

General Notice 870 of 2024.

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## CONSTITUTION OF ZIMBABWE

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### Notice Concerning the Review of the General Principles Published Pursuant to Section 260(2) of the Constitution by the Prosecutor-General

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IT is hereby notified, in terms of section 260(2) of the Constitution of Zimbabwe, 2013, as read with section 11A of the Criminal Procedure and Evidence Act [*Chapter 9:07*], that the Schedule sets out the second review of the general principles upon which the Prosecutor-General decides whether and how to institute and conduct criminal proceedings.

This notice supersedes the previous notice issued by the Prosecutor-General, published through General Notice 2759 of 2021.

7-6-2024.

HON. LOYCE MATANDA-MOYO,  
Prosecutor-General.

## SCHEDULE

# PROSECUTORIAL GUIDELINES

### PREAMBLE

ACCEPTING the responsibility entrusted upon me by the Constitution of Zimbabwe to independently decide whether and how to institute and conduct criminal proceedings without being directed or controlled by anyone and most importantly to ensure that the said decision is made without fear, favour, prejudice or bias;

AND AFFIRMING the supremacy of the Constitution of

Zimbabwe, whose obligations are binding on every person, natural or juristic, including the State and all executive, legislative and judicial institutions and agencies of Government at every level, and must be fulfilled by them:

NOW, THEREFORE, in fulfilment of the requirement set out under section 11A of the Criminal Procedure and Evidence Act [*Chapter 9:07*], I, Loyce Matanda-Moyo, the Prosecutor-General of the Republic of Zimbabwe, affirm that the decision on whether and how to institute and conduct criminal proceedings shall be guided by the Constitution, relevant statutes and case law that are within the body of Zimbabwe's criminal law and internal standard operating procedures, hereby review in accordance with the requirements of the law the said general principles.

## 1. Abbreviations

- 'CG' means the Commissioner-General of ZRP;
- 'CLO' or 'CPP' means Chief Law Officer in charge of a specialised Unit in the NPAZ or a Chief Public Prosecutor-in-charge of a province in Zimbabwe;
- 'Criminal Law Code' means the Criminal Law (Codification and Reform) Act [*Chapter 9:23*];
- 'Constitution' means the Constitution of the Republic of Zimbabwe;
- 'CP & E Act' means the Criminal Procedure and Evidence Act [*Chapter 9:07*];
- 'DPG' means a Deputy Prosecutor-General appointed in terms of section 8 of the NPA Act;
- 'DPP' means District Public Prosecutor;
- 'JSC' means the Judicial Service Commission established in terms of section 189 of the Constitution;
- 'LRF' means the Legal Resources Foundation;
- 'LSZ' means the Law Society of Zimbabwe;
- 'NPA Act' means the National Prosecuting Authority Act [*Chapter 7:20*];
- 'NPAZ' means the National Prosecuting Authority of Zimbabwe established by section 258 of the Constitution;
- 'MOJLPA' means the Ministry of Justice, Legal and Parliamentary Affairs;
- 'PG' means the Prosecutor-General of Zimbabwe appointed in terms of section 259 of the Constitution;
- 'PIC' means Prosecutor-in-Charge;
- 'PPCJLPA' means the Parliamentary Portfolio Committee on Justice, Legal and Parliamentary Affairs;
- 'PP' means Public Prosecutor;
- 'PPP' means Principal Public Prosecutor;
- 'SOPs' means the Standard Operating Procedures of the NPAZ;
- 'ZACC' means the Zimbabwe Anti-Corruption Commission established in terms of section 254 of the Constitution;
- 'ZRP' means the Zimbabwe Republic Police established in terms of section 219 of the Constitution;

## 2. Interpretation

In these guidelines—

“accused” or “accused person” means a person who has been arrested for or charged with an offence;

“complainant” means any person who is a victim of an offence;

“offence” means an act or omission punishable by law;

“public interest” means the welfare or well-being of the general public;

“suspect” means a person who is under consideration as a subject of formal criminal investigations or proceedings;

“vulnerable witness” means a person for whom any protective measure has been or is to be taken in terms of section 319B of the CP & E Act.

## INTRODUCTION AND AFFIRMATION

Considering the importance of these principles, consultations with various key stakeholders were conducted. The stakeholders consulted included: the JSC, ZACC, ZRP, LSZ, PPCJLPA and Law Faculties of Zimbabwean Universities.

These general principles give a broad view of the rationale and processes behind the making of decisions by the NPAZ in the

exercise of its prosecutorial duties. These guidelines will assist the general public and all stakeholders in understanding factors considered in making the decision to prosecute or not to prosecute. They will further assist in giving lay people an appreciation of the prosecutorial role, duties and discretionary powers without being overly legalistic. The general principles give an overview on the considerations that support the decision on whether to prosecute and how to conduct criminal proceedings. In compliance with the law the reviewed general principles will be available at all offices of the NPAZ for inspection by members of the public at all reasonable times during office hours.

The general principles seek to—

- promote transparency and openness in prosecutorial decision making;
- promote consistency in the conduct of criminal proceedings by prosecutors;
- promote consistency in decision making with regards to the prosecution of cases;
- ensure that prosecutorial discretion is used in a transparent and judicious manner;
- ensure fair and effective exercise of prosecutorial responsibility;
- promote public confidence that prosecutorial decisions are made rationally and objectively;
- provide reference points and guidance for all prosecutors;
- assist in the training of prosecutors;
- ensure institutional and individual accountability for prosecutorial decisions;
- enhance understanding and better co-ordination, co-operation and consultation between law enforcement agencies and related institutions; and
- curb abuse of authority in determining which matter to prosecute or not to prosecute.

On my behalf and on behalf of all public prosecutors, I affirm that I shall act in accordance with the Constitution and the law. I further affirm that I shall act without fear, favour, prejudice or bias and that I shall have due regard to the dictates of public interest and in the exercise of the NPAZ functions, not to—

- (a) act in a partisan manner;
- (b) further the interests of any political party or cause; and
- (c) prejudice the lawful interests of any political party or cause or violate the fundamental rights of any person.

I accept and affirm that I and all public prosecutors shall not be active members or office-bearers of any political party or organisation.

The specific and broader statement hereunder does not in any way seek to substitute the broad statement above but must be understood to be an address on matters that I consider need special attention as they present opportunity for misunderstanding if not specifically pronounced upon.

#### FACTORS CONSIDERED ON WHETHER OR NOT TO INSTITUTE CRIMINAL PROCEEDINGS

### **1. Reasonable Suspicion Consideration** (Application for remand pending trial)

Reasonable suspicion will be sustained if there are objective grounds that support a belief that an offence was committed or was about to be committed. Reasonable suspicion will be established if it is genuinely believed or suspected that an offence has been committed and in circumstances where any reasonable and right-thinking person would hold the same belief or suspicion. To establish reasonable suspicion against an accused the facts and circumstances relied upon must—

- (a) constitute an offence known at law; and
- (b) must show a clear nexus/connection between those facts and circumstances and the accused

### **2. Sufficiency of Evidence Consideration**

Broadly speaking, evidence can be described as any species of probative material that can legally be presented to a court of law for purposes of proving the existence of a fact. The evidence has to be sufficiently probative to assist in the proving of the guilt or innocence of a person accused of an offence. In regard to the decision to prosecute the available evidence must be sufficient to establish a *prima facie* case against the accused. A duty to prosecute shall arise in all cases where the available evidence establishes a *prima facie* case and there is no compelling reason for a refusal to

prosecute. In all cases in respect of which a *prima facie* case may be established, by the evidence on docket i.e., the witness statements, real or documentary evidence of such a nature that if presented to a court of law, by the prosecution, as admissible evidence, there exist a realistic prospect of conviction, the State will institute a prosecution. The evidence has to be obtained in terms of the law for it to be admissible in court.

### **3. Distinction between reasonable suspicion and *prima facie* proof**

Evidence sufficient to establish a reasonable suspicion, as required at the stage of arrest or placement of an accused person on remand pending trial, should not be equated to evidence required for proving a *prima facie* case – which is the standard prescribed for deciding to initiate a prosecution.

“Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; “I suspect but I cannot prove”. Suspicion arises at or near the starting point of an investigation of which the obtaining of *prima facie* proof is the end.”

When assessing the sufficiency of evidence for purposes of determining whether to initiate a prosecution it is important to ~~always draw a distinction between what amounts to suspicion and that which constitutes *prima facie* proof/evidence.~~

“There is another distinction between reasonable suspicion and *prima facie* proof. *Prima facie* proof consists of admissible evidence. Suspicion can take into account matters that could not be put in evidence at all ... suspicion can take into account also matters which, although admissible, could not form part of a *prima facie* case.”

### **4. The Public Interest Consideration**

Public interest is the welfare or well-being of the general public in which the public has some peculiar interest in the protection of their legal rights. There is however a constant need to strike a ~~balance between the interest of the public in effective criminal justice enforcement and the interest of the public in the protection of the rights and freedoms of all individuals suspected of, arrested for, charged with, convicted of and sentenced for an offence.~~ A person may in the public's subjective view be factually or morally guilty of committing an offence, but that does not mean they will be legally guilty. As a result, each matter shall be assessed meticulously i.e., on a case-by-case basis in order to objectively ascertain that the accused is guilty beyond a reasonable doubt.

The nature of the offence to be prosecuted shall be considered taking into account the means, the gravity or triviality of the offence and the effect the it had on the victim or any other person. The manner in which the offence was committed is also a consideration that affects public interest.

Peculiar circumstances of the offender are important. The age of the offender who may either be very old or very young, mental state, family set up and background are also factors that will guide the public interest considerations.

It is important to, disclose that, in very rare and in isolated cases, the PG, in the exercise of hers or his prosecutorial discretion, is empowered to decline to prosecute a matter, based on public interest considerations, even where the sufficiency of evidence threshold has been reached. Such decision is not one that can easily or lightly be arrived at, save, only after, conscientious and objective consideration of legitimate public interest factors.

## **SPECIFIC CONSTITUTIONAL AND STATUTORY PROVISIONS**

### **1. Constitution**

- Section 69—(Right to a fair hearing). The key consideration for the prosecution is to ensure that every person accused of committing an offence is expeditiously brought before a competent, impartial and independent court for the sole purpose of affording them a fair and public hearing;
- Section 70—(Rights of accused persons). The key guiding principles that guide prosecutors include, but are not limited to, the presumption of innocence, the right of the accused to be promptly advised of the charge, to be given adequate time to prepare his or her defence, to be informed of his or her right to be represented by a legal practitioner of own choice, at his or her expense, (this must be considered in light of the requirements stipulated by section 191 of the CP&E Act). Further rights include, the right not to be convicted of an act or omission which was not an offence when it occurred, not to be prosecuted for

an act or omission that is no longer an offence, not to utilize the fruits or any evidence that was obtained in violation of the Declaration of Rights, in circumstances where the admission of such evidence would render the trial unfair or would otherwise be detrimental to the administration of justice or the public interest, and finally the right to have the case reviewed by or appealed against to a court of superior jurisdiction;

- Section 81—(Rights of Children). The key principle that guides prosecutors is to ensure the protection of all children by guaranteeing them equal treatment before the law, to be detained for the shortest appropriate period, to be kept separately from detained persons over the age of eighteen years in conditions that take into account the age of the child, and to be granted adequate protection by the courts, This affords room for the prosecution to utilize the available mechanisms of pre-trial diversion that are designed to ensure that children, who come in conflict with the law are, where reasonably practicable, kept out of the formal criminal justice system;
- Section 259(11)—(Powers of the PG to direct the CG to investigate). This power will only be exercised in circumstances where the PG formulates an objective and honest opinion that the police, even after, being made aware of a possible criminal offence have neglected to or refrained from perform their constitutional mandate of investigating with the aim of bring to book the perpetrators. Once this power is invoked by the PG the CG is obliged to comply It is important to note that the PG retains the sole discretion to make an independent decision as to whether need exists to give such directive, bearing in mind the clear constitutional divide of the constitutional mandates of the investigatory branch of government and the prosecutorial branch of government. In any event, in practice the PG will only exercise this power in rare occasions bearing in mind the entitlement of an aggrieved party to compel the investigatory branches of government to fulfil their constitutional mandate by way of a judicial order of *mandamus* to require the investigators to institute and complete a comprehensive and diligent investigation of the alleged offence (reference *Chavunduka & Anor v Commissioner General of Police & Anor* 2000 (1) ZLR 418 (S)).

## 2. CP&E Act

- Section 4 – (Neither acquittal or conviction a bar to civil action for damages). This is a very important aspect of the law as it allows the victims of a crime to use the civil route to recover damages from the accused person. This should be read in conjunction with section 278 of the Criminal Law Code;
- Section 5(2) – Requires that where the PG deems it expedient, she or he may appoint any legal practitioner, subject to any general or specific instruction the PG gives, to perform all or any of the functions conferred on the PG by section 259 of the Constitution;
- Section 8 – (Power to stop public prosecutions). This entitles the PG to withdraw charges before plea, in which event, the accused is not entitled to a verdict of acquittal in respect thereof. Where charges are withdrawn, by the PG after an accused has pleaded to the charge, but prior to conviction, the PG may stop prosecution in respect to such charge and in such event the accused shall be entitled to an acquittal in respect of that charge.

What must be emphasised is that once a person has been charged with an offence the complainant is the State as represented by the PG, the victim or informant no longer in control or possesses the power to withdraw the criminal complaint/matter. This is clearly articulated in the PG's Circular No. 1 of 2017 and the general public is here made aware that after investigations have been undertaken to sustain a charge the prerogative to withdrawal the charge lies solely with the PG;

- Section 10 – (Power of ordering liberation of persons committed for further examination, sentence or trial). This broadly vests power in the PG to either make an order for the liberation of a detained unconvicted accused in circumstances where the PG is of the opinion that no grounds for prosecuting the accused exist or in the case of an incarcerated convicted offender, recommend to the court to set aside the conviction, in circumstances where the PG is of the opinion that the accused was wrongfully convicted;
- Sections 13 and 16 (Private Prosecution) – Where the PG declines to prosecute an accused at the public instance, she or he, at the request of any person, who can show some substantial and peculiar interest in either the acquittal or conviction of the accused, must, save in exceptional circumstances, grant to such person a certificate *nolle prosequi*, which is a critical requirement for instituting a private prosecution;

- Sections 115C and 117(2) – by reason of section 50(1)(d) of the Constitution, which elevated an accused entitlement to be released on bail pending trial, to a constitutional right, the PG will only oppose the granting of bail where it can be established by cogent evidence that there are compelling reasons justifying the refusal of bail.

## PROCEDURE FOR THE CONDUCT OF CRIMINAL PROCEEDINGS

### **Receipt of Crime Dockets**

Prosecution shall in all instances be commenced only upon the receipt of a completed crime docket from a competent investigating authority. A docket must contain the following: details of the accused person; time, alleged date and place of the commission of the offence and any other relevant miscellaneous information. The docket shall also contain the investigation diary which shows the steps taken in the investigation of the matter, ending with a summary of the relevant evidence prepared by the investigators. This should be signed off by the investigating officer. The docket should also contain the witness statements – from whence the NPAZ assesses the evidential requirements to undertake prosecution. Remember that a *prima facie* case must be established in all cases in order to institute a prosecution. These statements should contain all the relevant facts that prove each and every essential element of the charged offence. The docket should also contain documentary exhibits such as forged cheques, obscene or offending publications etc. The warned and cautioned statement or reply to the charge made by the accused, if any, must be included. It is constitutionally permissible for the accused to decline making any statement or giving any reply to the allegations against him or her. Simply put the accused has an unfettered right to remain silent and this should be respected by the State.

After perusal of the docket by the NPAZ, any of the following decisions may be made—

- Request the investigating authority to conduct, clearly defined or specified, further investigations; or
- Institute a prosecution; or
- Enter into a plea or sentence agreement with the accused; or
- Decline to prosecute and opt for pre-trial diversion or other non-criminal resolution; or
- Decline to prosecute without taking any other action – in such event detailed reasons for resorting to such course of action must be given by the declining prosecutor and included in the docket.

It is therefore crucial to note that the State must only prosecute where there is a docket. After receipt of a docket the factors mentioned above on whether or not to institute and conduct criminal proceedings then come into play.

Meaningful co-operation and collaboration with the investigating agencies of government is essential for the efficient and effective prosecution of offences. It goes without saying that where the investigating authorities do not or fail to adequately and efficiently investigate criminal cases, the likelihood of mounting successful prosecutions will be adversely affected.

### **Conclusion**

In the day-to-day discharge of the prosecutorial mandate as provided for under the Constitution of Zimbabwe, I and all public prosecutors shall endeavor to be fair, just and will at all times uphold the constitutional rights of all persons who are brought to the NPAZ for prosecution. I and all public prosecutors shall at all times endeavor to protect and preserve the rights and interests of victims and other persons affected by criminal activities to the best of our abilities as mandated by the law.