

On the record...

Interview with Advocate Menzi Simelane

The National Director of Public Prosecutions, Advocate Menzi Simelane, has faced critical and often hostile media attention since his appointment on 1 December 2009. Both the fact of his appointment and his actions as NDPP have been dogged by controversy. In this interview with Iole Matthews, Adv Simelane speaks candidly about the National Prosecuting Authority (NPA) and the changes he is making to the way in which the prosecuting authority operates.

Iole Matthews (IM): You are the fourth National Director of Public Prosecutions of the National Prosecuting Authority in the last 10 years, if we include Acting NDPP Mokotedi Mpshe. Do you think your vision differs from that of your predecessors?

Menzi Simelane (MS): No, I don't think so. I don't think the vision for the NPA should necessarily be different from one NDPP to another. What might be different are approaches and areas of emphasis. I say that because in the context of government work, and especially our cluster, it's quite clear what the National Prosecuting Authority is supposed to do. Its role is very straightforward. We do prosecutions and work incidental to prosecutions such as investigations related to those prosecutions – so I don't see that work changing unless the criminal law changes. The vision centres on doing as many prosecutions as possible and ensuring success in as many prosecutions as possible. So it is very difficult to imagine any other vision for the NPA under the present circumstances.

IM: If one looks at previous strategic initiatives within the NPA it seems that under the leadership of Adv Bulelani Ngquka there was the beginning of a shift towards seeing the NPA as having a preventative role to play within the criminal justice system and thus moving beyond just prosecutions. Your description of the NPA vision seems to embrace a more reactive role?

MS: I think it will always be both. If the NPA were more effective in its prosecutions that might be seen by the general public as being important and thus might be seen as a deterrent for those who are tempted into conflict with the law. Since prosecutions all over the world take place after a crime has been committed, any prosecuting authority is seen as reactive in that respect.

IM: So your effectiveness could be seen to be preventative in some way?

MS: Exactly, but while the effectiveness of the organisation may have a deterrent effect, why a person commits a crime won't always be affected by what the NPA does. That will depend on the specific circumstances that face that particular person at a point in time, and this will vary from person to person.

IM: If perceptions of the organisation's effectiveness in the eyes of the public is important, how has the negative publicity around your appointment affected the organisation? And had you anticipated that level of negative publicity?

MS: Well first, it was not unexpected. I think the public's reaction is not properly informed by factual issues. The media reports are largely informed by the political and ideological debates that are out there. And in that respect I think it is not fair on the public who are in a way being provided with a particular perspective agreed to

by certain sections of the media. So to a large extent the media are misinforming the public as to what the real issues are. This has contributed to a general state of confusion in some quarters, including in some parts of the NPA. At the same time I wouldn't want to submit that it's a serious problem within the NPA, because NPA staff, who are more familiar with the facts, are able to separate the facts from opinions. From that point of view our normal work, that of conducting prosecutions, continues unaffected. I think what does create challenges for them is the constant negative information that one sees or hears about the institution for which one works. That does eventually get to some people.

IM: One of the key issues focused on by the media is the disbandment of the Asset Forfeiture Unit (AFU) and the other specialised units. What is your response?

MS: Firstly, there is no disbandment of any unit – I don't even want to use the word 'unit' because that is also not a proper representation of what the law says. The fact that they are seen to be units is a function of internal management in the organisation. According to the law these structures are not units. I prefer to use the word 'processes' and there are no changes proposed (or otherwise) that relate to policy on areas of asset forfeiture, or in fact commercial crime or sexual offences. So none of the structures are being interfered with in the manner in which they implement government policy. What has happened is that we have adjusted the reporting lines, that's it.

Remember that it was during Adv Ngcuka's time that there was a realisation that sexual offences needed special attention. So a proclamation was made and signed off by President Mbeki to appoint a special director who would advise the NDPP on the policy relating to sexual offences and not necessarily to conduct prosecutions. This special director was intended to help the NDPP assist the DPPs to conduct prosecutions in respect of sexual offences. However once appointed, the special director was provided with posts to be filled with prosecutors who would conduct those

types of prosecutions, not only at national level but also in each of the provinces. You then had a situation where administratively the NPA began to refer to this as a 'unit', and the way they were treated, and are treated to date, is that they are an addition to existing prosecutors in the courts. In the area of development of policy on sexual offences and best practice, this unit has done tremendously well.

So on the ground you get a prosecutor who prosecutes rape cases or sexual offence-related cases and who reports to the DPP through the normal channels but then you have another set of prosecutors, referred to as SOCA (Sexual Offences and Community Affairs) prosecutors, who do exactly the same job, in the same court but they are not accountable to the DPP in that province. Instead they ultimately report to the special director at National Office because they deal with cases from the Thuthuzela Centres. So we are arguing against this approach. Surely all prosecutors should be answerable to the DPP in whose jurisdiction they operate, as required by law?

IM: So you are saying that reporting lines have been changed for SOCA? What about the AFU and the specialised commercial crimes unit?

MS: Yes, we have proposed that this applies to all the specialised units. It is the same issue whereby a special director was appointed to advise the NDPP on such matters and to prosecute in specific cases only. Now we have a number of prosecutors on the ground in the areas of jurisdiction of the DPPs prosecuting special commercial crimes. How do you distinguish between these cases, how do you distinguish between a commercial matter being dealt with by the prosecutor from the SCCU from the commercial crime matter being dealt by an ordinary prosecutor reporting to the DPP? This needs more attention because we should not exaggerate successes when more should be done.

Also, because they function completely differently to the rest of the organisation, you end up with multiple prosecuting authorities within one

prosecuting authority and it starts affecting accountability. So ask a SCCU prosecutor who do you report to, and they say Chris Jordaan, who is head of that unit at National Office. So who does Chris report to? Well, he reports to the Deputy National Director of Public Prosecutions in the Office of the NDPP, Dr Ramaite. Again, I can follow that structure, but then what informs their approach to prosecutions as opposed to the approach of the DPPs? You find that they have their own way of doing things, different to the DPPs. The point I am making is one of coherence. At the moment what we have is a fractured organisation and that type of organisation leads to multiple problems. You have one prosecutor in a court doing one thing and another doing something different and they see themselves as independent of each other. The same thing with the Asset Forfeiture Unit, in so far as the DPPs are excluded from making applications in terms of the Prevention of Organised Crime Act. They should be authorised to do so.

This lack of coherence is evidenced by the fact that each unit established its own mini corporate services and want their own strategy sessions.

IM: And yet in the past these units have not only grown, they have been marketed by the NPA as centres of excellence?

MS: Without being cynical, I think it was a function of not thinking through the idea of what the organisation should look like, because of the pressure to deliver at the time. They were quick-fix measures to respond to the pressure to come up with results. There was also the confusion created by the Scorpions, as you now had a police service within the NPA. The focus became this office of the NDPP and the people in it. It became such a powerful office that it virtually rendered the DPPs redundant.

IM: So you're saying that the role of the NDPP has inappropriately taken centre stage – you've become like a rock star!

MS: (Laughter) Absolutely, it's become this unbelievable individual. Where does that come

from? But again it flows from the way the media has not properly reported on the institution as a whole, on the framework of the law, and how that works. We have lost an immense opportunity to educate the public on how the prosecution service works and its role in helping government transform society.

Look at this Jub Jub case, I didn't speak to any of those guys prosecuting the case. It's not my business. I only engaged with the acting DPP and while I might say 'this is how I see things' it is the DPP who talks to the prosecutors. And each DPP is independent in his or her decision-making. While they definitely work under my direction in terms of ensuring a common strategy and policy, in terms of decision-making, they are independent. The National Prosecuting Authority Act specifies clearly under what circumstances I can overrule the DPP and what procedure has to be followed. I cannot just go in and say 'I disagree with you so change your decision'.

These things are not really known by the public, largely because it's this office of the NDPP, this NDPP individual, who is seen as more important. The public as a whole don't even know that the DPP is independent.

IM: So you seem to be arguing that the NDPP is not the most important person in the organisation?

MS: When I speak to people I always say to them that in fact the most important person in the system is the individual prosecutor holding your docket; because that person is the one who decides to prosecute or not. If we want to focus on excellence you don't always have to create the super units, you focus on ensuring that the quality of prosecutors everywhere is such that you can truly depend on it. If you have a bad individual prosecutor, it doesn't matter what rank, if that person is not up to scratch then you have a problem.

So if you take your entry level prosecutor handling his or her first first traffic violation case, that's where you should start looking at quality.

You know the NPA focuses so much on rank when we should rather be focused on quality and competence. That entry level prosecutor is a professional. What we are managing more are people and less processes – I manage processes.

IM: And what do you mean by that, surely people management is key for ensuring quality?

MS: I always argue that I don't manage people because I work with professionals. I take it for granted that once you are a full time employee of the NPA you should know what to do, unless you are completely new and need some guidance initially to get started. A prosecutor with two or three years' experience in the district court has a lot of experience because he or she lives in the courtroom, reading up to 30 dockets a day, litigating. At the end of a year you have a wealth of experience. Now tell me why that person needs a senior person telling them how to make decisions?

IM: The problem with that is that if that prosecutor does a bad job on day one and continues building experience on that by the end of the year they are really bad.... Especially if no one has been supervising and picked that problem up.

MS: Absolutely, but first let me say that managing people is not a NPA challenge, it's a public service challenge. There is huge emphasis on rank and seniority. The minute someone in the public service is appointed a director they stop working and they start looking for people to manage. Now if you are in an environment where you are dealing with professional people you get frustrated because there is no one to manage, because such people tend to do their own thing. They want to be getting on with their jobs and they don't need someone breathing down their necks. Now if you are a manager who has to be seen to manage people you start checking registers, you want to know where they are, and all of those types of things. There is an element of control in it which I accept as important but there is a time when that level of control becomes counterproductive, because people stop thinking,

they stop finding solutions, because they are always waiting for a manager to make a decision. Nobody moves until there is an instruction. And so if the manager is off sick for a week nothing happens, because there is no instruction to follow, no approval.

I focus less on that type of management of people and more on process. When I say I am process orientated I mean that any route to a good outcome has to be informed by a process. If the process is bad, the outcome is bad, so we need to be clear on what our processes are. When I was at the Competitions Commission we always focused on processes first.

IM: And you apparently had a good reputation from your days at the Competitions Commission...

MS: (laughter) Absolutely, that's what always amazes me, one moment you are okay and the next moment it's gone. People's opinions shift. But processes are important because whenever a decision is challenged, it's the process that can be looked at for answers. From an administrative point of view, process is key. That is a high level of accountability. I want people to explain process, tell me what has happened from day one, how did you arrive at your decisions, etc. and for a lot of people that is very uncomfortable. They are not used to a hands-on approach and then they say 'hang on you are micro managing me'. With accountability, you have to explain each and every step of the way. In the same way, Parliament is not a grilling session. It is an opportunity to explain how you came to a decision and not necessarily everyone has to agree. Again that is the public service culture, where the boss decides and then everyone just agrees. Junior staff are not able to say 'hang on, how did you arrive at that decision yourself?' I hope that we change some of these practices that do not help us go forward.

IM: Is that something you are trying to change?

MS: Absolutely, I think one of the criticisms in the *Mail and Guardian* recently refers to the 'blistering pace' of transformation. But my sense is

that we are behind schedule, we don't have the luxury of time because it's 16 years post 1994 and people still don't know how the system works or what their rights are. People call here to find out about their cases and I say 'ask for the Senior Public Prosecutor, ask for the Control Prosecutor, demand an answer.' And people in the public service generally feel that if people do that it's being disrespectful. But in fact the quicker you explain to someone how you reached a decision the faster they will go away, because they will understand. They may not agree with you but at least they will understand how a decision was made. Because of this attitude we tend to be very impatient with people and that is what contributes to an environment where prosecutors don't really pay attention to process. They expect to make a decision and have everyone just comply. We need to correct this culture. In a participatory democracy we want to encourage the public to engage and get people used to being accountable.

IM: And yet, while you argue for more engagement you've in fact been accused of not consulting on strategy and of making unilateral decisions.

MS: You'll remember I was appointed in October last year as Deputy and given the responsibility to focus on NPS, and so I dealt directly with the DPPs. We met in October and again in November last year to engage around the general framework of the prosecution service. We looked at the scheme of the Constitution and the scheme of the NPA Act. We all agreed that what is happening in the organisation is not a true reflection of what is in the law and how things actually should be. We saw a lot of scope for improvement.

We have DPPs who are emasculated from really taking responsibility. And again it's because of the approach that focused on the NDPP rather than the people with direct responsibility for certain processes. For me, from the way I see it, there was a lesser focus on a process of prosecution and greater focus on individuals. So we agreed that things have to change and as you can see this is reflected in the minutes of those meetings.

We agreed on the role of the DPP office, its jurisdiction, and that senior prosecutors should spend more time in court. It was also agreed that we would start implementation at the start of next financial year, April 2010, which is why a lot of things were then done in March in preparation for the new financial year, and then for everybody it looked coordinated.

IM: And yet the instruction for senior prosecutors to be in lower courts has met with serious resistance in some quarters. What was the thinking behind this decision?

MS: It seemed unreasonable that a senior prosecutor with up to 20 years or more experience does maybe two or three cases a year while a junior prosecutor who has just graduated from university does 20 cases a month. Even if those cases are more complex, logic should tell you that the more senior you are, the more experience you have, the quicker you can make decisions and the more value you can add.

Also, prosecutions should never just be about court appearance for trials. Many cases can be dealt with administratively. And running a court case is a skill, like surgery, so we should reserve trials for the more serious cases that deserve a trial. In many cases one can get a plea and just deal with the case administratively but still get the appropriate outcome. Now who is in a better position to do this, someone experienced or someone less experienced? The more senior you are the better you can negotiate and execute that responsibility and if you are successful you save court time, reduce backlogs. And the seniors do court work anyway, so it is just the frequency that is in question. Many seniors also sell themselves as specialists, say in sexual offences, but then shouldn't they be prosecuting in those courts with the highest rates of sexual offence cases and guiding more junior prosecutors?

IM: Okay, so you are not just talking about seniors conducting prosecutions – which for me is problematic since there aren't enough of them to seriously impact on the cases in the system – but also acting as mentors and building the skills base in the organisation?

MS: Yes, there are not enough of them, which is why we can't have a system that is dependent on a few individuals. We have to get the whole system to work which is why for me it's a question of building competence. When a senior person arrives to conduct a case at a court, all the prosecutors are interested, they want to see what's happening, they want to ask questions, they want to learn. So you achieve a lot with just your physical presence. If you then engage with those people you have no idea of how much value is added. Now if there is the presence of a senior in that court on a regular basis you can fundamentally change that system and instead of you alone doing five or ten cases very well, you have 15 prosecutors doing 5 000 cases very well because you've taken the time to engage.

Also, the magistrate's court is a court like any other, maybe inferior in terms of physical structure or resources for historical reasons, but it's still a court. When a senior is going to appear you get a different quality of service in that court. It starts on time, the magistrates are sometimes former colleagues so there is a healthy respect and you get a better form of justice being done. So there is an immediate change. You see this better level of service in high courts and this is how it should be in the lower courts. Why should we act differently where 90% of our cases are heard?

That is why everyone robes, and while some NPS advocates objected to robing in the lower courts I insisted that if you work for this employer, you robe. The message that is communicated is that I respect this court as an important constitutional structure and I respect the magistrate as a judicial officer. This is not a fashion show, but there is dignity to the justice process. We are using the hierarchy of the system strategically. If I pay attention to a case, everyone pays attention. The importance of rank in the system can be used positively as well as negatively. We just have to find the time to care.

This is not new, so I am not a genius. These issues were being discussed during Adv Mpshe's time and he and I also talked about it. The only

difference is that I am insisting on it and I am implementing it now and not after further discussions, otherwise we'll never get started.