

THE SCORPIONS LOSE THEIR STING

Challenges to incorporation of the DSO into the SAPS¹

Anthony Minnaar
University of South Africa (UNISA)
aminnaar@unisa.ac.za

While it would appear that the motivations to incorporate the Directorate of Special Operations (DSO) or Scorpions into a new South African Police Service directorate are largely politically driven, there are a number of practical obstacles standing in the way of a 'smooth' incorporation. Foremost among these is the manner of operations of the Scorpions, the way that they investigate certain crimes by means of prosecution-led teams, and their more effective use of intelligence-driven crime information. This is diametrically opposed to the SAPS investigation modus operandi, which is largely reactive. Furthermore, many of the Scorpions investigators, representing as they do a vast pool of built up experience and expertise, do not want to serve in the SAPS under the latter's investigating regime. Other sticking points would be the fact that they are paid infinitely better than SAPS detectives, are better funded and resourced, have a far lighter case load (and one shared in a team) – all in direct contrast to members of the SAPS.

While it would appear that the decision to incorporate or subsume the Directorate of Special Operations (or Scorpions), into the South African Police Service (SAPS) is a *fait accompli*, the process of incorporation will not be straightforward. This is largely because the decision to disband the Scorpions is politically motivated, rather than motivated by practical concerns around the functionality of the unit.

There are a number of practical obstacles to the disbandment of the unit. These obstacles relate fundamentally to the fact that the methods used by the Scorpions to undertake investigations cannot easily be incorporated into the police. These include:

- The use of a 'preparatory investigation' or enquiry

- The use of teams of multi-disciplinary investigators, prosecutors and intelligence analysts
- The reliance on the collection of crime information/intelligence
- The type of specialist training members receive
- The specialised focus of the investigations and their selection on the basis of being 'high profile', combined with the probability of obtaining successful convictions
- The types of crime focused upon

Additional issues that complicate incorporation are the sense of elitism (*esprit de corps*) that was built up around the unit; that the DSO investigators were used to lower case loads (than SAPS detectives); and the fact that they have been better paid and better resourced than units of the SAPS. They have

also enjoyed a great deal more independence than the SAPS,² reporting directly, as they do, to the Director of Public Prosecutions (via the DSO Director) who in turn is accountable directly to the President (although, again this is nominally supposed to be through the Minister of Justice). Only then do they report to Parliament via the Parliamentary Portfolio Committee for Justice.

Background and legislative context

In 1998 Parliament legislated for the establishment of a National Prosecuting Authority (NPA) with a Director of National Prosecutions to replace the old Attorneys General's offices nationally and provincially. At the same time this legislation – the National Prosecuting Authority Act (No 32 of 1998) – made provision for the President to establish 'Investigating Directorates' (not more than three were to be allowed) to reside in the Office of the National Director of Public Prosecutions (National Prosecuting Authority Act, 1998: s7(1a)).

This Act allowed investigating directors to investigate any matter relating to an offence or a suspected offence by means of an 'enquiry' or a so-called 'preparatory investigation' (NPA Act 1998: s28(1)). Such an inquiry was allowed to be held in camera (NPA Act 1998: s28(3)). Moreover, an investigating director in such an enquiry (preparatory investigation) could call any person to give evidence, obtain any document, seize any computer (as evidence), and enter and search any premises (with reference to the applicable sections for warrants and searches in the Criminal Procedure Act) in connection with the alleged offence or suspected commissioning of any specified offence (NPA Act 1998: s28(6&7); s29(1&2)). On the basis of such an enquiry a full-blown criminal investigation could be launched by the NPA.

Although the forerunner of the DSO – the Investigative Directorate for Organised Crime (IDOC) – was set up on 1 September 1999, the DSO was formally established by means of the National Prosecuting Authority Amendment Act No 61 of 2000. This Act specified that because of its 'limited investigative capacity' it needed to concentrate on investigating organised crime, violent crimes, political violence, terrorism, serious

economic crime, and corruption in the police, criminal justice system and security forces. This was important later when the the Anti-Corruption Unit of the SAPS was disbanded in 2003.

The Amendment to the Act specifically tasked the DSO to undertake investigations and to 'carry out any functions incidental to investigations'. Furthermore, it was tasked to 'gather, keep and analyse information' (NPAA Act 2000: s7(1a(i-iii)(aa-bb)). This Act also replaced 'enquiry' throughout the Act with the word 'investigation' and for the first time used the word 'Special Investigator'. The amended Act also refers to the DSO acting on the existence of 'reasonable suspicion' that an offence had been committed or was being contemplated and planned (NPAA Act 2000: s13(b)(b)).

Accordingly the initiation of 'preparatory investigations' was strongly premised on the collection of information and crime intelligence, as well as on information submitted to them. The DSO's use of crime information/intelligence-driven investigation and prosecution as a *modus operandi* was innovative and more advanced than the SAPS' more recent intelligence-led policing.³ The amended Act set up a Ministerial Co-ordinating Committee to co-ordinate operations (intended to be applicable to all agencies within the Criminal Justice System) as well as to oversee communication and the transfer of relevant information to the DSO (NPAA Act 2000: s31). In addition, the Committee was tasked to ensure that DSO investigators adhered to a 'Code of Conduct for Special Investigators' (NPAA Act 2000: s41(2)(n)). This was the first time a specific code for investigators had been developed and implemented.

This pointed to the fact that a 'new' kind of investigation process was underway, that specifically emphasised the use of information/intelligence in directing investigations. A further innovation was the fact that the unit operated on a team basis. Teams were headed by prosecutors and included special investigators and intelligence gatherers and analysts, who all worked together to ensure that such a focused investigation yielded enough evidence for conviction. This was loosely modelled on the investigative methods of the USA Federal Bureau of Investigation (FBI).

DSO vs SAPS methods of investigation

This way of operating is fundamentally different to the way SAPS detectives investigate a crime. Police detectives respond to a crime being committed (reactive), possibly need to secure a crime scene, collect evidence, open a docket, make further investigations and then hand over such docket of evidence to the Prosecution Services for evaluation. The Prosecution Services decide whether the case should proceed to court for a possible prosecution and eventual conviction. In most cases the first time a prosecutor has contact with the individual detective or has insight into the case evidence is when s/he is presented with a completed case. Experience has shown that this often leads to dockets being rejected by prosecutors or cases being struck off the roll even before they come to court, simply because they are under- or ill-prepared by the overworked and overburdened SAPS detectives, or because the evidence has been poorly or inadequately collected and the investigation has, in many cases, been substandard and/or rushed.

In contrast, placing a prosecutor at the head of the DSO investigative teams means that cases are developed under the continuous guidance of a prosecutor, from the initiation of a 'preparatory investigation' to conviction. In this way the chance of case evidence being incorrectly collected is drastically reduced. In addition, the insights and conclusions of a multi-disciplinary group are considered. This reduces the probability that evidence or possible leads for further investigation will be overlooked, as may be the case if there is a single detective leading an investigation.

The Scorpions have the additional advantage of sufficient funding to contract and pay for the services of specialist consultants, as well as to make use of outside forensic auditors. This is necessary due to the complicated nature of the types of crimes being investigated. They are also able to follow leads internationally, with all the cost implications thereof. In short, the Scorpions are far better resourced and funded than their SAPS counterparts could ever hope to be.

There are other differences between DSO and SAPS investigations. The DSO prosecution-led

investigation teams are able to become specialists. This is because individual teams tend to concentrate on one type of crime. Since they deal with considerably fewer cases than SAPS detectives, they are also able to spend more time and concentrated attention on single cases. On the other hand, it has been estimated that each docket-carrying SAPS detective has on average 70 dockets on hand (IHRCJS 2001: 7).⁴ Such a heavy caseload also tends to mean that detectives take shortcuts or simply mark dockets as 'undetected', or 'witness/es cannot be traced/found', or 'insufficient evidence available' – all in an effort to reduce their caseloads. So while DSO investigators have become specialists, SAPS detectives have become merely generalists, particularly since the amalgamation of the specialist units into three core focus groups.

All things considered, the DSO has a much better chance of a high success rate for convictions than the SAPS, although one should bear in mind that the Scorpions select cases on the basis of success probabilities. This is shown for instance by the results of the 2002/3 recording year where out of 167 finalised investigations and 117 finalised prosecutions the DSO obtained 104 convictions (Redpath 2004: 51).

A recipe for friction

The public perception that the DSO is more successful than the SAPS has led to friction and envy between the DSO investigators and the SAPS detectives. The better success rate has been assisted by the fact that the DSO is able to resource its far smaller number of investigators infinitely better than their SAPS counterparts. The high success rate and the perception that DSO investigators are a 'cut above' meant that as they became more successful, their morale grew – again in contrast to the low morale evident among many members of the SAPS, which is often manifested in poor service delivery at police stations.

These perceptions of envy and resentment have been confirmed in a number of field research projects undertaken by the author over the last few years, dealing *inter alia* with police service

delivery, use of force by police, community policing and the transformation of SAPS.

SAPS resentment towards the DSO has also been greatly fanned by the fact that investigators in the DSO are much better paid than their SAPS counterparts. Even more galling to SAPS detectives is the fact that many of their number left the police for the more lucrative posts in the DSO. These former SAPS detectives were invariably those with many years of experience and built-up expertise. As the SAPS Detectives Division was left with a smaller pool of detectives, this started a vicious cycle of training new recruits, then overloading them with dockets so they had no time to give concentrated focus to a more manageable number of dockets, nor to build up specialist expertise.

In fact as early as 1994, only about 26 per cent of detectives had been on a formal investigation training course, while only 13 per cent of detectives had over six years experience (White Paper 1998: 13). So within this situation the loss of experienced detectives to the DSO had a double impact. In the context of high crime levels and overloaded detectives it was virtually impossible to implement meaningful training programmes, as SAPS detectives had no time to go on lengthy training courses.

The skills differences were further compounded when DSO investigators received specialised investigation training from both the FBI⁵ and the London Metropolitan Police.⁶ While this was happening the SAPS began amalgamating their specialised detective units.⁷

Although the specialised units were not without problems, the amalgamation meant that the overall specialised investigative capacity of the SAPS was reduced and the 'surplus' detectives (i.e. those who were not taken up in the three specialist investigation units that were established) were reassigned back to police stations under the direct management of a police station commissioner. This once again diluted their specialised crime focus, forcing them to try and deal with station case backlogs of all crime dockets. Furthermore, the creation of large but fewer multi-disciplinary

detective units to replace the multiplicity of specialised units again led to SAPS detectives becoming investigators of a whole range of crimes instead of concentrating on a few selected crimes and building expertise in those specific crime fields.⁸

It is therefore no wonder that the Scorpions, with their approach, appear to perform so much 'better' than the SAPS detectives. Even though the Scorpions are accused of being selective ('cherry picking') in the (high profile) cases that they took on, and that their decisions to prosecute are often based on the likelihood of obtaining a successful conviction, there is no doubt that the Scorpions are overall extremely effective in their investigations.

More importantly, because the DSO combines a criminal law and criminal procedure approach with a civil law perspective it is more effective at addressing corruption than is the SAPS. In practical terms this means that the Scorpions' teams incorporate the principles of asset recovery, following the proceeds of crime and implementing forfeiture and restitution within their overall investigation approach. To this end the Scorpions work closely on joint operations with the other two NPA Investigative Directorates, namely the Asset Forfeiture Unit (AFU) and the Special Investigations Unit (SIU), both of which were tasked, *inter alia*, to look at all forms of high-level (i.e. large-scale) corrupt practices, particularly in government departments.

One of the unfortunate misconceptions in the debate about the DSO has been caused by lumping together the activities, investigations, cases and eventual joint prosecutions of the three Investigative Directorates of the NPA, namely the DSO, the SIU and the AFU. While they have often undertaken joint operations, these have usually been reported as being solely the work of the Scorpions. While the units support or complement each other's work and investigations, they remain independent of one another and work on different cases. The SIU and AFU often become involved in the later stages of DSO-led investigations. Closing down the DSO will break down this investigative 'troika' and is likely to compromise their overall effectiveness.

Some concluding remarks

The differences between the SAPS and the DSO present very real obstacles. The Government's new General Law Amendment Bill⁹ makes no mention of whether the 'investigative approach' developed by the Scorpions will be retained in the proposed new SAPS Directorate for Priority Crime Investigation (DPCI). Furthermore, in the new Bill the implied emphasis has been solely on 'fighting organised crime'. No mention is made of other crime focuses, notably corruption.

Members of the Scorpions have been leaving the unit in droves since its disbandment and absorption (restructuring) was first mooted. This represents a huge loss of specialist investigative skills and expertise that the new DPCI would have to replace, or train up new recruits.

While the Minister of Safety and Security has publicly proclaimed that the DPCI will continue to investigate all current cases of the Scorpions, the DSO investigators have voiced concerns that they would not be investigated with the same vigour or in the same manner as the Scorpions did. A further obstacle to their incorporation has been their fears that they will be required to fit into the same old police culture and manner of conducting investigations as has become standard in the SAPS (reactive, overloaded, overworked and rushed, without access to supporting colleagues or outside specialists, nor continual consultation with a prosecutor).

Questions have also been raised whether the new DPCI would be resourced and funded at the same level as the Scorpions'. And does the SAPS have the necessary infrastructure, resources and funding to handle sophisticated organised crime cases?

Other practical concerns that have been raised deal with such aspects as the higher remuneration received by the Scorpions and whether they would still be paid on the same level.

Another stated intent contained in the Bill is that all new members will be selected by the National Police Commissioner. This is understood by Scorpions members to be a thinly veiled political

aim to screen, weed out and get rid of all those perceived to be politically incompatible with government's 'fight against crime'. To this end government members have made wild statements about the Scorpions being populated largely by former 'apartheid spies'. Facing this attitude, not only towards their investigation approach, but also to their professionalism and loyalty to the government, many Scorpions investigators have come away with the feeling that the SAPS does not really want to employ any of them in the new DPCI, nor does it want to make use of their specialist investigation skills, or implement (for continuity) any form of prosecution-led investigations. It has also been stated publicly that the DPCI will not be allowed to pick only cases that it wants to investigate but has to investigate all cases of high-impact organised crime. Such a result makes a further mockery of the stated intent of the Bill that the DPCI will be a 'specialist investigation unit'.

It is then not surprising that it is being asked whether any of the existing members of the Scorpions will ever willingly accept employment with and incorporation into the new DPCI. Simply put, it is doubtful whether the SAPS will have the capacity (without incorporating all the Scorpions investigators into the new unit) to continue with, let alone improve on, the case successes of the DSO, and whether the fight against corruption will be a focus of the new DPCI. Finally, whether the DPCI will ever become the mooted 'super-unit', as intended, remains to be seen.

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Endnotes

- 1 I would like to acknowledge and thank my colleagues, Prof. Johan Prinsloo and Dr Rudolph Zinn, for their insightful comments and the informal discussions I had with both regarding the content of this article.
- 2 For instance they have steadfastly resisted being told to close or abandon any cases (unlike certain instances where National Commissioner Selebi has allegedly done so) on non-legal or non-investigation grounds by not brooking any interference in the whole process.
- 3 This has been more sporadic than formally implemented in the SAPS, and there has been

opposition to its use in the SAPS, being largely based on the use of modus operandi and perpetrator profiling crime information as well as the recent implementation (only at selected police stations) of spatial (GIS) crime analysis as an adjunct to reported crime statistics. See Zinn (2008) for a more detailed analysis of intelligence-led policing).

- 4 The internationally accepted (Interpol) docket caseload norm is an average of 23 dockets per detective.
- 5 A number of selected investigators were even trained at the FBI Academy at Quantico, Virginia (near Washington).
- 6 Others received different training (in intelligence gathering and analysis for instance) at the Bramshill Training Centre north of London in the UK.
- 7 Before the restructuring of the Detective Service began in 2000, there were 534 specialized units in the Detective Service, which led not only to fragmentation of investigations but to the non-sharing of information or any close co-operation in investigating similar cases.
- 8 See Minnaar (2008 forthcoming).
- 9 This amends the South African Police Service Act. A second Bill, which repeals the Scorpions provisions in the National Prosecuting Authority Act, has not yet been tabled in Parliament, although it was also approved by the cabinet at the same time (end of April 2008).