matters

As already emphasized, members of the NPA are responsible for undertaking all criminal proceedings in the name of the state,⁷³ including all corruption related crime.⁷⁴ The NPA has the duty to ensure that perpetrators of corruption are indicted and prosecuted.⁷⁵

The criminal justice system in Zimbabwe is accusatorial.⁷⁶ In an accusatorial system the public prosecutor is *dominus litis* as he/she has discretion on whether to institute criminal proceedings as well as what charges to prefer against the accused.⁷⁷ In the amply cited case of *Smith vs Ushewokunze*, the court held that prosecutors are 'ministers of truth' who have a duty to ensure that justice is served at all times.⁷⁸

The NPA has taken practical measures to fight corruption such as launching the Asset Forfeiture Unit and the Economic Crimes and International Cooperation Section.⁷⁹ Transparency International however proposes that the success of anti-corruption strategies is not reliant on the efforts of the NPA alone but is dependent on coordination between the NPA and various ACAs.⁸⁰ Accordingly, the NPA works alongside ZACC and ZRP which are responsible for investigating corruption and transmitting matters to the NPA for prosecution.⁸¹ The PG also has the power to charge the ZRP to conduct investigations relating to alleged offences.⁸²

3.4 Exclusive Power of the NPA

Section 258 of the Constitution vests exclusive power to prosecute criminal matters on behalf of the state in the NPA,⁸³ but these powers must be exercised without

⁷³ B Crozier 'Criminal Procedure in Zimbabwe' available at www.zimlil.org (assessed 13 August 2021)

⁷⁴ T Chigwata 'Endemic Corruption in Zimbabwe: Why are anti-corruption agencies ineffective?' in C Fombad & N Stelytler (eds) 'Corruption and Constitutionalism in Africa' (2020)246

⁷⁵ Transparency International Zimbabwe 'The success of National Anti-Corruption Strategy requires a coordinated approach in the fight against corruption' 14 December 2020 available at <https://www.tizim.org> (assessed 4 May 2021)

On the duties of public prosecutors see also *Jesse vs Praat & Another* 2001(1) ZLR 48(H)

⁷⁶ J Redgement 'Introduction to the legal system in Zimbabwe' (1981)71

⁷⁷ V D Chikwekwe 'An Introduction to the legal system of Zimbabwe' (2016)102

⁷⁸1997(2) ZLR 544

⁷⁹ T Chigwata (note 74 above) 246

⁸⁰ Available at <https://www.tizim.org> (note 75 above)

⁸¹ T Mugadza 'Effectiveness of anti-corruption agencies in Southern Africa' 2017 *Open Society Initiative for Southern Africa* pg 330-369

⁸²Constitution of Zimbabwe, Section 259(11)

⁸³ Constitution of Zimbabwe, Section 258

influence from the executive.⁸⁴ This is consistent with the principle of separation of powers which dictates that the legislature's function is law making; the executive enforces it whilst the judiciary interprets the law.⁸⁵

The state jealously guards its right to prosecute criminal offenders.⁸⁶ Consequently, delegation of powers by the NPA is done in limited circumstances and where it is delegated, it is immensely regulated.⁸⁷

3.5 Delegation of Powers of the NPA

Delegation of prosecutorial powers may either be done in terms of Section 259 or Section 263 of the Constitution. Additionally, Section 5(2) of the CP&E Act allows the PG to delegate prosecutorial power to a legal practitioner.⁸⁸ These prosecutors must be independent and subject only to the law and the direction and control of the PG.⁸⁹

Magaisa argues that in terms of Section 259 of the Constitution as read with Section 5(2) of the CP & E Act, the PG may only delegate prosecutorial powers to legal practitioners employed within the NPA.⁹⁰ Persons who exercise prosecutorial powers in terms of Section 259 of the Constitution may not be employed outside the NPA.⁹¹ The rationale is to ensure that the NPA discharges its functions independently without influence from the other arms of government.

There are limited circumstances where the NPA may delegate powers to persons employed outside of the NPA. Section 263 of the Constitution states that powers of the NPA may be delegated to any other person through an Act of Parliament.⁹² Currently the only delegation of powers provided by an Act of Parliament is in terms

⁸⁴ J Reidpath, 'Failing to prosecute? Assessing the state of the National Prosecuting Authority in South Africa' (2012) *Institute for Security Studies Monograph Number 186* pg 1

⁸⁵ IM Rautenbach *Constitutional Law* 4th edition (2003) 78. Rautenbach states that the judiciary keeps the other arms of state in check as it determines what the law is and how it should be applied in the event of dispute

⁸⁶ A V Lansdown & J Campbell *South African Criminal Law and Procedure Vol 5* (1982) 120

⁸⁷ J D Mujuzi (note 70 above) 37

⁸⁸ Criminal Procedure and Evidence Act, Section 5(2)

⁸⁹ (Note 37 above)

⁹⁰ A Magaisa, 'The Big Saturday Read: The trouble with ED's Anti-Corruption Unit' 22 May 2018 available at www.bigsr.co.uk (assessed 4 May 2021)

⁹¹ Anti-Corruption Trust of Southern Africa, 'Civil Society Report on the Implementation of Chapter II (Prevention) & Chapter V (Asset Recovery) of the of the United Nations Against Corruption in Zimbabwe', available at <https://uncaccoalition.org> (assessed 3 May 2021).

⁹² Constitution of Zimbabwe, Section 263

of Section 12 of the NPA Act which provides for delegation by *nolle prosequi* certificate to persons intending to institute private prosecutions in terms of the CP&E Act.⁹³ This is inclusive of corporate entities.⁹⁴

A *nolle prosequi* certificate may be issued by the PG upon request by a private prosecutor,⁹⁵ who must demonstrate a 'substantial and peculiar interest' in the matter under prosecution.⁹⁶ A person is therefore not allowed to prosecute privately merely because the PG has declined to prosecute, but because they have a substantial interest in the matter.

3.6 The Special Anti-Corruption Unit

The SACU is an ACA which is housed in the office of the President and Cabinet.⁹⁷ Members of the SACU are appointed by the President and are bound by the Official Secrets Act [Chapter 11:10].⁹⁸ It is argued that the fact that the SACU is housed in the President's office and bound by the Official Secrets Act is not only a violation of the principle of separation of powers but it also conveys that the SACU lacks independence, which is the key facet of every prosecutorial authority.

Magaisa argues that the SACU has not been established under any legal instrument, hence it may be concluded that it was formed through a presidential decree which is a 'hallmark of arbitrary rule'.⁹⁹ Linnington adds that a presidential decree must only be necessitated by a state of emergency and even then, must be approved by Parliament.¹⁰⁰

Feltoe submits that subsidiary legislation only becomes effective after it has been promulgated in the Government Gazette.¹⁰¹ This position was also affirmed In *Hayes*

⁹³ [Chapter 9:07] See also Criminal Procedure & Evidence Act, Section 13

⁹⁴ *Telecel Zimbabwe (Pvt) Ltd vs Attorney General of Zimbabwe N.O SC 1/14*

⁹⁵ Criminal Procedure & Evidence Act, Section 16

⁹⁶ *Telecel Zimbabwe (Pvt) Ltd vs Attorney General of Zimbabwe N.O SC 1/14*

⁹⁷ Office of President and Cabinet(2018) '*President Mnangagwa establishes a Special Anti-Corruption Unit*' 22 May 2018, available at <http://www.theopc.gov.zw> (assessed 4 May 2021)

⁹⁸ Available at <http://www.theopc.gov.zw> (note 97 above)

⁹⁹ A Magaisa (note 13 above)

¹⁰⁰ G Linnington *Constitutional Law of Zimbabwe* (2001)521

¹⁰¹ G Feltoe *A guide to Zimbabwean Administrative law 3rd Ed* (1998)5

vs Baldachin and Ors where the court reiterated that no law becomes effective until it has been Gazetted.¹⁰²

In light of the aforesaid, two issues remain pertinent. Firstly, the establishment of the SACU through a Presidential decree cannot be legally justified as it was not founded during a state of emergency. Secondly, if the presidential decree cannot be justified then it suffices to say that the SACU has no legal basis as it has not been established under any legal instrument and its prosecutorial powers have no legal basis whatsoever.

3.6 Role of the SACU in corruption matters

Although the prosecution of corrupt individuals is the exclusive mandate of the NPA,¹⁰³ it has been condemned for 'lacking the appetite or competence' to prosecute high profile individuals involved in corruption.¹⁰⁴ This is because the culprits behind corruption are usually politicians whose political power and influence makes them 'untouchable'. The SACU was therefore established to increase efficiency of state mechanisms introduced to fight corruption.¹⁰⁵ It collaborates with ZACC, ZRP and other organizations and it is in charge of the prosecution of high-profile corruption cases.¹⁰⁶ Its powers are however subject to issuance of authority to prosecute by the NPA.¹⁰⁷

3.7 Powers of the SACU

Since there is no legal instrument which establishes the SACU,¹⁰⁸ it follows that there is an indeterminate atmosphere on the exact nature of its power. From the information that has been made available by the government, the SACU has power to prosecute high-profile corruption cases, subject to issuance of authority by the NPA.¹⁰⁹

¹⁰² *Hayes vs Baldachin and Ors* 1980 ZLR 422(S)

¹⁰³ Constitution of Zimbabwe, Section 258

¹⁰⁴ T Chigwata (note 74 above) 247

¹⁰⁵ Available at <http://www.theopc.gov.zw> (note 44 above)

¹⁰⁶ Available at <http://www.theopc.gov.zw> (note 44 above)

¹⁰⁷ T Chigwata (note 74 above) 247

¹⁰⁸ A Magaisa (note 13 above)

¹⁰⁹ Available at <http://www.theopc.gov.zw> (note 44 above)

In *Nyagura vs Ncube N.O* it was submitted that the powers of the SACU have been delegated in terms of Section 259 of the Constitution as read with Section 5(2) of the CP& E Act.¹¹⁰ The application was however dismissed without a determination on the merits on the ground that Applicant had used the wrong procedure by making an application to the Constitutional Court instead of appealing against the decision of the court a quo.¹¹¹

Magaisa argues that Section 259 of the Constitution only applies to prosecutors employed within the NPA.¹¹² It is submitted that Section 259 of the Constitution applies to prosecutors who are under the direction and control of the PG. The assertion that the SACU exercises its powers by virtue of Section 259 of the Constitution is legally untenable as it is an independent ACA which is not subject to the direction and control of the PG but is accountable only to the President and Cabinet.

3.7 Relationship between the NPA and the SACU

3.7.1 Duplication of roles

Only the NPA has the Constitutional mandate to institute criminal proceedings on behalf of the state.¹¹³ The responsibilities assigned to the SACU have already been assigned to the NPA.¹¹⁴

The establishment of the SACU as an ACA responsible for the prosecution of corruption is a duplication of the role of the NPA.¹¹⁵ It is submitted that there is no justification for the establishment of a unit to prosecute crime when there is a constitutional body that has already been established for that purpose.

¹¹⁰ CCZ 7/19

¹¹¹ CCZ 7/19

¹¹² A Magaisa (note 13 above)

¹¹³ Constitution of Zimbabwe, Section 258

¹¹⁴ T Chigwata (note 74 above) 249

¹¹⁵ Anti-Corruption Trust of Southern Africa 'Civil Society Report on the Implementation of Chapter II (Prevention) & Chapter V (Asset Recovery) of the United Nations Convention Against Corruption in Zimbabwe', available at <https://uncaccoalition.org> (assessed 3 May 2021)

3.7.2 Intersecting mandates

Prosecutorial power may be conferred on persons other than the NPA through an Act of Parliament but these powers must not conflict with the NPA's Constitutional mandate.¹¹⁶ The SACU depreciates the autonomy and independence of the NPA in effectively prosecuting corruption matters.¹¹⁷ It has not been established under any legislation hence its powers have not been conferred as per the Constitution.¹¹⁸

Transparency International maintains that what makes the efforts against corruption laborious in Zimbabwe is the assortment of the organizations, intersecting directives, contending agendas, nonexistence of institutional clarity and erratic levels of independence.¹¹⁹ Magaisa also argues that the effectiveness of ACAs such as the SACU is hooked on a distinct separation of their powers hence new ACAs are to be established within the confines of the law.¹²⁰

The role that has been assigned to the NPA in terms of the Constitution is of fundamental importance in the criminal justice system. If parliament intended to establish an ACA to aid the NPA in discharging its constitutional mandate, it would have done so expressly through an Act of Parliament.

3.8 Conclusion

This Chapter established the role of prosecutors in the anti-graft war in Zimbabwe. It illuminated the role of the NPA which is the organisation with the exclusive mandate to prosecute corruption in Zimbabwe. This Chapter also examined the role of the SACU as an ACA that has been established by the President to specifically prosecute corruption. Moreover, the Chapter analysed the paradox nature of SACU's powers. It argued that SACU is an illegal ACA which has no legal basis and whose prosecutorial powers have not been lawfully delegated. The SACU's powers conflict with those of the NPA and it unnecessarily duplicates the role of the NPA. The next chapter will focus on a comparative analysis of how prosecutorial power is delegated by the NPA in South Africa.

¹¹⁶ Constitution of Zimbabwe, Section 263

¹¹⁷ The Independent 'Mnangagwa's anti-corruption unit illegal' 1 June 2018, available at <https://www.theindependent.co.zw> (assessed 3 May 2021)

¹¹⁸ (note 115 above) available at <https://uncaccoalition.org>

¹¹⁹ Transparency International (n 78 above) available at www.tizim.org

¹²⁰ A Magaisa (note 13 above)

CHAPTER 4: The exclusive role of the NPA in the prosecution of corruption in South Africa.

4.0 Introduction

The previous Chapter discussed the exclusive role of the NPA in the prosecution of corruption matters in Zimbabwe. It argued that the prosecutorial powers of the NPA are exclusive and may only be delegated through legislation. It concluded that the SACU is an illegal entity whose prosecutorial powers have not been delegated by the NPA. When assessing a country's level of compliance with international standards and best practices on the role and independence of prosecutors it is paramount to do a comparative analysis of other jurisdictions. The present Chapter will analyse the role played by the NPA and other organisations in the prosecution of corruption in South Africa. The Chapter will also discuss the exclusive power of the South African NPA in the prosecution of corruption, the manner in which such powers may be delegated as well as the sufficiency of checks and balances.

4.1 SOUTH AFRICA

South Africa is Zimbabwe's Southern neighbor with a population of nearly 60 million people. Like Zimbabwe, the common law in South Africa consists of Roman Dutch and English law.¹²¹ South African legislation is also largely in *pari materia* with that of Zimbabwe and it has ratified the same anti-corruption conventions as Zimbabwe. These include the UNCAC and the AUCPCC *inter alia*. South Africa is a great example of a country that has not only shown commitment to, but has also taken practical measures to manage crime. Additionally, South Africa is also one of the few countries that have a high success rate in prosecuting crime.¹²² These factors combined therefore make South Africa a suitable jurisdiction for a comparative study.

¹²¹E M Burchell, J M Burchell & P M A Hunt *South African Criminal Law and Procedure Volume 1*(1997) 17

¹²² E Tshividzo 'South Africa: Over 85% success rate in prosecuting organised crime' 19 September 2007 available at <https://allafrica.com> (accessed 27 July 2021)

4.1.0 Legal Framework

4.1.1 The Constitution

Section 179 of the Constitution of the Republic of South Africa provides for a single National Prosecuting Authority (NPA) which has the power to institute criminal proceedings on behalf of the state and carry out any other functions incidental to prosecution.¹²³ The single NPA is headed by the National Director of Public Prosecutions (NDPP).¹²⁴ In *Corruption Watch NPC and Others vs President of the Republic of South Africa and Others*, the court held that the office of the NDPP is located at the core of delivering criminal justice.¹²⁵ This entails that the NDPP must be a fit and proper person who is capable of safeguarding the independence and impartiality of the NPA.¹²⁶

Like the NPA in Zimbabwe, the South African NPA has wide discretion on the decision of whether to prosecute or not.¹²⁷ This discretion must be exercised independently exclusive of any judicial, political and public interference.¹²⁸ However, prosecutorial discretion is not without limitations as it must be exercised within the confines of the law. It is for this reason that the Constitution provides for safeguards against the abuse of prosecutorial discretion by the NPA. Section 179(5) of the Constitution provides for the power of the NDPP to review a decision on whether to prosecute or not to prosecute.¹²⁹ This must be done after consultation with the Director of Public Prosecutions (DPP) and after hearing submissions from the complainant, accused and any person whom he considers significant.¹³⁰

In the spirit of separation of powers, courts are generally reluctant to meddle with prosecutorial discretion.¹³¹ Nonetheless, in *Freedom under Law vs National Director of Public Prosecutions & Others* the court held that prosecutorial discretion is not unregulated.¹³² This position was also affirmed in *Highstead Entertainment (PTY) Ltd*

¹²³ Constitution of South Africa, Sec 179(2)

¹²⁴ Constitution of South Africa, sec 179(1) (a)

¹²⁵ 2018(2) SACR 442(CC)

¹²⁶ *Pikoli vs President & Others* 2010(1) SA 400 (GNP) at 406F

¹²⁷ *Zuma vs Democratic Alliance & 2 Others* [2017] 4 ALL SA 726

¹²⁸ DWM Broughton (note 18 above)

¹²⁹ Constitution of South Africa, sec 179(5)

¹³⁰ Constitution of South Africa, sec 179(5) (d)

¹³¹ P Du Toit 'Recent Cases, Criminal Procedure' (2015) 28 1 SACJ pp 85-87

¹³² 2014 1 SACR 111 (GNP)

t/a “The Club” vs Minister of Law & Order & Others where it was stated that the courts will likely interfere with prosecutorial discretion where such discretion has been improperly exercised.¹³³

Maqutu submits that the principle of checks and balances is a critical facet of the doctrine of separation of powers as it facilitates the interference of one organ of state by another so as to prevent the abuse of power.¹³⁴ It may be remarked that in South Africa there is a clear construction of separation of powers not only on paper but also by implementation. This position is ideal compared to the Zimbabwean position where separation of powers is sufficiently provided for in legislation yet in reality there is interference of the executive with the other arms of government.

4.1.2 The National Prosecuting Act

The South African Constitution provides that legislation shall provide that the NPA shall exercise its functions without fear or favour.¹³⁵ The legislation which is envisaged by the Constitution is the National Prosecuting Authority Act.¹³⁶ Section 20 of the Act provides that the NPA shall have the power to institute and discontinue criminal proceedings.¹³⁷ In *Sibuta vs Minister of Police* the court held that according to Section 20, prosecution is the exclusive domain of the NPA which power must be exercised on behalf of the people of South Africa.¹³⁸

Section 20(5) is to the effect that any prosecutor shall be eligible to undertake all criminal proceedings to the extent that such powers have been conferred on them by the NDPP¹³⁹ In addition, Section 38 of the NPA Act provides for the engagement of persons outside the NPA to perform specific functions.¹⁴⁰ In *S vs Tshotshoza* the court found that there are various reasons why the NPA may engage persons outside the NPA and this may be attributable to issues such as scarcity of staff and

¹³³ 1994(1) SA 387(C) See also *Doctors for Life International vs Speaker of the National Assembly & Others* (2006) 6 SA 416 (CC) where it was held that the courts have a right to interfere with the other branches of government in order to prevent a violation of the Constitution

¹³⁴ L Maqutu ‘When the judiciary flouts separation of powers: Attenuating the credibility of the National Prosecuting Authority (2015) Vol 18 *PER/PELJ* 2674

¹³⁵ Constitution of South Africa, sec 179(4)

¹³⁶ (Act No. 32 of 1998)

¹³⁷ National Prosecuting Authority Act, sec 20(1)

¹³⁸ *Sibuta vs Minister of Police* [2020] ZAECGHC 6

¹³⁹ National Prosecuting Authority Act, sec 20(5)

¹⁴⁰ National Prosecuting Authority Act, Sec 38

shortage of experience and proficiency in dealing with specific cases.¹⁴¹ However where persons outside the NPA have been engaged, the terms of engagement, jurisdiction and bounds of powers must be clearly laid out.¹⁴²

Section 32 of the NPA Act is particularly important as it outlines the conduct expected of members of the NPA.¹⁴³ It states that they shall execute their duties in good faith without fear, favour or prejudice and they shall be subject only to the Constitution and the law.¹⁴⁴ In South Africa independence and impartiality of prosecutors is guarded jealously so as allow the NPA to prosecute crime independently, without fear or favour. In Zimbabwe, the creation of the SACU by the government poses a threat to the independence of prosecutors.

4.2 Role of NPA in Corruption

Corruption has adversely affected development in South Africa as it weakens the tenets of good governance and corrodes public trust in the government.¹⁴⁵ The prosecution of offences therefore allows the state to fulfill its constitutional duty of protecting against the violation of rights of citizen and to regain public trust.¹⁴⁶ The prosecutor's role in the fight against corruption is a crucial one. In South Africa, the prosecutor represents the state and the public in all criminal proceedings.¹⁴⁷ The prosecutor has control over all criminal proceedings and has the duty to put before the court all admissible evidence in order to prove an accused's guilt.¹⁴⁸

In the exercise of its functions, the NPA collaborates with anti-corruption organisations such as the South African Police Service (SAPS). In *Glenister vs President of the Republic of South Africa* the court stated that parliament has the discretion to establish other ACAs to assist in the battle against corruption.¹⁴⁹ These

¹⁴¹ 2010 (2) SACR 274 (GNP) at para 18

¹⁴² *S v Tshotshosa* (supra)

¹⁴³ National Prosecuting Authority Act, sec 32

¹⁴⁴ National Prosecuting Authority Act, Sec 32

¹⁴⁵ K Goto & O Ogunnubi 'Corruption and Development in Africa: Critical Reflections from Post-apartheid South Africa' (2014) Vol 25 *Lumina* pp 48-69

¹⁴⁶ *S vs Basson* 2007(1) SACR 566 (CC) at 620

¹⁴⁷ *Porritt vs National Director of Public Prosecutions* [2015] 1 SACR 686 (SCA) at para 13

¹⁴⁸ DWM Broughton (note 18 above)

¹⁴⁹ *Glenister vs President of the Republic of South Africa* 2011(3) SA 347(CC)

may either be established as independent bodies or within the NPA and the SAPS, the discretion which must be governed by the Constitution.¹⁵⁰

4.3 Exclusive powers of the NPA

Like Zimbabwe, the universal and widely accepted rule in South Africa is that all criminal prosecutions are to be public prosecutions for and on behalf of the state.¹⁵¹ In the *Glenister* case, the court held that as a general rule, only public prosecutors have the authority to institute criminal proceedings.¹⁵² This is by virtue of Section 179 of the Constitution which vests exclusive prosecutorial power in the NPA.¹⁵³

Mujuzi submits that South Africa when a crime is committed it is prosecuted by a public prosecutor although there are instances where this power may be delegated.¹⁵⁴ South African law however recognizes the right of private individuals to institute criminal proceedings where they have been victims of criminality.¹⁵⁵ These rights must be provided for expressly through legislation.

4.4 Delegation of Powers

4.4.1 Delegation by *nolle prosequi*

Private prosecution by virtue of a *nolle prosequi* certificate is the first form of delegation which is provided for in Section 7 of the Criminal Procedure Act 51 of 1977.¹⁵⁶ This is delegation of prosecutorial power to victims of crime or their lawfully recognized proxies.¹⁵⁷ In terms of Section 7, where the DPP declines to prosecute, he/she shall issue a *nolle prosequi* certificate to a private person who can show a substantial and peculiar interest arising out of some injury may prosecute the offence.¹⁵⁸

¹⁵⁰ *Glenister vs President of the Republic of South Africa* 2011(3) SA 347 (CC)

¹⁵¹ *Barclays Zimbabwe Nominees (Pvt) Ltd vs Black* 1990(4) SA (720) A at 726H

¹⁵² 2011(3) SA 347(CC)

¹⁵³ *Rodrigues vs National Director of Public Prosecutions South Africa & Others* 2019(3) ALL SA 962(GJ) at 23

¹⁵⁴ J D Mujuzi 'Protecting animals from mistreatment through private prosecutions in South Africa: A comment on the National Society for the Prevention of Cruelty to Animals vs Minister of Justice and Constitutional Development 2016 1 SACR 208 (SCA)' (2017) *Journal of African Law* pp 1-16

¹⁵⁵ *Delpont & Others vs S* [2015] 1 ALL SA 286 (SCA)

¹⁵⁶ Criminal Procedure Act, Sec 7

¹⁵⁷ Section 7(1) of the CPA Act also empowers husbands to prosecute in respect of offences committed against their wives, legal guardians, curators as well as wives and children of deceased persons.

¹⁵⁸ Criminal Procedure Act, Sec 7

The requirements for private prosecution in both Zimbabwe and South Africa are more or less the same. In *Ellis vs Visser* the court held that the private prosecutor must demonstrate a substantial and peculiar interest in the matter under prosecution ensuing from harm which has been individually suffered as a consequence of the offence.¹⁵⁹ It is worthy to note that the ambit of what constitutes a 'peculiar and substantial interest' must be construed restrictively.¹⁶⁰ The rationale for this requirement is to deter "public busy bodies" from unnecessarily interfering with prosecutorial discretion in respect of matters which do not disturb them any differently than other citizens.¹⁶¹

Private prosecution in South Africa is generally deemed to be on behalf of the state although it is not at the state's instance.¹⁶² The right to private prosecution however is not without limits. For instance, the right to private prosecutions only comes about after the DPP has declined to prosecute a matter. Secondly even where a private prosecutor has instituted proceedings, the DPP has the power to take over such proceedings at any stage.¹⁶³

4.4.2 Delegation by statutory right

Unlike Zimbabwe, South African law provides for delegation of prosecutorial power by virtue of a statutory right. This is in terms of Section 8 of the Criminal Procedure Act which provides that any person or body may institute and conduct prosecution in respect of any offence if that right has been expressly conferred by law.¹⁶⁴ It is submitted that Section 8 empowers both natural and juristic persons to prosecute by virtue of powers conferred by specific provisions of legislation.¹⁶⁵ This right must be exercised after consultation with the AG and after the AG has withdrawn his right to prosecute a certain of crimes.¹⁶⁶

There is an overabundance of legislation where the right to private prosecution is provided for in respect of specific offences. Section 8 of the Prevention of illegal

¹⁵⁹ *Ellis vs Visser* 1954(4) SA 431 (T) at 434

¹⁶⁰ *Ellis vs Visser* 1954(4) SA 431(T) at 434

¹⁶¹ *Attorney General vs Van der Merwe & Bornman* 1946 OPD 197 at 201

¹⁶² *Hansard Debates of the House of Assembly* (11 Mar 1977) col 3394 per submissions by Mr WT Webber

¹⁶³ Criminal Procedure Act, Sec 13

¹⁶⁴ Criminal Procedure Act, Sec 8(1)

¹⁶⁵ JD Mujuzi 'The history and nature of the right to institute a private prosecution in South Africa' (2019) Vol 28 No. 1 *Fundamina: A journal of legal History* pp 131-169

¹⁶⁶ Criminal Procedure Act, Sec 8(2)

eviction from and Unlawful Occupation of Land Act (PIEUOLA),¹⁶⁷ provides for the right to private prosecution for persons who have been unlawfully evicted.¹⁶⁸ There are certain requirements that are imposed on private prosecutors under this Act. They must be represented by any person entitled to practice law in South Africa,¹⁶⁹ and they must give notice to the public prosecutor in that jurisdiction.¹⁷⁰ In addition to the PIEUOLA, there are also various legislation that provide for private prosecution.¹⁷¹

There are notable differences between private prosecutions under Section 7 and Section 8 of the Criminal Procedure Act. Under Section 7 the private prosecutor must be a victim of an offence in that he must have a real and substantial interest and must have suffered injury. On the contrary, private prosecutors under Section 8 need not establish any harm or injury. Private Prosecutors under Section 8 of the CP Act are empowered by Section 38 of the Constitution which authorizes any person to approach the court in their own interests or in the interests of other people, alleging an infringement of the Bill of Rights.¹⁷²

Joubert argues that private prosecution provided for under Section 8 of the Criminal Procedure Act are not private prosecutions in the actual sense of the word.¹⁷³ This is because private prosecutors under section 8 are subject to the control of the DPP who may at any time revoke the private prosecutor's authority.¹⁷⁴ Whatever their nature, it may be commented that private prosecutions under Section 8 provide a leigh way under which individuals and organizations, may prosecute privately in the interest of the public even in circumstances where injury has not been suffered personally. This is an approach that Zimbabwe may adopt so as to allow individuals and entities to prosecute criminal matters without encroaching onto the powers of the NPA.

¹⁶⁷ Act 9 of 1998

¹⁶⁸ Prevention of illegal eviction from and unlawful occupation of land Act, sec 8(4)

¹⁶⁹ Prevention of illegal occupation and unlawful occupation of land Act, sec 8(5) (a)

¹⁷⁰ Prevention of illegal occupation and unlawful occupation of land Act, sec 8(5)(b)

¹⁷¹ See also Section 33 of the National Environmental Act 197 of 1998, Section 76 of the Attorneys Act 53 of 1979, Section 25 of the Hazardous Substances Act 15 of 1973 and Section 23 of the Extension of Security of Tenure Act 62 of 1997

¹⁷² Constitution of South Africa, sec 38

¹⁷³ JJ Joubert '*Criminal Procedure Handbook*' (2013)81

¹⁷⁴ J D Mujuzi 'Private prosecutions and discrimination against juristic persons in South Africa: A comment on National Security Council for the prevention of cruelty to animals vs Minister of Justice and Constitutional Development & Another (2015)15' *African Human Rights Law Journal* pp 581-595

4.5 COMPARATIVE ANALYSIS

4.5.1 INTERNATIONAL LEGAL FRAMEWORK

Both Zimbabwe and South Africa have ratified the same international legal instruments. These include the United Nations Convention against Corruption, the African Union Convention on Preventing and Combating Corruption as well as the African Charter on Human and Peoples' Rights *inter alia*. In summary, these international instruments collectively require state parties to adopt measures to ensure that prosecuting authorities exercise their duties independently and without influence from the other arms of government so as to effectively fight crime.

4.5.2 DOMESTIC LEGISLATION

The legislation in Zimbabwe and South Africa is largely in *pari matiria* with notable variances.¹⁷⁵ The study however highlights that although the legislation which provides for the powers of prosecutors is similar in both countries, South African legislation is more consistent with international standards particularly in the establishment of an independent and autonomous NPA. South Africa also strives against corruption by promoting a clear separation of powers thereby enabling the NPA to discharge its duties independently.

In South Africa both the Constitution and the NPA Act expressly provide for the exclusive power of the NPA in the prosecution of corruption. Moreover, the NPA Act provides for the manner of delegation of such prosecutorial power to other organisations through the provisions on private prosecutions in the public interest. Prosecutorial powers are also expressly conferred on various organisations through legislation such as the National Environmental Management Act and Attorneys Act. This ensures that the exercise of prosecutorial power by other organisations does not conflict with that of the NPA but instead complements its role.

There are a number of lessons that Zimbabwe may draw from South African legislation. A study of South Africa shows that apart from the NPA, there are other organisations that may be vested with prosecutorial power. This guarantees the

¹⁷⁵ *Telecel Zimbabwe (PVT) LTD vs Attorney General of Zimbabwe N.O SC 1/14*

effective and specialised prosecution of crime. However, the nature and extent of these powers must be clearly provided for in national legislation so that their powers may not conflict with that of the NPA. In the Zimbabwean context this entails that legislation must be crafted which establishes the SACU and confers on it power to prosecute privately in respect of high-profile corruption.

4.5 Conclusion

This Chapter analyzed the role of the NPA in the prosecution of corruption in South Africa. It accentuated the exclusive role of the NPA in the prosecution of criminal matters as well as the circumstances under which such powers may be delegated to other parties. It was established that prosecutorial power may be delegated to private prosecutors by virtue of a *nolle prosequi* certificate as well through powers conferred by various pieces of legislation. The Chapter demonstrated that unlike Zimbabwe, the instances where prosecutorial powers may be delegated in South Africa are strictly underscored in legislation so as to preserve the independence and autonomy of the NPA. This Chapter has also shown how the South African legal framework strives against the international standards on the role of prosecutors through its commitment towards separation of powers and launching a system of checks and balances.

CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

5.0 Conclusions Drawn from Study

Chapter 1 introduced the study. It demonstrated that corruption has become a global threat which is the root cause of poverty and underdevelopment in countries such as Zimbabwe. To better address the rot of corruption, countries have adopted various mechanisms so as to effectively prosecute corruption. In Zimbabwe, one such measure has been the establishment of ACAs such as ZACC and the SACU who work in coordination with the NPA which is the body responsible for the prosecution of all crime. The study further demonstrated that the success of these anti-corruption efforts requires a synchronized approach from the various ACAs whose mandate includes the investigation, arresting and prosecution of offences.¹⁷⁶

In Chapter 2, it was shown that the role of the prosecutor is of paramount importance in the fight against corruption. The study discussed the main international and regional instruments on the role of prosecutors in the global fight against corruption. The key international and regional instruments that were discussed were the UNAC, AUCPCC, ACHPR, *inter alia*. These are international conventions to which Zimbabwe is a party to.

The study also interrogated international best practices which emanate from international organisations such as the IAP and APA which are responsible for the harmonisation of prosecutorial standards at international and regional level. It was submitted that best practices, unlike conventions and treaties, are not binding in the legal sense but are a source of universally accepted standards which states must emulate. The study summarised the essential features which form the core facets of every Prosecuting Authority as independence, autonomy, impartiality, integrity, and respect for human rights.

In Chapter 3, the study inquired into the role of prosecutors in the fight against corruption from a Zimbabwean perspective. It verified the exclusive role of the NPA in the prosecution of corruption matters as well as the nature and extent of its authority. The study further illustrated the role of anti-corruption agencies such as the SACU in the prosecution of corruption. It argued that the NPA is the only organisation with the Constitutional mandate to prosecute offences on behalf of the

¹⁷⁶ (Note 114 above) available at www.tizim.org assessed 13 June 2021

state. This included a discussion of the circumstances under which the NPA may delegate its powers.

The study probed into the question of the legality of the SACU as an organisation that was established by the President to aid the NPA in the prosecution of graft related offences. It concluded that the role of the NPA is exclusive and the circumstances under which its powers may be delegated are limited and must be provided for expressly through legislation. As a result of such observation, the study determined that the SACU is an illegal entity whose existence has no legal justification. Its creation is not only a usurpation of the exclusive mandate of the NPA but is also a violation of the principle of separation of powers which debars the executive from meddling with the other arms of state.

Chapter 4 consisted of a comparative analysis of the role of the NPA in South Africa in the prosecution of corruption matters. It illuminated the exclusive role of the South African NPA in the prosecution of crime. The study further interrogated the manner in which prosecutorial power may be delegated, the principle of separation of powers as well as the sufficiency of checks and balances. It was argued that in South Africa the fight against corruption consists of a coordinated effort between the NPA and other organisations which have been authorised to prosecute specific offences by legislation.

The study concluded that although the Zimbabwean and South African legislation on the role of prosecutors is similar, South African legislation is more consistent with international standards as it seeks to promote separation of powers between the arms of government whilst also ensuring sufficient checks and balances. It was submitted that a similar approach should be adopted in Zimbabwe to cure the conflict between the powers of the NPA and the SACU.

5.1 Recommendations

5.1.1 Dissolution of the SACU

The SACU has not been established under any legislation. This means that it has no legal force. If an act is in law a nullity, then every act which results from it is incurably bad.¹⁷⁷ The SACU should therefore be dissolved to cure its legality. The SACU's

¹⁷⁷ *MacFoy vs United Africa Co Ltd* 1961(3) A 11 ER 1169 (PC) at 11721

existence is a direct violation of the principles of constitutionalism, rule of law as well as the principle of separation of powers.

5.1.2 Institution of Act of Parliament

The biggest hurdle that the SACU continues to face is that it has not been established under any legal instrument hence it has no legal foundation. The SACU was merely established through a presidential decree which is on its own a symbol of arbitrary rule.¹⁷⁸ There is no clarity as to the exact terms of reference of the SACU. Parliament must therefore come up with legislation which will establish the SACU and clearly define the nature, extent and scope of its powers. Legislation should clearly define whether the SACU has powers to investigate or to prosecute only or both. The Act of parliament must also clearly articulate the relationship between the SACU and the NPA so as to avoid encroaching into the exclusive mandate of the NPA.

5.1.3 Amendment of the National Prosecuting Authority Act

The Constitution provides that an Act of Parliament may provide for the delegation of powers to persons outside of the NPA.¹⁷⁹ The study did illustrate that in South Africa there are specific provisions which allow for private prosecutions by independent organisations in the public interest. It is recommended that parliament should effect an amendment to the NPA Act and other legislation so as to expressly provide for private prosecutions by organisations such as the SACU in respect of corruption matters.

5.1.4 Establishing the SACU as a department within the NPA

It has already been established that the SACU's role is a duplication of that of the NPA. There is already an organisation that has the duty to prosecute criminal matters in Zimbabwe hence the creation of another organisation with the exact mandate is superfluous. If anything, the creation of the SACU may be interpreted as an admission by the government that the NPA has become ineffective in fighting crime. Instead of creating an independent unit whose independence is compromised, the SACU may simply be launched as a department under the NPA which will be

¹⁷⁸ A Magaisa (note 13 above)

¹⁷⁹ Constitution of Zimbabwe, Section 263

established for anti-crime specialisation. This will promote the expeditious and specialised handling of corruption related offences.

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