

Neither a one-day, nor a one-person job.

20 September 2023

Learning from others

In 2021, two researchers published a paper on corruption in the US between 1865 and 1941, a period infamous for its corruption. They distilled four lessons from that period.

- Their first finding was that ‘it is possible to make a transition from a systemically corrupt political system to a system in which public corruption is aberrational.’ The paper specifically rejected the notion that an entrenched culture of corruption is virtually impossible to dislodge. South Africans can take comfort from that.
- Secondly, the US transition away from systemic corruption was incremental, uneven, and slow. There was ‘no big bang’. Some you win, some you lose. Again, South Africans can relate to this as we consider the first state capture case folding (the Nulane case, which the National Prosecuting Authority (NPA) is now appealing) and the fumbling on TV of the prosecution at the Senzo Meyiwa trial. Such defeats are painful but are not the end of the story.
- Thirdly, reduction in systemic corruption coincided with a substantial expansion of government in size and power, ie more resources going into the fight. Beware budget cuts for the NPA and the courts.
- Fourthly, institutional reforms played a key role in the US fight against corruption. Progress involved a combination of ‘direct strategies (such as aggressive arrests and prosecutions), and ‘indirect strategies (such as civil service reform and other institutional changes).

The focus of this note is on the institutional reforms in South Africa.

Creating institutions

Institutional reform in South Africa started in 2019 when President Ramaphosa created a tribunal to hear Special Investigative Unit (SIU) cases and, a month later, the Investigative Directorate (ID).

(The president started ‘people reform’ a year earlier when he fired the NPA director, later the two deputy-directors, and in due course also reversed the promotions of several senior prosecutors.)

The SIU Tribunal

The Tribunal – a panel of High Court judges – started life in 2019 and only handles SIU cases. The SIU is an ‘old’ organisation which started life in President Mandela’s time as the so-called ‘Heath Commission’. Its purpose is to use civil litigation to recover public funds lost to corruption or maladministration. For years, the SIU had to join the queue at the High Court to get orders to freeze and reclaim money. Creating a separate tribunal focusing only on SIU cases sped up the process considerably. Apart from monies recovered, it has also claimed several scalps as many people lost their jobs because of SIU investigations, most notably the previous Health minister, Zweli Mkhize, after the SIU pounced on Digital Vibes.

It is noticeable that the amount of money recovered, and volume of cases handled increased after 2018. In 2022, the SIU recovered funds and assets to the value of nearly R6 billion and set aside contracts to the value of R5,5 billion. Currently, around 119 cases worth more than R12 billion are enrolled at the Special Tribunal.

The SIU and the Tribunal have become South Africa’s most effective weapons against corruption. Fighting corruption is not just about orange overalls. Losing ill-gotten gains and jobs are very much part of holding the corrupt accountable.

The Investigative Directorate (ID)

In April 2019, the president established the Investigating Directorate (ID) in the National Prosecuting Authority. The ID is a prosecutor-led agency tasked to investigate and prosecute state capture cases. State capture and corruption is the NPA’s number one priority and the ID is key to that. The ID’s first head was Hermione Cronje. She resigned after

two and a half years and was succeeded by the feisty Andrea Johnson.

Experience shows that prosecutor-led investigations give better results. Readers will remember the old Scorpions which was exactly that (a prosecutor-led agency), and which was dismantled as the Zuma-era started. Luminaries like Zwelinzima Vavi and Fikile Mbalula have since admitted their mistake in supporting the abolition at the time.

To date, the ID could not quite fill that gap. It was established by presidential proclamation and can thus be disbanded by proclamation. The lack of permanence made it difficult to attract permanent staff, particularly analysts and criminal investigators. The ID has had to rely on secondment from other departments. Legislation is now in Parliament to make the ID a permanent institution with full investigative powers.

Once the legislation is passed, expect more Investigative Directorates to be created to tackle illegal mining and organised crime syndicates. As organised crime becomes more sophisticated and better resourced, so must the anti-crime institutions.

(For the record, there is criticism that the proposed legislation does not go far enough, particularly that the ID is not made a Chapter 9 institution. On the basis that the perfect need not be the enemy of the good, I will not cover that argument here.)

Currently the ID is working on 97 state capture investigations. They have enrolled 35 cases involving over 200 people (including senior politicians, civil servants, former CEOs, and corporate heavyweights like Tongaat-Hulett, ABB, McKinsey, Steinhoff and others). The ID has also secured restraining orders valued at R7.18 billion.

It is interesting to note that the UK equivalent of the ID, the Serious Fraud Office, a much older and more established institution than the ID, limits itself to about 100 cases at any given time. A targeted approach with priorities brings more success.

One of the biggest successes to date is the R2,5 billion punitive fine extracted from the global engineering company ABB for fraud committed at Eskom. The proceeds went into CARA – see below. (Back in 2020, ABB also paid R1.6 billion to Eskom to settle an investigation into allegedly criminal conduct involving contracts at the Kusile power station. They really had their hands deep in the cookie jar!)

Stronger coordination

The Anti-Corruption Task Team (ACTT) is a multi-agency team overseeing high-priority investigations and prosecutions. It brings together the NPA, ID, Hawks, South African Police Force (SAPS), intelligence services, the Financial Intelligence Centre, and others to combine resources and ‘follow the money’. As a direct result of the task team’s work, 554 suspects were arrested for corruption, of which 142 were convicted between 2019 and 2022.

The South African Revenue Service (SARS) continues to fight corruption with lifestyle audits and other legislative tools. It is piloting a new unexplained wealth initiative to recover assets suspected of having been acquired illegally or through the proceeds of crime.

When private shareholders, assisted by prominent banks, were ready to sell Tongaat-Hulett to suspect buyers, SARS stepped in with a tax claim that torpedoed the transaction. When Gupta-linked company Regiments Capital succeeded in staving off liquidation, SARS slapped it with a R700 million tax bill. Nice to see coordinated action.

Building partnerships

A further step in building better institutions is the partnership between the government and the private sector that authorises private sector resources to be made available to the NPA. The support can only be in kind, not money; and it is not with any individual companies, but with the Resource Management Fund (RMF) which also coordinates assistance to Eskom and Transnet. The partnership should help the NPA, particularly in the prosecution of complex corruption cases and in fighting organised crime.

The show goes on

In the meantime, the old workhorses of the NPA are carrying on.

The **Asset Forfeiture Unit (AFU)** investigates cases of organised crime and can seize assets or proceeds of criminal behaviour after it obtains a court order. Over the past five years the AFU has obtained 1 630 freezing orders to the value of R12,4 billion. (The money goes into CARA – see below.)

The **Specialised Commercial Crimes Unit (SCCU)**, which pursues, among other cases, corruption involving the state and state-owned enterprises, has an 87% conviction rate of government officials. Interestingly enough, it obtained 52% more convictions of people from the private sector than of people from the public sector. Clearly not only public servants put their fingers in the cookie jar.

The **Prosecuting Service** (the biggest workhorse in the NPA), deals with around 850 000 cases per year. At 250 working days per year, which comes to 5 550 cases per day or 700 per hour! The Prosecuting Service averages a conviction rate of 90% in the High Court, 82% in the Regional Courts and 95% in District Courts. In the case of complex tax cases, the conviction rate is over 96%. Once you are in the dock you are probably guilty. Better to stay out.

CARA – the Criminal Asset Recovery Account – is where monies recovered through NPA actions are deposited. It is then disbursed to fight priority crimes and help victims of crime. Currently there is some R3,4 billion in CARA and it is earmarked for combating illegal mining operations and building forensic capacity.

The NPA cannot do it alone

The above data, however, does not tell us about the SAPS and court administration, two institutions next to the NPA, wholly independent from, but critical to the NPA's success.

Shoddy police work undermines prosecutorial success. There is a ton of empirical evidence, from the likes of the Institute for Strategic Studies, that SAPS is a highly dysfunctional organisation. Its budget has increased, but its performance keeps declining. Money is not a problem. It is an area where both institutional and people reform are desperately needed. The president clearly needs to repeat the people reform and institutional renewal at SAPS that he initiated at the NPA from 2018.

There is not as much empirical evidence on dysfunctionality in court administration, but many cases just do not advance, and some judgements are inordinately delayed. Load-shedding does not help either, as court days are shortened. The courts are not part of the civil service and fall under the Office of the Chief Justice, complete with its own budget, personnel, and head office. Interference is correctly frowned upon. But judicial independence cannot exclude accountability for managerial and administrative weakness.

Consequences for 2021 KwaZulu-Natal (KZN) riots ongoing

The KZN riots of 2021 was South Africa's equivalent of the attack on the US Capitol on 6 January 2021, and the Bolsonaro riots in Brazil in January 2023.

On the KZN riots, 63 people have to date been charged and 28 preservation orders have been obtained by the Asset Forfeiture Unit. The first convictions were in August and September 2022 (about 14 months after the riots) followed by more convictions this year, the latest in this month. Investigations and prosecutions are still ongoing.

Out of curiosity I looked at prosecutions in the US for the 6 January attack. The first trial took place in March 2022 (about 14 months after the event) and cases are still ongoing. The wheels of justice turn slowly.

In Brazil, the first conviction was on 14 September – nine months after the attack there. The Brazilian judiciary created a 'fast track channel' just to hear and adjudicate these cases. Perhaps we can follow suit with similar courts on processing certain types of priority crimes?

So what?

- South Africa's titanic struggle against crime and corruption is not unique. It happened in the US, Singapore, Italy, and Ukraine. China is facing it right now.
- One lesson from the US experience is that progress is incremental, uneven, and slow. But there is progress. Monies recovered, cases enrolled, new institutions created, capacity strengthened...all of this is happening in South Africa.
- In the process, values shift. Consider how far the body politic has come since the days when Nkandla expenditure was vigorously defended, Gupta-looting was protected by official sanction, and Bosasa cash was handed out on video. Today, it is accepted practice that people with charges against them cannot/do not contest elections. Systems do change, however slowly.

- Another lesson from the US is ongoing civil service reform. People and institutional reform have happened in the NPA since 2018. But crime and corruption cannot be defeated by the NPA alone.
- It is now time for people and institutional reform in other parts of the civil service, ie SAPS, the Hawks and court system.
- The private sector also needs more accountability. Not too much action has been taken against auditors, lawyers, health professionals and other individuals in the private sector who fleece the system. Regulatory and corporate bodies have a role to play.