Security clearances before appointing the National Prosecuting Authority

By Brenda Wardle

On 5 July 2014 President Jacob Zuma announced that, after careful consideration of all matters, he had decided to institute an inquiry into whether or not the National Director of Public Prosecutions (NDPP) Mxolisi Nxasana, was fit to hold office.

The President, in instituting the inquiry, was acting pursuant to the provisions of s 12(6)(*a*)(iv) of the National Prosecuting Authority Act 32 of 1998 (NPA Act). Mr Nxasana, like his predecessors, was appointed in terms of s 179 of the Constitution, such appointment being for a period of ten years.

This will be the second inquiry, since the initial one was preceded by the Ginwala Commission of Enquiry, which had been set up to investigate whether Adv Vusi Pikoli was fit to hold office. It was the appointment of Adv Menzi Simelane as NDPP, following the Ginwala Commission, which caused the Democratic Alliance to challenge Mr Simelane's appointment in court. The Supreme Court of Appeal (SCA) declared the appointment of Mr Simelane irregular and invalid and subsequently referred the matter to the Constitutional Court for a confirmation of the declaration of invalidity.

The Constitutional Court reached conclusions on a number of issues, among others, was the fact that the 'fit and proper' requirement of an NDPP, with due regard to conscientiousness and integrity, was not a matter to be determined according to the subjective opinion of the President.

The Constitutional Court reiterated the requirement set out in the SCA that the 'fit and proper' requirement was a jurisdictional prerequisite, which ought to be determined objectively. The court further stated that the rationality requirement obliged the court to evaluate the relationship between the means and the end in the appointment process. The court also held that there had to be a nexus between each step taken in the decision-making process and the final decision itself, in order for the rationality requirement to be satisfied. The court dealt at length with the rationality requirement of both administrative actions and (by necessary implication) executive decisions and held that the doctrine of separation of powers (commonly, and very often referred to as the *trias politica* doctrine), found very little, if any applicability to the *Simelane* matter.

In the end, the Constitutional Court agreed with the SCA's finding that the appointment of Mr Simelane was unconstitutional, especially in view of the scathing attack and the recommendations of the Ginwala Commission, which were followed by the recommendations of the Public Service Commission, the latter which were reportedly ignored by the then Justice Minister, Enver Surty.

Section 12(6)(*a*) of the NPA Act proceeds thus:

'The President may provisionally suspend the National Director or Deputy National Director from his or her office, pending such enquiry into his or her fitness to hold such office as the President deems fit and, subject to the provisions of this subsection, may thereupon remove him or her from office –
(i) for misconduct;
(ii) on account of continued ill-health;
(iii) on account of incapacity to carry out his or her duties of office efficiently; or
(iv) *on account thereof that he or she is no longer a fit and proper person to hold the office concerned'* (my emphasis).

Section 179 of the Constitution refers to a single National Prosecuting Authority (NPA) consisting of an NDPP, appointed by the President as a member of the Executive and Directors of Public Prosecutions, and prosecutors as determined by an Act of parliament (in this instance the NPA Act).

The position of Mr Nxasana, on the limited facts available, relates to him not having disclosed that he was once on trial for murder. There are also further allegations of two other assault cases against him. One would have thought, or in fact expected, that following the decision in *Simelane*, the appointment of an NDPP would have been approached with some degree of diligence and care, as the President is bound by the decision of the Constitutional Court.

Allegations of political interference and delayed action notwithstanding, it appears doubtful or perhaps even highly unlikely, especially in the light of reports of alleged recent assault charges, that Mr Nxasana would be successful in arguing that he is indeed such a fit and proper person. From a contractual breach perspective he would appear to be well within his rights to argue that he had a legitimate expectation that his contract as NDPP would have continued for the remainder of the ten-year term.

The other difficulty which arises with Mr Nxasana, is that he is alleged to have tendered information on a disciplinary infringement by the KwaZulu-Natal Law Society, yet failed to see the relevance of and mentioning the murder charge, notwithstanding the fact that it appears highly unlikely that he would be denied clearance by virtue only of a matter he was acquitted on.

There are also other worrying allegations in the media that many other incumbents at the NPA do not or did not have the requisite security clearance. This leads one to ask the question why then there would be differential treatment, given the fact that s 9 of the Constitution affirms the right to equality with equal benefit to the law.

Similar concerns have been raised around police officers who have criminal convictions, as well as some with falsified qualifications still in the employ of the South African Police Service. A few years ago there were rumors about many staff members of the South African National Defence Force who were yet to be vetted. Given the fact that these individuals are privy to classified information on a daily basis, would it be safe to ask whether or not our institutions are compromised?

The real danger here is the unscrupulous persons and even rogue operatives from within and outside our borders who operate below the radar. These people can easily gain employment and obtain whatever information they require in their field of choice, in the full knowledge that security clearance in South Africa sometimes takes as long as six years. There are many who are already aware that, even where required, vetting does not precede appointment and that, in some strange way, people appear to be assumed to qualify for clearance by being appointed provisionally while vetting takes place. This means that by the time the report comes back, the proverbial horse might have long bolted.

In an advertisement for Aspirant Prosecutor Training published earlier this year, it was categorically stated in the advertisement that:

‘Successful candidates will be subjected to a security clearance at least up to a level of Top Secret. Appointment to these posts will be provisional, pending the issuing of security clearance. If you cannot get a security clearance, your appointment will be reconsidered/possibly terminated. Fingerprints will be taken on the day of the interview.’ (www.npa.gov.za/UploadedFiles/Aspirant%20prosecutor%20training%20(recruitment%20ad)%20 20June2014.pdf, accessed 7-8-2014.)

At a cursory glance, it would appear that the entry requirements for aspirant prosecutors are indeed unnecessarily onerous and might therefore be *ultra vires* the NPA Act.

The Minimum Information Security Standards Document (MISS) was approved by Cabinet as the national information security policy on 4 December 1996. Under classification, all official matters which are exempted from disclosure or which require the application of security measures, must be classified as either, ‘Restricted’, ‘Confidential’, ‘Secret’ or ‘Top Secret’.

The problem I foresee with the advertisement for the aspirant prosecutors programme is that it refers to security clearance ‘at least’ up to a level of ‘Top Secret’, which is the highest level attainable. Is there really a need for prosecutors to pass such stringent vetting and if it is indeed justifiable, how many of them currently hold ‘Top Secret’ clearance? Under the definitions section of the MISS Document, ‘Top Secret’ is defined as a level of classification given to information that can be used by malicious/opposing/hostile elements to neutralise the objectives and functions of institutions and/or the state. It further states that ‘Top Secret’ classification refers to instances where the compromise of such information can lead to the discontinuance of diplomatic relations between states and can result in the declaration of war.

The establishment of the NPA by the Constitution was a critical step towards ensuring that the prosecution of crime in South Africa moved away from its oppressive nature of the past towards a discretionary but credible prosecutorial institution with sufficient checks and balances. However, the history that has marred the appointment of NDPPs has been jagged.
In terms of the MISS Document political appointees, for example, Directors General and Ambassadors, etcetera are not vetted unless the President requests that they be vetted or the relevant contract otherwise so provides. However, all other levels from the lowest to Deputy Director General level, inclusive of anyone who should have access to classified information, must be subjected to vetting. It is, after all, the President’s prerogative to decide whether or not to confirm the appointment notwithstanding problems with security clearance. All eyes of course will be on the recommendations of whoever will be appointed to chair the commission of inquiry into the fitness of Mr Nxasana to hold office.

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