

**Annual lecture hosted by Freedom Under Law, in partnership with the
Department of Journalism at the University of Stellenbosch**

Strengthening the Rule of Law: Challenges and Opportunities for the NPA

INTRODUCTION

Thank you for the invitation to deliver this important lecture.

I am going to speak to you tonight about why the rule of law *must* be our collective priority, if SA is to survive this moment in our young democratic life, and hopefully thrive into the future. Sadly, global trends on the rule of law and justice don't bode well. South Africa has in the past been a global inspiration on the rule of law; a trailblazing innovator in many areas, and a moral guiding light, especially under the guidance of Madiba. We need to take up this role again, especially considering the global context. But to do this, we need to get our own rule of law house in order. The NPA must be a leading actor in this regard.

We are living in a world that is inhabited by those who want the rule of law to succeed and, increasingly, those who do not. It is a world where, as recent elections attest to, candidates with criminal records can hold high political office, and where populist political leaders do not hesitate to attack institutions like the judiciary which seek to hold them accountable.

Against this context, we should cherish the fact that we have a President and Government of National Unity that are explicitly grounded on the respect for the rule of law. Against the constant threats that the rule of law endures, both globally and locally, we should neither underestimate nor take for granted the importance of this government commitment.

The Rule of Law is one of our 'founding values'; our Constitution specifically provides that South Africa is founded on the "supremacy of the Constitution and the rule of law".

It is the central ingredient of the social contract holding us together, and a practical necessity that correlates to higher economic growth, greater peace, less inequality, improved healthcare, and better education.

Upholding and defending the rule of law in SA depends on many moving parts and the actions of many actors, key amongst them the three branches of government (executive, legislative and judiciary), the legal profession, civil society (including the media), and critically, the National Prosecuting Authority, which has a particularly heavy burden to bear. As powerful officials in any country's criminal justice system, prosecutors lead efforts to uphold the rule of law and ensure accountability for criminals and justice for victims. This we do fearlessly and independently (notably from political interference).

As the NPA, we recognise and take seriously our pivotal role in upholding the rule of law at a precarious time for South Africa. This is why over the past five years, since I assumed the position of National Director, we have dedicated ourselves to rebuilding an organisation weakened and fractured as a result of state capture, to ensure that the NPA is a fit-for-purpose, credible organisation that is able to pursue justice for all, deliver accountability, and thus contribute to rebuilding our country.

REBUILDING THE NPA

Much of the work that we have undertaken to rebuild the NPA into a strong institution once more - critical for a democratic society and rule of law – has not always been visible. It is also not the type of accomplishment that the media is interested in covering; the drudgery of institution-building is not always that interesting, and not as sexy as cases in court. And, let's face it, good news seldom sells. Strong institutions are critical to our constitutional democracy. So, let me share with you just a few of the strategic initiatives that we have undertaken to build a capable, modern fit-for-purpose prosecution service, ready to take on the challenges of the 21st century – one that we must not forget was crippled and debilitated by state capture:

- We stabilised the organisation's senior leadership layers, the NPA is led by people of unquestionable integrity. It is only after this and Covid 19 – in March 2021 - that institution building could begin in earnest – just over 3.5 years ago.

- We increased staff by about 1000 (about 25%), and we are increasing their capabilities to keep up with the changing nature of crime, guided by the Capability Review and Capacity Enhancement Initiative that we undertook, focussing on complex corruption, commercial crime, organised crime and asset recovery. We are also bolstering capacity through our strategic use of external counsel (it is s38 of NPA Act) - bolster – *not replace* – our capacity.
- We worked tirelessly on the establishment of the IDAC, which is now a permanent entity in the NPA.
- We adopted a bold and ambitious Asset Recovery Strategy and Implementation Plan, which is reaping rewards.
- We have adopted a strategic prioritisation approach for impact, given the sheer volume of crimes we have to deal with - a pilot housebreaking project in KZN and now utilising learnings to commence a stock theft project in the Free State and one on possession of firearms in the Western Cape.
- We have established an Office for Ethics and Accountability.
- We reintroduced the innovative Community Prosecution Initiative which focusses on finding long term solutions, to intractable crime identified by local communities, working closely with a range of partners and importantly the community. As of April 2024, 48 community prosecution sites have been established.
- We have engaged in bold and innovative engagements with business and other partners, to support key strategic initiatives, including in the area of SGBV.
- We have launched the NPA Knowledge Management portal to support staff in the core business, but also to ensure that institutional learnings are not lost.

Notwithstanding, as David Lewis - a former trade unionist, academic, policymaker, co-founder and director of Corruption Watch and now NACAC member – recently highlighted in a newspaper article: “The NPA is a regular whipping boy of the public, the media and the chattering classes.”

Over the past five years, the NPA has been judged primarily (and harshly if I may add given what has been achieved in just over 3.5 years) on its response to state capture corruption. The people of South Africa are rightfully outraged over the large-scale

looting of state resources. We understand and appreciate their demands for accountability for the alleged powerful perpetrators of state capture related corruption, and the frustration by the perceived slow pace of progress on these cases; this is the focus of much of our efforts. The last thing SA needs is complacency and the normalisation of crime.

We also recognise that we have experienced setbacks on some cases, and this affects public confidence. Some of these cases, however, are on appeal or to be re-enrolled. We must also accept that such setbacks happen in the criminal justice process, and that people may also be acquitted – it's the nature of the job.

We, as the NPA, must be held accountable – it is part and parcel of strengthening the rule of law in our country. But each of us must be conscious that allowing a narrative that the NPA is failing, without critically analysing the facts, is not only flawed, but also dangerous since it acts as a destructive force for the rule of law, at a time that we are working tirelessly to keep it alive.

The rule of law crisis that the country faces is not only confined to state capture related corruption. Much of it is also driven by the crisis of violent crime which has soared in recent years. South Africa has become one of the most crime ridden countries in the world. To put this in perspective, state capture and complex corruption matters make up a very small percentage (less than 0.01%) of the 850 000 odd matters that our prosecutors deal with each year. This violent crime crisis directly affects all of us daily, across the length and breadth of South Africa, and we are still reeling from the effects of state capture.

The NPA recognises this dual challenge, and we have laid a solid foundation that both delivers justice for victims of crime, and is capable of dismantling high-level corruption. Today, the NPA is performing significantly better than it did prior to February 2019.

Let me give you some examples of how we are doing in dealing with these dual crises. Firstly, the narrative that the NPA has done nothing with regard to accountability for state capture corruption is flawed. Recent high-profile arrests, guilty pleas and significant asset recoveries signal to criminals that impunity is no longer a given.

- As a relatively young democracy, South Africa is one of the few countries in the world that is prosecuting senior government officials, and high-profile politicians (including ex-Ministers, Chief Financial Officers, municipal managers, Heads of Department, mayors), as well as private sector actors (including Chief Executive Officers, companies and directors,) for complex corruption.
- In June this year, the new Investigating Directorate Against Corruption (IDAC) became a permanent prosecution-led agency with requisite investigative powers and capacity to effectively tackle the most complex and serious forms of corruption. Our history demonstrates the impact that can be achieved when adopting this cutting-edge model.
- Since 2019, the ID/IDAC has authorised 117 matters involving 212 accused persons and 68 entities. Of these, 78 are under investigation and 39 cases are enrolled.
- In the past year, our Specialised Commercial Crimes Unit (SCCU), secured 333 convictions in serious and complex commercial crime cases , representing a conviction rate of 90%.
- Almost 700 government officials and over 1 000 private sector individuals have been convicted for corruption in the last five years.
- Through our partnerships with law enforcement agencies, we have made notable progress in addressing the Financial Action Task Force (FATF) recommendations.
- As mentioned above, we have cultivated innovative partnerships with key private sector actors, including business, without compromising our independence, to facilitate the transfer of skills and hiring some of the best legal, forensic and financial minds the private sector can offer to tackle complex corruption and organised crime. This includes a tailored Digital Evidence Unit through the Presidential Initiative between government and business, that will provide cutting-edge digital evidence capacity in the IDAC to further enhance its capability. This is being set up and we expect it to be operational in the coming months. The private sector must be a key partner in our efforts to rebuild the rule of law in the country, while safeguarding the independence of the NPA. This is a global best practice, and in line with our international legal obligations to engage in multi-stakeholder collaborations. The NPA's pursuit of these

innovative partnerships to attract much needed expensive specialised capabilities and technological expertise represents a sign of strategic strength, and not one of government weakness, as some may want to argue.

- We achieved a 93.4% conviction rate in prosecuting organised crime cases in 2023/24. But this is still the tip of the iceberg, and a lot more needs to be done in respect of what has been referred to as an existential threat to our country. Not enough kingpins are arrested. With the adoption of our bold new Strategy Against Organised Crime focused on harm reduction early this year, we must prioritise, with our partners, disrupting the activities of a relatively small number of serial offenders, organised crime kingpins and those involved in grand corruption. Success is fully dependent on capacities and capabilities in the SAPS, including DPCI and critically Crime Intelligence.
- Importantly, we have re-energised the Asset Forfeiture Unit (AFU), guided by the Strategy and Implementation plan I referred to above, which is ramping up its efforts to deal with high-profile suspects, prioritising non-conviction based forfeiture, focussing on organised crime, international asset recovery, and the innovative Corporate Alternative Dispute Resolution mechanism (C-ADR). This mechanism is allowing *companies* involved in criminality to be held accountable by paying back to the state, and importantly collaborating with law enforcement to provide evidence to hold individuals, also directors and other company employees, accountable in terms of prosecutions.
 - Since 1999, AFU has frozen R30,38bn, confiscated and forfeited R12,98bn and recovered R11,7bn, of which R4,89bn paid into Criminal Asset Recovery Account (CARA).
 - Almost half (46%) of all freezing orders, 37% of all confiscations and forfeiture orders and 44% of all recoveries, since the creation of the AFU in 1999, have been attained in the last five years.

We have to recognise that globally, convictions for complex corruption cases involving powerful individuals can take years to secure, especially as the corrupt commit their crimes with unprecedented levels of sophistication, mostly on digital platforms designed to make evidence collection and presentation before court most challenging.

Yet, despite this, South Africa compares favourably with key entities in other parts of the world (like the Serious Fraud Office in the UK).

As I alluded to above, over and above state capture and complex corruption, we are also delivering on dealing with the second crisis and our mandate to ensure justice for thousands of victims of crime each year.

- Across the country, prosecutors continue to achieve over 77% conviction rate in more than 3000 murder prosecutions per year.
- We are currently dealing with 13 high-profile gang-related matters involving a total of 94 accused.
- We also continue to make important progress in bringing justice to victims of GBV, femicide and supporting them on their journey to becoming survivors.
 - The footprint of our Thuthuzela Care Centres (TCCs) – one-stop centres to provide comprehensive pre-trial services to GBV victims – has been expanded from 55 facilities in 2020/2021 to 64 in 2023/2024, working with various government partners like the SAPS, the Department of Health, the Department of Social Development, the GBV Response Fund in the Presidency, various NGOs that provide critical support services and, most innovatively with business.
 - Together with the police, we have launched a serial rapist prioritisation initiative to identify the top 10 serial rapists per province.
 - In 2023/24 dealt with over 5000 cases of sexual offences: conviction rate 72.3%.

Notwithstanding that we have seriously ramped up our communication efforts, it is clear that the work of the NPA is not fully understood or appreciated. Hopefully it is clear that the NPA has not been sitting idle or sleeping (as one cartoonist saw fit to depict) ; rather we have been actively engaged in fighting the twin crises of violent crime and corruption, in the most complex and complicated, and often toxic and dangerous environment.

It is critical to understand that painting the NPA with one brush of negativity, and peddling the perhaps self-fulfilling and false narrative, not based on evidence, that the NPA is failing, is a disservice to the battle for the rule of law, at a time when it is

diminishing. Such stance is also a slap in the face to the thousands of prosecutors who work tirelessly for justice every day, and fails to acknowledge the pain and reality of hundreds of thousands of victims who are served by the NPA. More fundamentally, it undermines the willingness of South Africans to believe in, and join in the fight for, the rule of law.

JOINING IN THE COLLECTIVE EFFORT TO SAFEGUARD THE RULE OF LAW

At the present juncture, therefore, we all have a responsibility to understand how our own actions, and those of others, can impact on the future of the rule of law in our country. Many of you might be aware of the smear campaign starting against the NPA, including personal attacks on its leadership. This 'playbook' is well tried and tested. It did significant damage in the past to the NPA and the DSO (Scorpions) - shut down because it flew too close to the sun. Arguably, state capture was enabled because many state institutions, like the NPA and SARS were weakened as a result of targeted attacks and smear campaigns, fuelled by smoke and mirror conspiracy stories. We should therefore be acutely aware of this 'playbook' dangers at this time. There is a responsibility on civil society, the media and other influential actors to see it for what it is, and robustly push back against it.

This requires that research institutes be ethical, rigorous, transparent and responsible in their work. To be credible, their views and criticisms should be evidence-based and, if they concern the NPA directly, they should have the courtesy and decency to seek views, which they can of course completely ignore.

We also call on advocacy groups within civil society to continue to support the NPA as we embark on fixing legal design flaws that we inherited, with the DG of Justice being the Accounting Officer of the NPA, which affects the NPA's operational and financial independence, and undermines the leadership of the NPA.

The role of a responsible civil society becomes more important as the NPA becomes more effective, and powerful political figures and private sector actors, sense that impunity is no longer a given, and the net of accountability is closing in. As the NPA we strike at the heart of what the vast majority of human beings value the most – freedom and money. Those who know that they are or might be on the radar of the NPA have every reason to attack us.

Many of those involved in grand corruption and organised crime have deep pockets, wily lawyers and powerful friends. In upholding the rule of law, the legal profession plays a key role in ensuring that legal practitioners act ethically, and calling out those who persist in pursuing frivolous or vexatious applications. In complex corruption cases, guilty pleas are rare, especially in adversarial systems like ours, with extensive constitutional protections that are often abused by those perfecting the art of delaying justice. As I have said before, Stalingrad tactics present one of the greatest risks to the rule of law, so we need legal practitioners to act ethically. And as Justice Cameron recently pointed out¹, judges can also issue cost orders against manifestly frivolous applications including ordering practitioners to personally pay the costs of the litigation.

Addressing State Capture is a government priority, the question must be asked - what is the role of the judiciary, as the third arm of government, in implementing this government priority, within its critical independent mandate? We need the firm resolve of an independent judiciary to ensure that cases move swiftly through the court process, while ensuring a fair trial, fair not only for the accused but also for victims and witnesses. Corruption is not a victimless crime - the people of our country are the victims, disproportionately affecting the poor, and women and children.

As both our Apex Court and the SCA have stated:

Fairness is not a one-way street conferring an unlimited right on an accused to demand the most favourable possible treatment but also requires fairness to the public as represented by the State.² This does not mean that the accused's right should be subordinated to the public's interest in the protection and suppression of crime; however, the purpose of the fair trial provision is not to make it impracticable to conduct a prosecution.³

Unjustified delays (whether by the prosecution or the defence) and abuse of process, which subvert the rule of law, should not be tolerated. Sometimes tough, case management by the judiciary is critical – it is what the rule of law demands - and serious consideration should be given to a fast lane for State Capture cases.

¹ E Cameron, 'Action needed against lawyers who undermine Constitution', *Business Day*, 23 July 2024.

² *S v Shaik* 2008 (2) SA 208 (CC) para 43

³ *NDPP v King* 2010 (2) SACR 146 (SCA), par 5.

As I said at the beginning, there are many moving parts in upholding the rule of law today. We expect that the battle for the rule of law will intensify, and that the NPA will continue to occupy centre stage as it enters a period of leadership transition next year. We will certainly play our part in trying to ensure that leaders who objectively meet the “fit and proper” standard required in our Constitution, are appointed into key positions, to further consolidate the gains we have made.

These are trying times for the future of the rule of law in our country. I therefore want to thank FUL for inviting us here today. This gathering comes at an opportune time to take forward this collective fight for the future of SA. It’s not about being defensive about the NPA. In order to fix problems in a complicated and challenging criminal justice system, we need to ensure that we properly identify and define the problems, not by casual confirmation of dinner table chatter – as David Lewis so eloquently put it. It’s about being realistic about the current challenges, and acutely aware of the fight back. South Africa will not survive state capture 2.0, which will again be made possible if the NPA is weakened over the coming years, especially as it goes through its leadership transition period. So let us, those fighting the good fight, use our powerful collective strength, to fight those fighting back!

We dare not fail; the future of our country and our people depend on it.

I thank you.