

# Independence in South Africa's Anti-corruption Architecture: Failures and Prospects



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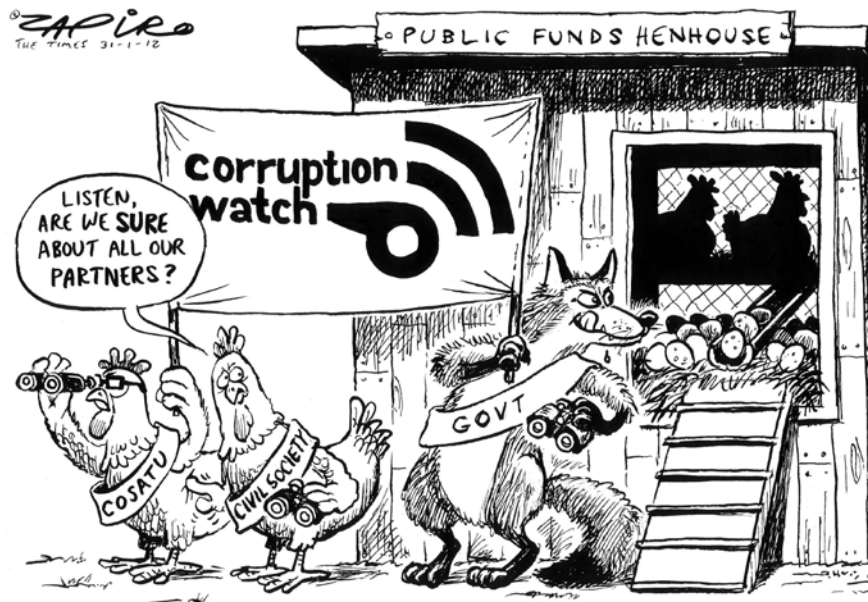
## Corruption

*There is a widespread belief that the level of corruption in South Africa has worsened significantly over the past few years. For example, on Transparency International's Corruption Perceptions Index, the country dropped 31 places from a ranking of 38 in 2001 to 69 in 2012.<sup>1</sup> Public concern around the need for government to prioritise tackling corruption has increased in recent years. The March 2012 Afrobarometer survey results rate the figure at an all time high of 26%.<sup>2</sup> Moreover, according to the survey, the proportion of people who thought that most or all national, provincial and local politicians were corrupt has more than doubled since 2002.<sup>3</sup> Only 33% of respondents thought that government was doing a good job in fighting corruption, a decrease from the 45% who thought so in 2006.<sup>4</sup>*

It is not merely that perceptions of corruption worsening have increased; there is hard evidence that actual levels of corruption have increased. For instance, the law firm Edward Nathan Sonnenbergs (ENS) in a report based on parliamentary documents and data from the Public Service Commission (PSC) concluded that in the 2011-2012 financial year, public sector fraud and malfeasance cost taxpayers close to R1 billion.<sup>5</sup> This was a considerable increase from a loss of R130.6 million in the 2006-2007 financial year.<sup>6</sup> A primary reason as to why corruption has worsened in South Africa is that there is little accountability for those who perpetrate it. The ENS report, for example, found that even though 88% of the public officials who were facing charges of financial misconduct were found guilty, only 19% lost their jobs. The vast majority (81%) continued with their employment in the public sector.

Corruption is not just a phenomenon that affects the public sector. As was well publicised, in June 2013 South Africa's Competition Commission fined 15 influential construction companies a total of R1.46 billion for bid rigging.<sup>7</sup> Clearly, South Africa is threatened by growing levels of corruption, which diverts substantial resources away from addressing key challenges into the pockets of highly unethical individuals.

Nevertheless, the South African government continues to speak out regularly against corruption and attempts to convince the public that the issue is being taken seriously. For example, Justice and Constitutional Development Minister, Jeff Radebe, publicly named and shamed 42 people, the majority of them civil



servants who were convicted of fraud and corruption.<sup>8</sup> Of course this was largely political showmanship as naming a few people who had already been publicly convicted in a court of law is hardly going to deter the vast majority of those that continue to commit acts of corruption and escape justice. However, this initiative was meant to convey the sentiment that government is willing to take new steps to stem the tide of corruption. During the same speech, the justice minister sought to assure the public that the country's architecture for combating corruption adhered to international practices as stipulated in various international protocols and conventions. These include the United Nations Convention Against Corruption (UNCAC), the African Union Convention on Preventing and Combating Corruption and the Southern African Development Community (SADC) Protocol against Corruption. In signing these documents, the South African government signalled that it will enact laws and policies designed to prevent corruption and that it will establish and resource agencies that are at least partly, if not completely, dedicated to tackling corruption. In an effort to demonstrate that the government is taking its international commitments seriously, the Minister highlighted that some 758 persons were under investigation for committing acts of corruption and that the Asset Forfeiture Unit (AFU) had successfully obtained 'freezing orders' valued at R1.07 billion.<sup>9</sup>

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On paper at least, South Africa looks to be doing relatively well in terms of adhering to the various anti-corruption conventions and protocols. For example, the country shows a strong performance in the 2012 country report on its adherence to the UNCAC articles.<sup>10</sup> This being the case, South Africa chose to make its full report publicly available to the Implementation Review Group of the UNCAC during its fourth session held in Vienna, Austria in May 2013. This

shows that the South African government is proud of its assessment. In fact, the country can point to at least 13 different state agencies that have some mandated role to play in tackling corruption.

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The primary question that must be asked is why, given our signature onto international commitments and apparent adherence to them, is corruption getting worse? And why is so little of the amount stolen by corrupt officials ever recovered? For example, while the Minister highlighted the amount of R1.07 billion that the AFU prevented from going missing, it pales into significance when one compares it to the R30 billion that the Treasury conservatively estimates is lost to the governments procurement fund, annually, due to fraud and corruption.<sup>11</sup>

The UNCAC, and other protocols, typically state that signatories should have at least one independent agency to prevent and combat corruption. South Africa will therefore point to the Directorate for Priority Crime Investigation (DPCI)—the Hawks—as such an agency. The country will also point to the constitution, which declares that the National Prosecuting Authority (NPA) is an independent entity.<sup>12</sup> The Organisation for Economic Co-operation and Development (OECD) notes that for an anti-corruption agency to be truly independent it has to be shielded from political interference and therefore should have structural and operational autonomy.<sup>13</sup> Furthermore, the OECD indicates that when the procedures for appointing and removing the head of such an agency are transparent, the possibility of undue interference in the entity’s work is removed.<sup>14</sup>

A close examination of the case of the three most important agencies responsible for tackling corruption, namely the DPCI, the NPA and the Special Investigating Unit (SIU) reveals that a fundamental shortcoming has been a failure to entrench their independence. So, while South Africa ticks the boxes in respect of having the agencies in place, the very characteristic that allows them to be successful, namely independence, is sorely missing.

## **Failure to entrench the independence of anti-corruption agencies**

### *Hawks or doves?*

In March 2012, the Constitutional Court, in the case of *Hugh Glenister v President of the Republic of South Africa and Others*, in which the Helen Suzman Foundation appeared as amicus curiae, found that the national legislation that created the DPCI, and disbanded the largely successful Directorate of Special Operations (the Scorpions), did not adequately insulate the DPCI from political interference and ordered that Parliament should ‘remedy’ this situation by enacting rectifying legislation.<sup>15</sup> The ruling made several references to the OECD’s work on the vital importance of independence for anti-corruption agencies, for example, that the head of such an entity should be appointed in a transparent manner to ensure that this person is not beholden to the demands or manipulations of political leaders.<sup>16</sup> However, the amended legislation that was introduced by the Minister of Police, Nathi Mthethwa, was deeply flawed and clearly revealed that there was no real intention to protect the Hawks from political interference.



A vast majority of the submissions to parliament rejected the draft legislation and it had to go through substantial changes by the Portfolio Committee on Police before being enacted into law. Nevertheless, the new Act still fails to protect the Hawks from political interference considering that the Minister of Police appoints the Hawks' leadership. Moreover, that the Hawks remain within the South Africa Police Service (SAPS) gives the National Commissioner immense influence over its members, who in terms of the new law remain members of the police and are bound by the SAPS Act.<sup>17</sup>

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Already, there have been several public allegations of interference in the operations of the Hawks in the past, for instance in allegations that the Minister of Police halted corruption investigations into former SAPS Crime Intelligence Head Lt-General Richard Mdluli. It later emerged that Richard Mdluli had been directly involved in signing off the illegal appropriation of close to R200 000 from the police's Secret Service Account for construction of a security wall at the police minister's private residence. This was gross misuse of funds that should be utilised for tackling organised crime. What is worrying is that it was the Auditor General (AG), an institution not invested with any arresting or prosecutorial powers, rather than the Hawks, that was tasked by the minister to investigate the matter. The AG concluded that although the security wall had indeed been constructed using funds from the Secret Service Account there was no evidence to prove that the minister knew what was happening. Of course the AG is not capacitated to undertake corruption investigations and therefore did not subpoena the minister's cellular phone records nor did it question him under oath as to what he knew or did not know. It appears as if simple email correspondence was sufficient to clear him in this debacle.





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Despite clear evidence of widespread malfeasance and fraud uncovered by the Hawks in the Richard Mdluli case, the Minister of Police protected him until a non-profit organisation, Freedom Under Law, won an application in the Pretoria High Court to prevent the minister from issuing him instructions. The then acting National Commissioner of the SAPS, Nhlanhla Mkhwanazi, used this as the basis for suspending Richard Mdluli from the police, a move that many argue cost him a permanent appointment to the post.

Most recently there have been reports of conflict between the head of the Hawks and the National Commissioner of the SAPS. This does not bode well for a unit that is supposed to be the premier agency in ensuring that corruption investigations are meticulously conducted, and that where there is prima facie evidence of illegal activities the alleged perpetrators are indicted and the evidence tested in a court of law. The case of the Hawks, just like that of the NPA, succinctly demonstrates a failure to entrench independence in South Africa's anti-corruption architecture.

### Failure to prosecute

Probably the most worrying development in the criminal justice system is the blatant disregard by President Thabo Mbeki and by the incumbent, Jacob Zuma, to protect the integrity and independence of the NPA. In the first few years of existence, the NPA was lauded as a model of a robust and independent prosecuting authority. However, its credibility as an independent agency has been severely eroded in recent years.

The situation took a particularly bad turn for this critical criminal justice agency with Advocate Vusi Pikoli's removal from the position of National Director of Public Prosecutions (NDPP) by Thabo Mbeki in a desperate bid to protect his loyal but corrupt, then National Commissioner of the SAPS, Jackie Selebi, from criminal prosecution. This transpired despite the Ginwala Commission's findings that Advocate Pikoli was indeed a person of integrity who acted independently and was fit for office.<sup>18</sup> In a surprise turn of events, President Zuma appointed Advocate Menzi Simelane to the position of NDPP, even though the Ginwala Commission took serious umbrage with his dishonesty in giving evidence and his lack of understanding of the role of the NPA as an independent agency.<sup>19</sup> Furthermore, the PSC's recommendations for disciplinary action to be taken against Advocate Simelane, and the existence of direct evidence that he was unsuitable for such a post fell on deaf ears as demonstrated by his subsequent appointment.

The opposition Democratic Alliance took Advocate Simelane's appointment before the courts and eventually, in December 2011, the Supreme Court of Appeal unanimously ruled that his appointment was 'irrational', forcing him to step down.<sup>20</sup> In his place, President Zuma then made a second controversial decision and appointed Advocate Nomgcobo Jiba as acting NDPP despite the fact that Advocate Jiba had previously been suspended from the NPA after it emerged that she had abused her prosecutorial powers in an effort to assist with the illegal arrest of her colleague Advocate Gerrie Nel. Advocate Nel was the lead prosecutor in the case against Jackie Selebi, and Advocate Jiba had allowed herself to become embroiled in political attempts to shield the commissioner from justice. Jackie Selebi was eventually found guilty and sentenced to 15 years in prison for his crimes. It emerged during her attempt to challenge her suspension that Advocate Jiba blamed Advocate Nel for Booker Nhantsi's—her husband—criminal conviction for theft to which he was sentenced to imprisonment for five years. Interestingly, it was Richard Mdluli who submitted an affidavit as a character witness in Advocate Jiba's favour. Advocate Jiba's ability to act independently was further damaged when it later emerged that President Zuma expunged Booker Nhantsi's criminal conviction allowing him to continue to act as an attorney.

*More worryingly has been the decision to withdraw criminal cases against politically connected individuals despite prima facie evidence of criminal activity. A good example of this includes the case against Richard Mdluli where different independent legal experts, including that of the Inspector General of Intelligence, insisted that the NPA should forge ahead with his prosecution on corruption charges.*

Still, in the face of this insurmountable evidence, that cast serious aspersions on Advocate Jiba's character and her suitability to hold the position of NDPP, she was appointed as acting head of the NPA. Under her leadership the agency suffered an unparalleled string of high-profile failures such as the inability to secure a conviction in the killing of Andries Tatane and the slap on the wrist for financial fraudster Arthur Brown. More worryingly has been the decision to withdraw criminal cases against politically connected individuals despite prima facie evidence of criminal activity. A good example of this includes the case against Richard Mdluli where different independent legal experts, including that of the Inspector General of Intelligence, insisted that the NPA should forge ahead with



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his prosecution on corruption charges. Connected to this is also the disciplinary case of Glynnis Breytenbach, who was instrumental in prosecuting Richard Mdluli, in which all of the 15 disciplinary charges brought against her were dismissed for lack of evidence. This lends considerable credence to the argument that Advocate Jiba was intent on removing her from the NPA in an attempt to torpedo Richard Mdluli's prosecution on corruption charges.

All of this has severely dented the NPA's credibility in the eyes of the South African public. Recently, Mxolisi Nxasana was appointed as the permanent NDPP. This followed legal action by the Council for the Advancement of the South African Constitution to compel the President to fill this vacancy. Whether the new NDPP will successfully lead the NPA out of its credibility crisis is an unknown.

### **Leadership and independence**

The twin variables of leadership and independence are key to the success of all anti-corruption agencies in South Africa including the SIU, an entity that has had considerable leadership challenges since the departure of Advocate Willie Hofmeyr as its head. The SIU Act requires that the country's President should give due 'regard' to the 'experience, conscientiousness and integrity' of a prospective appointee to the position and that the person should be a 'fit and proper person' who can be 'entrusted with the responsibilities of that office.'<sup>21</sup> Still, the act does not clearly articulate what is meant by 'fit and proper' and this endows the President with immense discretion in making an appointment. Given

his past appointments, there is little faith among many analysts that President Zuma has serious regard for principles of independence, conscientiousness and integrity when making key (criminal justice) appointments.

Judge Willem Heath headed the SIU at its inception in 1996 but had to resign in June 2001 following a Constitutional Court ruling barring a judge from heading the unit.<sup>22</sup> At that stage the SIU ceased to exist, at least formally.<sup>23</sup> A July 2001 proclamation by President Thabo Mbeki re-established the SIU with Advocate Willie Hofmeyr as the head.<sup>24</sup> In November 2011 Advocate Hofmeyr, who had been heading both the SIU and AFU relinquished his role in the SIU and was replaced by Judge Heath who at that stage had retired.<sup>25</sup> It was reported that the decision was meant to 'strengthen the institutional capacity to fight crime and corruption.'<sup>26</sup> However, in a shocking turn of events, Judge Heath resigned as head of SIU on 15 December 2011, barely a month into his tenure. This followed statements he made, which he could not substantiate, alleging that President Thabo Mbeki had instigated the rape and corruption charges against his then deputy, Jacob Zuma, and blocked some investigations into corrupt practices, thus compromising the justice system.<sup>27</sup>

Advocate Nomgcobo Jiba was appointed SIU acting head following Judge Heath's resignation, only to be replaced less than a week later by Advocate Nomvula Mokhatla – another acting appointment.<sup>28</sup> Spokesperson for the Presidency, Mac Maharaj, noted that there were no 'profound' reasons for the change in appointment and that there 'is nothing in the law that stops the president from making temporary appointments.'<sup>29</sup>

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The constitution expects transparency in government decision making. Indeed, leadership instability in an institution such as the SIU can weaken and thus hamper its effectiveness. The key issue is that when criminal justice institutions, including anti-corruption entities such as the Hawks, NPA and the SIU, are headed by temporary appointments, this corrodes their efficacy as such appointees are more likely to be cautious in making critical decisions.

With reference to the DPCI legislation, civil society groups raised a compelling argument that the permanent head of the entity should be nominated, selected and appointed through a transparent process; that a special parliamentary subcommittee should be established to manage this process; and that parliament should approve, through a special majority, the candidates recommended to the executive for appointment.<sup>30</sup> These recommendations are equally appropriate for the head of the SIU. Indeed, a transparent and independent process of appointing the head and other key officials of the SIU ensures that those who are eventually appointed are credible in the eyes of the public. This also strengthens the credibility of the institutions in which they serve. There is also the issue of security of tenure, which is relevant to the heads of all anti-corruption agencies.

Indeed, the dismissal of the head of any anti-corruption agency should be based on clearly defined grounds and it should be preceded by a transparent and independent inquiry that produces clear findings and recommends such a



dismissal.<sup>31</sup> The current SIU legislation states that the head ‘must stand down’ if the President, following consultation with the Judicial Service Commission (JSC), requests so.<sup>32</sup> This is just a consultation and there is no requirement for the President to furnish rational and coherent reasons as to why the SIU head should stand down.

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Budgetary independence is also critical to the functioning and overall autonomy of the SIU. The OECD recognises that it is vital for all anti corruption entities to have sufficient financial and human resources to effectively execute their mandates.<sup>33</sup> The SIU receives its budget through the Ministry of Justice and Constitutional Development. Currently, there are no legislative mechanisms that protect the fiscal independence of the SIU and indeed may have negative ramifications as investigations could be stymied through political interference to slow or cease the flow of funding. It is critical for the head of the SIU to be empowered, legislatively, to have fiscal independence. Indeed, legal measures to ensure that political functionaries do not have broad

discretionary powers to determine funding is key to the success of anti-corruption agencies.<sup>34</sup>

Operational independence, considering that the SIU can only commence proceedings once a case has been referred to it via a presidential proclamation, is key to the success of the unit.<sup>35</sup> While private persons, companies, newspapers, and other entities can refer allegations of corruption to the SIU,<sup>36</sup> this does not place an obligation on it to investigate their concerns since the President must first authorise investigations. This essentially means that regardless of the existence of robust prima facie evidence of wrongdoing, if the President neglects to sign a proclamation, or has an intention to protect individuals involved in corruption, some cases will not be investigated by the SIU, thereby weakening the unit’s corruption-busting capability. Recently, the Presidency announced that Advocate Vasantrai Soni SC would, with effect from 1 October, head the SIU. Only time will tell if this was a considered appointment.

### **Concluding observations: prospects**

The National Development Plan makes some cogent recommendations on the appointment of the National Commissioner of the SAPS and the deputies, to the effect that the President should appoint these individuals following a publicly transparent and competitive process.<sup>37</sup> This can be achieved if an independent panel is tasked with vetting and interviewing candidates against objective criteria.<sup>38</sup> Such a precedent is already in place with regards to Chapter Nine institutions such as the Public Protector and with the appointment of judges. These recommendations should be equally applicable to the appointments of heads of the Hawks, the NPA and the SIU. Indeed, the transparent appointment of heads of key criminal justice institutions is vital to building credibility and trust in their leadership and the institutions they serve in and lead.

Having anti-corruption agencies and legislation is but superficial compliance with international conventions and protocols. South Africa has a laudable anti-corruption framework and the prospects are positive if the country builds on this. But this can only be realised if anti-corruption agencies are insulated from political interference and when independent people of unquestionable character are appointed to head such agencies.

Robust political will is required to run an honest government. While naming and shaming convicted public servants or fining construction companies for bid rigging may send a signal that corruption is unacceptable, the country's political leadership has to build on this by ensuring that political and business elites and those who are connected to them are transparently and fairly held accountable for any alleged acts of fraud and corruption. Furthermore, top leadership in all anti-corruption agencies has to be appointed following a transparent vetting and interviewing process. Only then will these institutions be able to act against corruption no matter how well connected or powerful the perpetrators. This will in turn build public trust and effectiveness of South Africa's implementation of the many international anti-corruption conventions and protocols the country has ratified.

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