

## It is not the Criminal, it is the Civil

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After a week during which both Jacob Zuma's and Ace Magashule's criminal trials were postponed again, many South Africans are wondering when they will see people in orange overalls. That is fair. But while the wheels of *criminal* justice turn slowly, it doesn't mean there are no consequences for wrongdoing. *Civil* proceedings have already had quite an impact.

### The criminal-civil distinction

The criminal-civil distinction is important. Criminal cases must be proved 'beyond all reasonable doubt'. That is much more stringent than the 'balance of probabilities' required in a civil case. As the veteran prosecutor Gerrie Nel once put it, 'Knowing something has happened is a long way from being able to prove it in court.' South Africans have a good idea of what has happened thanks to evidence before the Zondo Commission and some really good investigative journalists. Proving all that beyond all reasonable doubt is a very different story.

The National Prosecuting Authority (NPA) and Hawks made the point in a recent joint submission to parliament: civil cases 'are administrative in nature and the burden of proof is **merely** on a balance of probabilities' (my emphasis). The NPA/Hawks work with criminal prosecutions, where the bar is higher. Their submission pointed out that in some cases audit reports fill 75 lever arch files which must be studied and compared to witness statements and documents in the criminal file. In an under-statement to parliament, they reported that it 'is time consuming'. One can almost feel their frustration.

Civil actions are easier. The main instrument of civil action in South Africa is the Special Investigative Unit (SIU) created in 1996. Its purpose is to investigate 'serious malpractices or maladministration in connection with the administration of state institutions, state assets and public money as well as any conduct which may seriously harm the interests of the public'. It does not have to prove a crime.

The case of the former Gauteng Health MEC, Bandile Masuku, illustrates the difference between criminal and civil proceedings. The SIU investigated the irregular awarding of tenders by the Gauteng Health Department whilst Masuku was MEC. The SIU found that he had been derelict in his duties as political head of Gauteng Health and suggested the premier act against him. The premier fired Masuku, who took the SIU report on review to the High Court. The latter found that '... the very purpose of the SIU is to investigate and reach conclusions which may found accusations of wrongdoing or impropriety – this role is purely investigative and not determinative'. The SIU did not have to prove that Masuku was involved in corruption, merely that there was a rational reason to conclude that he neglected his duties. The High Court dismissed Masuku's review with costs. If the SIU had to prove criminal intent, the outcome could have been very different.

After his forced resignation Zweli Mkhize thundered that he would take the SIU's Digital Vibes report on review. He may very well come up against the Masuku ruling, but let's wait and see.

### Extra capacity and more investigations

Court roles in South Africa are notoriously overloaded, with cases taking years to resolve. In 2019, President Ramaphosa established a Special Tribunal specifically to hear cases from the SIU outside the normal court rolls. Eight High Court judges in Gqeberha, Cape Town, Durban and in Gauteng have been tasked to serve on this.

President Ramaphosa has also sped up the work of the SIU considerably. In the three and a half years since he became president, he has gazetted 45 cases for the SIU to investigate. In the 17 years before he became president, a total of 116 cases were gazetted. I will write it again: 45 cases in three and a half years and 116 in 17 years. President Ramaphosa has literally doubled the annual number of SIU investigations.

## **President is not prosecutor**

Some argue that he is not driving criminal prosecutions hard enough. And neither should he. It will be a sad day in South Africa if the president gets involved in the prosecution of citizens. We have been there, it was sad, why repeat it?

Criminal prosecution is and should be the exclusive job of the NPA. The president has created a new unit in the NPA, the Investigate Directorate headed by Hermione Cronje. It focuses specifically on state capture prosecutions. He has changed the regulations to make evidence and personnel of the Zondo Commission more easily accessible for the NPA. The ball is now in their court, and the president should stay out of it.

## **Results of SIU work**

The SIU and the Special Tribunal have taken several high-profile scalps, like that of Zweli Mkhize, once touted by some as a future president; and Health MECs Bandile Masuku in Gauteng and Sindiswa Gomba in the Eastern Cape. She, of the ambulance scooters was also arrested for criminal prosecution along with her personal assistant.

Two months after he became president, Ramaphosa gazetted a SIU investigation into Eskom. By December 2019 there had been 59 dismissals for fraud and corruption; to date more than 1049 disciplinary enquiries have taken place; scores of employees resigned; the SIU is now investigating 40 employees after 366 lifestyle audits were conducted; and summonses were issued to recover R3,8 billion from 12 well-known defendants like the Guptas et al. Eric Wood of Trillian fame is fighting a personal sequestration order as part of efforts to recover R300 million from him. Civil actions do have bite.

The SIU and law firm Bowmans found a slush fund used by executives to pay millions to themselves for chicken farms and other passions. The SIU is investigating five private-sector companies for over-payment by Eskom to the tune of R1 billion. Much, much more is still to come from Eskom. It will probably carry on for years, but a clean-up is on the go.

In 2018, President Ramaphosa also ordered a SIU investigation into Transnet. In one of the very first Special Tribunal cases, former Transnet Capital Projects executive, Herbert Msagala, was ordered to forfeit 35 vehicles, several properties, and a farm. (An appeal by Msagala and his trusts was dismissed.) Scores of Transnet executives have left, and a new management team is in place.

Eskom and Transnet are the big names and had the big pots of money. But SIU work is also claiming scalps in the provinces and in lesser-known government entities. In our database on corruption, we have scores of entries on scalps claimed from the biggest entities to the smallest municipalities in the country. Just a few examples from many.

In the North-West province, the Head of Education resigned after being fingered in a SIU report. At the JB Marks Municipality (also North-West), the SIU froze the pension of a senior manager, and he was dismissed. The Chief Financial Officer (CFO) at the National Department of Agriculture lost his job and his pension to the SIU. At the Council for Medical Schemes the CFO, the Chief Information Officer and five general managers were all fired after a SIU investigation.

Currently, there are more than 90 SIU ongoing investigations.

COVID-19 related corruption fired South Africans up in 2020. In July 2020 the president ordered an investigation into all COVID-19-related procurement in all state institutions. Total COVID-19 expenditure for the last year was R126.7 billion, of which the SIU is investigating R14.3 billion (11,3%). Applications to cancel the underlying contracts and recover the money for R614.3 million (excluding Digital Vibes' R159 million) have already been made to the Special Tribunal. In June 2021, by value, 40% of the contracts have been investigated, 54% are currently being assessed and 6% have yet to commence.

In other civil action, former minister Bathabile Dlamini lost her ministerial pension after a civil claim for fruitless expenditure whilst she was a minister. No orange overall, but certainly financial pain and discomfort. The seven VBS accused have been arrested and are awaiting their criminal trial. In the meantime, they have all been declared insolvent because of civil action brought by the VBS executors.

## So what?

- South Africans tend to equate orange overalls, ie criminal prosecutions, as the only consequences for theft and looting. Indeed, where crime has been committed there must be orange overalls.
- However, there are also consequences from civil action. People lose their jobs, pensions, (stolen) money and assets and some are declared insolvent. Colleagues, friends, and family see this up close too. It is a visible manifestation of consequences for theft and looting.
- Civil action, mainly through the SIU, has developed into the main instrument for fighting corruption, holding people accountable and reversing impunity.
- In the ANC under Zuma there was clearly a “see no evil, hear no evil” attitude combined with serious impunity. Civil action is helping reverse that. Senior politicians losing their jobs and pensions was simply unthinkable five and ten years ago.
- Many more investigations have been referred to the SIU since Ramaphosa became president and he established a Special Tribunal to speed up the work of the SIU.