



Africa Criminal Justice Reform  
 Organisation pour la Réforme de la Justice Pénale en Afrique  
 Organização para a Reforma da Justiça Criminal em África

## The appointment and dismissal of the NDPP

### Instability since 1998

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### Instability at the top

The position of National Director of Public Prosecutions (NDPP) has emerged since 1998 as one of the most unstable positions in government. This can to a large degree be ascribed to how appointments and dismissals are made. Instability at the top of the NPA and several acting NDPPs gives credence to claims of political interference. Not one NDPP has served the full term of ten years. Since 1998, when the National Prosecuting Authority (NPA) came into being, there have been five permanently appointed NDPPs and three acting NDPPs. The longest serving NDPP was Bulelani Ngcuka who was in the position for 6 years,<sup>1</sup> followed by Mokothedi Mpshe in an acting capacity at nearly three years and Vusi Pikoli for just more than two and half years. Mxolisi Nxasana exited at just

less than two years after the President established an enquiry to assess his fitness to hold office but which never got off the ground. He later resigned after a deal was struck between the parties. Shaun Abrahams served from June 2015 to August 2018 and left after the Constitutional Court ruled that his appointment was irregular since the deal struck between then President Zuma and Nxasana was irregular.<sup>2</sup> Following the charging and later withdrawal of charges against the Minister of Finance and two others in 2016, Abrahams was instructed by the President to furnish reasons why he should not be suspended.<sup>3</sup> Following Abrahams's departure, Silas Ramaite, a Deputy National Director of Public Prosecutions (who has previously acted as NDPP), was appointed as Acting NDPP.<sup>4</sup> Further instability was created by the long periods that persons were appointed in an acting capacity, such as Mpshe and Jiba.

Incumbent	Period	Reason for departure
Bulelani Ngcuka	1998-2004	Resigned
Vusi Pikoli	2005-2007	Dismissed, challenged in court, settled out of court.
Mokotedi Mpshe	2007-2009	Acting NDPP
Menzi Simelane	2009-2012	Constitutional Court found appointment irrational.
Nomgcobo Jiba	2012 -2013	Acting NDPP

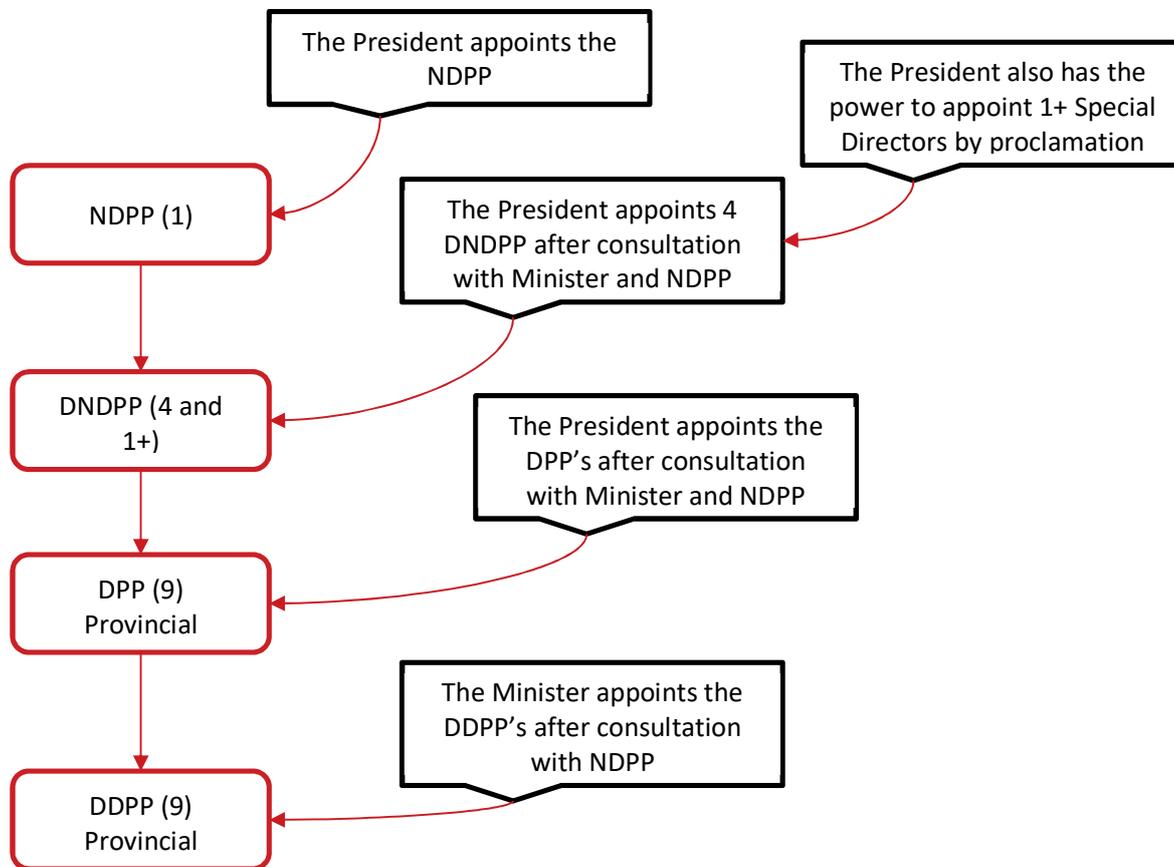
Incumbent	Period	Reason for departure
Mxolisi Nxasana	2013-2015	Resigned
Shaun Abrahams	2015-2018	Resigned
Silas Ramaite	2018-	Acting NDPP

## How are appointments made?

The Constitution and the NPA Act provide that the NDPP is appointed by the President,<sup>5</sup> who may also, after consultation with the NDPP and Minister of Justice, appoint up to four Deputy National Directors of Public Prosecution (DNDPP).<sup>6</sup> The President similarly appoints the Provincial Directors of Public

Prosecutions (PDPP).<sup>7</sup> The Minister, after consultation with the NDDP, appoints the deputy PDPP.<sup>8</sup> In addition, the Minister may ‘in respect of the Office of the National Director appoint one or more Deputy Directors of Public Prosecutions to exercise certain powers, carry out certain duties and perform certain functions conferred or imposed on or assigned to him or her by the National Director’.<sup>9</sup> See Figure 1 below.

Figure 1



It is evident, then, that the entire top echelon of the NPA (at least 14 positions) may be appointed by the President and Minister of Justice without any input from other key stakeholders, such as Parliament, professional bodies or the public in general. This poses significant risks for the NPA's independence and integrity. There is no requirement for a process calling for nominations and an assessment panel as in the case with the Judicial Services Commission in appointing judges, or Parliament in appointing the Public Protector.

## What are the qualification and experience requirements for the NDPP?

The requirements for the NDPP are rather slim when compared to those of the Public Protector and Auditor General of South Africa (AGSA). In the case of the NDPP it is required merely that the person be fit and proper and 'possess legal qualifications that would entitle him or her to practice in all courts in the Republic'.<sup>10</sup> In terms of the Legal Practice Act, any person who has been admitted and enrolled to practise as a legal practitioner in terms of the Act is entitled to practice throughout South Africa, unless his or her name has been ordered to be struck off the Roll, or is subject to an order suspending him or her from practising.<sup>11</sup> There is no requirement of specialist knowledge or numbers of years of experience. Whilst it may not be possible or even desirable to set specific criteria in respect of qualifications, a structure identifying the suitable candidate would benefit from the advice of experts from the legal community and civil society.<sup>12</sup> The current relatively low threshold is particularly worrisome given the powerful position of the NDPP.

## Taking lessons from other sectors

In contemplating reform of the current process for appointing the NDPP, a number of guidelines can be taken from the appointment process of the Public Protector and the AGSA. First, in both instances the positions are advertised and the appointment made by the President on recommendation of the National Assembly.<sup>1</sup> Second, candidates should reflect the race and gender composition of the population.<sup>13</sup> Second, in addition to a candidate being a fit and proper person, it should be a requirement that he or she has specialist knowledge, as is the case with the AGSA: 'Specialised knowledge of, or experience in, auditing, state finances and public administration must be given due regard in appointing the Auditor-General.'<sup>14</sup>

A certain minimum number of years of experience in a particular field may also be set as a requirement, as is the case with the Public Protector, who must be any of the following:

- a judge;
- an admitted and practising advocate or attorney with ten years' experience;
- a qualified and admitted advocate or attorney and have lectured law at a university with ten years' experience;
- a person with specialist knowledge of – or for a period of at least ten years, experience in, the administration of justice, public administration or public finance;
- a member of Parliament for at least ten years; or
- a person who has acquired any combination of experience listed in the above for a cumulative period of ten years.<sup>15</sup>

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<sup>1</sup> S 193(4) Constitution.

It should be noted that the requirements for the Deputy Public Protector are the same, save that this position cannot be occupied by a judge. It is evident that the drafters of the Constitution wanted to weed out wholly unsuitable applicants for the position of Public Protector and his or her Deputy by requiring at least ten years' experience in law, the administration of justice, public administration and/or public finance. There is no such specific requirement in respect of the NDPP.

## What information should the President consider when appointing the NDPP?

In *DA v President of SA*<sup>16</sup> the Constitutional Court found that the appointment of Menzi Simelane as NDPP was irrational in that the President failed to take into consideration relevant information emanating from the Ginwala Enquiry, in which negative findings were made about Simelane.<sup>17</sup> The Court found that the President must take all information into consideration, that the appointment process has to be rational, and that the President cannot cherry-pick the information on which he or she bases the decision to make an appointment. Even if the legislation itself is not particularly helpful in guiding the President to appoint the correct person, the duty rests with the President to be as thorough, rational and objective as he or she could possibly be.

## What is a 'fit and proper person'?

Given the power held by prosecutors and the discretion with which they are entrusted, it follows that they need to possess certain qualities of character to prevent the misuse of such power and discretion. It has been recommended that

prosecutors 'must act to a higher standard than a litigant in a civil matter' and that the qualities required of a prosecutor are similar to those of a judge, and thus require a suitable procedure for appointment and promotion.<sup>18</sup>

The requirement that the NDPP be a fit and proper person is relevant in both the appointment and dismissal of the NDPP. The NPA Act requires that the NDPP must possess the necessary legal qualifications and must 'be a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned'.<sup>19</sup> Similarly, the President may remove an NDPP from office on the basis that he or she is no longer a fit and proper person.<sup>20</sup> There is, however, little further guidance in law on what fit and proper means, an issue noted by the parliamentary Ad Hoc Committee that dealt with the dismissal of Adv Pikoli as NDPP.<sup>21</sup> The Ginwala Commission, which investigated Pikoli, also paid some attention to the notion of 'fit and proper':

There must be an appreciation of the significance of the role a prosecuting authority plays in a constitutional democracy, the moral authority that the prosecuting authority must enjoy and the public confidence that must repose in the decisions of such an authority.<sup>22</sup>

With the NPA Act being rather vague about the NDPP being a 'fit and proper person', the Supreme Court of Appeal (SCA) placed the issue under scrutiny in 2011 when it considered the appointment of Menzi Simelane as NDPP in *Democratic Alliance v President of the Republic of South Africa and others*.<sup>23</sup> The Court agreed with the DA's position that:

- Section 9(1(b) does not use the expression "in the President's view" or some other similar expression but requires an objective assessment
- The requirement of being fit and proper is couched in imperative terms, stating that the appointee "must" be a fit and proper person.

- Qualities like “integrity” can be objectively assessed and that such an assessment of a person’s personal and professional life ought to reveal whether he or she has integrity.<sup>24</sup>

The judgment lists several synonyms and antonyms for integrity to support the Court’s interpretation.<sup>25</sup> The SCA went on to state, ‘Consistent honesty is either present in one’s history or not, as are conscientiousness and experience.’ The Court added that ‘conscientious’ is defined as ‘wishing to do what is right and relating to a person’s conscience’.<sup>26</sup> On this point the Court concluded that there is no doubt that the appointment of the NDPP is not to be left to the subjective judgment of the President but needs to be ‘objectively assessed to meet the constitutional objective to preserve and protect the NPA and the NDPP as servants of the rule of law’.<sup>27</sup>

When the matter of Simelane’s appointment reached the Constitutional Court, the Court agreed with the SCA’s reasoning as to what is ‘fit and proper’, and confirmed the objective assessment against jurisdictional facts as exist in the NPA Act. The Court acknowledged that while the ‘fit and proper’ requirement does involve a value judgment, ‘it does not follow from this that the decision and evaluation lies within the sole and subjective preserve of the President’ and is therefore immune from objective scrutiny.<sup>28</sup>

The two *DA* decisions brought much clarity to the ‘fit and proper’ requirement. Identifying a ‘fit and proper’ NDPP is thus not a simple task and it would be appropriate that it not be done by one person behind closed doors.

## Dismissal of the NDPP

Section 12(6)(a) of the NPA Act provides that the President can provisionally suspend the NDPP or a Deputy Director of Public Prosecutions (DDPP) pending an enquiry into his or her fitness

told office. The President may remove him or her from office for:

- misconduct,
- on account of ill health,
- on account of incapacity to carry out his or her duties, and
- on account that he or she is no longer a fit and proper person.

The reason for the suspension as well as the representations (from the NDPP) thereto must be communicated to Parliament within 14 days of the suspension. Within 30 days (or as soon as possible after the communique), Parliament must pass a resolution to endorse or dismiss the decision of the President. The President must also dismiss the NDPP or DDPP from office if an address of each of the Houses of Parliament in the same session asking for such dismissal is received on the grounds set out above.

The parliamentary Ad Hoc Committee that dealt with the suspension and dismissal of Advocate Pikoli as NDPP observed that ‘it may be an anomaly that Parliament plays no role in appointing the NDPP, but has the final say in his or her removal. The review of the legislation should also consider whether Parliament should play any role in the appointment of the NDPP.’<sup>29</sup> The review of the legislation requested by the Ad Hoc Committee did not happen.

Noting that the NDPP serves a non-renewable term of ten years, but that not one NDPP has served his full term, the Pikoli matter was the only instance where Parliament became involved in the removal of the NDPP. In this instance it was a Joint Ad Hoc Committee with representation from both houses of Parliament, based on representation. The committee consisted of 13 members of the National Assembly (ANC 8; DA 2; IFP 1; other parties 2) and nine members of the National

Council of Provinces.<sup>30</sup> To date there have been only five Joint Ad Hoc Committees.<sup>31</sup> The Ad Hoc Committee had the powers under Rule 32 of the Joint Rules of Parliament.<sup>32</sup>

As noted above, the NDPP can be removed from office based on four grounds, but only two of these were relevant to the Ad Hoc Committee's work, namely misconduct and not being a fit and proper person. Two reports emerged from the Work of the Ad Hoc Committee, the majority report from the ANC supporting the President to remove Pikoli from office, and the minority report from the opposition parties. The majority report did not find, in as few words, that the NDPP made himself guilty of misconduct, nor did it find that he is not a fit and proper person. What seems to have been the most weighty reason is that Pikoli did not show the necessary sensitivity for matters of national security, an issue that emerged from the Ginwala Commission, but this is nowhere in the legislation listed as a requirement to hold office or to be dismissed. The Ginwala Commission did, however find Pikoli a fit and proper person: [Mr. Pikoli] "impressed me as a person on unimpeachable integrity";<sup>33</sup> "impressed me as a man of unquestionable integrity, with passion to execute his constitutional responsibilities without fear, favour or prejudice";<sup>34</sup> and again "impressed me as a person of unimpeachable integrity and credibility".<sup>35</sup> The Ginwala Commission consequently recommended that Adv Pikoli be reinstated, but the Pikoli case raises important concerns:

- Even though the Ginwala Commission, appointed by President Mbeki, recommended that Pikoli be reinstated, it was Mbeki's successor Motlanthe and Zuma's predecessor, that referred the matter to Parliament as required by section 12(6)(b) of the NPA Act. With the change in leadership in the ruling party, Pikoli found himself unprotected from political manipulation.

- The Ad Hoc Committee voted along party lines and the majority report forwarded questionable grounds for the dismissal of Pikoli, but it also failed to restrict itself to what the NPA Act requires as grounds for dismissal, i.e. misconduct and not being a fit and proper person.
- Moreover, the Ad Hoc Committee latched onto an issue (insensitivity for national security concerns) as the weightiest reason for Pikoli's dismissal, an issue identified by the Ginwala Commission but not one that was an issue prior to Pikoli's suspension, nor a sufficient reason for his dismissal.
- In essence, the current procedure has shown itself to be extremely vulnerable to political manipulation.

## Why were parts of the NPA Act declared unconstitutional?

Recently the Constitutional Court declared to sub-sections of the NPA Act dealing with the appointment and dismissal of the NDPP unconstitutional.<sup>36</sup> The case concerned the departure of former NDPP Nxasana and the appointment of Abrahams as NDPP. The first is section 12(4) providing for the extension by the President of the term of office of the NDPP or a Deputy NDPP which must normally come to an end at age 65. Even though none of the parties were affected by this provision, the court heard it in the abstract. Section 12(4) empowers the President to extend the term of office of the NDPP (or DNDPP) for a period of two years or shorter periods which in the aggregate do not exceed two years, provided that an NDPP's term of office shall not exceed 10 years. The Court found that this power to extend an NDPP's term of office undermines the independence of the office as it may influence the incumbent's behaviour and decision-making to curry favour with the President in order to remain in the position of NDPP. This

affected the independence of the office of the NDPP and is thus unconstitutional.

Section 12(6) empowers the President to suspend indefinitely with or without pay the NDPP. There is no time period attached to how long the suspension may last and continued remuneration is entirely at the discretion of the President. The Court further noted that there is no guidance in law on the discretion to continue remuneration and its quantum. The Court noted:

This tool is susceptible to abuse. It may be invoked to cow and render compliant an NDPP or Deputy NDPP. The prospect of not earning an income may fill many with dread and apprehension. The possibility of this enduring indefinitely exacerbates the situation. This is not a tool that should be availed to the Executive. It has the potential to undermine the independence and integrity of the offices of NDPP and Deputy NDPP and, indeed, of the NPA itself.<sup>37</sup>

The declaration of invalidity of section 12(6) was suspended for 18 months to enable Parliament to fix the problem and the

court went a step further ruling that during this period the suspension of an NDPP or Deputy NDPP shall not exceed six months and a suspended NDPP or Deputy NDPP shall receive their full salary. The Court further stated that if Parliament does not fix the problem within the 18-month period (by February 2020), the interim relief will become final.

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<sup>1</sup> Ngcuka hands in resignation, *News24*, 24 July 2004, <https://www.news24.com/SouthAfrica/News/Ngcuka-hands-in-resignation-20040724>

<sup>2</sup> *Corruption Watch NPC and Others v President of the Republic of South Africa and Others; Nxasana v Corruption Watch NPC and Others* (CCT 333/17; CCT 13/18) [2018] ZACC 23 (13 August 2018).

<sup>3</sup> 'Shaun Abrahams tells Zuma why he is fit to remain in his post as NDPP' *M&G*, 28 Nov 2016, <http://mg.co.za/article/2016-11-28-shaun-abrahams-tells-zuma-why-he-should-keep-his-job>

<sup>4</sup> Silas Ramaite appointed as acting NPA head, *News24*, 14 August 2018, <https://www.news24.com/SouthAfrica/News/breaking-silas-ramaite-appointed-as-acting-npa-head-20180814>

<sup>5</sup> S 10 NPA Act.

<sup>6</sup> S 11(1) NPA Act.

<sup>7</sup> S 13(1) NPA Act.

<sup>8</sup> S 15(1)(a) NPA Act.

<sup>9</sup> S 15 (1)(c) NPA Act.

<sup>10</sup> S 9(1) National Prosecuting Authority Act 32 of 1998.

<sup>11</sup> S 25(1) Legal Practice Act of 28 of 2014: 'In the case of an attorney who wishes to appear in the High Court, the Supreme Court of Appeal or the Constitutional Court must apply to the registrar of the Division of the High Court for a prescribed certificate to the effect that the applicant has the right to appear in the High Court, the Supreme Court of Appeal or the Constitutional Court and which the registrar must issue if he or she is satisfied that the attorney – (a) (i) has been practising as an attorney for a continuous period of not less than three years: Provided that this period may be reduced in accordance with rules made by the Council if the attorney has undergone a trial advocacy training programme approved by the Council as set out in the Rules; (ii) is in possession of an LLB degree; and has not had his or her name struck off the Roll or has not been suspended from practice or that there are no proceedings pending to strike the applicant's name from the Roll or to suspend him or her; or (b) has gained appropriate relevant experience, as may be prescribed by the Minister in consultation with the Council, if the attorney complies with paragraph (a)(iii). This means that if the nominated head of the NPA is an attorney, the latter threshold in terms of qualification and experience applies to him or her because

section 25 requires him or her to be entitled to practise ‘in all courts in the Republic’.

<sup>12</sup> *Report on European standards as regards the independence of the judicial system: Part II – The Prosecution Service*, Adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010) CDL-Ad(2010) 040, para. 35.

<sup>13</sup> S 193(2) Constitution.

<sup>14</sup> S 193(3) Constitution.

<sup>15</sup> Modified from s 1A(3) Public Protector Act 23 of 1994.

<sup>16</sup> *Democratic Alliance v President of the Republic of South Africa and others* (263/11) [2011] ZASCA 241; 2012 (1) SA 417 (SCA); [2012] 1 All SA 243 (SCA); 2012 (3) BCLR 291 (SCA) (1 December 2011).

<sup>17</sup> *Report of the Enquiry into the fitness of Advocate VP Pikoli to hold the office of National Director of Public Prosecutions*, Nov. 2008.

<sup>18</sup> *Report on European standards as regards the independence of the judicial system: Part II – The Prosecution Service*, Adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010) CDL-Ad (2010) 040, paras 14 and 18.

<sup>19</sup> S 9(1)(b) NPA Act.

<sup>20</sup> S12(6)(a) NPA Act.

<sup>21</sup> *Ad Hoc Joint Committee to consider matters in terms of section 12 of the National Prosecuting Authority Act, 1998 (Act 32 of 1998)*, Annexure 1 para. 4.

<sup>22</sup> *Report of the Enquiry into the fitness of Advocate VP Pikoli to hold the office of National Director of Public Prosecutions*, Nov. 2008, para. 72.

<sup>23</sup> *Democratic Alliance v President of the Republic of South Africa and others* (263/11) [2011] ZASCA 241; 2012 (1) SA 417 (SCA); [2012] 1 All SA 243 (SCA); 2012 (3) BCLR 291 (SCA) (1 December 2011)

<sup>24</sup> *Democratic Alliance v President of the Republic of South Africa and others* (263/11) [2011] ZASCA 241; 2012 (1) SA 417 (SCA); [2012] 1 All SA 243 (SCA); 2012 (3) BCLR 291 (SCA) (1 December 2011), para. 116.

<sup>25</sup> The term ‘integrity’ is therefore an objective requirement existing in law guiding the determination of ‘fit and proper’. The Court further drew upon the *Oxford Dictionary* to clarify ‘integrity’: ‘unimpaired or uncorrupted state; original perfect condition; soundness; innocence, sinlessness; soundness of moral principle; the character of uncorrupted virtue; uprightness; honesty, sincerity’. Further clarification was sought in the *Collins Thesaurus*: ‘honesty, principle, honour, virtue, goodness, morality, purity, righteousness, probity, rectitude, truthfulness, trustworthiness, incorruptibility, uprightness, scrupulousness, and reputability’. The following were noted as antonyms: ‘corruption, dishonesty, immorality, disrepute, deceit, duplicity’. *Democratic Alliance v President of the Republic of South Africa and others* (263/11) [2011] ZASCA 241; 2012 (1) SA 417 (SCA); [2012] 1 All SA 243 (SCA); 2012 (3) BCLR 291 (SCA) (1 December 2011), para. 116.

<sup>26</sup> *Democratic Alliance v President of the Republic of South Africa and others* (263/11) [2011] ZASCA 241; 2012 (1) SA 417 (SCA); [2012] 1 All SA 243 (SCA); 2012 (3) BCLR 291 (SCA) (1 December 2011), para. 117.

<sup>27</sup> *Democratic Alliance v President of the Republic of South Africa and others* (263/11) [2011] ZASCA 241; 2012 (1) SA 417 (SCA); [2012] 1 All SA 243 (SCA); 2012 (3) BCLR 291 (SCA) (1 December 2011), para. 117.

<sup>28</sup> *Democratic Alliance v President of South Africa and Others* (CCT 122/11) [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) (5 October 2012) para. 23.

<sup>29</sup> *Ad Hoc Joint Committee to consider matters in terms of section 12 of the National Prosecuting Authority Act, 1998 (Act 32 of 1998)*, Annexure 1 para. 7.

<sup>30</sup> Parliament of South Africa, *Terms of Reference - Ad Hoc Joint Committee to Consider Matters in terms of Section 12 of National Prosecuting Authority Act*.

<sup>31</sup> PMG Parliamentary Committees, <https://pmg.org.za/committees/>

<sup>32</sup> These are: summon any person to appear before it to give evidence on oath or affirmation, or to produce documents; receive petitions, representations or submissions from interested persons or institutions; conduct public hearings; permit oral evidence, including evidence on petitions, representations and submissions; determine its own procedure; meet at a venue determined by it, which may be a venue beyond the seat of Parliament; meet on any day and at any time, including on a day which is not a working day; on a day on which a House or both Houses are not sitting; at a time when a House or both Houses are sitting; or during a recess of a House or both Houses; and exercise any other powers assigned to it by the Constitution, legislation, the other provisions of the Joint Rules or resolutions adopted in both Houses Parliament of South Africa, *Joint Rules of Parliament*, <https://www.parliament.gov.za/storage/app/media/JointRules/joint-rules-a51.pdf>

<sup>33</sup> Report of the enquiry into the fitness of Advocate VP Pikoli to hold the office of National Director of Public Prosecutions, November 2008, para 95.

<sup>34</sup> Report of the enquiry into the fitness of Advocate VP Pikoli to hold the office of National Director of Public Prosecutions, November 2008, para 284.

<sup>35</sup> Report of the enquiry into the fitness of Advocate VP Pikoli to hold the office of National Director of Public Prosecutions, November 2008, para 296.

<sup>36</sup> S 12(4) and 12(6) *Corruption Watch NPC and Others v President of the Republic of South Africa and Others; Nxasana v Corruption Watch NPC and Others* (CCT 333/17; CCT 13/18) [2018] ZACC 23 (13 August 2018).

<sup>37</sup> Para 45 *Corruption Watch NPC and Others v President of the Republic of South Africa and Others; Nxasana v Corruption Watch NPC and Others* (CCT 333/17; CCT 13/18) [2018] ZACC 23 (13 August 2018).