**SOUTH AFRICA: SPECIAL INVESTIGATION TRIBUNAL – ASSET RECOVERY**

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Introduction

South Africa has, in recent years, experienced unprecedented levels of fraud and corruption across all spheres of government, particularly, in relation to public tender and procurement practices. More recently, the narrative of ‘state capture’ was introduced to describe the broad sweeping nature of the corruption which has plagued South Africa. Most interestingly for current purposes, ‘state capture’ extended also to the South African investigative and prosecutorial agencies, rendering them largely ineffective and unable to execute their enforcement mandate. This was confirmed in the recently released report following the Mokgoro Enquiry which resulted in President Cyril Ramaphosa dismissing the Deputy National Director of Public Prosecutions, Nomgcobo Jiba and Special Director of Public Prosecutions Lawrence Mrwebi.

When Rhamposa took over from former president, Jacob Zuma, he emphasised that addressing the levels of corruption in South Africa was a priority. To do so, Ramaphosa was forced to look at the malaise within the investigative and prosecutorial agencies and, in an effort to stem the rampant corrupting, Ramaphosa appointment the judicial commission of inquiry into state capture (“**State Capture Inquiry**”).

The evidence uncovered during the State Capture Inquiry made clear that more drastic measures were required to investigate and more importantly, prosecute matters of corruption in order to ensure that the money lost to corruption is returned to the state.

In a proclamation dated 25 February 2019 (“**Proclamation**”), the President announced that a specialised tribunal will be established in terms of section 2(1) of the Specialised Investigation Unit and Tribunals Act, 74 of 1996 (the “**Act**”) in order to adjudicate on cases arising out of the State Capture Inquiry (“**Tribunal**”). More specifically, the Tribunal will be aimed at fast-tracking the process of asset recovery of high priority cases mandated to the South African Special Investigation Unit (“**SIU**”).

Powers and function of the SIU

The SIU is a specialist and independent investigative unit, established in terms of the Act and falling under the Department of Justice and Correctional Services.

The SIU is generally regarded as the state’s forensic investigator, however, its powers and mandate include civil recovery of state monies and assets, providing evidence into disciplinary enquiries arising from an investigation and referring criminal matters to the National Prosecuting Authority (“**NPA**”) for criminal prosecution. Notably, the NPA has the sole mandate of instituting criminal action on behalf of the state and the final decision to institute criminal action lies only with the National Director of Public Prosecution. The SIU can only make recommendations to the NPA.

The SIU is a ‘creature of statute’ and its powers must specifically be mandated by way of a President proclamation.

In terms of process, section 4 of the Act states that the SIU may institute and conduct civil proceedings in a special tribunal in its own name or on behalf of the State. In the absence of a special tribunal, the SIU has to date been limited to pursuing civil proceedings in the High Courts and/or referring matters to the NPA for criminal prosecution and recovery, which has led to significant delays in the finalisation of matters referred to the SIU by the President. The 2018/2019 Annual Report, released by the SIU, showed that for the period under review, the SIU completed 1556 investigations and referred 148 matters to the NPA for criminal prosecution with many more civil cases currently pending before the various South African High Courts.

It is for this reason that the President established the Tribunal in order to “fast track the finalisation of matters that the SIU typically refers for civil litigation following their investigations”. Rather than proceeding through the already backlogged High Court system, the Tribunal now offers the SIU an alternative option for asset recovery.

Jurisdiction of the Tribunal

Importantly, the Tribunal’s functions and powers are limited to civil proceedings.[[1]](#footnote-1)

The South African Prevention of Organised Crimes Act, 12 of 2004 (“**POCA**”) provides for civil asset recovery under chapter 5 of POCA, without the need for a criminal conviction. The perceived benefit of civil asset recovery is that the onus of proof in civil proceedings is significantly lower than criminal proceedings, the former burden being on a balance of probabilities (as opposed to the onus of proving guilt beyond reasonable doubt in criminal proceedings). Practically, however, there have been limited cases brought in terms of chapter 5 of POCA. Of greater concern is that individuals involved would still be undeterred, largely as a result of the incapacity and delays at the NPA. A perceived lack accountability (i.e. criminal prosecution) has been identified as a key factor in criminal conduct.

Limiting the jurisdiction of the Tribunal to civil litigation, further excludes the application of the the International Co-operation in Criminal Matters Act which raises concerns *apropos* funds which have been transferred offshore.

Secondly, the Tribunal has limited jurisdiction in respect of cases which emanate from an investigation of the SIU. In this regard, section 8(2) of the Act states that the Tribunal will have the “*power to adjudicate in civil disputes which are brought before it by a special investigation unit or an interested person who emanates from a SIU investigation*”. The latter reference to “interested person” suggests that the State (including a municipality, state owned entity or other organs of state) which is the subject of an investigation could conceivably institute proceedings in the Tribunal through private litigators. In theory, the NPA’s Asset Forfeiture Unit may also institute proceedings in the Tribunal on behalf of the State.

There is still some uncertainty as to how the Tribunal will deal with the large overlap between the terms of reference of the State Capture Inquiry and the various proclamations issued by the President and more particularly, whether the Tribunal will be able to assert jurisdiction over matters brought by “interested person[s]”, based on evidence uncovered at the State Capture Inquiry.

Furthermore, there are critics who believe that the Tribunal results in an unnecessary complication and that the ‘tried and tested’ methods of High Court litigation are the preferred route to follow, particularly in light of the uncertainties *vis-à-vis* the jurisdiction and powers of the Tribunal and its limitation regarding foreign asset recovery.

Conclusion

The establishment of the Tribunal has largely been welcomed by the public and legal practitioners as a positive step towards the eradication of corruption in South Africa at a time when South Africa finds itself at cross-roads where imminent and drastic action is required. The Tribunal will hopefully assist in fast tracking the recovery of the proceeds of crime in order for such funds to be invested back into the economy.

1. Sections 2(1)(b) and 8 of the Act. [↑](#footnote-ref-1)