

WHEN THE JUDICIARY FLOUTS SEPARATION OF POWERS: ATTENUATING THE CREDIBILITY OF THE NATIONAL PROSECUTING AUTHORITY

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SUMMARY

The stature of the National Prosecuting Authority (NPA) has been subverted through highly publicised political interference by the executive. Beginning with the marathon legal entanglements of the current South African president the decisions of sitting National Directors of Public Prosecutions (NDPP) on high-profile criminal matters, particularly those involving prominent members of the political leadership, have been marred with controversy. Undoubtedly unwarranted intrusion into the prosecutorial domain, at the behest of key political protagonists, has blighted the repute of the NPA. The judiciary too has played a pivotal, if lesser role, in eroding the sagging reputation of the NPA.

This article charts the narrative of judicial influence on the diminishing credibility of the NPA, using selected cases from the recent past. It shows that key political events such as the Zuma corruption saga have placed the judiciary together with political forces at centre stage where the focus is their culpability for exceeding their lawful mandate. Finding itself vulnerable as a result of its being the target of rhetoric casting doubt on its integrity and threatening its independence, the judiciary (through a crucial judgment) entered the political fray and positioned itself behind what it judged to be the pervasive political sentiment of the day. The article examines whether, subsequently, in an effort to curb undue political influence of the executive on the NPA, the Constitutional Court in *Democratic Alliance v President of South Africa* interpreted and extended judicial authority in a manner that violated the doctrine of separation of powers. Furthermore, the article argues that in *Freedom Under Law v National Director of Public Prosecutions* the court again misconstrued its powers by unduly interfering with the discretionary decision-making powers of the NDPP. These cases illustrate that, once they have been issued, the far

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reaching consequences of judicial decisions may not be erased by corrections during the appellate process. Far from being an impartial adjudicator, the judiciary has played a significant role in attenuating the stature of the NPA.

KEYWORDS: National Prosecuting Authority reputation; judicial review of executive conduct; review for legality; separation of powers.