The South African Prosecutor in the Face of Adverse Pre-Trial Publicity

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Online ISSN
1727-3781

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Date Submission

21 September 2019

Date Revised

24 February 2020

Date Accepted

13 March 2020

Date published

20 April 2020

Editor Prof O Fuo

How to cite this article

Broughton DWM "The South African Prosecutor in the Face of Adverse Pre-Trial Publicity" *PER / PELJ* 2020(23) - DOI http://dx.doi.org/10.17159/1727-3781/2020/v23i0a7423

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DOI
http://dx.doi.org/10.17159/1727-3781/2020/v23i0a7423

Abstract

Pre-trial publicity regarding a pending criminal case, which publicity may be in the form of media coverage of the case or a prior decision given in parallel judicial proceedings arising from substantially the same facts as the criminal matter, may be adverse to an accused. Such media publicity or findings contained in the parallel judicial decision may implicate the accused in the commission of the crime on which he or she is to stand trial. The publicity may, for example, suggest that the accused is "guilty" of the crime charged, or that the accused is of bad character having had the propensity to commit the crime. Conversely, pre-trial publicity may portray the accused as innocent of any criminal wrongdoing. In other words, pre-trial publicity may prejudge the issues that are to be adjudicated on at trial. A central question that may arise in these instances is whether there is a real and substantial risk that such publicity would materially affect or prejudice the impartial adjudication of the criminal case; that is to say, whether the publicity is likely to have a biasing effect on the trial court in the adjudication process or the outcome of the trial, thereby imperilling the constitutional right to a fair trial.

Another key consideration, in respect of which there is scant literature and case-law, is the question of the impact which adverse pre-trial publicity may have on the prosecutor in instituting and conducting a prosecution. Being unduly influenced by such publicity, a prosecutor may impinge upon the accused's right to a fair trial. There is also a dearth of authority on how the prosecutor is to function in the face of pre-trial publicity which may be prejudicial to the accused. This article seeks to explore these aspects *vis-à-vis* the prosecutor. It is posited that in an adversarial criminal justice system the same level of impartiality required of the presiding judicial officer is not required of the prosecutor, and that prosecutorial bias towards the guilt of an accused is inevitable where the prosecutor decides to institute a prosecution after studying the police case docket. Thus, exposure of the prosecutor to virulent pre-trial publicity would not be inimical to the fair disposition of the accused's trial provided that the prosecutor conducts the trial fairly and without undue prejudice to the accused and is dedicated to assisting the court in arriving at the truth. Moreover, additional knowledge and understanding of a case which a prosecutor gains from an extraneous source does not amount to bias or prejudice.

Keywords

Pre-trial publicity; prosecutorial discretion; adversarial prosecutor; hostile pre-trial publicity; right to a fair trial; prosecutorial bias; additional prosecutorial knowledge; adversarial (accusatorial) process; litigation control; the opening address; closing argument

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> When a public prosecutor is convinced of the guilt of an accused, the case should be prosecuted with energy and skill but with propriety and fairness.[1]

1 Introduction

Pre-trial reporting on crime in South Africa, as is the case globally, is an accepted and common phenomenon or practice, but it can give rise to a tension between the right to freedom of expression, more particularly the right to a free press and other media, enshrined in section 16 of the *Constitution of the Republic of South Africa*, 1996 (hereafter the *Constitution*) and the right to a fair trial guaranteed in section 35(3) of the *Constitution*.[2] Publicity surrounding a criminal case that is *sub judice* (still pending) may be in the form of media reports, statements or comments, or in the form of published findings or pronouncements made in parallel judicial proceedings arising from substantially the same facts as the pending criminal matter. Such publicity may be adverse to an accused: it may indicate or suggest that the accused is "guilty" of the crime with which he or she has been charged, or it may suggest that the accused is of bad character, so much so that the accused had the propensity to commit the crime in question. Media coverage in advance of trial may conversely portray the accused as innocent of the crime with which he or she has been charged.[3] Such publicity, then, may prejudge the issues of the case at bar.

The central question that may arise in the above circumstances is whether there is a real and substantial risk that pre-trial publicity would materially affect or undermine the impartial adjudication of the accused's case or have a biasing effect on the outcome of his or her trial, thereby imperilling the right

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1 *Jennings v United States* 364 F 2d 513 (1966) 516 paras 6, 7.

2 See, for example, Broughton 2019a *THRHR* 213-214; *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 2 SACR 493 (SCA) (hereafter the *Midi Television* case); *Brown v National Director of Public Prosecutions* 2012 1 All SA 61 (WCC) (hereafter the *Brown* case); *Pelser v Director of Public Prosecutions* 2009 2 SACR 25 (T) (hereafter the *Pelser* case); *Banana v Attorney-General* 1999 1 BCLR 27 (ZS) (hereafter the *Banana* case); Snyman *Criminal Law* 320-322; Hill 2001 *SAJHR* 563; Stevenson 2007 *Obiter* 614; Paizes "Conduct of Proceedings" 22-42B; Van Rooyen 2014 *HTS Teologiese Studies / Theological Studies* 1-9; Swanepoel 2006 *Ecquid Novi* 3.

3 Broughton 2019a *THRHR* 214-217.

to a fair trial.[4] Such a question may arise even in the context of South Africa's criminal justice system, where a trial is not adjudicated on by a jury, but by a trained judicial officer (either a judge or magistrate depending on the forum in which the trial is heard) sitting alone or with assessors.[5]

Very little attention has been given in the case-law and literature to the question of the impact which adverse pre-trial publicity may have on the prosecutor in instituting and conducting a prosecution. A prosecutor being unduly influenced by such publicity may impinge upon the accused's right to a fair trial. There is also a dearth of authority on how the prosecutor is to function in the face of pre-trial publicity which is prejudicial to the accused. This article seeks to answer these questions. In exploring the said aspects, the article examines the core functions and duties of the prosecutor in exercising the prosecutorial discretion to institute a prosecution or decline to prosecute, the core functions and duties of the prosecutor in handling a prosecution in court, and the question of what would be required of the prosecutor when a criminal case generates extensive pre-trial publicity that is detrimental to the accused or prejudges the issues that are to be adjudicated on at trial. The article commences by outlining the underlying fundamental or pivotal role which the prosecutor plays in the criminal justice system.

It is posited in this paper that in an adversarial (accusatorial) system, the same level of impartiality required of the presiding judicial officer is not required of the prosecutor in handling a criminal trial, and that the court is the arbiter and ultimate repository of the fairness of the trial proceedings. It is posited, moreover, that where the prosecutor decides to prosecute it is inevitable that he or she would entertain a mental inclination or predisposition or bias towards the guilt of the accused, having studied the police case docket. The prosecutor will be partisan at trial and will be perceived by the accused as being biased. Thus, exposure of the prosecutor to surrounding hostile publicity in advance of trial would not be inimical to the fair disposition of the accused's trial, provided that the prosecutor conducts the trial fairly and without undue prejudice to the accused and is dedicated to assisting the court in arriving at the truth. Moreover, additional knowledge and understanding of a case which a prosecutor gains from an extraneous source does not amount to bias or prejudice.

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4 The *Banana* case 34E-I; Broughton 2019a *THRHR* 217. Also compare the *Midi Television* case para 19, in relation to the question of the test for *sub judice* contempt.

5 Broughton 2019a *THRHR* 213 *et seq*. For a leading Southern African decision on the matter, see the *Banana* case. Also see the *Pelser* case; the *Brown* case.

2 The pivotal role of the prosecutor in an adversarial criminal justice system

Prosecutors play a critical role in the criminal justice system. In *S v Tshotshoza* (hereafter the *Tshotshoza* case) it was noted that the *Constitution* acknowledges that there is crime and that criminals are to be prosecuted and punished, and that for this purpose there has to be a prosecuting authority which has to take the necessary initiative in the institution of prosecutions and the fulfilment of all necessary steps incidental thereto.[6] Prosecutors have a constitutional mandate to prosecute crime.[7]

In essence, the South African criminal trial is an adversarial proceeding which is characterised by a contest between the prosecution, for the State, and the accused (or defence), over which an impartial judicial officer is to preside and keep the scales even.[8] The parties to a criminal trial are the prosecutor and the accused.[9] The prosecutor conducts the case "for one of the two sides in a trial, namely the state, as representing the citizenry."[10] It is the function of the prosecutor "to place before a court what the prosecution considers to be credible evidence relevant to what is alleged to be a crime."[11] "The prosecutor must provide, independent of the accused, proof of any accusation made."[12] This is in line not only with the accused's constitutional right to be presumed innocent,[13] but also with the adversarial system, which is party-driven, in terms whereof each party conducts his or her own investigation and in a partisan way builds a case.[14] The prosecutor is moreover *dominus litis* (i.e. in control of the prosecution or "master of the suit"), and thus "[t]he presiding officer must always resist the temptation to descend into the arena to a point where he/she coaches or advises the public prosecutor on how to conduct his/her case."[15] As *dominus litis*, the prosecutor "has a discretion regarding

6 *S v Tshotshoza* 2010 2 SACR 274 (GNP) para 18.

7 *S v Basson* 2004 1 SACR 285 (CC) paras 32-33; *S v Basson* 2007 1 SACR 566 (CC) para 144, with reference to s 179(2) of the *Constitution*.

8 *S v Mamabolo (E TV intervening)* 2001 1 SACR 686 (CC) para 55; Wolf 2011 *TSAR* 712. See also *S v Rudman; S v Mthwana* 1992 1 SA 343 (A) 348F: "The essential characteristic of the adversary system is that the presiding judicial officer appears as an impartial arbiter between the parties."

9 Kruger *Hiemstra's Criminal Procedure* 22-1.

10 *Porritt v National Director of Public Prosecutions* 2015 1 SACR 533 (SCA) para 13 (hereafter the *Porritt* case).

11 The *Porritt* case para 11. Also see *Van Breda v Media 24 Ltd* 2017 2 SACR 491 (SCA) para 50 (hereafter the *Van Breda* case).

12 Steytler 2001 *LDD* 3.

13 *S v Lavhengwa* 1996 2 SACR 453 (W) 485c-e.

14 Steytler 2001 *LDD* 3.

15 *S v Moshoeu* 2007 1 SACR 38 (T) 41e. Also see *S v Matthys* 1999 1 SACR 117 (C) 119e-f.

prosecution and pre-trial procedures. For instance, the state may decide *inter alia* whether or not to institute a prosecution; on what charges to prosecute; in which court or forum to prosecute; when to withdraw charges, and so forth."[16] As *dominus litis*, the prosecutor is also "the party who dictates the route a case will take towards being finalised."[17]

In South Africa's criminal justice system prosecutors serve as the gatekeepers of the system. Not only do they evaluate the conduct of the police and the strength of the state's case, but they also actively present the case to the court and represent the interests of society throughout the proceedings.[18] "The role of the prosecutor comes with great responsibility as he is vested with the power to charge and try accused. [Prosecutors] must seek justice, do justice, protect the innocent and charge the guilty."[19] In other common-law jurisdictions the prosecutor similarly "plays his most important role as the gatekeeper of the criminal courts and as advocate of the state in criminal trials."[20] Prosecutors are gatekeepers of the criminal justice system because without their intervention judicial sanctions cannot occur.[21] The effects of the work of the prosecutor reverberate through every component of the criminal justice system: the police, the judiciary and correctional services.[22] It follows that the integrity of the system is largely dependent on the integrity of the prosecutor.[23] Few public officials can so affect the lives of others as can prosecutors.[24] Prosecutorial decisions to prosecute or not to prosecute clearly "affect accused persons and their families, victims, witnesses, law enforcement agencies and the public."[25] The prosecutor possesses the greatest power to take away the freedom of a person.[26] The discretionary power exercised by the prosecutor "in initiation, accusation, and discontinuance of prosecution gives him more control over an individual's liberty and reputation than any other public official."[27] The United States Supreme Court has held in this respect that:[28]

16 *S v Sehoole* 2015 2 SACR 196 (SCA) para 10.
17 *S v Khalema and Five Similar Cases* 2008 1 SACR 165 (C) para 22.
18 *S v Sithole* 2012 1 SACR 586 (KZD) para 7. Also see De Villiers 2011 *THRHR* 256.
19 De Villiers 2011 *THRHR* 256.
20 Felkenes 1975 *Sw U L Rev* 98.
21 Mokoena 2012 *Stell L Rev* 300.
22 Felkenes 1975 *Sw U L Rev* 98.
23 Felkenes 1975 *Sw U L Rev* 98.
24 Reiss 1987 *U Pa L Rev* 1365.
25 Du Toit 2015 *SACJ* 85.
26 Gershman 2001 *Geo J Legal Ethics* 311.
27 Note 1955 *U Pa L Rev* 1057.
28 *Young v United States ex rel Vuitton et Fils SA* 481 US 787 (1987) 814 (hereafter the *Young* case).

> Between the private life of the citizen and the public glare of criminal accusation stands the prosecutor. That state official has the power to employ the full machinery of the state in scrutinizing any given individual. Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life.

A former prosecutor in the United States of America, Kenneth Melilli,[29] observes as follows:

> No government official can effect a greater influence over a citizen than the prosecutor who charges that citizen with a crime. In many cases, the prosecutor determines the fate of those accused, at least in those cases where the evidence or statutory sentencing structure renders the ultimate outcome of the prosecution largely a foregone conclusion.

Melilli[30] explains that even when a criminal charge does not result in a conviction, the mere filing of the charge can have a devastating effect on an individual's life, including potential pre-trial detention, loss of employment, embarrassment and loss of reputation, the financial cost of a criminal defence, and the emotional stress and anxiety attendant upon awaiting the finalisation of the case. According to Melilli,[31] "[s]uch consequences may well have a permanent effect that is not cured even by an acquittal at trial." Melilli[32] expresses the opinion therefore that prosecutors, as many do, should "regard the possibility of charging an innocent person as 'the single most frightening aspect of the prosecutor's job'." Yutar[33] likewise indicates that a decision to prosecute should not be made lightly "because once you institute a prosecution against a person, even though he may subsequently be acquitted, you have done that person irreparable harm." Given the above role, and indeed the far-reaching power, which prosecutors have in the criminal justice system, the utmost in integrity, propriety and competence is required of them; they must adhere to the highest ethical and professional standards.

3 Exercising the prosecutorial discretion to institute a prosecution or to decline to prosecute (the charging discretion)

29 Melilli 1992 *BYU L Rev* 671 (footnotes omitted).
30 Melilli 1992 *BYU L Rev* 671-672. See similarly, *Mahupelo v Minister of Safety and Security* 2017 1 NR 275 (HC) para 132 (hereafter the *Mahupelo* case).
31 Melilli 1992 *BYU L Rev* 672.
32 Melilli 1992 *BYU L Rev* 672.
33 Yutar 1977 *SACC* 136.

A core responsibility of a prosecutor is making decisions to prosecute or not to prosecute.[34] Indeed, the first most important function that must be carried out by a prosecutor is the decision to charge a person with a crime.[35] Such a decision would have "extensive and pervasive consequences for all concerned."[36] The public must therefore have the assurance that those who wield this power will be guided by their sense of public responsibility for the attainment of justice.[37] A wrong decision to prosecute or, conversely, a wrong decision not to prosecute, would both tend to undermine the confidence of the community in the criminal justice system.[38]

With respect to the decision to prosecute or not, the law, as already alluded to, gives prosecutors a discretion; indeed, discretionary power is inherent in the office of the prosecutor.[39] South Africa does not have a system of compulsory prosecution.[40] Prosecutorial discretion should "be exercised fairly, intelligently, and in accordance with what is required at each stage of the criminal justice process."[41] The discretion which prosecutors have is "a very valuable safeguard", because one has to take into account when deciding whether to prosecute someone what the consequences to him or her may be, apart from any penalty which a court of law might inflict.[42] Mokoena[43] points out that "the manner and the process through which prosecutorial discretion is exercised are central to the quality of the criminal justice system." Mokoena[44] observes further that "prosecutorial discretion forms the cornerstone of prosecutorial independence", adding that:

> To this end, prosecutorial discretion has been described as an 'essential feature' of the criminal justice system. Such discretion is required, as a matter of course, in order to insulate the prosecutor from political interference, and to promote impartiality and independence.

Prosecutors in South Africa, as with prosecuting authorities in other Anglo-American jurisdictions, "enjoy a virtually unfettered discretion as to whether a person suspected of criminal conduct should be prosecuted or not, and if

34 The *Mahupelo* case para 132; Van der Merwe "Prosecuting Authority" 1-49.
35 Melilli 1992 *BYU L Rev* 671.
36 Van der Merwe "Prosecuting Authority" 1-49.
37 The *Young* case 814.
38 The *Mahupelo* case para 132.
39 Yutar 1977 *SACC* 136; Gourlie 1982 *Man LJ* 37.
40 Van der Merwe "Prosecuting Authority" 1-49.
41 Visser, Oosthuizen and Verschoor 2014 *SALJ* 880.
42 Yutar 1977 *SACC* 136.
43 Mokoena 2012 *Stell L Rev* 301.
44 Mokoena 2012 *Stell L Rev* 301 (footnote omitted).

prosecuted, with which offences and before which court";[45] "[t]he discretion to prosecute is a wide one".[46] It is submitted that this breadth of the prosecutor's discretion is underpinned or reinforced by the fact that, as the Constitutional Court has affirmed, "the prosecution of crime is a matter of importance to the State", which flows from the State's power to institute criminal proceedings in terms of section 179(2) of the *Constitution*, and the fact that the *Constitution*, by providing for an independent prosecuting authority able to exercise such power on behalf of the State "makes it plain that [the] effective prosecution of crime is an important constitutional objective."[47] There is a constitutional obligation on the State to prosecute crime; prosecuting those accused of offences which threaten or infringe the rights of citizens "is of central importance in our constitutional framework."[48]

However, a decision to prosecute or not to prosecute may be subject to judicial review and set aside where the prosecutor's discretion is exercised improperly or the decision is illegal and irrational or is *mala fides* or deployed for ulterior purposes - in other words, where the discretion is in breach of the principle of legality. The constitutional principle of legality requires that a decision-maker must exercise the powers conferred on him or her lawfully, rationally and in good faith. Rationality is a minimum requirement applicable to the exercise of all public power. Decisions by a public authority must be rationally connected to the purpose for which the power is given, otherwise they are in effect arbitrary and inconsistent with this requirement.[49] Nonetheless, while decisions to prosecute or not to prosecute are not

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45 Richings 1977 *SACC* 143. Also see, for example, *S v Yengeni* 2006 1 SACR 405 (T) para 52 (hereafter the *Yengeni* case), finding that the "untrammelled exercise" of the prosecutor's powers "in a spirit of professional independence is vital to the functioning of the legal system."

46 Van der Merwe "Prosecuting Authority" 1-49.

47 *S v Basson* 2007 1 SACR 566 (CC) para 144. Also see *S v Basson* 2004 1 SACR 285 (CC) paras 32-33; *S v Coetzee* 1997 1 SACR 379 (CC) para 13; *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; In re Hyundai Motor Distributors (Pty) Ltd v Smit* 2000 2 SACR 349 (CC) para 53; *S v Thebus* 2003 2 SACR 319 (CC) para 40. Having special regard to the rights of victims, "it would be unconstitutional if the prosecuting authority would refuse to prosecute 'where there is a strong case and adequate evidence to do so'" - Wolf 2011 *TSAR* 713, citing *Nkadimeng v National Director of Public Prosecutions* 2008 ZAGPHC 422 (12 December 2008) para 15.4.4.

48 *S v Basson* 2004 1 SACR 285 (CC) paras 32-33.

49 See in this regard, *Booysen v Acting National Director of Public Prosecutions* 2014 2 SACR 556 (KZD); *Freedom Under Law v National Director of Public Prosecutions* 2014 1 SA 254 (GNP); *National Director of Public Prosecutions v Freedom Under Law* 2014 4 SA 298 (SCA); *Democratic Alliance v Acting National Director of Public Prosecutions* 2016 2 SACR 1 (GP); *Zuma v Democratic Alliance* 2018 1 SA 200 (SCA); *Minister of Police v Du Plessis* 2014 1 SACR 217 (SCA) para 31; *Freedom Under Law v National Director of Public Prosecutions* 2018 1 SACR 436 (GP).

immune from judicial review, the power to review is one to be sparingly exercised in order to safeguard the independence of the prosecuting authority and given the great width of the prosecutor's discretion and the polycentric character that generally accompanies its decision-making, including considerations of public interest and policy.[50] In principle, a court cannot interfere with a *bona fide* decision of the prosecutor.[51]

Critically, as with all other powers, functions and duties of the prosecuting authority, the prosecutor's charging discretion must be exercised independently and impartially; that is, without fear, favour or prejudice.[52] This is in terms of the *Constitution*,[53] the *National Prosecuting Authority Act* 32 of 1998 (hereafter the *NPA Act*),[54] the *Code of Conduct for Members of the National Prosecuting Authority* (hereafter the *Code of Conduct for Members of the NPA*),[55] and the *Prosecution Policy* of the NPA (hereafter the *Prosecution Policy*).[56] The prosecutor's discretion is also subject only to the *Constitution* and the law.[57] De Villiers[58] writes in this regard:

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50 *National Director of Public Prosecutions v Freedom Under Law* 2014 4 SA 298 (SCA) paras 25-26. Also see Du Toit 2015 *SACJ* 90.

51 Van der Merwe "Prosecuting Authority" 1-40B-1-40C; De Villiers 2011 *THRHR* 257; *Mohan v Director of Public Prosecutions, Kwazulu-Natal* 2017 2 SACR 76 (KZD) para 42; *General Council of the Bar of South Africa v Jiba* 2017 1 SACR 47 (GP) para 43.

52 See, for example, *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* 2016 1 SACR 308 (SCA) para 24; Beinart 1962 *Acta Juridica* 123, noting that the decision to institute criminal prosecutions should "be in the hands of an impartial person who will judge independently of the executive and of the police whether a prosecution should be instituted – a person, who is under a duty to enforce the criminal law against all offenders and who will act in a quasi-judicial way, that is to say in a just and proper manner."

53 Section 179(4) of the *Constitution*.

54 Sections 32(1)(*a*) and (*b*) and (2) of the *National Prosecuting Authority Act* 32 of 1998 (the *NPA Act*).

55 Framed in terms of s 22(6) of the *NPA Act* and published in GN R1257 in GG 33907 of 29 December 2010 (the *Code of Conduct for Members of the NPA*), and contained in "National Prosecuting Authority" Prosecuting-53-Prosecuting-56 – see specifically paragraphs A(d), B and C.

56 Revision date: June 2013. Contained in "National Prosecuting Authority" Prosecuting-41-Prosecuting-51 – see specifically Parts 1 and 3. In *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* 2016 1 SACR 308 (SCA) para 24, it was pointed out that in making a decision to prosecute or not to prosecute, such a decision must not only be taken by a prosecutor impartially, without fear, favour or prejudice, but the prosecutor must also "adhere to prosecuting policy and policy directives", the aim of which axiomatically "must be to serve the interests of justice for the benefit of the public in general." Although this decision was overturned in *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* 2017 1 SACR 284 (CC), this does not affect the validity of the above finding in relation to the prosecution policy – see Du Toit 2017 *SACJ* 93-94.

57 Section 32(1)(*a*) of the *NPA Act*; De Villiers 2011 *THRHR* 252.

58 De Villiers 2011 *THRHR* 263.

> What is then the best constitutional structure within which to exercise prosecutorial discretion? The manner in which decisions to prosecute or not are reached is crucial to the criminal justice system. This requires that the manner in reaching such decisions must be impartial and fair. Prosecutorial decisions should only be made with due attention to the requirements of the law, while not forgetting the public interest implications of legal decisions.

In *S v Van der Westhuizen* (hereafter the *Van der Westhuizen* case), the Supreme Court of Appeal pointed out that the concept of prosecutorial impartiality, as it is understood under South African law and in terms of international instruments,[59] does not mean that the prosecutor may not act adversarially, but it denotes "acting even-handedly, i.e. avoiding discrimination; and the duty to act impartially is therefore part of the more general duty to act without fear, favour or prejudice."[60]

Prosecutors must carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination.[61]

For present purposes, it is important to highlight that prosecutorial impartiality also means that prosecutors in performing their duties must act with objectivity and remain unaffected by individual or sectional interests and public or media pressures. Prosecutors may take into account the public interest, but this is distinct from media or partisan interests and concerns, however vociferously these may be presented.[62]

Prosecutorial independence demands that no organ of state and no member or employee of an organ of state nor any other person shall improperly interfere with, hinder or obstruct the prosecuting authority or any member thereof in the exercise, carrying out or performance of its, his or her powers,

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59 See s 179(4) of the *Constitution*; s 32 of the *NPA Act*; *Code of Conduct for Members of the NPA*; *United Nations Guidelines on the Role of Prosecutors* (1990) (hereafter the *UN Guidelines on the Role of Prosecutors*); *Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors* (1999) (hereafter the *IAP Standards of Professional Responsibility*). In framing the *Code of Conduct for Members of the NPA*, due account was taken *inter alia* of the *UN Guidelines on the Role of Prosecutors* and the *IAP Standards of Professional Responsibility*. Moreover, s 22(4)(*f*) of the *NPA Act* requires the National Director of Public Prosecutions to bring the *UN Guidelines on the Role of Prosecutors* to the attention of directors and prosecutors working for the NPA and to promote their respect for and compliance with the principles contained therein (see De Villiers 2011 *THRHR* 252).

60 *S v Van der Westhuizen* 2011 2 SACR 26 (SCA) para 9.

61 The *Porritt* case para 12, with reference to s 13(a) of the *UN Guidelines on the Role of Prosecutors*.

62 Paragraph C(*c*) and (*f*) of the *Code of Conduct for Members of the NPA*; ss 3(b) and (c) of the *IAP Standards of Professional Responsibility*; s 13(b) of the *UN Guidelines on the Role of Prosecutors*.

duties and functions.[63] The prosecutorial discretion should be free from political, public and judicial interference.[64] Prosecutors should be protected against arbitrary action by the government and should be able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.[65]

The independence of members of the NPA is protected in terms of both the *Constitution*[66] and the provisions of the *NPA Act*.[67] Prosecutors, moreover, have always owed a duty to carry out their public functions independently and in the interests of the public.[68] The *Constitution* guarantees the professional independence of the National Director of Public Prosecutions (hereafter the NDPP) and every professional member of his or her staff, with the obvious aim of ensuring their freedom from any interference in their functions by the powerful, the well-connected, the rich and the peddlers of political influence.[69] "Prosecuting independence primarily denotes independence from political influence of the justice minister and the executive branch."[70] The *Constitution* and the *NPA Act* "direct all branches of government, and in particular the executive, to respect the domain of the prosecuting authority, and not to interfere in its decisions. For this reason, an accused has a constitutional right to a prosecutor that is independent from political influence."[71] The prosecutorial discretion must not be subject to the authority of the

63 Section 32(1)(*b*) of the *NPA Act*; De Villiers 2011 *THRHR* 252, 259.

64 Paragraph B of the *Code of Conduct for Members of the NPA*; s 2 of the *IAP Standards of Professional Responsibility*.

65 Section 4 of the *UN Guidelines on the Role of Prosecutors*; s 6 of the *IAP Standards of Professional Responsibility*; De Villiers 2011 *THRHR* 252, 257.

66 Section 179(4) of the *Constitution*; *S v Basson* 2004 1 SACR 285 (CC) para 33; De Villiers 2011 *THRHR* 258. Also see *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) para 146, where the Constitutional Court observed that s 179(4) of the *Constitution* provides that "national legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice", and that "[t]here is accordingly a constitutional guarantee of independence, and any legislation or executive action inconsistent therewith would be subject to constitutional control by the courts."

67 Section 32 of the *NPA Act*. See *Nkabinde v Judicial Service Commission* 2016 4 SA 1 (SCA) para 92 (hereafter the *Nkabinde* case); the *Yengeni* case paras 48-52. In *S v Tshilidzi* 2013 JDR 1356 (SCA) para 8, it was affirmed that s 32 of the *NPA Act* gives effect to s 179 of the *Constitution*, which entrenches the independence of the prosecuting authority.

68 *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2002 1 SACR 79 (CC) para 72 (hereafter the *Carmichele* case). Self-evidently, it would ordinarily be in the public interest that crime be prosecuted, and indeed, conscientiously and vigorously so.

69 The *Yengeni* case para 51.

70 Wolf 2011 *TSAR* 727.

71 De Villiers 2011 *THRHR* 248.

government.[72] The Supreme Court of Appeal has rejected the notion that a prosecutor is to be regarded as part of the executive; the NPA falls under Chapter 8 of the *Constitution*, dealing with "Courts and Administration of Justice".[73] The executive cannot instruct the NPA to prosecute or to decline to prosecute or to terminate a pending prosecution.[74] The prosecuting authority has absolute authority over these critical decisions; no person or entity can force the prosecuting authority to prosecute or to terminate a prosecution.[75] So crucial is the independence of the prosecuting authority that any person who infringes on such independence in contravention of section 32(1)(*b*) of the *NPA Act* shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment.[76]

Moreover, in line with the doctrine of the separation of powers, it is also not competent for a court to issue a mandatory interdict to compel a prosecution.[77] Exercising the prosecutorial discretion to institute a prosecution or to decline to prosecute lies exclusively in the domain of the prosecuting authority, whose constitutional mandate it is to prosecute crime.[78]

For present purposes, the question arises what the constitutional imperatives of prosecutorial independence and impartiality mean in the making of a decision to prosecute or not to prosecute in the context of pre-trial publicity. Firstly, the prosecutor cannot become, as it were, an extension of the media. The prosecutor must act independently of the media. That is to say, he or she must not base his or her decision on media reports or opinions or sentiments expressed in the media, nor in exercising his or her discretion may he or she yield to or be influenced by pressure placed on the prosecuting authority by the media or the public as expressed through the media. Besides political and judicial interference, the prosecutorial discretion to institute and stop

72 De Villiers 2011 *THRHR* 256.
73 The *Nkabinde* case para 88.
74 *National Director of Public Prosecutions v Zuma* 2009 1 SACR 361 (SCA) para 32. Also see Wolf 2017 *PER / PELJ* 9-10 n 35, noting that the executive cannot give orders to prosecutors.
75 De Villiers 2011 *THRHR* 262.
76 See s 41(1) of the *NPA Act*.
77 *National Director of Public Prosecutions v Freedom Under Law* 2014 4 SA 298 (SCA) para 51.
78 *National Director of Public Prosecutions v Freedom Under Law* 2014 4 SA 298 (SCA) para 51.

criminal proceedings must also be free from "*public*" interference.[79] Surrounding publicity may result in a prosecutor being reluctant to withdraw a case notwithstanding that he or she has personal doubts concerning the guilt of the accused, because by doing so he or she runs the risk of being perceived in the public domain as soft, fearful and lacking the skills to win the difficult case.[80] Where a case generates media attention, there may be "enhanced pressure" upon the prosecutor to obtain a conviction.[81] A prosecutor may prefer a particular charge or a more serious charge against an accused which is not supported by the *prima facie* evidence as per the case docket, where he or she is driven by a media frenzy attendant upon the case (because of its high-profile or notorious nature or because it involves shocking facts) or by an outcry from society (or community outrage) as expressed through the media in its various forms, including social media, especially as to what the outcome of the case ought to be. The prosecutor may thereby hope to obtain a conviction which is not supported by the evidence and to gain an increased or a more severe sentence than what the facts of the case warrant and thus to be seen in the media as a champion of "justice" who satisfied the public's baying for justice and the maximum or harshest possible punishment (i.e. who did what the public expected). The prosecutor may simply lose his or her objectivity on account of hostile or adverse pre-trial publicity when exercising his or her discretion, instead of devoting himself or herself to the facts of the case.

Prosecutors should bring professional standards of a non-partisan nature to their prosecutorial discretion.[82] The decision to prosecute or not to prosecute must be shaped in substance by an impartial and objective assessment of the *prima facie* evidence as contained in the case docket, the law and the public interest, as well as prosecutorial guidelines, codes of conduct and policy directives. Prosecutors must assess whether there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution. There must indeed be a reasonable prospect of a conviction, otherwise a prosecution should not be commenced or continued.[83] Before a prosecution is initiated, there should be reasonable and probable cause to believe that the accused is guilty of an offence.[84] When instituting or maintaining criminal proceedings, the prosecutor should proceed only when

79 *Democratic Alliance v President of the Republic of South Africa* 2016 2 SACR 494 (WCC) para 24; Paragraph B of the *Code of Conduct for Members of the NPA* (emphasis added).
80 Melilli 1992 *BYU L Rev* 688.
81 Melilli 1992 *BYU L Rev* 688.
82 De Villiers 2011 *THRHR* 256.
83 Part 3.A of the *Prosecution Policy*. Also see Du Toit 2017 *SACJ* 94.
84 The *Mahupelo* case para 136; *S v Lubaxa* 2001 2 SACR 703 (SCA) para 19.

a case is well founded, upon evidence reasonably believed to be reliable and admissible.[85] It is clear that prosecutors must pay meticulous attention to police dockets before deciding whether or not to prosecute,[86] and in this respect they must act with objectivity.[87] A "sensible discretion"[88] and "circumspection"[89] should be exercised by the prosecutor in deciding whether to institute a prosecution. After all, "it is excellent to have a giant's strength, but it is tyrannous to use it like a giant."[90] A prosecutor should be just a prosecutor, not a persecutor. As a public official and in giving effect to the aspect of prosecutorial accountability, decisions taken by the prosecutor should not be arbitrary. Prosecutors in their decisions should be responsible before the law and act within the confines of legality. "The rule of law requires that all those who exercise public power must do so in accordance with the law and the Constitution."[91] Openness and transparency are also required in the exercise of prosecutorial discretion.[92]

4 The adversarial prosecutor at trial in the face of adverse pre-trial or surrounding publicity

Once a decision has been made to prosecute, the prosecutor in taking the matter to court may act adversarially,[93] and he or she would seek the interests of the State and primarily aim at obtaining a conviction.[94] A prosecutor should seek to obtain the conviction of the guilty;[95] "[a] criminal trial follows a well-established order, with the prosecutor in a criminal case trying to establish, through the presentation of evidence, the guilt of the accused beyond a

85 The *Mahupelo* case para 136; para D(*d*) of the *Code of Conduct for Members of the NPA*.
86 Du Toit 2015 *SACJ* 87.
87 *Minister of Police v Du Plessis* 2014 1 SACR 217 (SCA) para 34.
88 *S v Macrae* 2014 2 SACR 215 (SCA) para 30. See also Du Toit 2015 *SACJ* 85.
89 Richings 1977 *SACC* 146.
90 Richings 1977 *SACC* 146.
91 *Lee v Minister for Correctional Services* 2013 1 SACR 213 (CC) para 70.
92 Mokoena 2012 *Stell L Rev* 303.
93 The *Van der Westhuizen* case para 9.
94 Cole 2010 *SACJ* 333; the *Van Breda* case para 50.
95 See, for example, the *Van der Westhuizen* case para 11; the *Porritt* case para 13; *S v Prinsloo* 2016 2 SACR 25 (SCA) paras 181-182 (hereafter the *Prinsloo* case); Swanepoel 2012 *SACJ* 120-123; Zacharias 1991 *Vand L Rev* 51; Damaška 1973 *U Pa L Rev* 563; Civiletti 1979 *NY L Sch L Rev* 1; Felkenes 1975 *Sw U L Rev* 110; *People v Vasquez* 137 P 3d 199 (2006) 211: "Zealous advocacy in pursuit of convictions forms an essential part of the prosecutor's proper duties and does not show the prosecutor's participation was improper"; *Randall v The Queen* 2002 1 WLR 2237 para 10 (Westlaw), per Lord Bingham (as cited with approval in the *Van der Westhuizen* case para 11), where it was pointed out that the adversarial format of the criminal trial is directed to ensuring a fair opportunity for the prosecution to establish guilt and a fair opportunity for the accused to advance his or her defence.

reasonable doubt."[96] The prosecutor in the adversary model of proceeding determines which factual propositions he or she will attempt to prove and must marshal evidence in support of his or her contentions.[97] Any dedicated prosecutor, being human, will endeavour to win his or her cases.[98] However, "the very essence of the function of the prosecutor is not to obtain a conviction at all cost, but rather to prosecute the case objectively with what appears to be essential and credible evidence and to challenge any evidence presented by the defence, with a view to discrediting such, in order to obtain a conviction."[99] De Villiers[100] notes that "[t]he criminal process is not a relentless pursuit to obtain a conviction. There are certain boundaries which the prosecution may not cross in order to obtain a conviction." While a prosecutor is not obliged to play chess against himself or herself and while it is not the prosecutor's function disinterestedly to place a hotchpotch of contradictory evidence before a court and then leave the court to make of it what it wills or to find its way through the maze, the prosecutor must act fairly in constructing and presenting the State's case with what appears to be credible evidence and in challenging the evidence of the accused and other defence witnesses.[101] A prosecutor may prosecute with earnestness and vigour, and in so doing strike hard or telling blows; but he or she is not at liberty to strike foul ones. It is as much his or her duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[102] Prosecutors may "not prosecute in single-minded pursuit of a conviction. They have a duty towards the accused to ensure that an innocent person is not convicted. In this regard they have a duty to disclose, in certain circumstances, facts harmful to their own case."[103] Where the accused is legally represented and the prosecutor knows of evidence in favour of the accused or that may be destructive of the State's case, the prosecutor must disclose and make such evidence available to the defence.[104] Where the accused is unrepresented, the prosecutor would be obliged to bring to the attention of the trial court information or evidence which is favourable to the accused or which points to his or her innocence or

96 The *Van Breda* case para 50.
97 Damaška 1973 *U Pa L Rev* 563.
98 Swanepoel 2012 *SACJ* 120-121.
99 Swanepoel 2012 *SACJ* 122, endorsing the *Van der Westhuizen* case para 11.
100 De Villiers 2004 *THRHR* 73-74.
101 The *Van der Westhuizen* case paras 11-12; the *Prinsloo* case paras 181-182.
102 *Berger v United States* 295 US 78 (1935) 88. Also see the *Van der Westhuizen* case para 11; De Villiers 2010 *THRHR* 124.
103 The *Porritt* case para 13.
104 See, for example, the *Van der Westhuizen* case para 13; *S v Masoka* 2015 2 SACR 268 (ECP) para 12 (hereafter the *Masoka* case); *R v Filanius* 1916 TPD 415 417-418 (hereafter the *Filanius* case); Part 6 of the *Prosecution Policy*.

may be to his or her advantage.[105] Moreover, where the accused is unrepresented and a material discrepancy arises between the testimony of a State witness and that witness' prior police statement, the prosecutor "must forthwith disclose the discrepancy to the court."[106] It goes without saying that the suppression by the prosecutor of exculpatory evidence or evidence materially favourable to the accused "would seriously impede the search for truth."[107] The prosecutor thus has a constitutional and ethical duty to disclose evidence supporting the accused's case that has the potential to illuminate the truth.[108] The prosecutor is required to play fairly in the sense that he or she cannot hide the truth if it is known to be favourable to the accused.[109] This is underpinned by the trite principle that all material must be placed before the court necessary for the investigation of the truth of the matter.[110] The concealing of material exculpatory evidence by the prosecutor would deny an accused a fair trial and seriously undermine the proper administration of justice.[111]

Of course, the role of the prosecutor is not to prosecute the State's case and also to defend the accused, but any prosecution must be done in an even-handed, open and honest manner, always recognising an accused's right to a fair trial.[112] "Clearly the prosecutor's role involves a duty to be fair to the accused in the administration of criminal justice."[113] A case should be firmly but fairly and objectively prosecuted.[114] Prosecutions must be fair and must not violate the accused's right to a fair trial.[115] Ultimately, the prosecutor

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105 See, for example, the *Masoka* case para 12; *S v Mayiya* 1997 3 BCLR 386 (C) 394G-J; *S v Van Rensburg* 1963 2 SA 343 (N) 343F; Steytler *Undefended Accused on Trial* 136-137.

106 *S v Xaba* 1983 3 SA 717 (A) 730B. Also see *S v Naude* 2005 2 SACR 218 (W) 222g-j (hereafter the *Naude* case), pertaining to a similar duty which rests on the State even where the accused is defended, but where the defence counsel despite docket disclosure does not deal with a material discrepancy in cross-examination. However, with docket disclosure it would generally be left to the defence counsel to cross-examine a State witness on a material inconsistency between the witness' *viva voce* evidence and a previous statement, so as to discredit the witness.

107 Gershman 2001 *Geo J Legal Ethics* 328.

108 Gershman 2001 *Geo J Legal Ethics* 328.

109 Goodpaster 1987 *J Crim L & Criminology* 136.

110 The *Filanius* case 417.

111 See, for example, the *Naude* case.

112 The *Masoka* case para 13; Van der Merwe "Prosecuting Authority" 1-40; De Villiers 2010 *THRHR* 129, noting that prosecutors must reconcile the responsibility of protecting the public interest and at the same time protecting the rights of the accused.

113 Gourlie 1982 *Man LJ* 37.

114 Paragraph D(e) of the *Code of Conduct for Members of the NPA*; ss 4.2(e) and 4.3 of the *IAP Standards of Professional Responsibility*.

115 The *Tshotshoza* case para 18.

stands in a special relation to the court: he or she must assist the court in ascertaining the truth.[116] The prosecutor has a fundamental duty to truth.[117]

For present purposes, the question arises what the import of the above analysis is for the function and duties of a prosecutor in an adversarial trial in the context of adverse pre-trial publicity. Where there may be enhanced pressure on a prosecutor to obtain a conviction in a notorious case that has attracted negative or virulent media attention,[118] the prosecutor may not allow himself or herself to be influenced by such to the prejudice of the accused by, for example, suppressing exculpatory evidence or foisting his or her opinion in the matter upon the Court or seeking to introduce tainted or unlawfully or unconstitutionally obtained evidence, the admission of which would bring the administration of justice into disrepute, but must remain committed to his or her duty, in the words of Glanville Williams,[119] "to bring the facts before the court" fairly. The prosecutor must remain faithful to his or her duty to ensure that the truth ultimately emerges at trial and that justice prevails. The prosecutor must, so to speak, look after the facts despite the negative publicity which a case generates and seek to protect the integrity of the proceedings. Throughout the course of the trial, the prosecutor may not act beyond what is indicated by the evidence.[120]

One commentator cautions that where pressure is brought to bear on a prosecutor in a heinous case, or a case involving a well-known person, with added media attention, "the prosecutor must be careful not to institute charges [which otherwise may be a generally popular move] or permit the continuation of a criminal case in the absence of admissible evidence sufficient for a conviction."[121] "[T]he prosecutor is forbidden from making these decisions based upon any personal or political consequences that might be involved, especially in cases that have attracted a great deal of publicity."[122] And the prosecutor is both legally and ethically bound to turn over evidence helpful to the accused.[123] Prosecutors in high-profile cases "must balance many important but often-competing interests when carrying

116 *S v Jija* 1991 2 SA 52 (E) 68A.

117 For an instructive discussion on this aspect, see Gershman 2001 *Geo J Legal Ethics* 309.

118 In Wallace 2004-2005 *Delaware Lawyer* 21, it is observed that "[w]hen a particularly heinous crime is committed, or a well-known person is suspected, the added media attention can visit incredible pressure upon the prosecutor."

119 Williams *Proof of Guilt* 30.

120 Section 4.2(e) of the *IAP Standards of Professional Responsibility*.

121 Wallace 2004-2005 *Delaware Lawyer* 21.

122 Wallace 2004-2005 *Delaware Lawyer* 21.

123 Wallace 2004-2005 *Delaware Lawyer* 21.

out their duties."[124] The pressure of intense publicity taxes the resources and tests the abilities of prosecutors to remain focussed upon the true goal in any criminal case – to serve the public with the utmost integrity, and to ensure that a just result is obtained.[125] Ultimately for prosecutors, success is not to be measured by convictions, but when the results are just, thus requiring the highest standards of conduct of any professional advocate.[126]

No matter how much pressure is put on the prosecutor due to the reprehensible nature of the crime, the surrounding publicity, or the parties involved, the prosecutor must retain his or her independence and objectivity.[127] Political, personal and private considerations must be set aside in all decisions taken by the prosecutor in dealing with a case.[128] A prosecutor must act with objectivity and protect the public interest and "must purposefully take all reasonable steps to ensure maximum compliance with constitutional obligations, even under difficult circumstances."[129]

William Lee Hon,[130] who is a prosecutor in the United States of America, also points out that besides pressure emanating from law enforcement officials and/or victims or their families who may have strong opinions or feelings about how a case should turn out, it is not infrequent to find pressure emanating from public opinion as expressed in the media which may be very much in favour of a particular outcome. Hon[131] notes that public sentiment in the media may often unfortunately be based on inadequate or unreliable facts, and that due to ethical constraints there is not much that prosecutors can do to change or counter such public opinion. Hon[132] explains that "[a]s long as the prosecutor and public are on the same page and the prosecutor has the wind at his back, there's not much of a problem here - but what happens when the prosecutor's obligation to see that justice is done conflicts with the prevailing public sentiment?"

Hon[133] refers to a prime example in the United States of America, where a prosecutor apparently allowed himself to make decisions based upon the intensity of the media attention surrounding a pending rape case rather than

124 Wallace 2004-2005 *Delaware Lawyer* 22.
125 Wallace 2004-2005 *Delaware Lawyer* 22.
126 Wallace 2004-2005 *Delaware Lawyer* 21.
127 See, for example, Gourlie 1982 *Man LJ* 37-38.
128 Gourlie 1982 *Man LJ* 37.
129 Van der Merwe "Prosecuting Authority" 1-40, citing *S v Jaipal* 2005 1 SACR 215 (CC) para 56 and the *Carmichele* case paras 72-73.
130 Hon 2012 http://www.tdcaa.com/journal/prosecuting-under-pressure.
131 Hon 2012 http://www.tdcaa.com/journal/prosecuting-under-pressure.
132 Hon 2012 http://www.tdcaa.com/journal/prosecuting-under-pressure.
133 Hon 2012 http://www.tdcaa.com/journal/prosecuting-under-pressure.

on an overriding sense of fairness or objectivity where there was no case. The charges were later dropped by the Attorney-General. As another writer points out, the media initially depicted the case as a sordid tale of spoilt, white student-athletes from an elite university who took advantage of an impoverished and troubled black woman, and that in essence the prosecutor positioned himself in the media as the knight in shining armour determined to ride roughshod over the accused in order to right a grievous injustice.[134] The prosecutor made several improper public statements to the media during the pre-trial phase where he cast the prospective accused in a poor light. The prosecutor moreover went so far as to fail to disclose exculpatory DNA evidence to the defence and he made other mistakes regarding the discovery process.[135] What ultimately emerged from that situation is that the prosecutor concerned was removed from office and disbarred.[136]

Hon[137] correctly comments that:

> At the end of the day, *the prosecutor has to be able to step back from the spotlight and cameras and make very important decisions based upon credible evidence and not what people who have less than the entire picture expect*. Never has that old adage 'to thine own self be true' been more meaningful than for the prosecutor who has to handle a high-profile, high-publicity case.

The prosecutor in the adversarial (accusatorial) system can moreover play a vital and pivotal role in safeguarding the fairness of an accused's trial in the face of unfavourable or hostile pre-trial publicity, particularly insofar as the impartial adjudication of the case by the trial court is concerned. The prosecutor can do this by means of (i) the opening address,[138] (ii) party control of litigation, and (iii) closing argument on the merits, before judgment. In all these respects the prosecutor can focus the court's mind on the issues to be determined at trial and the evidence which the parties determine the court should hear, rather than pre-trial publicity which is detrimental to the accused, thereby making it less likely or reducing the risk that the court's decision would be based in any way on such publicity.[139]

Whereas in adversarial process it is the prosecutor and the accused who shape the issues at trial and gather and present the evidence, which the court

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134 Medwed 2010 *Cardozo L Rev* 2193.
135 Medwed 2010 *Cardozo L Rev* 2193-2195.
136 Hon 2012 http://www.tdcaa.com/journal/prosecuting-under-pressure.
137 Hon 2012 http://www.tdcaa.com/journal/prosecuting-under-pressure (emphasis added).
138 In the South African legal system, in terms of s 150(1) of the *Criminal Procedure Act* 51 of 1977.
139 Broughton 2019 *THRHR* 226, 228; Broughton *Analysis of Pre-trial Publicity* 229-232, 349-353; the *Banana* case 38G-H.

is then primarily reliant on and indeed bound by in reaching its verdict, there is little opportunity for the presiding judicial officer to pursue his or her own agenda or to act on his or her biases.[140] Because the presiding officer seldom takes the lead in conducting the proceedings (in contradistinction to his or her counterpart in inquisitorial systems), he or she is unlikely to appear to be partisan or to become embroiled in the contest. His or her detachment preserves the appearance of fairness as well as fairness itself.[141] Advocacy in the accusatorial process "*has the potential to keep judicial idiosyncrasies in check*" and is an important controlling mechanism of the judicial authority.[142] There are several key and interrelated ways in which the adversarial (accusatorial) process may engender, promote or enhance judicial impartiality in the adjudication process when a court is confronted with adverse pre-trial publicity.[143] It is, for instance, "in the nature of the accusatorial process that judicial officers should play a [relatively] passive role and be aloof from the proceedings. This serves to enhance the principle of impartiality."[144] The adversarial process creates a presumption of impartiality.[145]

The right to a fair trial in these circumstances may also be promoted or enhanced when the prosecutor consults with the State witnesses in preparing for trial. The prosecutor can caution the witnesses that their evidence is solely to be based on their own observations and not in any way on pre-trial publicity. Cross-examination, which plays a pivotal role in the adversarial nature of criminal proceedings, would moreover be an effective means to point to specific instances of tainted testimony on account of pre-trial publicity.[146]

5 Prosecutorial impartiality compared with judicial impartiality

The role of prosecutors in a criminal trial cannot be equated with that of magistrates or judges. Their duties, functions and responsibilities are

140 See Landsman *Adversary System* 44. Also see the more ample discussion on this score in Broughton 2019a *THRHR* 225-228; Broughton *Analysis of Pre-trial Publicity* 229-232.

141 Landsman *Adversary System* 44-45.

142 Roodt 2004 *Fundamina* 139; Labuschagne 1993 *De Jure* 356 (emphasis added).

143 Broughton 2019b *THRHR* 367-380; Broughton *Analysis of Pre-trial Publicity* 199-232, 487-492, 497, 534-540.

144 Schwikkard and Van der Merwe "Judicial Notice" 515 (para 27 1) (footnote omitted).

145 Labuschagne 1993 *De Jure* 356.

146 The *Van Breda* case para 55.

different.[147] The judiciary is held to the highest standards of independence and impartiality because judges are the decision-makers in an adversarial judicial system. Prosecutors neither make the final decision on whether to acquit or convict, nor on whether evidence is admissible or not. Their function is to place before a court what the prosecution considers to be credible evidence relevant to what is alleged to be a crime.[148] The presiding officer is the arbiter of the guilt or innocence of the accused and is the ultimate repository of the fairness of the trial.[149] The presiding officer must keep an open mind throughout the proceedings until judgment. He or she is not permitted to form an early opinion as to the guilt or innocence of the accused.[150] It is inevitable that the prosecutor, on the other hand, will form an early opinion as to the guilt of the accused to found the institution of criminal proceedings, upon studying the case docket, and thus to entertain a natural bias or predisposition towards the guilt of the accused. The hypothesis that would invariably be entertained by the prosecution when taking a criminal case to trial is that the accused is guilty. "Prosecutors usually approach criminal prosecutions with a view, sometimes a very strong view, that accused persons are guilty", which is permissible, subject to the caveat that they must not prosecute in single-minded pursuit of a conviction.[151] The presiding judicial officer, however, may not prejudge the issues to be decided, as this would constitute clear impugnable bias.[152]

In an adversarial trial it is inevitable that the prosecutor, in conducting the prosecution on behalf of the State, will be partisan, and thus he or she will invariably be perceived as biased.[153] It is virtually inconceivable that an accused in a criminal case would ever hold the view that a prosecutor is objective and impartial, given that it is the prosecutor who reads the case docket, compiles the charge sheet and ultimately prosecutes the accused.[154] Whilst the prosecutor must not conduct himself or herself so as, in the eyes of the accused, to project a malign character, the prosecutor is nevertheless under the adversarial system not required to impress himself or herself upon

147 The *Porritt* case paras 11, 21.
148 The *Porritt* case para 11.
149 *R v Sole* 2001 12 BCLR 1305 (Les) 1342B-C (hereafter the *Sole* case); *S v Du Toit (2)* 2004 1 SACR 47 (T) 65b (hereafter the *Du Toit* case).
150 The *Sole* case 1330I-J.
151 The *Porritt* case para 13; the *Sole* case 1330H-1331D; Zupančič 1982 *J Contemp L* 68-69.
152 Devenish 2000 *TSAR* 402, 403-404; *De Lille v Speaker of the National Assembly* 1998 7 BCLR 916 (C) para 17.
153 The *Porritt* case para 13.
154 The *Du Toit* case 60d, 61c, 65a-b, as referred to with approval in the *Porritt* case para 13. Also see De Villiers 2010 *THRHR* 128.

an accused as a "benign influence".[155] The notion of a "neutral prosecutor" at trial is a fiction.[156] In *Marshall v Jerrico Inc.* the United States Supreme Court held that "[p]rosecutors need not be entirely 'neutral and detached'… In an adversary system, they are necessarily permitted to be zealous in their enforcement of the law".[157] A prosecutor "cannot realistically remain a neutral agent of justice above the adversary fray."[158] In the circumstances, the so-called "quasi-judicial" role of prosecutors should not be overplayed.[159] As one commentator aptly remarks, "[d]espite the prosecutor's duty to seek justice, the prosecutor is still an advocate in an adversary system."[160]

As noted above, prosecutorial impartiality does not mean not acting adversarially, but acting fairly or even-handedly, i.e. avoiding discrimination.[161] In a criminal prosecution the State is in the nature of the case a party with a substantial interest in the matter, which endeavours to prove the guilt of the accused ("*By 'n strafvervolging is die Staat uit die aard van die saak 'n party met 'n wesenlike belang by die geding wat poog om die beskuldigde se skuld te bewys*.")[162] The presiding officer, on the other hand, must keep the scales even in the contest between the prosecution and the accused. The morphology of the South African accusatory trial is "of a triangular nature, with judges holding the scales of justice at the pinnacle and the prosecutors facing the accused to ensure justice in the public interest."[163]

In all the premises, it is submitted that any additional knowledge and understanding of the facts of a case which a prosecutor may derive from adverse pre-trial publicity or judicial pronouncements on the facts contained in an earlier civil judgment or parallel proceedings or a judicial commission of inquiry cannot *per se* amount to prosecutorial bias that would result in trial prejudice.[164] After all, "unfairness for trial purposes cannot be inferred from

155 The *Sole* case 1332G-H.
156 Harris 1995 *Neb L Rev* 816.
157 *Marshall v Jerrico Inc* 446 US 238 (1980) 248, as endorsed in the *Porritt* case para 15.
158 Harris 1995 *Neb L Rev* 816. Also see Green and Zacharias 2004 *Wis L Rev* 898-899.
159 Uviller 1973 *Mich L Rev* 1159. Also see the discussion in Woolley 2017 *Can B Rev* 795 *et seq*.
160 Lee 1994 *UCLA L Rev* 171.
161 The *Van der Westhuizen* case para 9.
162 *In re Mjoli* 1994 1 SACR 336 (T) 343g-h.
163 Wolf 2011 *TSAR* 712.
164 See the apposite findings in *S v Shaik* 2008 1 SACR 1 (CC) paras 65-68 (hereafter the *Shaik* case), in the context of additional knowledge of the case which the prosecutor obtained in an investigatory position, that is, information which would not otherwise have been available to the prosecutor by virtue of his capacity as prosecutor to whom in the normal course the police would have made available the evidence of the case in the case docket. Also see *Director of Public Prosecutions, Western Cape v Killian* 2008 1 SACR 247 (SCA) (hereafter the *Killian* case); and the *Sole* case.

the mere fact that the prosecutor is partisan and holds a strong view that the accused is guilty."[165] Rather, what one would look for, as borne out by the case-law, to establish prejudicial bias on the part of the prosecutor is, for example, where he or she wages a personal vendetta, impairs the conduct of the proceedings and the dignity of the court, or uses the same office as the trial judge's assessors,[166] or where he or she launches a prosecution upon patently insufficient evidence or where, even though a *prima facie* case clearly exists, the prosecutor is nonetheless not content simply to do his or her duty and lead his or her case, but seeks to influence and to foist his or her opinion in the matter upon the trial court. While a prosecutor may inevitably entertain a natural bias towards the guilt of an accused, he or she crosses that invisible line when prejudice arises.[167]

6 South African case studies

Adverse pre-trial publicity would be difficult to curb or limit given the modern phenomenon of a rapid dissemination of news across a broad spectrum of media, including social media. It is for this reason that Moseneke,[168] in an extra-curial address, observed that the *sub judice* rule (i.e. the rule which prohibits statements that give rise to a demonstrable, real and substantial risk of prejudice to the administration of justice in pending court proceedings)[169] is "nearly impossible to hold and to keep" ("near impossible for the courts to police the rule"), and indeed, is "on the verge of extinction." This is all the more so in the light of the Supreme Court of Appeal in the landmark *Midi Television* case having significantly narrowed the scope or test for *sub judice* contempt of court *ex facie curiae* (beyond the face of the court) and related pre-trial publication bans – that is to say, from one of statements that *tend* to prejudice the administration of justice to one of statements that give rise to a *demonstrable, real and substantial risk* of prejudice occurring to the administration of justice.[170] As there is not in general an *a priori* answer to the question of whether a criminal trial will be fair or not,[171] it is submitted that it would be difficult to establish that there is a real and substantial risk that a

165 Van der Merwe "Prosecuting Authority" 1-68, with reference to the *Porritt* case.
166 See the *Shaik* case para 66; the *Killian* case para 25.
167 The *Sole* case 1331C-D.
168 Moseneke 2015 https://constitutionallyspeaking.co.za/dcj-dikgang-moseneke-the-media-courts-and-technology-remarks-on-the-media-coverage-of-the-oscar-pistorius-trial-and-open-justice/.
169 The test for *sub judice* contempt of court *ex facie curiae* and related pre-trial publication bans, as enunciated in the *Midi Television* case para 19.
170 Moseneke 2015 https://constitutionallyspeaking.co.za/dcj-dikgang-moseneke-the-media-courts-and-technology-remarks-on-the-media-coverage-of-the-oscar-pistorius-trial-and-open-justice/.
171 *National Director of Public Prosecutions v King* 2010 2 SACR 146 (SCA) para 4.

statement or publication would prejudice the administration of justice in pending proceedings - in other words, that there is a real and substantial risk that a publication would lead to an unfair trial. Such a submission is reinforced by the fact that there is a developed system of procedural or judicial safeguards that has evolved to prevent the contingency of adverse pre-trial publicity impinging upon the accused's right to a fair trial, especially the impartial adjudication of the case.[172]

How, then, have prosecutors in South Africa fared in handling prosecutions in the face of adverse pre-trial publicity? A few notable high-profile matters may be referred to. In the Oscar Pistorius case,[173] in respect of which I was a member of the prosecuting team on all appellate and sentencing afresh proceedings, the prosecutors remained dedicated to the evidence and facts of the case in seeking to have corrected on appeal the miscarriage of justice on both the initial conviction for culpable homicide and the sentence of six years' imprisonment imposed on the murder conviction substituted for the culpable homicide conviction. There is no evidence that the prosecutors were at any stage unduly influenced in the handling of the trial and appellate proceedings by pre-trial publicity that was adverse to Pistorius.

In the *Prinsloo* case (otherwise known as the so-called *Krion* case), which at the time was the largest Ponzi-scheme case to have been prosecuted in South Africa, one of the accused brought a pre-trial motion wherein he applied for a stay of prosecution predicated on adverse findings that were made against the accused in earlier reported civil judgments arising from substantially the same facts.[174] It was averred by the accused that such findings would bias the trial court in the criminal matter. The Court which heard the pre-trial motion, per Ngoepe JP, rejected this contention and accordingly dismissed the application. Ngoepe JP *inter alia* held and affirmed as follows in this respect:[175]

> The application was vehemently opposed by the State. It has always been without merit. In effect, what the applicant is contending is that, once a civil case has been decided and certain findings made, a criminal prosecution in respect of the same conduct should not be allowed to proceed, as the accused would be prejudiced by the prior civil court judgment against the accused (defendant).

172 See the *Banana* case; Broughton 2019a *THRHR* 213; Broughton 2019b *THRHR* 363. For a detailed discussion on the aspect of procedural safeguards in the face of adverse pre-trial publicity, see Broughton *Analysis of Pre-trial Publicity.*

173 See *Director of Public Prosecutions, Gauteng v Pistorius* 2016 1 SACR 431 (SCA); *Director of Public Prosecutions, Gauteng v Pistorius* 2018 1 SACR 115 (SCA).

174 See the *Pelser* case. For a detailed discussion of this case, see Broughton *Analysis of Pre-trial Publicity.*

175 The *Pelser* case paras 8-9.

> The premise of the application is that the trial judge would be influenced by the pronouncements in the various civil cases referred to above, and therefore fail to adjudicate in the criminal trial objectively, with an open mind and with the necessary impartiality. There is no basis for this. It is trite law that decisions by the one court are not binding on the other court; they are mere opinions; this is particularly so with regard to factual findings as *in casu*. Secondly, the standard of proof in criminal trials is higher than in civil trials. The applicant's submission could lead to absurdities. Not only would an accused person be absolved from criminal prosecution once a civil judgment has been handed down against him/her in respect of the same conduct, but the reverse would also have to occur: once a criminal conviction has been made against an accused person in respect of particular conduct, a subsequent civil trial in respect of the same conduct could likewise be deemed to be unfair to the accused (defendant) as a result of the perceived influence of the criminal verdict. This argument would make nonsense of the well-established principle of our law that conduct can give rise to both civil and criminal liability, both of which are prosecutable against the perpetrator. Furthermore, the criminal trial is of course going to be heard by a judge, the indictment having been served already.
>
> 'A Judge is a trained judicial officer and he knows that he must decide every case which comes before him on the evidence adduced in that case. He knows further that a decision on facts in one case is irrelevant in respect of any other case, and that he must confine himself to the evidence produced in the case he is actually trying.'
>
> The trial judge would also be aware that the State would still have to prove the facts required for the criminal conviction, despite the judgments in the civil matters.

The applicant in the *Krion* case moreover averred that the prosecutors handling the criminal trial would also be unduly influenced by the parallel civil findings or pronouncements in question. I handled the pre-trial motion on behalf of the State and was also a member of the prosecuting team that conducted the *Krion* trial. I was furthermore a member of the State team which handled the appeal against conviction and sentence in the Supreme Court of Appeal.[176] At no stage were the prosecutors actuated by the prior adverse civil findings or pronouncements in the conduct of the criminal trial and appeal.

In the recent case of *S v Oosthuizen* (otherwise known as the so-called *Coffin* case),[177] the accused were convicted *inter alia* of assault with intent to do grievous bodily harm and kidnapping for placing a man inside a coffin and threatening to set him alight or threatening to put a snake inside the coffin. A video recording of the incident made by the accused went viral on various social media platforms before trial. This provoked a huge uproar from the public. The accused were initially charged with and convicted of attempted

176 See the *Prinsloo* case.

177 *S v Oosthuizen* 2019 ZASCA 182 (2 December 2019).

murder for the incident, but this conviction was set aside on appeal. From the Supreme Court of Appeal judgment it is evident that no evidence had been presented to support a charge of attempted murder. It remains unclear on what basis the prosecutor preferred this charge against the accused. This case perhaps illustrates the point that prosecutors need to exercise greater caution in handling high-profile criminal cases that generate virulent publicity ahead of trial.

7 Conclusion

Pre-trial publicity is an unavoidable by-product of the criminal justice system in an open and democratic society, especially insofar as high-profile or notorious cases are concerned in the modern era of a rapid dissemination of news across various media platforms, including social media. Publicity in advance of a criminal trial may also be in the form of published judicial findings in a parallel civil case or commission of inquiry or other parallel proceedings, or evidence presented in a parallel matter which is reported on or is readily available in the public domain. Such publicity may be adverse to an accused or effectively amount to a prejudgment of the issues to be determined in the criminal trial. A trial by media can be pernicious, especially with sensationalised or fake news or disinformation.

Media attention which a criminal case generates may visit enhanced pressure upon the prosecutor especially to obtain a conviction. The prosecutor, however, may not allow himself or herself to be influenced or swayed by unfavourable or hostile surrounding publicity and in the process ride roughshod over the right of the accused to a fair trial and the proper administration of justice in order to "right" what he or she perceives to be a grievous injustice committed by the accused, which has attracted public outrage as expressed in the media. A prosecutor may not buckle under media or partisan interests and concerns, however vociferously these may be presented. In exercising the charging discretion and conducting a criminal prosecution in court, the prosecutor at all times must act independently of the media and with objectivity, devoting himself or herself to the facts of the case as they emerge from the evidence to be proved. The prosecutor must at all times be conscious of the fact that he or she has a fundamental duty to truth and must assist the trial court in ascertaining the truth fairly.

All the same, the prosecutor is not in the same position as the presiding judicial officer. He or she would be partisan at trial and entertain a natural bias towards the guilt of the accused, which he or she would be seeking to

prove beyond a reasonable doubt. Thus, exposure of the prosecutor to adverse pre-trial publicity would not *per se* result in trial-related prejudice.

In an adversarial system, the prosecutor can play a pivotal role in promoting or enhancing judicial impartiality in the adjudication of a case in the face of adverse surrounding publicity, and in focusing the trial court's mind on the evidence rather than on such publicity, thereby reducing the risk that the court's decision would be based in any way on publicity of this kind.

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List of Abbreviations

BYU L Rev	Brigham Young University Law Review
Can B Rev	Canadian Bar Review
Cardozo L Rev	Cardozo Law Review
Geo J Legal Ethics	Georgetown Journal of Legal Ethics
IAP	International Association of Prosecutors
J Contemp L	Journal of Contemporary Law
J Crim L & Criminology	Journal of Criminal Law and Criminology
LDD	Law, Democracy and Development
Man LJ	Manitoba Law Journal
Mich L Rev	Michigan Law Review
NDPP	National Director of Public Prosecutions
Neb L Rev	Nebraska Law Review
NPA	National Prosecuting Authority
NPA Act	National Prosecuting Authority Act
NY L Sch L Rev	New York Law School Law Review
PER / PELJ	Potchefstroomse Elektroniese Regsblad (Potchefstroom Electronic Law Journal)

SACC	South African Journal of Criminal Law and Criminology
SACJ	South African Journal of Criminal Justice
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
Stell L Rev	Stellenbosch Law Review
Sw U L Rev	Southwestern University Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal of Contemporary Roman-Dutch Law)
TSAR	Tydskrif vir die Suid-Afrikaanse Reg (Journal of South African Law)
UCLA L Rev	University of California Los Angeles Law Review
UN	United Nations
U Pa L Rev	University of Pennsylvania Law Review
Vand L Rev	Vanderbilt Law Review
Wis L Rev	Wisconsin Law Review