



Society of State Advocates and Prosecutors of South Africa  
(A Trade Union registered in terms of the Labour Relations Act, 1995)  
[www.ssapsa.org.za](http://www.ssapsa.org.za)

Tel: (Int + 27 11) 220 4115

Right Fax: (Int + 27 12) 843 3567

Cell: 082 336 2520

Email: [RBarnard@npa.gov.za](mailto:RBarnard@npa.gov.za)  
[secretary@ssasa.org.za](mailto:secretary@ssasa.org.za)

Private Bag X 8

JOHANNESBURG

2000

### **DISCUSSION WITH THE JSC REGARDING THE APPOINTMENT OF PROSECUTORS TO THE BENCH**

Dear Adv Batohi

The Society of State Advocates and Prosecutors of South Africa (SSAPSA) welcomes the opportunity to discuss the appointment of prosecutors, with relevant experience, to serve as judges. It raises important considerations for deliberation by the Judicial Services Commission, both at the level of principle and in practice.

We are not aware of any principle or any rule, which disqualifies prosecutors from being appointed as judges. On the contrary, it will be noted that many previously and currently serving judges have a long standing history with the prosecution service.

It has only now been brought to our attention that the issue will be tabled by the JSC this week and we would like to make detailed submissions in due course. For present purposes, however, we make the following brief notes:



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## Historical position

In the past, objections which were raised against the appointment of prosecutors emanated from the General Council of the Bar. It is in our view misplaced and in essence, anti-competitive. There is simply no case to be made that prosecutors would be “executive minded” any more than that members of the bar, previously acting on paid instruction, would be partisan. Such empty generalisations cannot be countenanced.

It is our understanding that previously, members of the NPA had the opportunity to serve as acting judges by being afforded unpaid leave for a time. Once they applied to become a judge, they would tender resignation at the NPA.

It seems, however, that in the recent past the NPA took a view that it would not release its employees to serve as “acting judges”. It was expected that employees who wished to so serve, should first resign their employment at the NPA. Given that serving for a time could not provide any measure of certainty, it had the effect of practically excluding employees of the NPA. By contrast, legal practitioners in private practice were not expected to permanently give up their practice as a prerequisite to serve for a time as an “acting judge”.

Motivations for excluding prosecutors, which are rooted in historical assumptions that there existed a hierarchy amongst legal practitioners, are also inconsistent with the expressed purpose of the Legal Practice Act, namely “to provide a legislative framework for the transformation and restructuring of the legal profession.”



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## **Relevant experience**

It was argued that prosecutors don't have the relevant experience to serve as judges in that their experience was limited to criminal law. This is not necessarily so, in that many prosecutors have previous civil experience. Many have also acquired civil experience either through their exposure to the work of the Asset Forfeiture Unit or by attending to all manner of preliminary litigation challenges, which have become the trend particularly in high profile commercial matters.

On the other hand legal practitioners are appointed to the bench with little or no criminal experience, which has at times adversely impacted on the High Court roll.

In the current South African context, the efficient and effective adjudication of criminal matters is a national priority. The appointment of candidates with extensive criminal experience to serve as judges must likewise be prioritised. It is only appropriate then to consider for appointment prosecutors with invaluable, relevant experience to strengthen a balanced, independent bench.

## **Independence**

Objections to the appointment of prosecutors to the bench based on their perceived allegiance to their erstwhile employer, are misplaced. The notion that there needs to be a time for a prosecutor to be "weaned" from the NPA before being able to render service on the bench, is unsubstantiated. This much is apparent in that magistrates are continuously being drawn to the bench directly from the ranks of the prosecutors.



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In fact, this tendency is one of the big contributors to the current resource challenges faced by the NPA.

Notwithstanding the current resource shortage, we hope that the employer will recognise the importance of creating an enabling environment for prosecutors with the requisite skill and experience to follow a career path, which includes appointment to the position of judge. This will also go a long way to improve the image of the NPA and reinforce parity of arms, which should be seen to exist between counsel employed by the NPA and counsel in private practice.

Independence lies at the heart of the prosecutorial function.

Section 179(4) of the Constitution stipulates that national legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice. The Constitution specifically demands the independence of the prosecuting authority.

This is a central tenet of the rule of law, one of the founding values of the Constitution. A prosecutor is not merely required to make a decision in the best interest of their paying client, but must consider the interests of society at large (including complainants and accused persons). Prosecutors must often make difficult, and at times unpopular decisions, without fear or favour.

Worthy candidates applying from the ranks of the prosecution for appointment as judges will have demonstrated their independence over an extended period of time in executing their prosecutorial tasks. They may be subjected to the scrutiny by the JSC on the strength thereof and when deserving, their appointment will strengthen the independence of the bench.



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Of course it remains the prerogative of the JSC to appoint the best suited candidates, all we request is that the pool of nominees should not be unfairly limited.

### **Practical implication**

On a practical level, serving as an “acting judge” provides an opportunity to show one’s skill as judicial officer. Prosecutors with the requisite experience and inclination would welcome such an opportunity.

This is necessarily subject to the invitation by the Judge President of a particular division. Discussion between the Director of Public Prosecutions and the Judge President of the particular division, would be required in order to facilitate this process. Insofar as a policy is required, we trust that can be resolved between the Chief Justice, the NDPP, the Directors of Public Prosecutions and the Judge Presidents of the various divisions.

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AA Mulaudzi

Chairperson of SSAPSA