

On the record

Interview with Shaun Abrahams, National Director of Public Prosecutions

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Managing Director of the Institute for Security Studies, Anton du Plessis, and Senior Researcher, Ottilia Maunganidze, sat down with the National Prosecuting Authority's (NPA) National Director of Public Prosecutions, Shaun Abrahams, to discuss life, presidents, politics and prosecutions in South Africa. Du Plessis and Abrahams have known each other for many years.

Anton du Plessis (ADP): Who is the real Shaun Abrahams?

Shaun Abrahams (SA): Simply, the guy next door. I come from humble beginnings. I had very strict parents from whom I received a hiding on numerous occasions while growing up. The morals and values my parents instilled in me as a child and young man, are morals and values that I espouse to this very day. I recall back in 2002 when I left Pietermaritzburg as a young prosecutor to take up a position in Pretoria, my mom handed me a card, wishing me well. In the card she inter alia wrote, 'My son, God has given you an ability to assist people. Please use this gift for the betterment of all people and don't ever forget where you come from.' I still have that card. I am the same person that you met many years ago.

ADP: What motivates you to get up in the morning, get in your car and drive to the NPA?

SA: I love this job. I'm living my dream. My dream might be a nightmare to many others but it remains a dream to me. I could never see myself doing anything else but being a prosecutor, and I now I lead this all-important institution. Many people don't know that my oath of office lies on the corner of my desk.

Every single day when I arrive at work, before I start working, I recommit myself by taking my oath. I know the responsibility of leading this institution, giving guidance to many experienced prosecutors and leaders. Delivering justice to the people of this country is a very onerous responsibility.

ADP: I've known you for many years. Of all the people I've known you are probably one of the top three workaholics, and that was before you got this job. Do you still work insane hours?

SA: It's much worse now! Most mornings I'm awake at any time from around two o'clock onwards. I do some work at home before going to the office, where I arrive at any time from 5:30 onwards. I ordinarily work late most nights. By way of an example, a week ago I arrived home at three o'clock in the morning and the day before that I arrived at home just after midnight. Of course not every day is like that. There are days when I get home fairly early at around six o'clock or seven o'clock, which is a highlight for me and which affords me the opportunity to spend time with my family.

ADP: That's important. Having known previous NDPPs I think people need to understand the commitment that it takes, so I'm glad you

shared that. I thought you would miss litigation. Do you plan to litigate like previous NDPPs have done?

SA: I envisage a situation where I would like my deputy national directors and me to argue matters in the Constitutional Court and the Supreme Court of Appeal. But is it appropriate for the NDPP, who is the final arbiter in the NPA, to actually lead a prosecution or argument? If a matter merits it I certainly would like to do so. I miss litigating tremendously.

Ottilia Maunganidze (OM): Without necessarily going into court, how are you as the NDPP leading right now without litigating?

SA: It's much easier and less stressful. I have tremendously experienced deputy national directors of public prosecutions. Of course we give directives to try and finalise matters speedily and efficiently, and in that way enhance the justice system. We want all matters to be concluded as speedily as possible. The challenge is that we have no investigative powers. We're also not responsible for case flow management, that's the responsibility of the presiding officers in the various courts. The constitutional mandate to investigate lies with the police.

I remind prosecutors daily that whenever they receive a telephone call or when a docket arrives with a single statement, they are obligated to provide the requisite guidance, as the decisions we make as prosecutors affect people's lives, their careers and that of their families. So we try and push our prosecutors to always do the right thing and not to forget the constitutionally enshrined principles and the rights of accused persons and victims of crime. In this sense we strive to deliver a more victim-centred service to society.

The NPA is represented on the National Efficiency Enhancement Committee (NEEC), which is chaired by the chief justice at national

level, and we are similarly represented at provincial level by the directors of public prosecutions in the Provincial Efficiency Enhancement Committee (PEEC), where issues of service delivery in the justice system are discussed, and we try to address the challenges to deliver a more efficient justice system to our citizens. The only thing that's really in our control, is prosecution. We guide investigations and issue directives. We don't determine the trial dates. That responsibility lies with the judiciary. We are, however, in control of proceedings from the moment we put charges to the accused and we present the available evidence.

I don't agree with the system. I've always asked, 'Is case flow management working?' The chief justice issues norms and standards, which means that all courts are supposed to sit four hours and 30 minutes. Notwithstanding this, some courts sit less than two hours. I have previously stated that we need a strong chief justice, strong judge presidents, strong regional court presidents and strong chief magistrates to maintain the norms and standards and to get the best out of the criminal justice system and all its role players. So everybody must be held accountable, even judicial officers.

ADP: Research into the number of cases finalised by the NPA with a verdict shows that they have declined by 10 000 in the last two years, from 329 000 to 319 000 (e.g. Jean Redpath, *Failing to prosecute*, 2012). At the same time the arrests being made by the police have increased by 900 000 annually over the last decade. So what we've seen is a decrease in the number finalised in court and an increase in the number of arrests. What's this about?

SA: It is all interlinked. I think we must look at it in the following light: The way the NPA measures performance is different from the way the police measure performance. There have been engagements between the police and the NPA to find a middle way for the measurement of

performance. The result is tragic. For example, the police will arrest 10 people for various crimes; let's say murder, rape, robbery. That's one case for the NPA. But the police will either measure the number of people that they have arrested or the charges that are proffered. It will always be difficult to equate the two or to find a way of measuring performance that takes a systematic approach, but I'm certain we can find one. I know that government at the highest levels wants to find a way to show citizens how government initiatives effectively fight crime.

I must say that investigations have also deteriorated over time. We are working hard on that with our stakeholders. Ultimately we are going to prosecute those cases so we must provide the requisite assistance.

ADP: The perverse performance indicator problems have been here for a while. We see an increase in the number of cases from the police with poor investigations, which decreases the chance of successful prosecution. But could it be that the reduction in cases prosecuted is not just a consequence of bad investigation but of a more rigorous screening by prosecutors?

SA: True. We've put in place screening mechanisms at all levels. In the lower courts, we have teams that screen the dockets to ensure that the investigations are properly done. Historically, we have also taken all dockets in which either witnesses could not be traced or the matters were removed from the court roll for other reasons, and we screen them. If these dockets have merits, we place them back on the court roll and provide a better quality of service. We don't want to lose cases but at the same time you shouldn't take matters to court when the interest of justice dictates that you should not and/or where there is no prospect of a successful prosecution.

ADP: The problem with the NPA in the last couple of years is that it has been at the

centre of a political storm relating to the decisions being taken, from the highest to the lowest levels. Is the politicisation of the NPA demoralising prosecutors?

SA: It is a myth that the institution is being utilised as a political tool to advance somebody's ends or goals. Of course, I cannot say that the NPA has never been utilised for political reasons before, that much is clear from cases that come to play now, especially matters that we have taken to the Constitutional Court.

I remember when I was appointed, the president said to me, 'Shaun, I'm appointing you because I want to give back to the NPA, I want to give them one of their own to lead them. I've tried people from the outside, they have failed. I've never tried someone from the inside. I've looked at your CV; I have looked at many other people's CV. I have interviewed you; I have interviewed a number of other people. You may lack the management experience that some of the deputy nationals and directors of Public Prosecution have. But your experience outweighs theirs by far. I want to give the NPA someone that knows the institution and how to turn it around, to show citizens the government's initiatives to fight crime.'

Of course, since my appointment the president has never asked me to do anything for him or on his behalf or on anybody's behalf. And it is a fallacy to suggest that I have been appointed to protect him or to use the NPA as a political tool. We decided to prosecute [former prosecutor] Glynnis Breytenbach, that trial is currently going on. The media is silent about it. Now of course prosecutors are deeply disheartened when they have to explain to their families, friends, loved ones, people in the community why the NPA is portrayed as a political tool. Of course there has been a history of political abuse, and to turn the tide against that history is difficult. We want the work of the institution to speak for itself. I have made it clear that I will not succumb to

public sentiment. I will not be pressurised by anybody into making any decision. I have never been a populist. I have walked the hard yards. I have made and will continue to make tough decisions. I will do what's right; I will do what's in the best interest of the NPA. I will consider the views of interested parties and that of the community. I accept that we can do more in so far as our engagement with the community is concerned to change the public perception of the NPA. But it's very difficult when positive news is not reported in the media.

ADP: You are concerned about the public perception of the NPA ...

SA: I'm deeply concerned about it. It hurts me tremendously when people have a negative perception of the NPA when hard-working prosecutors work night and day to keep this country safe, to deliver services to our communities. It really is a thankless job.

ADP: The NPA has appealed the Pretoria High Court's recent setting aside of then acting NDPP Mokotedi Mpshe's decision to drop charges against President Zuma in 2009. Most legal commentators think that the chance of the NPA's succeeding in the Constitutional Court is extremely low; you obviously disagree with that ...

SA: Completely.

OM: Why?

SA: Firstly, how can a court make a finding that the acting national director should have approached the court for the court to decide on the egregious nature of the conduct concerned? Why should the NPA approach the court at all for the court to decide whether it should prosecute a case? How can the NPA ask the court to assist it to exercise its own discretion and constitutionally enshrined powers? That cannot be correct. It has to be the head of the institution that must decide who must be prosecuted. If he or she is wrong

then it must be taken on review. But the court does not give guidance in so far as with which matters and under which circumstances the NPA should approach the court.

The question is: should the NPA approach the court to decide on the nature of the conduct before it decides whether or not it should prosecute? It's for the accused person to raise improprieties. In this matter, those representations were made, and after [former acting NDPP] Mokotedi Mpshe considered the presentations, listened to the tapes and read the docket, and having been briefed by the prosecution team, he decided that the conduct was so egregious that it had impacted the entire prosecutorial process. Now the prosecutorial process does not only start when you receive the docket, the prosecutorial process starts when you are contacted to give guidance on an investigation. In this matter, [former deputy NDPP Leonard] McCarthy was the head of the DSO [Directorate for Special Operations] and issued the Section 28 certificate that commenced the investigation into the matter. He was in charge of the entire investigation. The court got it wrong, I say this respectfully of course, in so far as the weight attached to the Browse Mole report. The purpose of us highlighting the Browse Mole report was to show Leonard McCarthy's conduct and the extremes he was prepared to go to, to besmirch Mr Zuma. You can't look at that in isolation. You must look at it holistically from the commencement of the investigation. Of course that is not an argument that was advanced and Advocate Mpshe should in all probability have advanced that, but he did not. We feel that the issue around the review of prosecution is not settled law.

I am really happy to consider the merits of the matter and to apply my mind to it should this become an eventuality. I am yet to make a decision on the merits of the matter as I

am currently bound by the processes and I would like these to be concluded. You would understand and appreciate that we can go directly to the Constitutional Court because the issues affect the powers of the national director and the NPA. We decide on matters on a regular basis. Any interested party who has locus standi can take us on review. We want the court to give clarity on my powers and the powers of the NPA so that we can continue with the constitutional mandate. We are concerned; I say this with the greatest respect, that the court wanted to usurp the constitutional powers of the NPA.

ADP: It's a very important point because they are quite separate. What happens if the Constitutional Court rules against you?

SA: I will be pleased if the Constitutional Court gives clarity and finality to the matter so that we can move forward as an institution. We must look at it in the following light: when the Constitutional Court was approached to decide on the powers of the public prosecutor, the public welcomed it. I wish that the public and the media could see this in the same light. This is about the powers of the NPA, the powers of the national director, and relates to the separation of powers. We need clarity on these issues. I see it as fulfilling my constitutional responsibilities and my oath of office to see this matter brought to finality as soon as possible, whether we win or lose, and to provide clarity around what my powers are and what the powers of the NPA are, as well as principles around the review process.

OM: One of the interesting things you did when you took over as NDPP was to restructure. Has the restructuring worked?

SA: Immediately after my appointment, I was mindful of the challenges facing the institution and the problems at the top. I had to make certain tough decisions and many people in the

institution feel it is in a much better place than it was before. Of course not everyone was happy.

I think we are doing better: the prosecution rates have increased for the Special Commercial Crimes Unit (SCCU), the Sexual Offences Unit (SOCA), and sexual offences in general. Overall we've done better as an institution, even though we may have received fewer cases.

ADP: Was it a smart move to appoint Advocate Jiba to head the NPS [National Prosecutions Service], considering the controversy around her? I know you said public perception can't drive your decisions, but I don't think the public has an understanding of why you did that.

SA: Immediately after my appointment I consulted with all deputy national directors, all directors of public prosecutions, special directors, and other senior members of the NPA. I wanted their views, among other things, on whether there should be changes. Ninety to ninety-five per cent of my directors of public prosecutions and special directors had recommended that Nomgcobo Jiba be assigned the responsibility to head the NPS. Nomgcobo is a very hard worker, is very decisive and she is a leader. I was very mindful of the history and stigma attached to her, largely attributed by the media. She has not disappointed me and has vindicated my decision, which I am extremely pleased about.

OM: Can you talk a little more about the roles that specialised units play in the NPA?

SA: I would like to start by speaking about the Priority Crimes Litigation Unit (PCLU). I grew up in that unit, and I led it for some months. Its mandate is to manage investigations and prosecutions of crimes impacting the country's security. It has specified crimes that fall within its mandate, including international crimes, terrorism, conventional arms control issues and TRC [Truth and Reconciliation Commission] matters. The Missing Persons Task Team

(MPTT) also falls within that unit. I have taken certain high-profile matters and assigned them to the unit specifically because I wanted its head to have oversight over those matters and to report to me. Because those matters impact on public perceptions of the NPA I wanted direct oversight over them, not to interfere in any way, although I can intervene in any matter, contrary to general belief, where policy is not being adhered to. This is to ensure that there is no manipulation, that nobody points fingers and says there is political and/or other interference. They must point fingers at me, I'm the head of the institution. The buck stops with me so I will take the responsibility for that.

Dr Torie Pretorius SC heads the unit. He is someone I trust implicitly. I am tremendously pleased with the leadership he has shown to date. I have recently indicated that I will provide the requisite resources to both the PCLU and the MPTT so that they can work efficiently. We are in a building phase.

OM: My primary area of interest is international criminal justice; how will the changes impact the work that the PCRU is doing in terms of international crimes?

SA: The challenge the PCLU has always faced is a lack of resources. Right now, every prosecutor in the PCLU has one or more matters in court. There was always the issue of these investigations dragging on and prosecutions not being conducted speedily. We now have sufficient resources for matters to go to court. So I can see the turnaround already by the mere fact that we have so many of our prosecutors in court. I have even gone as far as to place the Marikana matter under the head of the PCLU's direction and seconded experienced officials from other offices to provide assistance, because this is a very serious matter. I want direct oversight of the head of the PCLU in this matter because of the impact it has on society and the rule of law.

OM: Beyond the people housed at the NPA's head office, what else can the special units do?

SA: We want to decentralise. We will have prosecutors at head office to deal with specific matters, but we want the regions to also have the expertise. So when we invite people for international law training, we expect the people who are trained to lead prosecutions in their regions and we second them to head office to deal with these matters. We want to have a broad pool of prosecutors to choose from and we want to enhance expertise.

Early this year, I hosted a conference on organised crime. I felt that stakeholders weren't doing enough, in so far as their respective constitutional mandates and responsibilities go, to work together and in synergy to fight organised crime, serious economic offences and corruption. I don't want to take away the powers of the directors of public prosecutions but I have given them time to get their structures in place. I want to see results and if I don't see results I'm going to establish a special unit on organised crime. It's all about efficiency.

This has been the Sexual Offence and Community Affairs (SOCA) Unit's best year ever. In early 2000 when SOCA first started, they commissioned a work-study around sexual violence. At that stage, the successful prosecution rate was extremely low. They have now achieved over 70%. They have done tremendously well. This has shown us that the system has worked, the concept has worked and we are grateful to Mama Thoko Majokweni for her good work and to Pierre Smith and other leaders of SOCA for creating the structure. Of course a lot of work still has to be done. I'm willing to revisit SOCA's mandate. SOCA does not have a prosecutorial mandate. Why can't a special director take responsibility for all sexually related offences? Won't it enhance efficiency and streamline the entire process? We are going to work on that.

The SCCU again has done tremendously well under the leadership of Lawrence Mrwebi. They improved their results in the last financial year. I also want to revisit their mandate and resources to see how we can enhance the unit to fight serious economic offences and corruption. It's a priority for me.

OM: Do you have a mentor? And if so, what role does he or she play?

SA: You bring tears to my eyes when you raise this question. I don't know whether to say I have or I had. My very first mentor was a man called Tim McNally SC, who was the former attorney general of Natal, who gave me my first opportunity as a prosecutor. But if you speak of a mentor, his name is Anton Ackermann SC. Anton was a father, a friend and a mentor. I have never met a person who took the time to selflessly mentor another person the way Anton mentored me. The role he played in my life has contributed greatly to the leader and the person I am today. It was indeed a critical role in my career. During a recent discussion I told him that the flaws I have as a lawyer should never be attributed to him but I will be forever grateful for what he has done in my life and career. A few months ago, Anton had tears in his eyes and he inter alia said to me, 'My son, it pains me when the media lambasts you or when you are criticised, because I know you and I know what you stand for and I know the lawyer you are.'