

Why is nobody going to jail?

By Paul Hoffman SC

Advocate Hoffman is a director of Accountability Now and was lead counsel in the second Glenister case.



Advocate Paul Hoffman gives us a rare insider's view of how the rot set in and rendered our crime fighters impotent. But before we despair, he also tells us how we can put white collar criminals away.

A feature of grand corruption or kleptocracy (theft by those in power) is that those who partake of it all too frequently enjoy the spoils of their corrupt activities with utter and complete impunity that borders on immunity.

In South Africa, the project for the capture of the state, which is possibly still ongoing, has led to the repurposing of institutions of state that are meant to bring the corrupt to book, but still fail to do so. This is achieved by placing people sympathetic to the kleptocrats in key

positions in the public administration, the State Owned Enterprises and even in the Chapter Nine Institutions that are meant to be bedding down constitutional democracy under the rule of law in our post-liberation dispensation.

The direct answer to the question on so many lips: "Why is nobody going to jail" (for grand corruption) is that the criminal justice administration has fallen into the hands of cadres sympathetic to the state capture project. A National Director of Public Prosecutions, who lets his staff go on leave at the very point at which arrest of the Guptas is indicated, is not committed to equality before the law and the proper administration of criminal justice. If there is no one available, let alone willing, to prepare an arrest warrant for issue then no arrest is authorised and the suspects fly the coup long before annual holiday-making comes to an end. Too many prosecutors view action against the corrupt as a career-limiting activity.

The specialist body created to investigate the corrupt among us, the Hawks, has been a dismal failure. At a time when all metrics indicate a rise in the incidence of corruption, the arrest rate of the Hawks (for all priority crimes) dropped dramatically.

The opening of a Pandora's Box of revelations in the evidence being presented at the Zondo Commission into state capture does not bode well for the future of the Hawks. The evidence yet to come from former

Hawks officials Anwar Dramat and Shadrack Sibiyi will further illustrate the rot that ensures that no one well-connected gets arrested.

It has long been suspected by acute observers that the Hawks were captured by the baddies during the Zuma era. The efforts of "retired" General Berning Ntlemeza to secure a prosecution of Pravin Gordhan, one of the good guys, on trumped up charges designed to persecute, not prosecute, have long been a matter of public record.

However, the frightening depth of the malaise in the Hawks appears from the evidence before the Zondo Commission of Vytjie Mentor, once a senior Member of Parliament, Mcebisi Jonas, once a cabinet member, and Themba Maseko, formerly a top civil servant. They have all testified to the efforts of the Hawks to protect those in the orbit of the Zuma and Gupta families.

"Deny an interest in pressing charges," "leave the name of then president Jacob Zuma out of your statement" and, really taking the cake, "beware, we are investigating your IT procurement in 2005, Mr Maseko". According to the evidence given, there are unfortunately elements in the prosecution service who are in cahoots with the ne'er-do-wells identified in the testimony.

The Hawks are a creation of the Zuma era. They were custom-designed to enable state capture. Unlike the Scorpions, whom they replaced, they are obliged to report to a politician. The Scorpions reported to a public

“

The specialist body created to investigate the corrupt among us, the Hawks, has been a dismal failure.

servant – the National Director of Public Prosecutions. In constitutional terms the National Prosecuting Authority (NPA) is obliged to act independently and “without fear, favour and prejudice”.

It is to be hoped that the new incumbent, Shamila Batohi, keeps this obligation front and centre in all the work she does to clean up the mess in the entire criminal justice administration. She is likely to be foiled by prosecutors sympathetic to the Zuma faction of the ANC who knobble the investigation of their friends in high places.

Her idea of recreating an informal Scorpions-style unit is a bad one. Usurping the legislative mandate of the Hawks is not a legally sound way of going about restoring the integrity of the corruption-busting members of the justice administration. At present, the NPA has no investigative capacity beyond that presidentially conferred. The investigative work is meant to be done by the Hawks, but their arrest rates have fallen dramatically over the years since they were established.

At present, the politician to whom the Hawks must report is Bheki Cele, the Minister of Police. Cele was previously the National Commissioner of Police. Ordinarily that experience would stand him in good stead to be the minister to whom the police answer. Sadly, Cele was caught out irregularly leasing premises for police headquarters at grossly inflated rates.

This led, via an investigation by the Public Protector, to the appointment of the Moloi Board of Inquiry into his

fitness for office. The late Justice Moloi found Cele unfit for office due to his dishonesty and incompetence. He recommended that Cele be investigated for corruption. This judicial advice was ignored by the Zuma administration; instead Cele became a deputy minister in the Zuma Cabinet and now, heaven help us all, a full minister in the first Ramaphosa cabinet. What was the president thinking, putting Cele in the police portfolio?

The inherent problem with the Hawks is in the design of the unit. The Constitutional Court has called for a structural and operational design that complies with five criteria. Its findings in the majority judgment of the Glenister case handed down on 17 March 2011 are binding on the state. The five criteria embrace the notion of specialised and properly trained staff, who are well resourced in guaranteed fashion, and who enjoy security of tenure of office. The anti-corruption unit must be a single entity that is dedicated to preventing, combating, investigating and prosecuting serious corruption of all kinds. Most importantly, independence from political influence and interference is a vital feature of the make-up of the institution that the court envisaged in 2011.

Clearly, this vision was at odds with the state capture project underway at the time on Zuma’s watch. The remedial legislation passed in response to the court’s findings was successfully impugned for its failure to comply with the constitutional requirements prescribed by the court. As a result the Hawks are now in their third legislated incarnation. However, they are no closer to fulfilling the functions envisaged by the court than they were during their first incarnation. Their design is such that it is akin to a child’s tricycle being used for lunar exploration.

The messy aftermath of state capture, the need to end impunity, the desperate financial requirement to recover assets and funds misappropriated during state capture

– all these factors call for a fresh look at the court’s findings and a new institution to fit them. The Hawks are beyond repair when it comes to fighting grand corruption. Their structure, reporting lines, resources and capacity preclude it. They can be kept to attend to other priority crimes but they have very thoroughly proved themselves unequal to the task of preventing grand corruption, kleptocracy and the capture of the state. Their lot is not ameliorated by the serious corruption and involvement in political shenanigans now coming to light in top police management ranks.

How then should the Ramaphosa administration manifest its “new dawn” on the anti-corruption front?

Accountability Now, which played a role in getting the court to set the Glenister criteria when most cynical observers believed that this achievement would be “mission impossible”, has long championed the notion of creating a new Chapter Nine Institution called the Integrity Commission or something similar. Eagles that fly higher, see further and go after bigger prey than Hawks are needed and they are needed now.

Locating the anti-corruption machinery of state under the Chapter Nine umbrella immediately guarantees the independence, both structurally and operationally, of the unit. This is because it will be required to report to the multi-party parliament, not a member of the cabinet like, heaven forbid, Bheki Cele, furthermore, the Constitution itself prescribes the independence of Chapter Nine Institutions which, like the courts and prosecution service are required to act “without fear, favour or prejudice”.

The Hawks have shown that they fear the powerful, favour the corrupt and act in ways that are prejudicial to the public weal.

Pressure for the establishment of an Integrity Commission is required urgently from all quarters. **NA**