

Understanding the National Prosecuting Authority



The **National Prosecuting Authority (NPA)** is central to the rule of law, and **should stand for justice for everyone** in South Africa.



In the criminal justice system, the **police** investigate crimes and make arrests, the **NPA** prepares and conducts prosecutions, and the **courts** evaluate cases and pass judgments.

This document explains the role of the NPA and the steps required by legislation to bring prosecutions and secure convictions.

How prosecutions work



Police investigate crimes

A SA Police Service (SAPS) investigating officer or detective takes written statements and collects forensic evidence such as fingerprints, footprints, blood and DNA samples. This information is presented to a prosecutor in a **police docket**.



Deciding whether to bring charges

The **police docket** is then assigned to a **prosecutor** at a district or regional Magistrates Court, or transferred to the relevant High Court, depending on the nature, location and severity of the alleged crime.

The prosecutor uses the docket to determine if the alleged illegal activities constitute a crime and whether a suspect has been identified. In a criminal case, prosecutors are required to prove to a court that the accused is guilty 'beyond a reasonable doubt'.



The prosecutor then decides on one of four steps:

- Decline to prosecute without any other action.
- Ask the police to investigate the case further.
- Decline to prosecute and opt for an alternative dispute resolution mechanism.
- Institute a prosecution by compiling a charge sheet against the accused.



The courts consider whether to grant bail, taking account of issues such as the safety of the public and witnesses, the potential for interference with witnesses or evidence, and the accused's ability to travel or to forfeit bail. For serious offences such as murder or rape, the prosecutor can oppose bail.



The criminal trial starts after the bail hearing, with the accused appearing before the court. The prosecutor places the particulars of the case before the court, and reads the charge sheet to the accused. The presiding officer then asks whether the accused understands the charges brought and instructs the accused to plead innocent or guilty.



If the accused pleads guilty, and the presiding officer is satisfied that the accused is guilty, he or she will be convicted. This is typically followed by the prosecution leading evidence in aggravation of sentence, and the defence leading evidence in mitigation.



If the accused pleads not guilty the prosecutor will be required to lead the evidence-in-chief, which may include questioning the state's witnesses. The prosecution presents and then closes the state's case against the accused, and the defence then leads its witnesses and presents the defence against the charge.

The law allows for an accused to apply for the case to be dismissed where the state has failed to establish a prima facie case for the accused to answer. Both the prosecutor and the defence can cross-examine each other's witnesses and re-examine their own witnesses.



After all evidence has been presented the prosecutor and the defence close their cases. The prosecutor and defence then address the court on the merits of the case and the presiding officer either passes judgment or reserves judgment. If the accused is convicted, the prosecutor is given an opportunity to put any of the accused's previous convictions before the court.

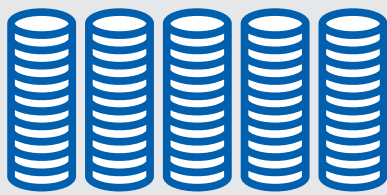


During sentencing the defence has the opportunity to address the court in mitigation of sentence, and the prosecutor can describe any aggravating circumstances that should be considered by the court. At this stage the defence, prosecution and presiding officer may call witnesses to inform the final decision on sentencing. These witnesses may be cross-examined and re-examined by both parties. The sentence is then passed and the trial concluded.

Prosecuting corruption

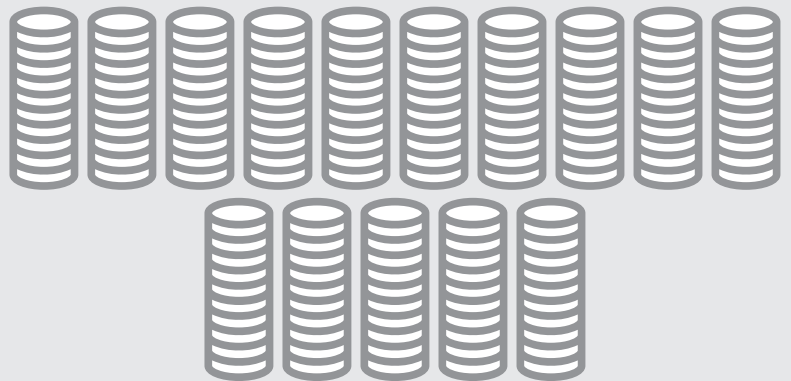
The public is understandably concerned about why there haven't been more prosecutions and convictions following detailed revelations at high-profile commissions of inquiry into state capture and corruption.

This had an enormous impact on the economy, the state's ability to deliver services, and public confidence in government.



The estimated cost of state capture and corruption is up to **R500 billion in direct money**

and **R1.5 trillion in lost revenue.**

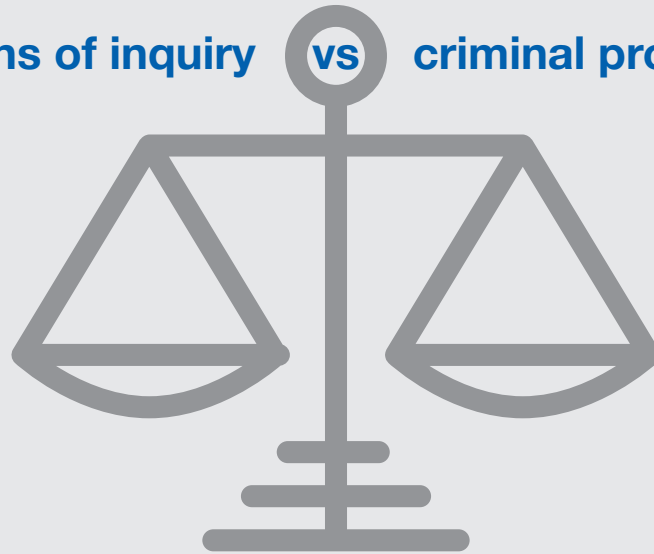


It took a long time before we saw any **high-profile arrests or prosecutions**, despite what appears to be abundant evidence of wrongdoing.

The public want to see action following commitments by President Cyril Ramaphosa to combat corruption and restore the rule of law.

But an independent NPA can't allow public opinion to inform the timing of justice. **Rushing into important cases risks failure** on technicalities or because of insufficient evidence. It is now more important than ever that due process be followed.

Commissions of inquiry vs criminal prosecutions



It is necessary to understand the difference between commissions of inquiry and criminal prosecutions, and what it takes for corruption charges to be pursued in court.

This is what will restore confidence in the NPA's ability to uphold the rule of law.

The aim of a commission of inquiry is to provide an official account of an issue. For example, the Judicial Commission of Inquiry into Allegations of State Capture, known as the Zondo Commission, was asked to report on what occurred as a result of high-level corruption.

During such inquiries, the requirements for a finding against an individual rests on the '**balance of probability**', or whether something is more likely than not to have occurred.

The **burden of proof** is higher for criminal prosecutions, where a successful conviction requires evidence that proves criminality '**beyond a reasonable doubt**', where no other logical conclusion can reasonably be drawn from the evidence presented.

Evidence and testimony at commissions of inquiry are not necessarily sufficient to secure convictions in a criminal trial. They may **guide prosecutors** but cannot simply be repurposed, because under the Criminal Procedure Act (CPA) evidence submitted in court must meet specific requirements and procedures.

Incriminating testimony heard at a commission needs additional supporting evidence such as invoices, bank statements, emails, forensic audits and witness statements. This evidence needs to be linked to the accused, and must corroborate testimony against them. It needs to be gathered legally, collated in the case docket, and submitted to courts in a process prescribed by law.

Prosecutors must ensure a witness is called to authenticate every document. For complex financial charges, the prosecutor may also be required to call expert witnesses such as chartered accountants and specialists in business analysis, banking or information technology.

No amount of evidence is sufficient for a prosecution if not collected and presented in accordance with the law. The NPA needs to ensure its cases are watertight.

This is what will ensure that well-resourced legal teams working for wealthy and powerful accused persons can't undermine the prosecution's case or challenge the charges on technicalities.

What is the NPA and how does it function?

The work of the National Prosecuting Authority (NPA) in the criminal justice system (CJS) is often not seen or understood. Yet the NPA is central to the maintenance of the rule of law, **ensuring justice for victims of crime** in a criminal justice system which serves its intended purpose.

It is the link between the SA Police Service (SAPS) and the courts, and it makes the case for justice on behalf of everyone living in South Africa.



Criminal procedures

The Criminal Procedure Act is the primary legislation determining roles and responsibilities of actors in the criminal justice system. The police investigate and make arrests, the NPA prepares and conducts prosecutions, and the courts evaluate cases and pass judgments.

The role of the NPA is determined by the National Prosecuting Authority Act.

The Child Justice Act creates a separate criminal justice and procedural system for children, aiming to protect their rights while holding them accountable for their actions.



Who decides?

The NPA and its prosecutors determine whether a criminal matter should be dealt with by a criminal court of law. This work is undertaken after a SAPS docket liaison officer has submitted a decision docket, compiled by the SAPS investigating officer, to a senior or control prosecutor at the court with jurisdiction to try or adjudicate the matter.

There are also dedicated courts for some offences, such as the Specialised Commercial Crimes Court.



Role of the police

Investigation of crimes is undertaken by a SAPS investigating officer or detective assigned to the case. The investigating officer takes written statements from the person reporting the crime or from the victim and witnesses. They may also collect forensic evidence such as fingerprints, blood samples and DNA samples for analyses, District Surgeon reports, or footprint analyses. In complex commercial crimes the documentary evidence may run into the millions of pages.

Once sufficient evidence has been collected against a suspect to make a credible case, the investigating officer presents this information to a prosecutor in the form of a police docket.

Police officers must have a reasonable suspicion that someone has committed an offence before they can lawfully arrest such a person without a warrant of arrest.

There are three sections in a docket submitted to the NPA and assigned to a prosecutor.

- 1  Witness statements, expert reports and documentary evidence
- 2  Internal reports and memoranda
- 3  Investigation diary

The docket is what the prosecutor uses to determine if the alleged illegal activities constitute a crime

The docket is what the prosecutor uses to determine if the alleged illegal activities constitute a crime and whether a suspect or suspects have been identified. During this step a prosecutor would also have to assess whether evidence contained in the docket is relevant, admissible in court and legally obtained. This may include whether a search warrant was obtained before the accused's home was searched and evidence seized.



Evidentiary and public interest test

A case must only be placed on the court roll if there is evidence under oath or affirmation that establishes the elements of an offence, links the identified suspect to the offence, and if there is sufficient relevant and admissible evidence to have a reasonable prospect of a conviction. **This is the evidentiary test.**

There is no rule in law stating that all the provable cases brought to the attention of the NPA must be prosecuted, as this would impose an impossible burden on the prosecutor and a society interested in the fair administration of justice. When considering whether or not it will be in the public interest to prosecute, prosecutors must consider whether a matter is worthy of the court's time and attention, as well as the resources of the criminal justice system. **This is the public interest test.**

Factors to be considered include the nature and seriousness of the offence, the motivation for the act, the relationship between the accused and the victim, and the effect of the crime on the victim or on public order and morale. Prosecutors must also consider the impact of the offence on the community, the likely outcome in the event of a conviction, and the potential effects of discontinuing the case.

Also to be considered are the circumstances of the offender, including previous convictions, their criminal history, mitigating or aggravating factors, and whether or not the accused has admitted guilt, shown repentance, made restitution or been willing to co-operate in the investigation or prosecution of others. Prosecutors will also look at whether the objectives of criminal justice would be better served by alternatives to prosecution such as mediation or rehabilitation.



Courts and their functions

Magistrates Courts are divided into district and regional courts.

In criminal matters, the severity of the crime committed, and the minimum sentences set by law for the crime, determine whether a matter will be heard in a district court or referred up to a regional court.

A district court can normally only hand down sentences of up to three years imprisonment, while regional courts can normally hand down sentences of up to 15 years imprisonment. In some cases, trials are heard in district courts and after conviction a matter is transferred to a regional court for sentencing.

High Courts try or adjudicate serious criminal cases and appeals of criminal cases from district and regional Magistrates Courts. High Court decisions are binding on Magistrates Courts.

Prosecutors have discretion as to whether a case should be tried

The next steps are determined by a prosecutor only after an assessment of the facts, evidence and surrounding circumstances in the docket. South Africa does not have compulsory prosecutions, and prosecutors have discretion as to whether a case should be tried in court. This decision is most often based on whether there are reasonable prospects of a successful conviction.

Prosecutors are required to prove to a court that the accused is guilty 'beyond a reasonable doubt'

In a criminal case, prosecutors are required to prove to a court that the accused is guilty 'beyond a reasonable doubt' – this is known as the burden of proof. It requires that there can be no other reasonable explanation for the facts and evidence, other than that the accused committed the crime.

With this stringent requirement in mind, the prosecutor can decide on one of four next steps:

- 1 **Decline to prosecute without any other action.**
The prosecutor may provide reasons for their decision if requested by interested parties, unless the individual rights of persons such as victims, witnesses or accused persons might be prejudiced, or where it might not be in the public interest to do so.
- 2 **Ask the police to investigate the case further.**
The new evidence then guides whether to institute a prosecution.
- 3 **Decline to prosecute** and opt for pre-trial diversion or other forms of resolution. Diversion is an alternative dispute resolution mechanism. It entails the resolution of cases outside normal court proceedings, usually involving mediation between the affected parties.
- 4 **Institute a prosecution.** If the prosecutor finds a successful prosecution is likely, he or she will compile the facts and details needed to draft a charge sheet against the accused.

There are three options when bringing charges



There is no limit on the number of charges the prosecutor can bring

Although there is no limit on the number of charges the prosecutor can bring, the charges should not be split where the accused had a single intent and committed only one crime. This is to avoid the possibility of prejudice and injustice to an accused by being convicted and sentenced on several charges where he or she committed only one offence.

Depending on the schedule of offences, or the severity of the crime, the prosecutor must meet different requirements with regards to bail application hearings. Bail hearings happen in the court that has jurisdiction over the case before the actual trial commences.

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The prosecutor can oppose bail for serious offences

For serious offences such as murder or rape, the prosecutor can oppose bail by presenting evidence, either orally or through an affidavit, in consultation with the investigating officer.

If the prosecutor does not oppose bail, their reasons must be placed on record. For serious offences the defence for the accused must give evidence that exceptional circumstances would permit release on bail.



What the courts must consider when granting bail

Issues to be considered when deciding whether to grant bail are prescribed by Section 60 of the Criminal Procedure Act, and they include:

- The safety of the public and witnesses
- Whether the safety of the accused might be jeopardised by his or her release on bail
- Possible evasion of trial, and whether the nature and gravity of the charge, strength of the case or potential punishment may inform the willingness of the accused to evade trial
- The potential for interference with witnesses or evidence
- Violence or threats of violence directed to others implicit in the charge
- Previous offences
- Personal ties of the accused
- The ability of the accused to travel, including the availability of travel documents such as a passport
- The accused's ability to forfeit bail
- The feelings of the community



Bail conditions

The courts have the option of setting specific bail conditions, which may include:

- Requiring the accused to deposit a sum of money with the police or the court
- Reporting in person at a specified time and place to any specified person or authority
- Prohibiting the accused from going to any specified area or communicating with witnesses
- Placing the accused under the supervision of a probation officer or a correctional official

Following the bail hearing, irrespective of whether bail was granted, the criminal trial can commence with the accused appearing before the court

Following the bail hearing, irrespective of whether bail was granted, the criminal trial can commence with the accused appearing before the court. If the accused fails to appear the prosecutor is required to inform the court, provide the relevant information and apply for a warrant for his or her arrest.

South Africa's Chief Justice has decreed English to be the only language of record in the country's courts. However, courts are obliged during criminal proceedings to provide a competent interpreter or a sign language interpreter if the accused or witness does not understand the language in which court proceedings are conducted.

In the case of a foreign accused the court is obliged to procure the services of a foreign language interpreter.

The first requirement in the trial is for the prosecutor to place the particulars of the case before the court, and to inform the court that the state is ready to put the charges to the accused.

Courts are obliged to provide an interpreter

The prosecutor puts the charge to the accused by reading out the charge sheet

After the presiding officer - which could be a magistrate or judge - has indicated that the prosecutor can proceed, the prosecutor puts the charge to the accused by reading out the charge sheet. At this point the prosecutor may also indicate what evidence will be presented to the court in support of the charges.

The presiding officer then inquires whether the accused understands the charges brought and instructs the accused to plead to the charge. Normally an accused pleads guilty or not guilty.

If the accused pleads guilty the prosecutor can still present evidence on any aspect of the charge. If the presiding officer is satisfied that the accused is guilty, he or she will be convicted.

This is typically followed by the prosecution leading evidence in aggravation of sentence, and the defence leading evidence in mitigation of sentence.



Schedule of offences in Child Justice Act

The Child Justice Act divides offences committed by children into three schedules depending on the seriousness of the offences. Schedule 1 contains the least serious offences and Schedule 3 the most serious offences.

If the accused pleads not guilty the prosecutor will be required to lead the evidence-in-chief

If the accused pleads not guilty the prosecutor will be required to lead the evidence-in-chief, which may include questioning the state's witnesses to demonstrate the accused's guilt to the court. The prosecutor may call as many witnesses as needed.

In a two-step process, the prosecution first presents and then closes the state's case against the accused, and the defence then leads its witnesses and presents the defence against the charge. The CPA allows for an accused to apply for a case to be dismissed where the state has failed to establish a prima facie case for the accused to answer, and if a reasonable person would not convict them on the evidence presented by the prosecutor.



Response to developments

During the course of the trial prosecutors are required to respond to new developments, such as the mental capacity of an accused, and whether they understand the court proceedings. They may also be required to review the merits of continuing the trial, dependent on any new evidence that may come to light.

The defence can also call witnesses to make their case that the accused is not guilty. Both the prosecutor and the defence can cross-examine each other's witnesses and re-examine their own witnesses after a cross-examination.

After all evidence has been presented the prosecutor and the defence close their cases. The prosecutor then has to address the court on the merits of the case. The defence does the same. The prosecutor has the right to reply to the address by the defence.

Once proceedings are concluded the presiding officer either passes judgment or reserves judgment, which means the court is adjourned to allow for reflection and consideration of the merits of the case. Once the presiding officer (judge or magistrate) has come to a decision, all parties will be notified to appear before the court for delivery of the judgment.

The Criminal Law Amendment Act provides for minimum sentences to be imposed on persons convicted of certain offences. If the presiding officer diverges from these prescribed sentences, they must justify why a lesser sentence has been handed down. If the accused is convicted, whether they had pleaded guilty or not, the prosecutor is given an opportunity to put any of the accused's previous convictions before the court. These previous convictions are only relevant in bail hearings and during sentencing.

During sentencing the defence has the opportunity to address the court in mitigation of sentence, and the prosecutor can describe any aggravating circumstances that should be considered by the court in determining an appropriate sentence. At this stage the defence, prosecution and presiding officer may call witnesses to inform the final decision on sentencing. These witnesses may be cross-examined and re-examined by both parties. The sentence is then passed and the trial concluded.



Sentencing

South African courts take into account three main considerations when imposing a sentence on a convicted accused: the crime itself, the personal circumstances of the offender, and the interests of society.



About the ISS

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