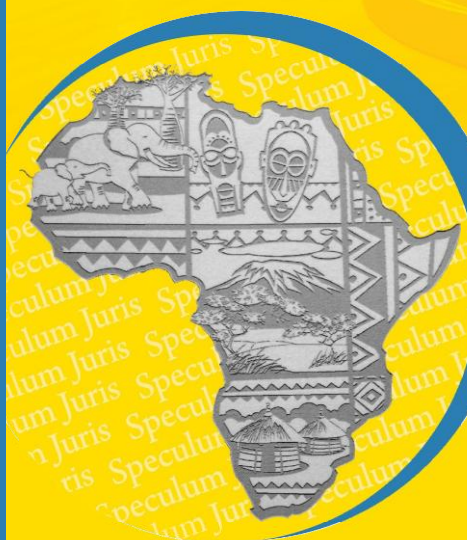




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Prosecutorial Misconduct: Incompetent or Unethical Conduct by the Prosecution

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Abstract

In the South African adversarial criminal trial, the prosecutor represents the citizenry and acts on behalf of the state. There is a pressing social need for the effective prosecution of crime, and the community's perceptions in this regard are important for fostering trust in the criminal justice system. Prosecutorial misconduct, in the form of incompetent or unethical conduct, comprises any conduct, intentional or inadvertent, during a prosecution that violates applicable codes of professional ethics, contravenes a particular law or prejudices or appears to prejudice the administration of justice. There is a pressing social need for the effective prosecution of crime, which is undermined by prosecutorial misconduct. In this case note, the recent decision in S v Omotso is discussed, in which substantial prosecutorial misconduct occurred and partly led to the accused's acquittal.

Keywords: community perceptions; incompetent or unethical conduct; ineffective prosecution; prosecutorial misconduct

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1 INTRODUCTION

In the recent case of *S v Omotoso*,¹ two pertinent issues came to the fore: firstly, the issue of prosecutorial misconduct in the form of incompetent or unethical conduct by members of the prosecutorial team and secondly, shallow or insufficient cross-examination of the accused, which lacked placing the evidence of the accused in dispute with the intention to uncover the truth. In this case note, only the issue of prosecutorial misconduct and the ethical duties resting on the prosecution will be discussed with reference to the judgment at hand. The case note commences with a discussion on the legal ethics framework within which a criminal prosecution should be conducted. Thereafter, the instances of alleged prosecutorial misconduct that occurred in *Omotoso* will be evaluated against the legal ethics framework. In conclusion, the applicable legal procedures to be followed in cases of prosecutorial misconduct will be discussed.

2 THE FACTS AND FINDINGS

On 20 April 2017, Timothy Omotoso (accused 1), the founder and head of the Jesus Dominion International Church (JDI), was arrested in Gqeberha by the Directorate for Priority Crime Investigation (HAWKS), amidst widespread media coverage. On 23 November 2017, Omotoso's two personal assistants, Lusanda Sulani (accused 2) and Zukiswa Sitho (accused 3), were arrested.² The three accused were subsequently charged jointly and/or individually with 63 counts, which included contravening sections 2(1)(e) and 2(1)(f) of the Prevention of Organised Crime Act,³ committing sexual assault in breach of section 5(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act;⁴ committing rape in violation of section 3 of SORMA; engaging in trafficking in persons contrary to section 71(1); and trafficking persons for sexual exploitation in contravention of section 4(1) of the Prevention and Combating of Trafficking in Persons Act,⁵ along with alternative charges.⁶

It was common cause that the JDI owned a mission house in Umhlanga, where young girls who were members of the church gathered to pray together. The house was also used for choir practice; some girls had meals there, and others stayed there.⁷ The complainants in the case were young girls recruited by their local pastors, by Fizeka (an assistant of accused 1, who left the county before the arrests of the accused), as well as by accused 2 and 3, to go to Durban after accused 1 indicated that he was interested in these girls.⁸

The factual issues regarding the alleged offences committed by accused 1 dealt with what transpired between him and the complainants inside his bedroom in the mission house and at other venues where the girls attended crusades of the JDI. The complainants all testified that they were summoned to accused 1's room. They had to massage his feet, and during these appointments they were sexually assaulted or raped by him after being lured into his bed.

1 *S v Omotoso* (CC15/2018) [2025] ZAEQBC 8 (2 April 2025).

2 Media statement HAWKS "Two Suspects Arrested for Allegedly Aiding Omotoso in Human Trafficking" 2017 <https://www.saps.gov.za/newsroom/msspeechdetail.php?nid=13540> (accessed 03-06-2025).

3 121 of 1998.

4 32 of 2007.

5 7 of 2013.

6 *Omotoso* para 1.

7 *Ibid* para 4.

8 *Ibid* para 6.

These incidents were repetitive, and some of the complainants were sexually assaulted or raped on various occasions. Some of the complainants left the mission house at times but returned voluntarily.⁹

By his evidence in chief, accused 1 denied that he trafficked any person for sexual purposes or that he was involved in trafficking. In addition, he denied that he was managing an enterprise through a pattern of racketeering activity or that he participated in the conduct of the enterprise through a pattern of racketeering. He furthermore denied committing any crimes of a sexual nature (raping or sexually assaulting) against the complainants.¹⁰ The version of accused 1 accordingly denied the complainants' allegations. Accused 2 likewise denied that she recruited any girls for the mission house or threatened anyone to stay there. She denied participating in an enterprise through a pattern of racketeering activity or that she trafficked persons for sexual purposes or was involved in trafficking persons for sexual purposes. She also denied raping or sexually assaulting any of the complainants or conspiring with another person to commit sexual offences.¹¹ The evidence of accused 3 was not a total denial of the evidence of the complainants. She testified that she saw girls massaging the feet of accused 1 in his room. She testified that accused 1 never acted inappropriately towards her. She received no reports of sexual assault or behaviour and detected no culture of fear in the mission house. She denied that she recruited persons for accused 1, contacted anyone to come to the mission house, or prevented anyone from leaving.¹² It is submitted that the fact that accused 1 and 2 denied the allegations by the complainants, coupled with the fact that accused 3 conceded that some of the allegations made by the complainants indeed took place, made it necessary for the prosecution to subject the evidence of the accused to proper and thorough cross-examination.

After evaluating all the evidence, the court concluded that the state did not prove its case beyond a reasonable doubt. All three accused were found not guilty and discharged on all the charges against them.¹³ The court commented that aspects of the complainants' evidence were unsatisfactory, though not incredible. The evidence of the accused could not be rejected as false either, as it was not subjected to proper and thorough cross-examination. The court viewed the accused's explanations as improbable and not subjectively believable. It is important for this discussion that the court added that, due to prosecutorial misconduct by the lead prosecutor and the lack of proper cross-examination, it could not find that the versions of the accused were improbable and, as such, not reasonably possibly true. There was furthermore no onus on the accused to prove their innocence.¹⁴

In the following paragraph, the legal ethics framework governing criminal prosecutions will be discussed with reference to the *Omotoso* matter.

3 THE PROSECUTION AND LEGAL ETHICS

It is trite that the South African criminal trial is, in essence, an adversarial proceeding, a contest between the prosecution, representing the state, and the accused (or the defence), presided over by an impartial judicial officer.¹⁵ The prosecutor represents the citizenry and acts on behalf of the state.¹⁶

9 *Ibid* para 8.

10 *Ibid* para 36.

11 *Ibid* para 37.

12 *Ibid* para 39.

13 *Ibid* para 63.

14 *Ibid* para 62.

15 Broughton "The South African Prosecutor in the Face of Adverse Pre-Trial Publicity" 2020 *PELJ* 3.

16 *Porritt v National Director of Public Prosecutions* 2015 1 SACR 533 (SCA) para 13.

A public prosecutor has the difficult responsibility of reconciling the duty to ensure that the accused receives a fair trial with the duty to represent the state in that trial. This difficulty arises from the very nature of adversarial proceedings, in which litigants are typically concerned only with presenting one side of the case. Courts should allow the prosecutor to present only evidence aimed at proving guilt, while relying on the defence to produce all exculpatory evidence.¹⁷

In *Democratic Alliance v President of the Republic of South Africa*¹⁸ the court held that although the functions of the prosecution are not judicial in character, its functions of determining prosecution policy, deciding whether to prosecute, and ensuring compliance with that policy are fundamental to South Africa's constitutional democracy. This office is closely related to the judiciary's function and should broadly aim to achieve justice, as the core entity tasked with delivering criminal justice.¹⁹

The Standards of Professional Responsibility and the Statement of the Essential Duties and Rights of Prosecutors²⁰ state that a prosecutor shall disclose to the accused relevant, prejudicial, and beneficial information as soon as is reasonably possible, in accordance with the law or the requirements of a fair trial. Under the Code of Conduct for Members of the National Prosecuting Authority,²¹ prosecutors must conduct themselves professionally, with courtesy and respect for all, and in accordance with the law and the recognised ethical standards of their profession. In addition, prosecutors must be individuals of integrity whose conduct is objective, honest and sincere.²² Prosecutors who are admitted as advocates or attorneys of the High Court will, in addition, fall under the provisions of the Legal Practice Act,²³ which vests the Legal Practice Council with the duty to enhance and maintain appropriate standards for professional practice and ethical conduct of all legal practitioners.²⁴

Our courts have repeatedly held that it is not the task of a prosecutor to pursue a conviction in all cases. A prosecutor stands in a special relationship to the court, which implies that a prosecutor's main duty is not to secure a conviction but to assist the court in discovering the truth.²⁵ A prosecutor, as representative of the state, the community at large, and the general interests of justice, has a comprehensive and demanding task to fulfil.²⁶ These principles are echoed in the Prosecution Policy of the NDPP²⁷ where, in paragraph 3, it is further emphasised that members of the prosecuting authority must act impartially and in good faith.

In the following paragraph, the alleged instances of unethical or incompetent prosecutorial conduct will be set out and evaluated.

17 "The Duty of the Prosecutor to Disclose Exculpatory Evidence" 1960 *Columbia LR* 60 858–859.

18 2013 1 SA 248 (CC) para 26.

19 See further Joubert (ed) *Criminal Procedure Handbook* (2017) 76–78.

20 Adopted by the International Association of Prosecutors on 23-04-1999.

21 Code of Conduct of Members of the National Prosecuting Authority under s 22(6) of the National Prosecuting Act 32 of 1998 para A (e).

22 *Ibid* para A (a).

23 28 of 2014.

24 *Ibid* s 5(g).

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

26 See *S v Ntebo* 2004 1 SACR 79 (NC) 81 b-g.

27 Issued in terms of s 2(1)(a) of the National Prosecuting Act.

4 UNETHICAL PROSECUTORIAL CONDUCT OR INCOMPETENCE OF PROSECUTORS EVALUATED

Prosecutorial incompetency or misconduct can be defined as any conduct, intentional or inadvertent, during a prosecution that violates applicable codes of professional ethics, contravenes a particular law, or prejudices, or appears to prejudice, the administration of justice.²⁸

The following most blatant and serious examples of unethical prosecutorial conduct or incompetence of the prosecution in *Omotoso* included:²⁹

4.1 Failure to Disclose Deviations from Police Statements during Consultation with State Witnesses to the Defence

During consultations with witnesses, one of the prosecutors, Ms Cerfontein, established that some witnesses' versions differed substantially from their police statements or the averments in the indictment. Mr Ntelwa, the lead prosecutor and senior prosecutors, advocates Goberdan and Gouden, were informed of these discrepancies. Instead of obtaining new affidavits, Mr Ntelwa suggested in an email that the witnesses should be persuaded to stick to the versions contained in their police statements. The reason for his suggested action was that retaking statements would prompt the defence to request a postponement of the trial. This fact was brought to the notice of the senior prosecutors by Ms Cerfontein. Mr Ntelwa drafted a second indictment incorporating some of the amendments in accordance with the witnesses' new statements. In the case of *S v Takaendesa*³⁰ it was explicitly stated that a prosecutor who had been aware of the facts and concealed them from the court made himself guilty of a gross dereliction of duty, one that "could only be strongly condemned."

Because of the adversarial system, the contents of the police docket, including statements of state witnesses, were privileged from disclosure to the defence before 1994, as they formed part of the prosecution's brief.³¹

Despite this previous legal position, it was held as early as 1954 in *R v Steyn*³² that a prosecutor is under a duty to disclose to the accused or defence counsel, when the evidence of a state witness at the trial differs from a prior statement made to the police, this disclosure is left to the prosecutor's discretion, who stands in a special relationship to the court. In the case of a serious discrepancy, the court has the right to expect that the prosecution, of its own volition, direct the court to this fact, unless there are special and cogent reasons to the contrary. This statement must then be made available for cross-examination. The court added that the proper administration of justice requires that this practice should be invariable. In *S v Xaba*,³³ the court emphasised that the rationale of this rule is to safeguard against the risk of an accused being convicted on the evidence of an unreliable, non-credible witness. A discrepancy will be sufficiently serious when there is a real possibility that the testing thereof by means of cross-examination could hurt the assessment of credibility and reliability of the witness.

28 Center for Prosecutor Integrity "Definition of Prosecutorial Misconduct" <https://www.prosecutorintegrity.org/registry/definition/> (accessed 28-07-2025).

29 *Omotoso* para 40.

30 1972 4 SA 72 (RAD) 74F-G.

31 Bursey "A Prosecutor's Duty to Disclose Previous Inconsistent Statements: Defence Allegations" 1991 *DR* 181.

32 1954 1 SA 324 (A) 337A.

33 1983 3 SA 717 (A) 729E.

In *S v Ncaphayi*³⁴ it was held that where a state witness materially deviates during his evidence in court from his police statement, the prosecutor must disclose that statement and make it available to the defence to test the witness's credibility by cross-examination on its contents. This is based on the ethical principle that the prosecution should make available any evidence in its possession that is favourable to the accused, to ensure the accused receives a fair trial.³⁵

In the case of *Shabalala v Attorney-General of the Transvaal*³⁶ the right of an accused to access information contained in the police docket was recognised as arising from the right to a fair trial. The witnesses in the *Omotoso* matter supplied additional information during their consultations conducted by Ms Cerfontein. This additional information differed substantially from their police statements. It is submitted that the correct procedure to follow under these circumstances would have been to retake the statements of the witnesses where the additional information would have been included. These additional statements should have been disclosed to the defence. The mere suggestion by Mr Ntelwa to persuade the witnesses to stick to their original police statements clearly amounts to prosecutorial misconduct. The fact that advocates Goberdan and Gounden condoned this suggestion or refrained from taking disciplinary action against Mr Ntelwa for making it amounts to a second instance of prosecutorial misconduct.³⁷

It is generally accepted that police statements are not taken down under ideal conditions. They are often not recorded with sufficient care, accuracy, or completeness. They are mostly recorded by police officials who might not have the necessary skill or language proficiency to take down a proper statement.³⁸ In *S v Bruiners*³⁹ it was correctly pointed out that the purpose of a police statement is to obtain details of an offence to decide whether to institute a prosecution. It is not intended to be a foundation of the evidence of a witness in court. In a fresh statement, a witness may be allowed to supply reasons for the discrepancies between the two statements.

4.2 An Amended Indictment Used for Plea Purposes without Informing the Defence

The indictment the accused were required to plead was materially different from the indictment originally served on them at the inception of the proceedings. The second indictment was re-drafted by the lead prosecutor, Mr Ntelwa. This fact only became apparent at a later stage of the proceedings, suggesting that the defence was not informed of the changes to the indictment.

S86(1) of the Criminal Procedure Act⁴⁰ makes provision for the amendment of an indictment or charge in the following instances: where it is defective because it lacks an essential averment; where there is a difference between the averment in the charge and the evidence offered to prove such averment; where words or particulars have been omitted, or unnecessarily inserted or where any error is made. Applications for the amendment of an indictment are normally made by way of a formal application to the court. The court may order an amendment only if it considers that the granting of the amendment will not prejudice the defence of the accused.⁴¹ In the present matter, the prosecution did not bring such an application. The fact that the amended indictment that was used for plea purposes was not even brought to the attention of the defence, in itself, amounts to an irregularity or at least a breach of a duty of good faith resting on a litigant.

34 1990 1 SA 472 (A) 486I.

35 *S v Xaba* 1983 3 SA 717 (A) 722.

36 1995 12 BCLR 1593 (CC).

37 *Omotoso* para 40.

38 *Xaba* 730B–C.

39 1998 2 SACR 432 (SE) 437h.

40 51 of 1997.

41 See *S v Taitz* 1970 3 SA 342 (N) 344–345.

4 3 Prosecutor Picking and Request for Removal of Prosecutor

After the first witness had testified, Mr Ntelwa was supposed to be replaced as the prosecutor.⁴² This witness then wrote to the then National Director of Public Prosecutions, Ms Bathohi, to complain about this decision and also forwarded a petition signed by other witnesses against the assignment of Ms Cerfontein as prosecutor. This letter was forwarded to the acting Director of Public Prosecutions in Makanda for his comments. After this, Mr Ntelwa rejoined the prosecuting team, even though his seniors were aware of his suggestion that the witnesses should stick to the versions provided in their police statements. Ms Cerfontein was removed from the case, and further consultations with other witnesses by her were cancelled without supplying any reason. The court indicated that a probable inference of this step is that Mr Ntelwa wanted to prevent further deviations by the witnesses from their police statements.⁴³

Section 106(h) of the Criminal Procedure Act 51 of 1977 provides that an accused who pleads to a charge may plead that the prosecutor has no title to prosecute. This plea attacks the prosecutor's *locus standi* and will, in most instances, be raised in private prosecutions.⁴⁴ In a prosecution by the state, it has been held that the term "the prosecutor" in section 106(h) refers to the person who acts as the prosecutor in the particular case.⁴⁵ In *Porritt v NDPP*,⁴⁶ an application for the removal of the prosecutors was based on the premise that the retention of the prosecutors would infringe on the appellants' right to a fair trial in terms of section 35(3) of the Constitution. The court found that the prosecutors in the case had prior involvement in other matters relating to the appellants. This involvement laid a proper basis for the objection that both prosecutors had to be removed from the prosecution. The court, however, pointed out that the principles governing prosecutorial conduct must be viewed and understood within the framework of the adversarial system, in which prosecutors will be predictably partisan. This does not exclude instances in which a prosecutor could not be disqualified on the grounds of bias or perceived bias. If the bias impacts on the right of the accused to a fair trial, a prosecutor may well be removed.⁴⁷

The position of a witness differs vastly from that of an accused. The role of a witness in a criminal trial is to provide information and evidence to the court regarding the charges pending before the court. Unlike an accused, a witness is not on trial and in *Nel v Le Roux*⁴⁸ it was held that the fair trial rights contained in section 25(3) of the Constitution apply only to accused persons. In terms of section 203 of the Criminal Procedure Act, a witness can refuse to answer a question if it would expose them to a criminal charge. In the matter at hand, Schoeman J commented that a complainant shouldn't have dictated who should prosecute in a trial, especially where a decision has been made to remove the same prosecutor.⁴⁹

4 4 Communication between Prosecutor and State Witness Still under Cross-examination by the Defence

It was common cause that Mr Ntelwa entered the witness room and spoke to one of the witnesses during an adjournment, when she was still under cross-examination. He claimed he had only

42 The matter originally commenced before Makaula J, who recused himself after Ms Jijane testified. The trial then commenced before Schoeman J.

43 *Omotoso* para 40.

44 Reddy "Criminal Procedure" 2015 *SAJC* 231.

45 See *Ndluli v Wilken* 1991 1 SA 279 (A) 306 D-C.

46 *Porritt* para 13.

47 *Ibid* para 17.

48 1996 1 SACR 572 (CC) para 11.

49 *Omotoso* para 60.

comforted the witness and had not discussed the case with her. The court accepted his answer as an officer of court. Later, the court pertinently asked him whether he knew that the witness had made a contradictory statement, and he denied it. The court correctly regarded this as a lie and commented that, if he had consulted with the witness, it would have amounted to unethical behaviour.⁵⁰

In terms of rule 26.2 of the Code of Professional Conduct and Ethics of the National Bar Council of South Africa, it is improper for an advocate to interview a witness who is under cross-examination, unless circumstances make such an interview necessary. In such a case the advocate who desires to hold the interview must inform the opponent before doing so.⁵¹

In the Namibian case of *S v Malumo*⁵² the court referred to the *dictum* from *R v Ramsay*⁵³ where it was held that “once a witness has begun his evidence it is highly undesirable for either party in either civil or criminal cases to interview that witness”. It was pointed out that the rule’s purpose is to prevent the coaching of witnesses.

It is submitted that Mr Ntelwa’s conduct indeed amounts to prosecutorial misconduct. The mere fact that a prosecutor makes contact with a witness during cross-examination is inappropriate. Even if he did not discuss the case with the witness, his actions created perceptions of impropriety.

4 5 Prosecution Not Playing Open Cards with the Court and Defence

Upon the defence’s application, emails between the prosecutors were disclosed to the defence as part of the mistrial application. Large portions of these emails were redacted and blocked out. The court ordered that unredacted emails should be supplied to the defence. The unredacted emails revealed further discrepancies between other witnesses’ statements and the content of Ms Cerfontein’s consultations. The court commented that the reductions were indicative of an attitude that the prosecutors were still not playing open cards with the court and the defence, despite what had been disclosed at that stage. These emails further indicated that Mr Ntelwa’s assurance that he was unaware of the contradictory statements was false. He was informed of the contradictory statements by Ms Cerfontein after her consultations, at the same time as she informed the seniors.⁵⁴

In the case of *S v Choguguduza*⁵⁵ it was emphasised that prosecutors are placed in positions of authority and that it is their duty to ensure that accused persons receive proper and fair treatment. They have the obligation to uphold the law by their conduct and must set an example of “impeccable honesty and integrity”. If they fail to do so, the public will lose confidence in their actions. In this matter, the prosecutor’s perceived dishonesty clearly tarnished the NPA’s image.

4 6 Dishonesty or Incompetence by Prosecutor

During an application for a mistrial, Mr Ntelwa averred in one of the affidavits that he did not know that the digital penetration of the genitalia amounted to rape. The court commented that it is inconceivable that a prosecutor with 14 years’ experience is not familiar with the definition of rape.

50 *Ibid* para 40.

51 Code of Professional Conduct and Ethics of the National Bar Council of South Africa <https://nationalbarcouncil.co.za> (accessed 23-07-2025).

52 CC 32/2001 delivered on 10-02-2005 at 22.

53 1935 EDL 239 25 PHF 28.

54 *Omotoso* para 40.

55 1996 1 SACR 477 (ZS) 487h.

This, according to the court, was indicative of either his extreme incompetence or his dishonesty when making the affidavit. In the Practical Guide to the Ethical Code of Conduct for Members of the NPA, prosecutors are obligated to be honest and direct with the court.⁵⁶

In the matter of *Mzayiya v Road Accident Fund*⁵⁷ it was pointed out that a legal practitioner has a duty not to mislead the court on evidentiary and legal issues. A legal practitioner is not permitted to knowingly offer or rely on false evidence or to misstate evidence. He may not induce a witness to give dishonest evidence or to depose to an affidavit containing a version different from what he knows to be the facts. The court added that for a legal practitioner to suppress evidence, or worse still to suborn perjury, would amount to sabotage of the administration of justice. Actions like these strike at the heart of the duty owed to the court.

4 7 Communication between State Witnesses during the Trial

Mr Ntelwa also formed a WhatsApp group that connected all the complainants. The state witnesses thus had an opportunity to communicate with each other constantly throughout the trial. No particulars of the messages that appeared in the WhatsApp group were cited in the judgment. The court, however, listed the existence of the WhatsApp group as an instance of possible prosecutorial misconduct. This action by the prosecutor might have been taken inadvertently. Still, it is submitted that he ought to have foreseen that his actions would compromise the integrity of the witnesses, since they could communicate freely with one another during the trial.⁵⁸

4 8 Legal Procedures to be Followed in Cases of Prosecutorial Misconduct

Prosecutorial misconduct has been viewed as irregular proceedings by our courts. In *S v Moodie*⁵⁹ the general rule to be applied in the cases of irregularity was formulated as follows: a court had to determine that there was, in fact, a failure of justice if it could not hold that a reasonable trial court would inevitably have convicted the accused in the absence of the alleged irregularity. In exceptional cases, the irregularity may entail such a gross departure from the procedural rules that the accused has in fact not been properly tried. In this second instance, it would not be necessary to proceed with the enquiry as to whether a reasonable court would inevitably have convicted. The outcome of this test will depend on the nature and degree of the irregularity. Examples of such irregularities are the removal of an assessor by the presiding judge for reasons not debated in open court;⁶⁰ the failure of the prosecutor to disclose discrepancies in a witness's statement⁶¹ and where a breach of attorney-client privilege occurred, and the evidence obtained was used against the accused.⁶²

The process to be followed when irregularities occur during a trial is set out in section 317 of the CPA and is referred to as a special entry. According to section 318, a special entry affords the accused the right to appeal his conviction, and section 322 provides that, on appeal, the appeal may be allowed if the judgment should be set aside because of the irregularity. Special entries are addressed at the appeal stage, although irregularities may arise during or after the trial.

56 "A Practical Guide to the Ethical Code of Conduct for Members of the National Prosecuting Authority" https://www.npa.gov.za/sites/default/files/resources/public_awareness/Ethics_final.pdf (accessed 23-07-2025).

57 2021 1 All SA 517 (ECL) para 83.

58 *Omotoso* para 40.

59 1961 4 SA 752 (A) 758G.

60 *S v Malindi* 1990 1 SA 962 (A) para 56.

61 *Xaba* 722.

62 *S v Mushimba* 1977 2 SA 829 (A) 844H.

The ultimate enquiry at the end of every criminal trial must be whether the accused received a fair trial within the prescripts of the Constitution. The trial court best answers this question at the end of the trial, when all the evidence adduced can be properly and materially assessed. In some exceptional cases, it might be appropriate to make such a determination during the trial. This decision is left in the discretion of the presiding judge.⁶³ It must also be kept in mind that the right of an accused to a fair trial requires not only fairness to the accused, but also fairness to the public as represented by the prosecution. This will instil confidence in the criminal justice system among the public, including those close to the accused and those distressed by the high crime rate.⁶⁴

In the current matter, the defence brought an interlocutory application for a mistrial on the allegation that Mr Ntelwa, the prosecutor, intended to suborn witnesses or attempted to do so. The court held that there were no common-cause facts that the witnesses had been suborned or that there had been an attempt to do so. The court could not find, at the time the application for a mistrial was brought, that Mr Ntelwa had indeed suborned witnesses or attempted to do so. Such a finding would be speculative and not based on evidence presented at trial, which can only be assessed after all evidence has been concluded.⁶⁵

It was accordingly held that the irregularity was of such a nature that the court could not at this juncture find that it resulted in a failure of justice and rendered the trial unfair to such an extent that the accused could not be said to have had a fair trial as envisaged in section 35(3) of the Constitution. The court confirmed that such an order could be made during the trial, but that the instant matter did not fall within this category.⁶⁶

In the United States of America, irregularities by the prosecution are dealt with differently. When a prosecutor becomes aware of evidence favourable to the accused during the course of trial preparation or during the trial itself, disclosure thereof is required.⁶⁷ In the USA, the sanction for a prosecutor's failure to disclose evidence favourable to the defendant is the setting aside of the conviction.⁶⁸ In *Brady v Maryland*,⁶⁹ it was held that the suppression of evidence favourable to an accused person by the prosecution violates due process if the evidence is material to either guilt or punishment. This will be the case regardless of the prosecution's good or bad faith. Referring to the case of *Mooney v Holohan*,⁷⁰ the court emphasised that this principle is not invoked to punish society for the misdeeds of a prosecutor, but to avoid an unfair trial to the accused. A constitutional violation in terms of *Brady* would in theory allow a defendant to institute a civil action in terms of section 1983 of the United States Code of 1983.⁷¹ A prosecutor may not use "improper suggestions, insinuations or assertions of personal knowledge" as tools to achieve a guilty verdict. The intentional withholding of exculpatory evidence falls within the ambit of improper tools.⁷² Improper prosecutorial tactics may amount to prosecutorial misconduct where such conduct is serious and persistent, permeates the entire course of the trial, or is so egregious that it is likely to prejudice the defendant. Four factors may be considered to determine whether alleged misconduct is patent: the probability that the

63 *S v Zuma* 2022 1 SACR 575 (KZP) para 135.

64 *S v Jaipal* 2005 1 SACR 215 (CC) para 28.

65 *S v Omotoso* (Unreported Interlocutory Judgment on Mistrial Application) para 39.

66 *Ibid* para 40.

67 Kurlas "The Duty of the Prosecutor to Disclose Exculpatory Evidence" 1960 *Columbia LR* 855–9.

68 *Ibid* 868.

69 373 U.S. 83 (1963) para 87.

70 294 U.S. 103.

71 Harding "Prosecutorial Misconduct: Conviction by Any Means Necessary" 2023 *Lincoln Memorial Univ LR* 90.

72 *Ibid* 91.

prosecutor's comments influenced the jury unfairly or prejudiced the defendant; whether these comments were few or numerous; whether they were made intentionally or by mistake; and the overall strength of the evidence supporting the defendant's guilt.⁷³

It is advanced that the granting of a mistrial in the USA is based on the use of jury trials. The irregularity may unduly influence the jury; therefore, a retrial would be obligatory. In South Africa, the trial judge will have to determine whether the accused had a fair trial, which is in general not "an *a priori* answer to the question whether the trial will be fair or not". Potential prejudice may be rectified during a trial, and the court may make preliminary rulings. Irregularities therefore do not necessarily lead to a failure of justice.⁷⁴

5 CONCLUSION

In *S v Omotoso*, serious instances of prosecutorial misconduct manifested themselves. These instances of prosecutorial misconduct partly justified the acquittal of the accused. The court held that had Mr Ntelwa been removed from the case when the prosecuting authority intended to do so, the outcome of the trial might have been different.⁷⁵ In *Mzayiya*, Kroon AJ pointed out that the legal profession is an honourable one that requires legal practitioners to conduct themselves with honesty and integrity. This imperative must be beyond reproach and not be allowed to become a cliché to which lip service is paid.⁷⁶ A legal practitioner may not mislead the court on evidentiary or legal points, knowingly present or rely on false or misstated evidence, induce a witness to proffer dishonest evidence or depose to an affidavit which contradicts known facts. The suppression of evidence or suborning of perjury amounts to the sabotage of the administration and "it strikes at the heart of the legal practitioner's duty to the court."⁷⁷

When a legal practitioner engages in misconduct, the Legal Practice Council, as the watchdog of the profession, has an obligation to take appropriate action against the perpetrator. The Code of Conduct for all Legal Practitioners, Candidate Legal Practitioners, and Juristic Entities,⁷⁸ read with section 36(2) of the Legal Practice Act 28 of 2014, sets out the expected standards of conduct for legal practitioners. Article 3.1 requires legal practitioners to maintain the highest standards of honesty and integrity.⁷⁹ In *General Council of the Bar of South Africa v Geach*,⁸⁰ the court reiterated that legal practitioners, as officers of the court, play a vital role in upholding the Constitution and ensuring that the justice system is both efficient and effective. This demands absolute integrity and honesty of them.

As a member of the NPA, Mr Ntelwa was bound by the Code of Conduct for Members of the National Prosecuting Authority, as set out above.⁸¹ This entails, *inter alia*, that he should have acted in accordance with the law and the recognised standards of ethics of the legal profession. In addition, prosecutors are expected to be individuals of integrity whose conduct is objective, honest and sincere. It remains to be seen whether any disciplinary action will be levelled against him.

⁷³ *Ibid* 92.

⁷⁴ *National Director of Public Prosecutions v King* 2010 2 SACR 146 (SCA) para 4.

⁷⁵ *Omotoso* para 60.

⁷⁶ *Mzayiya* para 82.

⁷⁷ *Ibid* para 83.

⁷⁸ GG 42364/29-3-2019.

⁷⁹ Van Eck "Duties of Practitioners to Court?" 2022 *DR* 32.

⁸⁰ 2013 2 SA 52 (SCA) para 87.

⁸¹ *Ibid* para 3.

In 2023, the NPA established a new Office for Ethics and Accountability (OEA) as an internal mechanism aimed at promoting ethical conduct and accountability among South African prosecutors. The OEA has two primary functions: managing and investigating complaints against members of the NPA and fostering an ethical culture within the NPA. Regulations regarding the complaint process have been drafted.⁸² Muntingh correctly argues that the OEA's lack of structural independence is a serious concern. At the time of writing this case note, it could not be established whether the OEA is investigating the alleged instances of prosecutorial misconduct in *Omosoto*.

A sad consequence of the prosecutorial misconduct in this case was that the complainants did not receive justice. They were vulnerable young girls who claimed that they were sexually assaulted by the accused, who stood in an authoritative relationship to them, and whom they saw as a mentor and father figure. The court held that it could not find the complainants' evidence incredible, despite some unsatisfactory aspects. The accused's explanations were improbable and subjectively unbelievable. Still, due to the uncertainty regarding the effects of prosecutorial incompetence or misconduct and the lack of proper cross-examination, the court could not find that their explanations were not reasonably possibly true.⁸³

Another consequence of the prosecutorial misconduct is that the case was drawn out for 8 years, creating significant cost implications for the fiscus. The chairperson of the Portfolio Committee on Justice and Constitutional Development issued a media statement noting with grave concern the outcome of the court hearing and commenting that "we have failed our women". Ironically, a community activist who supported witnesses in this case was shot dead in her car in the driveway of her home in Gqeberha days before the judgment in this matter was delivered.⁸⁴ Nobody has been arrested for this crime to date. This incident also illustrates the lack of protection afforded to persons who support victims of crime.

Finally, the community's perceptions of the acquittal are important. In *S v Coetzee*⁸⁵ the court commented that "there is no doubt a pressing social need for the effective prosecution of crime". Goodpaster correctly points out that a criminal trial needs to generate decisions in a manner and with results that the community can accept and use.⁸⁶ Public trust in the criminal justice system is essential. Some see the outcome of the trial as not only a blow to survivors who come forward, but to all who support the fight for justice against gender-based violence.⁸⁷

82 Muntingh 2025 "Brief on the National Prosecuting Authority's Office for Ethics and Accountability" *Dullah Omar Institute* <https://dullahomarinstitute.org.za/acjr/acjr-publications/brief-on-the-national-prosecuting-authority2019s-office-for-ethics-and-accountability-by-lukas-muntingh-2025> (accessed 04-05-2026).

83 *Omosoto* para 62.

84 Media Statement "Justice Committee Concerned about Omosoto Acquittal, Poor Quality of Cross-examination" <https://parliament.gov.za/press-releases/media-statement-justice-committee-concerned-about-omosoto-acquittal-poor-quality-cross-examination> (accessed 28-07-2025).

85 1997 3 SA 527 (CC) para 13.

86 Goodpaster "On the Theory of Adversary Criminal Trial" 1987 *Journal of Criminal Law and Criminology* 152.

87 Soul City Institute "Enough is Enough: Eight Years, No Justice: Soul City Institute Reacts to Omosoto Verdict" <https://www.soulcity.org.za/news-events/eight-years-no-justice-soul-city-institute-reacts-to-omosoto-verdict> (accessed 29-07-2025).