

Is it criminal to pay our head prosecutor to resign?

Weekend press reports suggest that Freedom Under Law is considering civil litigation concerning the constitutionality of the recent engagements between the President and our freshly resigned National Director of Public Prosecutions, Mxolisi Nxasana.

The law is clear: section 179 of the Constitution itself prescribes that the President, as head of the national executive, appoints the head of the prosecuting authority. In the broader perspective, the provisions of section 1 apply; they require that there must be accountability, responsiveness and openness in our system of democratic government.

The issue which FUL presumably wishes to raise is whether or not the President has been behaving accountably in his appointing and “dis-appointing” of the NDPP.

So far no holder of that office has served a full term. Bulelani Ngcuka resigned. Vusi Pikoli was dismissed, then exonerated in the expensive settlement he concluded in the litigation impugning his dismissal, Menzi Simelane was declared an irrational choice and now Nxasana has “engaged” with the President leading to his resignation and acceptance R17,3 million of public funds to do so. No reason for the resignation has ever been made public and it would seem that no good reason in fact exists.

Section 179(4) stipulates that national legislation must ensure that the prosecuting authority, which the NDPP heads, exercises its functions without fear, favour or prejudice.

This essential independence includes independence from executive interference in the functioning of the NPA. In the case of Nxasana we have a long litany of instances of executive interference. The threat to suspend him, warded off by a High Court interdict that Nxasana obtained and the appointment of the Cassim Commission of Inquiry into his fitness for office are the main instances of interference. The failure of the executive to take seriously and act on the recommendations of the Yacoob inquiry set up by Nxasana is another instance of a lack of respect for the independence of the NPA as an institution. The failure to deal with the problems very properly identified by Justice Yacoob has exacerbated tensions within the NPA and may have led to the resignation of its leader. The tensions exist, in the broadest sense, between those who regard themselves as first and foremost loyal deployees of the national democratic revolution and those who give priority to their constitutional obligation to act independently. These tensions give rise to the incompatibilities evident in the upper echelons of the NPA.

The inexplicable resignation of Nxasana is legally not a development for which the president can account in any way that is constitutionally compliant; hence FUL’s concerns. There is no justification for easing Nxasana out of his post because he wants his deputies Jiba and Mwrebi suspended. Nor because he is interested in the complaints of criminality in the Nkandla procurements. Nor his willingness to prosecute Richard Mdluli for his various alleged crimes.

There is, however, another angle on the goings on in the NPA. The question is whether the law countenances the resignation, apparently for no good reason, of the NDPP long before the expiration of his fixed term of office of ten years. The “engagement” that led to his resignation is instructive. The Cassim commission of inquiry was abandoned after its

chairman let it be known that he inclined to the view that Nxasana is indeed a fit and proper NDPP. Thereafter the “engagement” between president and NDPP was finalised quickly with the announcement of the settlement in terms of which Nxasana resigned and was given a golden handshake of R 17,3 million. He was given a clean bill of professional health in the presidency’s announcement of the settlement and departed his post with great haste.

The provisions of section 9 of the Prevention and Combating of Corrupt Activities Act are a useful starting point when pondering the legality of what has occurred.

They read:

“Offences in respect of corrupt activities relating to members of prosecuting authority

(1) Any-

(a) member of the prosecuting authority who, directly or indirectly, accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person;

(b) person who, directly or indirectly, gives or agrees or offers to give any gratification to a member of the prosecuting authority, whether for the benefit of that member or for the benefit of another person,

in order to act, personally or by influencing another person so to act, in a manner-

(i) that amounts to the-

(aa) illegal, dishonest, unauthorised, incomplete, or biased; or

(bb) misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;

(ii) that amounts to-

(aa) the abuse of a position of authority;

(bb) a breach of trust; or

(cc) the violation of a legal duty or a set of rules;

(iii) designed to achieve an unjustified result; or

(iv) that amounts to any other unauthorised or improper inducement to do or not to do

anything,

is guilty of the offence of corrupt activities relating to members of the prosecuting authority.

(2) Without derogating from the generality of section 2 (4), 'to act' in subsection (1) includes-

(a) performing or not adequately performing a function relating to the-

(i) institution or conducting of criminal proceedings;

(ii) carrying out of any necessary functions incidental to the institution or conducting of such criminal proceedings; or

(iii) continuation or discontinuation of criminal proceedings;

(b) delaying, hindering or preventing the performance of a prosecutorial function;

(c) aiding or assisting any particular person in the performance of a function relating to the institution or conducting of criminal proceedings;

(d) showing any favour or disfavour to any person in the performance of a function relating to the institution or conducting of criminal proceedings; or

(e) exerting any improper influence over the decision making of any person, including another member of the prosecuting authority or a judicial officer, performing his or her official function.”

It is at least arguable that the settlement between the president and the NDPP is a corrupt activity, and therefore a criminal act, given that the latter has been offered gratification to the tune of R17,3 million to do what he ought not to do before his ten year term of office expires, namely resign his post in exchange for payment of a great deal of money.

The provisions of section 9(1)(b) (ii) (bb) and (cc) could apply, given the duty to act independently, and it is also apparent that subsections 9(1) (b) (iii) and (iv) may also be implicated.

It is also, given the various criminal charges pending against the president, arguable that the acceptance of the golden handshake on offer amounts to a contravention of section 9(2) (d) in that it shows favour to the president by vacating office rather than pursuing the charges relating to the Shaik conviction, the Nkandla debacle and any other nefarious involvements of the president such as the receiving of certain well connected wedding guests via Waterkloof air-force base and defeating the ends of justice by spiriting Al-Bashir out of the country.

These issues may be in the realms of academic debate given the gutting of the Hawks, IPID and the NPA at the hands of the Zuma administration. No will to prosecute the president is apparent from those left standing in positions of authority in SAPS, the Hawks and the NPA.

However, there is always the possibility of a private prosecution, a device that is resorted to when the persons in authority in the criminal justice administration are unwilling to prosecute in a particular matter. The thought of prosecuting the president and a former NDPP is not attractive to the leadership of our current criminal justice administration. It might be necessary for civil society to step into the breach.

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22 June 2015.