

The Khampepe Commission

The future of the Scorpions at stake

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Introduction

The early years following the advent of democracy were fraught with a myriad of challenges. Broadly speaking, South Africa was confronted with the mammoth challenge of transforming the state from the racially discriminatory machinery of the erstwhile apartheid regime into a regime geared to cater for the needs and aspirations of the majority of its citizens. In the security realm, these early days were even more daunting; there was an urgent need to bring security and law enforcement agencies into line with the newly adopted Constitution, which enjoins all security apparatus to conduct their business in a manner that respects democratic rights and human dignity.

One of the key security challenges was the creation of a police service capable of protecting South Africans from all sorts of criminal threats. Unfortunately, while policy makers were working hard to achieve this goal, it was at the same time becoming clear that criminals were taking advantage of the vacuum created by the transformational tasks. The levels of crime were rising alarmingly, especially organised crime. Among others, this contributed to diminishing public confidence in the ability of the South African Police Service (SAPS) to deal with crime. It therefore became clear that some urgent intervention was necessary. It is within this context that discussions in government on the need to create a specialised organised crime-busting agency began to take place. This agency eventually turned out to be the Directorate of Special Operations (DSO), otherwise known as the 'Scorpions'. In September 1999, hardly a year in office as president, President Thabo Mbeki announced the creation of the Scorpions. Legislatively, this was made possible through the amendment of the National Prosecuting Authority Act of 1998. This was an indication of the seriousness of the challenge posed by organised crime as well as government's commitment to combating it.

Tempers ran high during the proceedings, since parties presented their arguments with a high degree of passion

However, the Scorpions have had a turbulent life since they started to operate in 2001. While general public perceptions of the DSO seemed positive, its relationship with the SAPS has not been good. The overlap of its work and that of the SAPS, as well as problems arising from its mandate, has led to the boiling of tensions between political principals and senior bureaucrats responsible for the security agencies. The investigation of high-profile politicians by the Scorpions, the DSO's aggressive media strategy and what others perceived to be an abuse of power, provoked negative reactions from a range of political actors. It is against this background that President Mbeki appointed Judge Sisi Khampepe on 1 April 2005 to head a commission of enquiry (known as the Khampepe Commission) to review the mandate and location of the DSO and make recommendations.

The Khampepe Commission conducted hearings at the end of 2005. Tempers ran high during the proceedings, since parties presented their arguments with a high degree of passion. It was particularly striking that the views of some political principals differed from those of their directors general on the same issues, making proceedings at the commission exceptionally interesting. While the hearings received extensive media coverage, very few from the research community have written to provide insights into the drama that unfolded during proceedings at the commission. This paper is therefore intended to fill this void. However, it does not purport to provide a legal analysis of arguments presented during the commission, but seeks only to offer a general overview of what was at stake during the proceedings. It is written in simple language to ensure that it is accessible to the public. The overall aim is to ensure that, before President Mbeki makes a pronouncement on the questions the commission dealt with, members of the public know how the proceedings unfolded.¹



Was the creation of the Scorpions necessary in the first place?

The Scorpions were established at a time that South Africa was fast becoming a playground for crime, especially organised crime. Criminal gangs and syndicates were taking advantage of the transition from apartheid to democracy. This became as much a matter of concern to the general South African public as it was to politicians. In his official opening of parliament address in 1999, President Mbeki expressed concern at this situation. He said that, "One of the central features of the brutish society we seek to bring to an end is the impermissible level of crime and violence."² But the government needed to do more than just express intolerance of the high levels of crime. In this regard, the president announced:

To enable our law enforcement agencies to translate this into reality, I am privileged to announce that a special and adequately staffed and equipped investigation unit will be established urgently to deal with all national priority crimes, including police corruption.³

Hardly three months after he made this promise, the president launched the Scorpions in Guguletu, Western Cape. In light of the latest developments that culminated in the formation of the Khampepe Commission, it is interesting to remember that the Ministry of Safety and Security was in full agreement with the president and enthusiastic about work pertaining to the operationalisation of the new investigative unit. The then Minister Steve Tshwete revealed the following details about the new agency:

As was indicated in the President's speech to parliament on Friday, a decision has been taken to ensure that the investigation of priority crimes receives better attention. Plans are already under way for the creation of a newly structured capacity for that purpose. The new structure will focus, with the back-up of highly skilled personnel, effective equipment and adequate resources, on intelligence gathering, investigation and the prosecution of persons and groups committing or involved in priority crimes. The relevant ministers and their senior structures are already in the process of setting up the new structure. I am confident that this initiative will establish the type of capacity that is necessary to give organised crime, particularly the criminal elements committing violent and commercial crime, a severe blow.⁴

It is also worth remembering, back in 1999, the view of the Ministry of Justice and Constitutional

Development regarding the establishment of the Scorpions. Mr Pennuel Maduna, former Minister, saw the rationale behind the establishment of the DSO as being necessitated by:

... the existence of corruption among certain officers in law enforcement agencies; the callous murder of police officers on duty; unsatisfactory standards of investigations which result in unacceptably low rates of conviction; and a general lack of an efficiently co-ordinated attack on organised and syndicated crimes by the investigation, intelligence and prosecution authorities.⁵

The debate leading to the establishment of the Scorpions was characterised by consensus on the need for the state to do something to stem the tide of crime that was fast engulfing the country. At the time, concerns about the new agency, expressed particularly by opposition political parties, revolved around the lack of public information about its nature. This therefore left the ground fertile for speculation on what the new unit would look like and how it would carry out its tasks. But, on the whole, the rationale for the creation of the agency was not contested.

Considering this consensus, a question arises: Did parties at the Khampepe Commission advance divergent views on the rationale behind the establishment of the Scorpions? The views of the main players who made presentations to the Commission may be summarised as follows:⁶

- *SAPS*: "The need for multi-disciplinary investigations into priority crimes such as transitional and other organised crime, as well as terrorism investigations."⁷
- *NPA*: "A combined effort was necessary to radically improve the safety and security of all our citizens."⁸
- *DG-NIA*: "In the public's eye, the formation of the DSO constituted a radical intervention by government to address the perceived inefficiency by the SAPS to combat rising levels of crime and the increasing targeting of South Africa by international syndicates."⁹
- *MI*: "The DSO was established to focus on 'offences or any criminal or unlawful activities committed in an organised fashion' or 'such other offences or categories of offences' as determined by the president by proclamation in the Gazette."¹⁰
- *MJ & CD*: "... the need to effectively deal with, inter alia, organised crime syndicates, corruption, post-TRC prosecutions and global issues around terrorism."¹¹

While these actors used different expressions to describe what they understood to be the rationale

behind the establishment of the Scorpions, the essences of their views converged. They all agreed that it was necessary in the first place to create an agency such as the DSO.

As pointed out earlier, the Khampepe Commission was not only an arena for players from government, but organs of civil society as well as political parties were also part of the fray. The Foundation for Human Rights (FHR) and the Institute for Security Studies (ISS) were among the key non-governmental organisations (NGOs) that made formal presentations to the commission. In the main, these civil society organisations did not deviate from the understanding of the major players as to what had led to the creation of the Scorpions. For example, the ISS argued that “the transition to democracy placed enormous burdens on the police. These resulted in part from the high level of criminality in the country that, even in the absence of other pressures, would have made managing the organisation difficult.”¹²

Given the centrality of the police force to the subject the Khampepe Commission was tasked to deal with, it is understandable that the Police and Prisons Civil Rights Union (POPCRU)¹³ was the only labour union that appeared before the commission. However, POPCRU did not deviate from the consensus that emerged on the rationale question.

Almost all parties that made presentations referred to the president’s 1999 parliamentary opening speech. However, while parties agreed on the rationale, the tone of their presentations, from the outset, gave clear signals that they would soon take different lines on other aspects pertaining to the life of the DSO. The major areas of divergence related to the interpretation of the mandate, and the location, coordination, modus operandi and performance of the DSO. Perhaps the unanimity about the rationale was a natural necessity, given that when the DSO was created, it was not anticipated that the Scorpions would find themselves in a situation where they had to deal with corruption cases involving high-ranking politicians from the party (ANC) that seemed united in its desire to prove that its government was capable of making strategic interventions to restore order in a society that was fast becoming crime-ridden.

The mandate of the DSO: a quagmire created by the legislators?

In its submission, the NPA reminded the commission of the DSO’s statutory mandate as being to investigate:

- Offences committed in an organised fashion;

- Such other offences or categories of offences as determined by the president by proclamation in the Gazette;
- Any criminal activities committed in an organised fashion;
- Any unlawful activities committed in an organised fashion;
- Any matter specified in an investigative directive issued in term of section 23(3) of the Prevention and Combating of Corruption Activities Act, 2004 (Act No 12 of 2004).¹⁴

In this regard, the investigative work done by the DSO, according to the NPA, has always been within the limits of the Scorpions’ mandate. No party disputed this view during proceedings at the commission. What was in contention, however, was the broad nature of the DSO’s mandate that inevitably led to an overlap between the Scorpions and the SAPS. Among others, it is this overlap that has upset the SAPS. The SAPS therefore submitted to Judge Khampepe that:

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Whilst the NPA Act provides for virtually unlimited extension of the NPA’s investigative powers, it is ironic that these rights do not diminish the obligations on the SAPS to perform these functions. In fact, the investigations undertaken by the relevant Investigating Directorate are largely discretionary in nature, a luxury which is not afforded the SAPS.¹⁵

For POPCRU, a solution to this problem was for Judge Khampepe to recommend to President Mbeki that “the intelligence and investigation capacities of the DSO ... be relocated under the auspices of the National Commission of the SAPS”.¹⁶

This view was also advocated by the SAPS. However, other organisations submitted that the commission should recommend the tightening up of the mandate. For example, the FHR “recommended the introduction of a more definitive statutory mandate which provides direction and which reduces the possibility of abuse of power ... Such a mandate should restrict the focus of the DSO to those criminal endeavours that are most threatening to society.”¹⁷ This recommendation is based on the view that the current mandate of the DSO creates space for the Scorpions to abuse power. But what the FHR proposes still appears unhelpful. Calling for the DSO to focus on acts of criminality that are most threatening is as broad as the definition of organised crime,¹⁸ which seems to be part of the problems that had led to the creation of the Khampepe Commission in the first place.

According to the FHR, the demarcation would make it clear to both organisations where their operational



boundaries begin and end. However, other players in the commission contested this view. While the ISS concurred with the FHR's observation that the DSO mandate "is wide and permissible",¹⁹ the ISS argued that attempting to change the mandate of the DSO would only serve to defeat the objective for which the DSO was created. The ISS alerted the commission to undesirable consequences that were likely to result from any tinkering with the current mandate. The ISS contended that:

Any attempt at establishing a prescriptive mandate for the DSO that would seek to eliminate all potential for conflict between it and the SAPS is bound to lead to time-consuming and energy-sapping procedural challenges in every court case the DSO might bring to trial. In every case, the accused person would seek to persuade the court that the DSO had no jurisdiction over the matter and that the case mounted against him or her was, for that reason, unlawful. The jurisdictional conflict between the SAPS and the DSO would, therefore, be eliminated at the expense of creating procedural difficulties for the organisation in court.²⁰

However, this view does not seem to address the fact that the current mandate of the DSO has led to serious conflict between the SAPS and the Scorpions. Also, suggesting that the mandate should be left as it is would imply the perpetuation of the problem. The practical operational difficulties experienced by the SAPS as a result of the current DSO mandate include:

The practice whereby existing police investigations are "taken over" by members of the Investigating Directorates and whereby a Provincial Commissioner was for example summoned to appear before an Investigating Director to hand over police dockets which were in an advanced stage of completion is not only a blatant abuse of the powers granted to the Investigating Director in terms of section 28 of the Act, but seriously brings into question who in fact is ultimately responsible for the successes achieved.²¹

It was against this background that the SAPS felt that this situation should not be condoned and, since it arose because of the DSO mandate, something needed to be done. However, the challenge was: How do you tighten up the mandate without curtailing the work of the DSO?

Of all those who made presentations before the commission, none came up with a concrete proposal

on what a new mandate for the DSO would include. For the SAPS, the solution lay in incorporating the DSO into the police service. The NPA, on the other hand, submitted that amending the Scorpions' mandate was not the way to go, but that the solution lay "in establishing a proper and functioning working relationship with the SAPS".²²

From the NPA's proposal, the question arose: Is there value to be derived from the existence of two organisations (the SAPS and the Scorpions) that carry out similar functions? This question is important, given that the Scorpions were established largely as a result of the failure of the SAPS to deal effectively with organised crime in South Africa. In this regard, the SAPS argued that its specialised units had developed the capacity they did not possess at the time that the Scorpions were conceived, and it had therefore become unnecessary for the Scorpions to continue existing independently of the SAPS. This argument was interpreted by the NPA as proposing the disbandment of the DSO. For this reason the NPA was quick to remind the Khampepe Commission that it was "tasked with the making of recommendations pertaining, inter alia, to the location and mandate of the DSO and there is nothing in the terms of reference authorising the Commission to enquire into its disbandment".²³ Therefore, the NPA sees the role of the DSO as being complementary to that of the SAPS and believes that this should be enhanced by more effective coordination.

It should be noted that the question of mandate not only was contentious in relation to the DSO and the SAPS, but also affected the intelligence community. The statutory mandate provides for the DSO to "gather, keep and analyse information", which means the operational jurisdiction of the DSO encroaches on the territory of the crime intelligence arm of the SAPS, and reaches into the areas of authority of other intelligence bodies such as the NIA (National Intelligence Agency). For this reason a number of actors from the intelligence community also devoted their energies to making presentations to the commission. These included the Minister of Intelligence, the Director General for the NIA, the Inspector General of Intelligence, and the Coordinator for the National Intelligence Coordinating Committee.

While the presentations of these actors differed in tone, they were united in agreeing that the main problem, at least as far as intelligence is concerned, is the legislative gap that allows the Scorpions not to account directly to and become coordinated through regulatory mechanisms governing the operations of the intelligence community. For this reason the

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Inspector General of Intelligence recommended that the DSO “must be duly empowered by legislation”²⁴ to carry out its intelligence functions. In this regard, the Minister of Intelligence specifically recommended the amendment of the “Intelligence Oversight Act to include the DSO within the ambit of the oversight of the Inspector General for Intelligence and the Joint Standing Committee on Intelligence” as well as “amendments to the National Strategic Intelligence Act to provide for the National Intelligence Coordinating Committee (NICOC) to coordinate the intelligence activities of the DSO”.²⁵ It is important to note that some damage control was done by the Coordinator for Intelligence shortly before the Khampepe Commission. When asked by the judge as to whether the DSO sat on the NICOC or not, the Coordinator for the NICOC indicated that the Scorpions had been invited in June 2005 and had joined the NICOC the following month, although the existing legislative frameworks did not specifically acknowledge the existence of the DSO. It should be noted, however, that when the two important pieces of legislation were enacted in 1994 (the National Strategic Intelligence Act and the Intelligence Oversight Act), the DSO had not been contemplated. For this reason these two pieces of legislation revolve around the coordination of the NIA and the South African Secret Service (SASS), departmental intelligence functions as well as the intelligence arms of the SAPS and the South African National Defence Force (SANDF).

The proposal of the intelligence community is congruent with that of the NPA in as far as intelligence is concerned. Given this consensus, it would appear easy for Judge Khampepe to recommend the amendment of relevant legislation. However, this would not resolve problems arising from the location of the DSO (as perceived by the SAPS) and its modus operandi. If this problem is not addressed, it would appear as though the objective for setting up the commission had not been achieved.

The question is whether better coordination between the SAPS and the Scorpions can be achieved? While the NPA believes that this is possible, its political principal, the Minister of Justice and Constitutional Development, believes that “it will not be possible to achieve cooperation between the DSO and the SAPS”.²⁶ This observation came as a surprise to many observers since, according to section 31(1) of the NPA Amendment Bill, the Minister is the head of the Ministerial Coordinating Committee (MCC)²⁷. It was widely expected that, being the political head of a ministry that houses the DSO, the Minister would be the first to argue against the proposed movement of the DSO to the SAPS. The willingness of the Minister

to sacrifice the DSO came as a huge surprise and could be likened to a parent allowing kidnappers to abduct his or her own child. Most observers therefore suspected that the Minister may have been given a political instruction from her political party (ANC) or elsewhere not to defend the Scorpions. It is partly owing to this that the Khampepe Commission took on the aspect of a drama full of suspense.

In the end, three proposals emerged: incorporate the Scorpions into the SAPS and solve the problem arising from its broad mandate; leave the mandate as it is and improve coordination; or amend existing intelligence legislation to ensure accountability and coordination of the activities of the Scorpions. Which route will Judge Khampepe recommend and which one will the president prefer?

Location of the DSO: taming a loose dog?

One of the specific areas about which President Mbeki sought advice is the location of the DSO. Put crisply, the president sought an answer to the question whether the Scorpions should continue to be located within the NPA or be moved to the SAPS? This question arose partly because of operational problems between the two organisations and partly because of concerns expressed by senior politicians from the ANC and its alliance partners who felt that the Scorpions were being used to settle political scores by those at the helm of state power. In this regard, some high profile cases investigated by the Scorpions were sometimes interpreted as a battle between political bulls. Jean Redpath observed:

For some time in August 2003 there was speculation in the media over whether either or both the DSO and the national director [of the NPA] would survive the political fallout: his [the Director] decision not to prosecute Zuma but to allege publicly that there was prima facie evidence against the deputy president attracted much discussion and speculation.²⁸

Indeed, at the time the DSO was subjected to fierce criticism, with some accusing it of employing ‘Hollywood tactics’²⁹ in its handling of cases. The publicisation of the cases it handled was also mentioned during proceedings at the Khampepe Commission as cause for concern. In its presentation, the SAPS even accused the DSO of following an approach that allows it “to select cases where ‘media interest and coverage’ were certain”.³⁰ It should be noted that this concern was not only registered by actors from government, but civil society groupings shared the SAPS’s concern. For example, the FHR presented to the commission

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that they were “concerned with the somewhat ‘flashy’ public image that the DSO has developed over the years”.³¹ It should be said, however, that this appeared more of a problem to political observers than to those who were concerned about the technical aspects of the DSO’s work. While the media question was registered as a concern by a number of actors, those favouring the retention of the DSO within the NPA merely advised that the Scorpions’ media strategy should be improved and that the DSO should not make media statements until cases had been finalised.

Political considerations and media drama aside, technical arguments were presented for and against the possible incorporation of the DSO into the SAPS. The crux of the SAPS’s argument was that section 199 of the Constitution provided for the creation of a single police service. Therefore, all the police functions performed by the DSO were unconstitutional and this situation should be corrected by incorporating the DSO into the SAPS. Actually, the SAPS argued that the Scorpions, among others, were created as a result of the “previous National Commissioner of the South African Police Service’ having ‘identified the need for the establishment of a specialised investigative capacity within the South African Police Service’”.³² However, this position was fiercely contested by the NPA. The NPA went to great lengths in order to cite court cases where judges had ruled in validation of the constitutionality of the DSO. At some point the commission seemed to be the site for the battle of constitutional interpretations. Both the DSO and the SAPS were well armed with legal heavyweights to defend their side of the story. Small players such as NGOs also clamoured for attention, largely arguing in support of the DSO’s position.

The other big question on the location debate was whether the SAPS had the best environment to accommodate the DSO’s prosecution-led and intelligence-driven investigations. For the DSO, prosecution-led investigations are critical to securing convictions because:

When prosecutors are involved from the start, they can provide guidelines relating to those aspects on which the investigators should concentrate, in order to secure a *prima facie* case and successful prosecution.³³

Against this background, the DSO argued that it was (and still is) important to locate the DSO within the NPA as it is the home of prosecutors. Organisations such as the ISS supported this view, also persuading Judge Khampepe to consider ‘cop culture’ a possible hindrance to the work of prosecutors. They alerted

the commission to the likelihood of internal problems arising from a transplantation of the DSO in its current form into the SAPS. They argued, for example, that it would be:

... extremely difficult for the Police Service to manage the inevitable tensions that arise when the members of one of its units are paid more and are better resourced than are other members who may well be doing comparable work.³⁴

From the SAPS’s perspective, if the DSO were to be incorporated into it, the situation where members of the DSO were paid more and were better resourced would not arise since DSO members would be treated in the same way as their colleagues within the SAPS. During his presentation, the National Commissioner of the SAPS expressed confidence in the work done by the Serious Economic Offences Unit (SEOU), thereby implying a possible infusion of the DSO into the SEOU, should President Mbeki take a decision to incorporate the DSO into the SAPS. An indication

was therefore made to the Khampepe Commission that prosecutors would not be accommodated in the SAPS – a clear signal of a possible abandonment of the prosecution-led approach currently followed by the Scorpions. Actually, the National Commissioner did not mince his words: “The South African Police Service is not at all in favour of a prosecution-led approach.”³⁵

Interestingly, players from the intelligence community did not comment on the location question – from the Minister of Intelligence, the Coordinator of Intelligence to the Inspector General of Intelligence. These actors confined their

presentations to matters related to the intelligence functions of the DSO and to intelligence coordination and the accountability of the DSO. The only player from the intelligence community who said something about the location of the DSO was the Director General of the NIA. While his presentation focused predominantly on what he thought were intelligence problems arising from the DSO’s work, he finally recommended to Judge Khampepe that:

Relocation could result in improved oversight and control, while changes to the mandate would ensure more functioning in cooperation with other statutory structures.³⁶

Essentially, this recommendation concurs with that of the SAPS. In this regard, it is important to note that the recommendation of the Director General of the NIA is not in line with his Minister. However, this was not a unique situation in government departments. The

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Minister of Justice and Constitutional Development also recommended that a reconsideration of the location of the DSO was due – a recommendation that ran counter to that made by the NPA. These are some of the things that made attendees at the Khampepe Commission expect surprises each day. More importantly, because the bureaucrats and Ministers involved were all senior members of the ANC, it could be suggested that they mirrored a schism within the ruling party regarding the future of the Scorpions. Other observers may construe it to suggest that those from within the ANC who were for the relocation of the Scorpions saw the DSO as a loose dog in need of taming, while those who favoured the status quo viewed the Scorpions as an important instrument through which to weed out corrupt comrades. However, Judge Khampepe should be commended for always brushing aside political insinuations and focusing on the technical merits and demerits of presenters' arguments. It is against this background that she kept on interjecting while a representative of the Democratic Alliance (DA) was presenting.³⁷ Thus, to her frustration, the DA presenter was always steered away from political innuendos and back to factual technicalities.

In the end, Judge Khampepe was left with two options on the basis of which to make a recommendation to the president: maintain the status quo or relocate the DSO to the SAPS.

The intelligence community, the SAPS and the DSO: Is an overlap avoidable?

When enacting legislation to regulate the existence of the Scorpions, parliament was fully aware that the new investigative agency's work would inevitably straddle the terrains of the SAPS and the intelligence community. It was envisaged that the investigative functions of the DSO as set out in section 7(1)(a) of the NPA Act would entail aspects of the work done by the SAPS. It was also foreseen that the information-gathering function of the new unit would sometimes intersect with the work of the intelligence structures.³⁸ As an attempt to avert foreseen conflicts arising from the conflation of roles, parliament built into the Act a conflict-prevention mechanism in the form of the Ministerial Coordinating Committee (MCC) as provided for in section 31. According to the Act, the MCC is chaired by the Minister of Justice and comprises cabinet members responsible for Correctional Services, Defence, Safety and Security and Intelligence. The committee's responsibility, among others, is to determine:

- Policy guidelines in respect of the functioning of the DSO;
- Procedures to coordinate the activities of the DSO and other relevant government institutions;

- The responsibility of the DSO in respect of certain matters;
- The further procedures to be followed for the referral or assigning of any investigation to the DSO;

There is little doubt that if the Ministerial Coordinating Committee (MCC) had met regularly and performed all the responsibilities bestowed upon it by the Act, some of the conflicts between the SAPS and the Scorpions could have been averted. Trying to understand whether the MCC acted in accordance with its legislative responsibility, Judge Khampepe requested the Minister of Justice to inform the commission as to when and how many times the committee had met since its inception. The following dates are as provided by the Minister:

- 1 June 2004
- 8 June 2004
- 3 November 2004
- 9 November 2004
- 9 December 2004
- 3 August 2005³⁹

It is clear from these dates that the MCC started to meet very late in the life of the DSO (the DSO began its work in 2001). The most important question is whether the Ministers performed their duties as per the Act at these meetings? It would be fair to say that they did not. The Minister of Justice reported to Judge Khampepe that the relationship between the Scorpions and other relevant state organs was bad and was already in the public eye and as a result "it was difficult to focus the discussions on developing and finalising the guidelines, as envisaged in section 31".⁴⁰

Other government actors gave a variety of reasons as to why the MCC could not perform its duties. For example, the National Commissioner of the SAPS thought that the MCC was destined to fail since, in the first place, it was not chaired by the right Minister. He further contended:

Institutionally it is unacceptable that another organization or body be responsible for the investigation of crimes which are a priority, both from a national and international perspective, whilst that body politically falls under another Minister, namely the Minister of Justice and Constitutional Development.⁴¹

At a lower level, the NPA presented to the commission that: "The Head of the NDPP ... met on various occasions with senior members of the SAPS in order to discuss efficient cooperation between the NPA and the SAPS. The drafting of concept guidelines for submission to the Ministerial Coordinating Committee was, among others, on the agenda of these discussions."⁴² But the

SAPS was quick to dismiss this claim and referred to the draft guidelines as having been developed by the NPA unilaterally. Accusations and counter-accusations aside, it was clear during the proceedings of the commission that at some point there was a breakdown in the relationship between political principals who were to sit on the MCC and their officials who were to provide technical support for the coordination envisaged in section 31 of the NPA Act. It was, among others, this situation that led the Minister of Justice to recommend to the commission that the location of the DSO should be reconsidered.

But the NPA proposed that the MCC could still perform its duties in spite of the turbulence that rocked relations among its members. Other actors submitted that a similar “body with mixed composition of executive and independent civil society members is the answer”.⁴³ However, it would be statutorily difficult to entrust a committee constituted of independent civil society with the responsibility of handling intelligence-related issues, especially since most of the actors from the intelligence community proposed that in order to improve intelligence coordination and accountability, the Scorpions should be brought under the legislative framework regulating intelligence agencies.

When all was said and done, Judge Khampepe was left with two proposals on her table. The first recommendation was that by relocating of the DSO into the SAPS, all the coordination problems that bedevilled the MCC and relevant bureaucrats would be resolved. This, it was suggested, would also resolve accountability complications arising from the DSO as a stand-alone investigative agency, since the SAPS would be the only police service and would continue to account to parliament and other relevant bodies through existing accountability channels. The second recommendation was to leave the DSO where it is, but refine existing legislative frameworks regulating the activities of the intelligence community to ensure that the DSO accounts in the same way as other intelligence bodies. This proposal includes tinkering with or restoring cooperation between the political bulls comprising the MCC. It would appear that the second option would involve a great deal of mind sobering, if not some serious whipping into line by the president, so that the MCC political bulls unlocked their horns. Whatever proposal was placed before Judge Khampepe, the ‘buck would finally stop’ with President Mbeki.

The performance of the DSO: a case of cherry-picking?

It was not within the mandate of the Khampepe Commission to review the performance of the

Scorpions. But some players, especially the SAPS and the NPA itself, hammered on this question in an attempt to persuade Judge Khampepe to recommend either the maintenance of the DSO’s current location or its incorporation into the SAPS. However, the views of the SAPS and the NPA were almost predictable.

Coming to the commission with a view to defending one of its directorates, the NPA seemed to have had a natural duty to prove that the DSO’s performance was beyond reproach and cited a number of cases to whose successful prosecution the DSO had contributed. These included political violence in Richmond, Kwa-Zulu Natal, taxi violence in the Eastern Cape, urban terror and gang-related violence in the Western Cape, restrictive practices in the Hout Bay fishing industry, and anti-corruption in the Eastern Cape.⁴⁴ All the NPA was doing by drawing the attention of Judge Khampepe to these cases was to:

... highlight the ability of the DSO to successfully conduct complicated investigations as well as demonstrate how through thorough investigations and the utilisation of sophisticated technology and techniques, the true extent of the problem can be revealed involving large amounts of money.⁴⁵

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But in the eyes of the SAPS, this was nothing more than hollow self-praise. The DSO was merely claiming easy and undeserved victories. As noted above, the SAPS’s view was that the DSO ‘takes over’ cases from the SAPS that were nearing finality and in which prosecution success was almost guaranteed. As far as the SAPS was concerned, its specialised units now

have the investigative capacity to perform exactly what the DSO can do. Therefore, the DSO’s strategy of using its ‘contested’ success to defend its location within the NPA was questionable.

Unsurprisingly, NGOs and other parties that presented to the commission, particularly those that cared to comment on the performance of the DSO, made statements in support of either the NPA position or the SAPS. But only one of them, the ISS, had ever conducted an independent study on the performance of the DSO. For this reason, the ISS study became the major point of reference on this matter, and was cited by both the SAPS and the NPA. Despite a number of loopholes in the work of the DSO, the final conclusion of the study should be noted: “The DSO appears to have an excellent record of success in obtaining convictions in matters it chooses to prosecute, and does not waste resources with frivolous arrests or searches.”⁴⁶ Having said this, one should again recall

that President Mbeki did not appoint the commission to review the performance of the Scorpions.

Conclusion

The period immediately preceding the creation of the Scorpions showed signs that South Africa was fast becoming a crime-infested society. Given the role played by the former apartheid police force in the past and the infancy of the transformational process in the newly created South African Police Service at the time, it is not surprising that the public torch in search of an intervention hovered far from the SAPS. This partly explains why President Mbeki decided to locate the DSO outside the SAPS. The prosecution-led approach of the new agency, as envisioned by its architects, is another factor that made the NPA the natural home of the Scorpions.

However, as emerged during presentations at the Khampepe Commission, the SAPS never supported the idea of locating the DSO within the NPA, let alone the DSO's prosecution-led approach. While the crafters of the Scorpions' legislative framework tried to avert the emerging conflict between the DSO and other security agencies by providing for a coordinative mechanism, proceedings at the commission demonstrated how personalities could hamper the work of statutory structures. While the human factor does explain why matters became worse, it became clear that the existence of a number of legislative gaps further compounded matters.

Ultimately Judge Khampepe was left with two broad options: to recommend retention of the status quo and the fixing of the legislative architecture; or to recommend the incorporation of the Scorpions into the SAPS as a panacea for all the acrimony that characterised the relationship between the SAPS and the DSO.

In the final analysis, it would be naïve to think of the Khampepe Commission as a pure technical process devoid of politics. While Judge Khampepe did her best to guide presenters to make their submissions in a manner that made legal sense, statements by extra-commission actors in relation to the process indicated clearly that political knives were out on both sides of the Scorpions divide. A quiet period has passed since the commission closed its hearings. But whispers continue: *I yo zala nkomoni?* ('What will happen?') The only person who holds an answer to this question is President Mbeki. Referring to matters on his agenda for 2006, the president said: "Other important matters include ... consideration of the recommendations of the Khampepe Commission on the Directorate of Special Operations ..."⁴⁷ For now, all that South Africans (on the side of the Scorpions or of the SAPS) need to do is to cross their fingers until the president has spoken.

Endnotes

- 1 The paper is a unique contribution since it was prepared by a person who took part in the hearings.
- 2 T Mbeki, Opening Address to Parliament, 25 June 1999, Cape Town.
- 3 Ibid.
- 4 S Tshwete, parliamentary briefing, 28 June 1999, Cape Town.
- 5 P Maduna, address to parliament, 11 November 1999, Cape Town.
- 6 SAPS: South African Police Service; NPA: National Prosecuting Authority; DG-NIA: Director-General of the National Intelligence Agency; MI: Ministry of Intelligence; MJ & CD: Ministry of Justice and Community Development.
- 7 J Selebi, affidavit to Khampepe Commission, 14 June 2005.
- 8 V P Pikoli, submission to Khampepe Commission, 17 June 2005.
- 9 B L Masetlha, NIA submissions to Khampepe Commission, undated. This submission was leaked to the media and later withdrawn from the Commission by the author. Citations from it are not regarded as the official position of the NIA, but only meant to shed light on the thinking of Mr Masetlha.
- 10 R Kasrils, affidavit submitted to Khampepe Commission, 20 June 2005.
- 11 B Mabandla, submissions to Khampepe Commission, undated.
- 12 Institute for Security Studies, oral submission to the Khampepe Commission, undated, p 2.
- 13 POPCRU is the largest police and prisons labour union in South Africa.
- 14 See section 7 of the NPA Act as amended (Act 32 of 1998).
- 15 Selebi, *ibid*, p 29.
- 16 N L Theledi, heads of argument on written submissions of the Police and Prisons Civil Rights Union submitted to Khampepe Commission, undated.
- 17 H Vaney, presentation made to Khampepe Commission on behalf of Foundation for Human Rights, undated, p 8–9.
- 18 See Article 2(a) of the United Nations Convention Against Transnational Organised Crime for a definition of organised crime.
- 19 Institute for Security Studies, *ibid*, p 7.
- 20 *Ibid*, p 9. See the ISS presentation for other negative consequences that might result from changing the mandate of the DSO.
- 21 J Selebi, affidavit to Khampepe Commission, 14 June 2005, p 21.
- 22 V Pikoli, NPA's heads of argument presented to Khampepe Commission, 30 September 2005, p 10.
- 23 *Ibid*, p 2.
- 24 J Govender, final submission to Khampepe Commission on behalf of the Inspector General for Intelligence, 30 September 2005, p 7.
- 25 Kasrils, *ibid*, p 15.
- 26 B S Mabandla, response to the request for further

- particulars by Khampepe Commission, 10 October 2005, p 9.
- 27 This is a committee established on the basis of Section 31 of the NPA Act which is supposed to coordinate the work of the Scorpions in relation to areas that bear relevance to other security agencies.
- 28 J Redpath, *The Scorpions: Analysing the Directorate of Special Operations*, Institute for Security Studies Monograph Series No 96, March 2004, p 17.
- 29 This is an expression often used to criticise the use of the media by the DSO to publicise searches, arrests and other operational activities related to the cases it handles.
- 30 Selebi, *ibid*, p 9.
- 31 Vaney, *ibid*, p 13.
- 32 Selebi, *ibid*.
- 33 V P Pikoli, submission to Khampepe Commission, 17 June 2005, p 38.
- 34 Institute for Security Studies, *ibid*, p 18–19.
- 35 Selebi, *ibid*, p 15.
- 36 Masetlha, *ibid*, p 31.

- 37 See the Democratic Alliance’s presentation dated 10 October 2005.
- 38 Despite the contested meaning of ‘information’. For example, the SAPS, in its submission, argued that information should “not be construed as intelligence but rather information normally gathered during an investigation”.
- 39 Mabandla, *ibid*, p 2.
- 40 *Ibid*.
- 41 Selebi, *ibid*, p 77.
- 42 V P Pikoli, submission to Khampepe Commission, 17 June 2005, p 110.
- 43 Vaney, *ibid*.
- 44 Pikoli, submission to Khampepe Commission, 17 June 2005, p 90–99.
- 45 *Op cit*.
- 46 Redpath, *ibid*, p 62.
- 47 T M Mbeki, State of the Nation Address to the Joint Sitting of Parliament, Cape Town, 3 February 2006.

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About this paper

While hearings at the Khampepe Commission received extensive media coverage, very few from the research community have written to provide insights into the drama that unfolded during proceedings at the commission. This paper is therefore intended to fill this void. However, it does not purport to provide a legal analysis of arguments presented during the commission, but seeks only to offer a general overview of what was at stake during the proceedings. The overall aim is to ensure that, before President Mbeki makes a pronouncement on the questions the commission dealt with, members of the public know how the proceedings unfolded.

About the author

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