IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 82109/17

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

15/10/2019

In the matter between:

PSA obo MEINTJIES & 56 OTHERS	Applicant
and	
NATIONAL PROSECUTING AUTHORITY	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
MINISTER OF PUBLIC SERVICE AND ADMINISTRATION	Third Respondent
MINISTER OF FINANCE	Fourth Respondent
GOVERNMENT EMPLOYEES PENSION FUND	Fifth Respondent
DIRECTOR-GENERAL: DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Sixth Respondent

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JUDGMENT

VAN DER WESTHUIZEN, J

[1] The applicant is the Public Servants Association of South Africa, a trade union registered in terms of the provisions of the Labour Relations Act, 66 of 1995 (LRA). It acts in this matter on behalf of 54 Deputy Directors of Public Prosecutions (DDPP) and three Chief Prosecutors (CP), who are all members of the applicant.

[2] The first respondent is the National Prosecuting Authority of South Africa, the employer of all the DDPP's and CP's. It is established in terms of the provisions of the National Prosecuting Act, No. 32 of 1998 (the Act).

[3] The second respondent is the Minister of Justice and Correctional Services to whom the first respondent reports.

[4] The third respondent is the Minister of Public Service and Administration, a member of the National Executive, and who is responsible for public service and administration of South Africa.

[5] The fourth respondent is the Minister of Finance, a member of the National Executive, and responsible for the National Treasury of the Republic.

[6] The fifth respondent is the Government Employees Pension Fund, a pension fund scheme for government employees.

[7] The sixth respondent is the Director-General of the Department of Justice and Constitutional Development, who is the accounting officer.

[8] The applicant, on behalf of the DDPP and CP, seeks *inter alia* specific performance by the first respondent in respect of a contractual obligation relating to the structure of remuneration agreed upon by the parties.

[9] Only the first, second and sixth respondents oppose the relief sought. In this regard, it is to be noted that neither the third, nor the fourth respondent opposes the relief sought. It is further to be noted that neither the third nor fourth respondent filed any affidavit, whether opposing or explanatory. The importance of lack of an answering or explanatory affidavit by either of the third or fourth respondent will appear from this judgment.

[10] Fundamental to a determination of this application, is the interpretation to be afforded to the Act, the LRA and a number of other documents. It is trite that an important underlying principle in the interpretation of a document, whether it is a statute, a contract or other document of whatever nature, is that the document shall be given a purposive interpretation in its context as a whole.

[11] The first, second and sixth respondents (opposing respondents) have raised a number of points *in limine* and has dealt with the merits of this application to an extent. The points *in limine* raised are: lack of jurisdiction of this court; *lis pendens*; and lack of an application to condone the late institution of these proceedings and prescription.

[12] The essence of the opposition by the opposing respondents is summarised in the heads of argument filed on their behalf as follows:

> *"In essence, what the 56 (sic) employees ultimately seek, is that they be promoted to a position which does not exist at the NPA, more particularly the position of Specialist at level LP10."*

[13] This submission, in my view, does not do justice to the cause of action to be gleaned from the papers, nor is it correct. I shall deal with this issue later in the judgment. The issue of interpretation lies at the heart of the aforesaid submission of the opposing respondents.

[14] The opposing respondents primarily rely on three preliminary points, that of lack of jurisdiction, *lis alibi pendens* and no condonation for late institution of proceedings and prescription.

Lack of jurisdiction

[15] It is submitted on behalf of the applicant, that the dispute underlying this application, is of an contractual nature and in terms of the provisions of section 77(3) of the Basic Conditions of Employment Act, 75 of 1999 (BCEA), concurrent jurisdiction is conferred upon the High Court and the Labour Court in that regard.

[16] The opposing respondents submit that the pleaded case is one for the enforcement of Bargaining Council collective agreements. Hence, where the said collective agreements were concluded under the LRA, specific remedies are prescribed to enforce such collective agreements. Consequently, the High Court has no jurisdiction to hear the matter.[1]

[17] It is further submitted by the opposing respondents that the *dictum* in *Ekurhuleni Metropolitan Municipality v South African Municipal Workers Union*[2] finds application. In particular, reliance is placed on paragraphs 24 to 26 of that judgment. Those read as follows:

> *"[24] In argument on this point of jurisdiction, counsel for the respondent did not contend that the real dispute between the parties was not about the interpretation of the main agreement or the clauses of that agreement that have been referred to, but argued that those provisions had become a part of the employment contract of each of the full-time shop-stewards (in*

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[1] *IMMATU v Northern Pretoria Metropolitan Substructure* (1999) 20 ILJ 1018 (T)
[2] (JA12/13) ZALAC 61

this case that of Pos, Mazibuko and Moepye) and that the court a quo was interpreting, not the main agreement per se, but the individual contracts of employment of those employees insofar as those contracts "incorporated" the relevant clauses of the main agreement and that it had the power to do so in terms of section 77(3) of the BCEA.

[25] This argument, in my view, which is made to overcome the difficulty which the jurisdictional point presents to the respondent, ignores the primacy of collective agreements under the LRA. One could equally argue that the court a quo was interpreting the main agreement and that the dispute was about the main agreement which was the source of the relevant clauses. For this argument, respondent's counsel purportedly relied on section 23(3) of the LRA which provides: "Where applicable, a collective agreement varies any contract of employment between an employee and an employer who are both bound by the collective agreement." That provision is likely to apply to all collective agreements where reciprocal rights and obligations of employers and employees are dealt with. But it is not correct that if clauses in the collective agreement, by which the employment contract is varied, are interpreted, that it is in fact an interpretation of the employment contract and not of the collective agreement. The interpretation is certainly of the relevant clause(s) in the collective agreement and by implication, also of the relevant clauses in the employment contract.

[26] Collective agreements are to be accorded primacy. In National Bargaining Council for the Road Freight Industry and Another v Carlbaik Mining Contracts (Pty) Ltd and Another, this Court held that section 199 of the LRA, read together with section 23(3) of the LRA, purpose (is) "to advance the primary object of the LRA, namely the promotion of collective bargaining at sectoral level and giving primacy to the collective agreements

above individual contracts of employment." Section 199 provides, inter alia, in essence, that "contracts of employment may not disregard or waive collective agreements.""

[18] In *Steenkamp et al v Edcon Limited (1)*[3] the following was held:

"[137] The second basis for my conclusion that the applicants' appeal should be dismissed is a principle that, for convenience, I call "LRA remedy for an LRA breach". The principle is that, if a litigant's cause of action is a breach of an obligation provided for in the LRA, the litigant as a general rule, should seek a remedy in the LRA. It cannot go outside of the LRA and invoke the common law for a remedy. A cause of action based on a breach of an LRA obligation obliges the litigant to utilise the dispute resolution mechanisms of the LRA to obtain a remedy provided for in the LRA."

The opposing respondents rely on the principle enunciated in the aforementioned quote in respect of the point *in limine* that relates to lack of jurisdiction of this court.

[19] The issue to be decided is whether the cause of action that the applicant relies upon is a breach of an obligation provided for the LRA. In this regard it is required to consider the obligation that the applicant seeks specific performance in the context of the evidence placed before the court.

[20] The Act provides for various appointments of office, each having specific requirements. Of relevance to the present instance only certain appointments of office are of importance. These are:

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[3] 2016(3) SA 251 (CC)

"1 Definitions

In this Act, unless the context otherwise indicates-

...

'Deputy Director' means a Deputy Director of Public Prosecutions appointed under section 15 (1);"

"15 Appointment of Deputy Directors

(1) The Minister may, subject to the laws governing the public service and section 16 (4) and after consultation with the National Director-

(a) in respect of an Office referred to in section 6 (1), appoint a Deputy Director of Public Prosecutions as the head of such Office;

(b) in respect of each office for which a Director has been appointed, appoint Deputy Directors of Public Prosecutions; and

(c) in respect of the Office of the National Director appoint one or more Deputy Directors of Public Prosecutions to exercise certain powers, carry out certain duties and perform certain functions conferred or imposed on or assigned to him or her by the National Director.

(2) A person shall only be appointed as a Deputy Director if he or she-

(a) has the right to appear in a High Court as contemplated in sections 2 and 3 (4) of the Right of Appearance in Courts Act, 1995 (Act 62 of 1995); and

(b) possesses such experience as, in the opinion of the Minister, renders him or her suitable for appointment as a Deputy Director .

(3) If a vacancy occurs in the office of a Deputy Director, the Minister shall, after consultation with the National Director, as soon as possible appoint another person to that office.

16 Appointment of prosecutors

(1) Prosecutors shall be appointed on the recommendation of the National Director or a member of the prosecuting authority designated for that purpose by the National Director, and subject to the laws governing the public service.

(2) Prosecutors may be appointed to-

(a) the Office of the National Director ;

(b) Offices established by section 6 (1);

(c) Investigating Directorates ; and

(d) lower courts in the Republic .

(3) The Minister may from time to time, in consultation with the National Director and after consultation with the Directors, prescribe the appropriate legal qualifications for the appointment of a person as prosecutor in a lower court.

(4) In so far as any law governing the public service pertaining to Deputy Directors and prosecutors may be inconsistent with this Act, the provisions of this Act shall apply."

[21] In terms of section 15(1) of the Act, there are three categories of DDPP's. The first relates to the head of an Office referred to in section 6(1) of the Act, the second relates to the Office for which a Director has been appointed and the third relates specifically to the Office of the National Director. However, each category of DDPP has the same requirements in respect of qualifications and experience as required in section 15(2) of the Act.

[22] In the context of section 15 of the Act, and the Act as a whole, and taking into consideration the purpose of the Act, the meaning of *"possesses such experience"* in section 15(2)(b) of the Act can have no other meaning than relevant experience in prosecuting criminal cases. The further requirement in section 15(2)(a), namely having the right to appear in the High Court, confirms such interpretation. The right to appear in the High Court would depend on the particular circumstances, whether a legal qualification is required at the time. The second requirement is relevant experience (in criminal prosecutions). Those are the clear requirements.

[23] In my view, the aforesaid requirements support the assumption that a candidate for appointment as a Deputy Director of Public Prosecutions would, of necessity, have been appointed as a prosecutor in terms of section 16 of the Act. To hold otherwise would defy logic.

[24] Further in this regard, section 18 of the Act, clearly provides that the salaries of DDPP's and Prosecutors shall be determined by notice in the Government Gazette in accordance with the scale determined from time to time by the second respondent after consultation with the National Director of Public Prosecutions and the third respondent with the concurrence of the fourth respondent. In my view, the provisions of

section 18(1) of the Act does not distinguish between the appointment of prosecutors and DDPP's in respect of the structure of remuneration, albeit that different categories of salaries may apply.

[25] All the DDPP's on whose behalf this application is brought are employed in the Office of the National Director. They have confirmed that more than 80% of their work involves litigation and less than 20% administration. It would follow that the said DDPP's are in fact prosecutors who would have been appointed as such in terms of the provisions of section 16 of the Act. Further in that regard, it is common cause that all the DDPP's and CP's who were appointed as prosecutors, moved through the ranks, until being appointed as a DDPP or CP.

[26] The provisions of section 15(1)(c) of the Act, in the context of the Act as a whole and in the specific context of section 15 of the Act, clearly demonstrate that the functions and duties of a Deputy Director of Public Prosecutions who are employed in the Office of the National Director are those conferred or imposed or assigned to him or her by the National Director of Public Prosecutions. In the present instance, all the DDPP's are primarily prosecutors. This is common cause between the parties. There is also no dispute that the CP's are prosecutors, appointed in terms of the provisions of section 16 of the Act. The Act does not specifically provide for the appointment of Chief Prosecutors.

[27] It is an important jurisdictional fact that in terms of section 19 of the Act, the condition of service of DDPP's and prosecutors, other than their remuneration, are determined in terms of the provisions of the Public Service Act. The remuneration is to be determined in terms of the provisions of section 18 of the Act.

[28] In the present matter, and in particular regarding the issue of remuneration, the applicant refers to and relies upon the following:

(a) Resolution 1 of 2007, the first Collective Bargaining Agreement;

(b) Resolution 1 of 2008, the second Collective Bargaining Agreement;

(c) Notice No. 1146 published in Government Gazette on 2 December 2010;

(d) The National Director of Public Prosecution's approval regarding the implementation of the Occupation Specific Dispensation (OSD) dated 29 July 2014; and

(e) The memorandum from the Office of the Chief Executive Officer of the first respondent dated 24 November 2014.

[29] It is common cause that on 2 December 2010 the second respondent published a notice in terms of the provisions of section 18(1) of the Act. The notice records the following:

> *"DETERMINATION OF SALARIES OF PROSECUTORS UNDER SECTION 18(1) OF THE NATIONAL PROSECUTING AUTHORTY ACT, 1998*
>
> *WHEREAS the former Minister for Justice and Constitutional Development, as per Government Notice No. 1088 published in Government Gazette No. 31486 of 7 October 2008, determined as the first phase translation, on the same basis as provided for in the Occupation Specific Dispensation for legally qualified professionals as per GPSSBC Resolution 1 of 2008 and pending a final determination, new salaries for prosecutors with effect from 1 July 2007;*
>
> *AND WHEREAS a second phase translation and determination has been negotiated with the Department of Public Service and*

Administration in line with abovementioned Occupation Specific Dispensation;

NOW THEREFORE, I, Jeffrey Thamsanqa Radebe, Minister for Justice and Constitutional Development, acting under section 18(1) of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998), and after consultation with the National Director of Public Prosecutions and the Minister for the Public Service and Administration, and with the concurrence of the Minister of Finance, hereby determine an Occupation Specific Dispensation and second phase translation for prosecutors as per Schedule, with effect from 1 July 2007."

[30] It follows from a clear and purposive reading of the aforementioned notice in the Government Gazette, that the second respondent had determined the basis of remuneration in respect of prosecutors, *on the same basis as provided for in the Occupation Specific Dispensation for legally qualified professionals as per GPSSBC Resolution 1 of 2008 and pending a final determination, new salaries for prosecutors with effect from 1 July 2007.*

[31] In my view, although the determination of the basis for remuneration of prosecutors was premised upon a collective agreement, new salaries for prosecutors were in fact determined as prescribed in section 18 of the Act. The mere fact that the starting point for the determination of prosecutors' salaries is founded upon a collective agreement, it is ultimately determined in terms of the provisions of section 18 of the Act. That much is made clear in the context of the notice read as a whole. The wording "*on the same basis*" is nothing more than setting a baseline for the determination in terms of section 18 of the Act.

[32] Furthermore, after setting a baseline and having the further required consultation with other roll players, approval is obtained from the correct and proscribed authorities. That is to be gleaned from the

second paragraph of the preamble and the determining or concluding paragraph of the notice. The second respondent is the author of the notice of 2 December 2010. It is trite that any lack of clarity that may be found in the notice, is to be decided against the second respondent. That notice has not been withdrawn.

[33] The flaw in the opposing respondents' argument relating to the fact that collective agreements have no legal force under common law and is enforceable only under the LRA, is that the second respondent has merely used the collective agreement under GPSSBC Resolution 1 of 2008 as a guideline to set a baseline and not to endorse that collective agreement as being applicable and extended to prosecutors outright. Applying a collective agreement as a guideline to set a baseline is far different and distinct from enforcing or expanding the collective agreement. The ultimate decision is separate and distinct from the collective agreements.

[34] It follows that the distinction sought by the opposing respondents as to the enforcement under the common law and the LRA has no merit.

[35] Although some of the relief claimed in the notice of motion is related to the collective agreements, the applicant is in effect not seeking to enforce compliance with the collective agreement of 7 February 2008, but also seeks the notice of the second respondent of 2 December 2010 to be endorsed. The latter is clearly not a matter that only requires the attention of the Labour Court.

[36] Further in this regard, the applicant seeks specific performance as is clear from the notice of motion. The provisions of section 77(3) of the Basic Conditions of Employment Act, 75 of 1997, provide that concurrent jurisdiction is conferred to both the Labour Court and the Civil Court, i.e. this court. Furthermore, this court, in my view, has the necessary jurisdiction to hear this matter for what follows later in this judgement.

[37] The opposing respondents' point *in limine* in respect of lack of jurisdiction fails and stands to be dismissed.

[38] Furthermore, it is clear from the notice of 2 December 2010, that the second respondent had taken a decision to remunerate prosecutors (and by definition DDPP's and CP's) according to a new dispensation that provides for the translation of legally qualified professionals in line with the Occupation Specific Dispensation agreed upon by all relevant roll players, i.e. the National Director of Public Prosecutions (the first respondent), the Minister for the Public Service and Administration (the third respondent) and with the concurrence of the Minister of Finance (the fifth respondent) as per the provisions of section 18 of the Act.

[39] The prayer for specific performance is in effect premised upon this official decision by the second respondent in accordance with the provisions of section 18 of the Act.

[40] On 13 August 2008, the Director of the third respondent, one of the parties to be consulted when the salaries of prosecutors are determined, addressed a circular to all the government departments pertaining to the translation to, and implementation of, the Occupation Specific Dispensation for legally qualified personnel. This circular was presumably part of the consultation process as stipulated in section 18 of the Act. In this regard, the second paragraph of that circular reads:

> "2. *All qualifying legally qualified employees employed on salary levels 13 and 14 must translate to the Occupation Specific Dispensation (OSD) as follows: ...*"

[41] The catch words are "*salary levels 13 and 14*". The translation would be to the post of Production Specialist (LP10) as per the schedules attached to the circular. The intention of the translation was that qualifying personnel on salary levels 13 and 14 will translate from Senior Management Structure (SMS) to Occupation Specific

Dispensation on level LP10. Prosecutors (and by definition DDPP's and CP's) who were on salary levels 13 and 14 in the SMS scenario would translate to OSD level LP10.

[42] As recorded earlier, the second respondent, following on the aforementioned circular of 13 August 2008, published the vexed notice on 2 December 2010.

[43] It is to be noted that appended to the notice in the Government Gazette of 2 December 2010, were schedules that clearly identified DDPP's and CP's under job titles *"Litigation Specialist and Deputy Director of Public Prosecutors (Production)"*.

[44] Initially there appears to have been confusion or uncertainty relating to the issue of the OSD with respect to the qualifying DDPP's. The National Director of Public Prosecutions, as head of the first respondent and in terms of the authority vested in him, approved on 29 July 2014 the implementation of the OSD for levels 13 and 14 of the SMS and in respect of DDPP's and CP's. The implementation of the foregoing followed on a recommendation by the Chief Director: Human Resources (HRM&D) dated 18 July 2014.

[45] On 24 November 2014, a memorandum was circulated to all DND's of the first respondent. The memorandum, prepared by Adv. Karen van Rensburg, the Chief Executive Officer of the first respondent, informed all Deputy National Directors of the implementation of P10 in the NPA.

[46] Following on the aforementioned memorandum of the Chief Executive Officer of the first respondent of 24 November 2014, meetings were held on 25 May 2015 with the DDPP's and on 4 June 2015 with CP's, informing them of the implementation of the OSD LP10.

[47] Despite grievances being lodged by affected DDPP's and CP's, the implementation of the OSD LP10 came to naught.

Lis alibi pendens

[48] The opposing respondents have taken a second point *in limine*, that of *lis alibi pendens*. This preliminary point relates to pending matters before the Bargaining Council and another before the Labour Court in respect of the same relief sought in this matter and between the same parties on the same issues.

[49] The applicant states that the matter before the Labour Court relates to the issue of cost-of-living adjustments which, in terms of the provisions of section 18(1)(b), is to be determined by the second respondent. The applicant contends that on comparison of the two matters and the respective relief sought, there is no *nexus* and thus there is no similar pending *lis* before the Labour Court. I agree.[4]

[50] In respect of the matter before the Bargaining Council, the applicant states that that matter has been stayed pending a decision by this court. In view of the stayed nature of the matter before the Bargaining Council, this court may continue to hear this matter. In any event, it is trite that a court hearing a matter and in particular where the defence of *lis alibi pendens* is raised, the court has a discretion to either uphold the defence of *lis alibi pendens* or to deal with the matter despite the fact that the matter is pending in another forum.

[51] In view of my finding that the issue at hand is not the expansion of Resolution 1 of 2008 to DDPP's and CP's, but the decision by the second respondent as set out in the notice of 2 December 2010 and the decision to implement that notice as evidenced by the approval of the recommendation in the memorandum of 18 July 2014 and the meetings of 25 May and 4 June 2015, this preliminary point is without merit and fails. It stands to be dismissed.

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[4] *Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC et al* 2013(6) SA 499 (SCA)

Condonation and prescription

[52] The preliminary point raised by the opposing respondents of lack of condonation is without merit. That point is raised in respect of alleged relief sought with regard to the implementation of cost-of-living adjustment. The applicant does not seek in this application any relief in respect of the implementation of any adjustment of cost-of-living. This point fails and stands to be dismissed.

[53] In respect of the issue of prescription, the DDPP's and CP's represented by the applicant have raised grievances during 2015. The dispute raised has, it is contended by the applicant, interrupted the running of prescription.

[54] In my view, the issue of prescription does not arise in this matter. The second respondent has taken a decision as clearly identified in the notice of 2 December 2010, but the first respondent has put the implementation thereof on hold per the DNP in office at the time of the institution of this application, namely Adv. Abrahams. That decision to put the implementation of OSD LP10 by the predecessors of Adv Abrahams, on hold was clearly arbitrarily taken. In any event, the implementation of the OSD LP10 cannot summarily be ignored, unless the required process to suspend such decision of implementation has followed to its finality. This has not happened. The original decision stands until set aside.[5]

[55] The DDPP's and CP's have timeously, i.e. during 2015, declared a dispute by raising grievances for the non-implementation of the OSD. During 2017 the applicant instituted this application.

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[5] *MEC for Health, Eastern Cape v Kirkland Investments (Pty) Ltd* 2014(3) SA 481 (CC); see also *Economic Freedom Fighters v Speaker of the National Assembly* 2016(3) SA 580 (CC)

[56] For the foregoing, the issue of prescription does not arise.

[57] In view of the approach taken in this judgment, it is not required to consider and determine the issue of reasonable legitimate expectation raised by the applicant. However, that issue has been conceded by the opposing respondents.

Prayer for Specific performance

[58] The DDPP's and CP's respectively completed the required documents indicating their acceptance to migrate from SMS to OSD. In my view, that indicates a clear acceptance of the provisions stipulated in the notice of 2 December 2010 as approved by the first respondent on 29 July 2014. Consequently, an agreement was reached between the DDPP's, CP's and the first and second respondents. It is that agreement that is sought to be complied with by the applicant.

[59] Further in this regard, neither the third nor fourth respondent has participated in this application. That lack of participation is telling. In my view, if the applicant's contentions in respect of the notice of 2 December 2010 are flawed, the third and fourth respondents would certainly have placed the relevant and true facts before the court. The absence of such facts is a further support that the required and necessary consultation and concurrence were achieved.

[60] It follows that the preliminary points taken by the opposing respondents stand to be dismissed.

[61] The applicant is entitled to the relief sought in so far as it relates to specific performance of the second respondent's notice of 2 December 2010 in the Government Gazette of that date as approved by the first respondent on 29 July 2014.

I grant the following order:

(a) The first respondent is ordered to comply with the Government Notice dated 2 December 2010 and gazetted in terms of the provisions of section 18 of the National Prosecuting Authority Act, 32 of 1998;

(b) The approval by the National Director of Public Prosecution on 29 July 2014, regarding the implementation of the Occupation Specific Dispensation as provided for in the second respondent's notice of 2 December 2010, and gazetted in the Government Gazette of that date, is declared to be lawful and enforceable, and must be complied with;

(c) The first respondent is directed to pay the costs.

C J VAN DER WESTHUIZEN
JUDGE OF THE HIGH COURT

On behalf of Applicant:	S Sethene
Instructed by:	Couzyn Hertzog & Horak
On behalf of Respondent:	F A Boda SC Z Ngwenya
Instructed by:	State Attorney