

**SUBMISSION BY THE AFRICAN CHRISTIAN DEMOCRATIC
PARTY ON THE NATIONAL PROSECUTING AUTHORITY
AMENDMENT BILL AND SOUTH AFRICAN POLICE SERVICES
AMENDMENT BILL
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INTRODUCTION

As was stated in the Glenister High Court application, the issue of the future of the Scorpions is about crime and accountability. It is about crime inasmuch as it has to do with the right of all South Africans to go about their lives in the secure knowledge that the law-enforcement agencies will take reasonable measures to protect them from the scourge of crime. It is about accountability inasmuch as it has to do with the fiduciary obligation of the state to act in the best interest of all its citizens.

The ACDP believes that government has breached this obligation by reversing its decision on the Khampepe Commission Report to further the narrow interests of the ruling party. By doing so, we believe that government has sacrificed the well being of all South Africans on the altar of political expediency.

There are two crucial constitutional issues in this matter.

Firstly, the high crime rate in South Africa is inconsistent with various constitutional rights and the rule of law in general. The Supreme Court of Appeal in the Shaik matter emphasised the following:

“The seriousness of the offence of corruption cannot be overemphasised. It offends against the rule of law and the principles of good governance. It lowers the moral tone of a nation and negatively affects development and the promotion of human rights. As a country we have travelled a long and tortuous road to achieve democracy. Corruption threatens our constitutional order. We must make every effort to ensure that corruption with its putrefying effects is halted.”¹

The second issue relates to the accountability of persons exercising public power with specific reference to section 41(1)(c) and section 195(1)(f) read with section 195(2) of the Constitution.

The Executive and Parliament have constitutional constraints – the rule of law is a foundational value of the constitution – all law that is inconsistent with the principle of legality is liable to be set aside. It is a component of the principle of legality that government conduct must not be arbitrary. In other words, all government conduct must be rationally connected to a legitimate government purpose, failing which it will be arbitrary and hence unconstitutional.

¹ S v Shaik 2007 1 SA 240 (SCA) para 223

It was common cause amongst all the parties in the Glenister application, including the government, that the Scorpions have been extremely successful in the fight against crime.

The government has admitted "that the DSO has scored significant successes in investigating and securing convictions in organised crime,"² and accepts "that the DSO has made a significant difference in the fight against organised and syndicated crime".³

The ANC's decision to disband the Scorpions was not motivated that the Scorpions have been *unsuccessful*, but was rather motivated by the fact that the Scorpions have been too *successful*, particularly in its investigations of high profile ANC members. These include Members of Parliament involved in "Travelgate", the successful prosecution of Mr Schabir Shaik and Mr Tony Yengeni, and the pending prosecution of the National Police Commissioner, Mr Selebi and ANC President, Mr Jacob Zuma.

Indeed ANC Secretary General, Mr Gwede Mantashe, admitted this much by stating that the ANC wanted the Scorpions disbanded because the unit is prosecuting its leaders.

Can we allow the interests of the ruling party to be put above the interests of all South Africans?

We, as Members of Parliament, cannot act arbitrarily in passing legislation, such as that before us here, that does not have a rationale connection to a legitimate government purpose. This would be inconsistent with the principle of legality and liable to be set aside.

IMPACT UPON DSO MEMBERS

Whilst the matter is likely to end up in the Constitutional Court, our concern is that the Scorpions are bleeding to death at the moment. We cannot afford to lose the expertise built up over years and at great cost to the taxpayer. The tabling of the amending legislation is resulting in the destruction of the unit.

There can be no doubt that the unit is being decimated by resignations. They have been specifically trained at combating organised crime and we cannot afford to lose more of these highly-skilled members.

The acting head of the NPA, Adv Mpshe, has warned that the collapse of just a few Scorpions' cases could bring the South Africa's criminal justice system "into disrepute" and that "the reckless disbanding of the Scorpions could devastate the whole criminal justice system".

² Department of Justice Director General Simelane affidavit in the Glenister application, p712

³ Simelane, p 699

We expressed our anxiety in this regard in the Glenister application that “during the pendency of the amendments that will have the consequence of dissolving the DSO and the transfer of some of its members to SAPS, that institution stands in jeopardy of being crippled.”⁴

THE KHAMPEPE REPORT

The Khampepe Commission recommended that the DSO should be retained within the National Prosecuting Authority. This view was initially accepted by government. However, government arbitrarily then did an about turn following the Polokwane conference and initiated legislation to disband and relocate the Scorpions.

The Khampepe Report categorically states that “the rationale for the establishment of the DSO is as valid today as it was at conception” and that “the DSO should continue to be located within the NPA”.

UNIQUE COMPOSITION OF THE DSO

As the NPA’s annual report indicates “the DSO’s unique composition enables it to focus its resources and tackle complex crimes under one command... The DSO is an institution of paramount importance in South Africa’s effort to disrupt trans-national and high-level organised crime. It should be nurtured, supported and celebrated...”

Its uniqueness lies in the fact that its investigations are prosecutor-driven. As the Khampepe Report points out,

“The one telling element of the DSO that sets it apart from the conventional methods used in the investigation and prosecution of offences is the methodology of using teams involving prosecutors, information analysts and investigators in the ultimate prosecution of their cases. It is a principle that is proving to be an effective tool in addressing complex and organised crime.”⁵

How can the principle of constant prosecutorial oversight in investigations that is the cornerstone of the success of the Scorpions be maintained if the Scorpions are incorporated into the SAPS?

There can be no doubt that disbanding and relocating the Scorpions will harm the fight against crime since the SAPS is not well-positioned to perform functions of this sort. This was the very reason for the creation of the Scorpions – and other units outside the SAPS – such as the Priority Crimes Litigation Unit (PCLU), the Asset Forfeiture Unit (AFU), the Specialised

⁴ Amicus bundle, Glenister application, Holomisa p6

⁵ Khampepe Report p 964

Commercial Crime Unit (SCCU), the Sexual Offences and Community Affairs (SOCA) Unit, the Witness Protection Unit (WPU). The Financial Intelligence Centre was also set up outside of the SAPS, to deal with the financing of organised crime and terrorist activities.

Even ANC MP Booi, as late as 18 March ANC MP stated that "the DSO has been able to build a capacity that the police have not been able to build in this regard." He goes on to say that "detectives do not have the kind of capacity to do that, but the Scorpions have that particular capacity."

In any event does the SAPS have the capacity to accommodate the Scorpions? By what stretch of the imagination would the SAPS be able to retain and attract other accountants and lawyers required for this unit? Surely it is very obvious that SAPS trade unions would not allow police officials to be paid the type of salaries necessary to attract such professionals? These concerns must be allayed before a rationale decision regarding the Scorpions can be made.

CONCLUSION

Adv Mpseh has emphasised that the DSO is "an intrinsic part of the country's law-enforcement arsenal, aimed at increasing the sense of safety and security of its citizens, as well as effectively combating organised crime."⁶

The Khampepe Commission conclusion could not be expressed in more forthright terms:

"Until such time as there is cogent evidence that the mandate of the Legislature (to create a specialised instrument with limited investigative capacity to prosecute serious criminal or unlawful conduct committed in an organised fashion) is demonstrably fulfilled, I hold the view that it is inconceivable that the Legislature will see it fit to repeal the provisions of the NPA Act that relate to the activities and location of the DSO."⁷

The ACDP shares this view and believes that the DSO should be retained in its present form separate from the SAPS.

⁶ Mpshe affidavit in Glenister application, para 5.1

⁷ Khampepe Report p 957