THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

CASE NO: 181/2014

Reportable

In the matter between:

SYLLA MOUSSA **APPELLANT**

And

THE STATE **FIRST RESPONDENT**

THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT **SECOND RESPONDENT**

Neutral Citation: *Moussa v S* (181/2014) [2015] ZASCA 61 (14 April 2015).

Coram: Navsa ADP, Ponnan, Mhlantla, Mbha & Zondi JJA

Heard: 5 March 2015

Delivered: 14 April 2015

Summary: Private counsel engaged by National Prosecuting Authority in terms of s 38 of the National Prosecuting Authority Act 32 of 1998 to conduct prosecution on fraud charges – prosecution requiring commercial expertise – challenge to prosecutor's authority – constitutionality of s 38 – challenge on basis that it impinged on constitutional imperative of prosecutions without fear, favour or prejudice – ultimately restricted to a challenge based on the fact that s 38 does not provide for an oath as required for permanent members of the National Prosecuting Authority – held that private counsel are required to conduct themselves within the structure of the Act – and that they conduct prosecutions under the control and supervision of the most senior

members of the NPA – s 38 held not to be unconstitutional.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Campbell AJ sitting as court of first instance):

The following order is made:

The appeal is dismissed with costs.

JUDGMENT

Navsa ADP (Ponnan, Mhlantla, Mbha & Zondi JJA concurring):

[1] This appeal, with the leave of the court below, concerns the constitutionality of s 38 of the National Prosecuting Authority Act 32 of 1998 (the NPA Act). The appellant, Mr Sylla Moussa, is a Guinean national who, during June 2006, was charged with 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 (the POCA). The preamble to the indictment reflects the following: The appellant was in control of two accounts held by corporate entities with Absa Bank. The accounts labelled 'credit accounts' bore a no-risk status which meant that the appellant could immediately make withdrawals against cheque deposits into the account. Electronic transfers can only be made from such an account if sufficient funds exist in that account, even if only by way of cheque deposits. The appellant, so it is alleged conducted 'cross-fire fraud' which is described in the preamble to the indictment as follows:

'1.10.1. No value cheques or cheques of insufficient value ("facilitation cheques") would be deposited into the beneficiary bank account at ABSA and drawn against the drawer's account at ABSA.

1.10.2. The lack of funds in the drawer's account to support the amounts depicted as per face value of the facilitation cheques, resulted in an artificial credit being created in the beneficiary bank account.

1.10.3. The drawing and depositing of the facilitation cheques would be recorded on the bank statements of the drawer's and beneficiary bank accounts as debit and credit entries respectively.

1.10.4. From the beneficiary bank account, the accused would then, on or about the day that the cheques were deposited or shortly thereafter, remit *via* electronic banking transfer a similar amount ("contra amount") back to the drawer's bank account.

1.10.5. When remitting the contra amount back to the drawer's account, the initial beneficiary account would be debited and the drawer's account credited.

1.10.6. The recording of the facilitation cheques on the drawer's bank account would however only happen after depositing the cheques into the beneficiary bank account, which would be on the same day or shortly after the contra amount is remitted, creating the impression of availability of funds in the drawer's account when the facilitation cheques were recorded and/or debited.

1.10.7. The balances and credits recorded on the respective bank statements of the beneficiary and drawer bank account would therefore not be represented by genuine and/or sufficient underlying funds created in *bona fide* manner in the ordinary course of business, but such balances and credits would record mere artificial or illusory balances of a temporary nature.

1.10.8. Such credits and balances were designed to mislead ABSA into accepting and/or believing that accused and/or the corporate entities were conducting *bona fide* transactions and/or are involved in genuine and *bona fide* arms length business transactions and/or doing well financially and that sufficient underlying funds existed to honour the facilitation cheques and subsequent contra payments.'

[2] For present purposes it is not necessary to deal with the particulars relating to the alternative charges of fraud, theft or the charges related to the contraventions of the POCA which are all founded on the same allegations. The amount ABSA Bank is said to have lost as a result of the appellant's alleged conduct appears in the indictment, namely, R41 329 188.37.

[3] Because of the nature of the commercial transactions in relation to which the appellant was charged, the National Prosecuting Authority (the NPA) took the view that it required the skills of a specialised prosecutor and thus engaged the services of Mr Zirk Pansegrouw (Pansegrouw), an advocate in private practice and member of the Pretoria Bar and a former prosecutor. In doing so, the NPA purported to act in terms of s 38 of the NPA Act, which reads as follows:

'(1) 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.

(2) The terms and conditions of service of a person engaged by the *National Director*, a *Deputy National Director* or a *Director* under subsection (1) shall be as determined from time to time by the Minister in concurrence with the Ministers of Finance.

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

(a) the *National Director*; or

(b) 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 the *Minister* as contemplated in that subsection.

(4) For purposes of this section, "services" include the conducting of a prosecution under the control and direction of the *National Director*, a *Deputy National Director* or a *Director*, as the case may be.'

[4] After his arrest in June 2006, the appellant appeared in the Regional Court, Johannesburg and was released on R100 000 bail. During March 2008, his trial was transferred to the Gauteng Local Division, Johannesburg. Faced with Pansegrouw as the prosecutor appellant's legal representative requested documentation to allay the appellant's concerns about Pansegrouw's authority to conduct the prosecution. After the documentation was supplied and scrutinised, the appellant correctly concluded that the oath in terms of s 32(2) of the NPA Act had not been taken by Pansegrouw. I interpose to set out the relevant part of that subsection:

'*(a)* A National Director and any person referred to in section 4 must, before commencing to exercise, carry out or perform his or her powers, duties or functions in terms of this Act, take an oath or make an affirmation, which shall be subscribed by him or her, in the form set out below . . .

. . .

(b) Such an oath or affirmation shall –

(i) . . .

(ii) in the case of a prosecutor, be taken or made before the Director in whose office the prosecutor concerned has been appointed or before the most senior judge or magistrate at the court where the prosecutor is stationed,

who shall at the bottom thereof endorse a statement of the fact that it was taken or made before him or her and of the date on which it was so taken or made and append his or her signature thereto.'

[5] Section 4 sets out the composition and hierarchical structure of the National Prosecuting Authority as follows:

'The *prosecuting authority* comprises the –

(a) *National Director;*

(b) *Deputy National Directors;*

(c) *Directors;*

(d) *Deputy Directors; and*

(e) *Prosecutors.*'

Prosecutor is defined as follows:

'**"prosecutor"** means a prosecutor referred to in section 16(1)'.

Section 16(1) in turn provides:

'(1) *Prosecutors* shall be appointed on the recommendation of the *National Director* or a member of the *prosecuting authority* designated for that purpose by the *National Director*, and subject to the laws governing the public service.'

[6] Having regard to the fact that at that stage Pansegrouw had not taken the oath provided for in s 32(2) of the NPA Act, the appellant gave notice in terms of s 106(3), read with s 106(1)*(h)* of the Criminal Procedure Act 51 of 1977 (the CPA), challenging Pansegrouw's authority to prosecute,[1] because he had not taken the oath provided for in s 32(2) of the NPA Act. The appellant launched an application in the Gauteng Local Division in which he sought an order: (a) that Pansegrouw had no authority to prosecute him; (b) that his trial was unfair and (c) for a permanent stay of his prosecution.

[1] Section 106(3) reads as follows:
'An accused shall give reasonable notice to the prosecution of his intention to plead a plea other than the plea of guilty or not guilty, and shall in such notice state the ground on which he bases his plea: Provided that the requirement of such notice may be waived by the attorney-general or the prosecutor, as the case may be, and the court may, on good cause shown, dispense with such notice or adjourn the trial to enable such notice to be given.'
Section 106(1)(*h*) provides:
'(*h*) that the prosecutor has no title to prosecute.'

[7] That application came before Mailula J in the Gauteng Local Division. An exchange ensued between Mailula J and appellant's counsel, during which the judge expressed reservations about whether a prosecutor appointed in terms of s 38 of the NPA Act was required to take an oath. That view appeared to be shared by appellant's counsel, who consequently sought a postponement in order to challenge the constitutionality of s 32(2) of the NPA Act, ostensibly because it did not provide for counsel appointed from outside of the NPA to take the oath provided for in that section. The original notice of motion was amended and the second respondent, the Minister of Justice and Constitutional Development (the Minister) was joined, as a party, as required by Uniform rule 10A.[2] Before the merits of the case were addressed, the appellant's legal representative was asked by Mailula J whether the appellant would abide Pansegrouw taking the prescribed oath before the trial commenced. Since the appellant's attitude was that it was the taking of the prescribed oath that was foundational to prosecutorial independence, one would have thought that the suggestion that Pansegrouw would take the oath would put paid to the appellant's objections to him being the prosecutor. Alas, the appellant changed tack and chose, instead, to challenge the constitutionality of s 38 of the NPA Act, which as reflected in paragraph 3 above, enables the engagement of persons outside of the NPA to perform prosecutorial services in specific cases.

[8] Thus, the appellant launched an application seeking an order declaring s 38 to be unconstitutional on the basis that it permitted the appointment of a prosecutor outside the National Prosecuting Authority's normal staff complement and therefore did not give effect to the constitutional principle enshrined in s 179(4) of the Constitution of the Republic of South Africa (the Constitution), that requires the prosecuting authority to

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[2]Uniform rule 10A provides:
'If any proceedings before the court, the validity of a law is challenged, whether in whole or in part and whether on constitutional grounds or otherwise, the party challenging the validity of the law shall join the provincial or national executive authorities responsible for the administration of the law in the proceedings and shall in the case of a challenge to a rule made in terms of the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985), cause a notice to be served on the Rules Board for Courts of Law, informing the Rules Board for Court of Law thereof.' Rules regulating the Conduct of Proceedings of the Several Provincial and Local Divisions of the Supreme Court of South Africa GN 48 of 1965.

exercise its functions without fear, favour or prejudice. The State as prosecuting authority and the Minister opposed the application.

[9] The application, in amended form, was heard by Campbell AJ. Three years before that application was heard and subsequent to the appearance before Mailula J, Pansegrouw had in fact taken an oath to act 'without fear, favour or prejudice'. The dispute before Campbell AJ was narrowed to the constitutionality of s 38 on the basis set out in the preceding paragraph.

[10] Campbell AJ took into account that s 38 of the NPA Act, in contradistinction to s 32(2)*(a)*, did not provide for the taking of an oath. The learned judge reasoned that the starting point of the enquiry was s 179(4) of the Constitution, which dictated that national legislation should provide for the prosecuting authority to act without fear, favour or prejudice. This led Campbell AJ to consider the composition of the 'prosecuting authority' and in turn to s 179(1) of the Constitution, which provides as follows:

'(1) There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of –

(a) a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive; and

(b) Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament.'

This, of course, must be read with the provisions of s 4 of the NPA Act as set out in paragraph 5 above, which sets out the hierarchical structure of the NPA.

[11] Campbell AJ considered that when persons are engaged as prosecutors in terms of s 38 of the NPA Act, they can hardly be regarded as free agents. In his view, they were subject to the control and direction of senior officers of the NPA, within the structure of the NPA Act. The court below held that persons appointed in terms of s 38 were 'prosecutors' in the normal sense of the word, but not necessarily as contemplated in certain other sections of the NPA Act. The court reasoned that Pansegrouw was obliged to carry out his functions as a prosecutor in the manner contemplated by s 179(4) of the Constitution. Section 32 requires permanently appointed prosecutors to

take an oath of office that they will carry out their duties in the prescribed manner. The absence of an oath in s 38 does not detract from the manner in which private counsel appointed in terms of the NPA Act are required to perform their duties. The following paragraphs of the judgment set out in succinct form the reasoning and conclusions of the court below:

'19. To conclude: section 38 of the Act, on this construction, simply authorises the employment of, *inter alia, ad hoc* prosecutors to carry out specific and limited tasks on behalf of the NPA, but does not specify their constitutional duties because such *ad hoc* prosecutors are part of the prosecuting authority and their constitutional duties are set out in section 32 of the Act.

20. It therefore follows that in my view section 38 of the Act is not unconstitutional and that the application, as currently framed, must fail.'

The court below dismissed the application with costs. It is against that order and the findings referred to above that the present appeal is directed.

[12] In written heads of argument it was contended on behalf of the appellant that s 38 of the NPA Act is inconsistent with the Constitution in that it does not specifically provide that such persons should conduct themselves without fear, favour or prejudice when prosecuting – the latter qualities being the hallmark of prosecuting integrity in this country. Before us counsel on behalf of the appellant, when pressed about the precise ambit of the appellant's case, stated that he was contending that s 38 of the NPA Act was unconstitutional because it did not compel 'outside counsel' to take the oath as prescribed for permanent members of the prosecution services by s 32 of the NPA Act. As I understood the submission, it was contended that it is the taking of the oath that is foundational to the independence of a prosecutor.

[13] The engagement of persons who have specialised skills, to assist in prosecutions, is not statutorily novel. This emerges from a brief review of legislation over the last few decades.[3]

[3] See *Harksen v DPP, Cape* 1999 (4) SA 1201 (C) and *The Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; in re Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2000 (10) BCLR 1079 (CC), where transition from former dispensation is discussed.

[14] Prior to the now repealed Attorney-General Act 92 of 1992 (the AGA), which commenced on 31 December 1992, the CPA provided for prosecutions (ss 2-5) and the Attorney-General was the prosecuting authority on behalf of the State. Section 4 of the CPA used to provide that an Attorney-General may, in writing:

'(a) delegate to any person, subject to the control and directions of the attorney-general, authority to conduct on behalf of the State any prosecution in criminal proceedings in any court within the area of jurisdiction of such attorney-general, or to prosecute in any court on behalf of the State any appeal arising from criminal proceedings within the area of jurisdiction of such attorney-general.'

[15] Section 2 of the AGA provided for the appointment of an Attorney-General by the State President in respect of each provincial division and of the Witwatersrand Local Division of the Supreme Court of South Africa. Section 6*(a)* of the AGA read as follows:

'6. An attorney-general may, in respect of the area for which he has been appointed, in writing –

(a) delegate to any person who has the right to appear in any court in terms of the Right of Appearance in Courts Act, 1995 (Act No. 62 of 1995), subject to the control and directions of the attorney-general, authority to conduct on behalf of the State any prosecution in criminal proceedings in any court within the area of jurisdiction of such attorney-general, or to prosecute in any court on behalf of the State any appeal arising from criminal proceedings within the area of jurisdiction of such attorney-general.'

The NPA Act repealed the AGA and ss 2-5 of the CPA which previously dealt with the prosecuting authority.

[16] In *S v Tshotshoza* 2010 (2) SACR 274 (GNP), where the propriety of private funding for a prosecution was discussed and decided, the court, considering s 38 of the NPA Act, said the following:

'[18] It has not been argued that s 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 are to be prosecuted and punished, and that for this 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. The detail is to be enacted in specific legislation and has been enacted in

terms of the Act. It is a prerequisite that prosecutions must be fair and must not violate an accused's right to a fair trial in terms of s 35(3) of the Constitution.

[19] All over the world, outside prosecutors are engaged to prosecute on behalf of the State. There cannot be objection in this country to the engagement of outside prosecutors in specific cases. There are many reasons why it may become necessary for the NPA to engage outsiders. One thinks of a shortage of staff or of staff with the necessary expertise and experience to prosecute in particular cases.'[4]

[17] In *Tshotshoza* the court there was, of course, not dealing with the constitutional challenge posed in the present litigation. I interpose to state that in the present case it is factually un-contentious that the State has routinely and extensively engaged the specialised services of outside counsel,[5] particularly in prosecutions requiring commercial expertise and that those prosecutions were conducted without the oath of office, or affirmation, prescribed by s 32 of the NPA Act being taken.

[18] I turn to deal with the appellant's challenge to the constitutionality of s 38 of the NPA Act. I agree with the court below that the starting point is s 179(4) of the Constitution which provides:

'National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.'

The NPA Act is that legislation. Section 2 provides for a single prosecuting authority. Section 3 reiterates that there is a single prosecuting authority consisting of 'the Office of the National Director and the offices of the prosecuting authority at the High Courts, established by section 6(1)'. Section 4 referred to above sets out the composition of the prosecuting authority. Section 5 established the office of the National Director of Public Prosecutions and places the National Director at its head. Section 6 established offices for the prosecuting authority at the seat of each High Court division. A number of sections of the NPA Act deal with hierarchical appointments. Section 16, alluded to

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[4] Cf *Bonugli & another v DNDPP & others* 2010 (2) SACR 134 (T) at 142F-145F, where it was held that a private practitioner can be appointed as prosecutor subject to the perception of the reasonable, objective and informed person of acting without fear, favour or prejudice, thus setting out the test for private prosecutions. That case was decided on its own facts and was primarily concerned with the funding of a prosecution.

[5] This appears from para 48 of the respondent's heads of argument and I did not understand it to be contested.

above, provides for the appointment of prosecutors. Section 20(1) states that the power to institute criminal proceedings contemplated in s 179(2) of the Constitution 'vests in the prosecuting authority and shall, for all purposes, be exercised on behalf of the Republic.'

[19] Significantly, s 20 subsecs (2)-(5) provide as follows:

'(2) Any *Deputy National Director* shall exercise the powers referred to in subsection (1) subject to the control and directions of the *National Director*.

(3) Subject to the provisions of the *Constitution* and *this Act*, any *Director* shall, subject to the control and directions of the *National Director*, exercise the powers referred to in subsection (1) in respect of –

(a) the area of jurisdiction for which he or she has been appointed; and

(b) any offences which have not been expressly excluded from his or her jurisdiction, either generally or in a specific case, by the *National Director.*

(4) Subject to the provisions of *this Act*, any *Deputy Director* shall, subject to the control and directions of the *Director* concerned, exercise the powers referred to in subsection (1) in respect of –

(a) the area of jurisdiction for which he or she has been appointed; and

(b) such offences and in such courts, as he or she has been authorised in writing by the *National Director* or a person designated by the *National Director*.

(5) Any *prosecutor* shall be competent to exercise any of the powers referred to in subsection (1) to the extent that he or she has been authorised thereto in writing by the *National Director*, or by a person designated by the *National Director*.'

[20] Section 21, consistent with s 179(5) of the Constitution,[6] provides for the National Director, with the concurrence of the Minister and after consultation with other Directors, to determine prosecution policy and issue policy directives which must be observed in the prosecution process. Section 22(1) of the NPA Act provides:

'(1) The *National Director*, as the head of the *prosecuting authority*, shall have authority over the exercising of all the powers, and the performance of all the duties and functions conferred or imposed on or assigned to any member of the *prosecuting authority* by the *Constitution, this Act* or any other law.'[7]

[21] Section 23 deals with the powers, duties and functions of Deputy National Directors and reads as follows:

'(1) Any *Deputy National Director* may exercise or perform any of the powers, duties and functions of the *National Director* which he or she has been authorised by the *National Director* to exercise or perform.'

[22] Section 24 of the NPA Act sets out the powers, duties and functions of Directors and Deputy Directors. Section 24(1) provides as follows:

'(1) Subject to the provisions of section 179 and any other relevant section of the *Constitution, this Act* or any other law, a *Director* referred to in section 13(1)*(a)* has, in respect of the area for which he or she has been appointed, the power to –

(a) institute and conduct criminal proceedings and to carry out functions, incidental thereto as contemplated in section 20(3);

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[6] Section 179(5) reads as follows:
'(5) The National Director of Public Prosecutions –
(a) must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Director of Public Prosecutions, prosecution policy, which must be observed in the prosecution process;
(b) must issue policy directives which must be observed in the prosecution process;
(c) may intervene in the prosecution process when policy directives are not complied with; and
(d) may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions, from the following:
(i) The accused person.
(ii) The complainant.
(iii) Any other person or party whom the National Director considers to be relevant.'

[7] A Code of Conduct was issued by the National Director on 1 October 1999 together with the Policy Manual, the former was published under GN R1257 in GG 33907 dated 29 December 2010 with effect from 18 October 2010.

(b) supervise, direct and co-ordinate the work and activities of all *Deputy Directors* and *prosecutors* in the Office of which he or she is the head;

(c) supervise, direct and co-ordinate specific investigations; and

(d) carry out all duties and perform all functions, and exercise all powers conferred or imposed on or assigned to him or her under any law which is in accordance with the provisions of *this Act.*'

[23] Section 25 deals with prosecutors at the lower end of the prosecutorial hierarchy. Section 25(1) reads as follows:

'(1) A *prosecutor* shall exercise the powers, carry out the duties and perform the functions conferred or imposed on or assigned to him or her –

(a) under *this Act* and any other law of the *Republic*; and

(b) by the head of the Office or *Investigating Directorate* where he or she is employed or a person designated by such head; or

(c) if he or she is employed as a *prosecutor* in a lower court, by the *Director* in whose area of jurisdiction such court is situated or a person designated by such *Director*.'

[24] That brings us to s 32(1)*(a)* of the NPA Act which provides:

'(1)*(a)* 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.'

[25] The picture that emerges from the statutory scheme, in line with the constitutional imperative of ensuring independence, impartiality and prosecutions without fear, favour or prejudice, is the establishment of a single national prosecuting authority with strict controls, directions and hierarchical supervision from the top downwards. It was not suggested that the policy and policy directives presently in place are not consonant with that model. Section 38 of the NPA Act, which is at the heart of the present litigation, ensures that the appointment of persons with suitable qualifications and experience to perform 'services' in specific cases occurs only after consultation at the highest level involving the Minister, the National Director and/or Directors or Deputy National Directors. Importantly, s 38(4) provides:

'(4) For purposes of this section, "services" include the conducting of a prosecution *under the control and direction* of the *National Director,* a *Deputy National Director* or a *Director*, as the case may be.'(My emphasis.)

This must mean that when persons from 'outside' are engaged as prosecutors, they do so after consideration at the highest level and that the prosecutions that they are involved in are subject to the control and direction of the highest ranking officials within the NPA, who themselves have taken the oath of office prescribed by s 32. This translates into ensuring that the decision and basis of the prosecution are within the control of those officials. All of this is to ensure that constitutional imperatives are met.

[26] Given the structure of the NPA Act and the controls and supervision referred to above, I struggle to understand how prosecutorial independence and impartiality are, without more, undermined by s 38. This is something that counsel on behalf of the appellant himself had difficulty with. In my view, it is that difficulty that drove him to reliance, on the failure by the legislature, in section 38 to provide for an oath, to be taken by outside counsel in the same manner as is required of permanent members of the NPA. As stated above, my understanding of the submission was that it was the oath of office that guaranteed the independence and impartiality that the Constitution demands. That meant, as counsel was constrained to concede, that the reading-in of an oath would have the effect of saving s 38 from constitutional invalidity. Having regard to the fact that Pansegrouw had by then taken an oath the attitude of the appellant in continuing to challenge his prosecution is strange, to say the least. I consider it necessary to record that, initially, the appellant attacked Pansegrouw's conduct in the prosecutorial process up until the time that he noted his objection. That was abandoned. It will be recalled that, initially, the appellant's challenge was based on the constitutionality of s 32 of the NPA Act. After the exchange with Mailula J, that stance altered and the attack was directed at the constitutionality of s 38. When pressed about why s 38 was lacking, the argument reverted to the failure to provide for the oath in terms similar to that contained in s 32. It leads one to the compelling conclusion that the latest argument on behalf of the appellant is contrived.

[27] It must also be borne in mind that Pansegrouw is a member of the Bar who upon admission took an oath of fidelity to the Republic and the Constitution and is required to subscribe to and practice in the best traditions of his profession.[8] Members of the Bar are ultimately officers of the court and required to conduct themselves as such. Pansegrouw is a former prosecutor and thus not a stranger to the workings of the NPA.

[28] 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.

[29] It is not the taking of the oath that guarantees prosecutorial independence and impartiality. Nor can the taking of the oath by itself ensure an accused's fair trial rights. It is the manner in which prosecutions are initiated and conducted that is the test of prosecutorial independence. Whether a trial is fair usually falls to be determined on a case by case basis. Our courts will be astute to ensure that the constitutional guarantees of prosecutions without fear, favour or prejudice and fair trial rights are met. The appellant's contentions have the effect of placing form above substance. In *Porritt v The NDPP* [2015] 1 All SA 169 (SCA), this court in dealing with a challenge of impartiality to a prosecution said the following in para 14:

'The protection of an accused person, therefore, lies not in a general standard of independence and impartiality required of all prosecutors, but in the right to a fair trial entrenched in s 35(3) of the Constitution. That right was described in *S v Shaik* [2008 (2) SA 208 (CC) para 43] in these terms:

"The right to a fair trial requires a substantive, rather than a formal or textual approach. It is clear also that fairness is not a one-way street conferring an unlimited right on an accused to demand the most favourable possible treatment. A fair trial also requires 'fairness to the public as represented by the State. It has to instil confidence in the criminal justice system with the public,

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[8] See the comparable case of *Prince v President, Law Society of Good Hope & others* 2000 (3) SA 845; 2000 (7) BCLR 823 (SCA) paras 3-6 of the separate concurring judgment of Mthiyane AJA, where the learned judge pointed out the interrelation between the professional oath of office and loyalty to the Republic and to the Constitution.

including those close to the accused, as well as those distressed by the audacity and horror of crime.”’’

[30] I can find no flaw in the essential reasoning of the court below in dismissing the appellant’s application. I turn now to consider whether there is anything in comparable jurisdictions that might detract from that conclusion.

[31] At our invitation, counsel filed a joint written note on the position in comparative jurisdictions in relation to the question of whether ‘outside prosecutors’ are required to take an oath when appointed to prosecute on behalf of the state in a particular matter. We are grateful for their assistance in this regard. 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.

[32] In those countries the scope of authority and powers delegated differ significantly. It does appear, though, that in all instances the mandate given to a person recruited from ‘outside’ is subject to the control of the prosecuting authority.

[33] In England and Wales, the Prosecution of Offences Act 1985 makes provision for the appointment of external counsel to conduct prosecutions on behalf of the Crown Prosecution Service. Part 1, section 5 of Chapter 23 of the Prosecution of Offences Act provides in relevant part:

‘(1) The Director may at any time appoint a person who is not a Crown Prosecutor but who has a general qualification (within the meaning of section 71 of the Courts and Legal Services Act 1990) to institute or take over the conduct of such criminal proceedings or extradition proceedings as the Director may assign to him.

(1A) . . .

(1B) . . .

(2) Any person conducting proceedings assigned to him under subsection (1) or exercising functions by virtue of an appointment made under subsection (1A) shall have all the powers of a Crown Prosecutor but shall exercise those powers subject to any instructions given to him by a Crown Prosecutor.'

[34] There is no legislative indication that members of the Bar in England and Wales are required to take the prosecutors' oath in addition to the oath taken by barristers on their admission to the Bar.

[35] In Canada, in terms s 7(2) of the Director of Public Prosecutions Act S.C. 2006 c. 9, s 121, the Public Prosecution Service has the power to appoint outside counsel to act as prosecutors. That section reads as follows:

'(2) The Director may also for that purpose retain on behalf of Her Majesty, the services of barristers and, in the Province of Quebec, advocates to act as federal prosecutors and, with the approval of the Treasury Board, may fix and pay their fees, expenses and other remuneration.'

In terms of section 7(3) of the Director of Public Prosecutions Act, the person whose services are retained under subsection (2) must be a member of the bar of one of the ten Canadian provinces.

[36] It is clear from s 9 of that Act that the person authorised, acts under the control and direction of the Director and acts as his/her agent. There does not appear to be any legislative requirement for a barrister to take the prosecutors' oath. As stated earlier, Quebec requires an oath in the prescribed form to be taken by outside counsel.

[37] In India the position appears to be regulated by ss 24 and 25A of the Criminal Procedure Code. The Central Government and State Government are empowered to appoint a Special Public Prosecutor for purposes of any case or class of case, if the so appointed person has been in practice as an advocate for not less than ten years. The circumstances in which a special private prosecutor may be appointed is limited to cases where, having regard to the nature of the case, the gravity of the matter and the public interest involved in the matter, such appointment is necessary.

[38] In *K.V. Shiva Reddy v State of Karnataka* 2005 CriLJ 3000 in paras 16 and 25 the following appears:

‘There is a clear distinction between a private Counsel engaged to assist a Public Prosecutor and private Counsel, who has been appointed as a Special Public Prosecutor by the State. In the latter case, he is a Public Prosecutor because he has been appointed as such while in the former case, he is a Public Prosecutor because he has been acting under the direction of a Public Prosecutor.

. . .

. . . Section 2(u) of the Code states that “Public Prosecutor” means any person appointed under Section 24 and includes any person acting under the directions of Public Prosecutor. Therefore, the words “Public Prosecutor” includes Public Prosecutor, Additional Public Prosecutor, Special Public Prosecutor and a Pleader instructed by a private person under Section 301(2) of the Code. . . .’

[39] We were referred to Rule 22 of the Rules for the Conduct of Legal Affairs of Government, 1984 which sets out the manner in which a special private prosecutor in India may be appointed. As far as could be ascertained, no provision is contained in the Criminal Procedure Code or the Rules for the special private prosecutor to take the prosecutor’s oath on their appointment in terms of section 24 of the Code. Section 22 provides:

‘22. Engagement of Special Public Prosecutor –

(1) The Government in the Law and Judiciary Department, either *suo motu*, or on the request of any aggrieved party or the concerned Department in the Government, may, engage an Advocate for not less than ten years, and having regard to his general repute, legal acumen and suitability, by appointing him, as a Special Public Prosecutor in any criminal case or class of cases, as the case may be:

Provided that, no order under this sub-rule regarding appointment of a Special Public Prosecutor shall be made unless, for the reasons to be recorded in writing, the Remembrance of Legal Affairs is satisfied, having regard to the nature of the case, gravity of the matter and public interest involved in the matter that such appointment is necessary.

(2) On the request of a private complainant not being the aggrieved party, the Government in the Law and Judiciary Department may, [appoint] any of the Public Prosecutor or Additional

Public Prosecutor as a Special Public Prosecutor in accordance with the provisions of sub-rule (1), for conducting any such case.

(3) Fees for such Special Public Prosecutor, appointed under sub-rule (1) or (2) may be borne by the Government or the aggrieved party or the private complainant, as may be directed by the Remembrance of Legal Affairs;

Provided that, in cases where the aggrieved party is, a Bank or an Institution or Trust or the like, the fees shall be borne by such aggrieved party;

Provided further that, the amount of the fees to be paid to such Special Public Prosecutor, shall be deposited with the Government in the Law and Judiciary Department first, and the same shall be paid by it to such Special Public Prosecutor on completion of the trial, unless directed otherwise by the Remembrance of Legal Affairs.'

[40] The U.S. Attorney's Office is the chief prosecutor for the United States in criminal cases. Title 28 Code of Federal Regulations ("CFR") § 600.1 empowers the attorney general to appoint special counsel in limited circumstances, often related to sensitive matters, matters in the public interest or matters which may raise a conflict of interest for Department of Justice Personnel. Special counsel appointed under these provisions are supervised by the Attorney General who must be notified of all significant actions that the special counsel is to take and may countermand any proposed action by the special counsel. Moreover, appeals by the special counsel have to be approved of by the Attorney General.

[41] Australia has the Commonwealth Office of the Director of Public Prosecutions (CDPP), which is headed by a Director of Public Prosecutions and each state or territory has a uniquely structured state prosecution service. At a federal level, the Attorney General is responsible for the Commonwealth criminal justice system and is accountable to Parliament for decisions made in the prosecution process. The Office of the CDPP runs independently of the Attorney General. In addition, there are areas where Commonwealth agencies conduct straightforward regulatory prosecutions by arrangement with the CDPP (for example, the Australian tax office and the Australian securities and investment commission). In the office of the CDPP, both the Director and Assistant Director of Public Prosecutions are required to take the oath of office

contained in the schedule to the Director of Public Prosecutions Act 113 of 1983. At federal level the Governor-General is empowered to appoint special prosecutors for a renewable period of five years in terms of the Special Prosecutors Act 79 of 1982. Special prosecutors are not appointed for a particular criminal prosecution but for a fixed period. There does not seem to be a requirement for Special Prosecutors to take an oath of office.

[42] There is nothing in the comparable survey that detracts from the conclusion set out above. If anything, the survey supports the conclusion. In any event, the challenge by the appellant has to be decided by reference to our Constitution and provisions of the NPA Act. It is that exercise that leads to the conclusion that the appeal falls to be dismissed.

[43] The following order is made:
The appeal is dismissed with costs.

MS NAVSA
ACTING DEPUTY PRESIDENT

APPEARANCES:

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