Under the influence: the Kusile tender and state capture permeating the national prosecuting authority

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Abstract

Purpose – The purpose of this paper is to give light to the present order of state capture and corruption within South Africa at present. South Africans often consider the National Prosecuting Authority to be an independent body which is free of the corruption of the rest of the Government; however, the situation that surrounds the Kusile Tender will suggest otherwise.

Design/methodology/approach – This paper's approach is purely qualitative using journal articles, textbooks, reports, periodicals, speeches and legislation as its basis. It is through a consolidation of this literature that this paper was formed.

Findings – This paper determines that even the National Prosecuting Authority of South Africa is not free from the scourge that is corruption through the depiction of the Kusile Tender. Within this tender, the National Prosecuting Authority entered into a non-prosecution agreement with a defendant, Asea Brown Boveri, which cannot be accounted for in the Criminal Procedure Act 51 of 1977.

Originality/value – The concept of state capture and corruption are not new to any jurisdiction, let alone South Africa. This paper, however, intends to give insight into how even the departments which the public believe to be (and are constitutionally mandated to be) independent can fall prey to corrupt dealings.

Keywords South Africa, Criminal law, Criminal procedure, Admission of guilt fines, Corruption, State capture, National prosecution authority, Plea and sentencing agreements, Eskom, Criminal asset recovery

Paper type Research paper

Introduction

According to Sutch, "state capture" can be defined as either individuals or groups, in either the public or private sector that influence the formation of laws, regulations, decrees and other government polices to achieve their own personal advantage. State capture has many forms;

Journal of Financial Crime
Vol. 32 No. 1, 2025
pp. 183-191
Emerald Publishing Limited
1359-0790
DOI 10.1108/JFC-01-2024-0056

however, all forms have the same effect: it undermines the efficiency of the state; it negatively impacts the economy and it undermines the legitimacy of the state.

The National Prosecuting Authority of South Africa (herein after "the NPA") derives its existence and force from Section 179 of the Constitution of South Africa, 1996 (herein after "the Constitution"). It empowers the NPA to institute criminal proceedings on behalf of the state and to do so "without fear, favour or prejudice". Furthermore, the vision and mission of the NPA is for justice to be served in the society, so that people can live in freedom and security, and they seek to serve the public by serving justice through "effective, efficient and equitable administration of justice".

State capture is not uncommon in South Africa, and it is almost a daily occurrence for the state institutions and office bearers to manipulate the law to suit their own financial goals. Most South Africans consider the NPA to be the institution far-removed from such state corruption. However, recent events surrounding the Kusile tender and the ongoing case against ESKOM's former CEO, Matshela Koko, suggest otherwise. This article plans to explore the controversy surrounding the Kusile tender and the state capture of the South African NPA.

Facts of the case

The case began in 2015 when ESKOM, the South African national power supply company, gave R2bn (two billion rand) to Asea Brown Boveri ("ABB") to install a control and instrumentation system (this is a computer-based system that controls the functions of the power unit) on the power units at the Kusile Power Station. The Kusile power station had suffered time delays and design defects, and these problems severely contributed to load-shedding in the country.

ABB paid Impulse International R549m from 2016 to 2017, while Koketso Aren, former ESKOM CEO Matshela Koko's stepdaughter, was a shareholder therein. Impulse International paid R30m to another company owned by Aren called Ukwakhiwa Investments. Ukwakhiwa Investments paid R14.5m to a company owned by Koko's wife, Mosima. The complexity of this case, with 18 accused, is briefly explained.

Matshela Koko, accused 1, faces seven counts: one count of fraud; five counts of contravention of the Prevention and Combating of Corrupt Activities Act and one count of contravention of Prevention of Organised Crime Act (POCA). In essence, these charges amount to corruption for accepting payment in exchange for the manipulation of tender processes.

Frans Sithole, accused 2, former most senior manager of Kusile who is facing four counts of fraud as well as corruption for assisting Koko to get Impulse International appointed at Kusile.

Mosima Koko, accused 3, who is Koko's wife and a businesswoman is facing three counts of corruption.

Turnkey Finishings and Dominion Capital, accused 4 and 5, are two companies owned by Mosima Koko, who as the director of these companies, faces three counts of corruption.

Koketso Aren, accused 6, and Firm Strategy (Aren's company), accused 7, will stand trial for charges of money laundering and corruption for the receipt of funds into the company's account.

Thabo Owen Mokwena, accused 8, with Leago EPC (accused 9) and Leago Consolidated (accused 10), his two companies, is facing two counts of fraud and a count of corruption for his role in agreeing to the subcontracting of ABB by paying bribes to Koko.

Johannes Coetzee, accused 11, an attorney who allegedly came up with the money channels through which to ensure the shielding of Koko's family, faces one charge of corruption.

Watson Seswai, accused 12, is facing one count of corruption for pretending to be an Impulse International employee and an associate of Koko.

Thato Choma, accused 13, and Throne Concepts, accused 14, Koko's other stepdaughter are facing two counts of money laundering and corruption.

Sunil Vip, accused 15, a German and former employee of ABB who ensured the appointment of Leago and Impulse, faces two counts of corruption.

Markus Bruegmann, accused 16, a German who worked for ABB and is allegedly the first person to approach Koko in 2013 to establish a corrupt relationship with him, is facing a count of corruption.

The company Impulse International, accused 17, the centre of the bribery scheme considering the CEO is now deceased, is now charged with three counts of corruption.

Gopal Shamji Kambi, accused 18, a UK national, faces one count of fraud for being a contractor who supported Sithole.

The settlement agreement between Asea Brown Boveri and the National Prosecuting Authority

On the 1st of December 2022, the Investigating Directorate authorised by the National Director of Public Prosecutions made the following statement. The "NPA" and ABB entered into a settlement agreement in which ABB agreed to pay R2.5bn into the Criminal Asset Recovery Account ("CARA") as punitive reparations in terms of Section 64(e) of the POCA 121 of 1998. In terms of this agreement, ABB acknowledged liability and took responsibility for any criminal acts committed by its employees during that period. The NPA also states that this agreement does not indemnify any individuals associated with ABB who have committed criminal conduct from prosecution, and as such, the NPA will continue to prosecute these individuals to ensure accountability for the criminal acts committed by them. The announcement also states that the NPA reserves the right to prosecute ABB as a juridical person, in the event that they breach the conditions of the settlement agreement.

The document states that this is "a bold and innovative step towards accountability and justice for alleged offenders, particularly in the form of restitution for the serious crimes committed at Eskom during the state capture period". It further states that this settlement agreement is "reflective of the NPA's two-pronged strategy to deal with corruption through prosecuting perpetrators and recovering stolen money".

It is worth mentioning that ABB is the only corporate entity that has been granted this form of settlement agreement, and no such agreement has been offered to any other natural or juridical person allegedly involved in the crime.

Koko's argument

On the 11th of November 2023, Matshela Koko made a formal complaint to the Public Prosecutor of the Republic of South Africa which he published on the platform "X" (formerly known as "Twitter").

Koko states that ABB South Africa acknowledges and states that, to the best of its knowledge, it was involved in the criminal activities that took place between 2013 and 2017. The Investigating Directorate decided not to prosecute ABB because they provided them with evidence and were compliant with any requests resulting therefrom.

Koko states that the only lawful form of sanction which involves a payment of a fine or penalty without an appearance in Court is found within Section 57 of the Criminal Procedure Act 51 of 1997 ("CPA"). Furthermore that this can only be exercised where the accused commits a crime for which the officer believes that in a court of law, they would not receive a fine of more than R10,000. As such offences of corruption and fraud, money laundering and contraventions of POCA, Prevention and Combating of Corrupt Activities Act 12 of 2004 and the Financial Intelligence Centre Act 38 of 2001 do not fall within the category of minor offences to which Section 57 applies.

Koko also makes reference to Section 341 of the CPA 51 of 1977; however, this section refers to the compounding of offences and both authors agree that this would not find application in this instance.

Koko concludes that the Investigating Directorate acted *ultra vires* by usurping the function of the courts to determine and endorse non-prosecution agreements, and as such, the agreement entered into between ABB and the NPA is illegal and should be set aside.

Understanding Section 64(e) of Prevention of Organised Crime Act 121 of 1998

The POCA's long title states that it was introduced to implement measures to combat organised crime, money laundering, racketeering-based activities, the prohibition of money laundering and the obligation to report such activities, to provide for the recovery of proceeds of unlawful activities and to provide for the establishment of a CARA among other activities and to bring proactive measures against white-collar crimes.

Section 64(e) specifically states that the Account (CARA) shall consist of any amount of money received or acquired from any source. It is apparent that this section does not provide for a non-prosecution settlement agreement for the payment of a fine or penalty for one's involvement in criminal activities. This section simply states that the CARA can accept money from any source including ABB.

The inner workings of Sections 57, 57A and 105A of the Criminal Procedure Act 51 of 1977

Section 57 and 57A of the Criminal Procedure Act

These sections apply to admission of guilt fines. It is unclear to most of the general public and to some legal practitioners, how these sections are applied in practice. The question addressed in this comment is whether it will be in the interests of a client to advise him/her to pay an admission of guilt fine or not, were such option to be available?

A lack of proper understanding of the practical implications of these sections stifles legal certainty in this relevant part of the criminal law and procedure. In laymen's terminology and also in legal jargon, the wording "admission of guilt" sounds perfectly descriptive, but this view would amount to seeing only the tip of the iceberg. The truth is that other factors and rules of practice must actually be taken into account to understand the "full picture". It is foreseeable that legal practitioners will come under fire in the future based on these sections. This could even entail a possible claim for malpractice, because of the over-hasty acceptance of an admission of guilt fine, without carefully explaining and/or considering all the concomitant effects of such acceptance. Such a claim may possibly even arise from a failure to advise a client against paying the fine in certain circumstances. An admission of guilt fine is very often considered a "quick-fix", an easy way out or a shortcut conclusion by defence practitioners and prosecutors alike, while it might in fact represent a significant risk for the client.

Section 57 reads as follows:

[57]. (1) Where *(a)* a summons is issued against an accused under Section 54 (in this section referred to as the summons) and the public prosecutor or the clerk of the court concerned on reasonable grounds believes that a magistrate's court, on convicting the accused of the offence in question, will not impose a fine exceeding 100 rand, and such public prosecutor, or clerk of the court endorses the summons to the effect that the accused may admit his guilt in respect of the offence in question and that he may pay a fine stipulated on the summons in respect of such offence without appearing in court; or *(b)* a written notice under Section 56 (in this section referred to as the written notice) is handed to

the accused and the endorsement in terms of paragraph *(c)* of subsection (1) of that section purports to have been made by a peace officer, the accused may, without appearing in court, admit his guilt in respect of the offence in question by paying the fine stipulated (in this section referred to as the admission of guilt fine) either to the clerk of the magistrate's court which has jurisdiction or at any police station within the area of jurisdiction of that court or, if the summons or written notice in question is endorsed to the effect that the fine may be paid at a specified local authority, at such local authority.

Section 57A reads exactly as Section 57.

Though countrywide practice is neither uniform nor consistent, the increasing modern-day tendency is to view Sections 57 and 57A nonchalantly. It is well-argued that Sections 57 and 57A are for the benefit of both the practice and the individual, as they reduce over-burdened court rolls, relax the stringent and the not-so user-friendly adversarial court process and generally save time.

The aim of this comment is not to discourage the payment of admission of guilt fines in valid cases. It rather serves as a warning. A cautious approach should be considered by practitioners and/or members of the public. Avoid the attitude of: "I would rather pay an admission of guilt fine of R1000 now, than try to convince a court of my innocence in a lengthy, frustrating and costly court case later."

I submit that failing to consider the CPA 51 of 1977 in conjunction with general practice obscures the artificial advantage of such a contention. The above attitude would be short-sighted, irresponsible and essentially because of an inadequate understanding of Sections 57 and 57A of the CPA. A client should, therefore, be well advised to determine the legal position properly before deciding to engage Sections 57 and 57A. The question will remain: Was it worth it in the end? It might well prove to be a bit expensive for what it is purported to attain. However, one will ignore the true contents of these sections at one's own peril. The contents of both Sections 57 and 57A are definitely not without identity crisis, sometimes blurry and slickly worded, although on the short list of and with a reputation of being the most used sections in the CPA.

The practical application of these sections is as follows. Section 57 provides for the admission of guilt in respect of the offence and for the payment of a stipulated fine without appearance in court. Section 57A, on the other hand, provides for the admission of guilt and the payment of a fine, after appearing in a court but before the accused has entered a plea in terms of Section 106 of the CPA.

Section 57 may be used where a summons is issued under Section 54 or where a written notice under Section 56 is handed to the accused. Either the prosecutor or the clerk of the court may endorse same. All that is required is that these officials must believe on reasonable grounds that a Magistrate's court, on convicting the accused, will not impose a fine exceeding the amount determined by the Minister of Justice from time to time, by notice in the Gazette.

It may be paid either to the clerk of Magistrate's Court, which has jurisdiction, or at any police station within the area of jurisdiction of that court (or in certain circumstances, at a specified local authority). It is intended that it be paid before the date specified therein, but payment may be accepted even after the suggested dates of payment or appearance have expired. The original document should preferably be surrendered, but the copy thereof, known as the "control document" or in certain circumstances an ordinary copy, may be accepted. An accused may even pay an admission of guilt fine, for the statutory offence of Section 55(1) in terms of Section 55(2A) (a) (ii) and avoid a charge of failure to appear in criminal proceedings, where a warrant has been authorised in terms of Section 55(2) and the summons was endorsed in terms of Section 57(1)(a).

A public prosecutor is never prevented from reducing an admission of guilt fine, on good cause shown.

Section 57(5)(a) suggests wishful thinking and assumes comparable standards of sentencing, which in practice sometimes differ from Magistrates' Courts to Magistrates' Court. It may, therefore, be criticised in that it does not promote legal certainty or broaden the scope for discrepancies of the amounts payable, albeit restricted to the amounts suggested in the Gazette.

Prosecutors and even non-legal persons are hereby indirectly granted the judicial powers of the Bench. To my mind, this is a serious cause for concern. This must, however, always be read in conjunction with the "power of reduction" that vests in a prosecutor in terms of Section 57(4).

The judicial officer is not empowered, to suspend, endorse or disqualify an accused in respect of any license or permit (if applicable), as such official is statutorily bound by Section 57(5)(b) to a maximum fine jurisdiction of either the prescribed fine or the fine determined by the minister only. If Section 57(7) results in a prosecution in the ordinary course, then the court shall probably have its ordinary and almost unlimited sentencing jurisdiction, as suggested by Section 276 of the CPA, read with the *Magistrates' Court Act 32 of 1944*.

Sections 57 and 57A do not stipulate for which type of offences an admission of guilt fine may be determined. Our courts, however, *inter alia,* in *S v. B 1954 3 SA 431 (SWA),* suggested that the scope of Section 57 (by way of analogy, probably also Section 57A) should be limited to statutory offences and not common law crimes.

In practice, it would seem that once the Section 57(6) procedure has been followed and thereafter not "specifically reviewed", but endorsed by Section 57(7) procedure, an accused will be deemed to have been convicted on the merits and sentenced by a competent court. This results in the accused being viewed in the eyes of the law as having been previously convicted.

Application to the settlement agreement

From the explained procedures explained, it is apparent that the settlement agreement is problematic on multiple levels.

Section 57 finds application where the accused has not yet appeared in court and is handed either a summons (in terms of Section 54 of the CPA) or a written notice (in terms of Section 56). These must be endorsed by either the clerk of the court or the prosecutor who reasonably believe that upon conviction the accused will not be given a fine greater than R10,000. As such, it is understood that such offences are less serious offences which in South Africa usually refer to traffic offences such as speeding; contravening traffic signs; and reckless or negligent driving. From the facts, it is apparent that crimes for which ABB made their payment do not fall into the monetary scope of that determined in the Government Gazette at present. It is likely that upon conviction, ABB would have been given a fine even greater than the R2.5bn it paid into the CARA. As such, Section 57 could not legally find application in this case, as the NPA could not reasonably believe that ABB would have received a fine less than R10,000 upon conviction.

The application of Section 57A to this case is not applicable because the accused, in this instance ABB, has not been summoned to court.

Therefore, neither Section 57 nor Section 57A finds application in this case.

Section 105A of the Criminal Procedure Act

Another section of the CPA that could have possibly been used in this instance is Section 105A which refers to Plea and Sentence Agreements. Section 105A (1)(a) states that a

prosecutor authorised by the NDPP and an accused, who is legally represented, before the accused pleads to the charge can negotiate and enter into an agreement in respect of a plea of guilty to a charge for which they may be convicted, and if the accused is convicted on the offence to which they have agreed to plead guilty, then a just sentence is to be imposed by the court.

The practical application of this section is as follows. The prosecutor will meet with the person in charge of the investigation to discuss the nature and circumstance of the offence; personal circumstances of the accused; previous convictions of the accused and the interests of the community [s105A(1)(b)(i)–(ii)]. The prosecutor must afford the complainant, or their legal representative, an opportunity to make representations to the prosecutor regarding the contents of the agreement and the inclusion of a condition in the agreement [s105A(1)(b)(iii)].

The agreement must be in writing and must at least state that the accused has been informed, before entering into the agreement, that he is presumed innocent until proven guilty beyond a reasonable doubt; to remain silent and not to be compelled to give self-incriminating evidence [s105A(2)(a)(i)–(iii)]. It should state fully the terms of the agreement, the facts of the matter, all other facts relevant to the sentence of the agreement and any admissions made by the accused [s105A(2)(b)]. It must be signed by the prosecutor, the accused and their legal representative, and if the accused has negotiated through an interpreter, then it must contain a certificate by the interpreter stating that they interpreted accurately [s105A(2)(c)–(d)]. The court must not participate in the negotiations [s105A(3)].

In the court, before the accused pleads, the prosecutor shall inform the court that an agreement was contemplated in terms of this section, has been entered into and the court shall then require the accused to confirm this, and satisfy itself that the requirements in terms of 105A (1)(b)(i) and (iii) have been complied with [s105A(4)(a)]. If the court is satisfied that the agreement complies with the requirements, then the court will require the accused to plead to the charge and order that the contents of the agreement be disclosed in court [s105A(5)]. After the contents have been disclosed, the court shall question the accused to ascertain whether they confirm the terms of the agreement and admissions made by themselves; that they admit the allegations in the charge to which they are pleading guilty; the agreement was entered into freely and voluntarily with sound and sober senses and without having been unduly influenced [s105A(6)(a)].

After this inquiry has been conducted, if the court is not satisfied that the accused is guilty of the offence in respect of which the agreement was entered into or if it appears to the court that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge or for any other reason, then the court is of the opinion that the plea of guilty by the accused should not stand, record the plea of not guilty and inform the prosecutor and accused of the reasons [s105A(6)(b)]. In any of these instances, the trial shall start from the beginning before another presiding officer, provided that the accused may waive their right to be tried before another presiding officer [s105A(6)(c)]. Where the trial starts from the beginning, the agreement shall be null and void and no due regard is given to the agreement; negotiations or admissions previously made unless the accused consents thereto [s105A(10)(a)]. The accused and the prosecutor may not enter into another agreement in respect of a charge arising from the same facts [s105A(10)(b)].

If the court is satisfied that the accused admits the allegations in the charge and that they are guilty of the offence in respect of which the agreement was entered into, then the court shall proceed to consider the sentence agreement [s105A(7)(a)]. For this purpose, the court may direct relevant questions, including those about previous convictions of the accused to the prosecutor and the accused and hear evidence. If the offence concerned is an offence

which falls within a schedule which prescribes a minimum sentence, then this will be considered [s105A(7)(b)].

If the court is satisfied that the sentence agreement is just, then the court shall inform the prosecutor and the accused of such satisfaction, whereafter the court shall continue to convict the accused of the offence and sentence the accused in accordance with the agreement [s105A(8)].

Where either the accused or the prosecutor withdraws from the agreement stated above, the trial shall start from the beginning before another presiding officer.

Application to the settlement agreement

While the explicit contents of the settlement agreement in the case are not known and as such cannot be scrutinised against the section itself, it is apparent that certain major procedural aspects in terms of this section of the CPA have been negated.

A settlement agreement only applies to an accused who has not yet pleaded in court. Furthermore, the contents of the settlement agreement must be presented to the court at the time when the accused is to plead and the court must scrutinise the agreement thoroughly to ensure that the accused, and his legal representative, have not been unduly influenced to plead guilty to the charge(s) and enter into the agreement. Above all else, this practice ensures that the settlement agreement is deemed an order of court if it is duly endorsed by the court.

The accused in this instance entered into such an agreement before even entering the court room or being arraigned. The settlement agreement in context was not presented to the court, and as such, the integrity thereof has not been transparently scrutinised. The agreement is no more than a "gentlemen's contract" between two parties of which one happens to be an entity representing the state. The agreement reached between the NPA and the ABB cannot be considered to be in terms of Section 105A of the CPA, as it does not meet the "procedural muster" required to be a valid settlement agreement in terms of the settlement mentioned.

Where does this leave us now?

From the above explanation, it is apparent that the transaction that has occurred between ABB and the NPA cannot be justified by any criminal court procedure and definitely not one found in the CPA 51 of 1977. It also means that the NPA, a long-standing institution whose job it is to institute criminal proceedings on behalf of the state, neither understands nor knows the provisions of the aforementioned act.

The NPA can no longer be considered a state entity acting without fear, favour or prejudice because it clearly will bend to the whim of the highest bidder, and as such, state-capture has permeated even the entities considered to be independent therefrom.

Further reading

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