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# Engagement of prosecutors not in the employ of the National Prosecuting Authority

## Abstract

This article focuses on the engagement of prosecutors not in the employ of the National Prosecuting Authority (NPA) to prosecute certain cases. Such prosecutors are appointed in terms of section 38 of the *National Prosecuting Authority Act 32 of 1998*. The article starts by presenting a number of recent court decisions that deal with the application of this section and contextualises the decision of the Supreme Court of Appeal (SCA) in *Moussa v S*. Given that it was in *Moussa* that the constitutionality of the section was challenged, the approach of the SCA and the reasons for its decision are discussed. It is submitted that the SCA's decision is a welcome step, in that the court has pronounced itself definitively on the constitutionality of the section and also outlined the approach to be used in determining which appointments of prosecutors, in terms of the section, are acceptable and which are not. In particular, the article explains the test to be used in making that decision.

## Aanklaers aangestel van buite die geledere van die Nasionale Vervolgingsgesag

Hierdie artikel fokus op die aanstelling van aanklaers van buite die geledere van die Nasionale Vervolgingsgesag om as aanklaers op te tree in sekere sake ingevolge artikel 38 van die *Wet op die Nasionale Vervolgingsgesag 32 van 1998*. Die artikel verwys na 'n aantal onlangse hofbeslissings wat gehandel het oor die toepassing van artikel 38 en toon aan dat regsonsekerheid geheers het tot en met die besluit in *Moussa v S*. Die benadering van die Hoogste Hof van Appèl (HHA) en die redes vir die beslissing word bespreek, omdat die grondwetlikheid van die artikel aangeval is in die *Moussa*-saak. Dit word geopper dat die besluit van die HHA 'n welkome stap is omdat die hof gesaghebbend uitspraak gelewer het oor die grondwetlikheid van die wetsartikel en ook die benadering uitgestip het wat gevolg behoort te word om die besluit te kan neem wanneer aanstellings van aanklaers in terme van artikel 38 aanvaarbaar is al dan nie. In besonder word die toets wat toepaslik is om hierdie besluite te neem uiteengesit.

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## 1. Introduction

The *Constitution of the Republic of South Africa* (1996)<sup>1</sup> stipulates that “[t]here is a single prosecuting authority in the Republic, structured in terms of an Act of Parliament”.<sup>2</sup> In line with this provision, the *National Prosecuting Authority Act*<sup>3</sup> was passed. Chapters two to five of the *Act* set out the structure of the National Prosecuting Authority (NPA), the appointment of staff, powers and duties of the NPA officials, as well as accountability mechanisms in respect of the authority. While the *Act* vests the responsibility for the prosecution of crime in the NPA, headed by the National Director of Public Prosecutions, it also allows the NPA to engage persons outside its employ to perform prosecutorial services in terms of section 38 thereof. This outsourcing<sup>4</sup> of prosecutorial services should be concluded on the basis of written agreements after consultation.<sup>5</sup> Persons so engaged must possess the necessary qualifications and experience and must act under the direction and control of the National Director, Deputy Director, or Director<sup>6</sup> when conducting prosecution.<sup>7</sup>

The NPA has been using prosecutors engaged in terms of section 38 of the *Act* for a considerable period of time and this outsourcing of prosecutorial services has been hailed as a measure that reduces the NPA’s workload and enables the NPA to acquire expertise needed for the prosecution of specific cases.<sup>8</sup> However, the NPA’s engagement of prosecutors in terms of this provision was to face a number of legal challenges. One such challenge, arguably the most significant, was *Bonugli v Deputy National Director of Public Prosecutions*,<sup>9</sup> where the court invalidated the appointment of two prosecutors engaged in terms of section 38 of the *Act*. A number of similar challenges followed the *Bonugli* judgement, with some of them based on the *Bonugli* decision.<sup>10</sup>

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1 Hereafter “the *Constitution*”.

2 Section 179(1) of the *Constitution*.

3 *National Prosecuting Authority Act* 32/1998 (hereafter “the *Act*”).

4 Keuthen 2007:70. Generally, for an exposition of the purpose and justification of this prosecutorial route, see Keuthen (2007:69-72).

5 Where the engagement does not have financial implications for the state, consultation within the NPA is sufficient (section 38(3)). However, where such engagement has financial implications, there should be consultation with the Minister responsible for the administration of justice (section 38(1) of the *Act*).

6 Section 38(4) of the *Act*.

7 The section provides for the engagement of persons outside the employ of the NPA to perform services in general and then, in section 38(4) specifies that “services” include “prosecution”.

8 See Keuthen 2007:69-72.

9 *Bonugli v Deputy National Director of Public Prosecutions* 2010(2) SACR 134 (T).

10 In *S v Delpport*, Case No: 18/2009 (North Gauteng High Court), for instance, the Regional Court Magistrate raised the issue *mero motu* and directed counsel to address the court on the implications of the *Bonugli* decision on the case before the court. See par. 10 of the *Delpport* judgement. The prosecution in this case was conducted by prosecutors appointed in terms of section 38 of the *Act*. Another challenge that came as a result of the *Bonugli* decision is *S v Tshotshoza* 2010 (2) SACR 274 (GNP) where the Regional Court Magistrate set an appointment of

The bases of the challenges, in general, revolved around the suitability of the particular prosecutors so appointed, given their relationship/s with people who funded the prosecution and, in one case, the fact that the prosecutor involved had not taken the prescribed oath.<sup>11</sup> *Moussa v S*<sup>12</sup> is the most recent of the cases and, in this instance, the Supreme Court of Appeal (SCA) dealt with a challenge to the constitutionality of section 38 of the Act. The fact that, in this case, the constitutionality of the section was challenged distinguishes the *Moussa* judgement from the decisions that preceded it, because none of them had challenged the constitutionality of the section.<sup>13</sup>

It is not hard to understand the essence of the reservations regarding the appropriateness of prosecution being conducted by outsiders to the NPA, often with interest in the case that goes beyond mere prosecution of crime in general.<sup>14</sup> At the core of the prosecutor's mandate lies prosecutorial independence, which requires that the prosecutor be insulated from any motivation or influence beyond simply the responsibility to prosecute crime. It is this tension between the general mandate of the NPA and the ability to use lawyers outside its employ, as will be shown later in the cases discussed, that constantly requires interpretation by the courts. It is on the basis of this tension that it has even been recommended that the appointment of prosecutors, in respect of whom there are financial implications (authorised in terms of section 38(3) of the Act), should be discontinued.<sup>15</sup> If this recommendation was to be accepted, the NPA would not be able to engage the services of prosecutors whose remuneration comes from any other source than the NPA itself.<sup>16</sup> The only route of involving lawyers who are not in the employ of the NPA would be through section 38(1), which, in essence, entails that their remuneration would come from the NPA.

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a prosecutor aside "because of the decision of Du Plessis ..." (see par. 5 of the *Tshotshoza* judgement). Du Plessis J delivered the *Bonugli* judgement.

11 The taking of an oath or affirmation was central to the *Moussa* decision. It was first raised in the trial court and later in the appeal before the Supreme Court of Appeal.

12 *Moussa v S* 2015 (2) SACR 537 (SCA).

13 The constitutionality of section 38, however, was always a simmering issue in all the cases, even though it was not put before court. See *Tshotshoza*:par. 18, for instance, where the court alluded to the constitutionality of the section.

14 The reason why the court declared the appointment of the prosecutors unlawful in *Bonugli*, apparent from the judgement, is that the prosecutors were linked to and funded by the complainant to focus on the particular case and the particular accused on behalf of the complainant. Equally, the appointment of the prosecutor in *Tshotshoza* was saved by the fact that the prosecution was general in nature, in that the outside organisations' funding of the prosecution was not in respect of a particular case nor a particular complainant, but for bank-related crimes in general.

15 See Watney 2009:589.

16 This is not to limit the issue in its entirety to remuneration only, but, at least in the cases discussed later herein, remuneration tends to be the centre of the tension.

This article, a reaction to *Moussa v S*,<sup>17</sup> outlines the general approach of the courts in interpreting the meaning of acting *without fear, favour, or prejudice* and the significance of the taking of an oath by a prosecutor. The discussion is concluded with a submission that the SCA's decision in *Moussa* provides the necessary clarity regarding this important issue, which goes to the core of accused persons' right to a fair trial<sup>18</sup> and has been a subject of contestation in a number of cases.<sup>19</sup>

## 2. Outside prosecutors and their engagement: The process and context

As mentioned earlier, section 38 of the *Act* empowers the NPA, after consultation with relevant role players such as the Minister responsible for the administration of justice,<sup>20</sup> to appoint prosecutors on an *ad hoc* basis. Section 38(1) states that:

The *National Director* may in consultation with the *Minister*, and a *Deputy National Director* or a *Director* may, in consultation with the *Minister* and the *National Director*, on behalf of the State, engage, under agreements in writing, persons having suitable qualifications and experience to perform services in specific cases.

Section 38(3) proceeds to state that:

Where the engagement of a person contemplated in subsection (1) will not result in financial implications for the State-

The *National Director*; or

A *Deputy National Director* or a *Director*, in consultation with the *National Director*,

may, on behalf of the State, engage, under an agreement in writing, such person to perform the services contemplated in subsection (1) without consulting with the *Minister* as contemplated in that subsection.

Given the challenge to the constitutionality of the section in the *Moussa* case as opposed to the other cases that preceded it,<sup>21</sup> it is in order to

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17 *Moussa v S* 2015 (2) SACR 537 (SCA).

18 Du Plessis J captured the position by stating that, "[i]f a prosecutor who acts without fear, favour or prejudice and thus independently, is an integral part of a just criminal prosecution, it follows, in my view, that such a prosecutor is also an integral part of a fair trial. An accused person who is prosecuted by a prosecutor, who is not free from outside influence, does not receive a fair trial" (page 142, paras. I-J of the *Bonugli* judgement).

19 For some of the cases, see footnotes 10 and 21.

20 Section 38(1) of the *Act*. The Minister is to be consulted only where the engagement has financial implications for the state (see section 38(3)).

21 In the *Bonugli v Deputy National Director of Public Prosecutions* 2010 (2) SACR 134 (T) (the case that in many ways started many of the challenges), the issue was about the manner of the appointment. It constituted an unlawful appointment, the court found, if such an appointment, as was the case in

outline the nature of the challenges that were adjudicated over by the courts before this case, because, principally, all of them revolved around the issue of the constitutional requirement that prosecutors act without fear, favour, or prejudice. This is also because the approach of the SCA in *Moussa* regarding this requirement will be analysed against the backdrop of the cases that preceded it. The court decisions make it possible to differentiate between unacceptable and acceptable appointments and, it is submitted, the picture emerging out of the decisions sets out some guiding criteria that should be followed in engaging prosecutors in terms of section 38 of the *Act*.

## 2.1 Unacceptable engagement: Bonugli v Deputy National Director of Public Prosecutions

The *Bonugli*<sup>22</sup> case was a review application by the accused who challenged the engagement of two advocates in private practice to lead their prosecution.<sup>23</sup> In brief, the accused faced a charge of fraud.<sup>24</sup> After representations were made to the NPA, the charges against them were withdrawn. However, the charges were later reinstated at the “urgings”<sup>25</sup> of the complainant. The complainant would also fund the prosecution.<sup>26</sup> The advocates, it was common cause, had performed some legal work for the complainant before their appointment as prosecutors in the case.<sup>27</sup>

The review application was based on three grounds. The first ground was that the Director of Public Prosecutions (DPP) disregarded relevant considerations in making the appointments.<sup>28</sup> These considerations turned out to be that the DPP did not consider the previous dealings between the complainant and the two advocates relating to the matter.<sup>29</sup> The court

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this matter, was instigated and funded by the complainant with whom the prosecutors had a relationship. Moreover, this was in a situation where the NPA would not have prosecuted but for the insistence and the funding. In *S v Tshotshoza* 2010 (2) SACR 274 (GNP), the issue was about the appointment of the specific prosecutor who had a relationship with the complainant by virtue of him having given the complainant legal assistance in certain cases against the accused. In *S v Delport* Case No: 18/2009 (North Gauteng High Court), which was later heard by the SCA (*Delport v S* 2015 (1) SACR 620 (SCA)), the challenge was based on the fact that the prosecutors had not been properly appointed. In the three cases, therefore, the challenge was not directed at the constitutionality of section 38 of the *Act*, but the manner in which it was applied in these cases. For further discussion of some of the cases, see Joubert 2011:51-53.

22 *Bonugli v Deputy National Director of Public Prosecutions* 2010 (2) SACR 134 (T).

23 *Bonugli*:140 A-J.

24 *Bonugli*:137 A-C.

25 *Bonugli*:144 A.

26 *Bonugli*:139 H.

27 *Bonugli*:140 G-H.

28 *Bonugli*:140 F-J.

29 *Bonugli*:140 G-I.

dismissed this ground, because, according to the court, the available evidence showed that the DPP did take these considerations into account when making the decision.<sup>30</sup> Even the written agreement between the two advocates and the NPA, presented to the court, showed that the dealings were common knowledge among the parties involved.<sup>31</sup>

The second ground was that the appointment of the two advocates was “unconstitutional and thus unlawful”.<sup>32</sup> The court found in favour of the applicants (accused) on this ground. The court’s finding was that the fact that the two advocates were funded by the complainant and prosecuted on the insistence of the complainant, created a reasonable apprehension of not acting without fear, favour, or prejudice.<sup>33</sup> This, it is submitted, was the crux of this judgement and, unsurprisingly, it was the deciding ground for the court in this case.

The third ground of the review was that the DPP acted irrationally in appointing the two advocates.<sup>34</sup> This ground is closely linked to the first ground,<sup>35</sup> because its essence was that, by appointing the two advocates while aware of their relationship with the complainant, the NPA acted irrationally.<sup>36</sup> The court rejected this ground without giving further explanation, but pointed out that it would be dealt with later when addressing the lawfulness of the decision, thereby – it is submitted – linking it to the second ground of the review.<sup>37</sup>

The accused were successful on the ground that there were reasonable grounds for apprehension of bias.<sup>38</sup> This favourable finding, therefore, related to the second ground of the review. The nature of the relationship between the prosecutors and the complainant played a major role in this decision. As Du Plessis J pointed out, the NPA admitted that it would not have prosecuted had it not been for the funding by the complainant who funded the whole prosecution<sup>39</sup> and the prosecutors had previously been involved in legal work for the complainant against the accused.<sup>40</sup> The court considered these factors and found that they provided a reasonable ground for apprehension of bias against the accused.<sup>41</sup> The court also stated that it was even possible for the prosecutors’ bias to be an unconscious one.<sup>42</sup> Du Plessis J put it as follows:

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30 *Bonugli*:140 G-H.

31 *Bonugli*:140 A-J.

32 *Bonugli*:141 B-C.

33 *Bonugli*:144 G-H.

34 *Bonugli*:140 J.

35 *Bonugli*:140 J.

36 *Bonugli*:140 J-141 A.

37 The second ground of review was that the appointment of the prosecutor was “unconstitutional and thus unlawful” (*Bonugli*:141 C).

38 *Bonugli*:14 C-145 D.

39 *Bonugli*:144 B.

40 *Bonugli*:144 B.

41 *Bonugli*:144 G.

42 *Bonugli*:145 A.

[T]he fact that someone else funds the prosecution cannot be objectionable. In this case, however, the advocates are paid by the complainant who urged the prosecution after it has been withdrawn and who is engaged in civil litigation with the trust whereof the first applicant is the only trustee. In my view a reasonable and informed person would on the basis of these facts already reasonably apprehend that the advocates would not throughout, albeit unconsciously, act without fear, favour or prejudice.<sup>43</sup>

## 2.2 Acceptable engagements

### 2.2.1 S v Tshotshoza

In the *Tshotshoza* case,<sup>44</sup> the NPA had engaged the services of a prosecutor who was not in its employ to prosecute cases related to bank and cash-in-transit robberies.<sup>45</sup> The banking community paid this prosecutor for his services.<sup>46</sup> The appellants challenged his role in their case, principally, because they found it inappropriate that he was not in the employ or control of the NPA. The accused argued that the appointment of the prosecutor was “unconstitutional and the accused did not enjoy a fair trial”.<sup>47</sup> They also based their challenge on the fact that the prosecutor had been involved in other cases against one of the accused.<sup>48</sup> They also raised the fact that he had a relationship with organisations outside the NPA and that this relationship affected his independence.<sup>49</sup> At the centre of the challenge, therefore, was the fact that the NPA did not control and direct the prosecutor, as required by section 38(4) of the Act.

The trial court found in favour of the accused on this challenge, but referred the decision to the High Court for review.<sup>50</sup> It is clear that, having found on behalf of the accused, the magistrate needed guidance regarding how to proceed with the matter. This is contained in the note

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43 *Bonugli*:144 G-I.

44 Hartzenberg J summarised the charges against the accused in this case as “... three counts of robbery with aggravating circumstances pertaining to an incident that happened on 13 February 2005 at First National Bank Pretoria, when allegedly the security guards were overpowered and threatened with fire arms, and R1,3 million and other items were removed. There are also charges of assault with intent to do bodily harm, kidnapping, possession of unlicensed firearms, malicious injury to property, housebreaking with intent to steal and of having contravened the provisions of sections 87 and 88 of the Electronic Communications and Transactions Act, No. 25 of 2002 in respect of the same incident.”

45 *Tshotshoza*:par. 3.

46 *Tshotshoza*:par. 3.

47 *Tshotshoza*:par. 3.

48 See *Tshotshoza*:par. 13, where it is stated the prosecutor had “played a role in proceedings in Villiers and Kroonstad where accused 3 was involved, but which proceedings were not covered by his agreement with the NPA.”

49 *Tshotshoza*:par. 3.

50 *Tshotshoza*:par. 3.

that accompanied the review referral, which, as quoted by Hartzenberg J, stated the nature and purpose of the review as follows:

The matter comes before us by way of an order of a Regional Court magistrate. The order reads as follows:

“The matter herewith is referred to the High Court of South Africa, Transvaal Provincial Division (as it then was) at Pretoria for review by a judge. This court requests such higher authority to consider the further steps to be taken, be it that:

Proceedings be stopped

Proceedings start *de novo* ...

The finding of this court is reversed and it proceeds without further delay and/or any other order that honourable judge deems fit.”<sup>51</sup>

The full bench of the High Court was constituted to hear the case. The High Court held that the magistrate had misdirected himself in finding that the prosecutor was not under the control of the National Director of Public Prosecutions or the Deputy Director of Public Prosecutions, as required by the enabling legislation.<sup>52</sup> This was because there was an agreement between the prosecutor and the NPA, which outlined the responsibility of the prosecutor and the requirement for him to operate under the direction of the NPA.<sup>53</sup> This fact was also contained in the said prosecutor’s affidavit presented to the court, in which he stated, among others, that he was in liaison with either the Deputy Director of Public Prosecution or the senior prosecutor at the court where he was involved, and consulted such relevant people whenever making a decision. He also stated that he adhered to the NPA’s guidelines for prosecutors.<sup>54</sup>

In finding against the accused, the court distinguished this case from the *Bonugli* judgement that preceded it, because, while they were both prosecutions in terms of section 38 of the *Act*, they were based on different factual scenarios. The core of the difference between these two cases is that, in *Bonugli*, the complainant funded the prosecution and was also pursuing a civil case against the accused, while in *Tshotshoza*, the organisations responsible for the funding of the prosecution did not have such interest.<sup>55</sup> This was because Business Against Crime (BAC) and the South African Banking Risk Information Centre (SABRIC), as the organisations responsible for the funding, were not actively involved in the prosecution and did not have a particular interest in the case of the particular accused. Theirs was a broad and general effort aimed at dealing with crime affecting the banking sector. The court explained the role of the funders as follows:

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51 *Tshotshoza*:par. 1.

52 *Tshotshoza*:par. 28.

53 *Tshotshoza*:paras. 3 & 28.

54 *Tshotshoza*:paras. 3-4.

55 *Tshotshoza*:par. 20.



The business community was invited to join hands with the State in the fight against organized crime. The four major banks agreed to sponsor an initiative that would co-ordinate and centralize the investigation and prosecution of organized country-wide cash-in-transit robberies and bank burglaries. As a result of the initiative a prosecutor is engaged. He has no direct contact with any specific bank. There is no direct relationship between the contribution of any one bank and the number of prosecutions in respect of burglaries at that bank or robberies of cash-in-transit of that particular bank.<sup>56</sup>

The court, aptly, called their involvement “extra voluntary taxation”<sup>57</sup> and declared it as an acceptable contribution. This should be contrasted with the same court’s description of what it termed an unacceptable contribution, which refers to a contribution

... made with the object of having a public prosecution, where the NPA itself would not have prosecuted, and where the contributor arranges a form of control for itself over the prosecution ...<sup>58</sup>

The court, therefore, distinguished between cases where the prosecution is funded by a person or entity that has an interest in the specific case and seeks to control the prosecution and cases where the external funder merely makes funds available for the prosecution of cases without seeking to have control over the prosecution of such cases. This distinction, it is submitted, is significant, because the *Tshotshoza* challenge was heavily based on the court’s approach in *Bonugli*.<sup>59</sup> The reliance on *Bonugli* emanated from the fact that, in that case, role-players outside the NPA also funded the prosecution.

## 2.2.2 Porrit v National Director of Public Prosecutions

In *Porrit*,<sup>60</sup> the accused faced tax-related charges<sup>61</sup> in the South Gauteng High Court. The prosecution team consisted of a Deputy Director of Public Prosecutions, and another prosecutor who was not in the employ of the state and was appointed in terms of the provisions of section 38 of the *Act*.<sup>62</sup> The accused challenged the titles of both prosecutors to prosecute in the case.<sup>63</sup> The challenge against the appointment of the prosecutor not

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56 *Tshotshoza*:par. 22.

57 *Tshotshoza*:par. 20.

58 *Tshotshoza*:par. 20.

59 As the court stated, “[t]he application was made because of the decision of Du Plessis J in the unreported matter of *Beulah Evelyn Bonugli and Another v Deputy Director of Public Prosecutions and four Others*, case no. 17709/2006 delivered on 1 February 2008 in this division” (par. 5).

60 *Porrit* [2015] 1 All SA 169 (SCA).

61 Tshiqi JA summarised the charges against the accused as “... more than 3000 counts involving contraventions of the Income Tax Act and the Stock Exchange Control Act, as well as racketeering and fraud” (par. 1).

62 *Porrit*:paras. 1-3.

63 *Porrit*:par. 2.

in the employ of the NPA was threefold. The first ground was that there was no consultation with the Minister, as required by section 38(1); the second, that his appointment was "... in breach of the appellants' fair trial rights as encompassed in s 35(3) of the Constitution",<sup>64</sup> and thirdly, that his appointment was

... in conflict with the provisions of section 32(1) of the NPA Act, which provides, inter alia, that a member of the prosecuting authority shall serve impartially and carry out his or her duties and functions without fear, favour or prejudice.<sup>65</sup>

The challenges regarding the prosecutor, who was an employee of the NPA, were that he had been tainted by supporting the appointment of the prosecutor not in the employ of the NPA and that he had "... assisted in the drafting of an affidavit in support of an application for the liquidation of a company in which the first appellant was involved".<sup>66</sup>

The High Court decided in favour of the accused and ordered that the two prosecutors be removed from the case.<sup>67</sup> In essence, the High Court accepted all the grounds presented by the accused except one, namely the ground that there had not been proper consultation as required by the Act. The court found that there had been proper consultation.<sup>68</sup> The court reasoned that:

There is no reasonable explanation before the court why as a prosecutor employed with the NPA, he [Ferreira] would be involved in drafting an affidavit in respect of a civil matter. The affidavit is clearly a response to the first applicant's [Porrit's] allegations in the liquidation application ... Having regard to the contents of the affidavit (directed at opposing or contradicting the first applicant's affidavit) as well as his role in the appointment of the third respondent (in light of SARS's proposal) his conducts reasonably create a perception of bias/partiality.<sup>69</sup>

The state, on a reserved point of law,<sup>70</sup> then approached the SCA. The SCA had to make a decision on the question of law, which was formulated as:

- a. What is the legal test to be applied, either in terms of section 106(1)(h) of the CPA, or the common law, for the removal of a prosecutor, and
- b. Was this test correctly applied by the trial court on the facts as found by the court?

Regarding the first question of law raised, the court found that section 106(1)(h) did not apply to the case. Consequently, the accused were not

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64 *Porrit*:par. 2.

65 *Porrit*:par. 2.

66 *Porrit*:par. 2.

67 *Porrit*:par. 4.

68 *Porrit*:par. 4.

69 *Porrit*:par. 4.

70 *Porrit*:par. 10.

entitled to an acquittal. Moreover, the court also expressed reservations as to whether, even if section 106(1)(h) was applicable, the accused would have been entitled to an acquittal. In essence, the court's reasoning was that the prosecutors were not removed from the case because of the lack of title to prosecute. Instead, they were removed because of apprehension of bias on the part of the accused.

On the second question of law, namely whether the court *a quo* had applied the correct test in removing the prosecutors, the SCA found that the High Court had employed a wrong test in the case. The court found that the court *a quo* was wrong to apply the test formulated in *President of the Republic of South Africa v South African Rugby Union*<sup>71</sup> which is applicable to presiding officers.<sup>72</sup> Instead, the correct test is the less stringent one applied in *Director of Public Prosecutions, Western Cape v Killian*,<sup>73</sup> where a prosecutor who had participated in the investigation of the case was allowed to prosecute. The test applied in respect of presiding officers is different from the one that should be applied to prosecutors.<sup>74</sup> This is basically because of the difference in their roles and, significantly, because the prosecutor does not make final decisions in the trial, while a presiding officer does. In any event, to an extent, the nature of the criminal justice system is such that it makes prosecutors partisan in that, when they prosecute, that decision often follows their conviction based on the evidence available regarding the guilt of the accused. Tshiqi JA, writing for the unanimous bench in *Porrit*, aptly put the position of the prosecutor in this regard as follows:

In an adversarial criminal justice system such as ours, it is inevitable that prosecutors will be partisan. They conduct the case for one of the sides in a trial, namely the State, as representing the citizenry. They often carry out their prosecutorial functions vigorously and zealously. A prosecutor's role in a criminal prosecution therefore makes it inevitable that he or she would be perceived to be biased. Prosecutors usually approach criminal prosecutions with a view, sometimes a very strong view, that accused persons are guilty. That is permissible subject to the caveat that they must not prosecute in single-minded pursuit of conviction.<sup>75</sup>

### 3. Uncertainty? Delport v S

In *Delport v S*,<sup>76</sup> the accused were facing "multiple charges, including fraud and racketeering".<sup>77</sup> The prosecution was conducted by two prosecutors

71 *President of the Republic of South Africa v South African Rugby Union* 1999(4) SA 147 (CC).

72 *Porrit*:par. 10.

73 *Director of Public Prosecutions, Western Cape v Killian* 2008(1) SACR 247 (SCA).

74 *Porrit*:paras. 13-14.

75 *Porrit*:par. 13.

76 *Delport v S* 2015 (1) SACR 620 (SCA).

77 *Delport*:par. 2.

who were not employees of the NPA. One prosecutor was an employee of the South African Revenue Service (SARS) and the other an advocate in private practice.<sup>78</sup> After the close of the state case, the magistrate *mero motu* directed the parties to prepare heads of argument “on the applicability of the principle enunciated”<sup>79</sup> in *Bonugli*. Subsequently, some of the accused changed their plea of not guilty to a special plea challenging the prosecutors’ title to prosecute.<sup>80</sup> The magistrate granted the application for change of plea and, ultimately, set the appointment of the prosecutors aside and acquitted the accused.<sup>81</sup>

The state noted an appeal against the magistrate’s decision. Later in the appeal judgement, Cachalia JA stated the basis of the appeal to the High Court thus:

There were six questions the High Court identified the magistrate as having considered in arriving at his decision. These were:

1. Whether an accused may at any stage during a criminal trial raise a plea in terms of section 106(1)(h) of the CPA even though section 106 in terms permits the plea to be raised when the accused pleads to the charge – in other words before the trial commences;
2. What legal consequences follow in the event of a court upholding such a plea in those circumstances;
3. What in law is to be understood by the expression ‘engage, under agreements in writing’ as it used in sections 38 (1) and (3) of the NPA Act;
4. Whether a person appointed in terms of section 38 requires written authorisation in terms of section 20(5) to institute and conduct prosecution;
5. In the event of this question being answered affirmatively, whether, in addition, the authorisation must, in terms of section 20(6), specify the area of jurisdiction, the offences and the court or courts in which the powers are to be exercised; and
6. Whether a person appointed in terms of section 38 must also take the oath or make an affirmation in the terms prescribed in section 32(2).<sup>82</sup>

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78 *Delport*:par. 3.

79 *Delport*:par. 5.

80 *Delport*:par. 9. For contextual purposes, it should be stated that, before granting the order setting the appointment of the two prosecutors aside, the magistrate referred the case “to the High Court for special review, the effect of which was to suspend the trial” (*Delport*:par. 6). However, the High Court remitted the matter back to the trial court without considering the merits, as “there were no proper grounds for the magistrate to have referred the case for review before the conclusion of the trial” (*Delport*:par. 7).

81 *Delport*:par. 9.

82 *Delport*:par. 11.

The High Court found in favour of the state on the basis that the appointment of the prosecutors “substantially complied with the requirements of the NPA Act”.<sup>83</sup> This is when the accused appealed to the SCA. The SCA struck the appeal from the roll<sup>84</sup> for two related reasons. The first was that, after explaining the requirements for appealability where a trial had not been concluded, the court found that such requirements had not been met.<sup>85</sup> The second reason was that the issue of the appointment of the prosecutors was not before the SCA. As Cachalia JA put it:

... the High Court granted leave on very limited grounds, which did not include its principal finding – and which is the *ratio decidendi* of the judgment – that the appointment of the prosecutors substantially complied with s 38 of the NPA. This means that this court has no jurisdiction to consider the appeal.<sup>86</sup>

The SCA, consequently, did not delve into the six issues as identified earlier. It did, however, touch on a number of the issues briefly without expressing itself definitely on them. For instance, the court expressed its doubts as to whether any challenge by the appellants to the High Court’s finding that “the appointment of the prosecutors substantially complied with s 38 of the NPA” was likely to succeed.<sup>87</sup> It did not make a finding in this regard and this, it is submitted, was a logical approach, as the issue was not before court. From this perspective, this decision does not make any meaningful contribution regarding the constitutionality or otherwise of section 38.

Another issue on which the SCA expressed itself without delving further is the relationship between the *Bonugli* and *Porrit* judgements. In this regard, the court stated:

Appellant six has now withdrawn his appeal to this court in light of its recent ruling in *Porrit v NDPP* which implicitly overrules the High Court’s ruling in *Bonugli* and removes any legal basis for challenging the prosecutors’ title on the ground of perceived bias because of their association with SARS.<sup>88</sup>

It is submitted that the court does not seem to have appreciated that *Bonugli* is distinguishable from *Porrit* in material respects. In *Bonugli*, the prosecutors were funded by the complainant who was not a state organ and the prosecutor was not under the control of the NPA. In *Porrit*, the court was at pains to explain the status of SARS as an organ of state, which puts it in a different category from other complainants who fund prosecutions. As Tshiqi JA stated, “to the extent that SARS has any direct interest in any prosecution, its interest is no more than that of the

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83 *Delport*:par. 12.

84 *Delport*:par. 44.

85 *Delport*:par. 39.

86 *Delport*:par. 40.

87 *Delport*:par. 40.

88 *Delport*:par. 38.

NPA”.<sup>89</sup> It is submitted that the appellant who withdrew his appeal because of the *Porrit* decision was correct. However, that is not because *Porrit* overruled *Bonugli*, but because the circumstances of *Delport* mirrored those of *Bonugli*. In both *Porrit* and *Delport*, SARS was involved as the complainant, while in *Bonugli*, the complainant was an entity outside the state. The difference between *Bonugli* and *Porrit* seems to have been better appreciated in *Moussa*, where the court stated that *Bonugli* “was decided on its own facts and was primarily concerned with the funding of a prosecution”.<sup>90</sup>

#### 4. SCA’s approach in *Moussa v S*

In *Moussa v S*,<sup>91</sup> the accused faced fraud charges<sup>92</sup> in the Gauteng Local Division of the High Court. In order to prosecute him, the NPA engaged the services of an advocate not in the employ of the NPA, but in private practice.<sup>93</sup> He was appointed on the basis of his experience and expertise in the prosecution of crimes of this nature in terms of the provisions of section 38 of the *Act*. The appellant, however, challenged the title of the said prosecutor right at the start of the trial.<sup>94</sup>

The first challenge manifested in a demand for the said prosecutor to produce proof that he had been duly appointed to prosecute the matter, which he did.<sup>95</sup> Once this challenge was overcome, the accused challenged the prosecutor on the basis that he had not taken the necessary oath required of all prosecutors.<sup>96</sup> The court found against the appellant on this issue, reasoning that section 32(1) did not apply to prosecutors appointed in terms of section 38.<sup>97</sup>

The accused then challenged the constitutionality of section 38, in that entrusting people outside the employ of the NPA with the responsibility to prosecute violated the requirement for prosecutors to act without fear, favour, or prejudice.<sup>98</sup> The court, again, found against the appellant on this challenge and this was when he approached the SCA.<sup>99</sup> In the SCA, the appellant challenged the constitutionality of section 38 of the *Act*. Eventually, the whole constitutional challenge revolved around the interpretation of section 32(1)(a) of the *Act* because, while the constitutional challenge was against section 38 of the *Act*, section 32(1)(a) also played a

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89 *Porrit*:par. 19.

90 *Moussa*:fn. 4.

91 *Moussa v S* 2015 (2) SACR 537 (SCA).

92 The charges were: “16 counts of fraud, alternatively, three counts of theft and three counts of money laundering in terms of the provisions of the Prevention of Organised Crime Act 121 of 1998” (see par. 1 of the judgement).

93 *Moussa*:par. 6.

94 *Moussa*:par. 6.

95 *Moussa*:par. 4.

96 *Moussa*:par. 6.

97 *Moussa*:paras. 26-30.

98 *Moussa*:par. 11.

99 *Moussa*:par. 11.

prominent role in the case, because section 32(1)(a) contains the precepts that the appellants argued had been violated. In any event, the SCA understood the issue before it as that the independence of the prosecutor was challenged, because he had not taken an oath or affirmation.<sup>100</sup> That framing of the issue, it is submitted, put it squarely within section 32(1)(a) which states:

A member of the prosecuting authority shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law.

It is clear that the two main issues the SCA focused on, namely the taking of an oath or affirmation and the requirement for prosecutors to perform their duties without fear, favour, or prejudice, are contained in section 32(1)(a) of the *Act*. They are, therefore, dealt with in turn.

#### 4.1 The taking of an oath or affirmation

The taking of an oath is an integral part of the criminal justice system, in that the majority of the role players in a trial take an oath at some stage before or during the trial.<sup>101</sup> Section 32(1) of the *Act* requires that prosecutors must take an oath or affirmation. However, this requirement refers to prosecutors in the employ of the NPA and not those engaged on an *ad hoc* basis for specific cases in terms of section 38 of the *Act*. There was some uncertainty regarding whether or not this requirement applied to prosecutors engaged in terms of section 38 of the *Act*. In *S v Phillips*,<sup>102</sup> the court found that the fact that prosecutors engaged in terms of the section had not taken an oath or affirmation was so irregular that it vitiated the proceedings and acquitted the accused.

The trial court (in *Moussa*), however, found that the requirement to take an oath or affirmation did not apply to prosecutors appointed in terms of section 38 of the *Act*. This means that it only applies to prosecutors in the employ of the NPA. The reason for this approach is articulated by the appeal court, which, in agreement with the decision of the trial court, stated:

I agree with the reasoning of the court below that prosecutors appointed in terms of s 38 of the NPA Act are statutorily required to perform their functions as part of the NPA, in the manner dictated by s 32(1)(a). The structure of the NPA Act is such that control and supervision are in place to ensure compliance with s 32(1)(a) and constitutional norms.<sup>103</sup>

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100 *Moussa*:par. 26.

101 For a detailed discussion of the purpose, origin and justification of the taking of oath, see Van der Schyff 2003:346-350.

102 *S v Phillips* 41/1899/2000 (Johannesburg Regional Court, unreported). For an incisive analysis of the *Phillips* case, see Watney 2009:577-589.

103 *Moussa*:par. 28.

The court bolstered its finding by referring to a number of foreign jurisdictions<sup>104</sup> that had been researched by counsel on the instructions of the court. The court summarised the findings of the research as follows:

The note had regard to legislation and case law in England, Canada, the United States of America, India and Australia. It is clear that the appointment of outside prosecutors is not unique to South Africa. We were informed that counsel could find only one local jurisdiction (the Canadian province of Quebec) that requires an outside prosecutor to take the same oath as that required of a permanent state prosecutor.<sup>105</sup>

Consequently, the court rejected the appellant's argument that the court understood as tying prosecutorial independence to the taking of an oath. The thrust of the court's view is that the taking of an oath does not necessarily determine the independence of a prosecutor. It is, rather, "[t]he manner in which prosecutions are initiated and conducted that is the test of prosecutorial independence".<sup>106</sup>

## 4.2 Without fear, favour, or prejudice

The notion that prosecutors must perform their duties and responsibilities without fear, favour, or prejudice has never been contested. This is the fundamental principle that permeates the criminal justice system. The United Nations' Guidelines on the Role of Prosecutors<sup>107</sup> states that:

Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.

Prosecutorial independence entails that the prosecutor should not be unduly influenced by anyone or anything in making decisions in the process of prosecuting a case, right from the beginning to the finalisation of the case. As Mokoena put it "... prosecutorial independence is a crucial component in advancing the right to a fair trial".<sup>108</sup> Prosecutorial independence, however, is often linked to the insulation of prosecutors from political interference.<sup>109</sup> While it is correct that prosecutorial independence is aimed at insulating the prosecutor from political interference, the concept does not stop there, because it also includes, among others, undue influence

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104 *Porrit*:paras. 29-41.

105 *Porrit*:par. 31.

106 *Porrit*:par. 29.

107 *United Nations Guidelines on the Role of Prosecutors* 2014:3. See point 12 of the *Guidelines*.

108 Mokoena 2012:300.

109 For a discussion of Nicholson J's judgement in *Zuma v National Director of Public Prosecutions* (2009) 1 All SA 54 (N), where the High Court set a prosecutorial decision aside because of political interference that influenced such decision, see Bennun 2009:371-390.



from the complainant or other outsiders with interest in the case. The United Nations put it as follows:

This independence must also be maintained in the face of inappropriate pressure that may arise from the media and individuals or interest groups in the community or even the public as a whole.<sup>110</sup>

Prosecutorial independence goes with accountability. The United Nations makes it clear that independence is not the same as complete autonomy.<sup>111</sup> There is, therefore, space and need for prosecutorial accountability, which is ensured by the existence and adherence to specified mechanisms.<sup>112</sup> This includes accountability to the general public, the legislature and the executive.<sup>113</sup> In the South African context, this accountability to the executive is in the form of the Minister responsible for the administration of justice, having overall responsibility and oversight over the NPA.<sup>114</sup> The NPA is also accountable to Parliament<sup>115</sup> and the courts may review its prosecutorial decisions.<sup>116</sup>

The independence of the prosecutor relates to the exercise of discretion in prosecuting cases in a significant way. Jacoby summarised the significance of the prosecutor's role by stating that "[i]n every way the prosecutor has more power over the administration of justice than judges, with much less public appreciation of his power".<sup>117</sup> In the exercise of this discretion, which is an integral part of a prosecutor's work, there should not be any undue influence. The prosecutor, in exercising the discretion, should be guided by the principle of legality. This principle is contained in Article 11 of the United Nations Convention against Corruption, which states:

When instituting criminal proceedings, the prosecutor should proceed only when a case is well-founded, upon evidence reasonably believed to be reliable and admissible, and should not continue with such proceedings in the absence of such evidence. In court, the prosecutor should ensure that the case is firmly but fairly presented, and not beyond what is indicated by the evidence ...<sup>118</sup>

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110 United Nations Office on Drugs and Crime 2014:8.

111 United Nations Office on Drugs and Crime 2014:13.

112 United Nations Office on Drugs and Crime 2014:13-15.

113 The United Nations Office on Drugs and Crime (2014:13) put the position thus: "Prosecution services are accountable to the executive and the legislative branches of government, to the public and to an extent the judiciary."

114 For the content and meaning of the Minister's responsibility, see *Ginwala* 2008:96-98.

115 Section 35 of the Act.

116 *Brand JA* captured the nature of such a review by finding that, "although decisions not to prosecute are – in the same way as decisions to prosecute – subject to judicial review, it does not extend to a review on the wider basis of PAJA, but is limited to grounds of legality and rationality" (*National Director of Public Prosecutions and Others v Freedom Under Law* 2014 (4) SA 298 (SCA):par. 27).

117 Jacoby 1980:28.

118 As quoted by the United Nations Office on Drugs and Crime (2014:44). In the South African context, Nugent AJA (as he then was) explained the position

Thus, an independent prosecutor is one who makes a decision based solely on the evidence produced in the investigation. Ideally, once the NPA has decided that there is evidence on the basis of which there should be a prosecution, a prosecution should follow. However, as the cases discussed above illustrate, there may be other factors that make it difficult for the NPA to prosecute, despite the decision and will to do so. These factors include staff shortages, or lack of expertise within the organisation.<sup>119</sup> It is clear that section 38 of the *Act* was formulated to maintain independence and the accountability that goes hand-in-hand with it. On the one hand, it makes it possible for the NPA to acquire outside expertise when necessary and, on the other, provides mechanisms to ensure that the NPA remains in control of the prosecution, thereby remaining true to the Constitutional injunction that prosecution of crime is the responsibility of a single national prosecuting authority.

## 5. Conclusion

The value of *Moussa v S*, it is submitted, lies in that it confirmed the constitutionality of section 38 of the *Act*, which had, until this judgement, not been fully dealt with. As can be seen in all the cases referred to earlier, it was the constitutionality of this section that belied the challenges, even though it was not so presented to the courts. A reading of these judgements, it is submitted, reveals that the constitutionality of the section has always been the simmering issue. Hartzenberg J intimated this fact when he stated that:

It has not been argued that section 38 of the *Act* or any portion thereof is unconstitutional. It is difficult to conjure up possible arguments for such a contention. After all the Constitution acknowledges that there is crime and that criminals have to be prosecuted and punished and that for that purpose there has to be a prosecuting authority which has to take the necessary initiative in respect of the institution of prosecutions and the fulfilment of all necessary steps incidental thereto.<sup>120</sup>

This observation by the judge indeed manifested itself in the SCA during the *Moussa* case when counsel, according to Navsa, ADP, found it difficult to sustain an argument on the unconstitutionality of the section itself and reverted to the issue of oath instead.<sup>121</sup> The fact that this constitutional

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thus: "That is recognised by the common law principle that there should be 'reasonable and probable' cause to believe that the accused is guilty of an offence before a prosecution is initiated (*Beckenstrater v Rottcher and Theunissen* 1955(1) SA 129 (A) at 135C-E), and the constitutional protection afforded to dignity and personal freedom (s 10 and s 12) seems to reinforce it" (*S v Lubaxa* 2001(2) SACR 703 (SCA):par. 19). Similarly, Navsa ADP stated that "... a prosecutor must act with objectivity and must protect the public interest" (*Minister of Police v Du Plessis* 2014(1) SACR 217 (SCA):par. 34).

119 See Keuthen 2007:69-72; Watney 2009:577-589.

120 *Tshotshoza*:par. 18, quoted in *Moussa*:par. 16.

121 *Tshotshoza*:par. 26.

grey area, until this case, has been dealt with by the SCA, brings the necessary legal clarity to what seems to be an important resource of the NPA in carrying out its constitutional mandate.

Finally, it is submitted that this judgment's significance also lies in that it sets the test that is applicable to the removal of a prosecutor from a case, on the basis of lack of independence or reasonable apprehension thereof. Perhaps accentuating the murkiness that engulfed the removal of prosecutors and the concomitant need for clarity, as discussed earlier, the High Court had equated the test to the one applied in respect of presiding officers. The SCA found this approach to be incorrect and, instead, found the approach followed in the *Killian* case to be the correct one in respect of prosecutors. This entails that the standard of the test in respect of prosecutors is lower than that used for presiding officers when deciding their recusal from a case. The reasoning of the SCA in the *Porrit* case in this regard is as lucid as it is pragmatic in the context of an adversarial criminal justice system:

[T]he role of prosecutors in a criminal trial cannot be equated with that of magistrates or judges. Their duties, functions and responsibilities are different. In my view, the court a quo erred in applying the test enunciated in SARFU (above Paragraph 10) for the removal of the two prosecutors in this matter. The test applies where the recusal of a judicial officer is sought on the basis of apprehension of bias. The test applied should have been the one formulated in *Killian*.<sup>122</sup>

Based on the foregoing discussion, it is submitted that the legal position can be summarised as follows:

1. Section 38 of the *Act* is not unconstitutional;
2. The taking of an oath or affirmation is not required for prosecutors whose services are engaged in terms of section 38 of the *Act*, and
3. Prosecution by an outside prosecutor is not acceptable in a situation where the NPA would not have prosecuted but for the insistence, urging and/or funding provided by a complainant in respect of a prosecution conducted by a prosecutor who is not under the control of the NPA.<sup>123</sup> In such instance, the route followed should be private prosecution in terms of section 7 of the *Criminal Procedure Act*.<sup>124</sup>

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122 *Tshotshoza*:par. 21.

123 While the courts have not dealt with a situation where the funding is from an outsider who is not the complainant in the matter, it seems logical that, in line with the court's reasoning in both *Bonugli* and *Moussa*, the same test would be applied to make such an engagement unacceptable. For instance, if A is the complainant in a matter and the NPA decides not to prosecute and B comes forth with funding for a prosecutor, the appointment of such a prosecutor would be unacceptable on the basis of the rationale expounded in *Bonugli*.

124 For the difference between a section 38 and private prosecution, see Watney (2009:577), where the author explains the difference thus: "The prosecution conducted by a person engaged in terms of section 38 of the National Prosecuting Authority Act has to be distinguished from a private prosecution

This outlined legal position is subject to the overriding proviso that the procedural requirements laid down by sections 38(1) and 38(3) of the Act, depending on the nature of the prosecution, have been complied with. It must be stated that this does not mean that a complainant cannot urge, engage or insist that the state prosecute a particular case in which such a complainant has an interest. This remains the legitimate avenue of a complainant in line with the citizenry's expectations from a criminal justice system.<sup>125</sup> What is inappropriate is for such a complainant to fund and/or exercise control over the prosecution.

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in terms of section 7 of the Criminal Procedure Act 51 of 1977. It appears that section 38 is applied in respect of cases where staff attached to the prosecuting authority lack the necessary expertise or skills to conduct the prosecution in a specific case or where staff shortages necessitate such an appointment. Private prosecutions, on the other hand, may only be instituted upon the issuing by a director of public prosecutions of a certificate *nolle prosequi* and by the categories of private persons as specified in section 7(1)(a) of the Criminal Procedure Act." For the requirements for a private prosecution, see Du Toit *et al.* (2010:1-55-1-56).

125 Generally, see Van der Merwe (in Du Toit *et al.* 2010:48-50), who explains the origin and rationale of the state shouldering the responsibility to prosecute crimes.

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