terms of the section under consideration'. To argue otherwise would mean that the multitude of persons who live in single-room shacks would always run the risk of contravening the section (at para [69]). Rather, on a proper construction, the court interpreted the provision of intentionally and unlawfully causing a child to witness the sexual activity in the sense that the persons engaging in such conduct (at para [70])

> 'must have consciously and deliberately created circumstances that conduce to a child witnessing the sexual activity being engaged in … [and] the perpetrators must be conscious of the fact that the child is watching them engage in sex',

The fact that the child-complainant had conceded under cross-examination that her parents, while engaging in sexual intercourse might have thought she was asleep, whereas she was awake and watching TV, was indicative of the absence of such intention. But the court then also noted that there was evidence of the accused having been drunk on many occasions while having sexual intercourse in the presence of the complainant. The court was not convinced that this evidence established *dolus eventualis*, or could provide a basis for a conviction of s 1 of the Criminal Law Amendment Act 1 of 1988 (at paras [71]-[72]). Since there was no proof beyond reasonable doubt that the accused had unlawfully and intentionally 'caused' the child to witness an act of sexual intercourse, they were both acquitted of this offence.

Criminal procedure

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1 Search and seizure

In *Mogale v Minister of Safety and Security* 2016 (2) SACR 682 (GP) the high court had dismissed an application sought by the appellants for an order setting aside certain search warrants issued by different magistrates (at paras [10] and [11]). It appeared that the affidavits placed before the issuing magistrates in support of the applications for the respective search warrants had already been prepared and signed before they were presented to the commissioner of oaths for administering the oath. On appeal to the full court it was held that

the procedure specified for the issuing of warrants, contained in s 21 of the Criminal Procedure Act 51 of 1977, includes the requirement that a warrant may only be issued if information, justifying the interference with the affected person's and institutions' rights, is presented to the justice or magistrate *under oath*. The court held that the condition that evidence should be given under oath ensures that such evidence is reliable. An affidavit must be signed and sworn to before a commissioner of oaths, as set out in the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 (at para [16]).

The court held that the commissioner of oaths, who declares that an affidavit

> 'on the strength of which people's lives may be negatively affected, has been finalised in accordance with the statutory prescripts, must satisfy herself or himself of the identity of the deponent and must be certain that it is the person who signed as the deponent who actually does swear to the affidavit'.

Therefore the deponent must sign in the commissioner's presence. A failure to fulfil this condition may lead to affidavits being presented to commissioners that have not been prepared and signed by the purported deponent. The court held that 'the potential for abuse, if this condition is not met, is self-evident' (at para [23]).

The court held that there was no room for the argument that there has been substantial compliance with the formalities, as the document purporting to be an affidavit had not been signed at all, or had been signed in the absence of the commissioner before the oath was taken. Had the magistrates issuing the warrants noticed the defect, they would not have issued the relevant warrants (at para [23]). The application for the setting aside of the warrants was therefore granted (at para [26]).

The judgment reaffirms that an application for a search warrant, as well as the issuing thereof, requires care. A warrant seriously infringes upon an individual's rights and can therefore not be regarded as mere interdepartmental correspondence (*Goqwana v Minister of Safety and Security* 2016 (1) SACR 384 (SCA) at para [31]). The law pertaining to the requirements of a valid search warrant has become very clear in recent years (*Minister of Safety and Security v Van der Merwe* 2011 (2) SACR 301 (CC)). Invalid search warrants lead to unnecessary preliminary litigation (*Thint (Pty) Ltd v National Director of Public Prosecutions, Zuma v National Director of Public Prosecutions* 2008 (2) SACR 421 (CC) at para [64]), as in the case under discussion, and the police may be compelled to restore the unlawfully seized property into the possession of the person from whom it had been seized (*Ngqukumba v Minister of Safety and Security* 2014 (2) SACR 325 (CC)). It is ultimately the duty of the trial court to adjudicate on the issue of the admissibility of evidence obtained as a result of an invalid warrant and the possibility exists that such evidence may still

be admitted in exceptional cases (*Thint (Pty) Ltd v National Director of Public Prosecutions, Zuma v National Director of Public Prosecutions* supra at para [64] and *S v Dos Santos* 2010 (2) SACR 382 (SCA) at paras [20]-[24]).

2 Arrest and detention

In *Dlamini v Minister of Safety and Security* 2016 (2) SACR 655 (GJ) the appellant had instituted an action for damages against the minister of safety and security for unlawful arrest and detention. His claim was dismissed by the high court. The arrest was effected by a police official who was shown a docket opened by the complainant, the appellant's wife, in which she stated that she had been assaulted by him and that he had damaged certain property. The policeman, accompanied by the complainant, proceeded to the couple's home where the complainant identified the appellant and he was arrested. The court *a quo* held that the arresting officer had reasonable grounds to arrest the appellant, even though 'it would not have been difficult for him to make a few enquiries' to verify the allegations made by the complainant (at para [7]).

On appeal it was held that the trial court correctly found that reasonable grounds for the arrest of the appellant had been proved. The arresting officer was in possession of a statement made by a complainant to a colleague under oath revealing serious allegations concerning domestic violence. He had the opportunity of interviewing the complainant who confirmed the allegations of domestic violence. The complainant was limping and her explanation therefore had corroborated the version in her statement (at para [13]). The court held that the real issue in the matter was the question as to whether the arresting officer had exercised his discretion properly in deciding to arrest the appellant. The question that arose was whether there was a duty on the arrestor to conduct such further investigation and verification, in order to enable him to properly exercise his discretion whether or not to arrest the appellant (at para [15]).

Relying on *Minister of Safety and Security v Van Niekerk* 2008 (1) SACR 56 (CC), the court held that the constitutionality of an arrest will almost invariably be heavily dependent on the factual circumstances of each case. The court made much of the right to freedom from violence as a fundamental right to the equal enjoyment of human rights and freedom, as well as the nature of domestic violence as discussed in *S v Baloyi* 2000 (1) SACR 81 (CC) (at para [16]). The court further considered the duties of police officers to assist victims of domestic violence. In this regard, the court relied on the Domestic Violence Act 116 of 1998 and its regulations, as well as the police standing orders

as encapsulated in the National Instruction 7 of 1999 issued by the National Commissioner of Police pursuant to the provisions of the Act (at paras [17]-[18]).

The court held that the arrestor fully complied with his duties under the provisions referred to above and held that a further investigation into the issue would have been superfluous. The court held that, as a general rule and depending on the circumstances of each case, it cannot be expected of a reasonable police officer in these circumstances to conduct a further investigation. The arrest of the appellant was for the purpose of bringing him before court. 'Once arrested, the appellant would have been entitled to exercise all the rights enjoyed by an arrested person' (at para [19]). The court held that the arrestor had exercised his discretion to arrest the appellant properly and not arbitrarily or without lawful cause and dismissed the appeal (at paras [20]-[21]).

The purpose of an arrest is to bring the arrestee before the court for the court to determine whether the arrestee ought to be detained further, for example, pending further investigations or trial (*Minister of Safety and Security v Sekhoto* 2011 (5) SA 367 (SCA) at paras [30]-[31]). An arrest will be irrational and consequently unlawful if the arrestor exercised his or her discretion to arrest for a different purpose. It may become very difficult for police officials to decide whether or not to effect an arrest in the emotionally laden circumstances of alleged domestic violence. An arrest may, however, not be effected as a matter of course in the light of the nature of and the rights affected by domestic violence. The arrest will be unlawful if it is effected simply to separate the parties or to threaten the parties to reach a settlement (*Naidoo v Minister of Police* 2016 (1) SACR 468 (SCA) at paras [41]-[42]).

3 Access to information

The Constitutional Court has held that a blanket docket privilege in criminal cases is in conflict with the right to a fair trial (*Shabalala v Attorney-General of the Transvaal* 1996 (1) SA 725 (CC)). In *National Director of Public Prosecutions v King* 2010 (2) SACR 146 (SCA) the Supreme Court of Appeal provided a useful summary of the current legal position pertaining to an accused's right to access to information to enable him or her to prepare for trial. The court held that privilege no longer applies to documents in the police docket that are incriminating, exculpatory or *prima facie* likely to be helpful to the defence. An accused is entitled to the content in the docket relevant to exercising or protecting that right. The entitlement is not restricted to statements of witnesses or exhibits but extends to all documents that might be important for an accused to properly adduce and challenge

evidence to ensure a fair trial. 'The blanket privilege has, however, not been replaced by a blanket right to every bit of information in the hands of the prosecution' (at paras [1] and [2]).

In *Du Toit v The Magistrate* 2016 (2) SACR 112 (SCA) the court was called upon to weigh conflicting interests to determine the extent to which an accused may have access to certain material the state intended to use against him at his trial. The background facts were that the police had conducted a search of the home of the appellant and seized various items, including mobile phones, compact disks, memory sticks and a laptop. The appellant was eventually charged with the possession of child pornography. Before the commencement of his trial in the regional court, the appellant sought an order from the presiding magistrate that the prosecution be directed to furnish him with copies of the images said to constitute the offence charged. The appellant had refused to take up an offer by the prosecutor of disclosure by private viewing. The prosecutor, who had objected to reproducing the images and furnishing copies thereof to the defence, offered to put arrangements in place for him, his legal representatives and any expert for the defence to view the images at an office at either the local police station or the court (at para [3]). The magistrate ruled that the arrangement proposed by the prosecution was sufficient and accordingly dismissed the application. The high court reviewed and set aside the decision of the magistrate and held that it could see no reason why copies and not originals, could not be made available to the appellant to enable him to exercise his fair trial rights, provided he be allowed to verify such copies against originals if that need arose (at para [7]). Both the appellant and the prosecution obtained leave to appeal on different issues. The only issue that the Supreme Court of Appeal was eventually called upon to consider was the correctness of the finding of the high court in respect of the appellant's right to access to the material (at para [6]).

Relying on the Canadian Supreme Court case *R v Stinchcombe* (1991) 68 CCC (3d) 1 (SCC) and *Shabalala* supra, the Supreme Court of Appeal held that, although entitlement to disclosure is a matter of constitutional right, such right was not an unqualified one. Instead, in each instance, it was for the court to exercise a proper discretion by balancing the degree of risk involved in attracting the consequences sought to be avoided by the prosecution (if access is permitted) against the degree of the risk that a fair trial might not ensue (if such access is denied). What was essentially required was a 'judicial assessment of the balance of risk' (at para [9]). The court held that it was 'enjoined by the Constitution to promote values that underlie an open and democratic society based on human dignity, and to consider international law. In striking the appropriate balance, adequate weight had to be accorded

to the interests of the children'. The court considered a number of international and regional instruments, as well as s 28(2) of the Constitution – all relating to the notion of the best interests of the child (at paras [11] and [12]). The Supreme Court of Appeal concluded that the children who were depicted in the images had a reasonable privacy interest. The court held that significant public interest prevailed in ensuring that no duplication or distribution of the material occurs in the disclosure process. Those interests ought not to be further compromised by the copying, viewing, circulation or distribution of the images beyond what is reasonably necessary to give effect to the accused person's constitutional right (at para [13]). The court referred to the negative impact of the distribution of child pornography on the children involved (at para [14]). It also held that an important principle of fundamental justice is that the integrity of the criminal justice system needs to be maintained (at para [15]). Reference was also made to the Prosecution Policy and Policy Directives (Sexual Offences: B7), which were not challenged by the appellant. It provides that in cases where dockets contain visual images of child pornography, prosecutors need only allow the defence access thereto and should not provide copies unless so ordered by the court. It furthermore provides that dockets containing child pornography must at all times be kept at the official workplace and stored in a securely locked location. The court held that the prosecution should be allowed to exercise that discretion, if necessary, 'to protect the privacy interests of members of the public or to protect the public interest by preventing the commission of further criminal acts, which could occur if the disclosure of the information was ordered without putting adequate safeguards in place' (at para [16]). Thus, 'in the ordinary course of events, disclosure should be by copy', and 'where there are other conflicting rights at stake, the constitutional requirement may be adequately met by providing an opportunity for private viewing' (at para [18]). The court held that, given the secrecy inherent in the production and distribution of child pornography, the prosecution properly exercised its discretion in the case, 'consistent with contemporary principles and values, to refuse to make the images available' (at para [18]). The order issued by the magistrate was therefore reinstated. It is submitted that the Supreme Court of Appeal succeeded in striking a fair balance between the policy considerations affecting the best interests of children and the rights of accused persons. Our courts have emphasised that the right to a fair trial should not be viewed as a one-way street – an unlimited right for an accused to receive the most favourable possible treatment. A fair trial also requires 'fairness to the public as represented by the state' (*S v Shaik* 2008 (2) SA 208 (CC) at para [43]; *National Director of Public Prosecutions v King* supra at para [5]).

4 Prosecutorial discretion

In *National Director of Public Prosecutions v Freedom Under Law* 2014 (2) SACR 107 (SCA) the court held that decisions to prosecute are not immune from judicial review, but that courts should interfere sparingly. There are two policy considerations for this approach. First, the independence of the prosecuting authority must be safeguarded by limiting the extent to which review of its decisions can be brought. The second consideration is the 'great width of the discretion exercised by the prosecuting authority and the polycentric character that generally accompanies its decision making, including considerations of public interest and policy' (at para [25]). The court held that the 'underlying considerations of policy can be no different with regard to decisions not to prosecute *or to discontinue a prosecution*' (author's emphasis; at para [26]). The court held that, although decisions not to prosecute are – in the same way as decisions to prosecute – subject to judicial review, they do not extend to a review on the wider basis of the Promotion of Administrative Justice Act 3 of 2000, but are limited to grounds of legality and rationality.

Readers of this journal will be well aware of the controversies and litigation surrounding decisions by the prosecuting authority to decline initially to prosecute, later institute a prosecution, and eventually to discontinue the prosecution against current president, Jacob Zuma. These issues cannot be revisited in any detail here. In *Democratic Alliance v Acting National Director of Public Prosecutions* 2016 (2) SACR 1 (GP) the applicant, a political party, launched a review application for correcting and setting aside the decision by the Acting National Director of Public Prosecutions (ANDPP) to discontinue the prosecution of Mr Zuma (at para [1]). In opposing the application, the ANDPP relied on the abuse of process doctrine for discontinuing the prosecution. The reason given for the discontinuing of the prosecution was that a senior member of the prosecuting authority, the head of the Directorate of Special Operations (DSO) – a unit within the NPA at the time when the decision was taken – had manipulated the legal process for purposes extraneous to the prosecution itself and other than that which the process was designed to serve. The ANDPP was of the opinion that it would not have been possible to give the accused a fair trial or that it would have offended one's sense of justice, integrity and propriety to continue with the trial. In essence, it was alleged that the head of the DSO, a former NDPP and others had manipulated the timing of the service of the indictment on Mr Zuma for political reasons (at paras [39]-[42]).

On the evidence placed before it, the review court held that, prior to the ANDPP's decision to discontinue the prosecution, he had been satisfied that the state had a strong case on the merits. Initially and

after receiving representations from Mr Zuma's legal representatives, the ANDPP, his deputies and the prosecution team held the view that the prosecution would succeed (at para [27]). After the ANDPP and his deputies had listened to certain audio tapes of telephone conversations between the head of the DSO and a former NDPP, as well as other audio recordings, he had decided to discontinue the prosecution (see *Zuma v Democratic Alliance* [2014] 4 All SA 35 (SCA), regarding litigation surrounding the audio tapes). The ANDPP relied on foreign case law for the application of the abuse of process doctrine in the matter (at para [62]). The court, however, held that he had omitted to mention that it was held in those cases that 'determination of the principles of abuse of process was an exercise for a court of law and not an extrajudicial pronouncement' (at para [64]).

The court also found that the ANDPP had disregarded, without giving reasons, the recommendation of the prosecution team that, even if the allegations regarding abuse of process were true, the decision to stop the prosecution was to be made by a court of law (at para [66]). The court also referred to the earlier decision in *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at para [37], in which it was held that a prosecution is not wrongful merely because it is brought for an improper purpose. It will only be wrongful if, in addition, reasonable and probable grounds for prosecuting are absent (at para [67]). The court confirmed that the appropriate forum to deal with the abuse of process doctrine is a court of law and not any extrajudicial process. The court held that the ANDPP's initial response, after hearing the audiotapes, was to subscribe to the view held by the prosecution team, that the allegations raised by the tapes had to be subjected to judicial process to test the veracity thereof (at para [68]). When the ANDPP announced his decision to discontinue the prosecution, no discussion was held with senior colleagues to source their views on this subject. The court held that this omission was critical, because they had been collectively agreed to continue with the prosecution. They too had been briefed on the content of the tape and had also heard it. The court held that it was expected that they would have formed some views on the matter individually. The failure of the ANDPP to source their views under the circumstances was therefore regarded as irrational (at para [83]).

The court further held that the ANDPP had failed to explain how the information he had heard on the tape recording could be said to have affected, compromised or tainted the envisaged trial process and the merits of the intended prosecution. In his media announcement of the discontinuation of the prosecution, he conceded that the alleged conduct of the head of the DSO had not affected the merits of the charges against Mr Zuma. The court held that there thus was

'no rational connection between the need to protect the integrity of the NPA and the decision to discontinue the prosecution against Mr Zuma' (at para [88]). The court further held that he had ignored his own personal concerns, that the information from the tape and the representation from Mr Zuma's lawyers had to be investigated, verified and the tapes authenticated (at para [89]). The court also held that the ANDPP's feelings of anger and betrayal by what he had heard on the tape recordings caused him to act impulsively and irrationally. He did not allow himself time to consider the question as to whether the very decision he was about to take could be regarded by other people, facing similar charges throughout South Africa, as a breach of the principles of equality before the law, or that it would be an abuse of process to discontinue charges against people of high profile or standing in the community. The conflict between Mr Zuma's defence and the prosecution's evidence could only be resolved if all the relevant evidence was presented and tested in a court of law (at para [90]).

The court held that the ANDPP had ignored the importance of the oath of office which demanded of him to act independently and without fear or favour. The envisaged prosecution against Mr Zuma was accordingly not tainted by the allegations against the head of the DSO. The court held that Mr Zuma should face the charges as outlined in the indictment (at para [92]). As a result, the application succeeded and the decision to discontinue the prosecution was set aside (at para [97]).

A few brief comments can be made regarding this case. First, an aspect which deserved some attention and which was not dealt with by the court is the effect of the Prosecution Policy and Policy Directives of the National Prosecuting Authority. In terms of s 179(5) of the Constitution, the NDPP has to determine prosecution policy and must issue policy directives. The policy and directives must be observed in the prosecution process. The Supreme Court of Appeal has on occasion relied on these policy documents to discuss the role of prosecutors (see *S v Van der Westhuizen* 2011 (2) SACR 26 (SCA) at para [7]). In the discussion of *Du Toit v The Magistrate* supra, reference was also made to the fact that the Supreme Court of Appeal in that case (at para [16]) relied on the Prosecution Policy and Policy Directives, in upholding the discretion of a prosecutor with regard to providing access to certain information to an accused person. In *Du Toit* the Supreme Court of Appeal even criticised the high court for not even mentioning the Policy and Directives in their judgment. All decisions by prosecutors to prosecute or not to prosecute must adhere to the prosecuting policies and policy directives. The aim of these policies and policy directives must be to serve the interests of justice to the benefit of the public in general (*National Society for the Prevention of Cruelty*

to Animals v Minister of Justice and Constitutional Development 2016 (1) SACR 308 (SCA) at para [24] – 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 statement regarding the prosecution policy). Similarly, in English law, in *R v Director of Public Prosecutions, ex parte C* [1995] 1 Cr App 136 (QBD) at 141C-D the Queen's Bench, after reviewing a number of decisions, concluded that a decision not to prosecute may be reviewed on a number of grounds, including the failure by the Director of Public Prosecutions to act in accordance with the policy set out in the prosecution code. In terms of the South African Prosecution Policy, prosecutors must, in deciding whether or not to institute criminal proceedings against an accused person, assess whether there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution. Once a prosecutor is satisfied that there is sufficient evidence to provide a reasonable prospect of a conviction, *a prosecution should normally follow*, unless public interest demands otherwise (National Prosecuting Authority of South Africa 'Prosecution Policy' at 5 (Revision date: June 2013)). The policy then provides a number of factors to be considered in making the decision whether or not it is in public interest to prosecute (National Prosecuting Authority of South Africa 'Prosecution Policy' supra at 6-8). It is submitted that if one weighs these factors carefully, a prosecution in the circumstances of this case would be appropriate indeed. It is submitted that the integrity of the NPA (although not specifically mentioned as a factor in the Prosecution Policy) is only one aspect to consider when consideration is given to public confidence in the criminal justice system (a factor specifically mentioned in the Prosecution Policy). One should further consider that, in terms of the United Nations 'Guidelines on Role of Prosecutors', prosecutors must give due attention to the prosecution of crimes committed by public officials, particularly corruption (Office of the United Nations High Commissioner for Human Rights 'Guidelines on the Role of Prosecutors' (adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba (1990) at para 15).

Secondly, mention must be made of the integrity of the NPA. The issue of the integrity of senior officials with regard to exercising their prosecutorial discretion, as well as allegations of political meddling in the affairs of the NPA, has been under scrutiny from various corners, including the press, non-governmental organisations and the courts. In the case under discussion, the court in fact held that the ANDPP had ignored his oath of office, which demanded of him to act independently and without fear or favour (at para [92]). The

manner in which the NPA has dealt with this case creates cause for concern. The NPA initially declined to prosecute Mr Zuma, stating that although there was a *prima facie* case of corruption against him, he would not be prosecuted, as the prospects of success were 'not strong enough'. The Public Protector later found that the press statement made by the NDPP in this regard unjustifiably infringed upon Mr Zuma's constitutional right to human dignity and caused him to be improperly prejudiced (Public Protector 'Report on an Investigation by the Public Protector of a Complaint by Deputy President J Zuma against the National Director of Public Prosecutions and the National Prosecuting Authority in Connection with a Criminal Investigation Conducted against Him' (Report No 26) (Special Report) (2004)).

Later, after a decision had been taken to prosecute Mr Zuma, he successfully applied to a high court for that decision to be set aside (*Zuma v National Director of Public Prosecutions* [2009] 1 All SA 54 (N)). The NPA then successfully appealed against the setting aside of the indictment (*National Director of Public Prosecutions v Zuma* 2009 (1) SACR 361 (SCA)), yet the prosecution was later discontinued. Our courts have been critical of the integrity of senior members of the NPA (*National Director of Public Prosecutions v Freedom Under Law* supra at paras [37]-[42]). In *Zuma v Democratic Alliance* [2014] 4 All SA 35 (SCA) at para [41] the court also stated that the conduct of a deputy director was not worthy of the office of the NDPP and that it undermined the esteem which the public should hold for the office of the NDPP (also see *Booysen v Acting National Director of Public Prosecutions* 2014 (2) SACR 556 (KZD) and *General Council of the Bar of South Africa v Jiba* 2017 (1) SACR 47 (GP)). The recent decision of the NDPP to prosecute the then Minister of Finance, only to withdraw the charges shortly thereafter, also met with wide disapproval (see, eg G Nicolson 'NPA's integrity in tatters, calls grow for Shaun Abrahams to go' *Daily Maverick* 31 October 2016, accessed at *https://www.dailymaverick.co.za/article/2016-10-31-npas-integrity-in-tatters-calls-grow-for-shaun-abrahams-to-go/,* available 23 February 2016; P Hoffman 'How Shaun Abrahams is cooking his goose' 24 October 2016, available at *https://www.businesslive.co.za/rdm/politics/2016-10-24-how-shaun-abrahams-is-cooking-his-goose/*, accessed 23 February 2016).

Citizens can rightly expect that senior members of the NPA (and all prosecutors) exercise the different discretions bestowed upon them sensibly and in accordance with the law. In view of the perceptions of the current state of the NPA one must sadly ask whether the time has not come for South Africa to introduce further oversight mechanisms over the NPA, since judicial review is time consuming and expensive. In 2014 the Institute for Security Studies published a

report regarding dedicated oversight and accountability mechanisms to scrutinise the activities of prosecutors (M Schönteich 'Strengthening Prosecutorial Accountability in South Africa (ISS Paper 225) (2014)). It found that constructive oversight could assist the NPA to enhance both its performance and public confidence in its work. The paper reviewed a number of prosecutorial accountability mechanisms drawing on comparative studies. These mechanisms include independent complaints assessors, prosecution service inspectorates and prosecutorial review commissions. The introduction of one of these mechanisms may be necessary to restore public confidence in the NPA, as the office of the NDPP is integral to the rule of law and to our success as a democracy (*Democratic Alliance v President of the Republic of South Africa* 2012 (1) SA 417 (SCA)).

Sentencing

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1 General principles and procedure

1.1 Remorse

Our courts readily accept true remorse as a mitigating factor at sentencing. However, they do not readily accept that an offender is remorseful. Rather, they are more inclined to take an expression of remorse as an indication of regret at the situation in which the offender finds himself (cf *S v Matyityi* 2011 (1) SACR 40 (SCA) at para [13]). In *S v Nteta* 2016 (2) SACR 641 (WCC) the court also took this position. Although the accused expressed their regret and even apologised to the family of the deceased, the court was unconvinced about their true remorse. The accused were blamed for failing to take the court into their confidence. Instead of assisting the court to get a clear picture of what happened during the commission of the crime, they attempted to mislead the court (at para [25]).

1.2 Failure of justice in magistrate's court

The judgment in *S v Maliswane* 2017 (1) SACR 26 (ECG) is very critical of the way in which the magistrate dealt with the case, especially related to sentencing. The two appellants both had, according to the