



Mr. V Ramaano

Committee Secretary

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12 May 2012

Dear Sir

**LETTER OF SUPPORT ON THE JUDICIAL MATTERS AMENDMENT BILL
2012 [B11-2012]**

- 1 This letter addresses the amendments proposed in the Judicial Matters Amendment Bill, [B11-2012], ("the Bill").
- 2 As the Memorandum accompanying the Bill makes plain, the Bill seeks to amend the Special Investigating Units and Special Tribunal Act No. 74 of 1996 ("the SIU Act") in order to:
 - 2.1 Further regulate the litigation functions of the Special Investigating Unit ("SIU");

- 2.2 Provide for the secondment of a member of an SIU to another State institution; and
 - 2.3 Provide for funding of an SIU, which includes expenses and fees for services rendered in the course of or in connection with the exercise of powers and the performance of functions of the SIU in terms of the SIU Act, and to authorise any such fees or expenses levied or defrayed prior to the amendments proposed in the Bill.
- 3 The Memorandum also seeks to amend the National Prosecuting Authority Act No.32 of 1998. The submissions in this letter will only deal with the amendments pertaining to the SIU Act.
 - 4 We welcome the improvements made to the SIU Act.
 - 5 We structure our analysis of the provisions of the Bill under the themes of litigation functions of the SIU, secondment of members of the SIU and funding of the SIU, as set out in the Memorandum accompanying the Bill.

LOCUS STANDI

- 6 In terms of the current SIU Act, the SIU can only investigate serious malpractices and maladministration.

- 7 We submit that the amendment of section 4 of the current SIU Act to authorise the SIU to “institute and conduct civil proceedings” in a Special Tribunal “or any court of law” will significantly address the challenges of the current framework, which include:
- 7.1 The fact that the SIU can only collect evidence regarding acts of omissions which are relevant to its investigation¹; and
- 7.2 Present evidence in proceedings brought before a Special Tribunal.²
- 8 We submit that the functions of the SIU as set out in section 4 of the SIU Act and in particular the subsections mentioned in paragraph 7 above, effectively render the SIU toothless and ineffective.
- 9 Firstly, section 4(1) (b) of the SIU Act states that the SIU can “if applicable... institute proceedings in a Special Tribunal”. This wording is cumbersome and vague. It is not clear what is meant by “if applicable”. This type of vagueness has the potential to get cases thrown out of the Special Tribunal if the President of the Special Tribunal rules that evidence brought before it is not “applicable”³. In addition, after investing much of its resources in a particular investigation, the SIU will first have to submit a report to the President, who will have to make a

¹ Section 4(1) (b) of the SIU Act.

² Ibid Section 4(1) (c).

³ See the judgment of Pickard JP, in *SIU v Mfeketo and Others* Case No: EC/72/99.

determination on what further steps to take in any. We respectfully submit that this is not an effective use of the SIU's competencies. We therefore support the deletion of this latter part of section 4(1) (b).

- 10 Secondly, neither the SIU Act nor the Regulations, make it clear how proceedings before the Special Tribunal are conducted.
- 11 Should the amendments proposed pass, the SIU will be able to initiate ("*institute*") and run ("*conduct*") its cases in a Special Tribunal or *in any court of law* as opposed to just presenting evidence in the Special Tribunal.
- 12 The further amendments in section 4(c) (i)-(iii) dealing with relief, will give the SIU the power to execute judgments in its favour and recover damages or losses and prevent damages or losses which may be suffered by such a State institution; any relief relevant to any investigation or, any relief relevant to the interests of the SIU, such as recovery of damages from its service providers or its own members. Although we support the inclusion of a clause dealing with relief, we submit that section 4(1)(c)(ii) and (iii) should be more clear in their meaning, for example, it is not clear in subsection 4(1)(c)(iii) what is meant by "relief relevant to the *interests* of a Special Investigating Unit". [emphasis added]
- 13 Section 5 of the SIU Act deals with the powers of the SIU. We propose that the proposed amendment, section 5(1) (b), which will allow the SIU to recover fees and

expenses from a state institution goes directly to funding for the SIU. We are advised that the body does not get enough funding from National Treasury to cover all the costs of its investigations. This provision will thus assist the SIU in expanding its human resources and expertise. This argument is elaborated further in the section dealing with funding below.

SECONDMENT

- 14 The SIU Act in its current form provides for the secondment of a member of the Public Service to the SIU, however the converse does not apply. We submit that although the SIU is a state body and is thus part of government, its members are not public servants or officers⁴ as defined in the Public Service Act. Therefore, whereas the Public Service Act allows its officers to be seconded to other government departments⁵, the same is not applicable to the SIU.
- 15 The proposed amendment of section 3 of the SIU Act will allow the Head of the SIU to second one of its members to a government institution for a particular task or for a specified period. We submit that this will assist those government institutions, with

⁴ The Public Service Act 103 of 1994 defines an officer as "a person who has been appointed permanently, notwithstanding that such appointment may be on probation, to a post contemplated in section 8(1) (a), and includes a person contemplated in section 8(1) (b) or 8(3) (c).

⁵ Section 15 of the Public Service Act.

the capacity and expertise that it would not necessarily have to investigate its own case of serious malpractices or maladministration.

FUNDING

- 16 The SIU Act is currently silent on the issue of how the SIU is funded.
- 17 We submit that the practice of the SIU entering into service level agreements (SLAs) -as mentioned in the Memorandum accompanying the Bill- with state institutions in respect of which the President has issued a proclamation, the purpose of which was to supplement its funding, is not ideal. In fact we are advised that this type of supplementary funding has been suspended, pending a determination as to whether the SIU as a creature of statute is authorised to conclude SLAs with other entities.
- 18 Should this matter not be resolved as a matter of urgency, we submit that the SIU and the state institutions in which it is currently conducting investigations will be severely compromised as will its efforts to eradicate corruption within these institutions.
- 19 The amendments also indicate that the SIU is transparent in that it will be clear where its funding originates.

20 Furthermore, the amendment of section 11 empowers the Minister of Justice to make regulations regarding, *inter alia*, “fees and expenses recoverable for services rendered in terms of this Act”. This will mean that the SIU will be guided by the tariffs set by the Minister only (section 11 as amended under clause 6 of the Bill). We would contend that should the Committee reject this amendment, it will be incumbent upon National Treasury to allocate more money within its budget to meet SIU’s financial needs.

CONCLUSION

21 We would like to highlight the following:

21.1 The current legislation has rendered the SIU impotent. Currently, the SIU can, once it has completed its investigations, only make recommendations in a report which is submitted to the President for consideration.

21.2 The amendments will address the challenges currently faced by the legal framework of the SIU Act. The SIU, given its resources in terms of expertise, is well suited to second some of its members to state institutions that require investigative and asset recovery capacity. The process of recovery of state assets will be expedited if the SIU is empowered to institute and conduct proceedings in its own name or on behalf of the state institution.

21.3 Funding of any organisation or institution is crucial to the effective running of such organisation or body. If government is to stand by its commitment to fight corruption, bodies such as the SIU should be able to supplement their financial resources through the charging of fees. We would submit that these fees could come from two places: damages recovered on behalf of the affected state institutions and from units within the state institutions tasked with forensic investigations.

22 In the light of these submissions, we urge the Committee to consider our submissions favourably.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Mary-Anne', written in a cursive style.

Mary-Anne Munyembate

Acting Head: Legal Services

Corruption Watch