

WILL THE SCORPION STILL STING?

The future of the Directorate of Special Operations

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Following the politico-legal row that has engulfed the National Prosecuting Authority's Directorate of Special Operations (otherwise known as the Scorpions), President Mbeki appointed Judge Sisi Khampepe on 1 April 2005 to head a commission of enquiry (known as the Khampepe Commission) to review the mandate and location of the DSO and make recommendations. On receipt of the Commission's recommendations, the President, in consultation with Cabinet, has made a decision on the future of the Scorpions. This article analyses the implications of the decision and raises critical questions related to the past and the future.

Responding to the key challenge of organised crime, President Thabo Mbeki in 1999 launched the Directorate of Special Operations (DSO), otherwise known as the Scorpions. Given that prosecutors are central to the Scorpions' prosecution-led approach, the DSO was located in the National Prosecuting Authority (NPA). The DSO began its work in 2001 after almost three years of setting up the institutional architecture of what, in the eyes of the public, soon became South Africa's exemplary crime-busting agency.

Despite positive public perception, the Scorpions have had a turbulent life since they started operating. The overlap of their work and that of the South African Police Service (SAPS), as well as problems arising from their mandate, has led to boiling tensions between political principals and senior bureaucrats responsible for security agencies. The investigation of high-profile politicians by the Scorpions, the DSO's aggressive media strategy and what some perceived to be an abuse of power, provoked negative reactions from a range of

political actors. It is against this background that President Mbeki appointed Judge Sisi Khampepe on 1 April 2005 to head a commission of enquiry (known as the Khampepe Commission) to review the mandate and location of the DSO and make recommendations.

The Khampepe Commission has come and gone; it has made recommendations and submitted its report to the President. After consulting the National Security Council (NSC) and Cabinet, the President made a decision in June 2006, and the wheels of implementation are currently turning. Yet, there is little public understanding of the meaning and implications of the decision for the agencies concerned and on the future effectiveness of the Scorpions. This article is an attempt to shed light on the decision.

Reporting to two political principals – will it work?

That the Scorpions had become a political hot potato became clear long before the Khampepe Commission was appointed. Senior politicians

within the ruling African National Congress (ANC) made conflicting statements in relation to the DSO, with some accusing it of employing 'Hollywood tactics' in its handling of cases. In an attempt to make sense of the divergent positions presented to the Commission by government bureaucrats and ministers, the political divide with regard to the Scorpions has been summed up as follows:

... because the bureaucrats and Ministers involved were all senior members of the ANC, it could be suggested that they mirrored a schism within the ruling party regarding the future of the Scorpions. Other observers may construe it to suggest that those from within the ANC who were for the relocation of the Scorpions saw the DSO as a loose dog in need of taming, while those who favoured the status quo viewed the Scorpions as an important instrument through which to weed out corrupt comrades.¹

Indeed, the division within the ANC also extended to the general South African public; some wanting the Scorpions to be relocated to the SAPS, and others preferring the DSO to remain within the NPA. This presented a daunting political challenge to President Mbeki: how to accommodate the wishes of two diametrically opposed camps within his own party and outside. Here is the president's decision:

Cabinet has endorsed the NSC's decision to accept in principle the recommendations of the Commission, including the matter of retaining the DSO with the NPA and that its law enforcement responsibilities shall be subject to political oversight by the Minister of Safety and Security.²

This decision should not be misconstrued to mean a complete relocation of political responsibility to the Ministry of Safety and Security (MSS). The retention of the Scorpions within the NPA means that they will continue to report to the Ministry of Justice and Constitutional Development (MJ&CD) on matters outside the law enforcement work of the DSO. Politically, the decision splits the Scorpions; the law

enforcement function becomes the responsibility of the MSS while prosecutions remain within the ambit of the MJ&CD.

Located within the context of the political divisions in the ANC, the decision is a crafty political tactic by the President to quieten both camps. Those who are for the status quo have reason to celebrate that the Scorpions remain in the NPA, even though they also have to report to the MSS. But the fact that they have to report to the MSS provides solace to those who called for the entire relocation of the DSO. The political content of this decision could therefore be interpreted as a win-win situation.

Furthermore, President Mbeki deserves credit for passing the Khampepe Commission report through the NSC and Cabinet before making a decision. This has, at least for now, silenced potential deviant voices from within. It would appear as though the President borrowed a leaf from Lord Melbourne's book of political philosophy: "I do not care what the members of the Cabinet say as long as they all say the same thing outside."³

However, only time can tell how long President Mbeki's colleagues in Cabinet will say the same thing regarding the decision on the Scorpions. Perhaps the more difficult question is: If they start saying different things in public, as they did before and during the Khampepe Commission, are stakeholders again going to be invited to make presentations before another commission of inquiry on how to get out of the political quagmire?

Politics versus operational efficiency?

The recommendations made by Judge Khampepe and endorsed by the President state, among others, that:

prosecutors who work for the DSO ... [are to] continue to receive instructions and be accountable to the National Director of Public Prosecutions (NDPP). The NDPP, in turn, ... [will] remain accountable to the Minister of Justice and Constitutional Development as currently provided for in law.⁴

It is important to read this decision bearing in mind that “Cabinet reaffirmed the architecture and practice of the DSO” that relates to the prosecution-led approach. The key question is whether, on a practical level, it is that easy to separate the law enforcement work of the DSO (which relates to investigators) from its prosecutorial responsibilities (which relates to prosecutors).

It is useful to understand how the prosecution-led approach works in practice. When a specific case is under consideration, an investigator(s), analyst(s) and prosecutor(s) (all from within the DSO) sit around the table to collectively deal with it, with the prosecutor leading the process. The investigator places pieces of evidence with the analysts, who then consider crime intelligence or other implications arising from existing evidence. As the leader of the process, the prosecutor advises both the investigator and the analyst on aspects of the case needing revalidation or further investigation, in order to build a formidable legal case that can stand the test of law in court.

What subsequently goes to court is the culmination of the investigative and analytical work of the team, satisfying the legal requirements as determined by the prosecutor. So, if any person expects a comprehensive report on how a specific case was built, the prosecutor is the person to contact since s/he leads the process with the view to ensuring conviction in court. It would, therefore, be a mistake to expect the investigator or the analyst to give a complete picture of a case since these two only deal with certain aspects of DSO cases.

Regarding political reporting, the head of the Scorpions reports to the National Director of Public Prosecutions (head of the NPA), who in turn reports to the minister concerned. With the new arrangements, the NPA head will be expected to report to the MJ&CD and MSS. The complexity of the Cabinet decision is that it is based on the assumption that drawing a line between the investigative and prosecutorial aspects of the work of the DSO is a clear-cut exercise.

But as shown above, cases are not always that straightforward, especially when a prosecution-led

approach is followed. Investigative and prosecutorial issues often interweave. The NPA head, preparing a political briefing for the Minister of Justice or for the Minister of Safety and Security, may in some cases merely need to reproduce a single report for both ministers.

The bigger political question is: What exactly is the role of the Minister of Safety and Security in relation to the DSO? The Minister does not decide which SAPS cases to investigate or not. Such decisions are made at an operational level. Fears that the Minister would in this regard dictate terms to the DSO are without precedent. It should also be remembered that, even when cases are initiated and handled by the SAPS, the NPA has the final word as to whether there is a case to be made in court or not. At best, the Minister may seek an explanation on the specifics of a case if he has an interest in it. He cannot even determine the budget for the ‘law enforcement aspects’ of the DSO’s work, since operationally the DSO remains in the NPA. The DSO’s budget will continue to come from the Ministry of Justice and Constitutional Development through the NPA.

Also related to the role of the Minister of Safety and Security is the decision that:

the capacity of relevant entities within the SAPS should be enhanced, for example, by investing them with the same legal powers as the DSO and co-locating prosecutors with its investigators and analysts.⁵

Here the Minister has some leverage, since he can bargain for more financial resources from Treasury. However, the question is whether the SAPS can accommodate prosecutors in this way. The problem is not money, but whether the SAPS can be a home for prosecutors. In its submission to the Khampepe Commission, the Institute for Security Studies advised:

Police agencies, the world over, find it difficult to accommodate civilians because ‘cop culture’ (as often called), like all organisational cultures, is exclusive.⁶

The words of the SAPS National Commissioner may hold a clue to the position of police leadership on

this issue: "The South African Police Service is not at all in favour of a prosecution-led approach". Given this, one may well ask whether the Cabinet decision is going to be implemented.

Improving coordination: will we learn from the past?

While the wisdom and spirit of the decision on improving coordination is welcome, questions arise on how the measures decided on will work in practice.

It has been decided that a "coordinating committee of officials"⁷ will be established to handle operational issues and advise the Ministerial Coordinating Committee (MCC).⁸ However, there has always been a need for interdepartmental dialogue involving senior officials from security agencies. More importantly, the Scorpions cannot be effective without the cooperation of the police and other relevant government agencies. The value of the decision to create a committee of officials perhaps lies in imposing an obligation on the officials concerned to work together in dealing with matters relating to the DSO.

But a policy-driven responsibility does not automatically guarantee compliance. It remains to be seen how the creation of a subcommittee will resolve personal differences that have hindered cooperation among the same officials in the past.

While it makes sense for officials to deal with operational issues, it should be remembered that operational problems were among the issues that pushed the Scorpions into the centre of political turbulence that led to the institution of the Khampepe Commission. Consider, for example, how the raids by the Scorpions on Jacob Zuma's house became a serious political affair.

When operational issues induce political interest, politics and operations become blurred, as do the responsibilities between ministers and officials. It is against this background that the proposals of the NSC directors general, as mandated by Cabinet, should be awaited with keen interest.⁹

Realistically, to assume that politics would not creep into a committee of officials is to ignore

history. The case of the former NIA director general differing with his political principal before the Khampepe Commission, and that of the current head of the NPA differing with his minister at the same Commission, tell a story of officials embroiled in politics. That the officials have in the past locked horns on similar issues is also common knowledge.

Bearing in mind that Justice Minister Bridget Mabandla described differences among her MCC colleagues as irreconcilable, it will be interesting to see how the ministers sitting on the MCC develop new relationships. In this regard, her exact words are worth citing:

My view is that it is highly unlikely that the situation will improve, notwithstanding possible suggested remedies that can be considered.¹⁰

The fact that the same ministers who had irreconcilable differences in the past are now expected to work together better, is indeed intriguing. 'What did not work in the past will work in future' seems to be the guiding formula in this instance – but with no measure of success as yet.

The impact on the fight against crime

What does this decision mean for the fight against crime? Cabinet's reaffirmation that "the DSO deal with high level priority crimes and that it should deal with cases referred to it by the police" is likely to generate confusion between the SAPS and the Scorpions. On the one hand, the DSO will sometimes feel justified to initiate and handle cases they deem serious and of high priority. On the other hand, the SAPS may at times feel that a specific case should not be handled by the Scorpions or should have been referred to the DSO by the SAPS.

One can only hope that the proposals by the NSC DGs will also provide guidance on who shall be the final arbiter and on what arbitration would be based in a scenario like the above. If these issues are not clarified, criminals will be the victors while the Scorpions and the SAPS are in a tug of war over cases.

The reality is that before the President's decision is implemented no degree of certainty can be

attached to any prognosis regarding the impact of the decision on the general fight against crime. Many variables exist to influence the situation.

How firm the Scorpions will be in their future handling of high profile cases is another question to which only time will provide the answer. And to what extent will the SAPS curtail the work of the Scorpions by evoking Cabinet's decision that the Scorpions should deal with cases referred to them by the SAPS? And, importantly, will the Ministry of Safety and Security's new partial political responsibility be exercised in a manner that hampers the effectiveness of the DSO?

What about the "concern expressed with regard to the manner in which the DSO publicised the subject matter of some of its investigations"?¹¹ Does this not imply a 'media gag' on the DSO, and will it not have a negative impact on public perception? It is indeed true that the apparent positive public perceptions of the Scorpions to a large extent derive from the over-publicising of the DSO's work through the media. In this regard, it is problematic for the Scorpions to involve the media when raids and arrests are made, before a conviction is secured. The impression created by this process is that the suspect involved is guilty even before a court of law so pronounces.

Conclusion

While the decision to split political responsibility for the Scorpions seems to have generated less controversy than some would have expected, it remains to be seen whether the decision can stand the force of a political turbulence such as the one that led to the institution of the Khampepe Commission. The assumption that the DSO's work can neatly be divided into law enforcement and prosecutions, calls for further clarification. Such clarity would provide important guidance on how the Scorpions will in future report to two political principals.

The fact that the measures decided on to improve coordination between the DSO, the SAPS and other security agencies include those that did not work in the past raises more questions than answers. Further questions also arise as to the full impact of the

President's decision on both the effectiveness of the Scorpions and the general fight against crime, particularly organised crime. What is clear, though, is that the question arising from the decision can only be answered in the course of implementing the decision. It would therefore not be surprising that the issues that currently seem clear will in the future have to be revisited.

Endnotes

- 1 P Mashele, The Khampepe Commission: The future of the Scorpions at Stake, *ISS Paper*, No. 126, June 2006, p 7.
- 2 Presidency, Media statement on the report of the Khampepe Commission of inquiry, 29 June 2006, p 3.
- 3 Lord Morrison of Lambeth, P.C., C.H. (1962) *British Parliamentary Democracy*, London: Asia Publishing House, p 13.
- 4 Presidency, *Ibid*, p 2.
- 5 *Op cit*.
- 6 Institute for Security Studies, Oral submission to the Khampepe Commission, undated, p 5.
- 7 Presidency, *op cit*. The decision states that it should be officials with the requisite level of authority to make decisions, implying Directors General or their representatives.
- 8 The MCC was established on the basis of Section 31 of the National Prosecutions Authority Act, as amended.
- 9 Cabinet "charged the Directors General (DGs) of the NSC ... to develop proposals that will specifically enable the government to implement" its decisions on the future of the Scorpions. See Press statement by the Presidency, *op cit*.
- 10 B S Mabandla, response to the request for further particulars by Khampepe Commission, 10 October 2006.
- 11 Presidency, *Ibid*. p 1.