



The Case for Retaining the Scorpions

Democratic Alliance
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Background

The government's decision to disband the Directorate of Special Operations (DSO), in line with the ANC's resolution at Polokwane is a transparent attempt to destroy the most effective corruption-busting force in the country.

The only conclusion to draw is that the ANC wants to get rid of the DSO to protect prominent members of the ruling party. Besides the seven convicted criminals on the ANC's National Executive Committee (NEC), six NEC members are currently the subject of ongoing criminal investigations. At least two of these are under investigation by the DSO.

In the absence of a cogent argument from the ANC why the DSO should be disbanded, it can only be assumed that they are motivated by the desire to protect ANC members from any current and future corruption investigations.

It is important to note that the charges of corruption and defeating the ends of justice would not have been brought against National Police Commissioner Jackie Selebi had it not been for investigations carried out by the DSO. The same is true in the case of the indictment which has been brought against ANC President Jacob Zuma.

In time, given the record of many members of the ANC, further investigations by the DSO would no doubt reveal the extent of the web of corruption that surrounds the ANC.

The ANC's resolution to disband the DSO, and government's apparent willingness to acquiesce to this request, not only displays an arrogant disregard for public opinion, but also blatantly ignores the Khampepe Commission recommendation that the DSO be retained in its current form. This recommendation, it should not be forgotten, was adopted and approved by Cabinet and the President.

The ANC's unedifying rush to disband the DSO illustrates the contempt with which they hold democratic institutions. Dismantling the DSO will require a number of legislative amendments, which will need to comply with the constitutional requirement of public participation.

The Speaker of Parliament, Baleka Mbete, has gone on record stating that the ANC's self imposed deadline of June 2008 is "do-able". This perfectly illustrates just how compromised Mbete is on these kinds of matters. As the Chairperson of the ruling party and the head of the political committee that co-ordinates relations between the ANC and Parliament, it is clear that

her loyalties lie much more with furthering the agenda of the ANC, than with protecting and upholding Parliament's constitutionally defined role.

Mbete's statement reinforces the perception that following due process is irrelevant to the ANC, and that they will do as they please in their rush to protect themselves from any further embarrassing revelations that might flow from future DSO investigations.

The purpose of this document is to present the case for the retention of the DSO in its current form - in the NPA. This is done to differentiate between fact and fiction and to show why the ANC's decision to disband the DSO can only be for political and not operational reasons.

The DSO is one of the last, if not actually the last, remaining institutions that are effective in exposing corruption and dealing with complex investigations, such as those related to organised crime. If we were to lose the DSO, we would lose a great deal of our ability to tackle organised criminal activities, and allow criminal syndicates to contribute even more to our already dangerously high levels of organised crime.

We would also lose a great deal of our international credibility, as investors would see that government is not serious about combating crime – which has already been identified as a major impediment to increased investment in South Africa. This, in turn, would hamper economic growth and development for all.

The Constitutional and Legislative Requirements to Disband the DSO

Changing legislation is easier said than done. The deadline of June 2008 is excessively optimistic. Both the South African Police Service (SAPS) Act and the National Prosecuting Authority (NPA) Act may need to be substantially changed. The Constitution may also have to be amended in order to change section 199, which allows for law enforcement services outside of the SAPS.

The following steps are required in order to fulfil the constitutional mandate of open and transparent process, as well as public participation, as set out in section 59. If an amendment is regarded as not having sufficiently met the requirements for public participation, it can be set aside by the Constitutional Court, and Parliament will then have to reopen the proceedings.

Proposed amendments to the SAPS and NPA Acts must follow the following procedures:

- The proposed amendments to the two Acts must be introduced in Parliament;
- After that, the amendments are referred to the relevant Portfolio Committees for consideration.
- Public hearings will need to be held in order to fulfil the requirement of public participation;
- On the basis of the actions of the Portfolio Committees, the National Assembly will then be given the opportunity to pass, amend or reject the amendments;
- The National Council of Provinces then has its turn to debate and consider whether to accept, amend or reject the proposed amendments.

If Section 199 of the Constitution is to be amended, the following process must be followed:

- Both the National Assembly and the National Council of Provinces must pass the amendments;
- All proposed amendments must be published in the Government Gazette to allow for public comment no less than 30 days before the amendments are introduced in Parliament;
- After the proposed amendments have been tabled, at least 30 days must pass before the National Assembly can vote on them. After that, the amendments must be passed by the NCOP.

The above processes can take several months. The notion that these required amendments can take place before June 2008 indicates a flawed understanding of the parliamentary processes and constitutional requirements. Complex amendments to existing legislation have not infrequently taken years.

Given the highly contentious nature of the proposed changes, we can expect the process to be lengthy and it is arrogant of the ANC to suggest otherwise, unless they are stating upfront that they intend to bulldoze the amendments through Parliament.

The Case for the Scorpions

South Africa cannot afford to be without an independent unit capable of conducting complex and high profile investigations and seeing them through to successful prosecution.

The credibility of our country, government, state apparatus and criminal justice system depend on our ability to bring guilty people before the courts, try and convict them. Closing the DSO or

redeploying the unit into the SAPS, will cast serious doubt over government's commitment to fight crime and corruption.

In the words of President Thabo Mbeki on the creation of the DSO:

"To enable our law enforcement agencies to translate this into reality, I am privileged to announce that a special and adequately staffed and equipped investigation unit will be established urgently to deal with all national priority, including police corruption"¹. (bold) [our emphasis]

Even during the Khampepe Commission, scarcely anyone who presented at the Commission contested the criminal justice needs of the country, and that the need to create an agency such as the DSO was necessary².

The DSO differs from the SAPS in that it makes use of a troika of activities: intelligence gathering, criminal investigation and prosecution taking place within one team. This powerful combination of skills and expertise led by a qualified and experienced prosecutor means that the DSO is able to conduct investigations that are solid and will stand up in court. This is the reason behind its excellent conviction record.

However, this is not to imply that there is no room for improvement within the DSO. There are areas where the DSO can improve on technicalities, as well as on interacting with the media.

Success of the DSO

However, the results that the DSO has been able to deliver since its creation speak for themselves:

- The conviction rate for the DSO has remained between 82 and 94% since 2002³;
- The number of people arrested by the DSO has increased from 66 (2002) to 617 (2006); and
- The number of prosecutions finalised has gone from 180 (2002) to 214 (2006).

¹ Thabo Mbeki. Opening address to Parliament. 25 June 1999, Cape Town.

² Mashele, P. (2006). The Khampepe Commission: The Future of the Scorpions at Stake. Occasional Papers 126, June 2006. Institute for Security Studies.

³ National Prosecuting Authority (NPA) annual report 2006/2007

A list of the high profile DSO investigations and cases illustrates how crucial the unit is:

- The DSO was first in South Africa to convict financial directors of fraud, tackle major international corporate raiding in conjunction with the UK and USA, and register money-laundering and racketeering convictions, to name a few ⁴;
- Arrest in the Brett Kebble murder;
- Operation Yield, which focused on platinum smugglers and has resulted in 13 arrests;
- Operation Guanxi, focusing on illegal abalone smuggling and resulting in 335 arrests, 111 convictions and contraband seizures to the value R3bn⁵;
- Confiscation of drugs to the value of R600 million;
- Travel fraud prosecutions resulting in 38 cases against members of Parliament being concluded;
- Convictions in the Leisurennet prosecution;
- The Shaik and Yengeni rulings;
- The Zuma, Selebi, Agliotti and Fidentia cases currently being investigated⁶.

The above investigations illustrate the need for a specialised unit that can investigate complex and sophisticated organised crime activities, using “team-based, multi-disciplinary investigations that involve...detectives, intelligence analysts, forensic accountants and prosecutors”⁷.

In addition, the DSO has succeeded in forming relations with a broad variety of government departments, private sector bodies and international agencies, such as:

- The Federal Bureau of Investigations (FBI);
- The Attorneys General of Switzerland, Mauritius and the Ukraine;
- The police in Hong Kong, Australia, Sweden, Namibia and Mozambique;
- The Serious Organised Crime Agency (UK); and
- The Economic and Financial Crimes Commission (Nigeria)⁸.

There are a number of countries who make use of units separate from the main law enforcement body to combat specific crimes such as corruption and organised crime. While each country's strategy is unique, Italy, Nigeria, Spain, Germany, the UK, Norway and the USA have criminal investigative capacities that exist outside of the traditional police force⁹. Given the impressive list of achievements, one wonders why the question to disband the DSO even arises.

⁴ National Prosecuting Authority (NPA) website. Accessible on <http://www.npa.gov.za>

⁵ Hofmeyr, W. (2007). The role of Specialist Units in the NPA. Presentation at stakeholder conference March 2007.

⁶ National Prosecuting Authority (NPA) annual report 2006/2007

⁷ Institute for Security Studies (October 2005). Oral Submission to the Commission of Inquiry into the Mandate and Location of the Directorate of Special Operations.

⁸ National Prosecuting Authority (NPA) annual report 2006/2007

⁹ Bruce, D. (2005). SA's Scorpions are a breed apart. Business Day 10 June 2005

The case against the South African Police Service

There are several key arguments against redeploying the DSO to operate within the SAPS:

- The fact that the SAPS does not have a good track record with redeploying, integrating and restructuring. There are clear indications that the successive waves of restructuring of the SAPS since 1994 have compromised its ability successfully to detect crimes, arrest suspects and investigate crimes in such a manner that lends itself towards a successful prosecution. **Three examples will suffice:**
 - The incorporation of the old SA Railway Police into the SAPS, which resulted in an escalation of crimes committed on the railways and the subsequent reopening of railway police units within the SAPS;
 - The compromised effectiveness of the Family Violence, Child Protection and Sexual Offences (FCS) units that have been largely redeployed to station level and no longer operate as stand-alone specialised units. A DA analysis of the current functioning of the FCS in KwaZulu-Natal and Mpumalanga indicates that many FCS officers are no longer able to fulfil their core functions¹⁰; and
 - The impact of the closure of specialised anti-poaching unit Operation Neptune which, due to the inability of the Marine and Coastal Management Inspectorate to fill the gap, has resulted in the poaching of abalone going largely undetected and anti-poaching laws no longer being enforced. The links between the illegal abalone trade and crime syndicates are widely acknowledged.
- The definition of '*policing functions*' as described in the ANC resolution does not make it clear whether mainly traditional policing activities are referred to (for example, standard detective investigations and normal police work) or whether specialists would be included in that category. In other words, it is not clear from the resolution who from the DSO would be included and who would be excluded. By excluding many of the professional specialists, South Africa would lose much of its ability to fight complex and sophisticated crime effectively;
- The National Commissioner of Police has already gone on record stating that "The South African Police Service is not at all in favour of a prosecution-led approach"¹¹;
- The incompatibility of the SAPS's 'cop culture' with the professional legally-orientated culture of the NPA and the DSO. It is likely that professional specialist staff from the DSO who are redeployed to the SAPS will battle to integrate and function effectively. It is also

¹⁰ Democratic Alliance report into the Family Violence, Child Protection and Sexual Offences Units (FCS) in KwaZulu-Natal and Mpumalanga. (2007). Accessible at <http://www.da.org.za>

¹¹ Mashele, P. (2006). *The Khampepe Commission: The Future of the Scorpions at Stake*. Occasional Papers 126, June 2006. Institute for Security Studies.

- likely that their ability to deliver on results will be compromised once they have been separated from the legally-orientated professional environment of the NPA¹²;
- The substantial differences in pay scales and career prospects between the DSO and the SAPS will result in serious tensions and disagreements between staff. People seeking employment as specialist professionals are not likely to regard the SAPS as an employer of choice, given the slow rate of career advancement and comparatively low rates of pay. The SAPS has experienced considerable difficulties in retaining its specialist forensic staff at the Forensic Science Laboratories¹³. The SAPS will most likely find itself unable to attract and retain high calibre individuals required in order to replicate the DSO's success;
 - The SAPS has a very poor track record on anti-corruption initiatives managed from within the SAPS. According to researcher Andrew Faull,¹⁴ the implementation of anti-corruption strategic plans has been poor, with little or no progress or results. In addition, the SAPS closed down the successful Anti-Corruption Unit in 2002 on the grounds of lack of accountability and transformation. This closure created a void that the Independent Complaints Directorate (ICD) has not been able to fill due to serious resource and staffing constraints;
 - By combining all anti-corruption authorities under one roof, the SAPS becomes especially vulnerable to corruption from within. "Internationally, it is recognised that police tackling organised crime are highly vulnerable to corruption by powerful syndicates"¹⁵. Undercover operations are especially at risk¹⁶, and the highly complex criminal investigations, such as those the DSO investigate, and which would then fall strictly under the SAPS, would be the ones most likely to make use of covert operations and most at risk from corruption;
 - The accountability risks for the country are enormous. Given the degree to which South Africa has become an attractive location for sophisticated and organised crime, *who guards the guards?*¹⁷

¹² Institute for Security Studies (October 2005). Oral Submission to the Commission of Inquiry into the Mandate and Location of the Directorate of Special Operations.

¹³ Institute for Security Studies (October 2005). Oral Submission to the Commission of Inquiry into the Mandate and Location of the Directorate of Special Operations.

¹⁴ Faull, A. (2007). Corruption and the South African Police Service: A review and its implications. ISS Paper 150. September 2007.

¹⁵ Bruce, D. (2005). SA's Scorpions are a breed apart. Business Day 10 June 2005.

¹⁶ Marx, G. T. (1992). When the Guards Guard Themselves: Undercover Tactics Turned Inward. Policing and Society. 1992 Vol. 2

¹⁷ Roman poet Juvenal: "quis custodiet ipsos custodies", mentioned in Marx, G. T. (1992). When the Guards Guard Themselves: Undercover Tactics Turned Inward. Policing and Society. 1992 Vol. 2.

Conclusion

The main reason for the proposed closure of the DSO is that the DSO presents a serious threat to certain individuals who are seeking to protect their own interests at the expense of the welfare of the country. Willing to compromise the criminal justice system's ability to maintain and uphold the law, these individuals are purely concerned about protecting themselves and each other.

The DA strongly recommends that the DSO remains within the NPA and that any attempt to disband or redeploy the DSO must be rigorously resisted.

There are certainly issues that need to be addressed in order to improve the relationship between the DSO and the SAPS, reduce the scope for political interference and ensure that the DSO, through the NPA, are accountable to Parliament. Many of these issues were highlighted during the Khampepe Commission.

The DA calls for the recommendations of the Khampepe Commission to be respected and urgently addressed by Parliament.

Sources

Bruce, D. (2005). SA's Scorpions are a breed apart. Business Day 10 June 2005.

De Lange, D. (2007). Government to toe ANC line and disband Scorpions. Cape Times 20 January 2008

Democratic Alliance (DA). Analysis of the Family Violence, Child Protection and Sexual Offences units (FCS) in KwaZulu-Natal and Mpumalanga. (2007). Accessible at <http://www.da.org.za/da/Site/Eng/News/FCS2007.doc>

Faull, A. (2007). Corruption and the South African Police Service: A review and its implications. ISS Paper 150. September 2007.

Institute for Justice and Reconciliation. (2007). The 2007 SA Reconciliation Barometer Survey. Seventh Round Report.

Institute for Security Studies (October 2005). Oral Submission to the Commission of Inquiry into the Mandate and Location of the Directorate of Special Operations.

Marx, G. T. (1992). When the Guards Guard Themselves: Undercover Tactics Turned Inward. Policing and Society. 1992 Vol. 2.

Mashele, P. (2006). The Khampepe Commission: The Future of the Scorpions at Stake. Occasional Papers 126, June 2006. Institute for Security Studies.

- (2006). Will the Scorpion Still Sting? The future of the Directorate of Special Operations. SA Crime Quarterly No 17 September 2006.

Mbeki, T. (1999) Opening address to Parliament. 25 June 1999, Cape Town.

National Prosecuting Authority (NPA) Annual Report 2006/2007

Powell, A. (2007). Bring back Operation Neptune – Zille. Cape Times 25 July 2007.

South African Police Service

- Annual report 2004/2005
- Annual report 2005/2006
- Annual report 2006/2007

South African Press Association. Warning against closing elite police units. 31 October 2007. Mail & Guardian.

Tshehla, B. Had the Scorpions been part of the SAPS, would Selebi be facing charges? ISS Today. 22 January 2008.