*TO RECUPERATE FROM THE INJURIOUS LEGACY OF STATE CAPTURE, SOUTH AFRICA NEEDS TO ADOPT A COMPREHENSIVE AMNESTY PROCESS**

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I INTRODUCTION

The grand-scale corruption that characterised the years of the Zuma presidency "*has wiped out a third of South Africa's R4.9-trillion gross domestic product*".[1] This theft has occasioned obviously catastrophic consequences for the South African economy. There are considered estimates that, as result of the looting of the State coffers during 2010 to 2017, somewhere between 500,000 and 2.5 million jobs were

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1 Marianne Merten 'State Capture wipes out third of SA's R4.9-trillion GDP – never mind lost trust, confidence, opportunity' *DailyMaverick* (1 March 2019), available https://www.dailymaverick.co.za/article/2019-03-01-state-capture-wipes-out-third-of-sas-r4-9-trillion-gdp-never-mind-lost-trust-confidence-opportunity/, accessed on 1 February 2020.

not created; R500-billion to R1-trillion in tax revenue was foregone; and essential social programmes and services went undelivered.[2]

South Africa, despite the much hoped-for sea of change, and the "new dawn" expected to be ushered in by the inauguration of President Ramaphosa, remains afflicted with the consequence of pervasive and systemic corruption that is the legacy of former President Zuma and his acolytes. As a result, South Africa remains plagued by unrelenting corruption, which has not as of yet been ameliorated to any tangible extent by the anti-corruption methods that have in the past, and are currently being, implemented. Thus, over the years, South Africa's level of perceived corruption has remained relatively unchanged, as measured by Transparency International in terms of its Corruption Perceptions Index ("**the Corruption Index**").[3]

The release, on 23 January 2020, of the 2019 Corruption Index by Transparency International instils little confidence that inroads were made in reversing South Africa's negative CPI of 2018 and previous years. South Africa, accordingly, urgently needs to expose the extent of State capture, impose sanctions on the corrupt and to recover misappropriated funds in order to eradicate corruption, both actual and perceived.

During his inaugural State of The Nation Address in June 2019, President Cyril Ramaphosa acknowledged the Herculean task that confronts him, which is the arduous challenge of undoing the systemic corruption bequeathed to him by his predecessor. An urgent priority of President Ramaphosa's administration remains the rooting-out of corruption and State capture, whilst also effectively recovering the

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[2] Ibid.

[3] Trading Economics "South Africa Corruption Index", available https://tradingeconomics.com/south-africa/corruption-index, accessed on 2 February 2020.

stolen public money in some manner and reassuring potential investors about a transition to clean governance. In recent public statements, the President has emphasised his administration's commitment to fight corruption and State capture. Thus, speaking at the Financial Times Africa Summit in London in October 2019, President Ramaphosa announced to a gathering of international investors that State capture had possibly cost the country more than R500 billion.[4] The task confronting State authorities has, however, proved to be arduous in the extreme. This is because those allegedly implicated in grand-scale corruption and State capture are senior members of President Ramaphosa's own political party, the ruling African National Congress ("**ANC**"), with some of the alleged offenders still occupying public office in government. Indeed there is a widely held perception that the Ramaphosa administration is failing to uproot corruption because of a so-termed "fight back" by those allegedly implicated in corruption and who continue to wield the influence of high office, whether within government institutions or the structures of the ruling party.[5]

In this paper, we argue that amnesty for corruption, because of its potential to put an end to the endless cycle of promised prosecution yet little progress in achieving conviction and prosecutions, has the potential to effect a change in South Africa's political culture. It could therefore play a crucial role in establishing clean government in South Africa. Thus, in what follows, we suggest that an amnesty process would assist in providing a solution to the seemingly intractable problem posed by the entrenchment of State corruption. In our view, such a process would:

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4 Lameez Omarjee "Ramaphosa says State capture cost SA more than R500bn, overseas criminals will be brought to book" (14 October 2019) *fin24.com*. Accessed on 13 January 2020.

5 For some insight into the consequent impact on the ruling party, see Judith February 'ANC: Can the centre hold?' *Financial Mail* (24 October 2019). Accessed on 29 January 2020.

(a) bolster prospects of inspiring the fundamental change now required of a political culture that remains mired in corruption;

(b) be of general application;

(c) have a defined cut-off period; and

(d) be available only on condition of full disclosure by the person applying for amnesty, including disclosure relating to the corrupt acts and persons involved.

The conditions of amnesty would also entail some form of recovery of the benefits of the corrupt act(s) in question. The recovery mechanism could involve anything from a disgorgement of profits, to the payment of heavy fines by those implicated in corrupt acts, which would facilitate a substantial recovery of looted assets and State revenue.

Further, we argue that, for South Africa, much can be learned from an amnesty process that Hong Kong anti-corruption authorities employed in the 1970s. As has been noted, the Hong Kong experience "*is interesting because it is a story of big changes, with fairly clear causal connections between anticorruption interventions and outcomes*".[6] These enabled Hong Kong to serve as the "*example of a successful government-coordinated 'equilibrium switch*'"[7] from widespread corruption to clean government.

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6 Melanie Manion *Corruption by Design: Building Clean Government in Mainland China and Hong Kong* (2004) at 27.

7 Ibid.

II THE GENERAL THEORY OF AMNESTY

Since at least the advent of our democracy, there has been general agreement about what constitutes political corruption. It is the "*unsanctioned or unscheduled use of public resources for private ends*".[8] In the South African context, a general definition of corruption can be gleaned from the Prevention and Combating of Corrupt Activities Act, 2004, which provides for a comprehensive "*general offence of corruption*".[9] There has, however, not been consensus as to what constitutes the best means of combatting corruption, and there is surprisingly relatively little informed debate about whether amnesty itself could be effectively used as an anti-corruption measure.

In theory, "*amnesties presuppose a breach of law and provide immunity or protection from punishment. Historically, amnesties were invoked in relation of the laws of war and were reciprocally implemented by opposing sides in international armed*

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[8] Victor Levine, *Political Corruption: The Ghana Case* (1975), cited in Tom. Lodge *Political Corruption in South Africa* African Affairs 97(387) (1998) 157-187.

[9] Section 3 provides as follows:

"***3. General offence of corruption***.—*Any person who, directly or indirectly—*

(a) accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or

(b) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person,

in order to act, personally or by influencing another person so to act, in a manner—

(i) that amounts to the—

(aa) illegal, dishonest, unauthorised, incomplete, or biased; or

(bb) misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;

(ii) that amounts to—

(aa) the abuse of a position of authority;

(bb) a breach of trust; or

(cc) the violation of a legal duty or a set of rules;

(iii) designed to achieve an unjustified result; or

(iv) that amounts to any other unauthorised or improper inducement to do or not to do anything,

is guilty of the offence of corruption."

conflicts".[10] Amnesty, however, does not merely involve legal considerations. Rather, it involves a complex combination of moral, political *and* legal considerations.[11] Thus, as argued by Childress:

> *"Amnesty may be justified for the sake of the persons involved or the community as a whole. According to Hannah Arendt, although forgiveness and punishment are alternatives, they 'both have in common that they attempt to put an end to something that without interference could go on endlessly'. Forgiveness overlooks what was done for the sake of the one who did it; its motive may be love in personal terms, or respect in more social or political terms. Both concern who is forgiven, the one for whose sake forgiveness takes place. Amnesty, which some try to connect with forgiveness, also puts an end to some acts or states of affairs; its motive may well be respect for the offenders, but more often, I think, it will be the welfare of the community as a whole. Amnesty is for the sake of the community, signifying by the nullification of legal penalties and the removal of civil disabilities that the strife is terminated.*"[12]

III THE HISTORY AND EFFICACY OF AMNESTY IN SOUTH AFRICA

South Africa has had relatively extensive experience with amnesty processes. Firstly, at the cusp of democracy, an amnesty process assisted in bringing about a political transition from the oppressive system of apartheid to a democratic dispensation in which the Constitution of the Republic of South Africa, 1996 is supreme and the rule of law and human dignity are founding principles. Secondly,

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[10] Jessica Gavron "Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court" *The International and Comparative Law Quarterly* 51(1) (2002) 91-117 at 91.

[11] James F Childress "The amnesty argument" *CrossCurrents* 23(3) (1973) 310-328 at 310.

[12] Ibid at 318.

post-apartheid, amnesty has been used as a means to regularise the tax affairs of those South Africans who had contravened various exchange control laws.

(1) Amnesty under the Truth and Reconciliation Commission

To assist in the goal of overcoming historic and systematic State-administered racial oppression under apartheid, the country made use of the granting of conditional amnesty to perpetrators of various apartheid era crimes through the Promotion of National Unity and Reconciliation Act 34 of 1995 ("**the Act**"). The Act established a Truth and Reconciliation Commission ("**TRC**") and created three committees for the purpose of achieving the objectives of the Commission. One of these was a Committee on Amnesty, which was empowered to grant amnesty in respect of any act, omission or offence, provided that the applicant concerned had made a full disclosure of all relevant facts and provided further that the relevant act, omission or offence was associated with a political objective committed before 6 December 1993.

The objectives of the TRC were set out in section 3 of the Act. The TRC's main objective was "*to promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past*". It was enjoined to pursue that objective by "*establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights which were committed during the period commencing on 1 March 1960 to the cut-off date*". For this purpose, the TRC was also required to facilitate the granting of amnesty to

persons who made full disclosure of all the relevant facts relating to acts associated with a political objective.[13]

Although controversial in many respects, the true success of the TRC was its ability to help peacefully transition the country from apartheid to democracy. Despite continued contestation over its legacy, the TRC undoubtedly played a role in attenuating retributory violence.[14]

(2) Amnesty under the Exchange Control Amnesty legislation

Amnesty has also been effectively used in relation to exchange control and tax compliance. The South African tax and exchange control amnesty experience was largely successful and it left an important legacy of disclosure, revenue recovery and post-amnesty compliance with tax and exchange control laws.

Before the exchange control amnesty was introduced in South Africa, the government noted that many South Africans (both individuals and corporate entities) had "*a long history of shifting assets offshore illegally in a variety of ways*" and that "*the foreign income from these assets goes unreported*" despite the existence of exchange controls.[15] As a result, numerous South African citizens held assets offshore and were reticent to report, or to repatriate, their funds simply because they were concerned that they may be prosecuted in terms of the relevant Exchange Control Regulations. Evidence suggested, however, that South Africans wanted

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[13] See Emily H McCarthy "South Africa's Amnesty Process: A Viable Route Toward Truth and Reconciliation" 3 *Michigan Journal of Race & Law* 183 (1997). See also *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others* 1996 (4) SA 671 (CC).

[14] See, for example, *Derby-Lewis and Another v Chairman of the Committee on Amnesty of the Truth and Reconciliation Commission and Others* 2001 (3) SA 1033 (C).

[15] Speech made by Minister Manuel MP on 15 May 2003 in the National Assembly when introducing the Exchange Control Amnesty and Amendment of Taxation Laws Bill.

voluntarily to regularise, and repatriate, their foreign assets that were being held offshore.[16]

Thus, on 15 May 2003, the then Minister of Finance, Trevor Manuel, tabled the Exchange Control Amnesty and Amendment of Taxation Laws Bill in the National Assembly, stating that it had been time for South Africans, including deceased estates and trusts, to place their confidence and funds in the South African economy. He observed that, although "*[g]overnment has rightly taken the position that contraventions of Exchange Control Regulations and tax should not be tolerated*", it had been time for the proposed amnesty, given the prevailing desire by many South Africans "*to repatriate their foreign held assets voluntarily and to regularise their affairs due to greater international co-operation in tax compliance efforts and enhanced surveillance of international capital flows*".[17] In addition, Manuel noted that "*the recent promulgation of the Financial Intelligence Centre Act[18] has further increased the risk of holding illegal foreign assets. Internationally, the legal and economic environment has also become less favourable for illegally held foreign assets*".[19]

The Exchange Control Amnesty and Amendment of Taxation Laws Act 12 of 2003 ("**the Tax Amnesty Act**") came into effect on 31 May 2003. Its objectives were:

> *"(a) to enable violators of Exchange Control Regulations and certain tax acts to regularise their affairs in respect of foreign assets attributable to those violations;*

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16 Ibid.

17 Ibid.

18 Financial Intelligence Centre Act 38 of 2001 ("**FICA**").

19 Manuel op cit note 15.

(b) to ensure maximum disclosure of foreign assets and to facilitate repatriation thereof to the Republic; and

(c) to extend the tax base by disclosing previously unreported foreign assets."[20]

Thus, a full disclosure done through the Tax Amnesty Act's prescribed application process,[21] under *Part B* of the Tax Amnesty Act, allowed residents (individuals and entities) to exonerate themselves and regularise their exchange control and income tax affairs at minimal cost[22] within the limited window period in which applications were to be delivered to the amnesty unit, commencing on 1 June 2003 and ending on 29 February 2004.[23]

An amnesty unit established in terms of the Tax Amnesty Act was the independent body that evaluated all applications for amnesty and either granted or denied approval in relation to the amnesty applications.[24] It was constituted of at least nine members, including its chairperson, half of whom were from the South African

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20 Preamble of the Exchange Control Amnesty and Amendment of Taxation Laws Act 12 of 2003.

21 In terms of sections 5 and 6 of the Tax Amnesty Act, disclosures had to be made on sworn affidavit or solemn declaration within the period 1 June 2003 to 29 February 2004; disclose the market value, foreign currency and country in which the asset was held; and submit a certified valuation in respect of the assets; and had to include a description of the asset and its location.

22 In terms of section 15 of the Tax Amnesty Act applicants were not required to pay income tax on the foreign held assets for receipts and accruals up to the tax year ending on or before 28 February 2002. In terms of Part C of the Act to the extent that foreign assets were repatriated to South Africa, a once off exchange control levy of 5% would be due on the market value of the foreign assets. Alternatively, if the applicant elected to retain the foreign assets offshore, a once off exchange control levy of 10% would be due on the market value of the foreign assets. In both instances, the levies would only be payable to the extent that the value of the foreign assets exceeded the then overseas investment allowance limits of R750,000 per natural person, less any amount of the allowance previously utilised.

23 Section 5 of the Tax Amnesty Act.

24 Section 22 of the Tax Amnesty Act.

Reserve Bank and the other half from the South African Revenue Service and support staff, seconded from both institutions respectively.[25]

In the result, the 2003 exchange control amnesty was regarded as an overwhelmingly successful, as it "*attracted approximately 43,000 applications, with some prominent South Africans going public with their amnesty disclosures in a show of national pride and enthusiasm*".[26] Following this success, the Special Voluntary Disclosure Programme ("**SVDP**") for exchange control and tax transgressions, operative from 1 October 2016 to 31 August 2017 was subsequently introduced. In February 2017, the then Finance Minister Pravin Gordhan, when presenting his 2017 Budget Speech, confirmed that, as at 22 February 2017, SARS had received disclosures under the SVDP of R3,8 billion in foreign assets, with an anticipated revenue yield of approximately R600 million.[27]

The benefits of the exchange control amnesties cannot be gainsaid. They offered a clean slate to errant individuals and entities, while bringing them within the tax net from their successful application going forth. Analogously, we argue (as will be expanded on below) that these principles can be extended to the challenges of corruption and State capture in South Africa. It seems clear that the depth and width of corruption in South Africa is so engrained that it would, even in the best case scenario, take a few decades to bring perpetrators to book, and at an enormous cost to South Africans both in terms of time and economics, in the face of weakened law enforcement and prosecution institutions as a result of the State capture project,

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25 Section 23 of the Tax Amnesty Act.

26 Lisa Brunton "Amnesty then and now – Tax and exchange control" *GoLegal* (24 April 2017).

27 Speech made by Minister Pravin Gordhan in relation to the 2017 Budget, available https://www.politicsweb.co.za/documents/pravin-gordhans-budget-speech-2017, accessed 17 February 2020.

which need re-building. This is compounded by those who are implicated in corruption being able to utilise, with some success, their Stalingrad type legal defences with resultant delays and costs

IV AMNESTY FOR CORRUPTION OFFENCES

Although amnesties are renowned for, and have typically been granted in, post-conflict circumstances, amnesty can be utilised effectively for a broad range of situations.[28] The common theoretical underpinning for the granting of amnesty is that it is "*used as a mean to facilitate a shift from intractable situations in society…to more tractable ones*".[29] Thus understood, the granting of amnesty is a potential solution to any situation in which a society wishes to transform from an undesirable set of circumstances to a more desirable one. In this sense, it can be seen as a means to "*establish a turning point between one state of affairs and another*".[30]

Amnesties have been granted for a wide range of (previously unconventional) purposes, such as amnesties for firearm contraventions in countries such as South Africa, Kosovo and Iraq, but also for tax law violations in the United States and South Africa.[31] More importantly for present purposes, is that there are historical precedents where amnesties have been granted for corruption offences in countries where corruption had become pervasive and entrenched.

Corruption has proved to be a particularly pervasive and intractable phenomenon throughout the world, although more so in some countries than others. Part of the

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[28] Germano Vera Cruz & Etienne Mullet 'Mapping Mozambican people's views on corruption amnesty laws' (2019) 58(1) *Social Science Information* 84 at 85. See too Roman David 'Transitions to clean government: Amnesty as an anticorruption measure' (2010) 45(3) *Australian Journal of Political Science* 391 at 395.

[29] Vera Cruz & Mullet op cit note 28 at 85.

[30] David op cit note 28 at 395.

[31] Ibid at 396.

reason for the pervasiveness of corruption is its widespread and systemic nature. Once it becomes systemic, rather than being an individual problem (committed by a few especially venal individuals), corruption becomes a social and cultural problem (committed by a large portion of society).[32] In a pervasively corrupt environment the individual's incentive to engage in corrupt activities is greatly increased. Further, where corruption is prevalent, society's adverse perception of, and reaction to, corruption is attenuated due to the fact that corruption is ubiquitous and expected.[33] In such an environment, it becomes almost irrational for an individual, not to act corruptly. Particularly because, in a systemically corrupt society (where many of one's peers, and the officials who enforce the law, are also likely to be corrupt), the probability of being caught for corruption is low, whereas the potential gain may be high.[34] Additionally, in some instances the pressure exerted on individual government officials by their superiors and peers may make it nearly impossible to resist corrupt activity.[35] Thus, "*[a]n otherwise honest citizen, investor or bidder may decide to act in a corrupt manner because he or she thinks that others who compete with him or her for services, licences or tenders do the same*".[36] In this manner, corruption is so frequent, widespread and expected that it becomes engrained into the very political fabric of society.[37]

In corrupt societies, therefore, where a culture of corruption is prevalent, it is incredibly difficult, if not nigh on impossible, to eradicate corruption by conventional

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[32] Ibid at 393-394.

[33] Ibid at 394.

[34] Ibid at 394.

[35] David op cit note 28 at 394. See too Ed Peters 'The ICAC: How Hong Kong's corrupt police force became 'Asia's finest'' (2019) *South China Morning Post*, available at https://www.scmp.com/magazines/post-magazine/long-reads/article/3035736/icac-how-hong-kongs-corrupt-police-force-became, accessed on 12 January 2020.

[36] David op cit note 28 at 394.

[37] Ibid

methods, such as the enactment of anti-corruption laws and the establishment of institutions that investigate and prosecute instances of corrupt activity. A significant reason for this is that the government officials who are charged with the mandate of eradicating corruption are often themselves corrupt – or the individuals who are corrupt have such high status, power and influence – such that they seek to obstruct any attempt by society to eradicate corruption, both for the fear of being caught, and for the fear of losing out.[38] Put differently those in high office may feel constrained to emasculate any attempt to rid society of corruption because they have benefitted from corruption and now have too much to lose. It is for this reason that a number of countries have either debated, or have commenced the process of implementing, the adoption of corruption amnesty laws for corruption offences committed by both citizens and government officials. Thus, as noted by Vera Cruz and Mullet:

> "*The rationale behind corruption amnesty laws is that, owing to their very nature (a conflict of ethics), 'corrupt' practices are generalized and there is no will or no possibility to change them. Those theoretically in charge of fighting corruption are themselves corrupt and, consequently, at a high risk of being denounced in turn. Corrupt people are, in some way, trapped in a prisoner's dilemma game (Gorsira et al., 2018) in which the most favourable outcomes are obtained if nobody in the community unveils the numerous secret pacts that link or have linked officials and officials, officials and entrepreneurs, and entrepreneurs and entrepreneurs (Hudon and Garzón, 2016). As a result, dramatically altering the rules of the game would be the only way to unblock the system. Amnesty laws are precisely aimed at altering these rules.*"[39]

[38] Vera Cruz & Mullet op cit note 28 at 91.

[39] Ibid.

The 'rules of the game', and the laws of society, have to be altered because the systemic web of rampant corruption has proved impenetrable by conventional anti-corruption measures. The argument that conventional means to combat corruption are capable of maintaining a society that already has relatively clean government, but not where corruption is endemic, is, in our view, compelling. More often than not, however, conventional means have proven incapable of transforming a highly corrupt society into a clean one.[40] Conventional anti-corruption methods simply cannot counter widespread corruption when they are undermined and obstructed by many of the very individuals that are mandated to give effect to them. Moreover, when corruption is systemic, it is unlikely that anti-corruption institutions would even have the capacity to investigate and prosecute the sheer number of corrupt acts and corrupt individuals that exist. What is needed, therefore, is a means by which immediately to eradicate the seemingly impenetrable resistance and inertia that anti-corruption measures face, as well as to decrease the overwhelming number of corrupt individuals and corrupt acts. Ultimately, what is required is a means by which to establish a change in social and political culture.[41]

Accordingly, where a country finds itself in a situation where corruption has become systemic and conventional anti-corruption measures have proven ineffective, it is our view that an effective means by which to counter corruption is to implement a broad amnesty programme, which grants amnesty to individuals for corrupt acts committed prior to a given date. This is because the granting of amnesty has an instantaneous, tangible effect on the incentives of the individuals living in a society, as well as an immediate reduction in the number of corruption cases that government institutions

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[40] David op cit note 28 at 395-396.

[41] Ibid at 393-396.

have to investigate, to a far more manageable level. Further, it has been argued that the granting of amnesty has the capacity to instil a change in the political culture of a society. The granting of amnesty thus has transformative potential.[42] As David points out:

> "*By its nature, collective amnesty instantly reduces the ratio between the corrupt and non-corrupt officials by the inclusion of those who are willing to accept the second chance offered to them. At the same time, it creates uncertainty among the officials who hesitate to accept the second chance since their fellows may go forward to report cases of corruption, as demonstrated in Hong Kong throughout the year after the amnesty was declared. This effect may be enhanced when the amnesty is conditional on the exchange of information. The interaction of these factors may intensify the snowball effect to overcome the threshold after which corruption can be contained.*" [43] (Footnotes omitted).

Probably the most renowned and quintessential example of corruption amnesty is the amnesty process that was implemented in Hong Kong in 1977. In the early 1970s, Hong Kong was regarded as one of the most corrupt societies in the world, overrun by corrupt officials from a wide array of public services, especially within the Royal Police Force of Hong Kong.[44] In reaction to this, one of the principal means by which Hong Kong sought to combat its rampant corruption was to establish an independent body called the Independent Commission Against Corruption ("**the ICAC**").[45]

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[42] Ibid at 395-396 & 405.

[43] Ibid at 405.

[44] Jeremy Lo Kwok-chung 'Combating corruption in Hong Kong' (2009) Resource Material Series No 77: 138th Senior Seminary Visiting Experts' Papers *United Nations Asia and Far East Institute* at 3.

[45] Lo Kwok-chung op cit note 44 at 3. See too David op cit note 28 at 396

The ICAC consisted of a "three-pronged" structure, with three separate units tasked with (i) investigation and prosecution; (ii) prevention; and (iii) education and publicity. The first "prong" was aimed at the investigation and prosecution of corruption, and was conducted by the "Operations Department" within the ICAC. The second prong, the "Corruption Prevention Department", enabled ICAC to evaluate government departments and other public bodies by analysing their practices and procedures in order to establish whether each body's practices were conducive to corruption, and, if so, to recommend means by which they could prevent, or ameliorate the risk of, corruption. The third and final prong of the ICAC was the "Community Relations Department", which had the role of "*(i) educating the public against the evils of corruption; and (ii) enlisting and fostering public support in combatting corruption*".[46]

Armed with significant legal power[47] and resources, the ICAC embarked on a rampage of investigations and prosecutions into instances of corruption in Hong Kong, particularly aimed at the Royal Police Force, as it was one of the most corrupt government bodies.[48] The ICAC's relentless investigations and prosecutions of the Royal Police Force ultimately resulted in untenable tension within Hong Kong,

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[46] Lo Kwok-chung op cit note 44 at 3-5. See too David op cit note 28 at 396.

[47] This is explained in the following extract from Steven Lam 'Tackling Corruption: The Hong Kong Experience' in UNAFEI 'Resource Material Series No. 83' (2011) at 112, available https://www.unafei.or.jp/publications/pdf/RS_No83/No83_00All.pdf, accessed on 3 March 2020.

"*In Hong Kong, the anti-corruption horizons changed definitely with the enactment* of the *Independent Commission Against Corruption Ordinance in February 1974. Notably:*

- *the ICAC Ordinance would have a Commissioner appointed, who, one of the non-politically appointed Principal Officers, would carry as much authority and be of a status equivalent to that of a full-fledged Policy Secretary or the Commissioner of Police;*
- *the ICAC was to operate independently. Independence means, as prescribed in the law, that the Commissioner of the ICAC "shall not be subject to the direction or control of any person other than the Chief Executive (the Governor of Hong Kong at that time)"; and*
- *right at its inception, the ICAC was given the legal powers, the policy support, and the resources it needed to pursue its tasks.*

Initially the ICAC had 682 officers (actual strength 369), three times that of the Police Anti-Corruption Branch. As of today, the Commission comprises 1,360 officers, operating on a budget of HK$701 million, approximately 0.3% of the Government's total expenditure".

[48] Lo Kwok-chung op cit note 44 at 3-5. See too David op cit note 28 at 399.

however, which culminated in a series of mass rallies and an astonishing protest during which members of the police force carried out an assault on the ICAC's headquarters in order to threaten its officers and halt its investigations.[49] The situation became so dire that Hong Kong was reportedly on the brink of a complete uprising. Further, the ICAC was effectively prevented from properly performing its role as Hong Kong's primary anti-corruption agent.[50] Hong Kong thus found itself in an ungovernable quagmire, which required extraordinary measures to alleviate. As a hoped-for solution to Hong Kong's circumstances, the then Governor of Hong Kong effectively granted amnesty to any individuals who had committed corruption offences prior to 1977, in an effort to mitigate the tension and to allow Hong Kong to move forward.[51]

Although many critics, especially at the time, regarded the amnesty granted in Hong Kong as subversive of Hong Kong's established anti-corruption initiatives, of the public's confidence, as well as the rule of law, the actual outcome of the amnesty was overwhelmingly positive.[52] Thus, the ICAC continued its mandate and commenced investigations and prosecutions in respect of offences that were not covered by the amnesty, with renewed rigour and to great success.[53] For its own part, the Royal Police Force was rapidly reinvigorated: it employed new officers, changed its standards and culture, and, in many instances, even provided the ICAC with assistance in respect of its investigations.[54] In due course, the police force built up a stellar reputation, and even became known as "Asia's finest", while the ICAC

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[49] Ibid.

[50] Ibid.

[51] Ibid.

[52] David op cit note 28 at 397 & 403-404. See too Peters op cit note 35.

[53] David op cit note 28 at 402 & Peters op cit note 35.

[54] Peters op cit note 35. See too David op cit note 28 at 402.

made significant strides in its mandate to eradicate corruption in Hong Kong.[55] Previously, Hong Kong was regarded as an epicentre of corruption, as "one of the most corrupt cities in the world",[56] but is now ranked as one of the least corrupt in the world, with a score of 76 out of 100 (a score of 0 being "highly corrupt", and a score of 100 being "very clean") in terms of the Corruption Index.[57]

The 1977 Hong Kong amnesty process demonstrates the uniquely transformative ability of granting amnesty in circumstances where conventional anti-corruption methods have proven ineffective. Indeed, the Hong Kong amnesty process illustrates that the granting of amnesty for corruption offences has the potential to alter the incentives of individual members of society with regard to corruption, to cause a rapid shift in the social and political culture of a country, and to enable a country to embark on a trajectory towards a permanent reduction of corruption.[58]

The necessary caveat, however, is that the granting of amnesty is not, and cannot be, a panacea for the scourge of corruption, for it is not a tool by which to permanently eradicate corruption. It is simply incapable of doing so, as *"[a]mnesties are not solutions to the complicated problem of corruption, although they may momentarily ease a critical situation of widespread corruption and inspire long term cultural changes*".[59]

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55 Peters op cit note 35.

56 Diego Laje "What China can learn From Hong Kong in its fight against corruption" (2013) *CNN*, available at https://edition.cnn.com/2013/10/15/world/asia/china-hong-kong-corruption/index.html, accessed on 12 January 2020.

57 Transparency International "Corruption Perceptions Index 2019", available at https://www.transparency.org/country/HKG, accessed on 2 February 2020.

58 David op cit note 28 at 404-405.

59 Ibid at 405.

V THE ADOPTION OF AMNESTY FOR CORRUPTION OFFENCES IN SOUTH AFRICA

Similarly to Hong Kong in the 1970s, South Africa suffers from a particularly systemic and widespread corruption, which has proven to be increasingly difficult to uncover and eradicate over the years. Indeed, South Africa obtained a score of 44 out of 100 for its perceived level of public sector corruption,[60] which illustrates that South Africa is generally perceived as being relatively corrupt.

For South Africa, there is much to be learned from Hong Kong's experience of granting amnesty for corruption offences. Amnesty was not Hong Kong's primary solution to eradicate corruption; rather its primary solution was the use of an independent body (the ICAC) to investigate and prosecute corrupt acts. Nonetheless the granting of amnesty was an essential prerequisite to enabling the ICAC effectively to carry out its mandate, and for a considerable change in Hong Kong's social and political culture to occur, away from corrupt practices. Prior to the amnesty, government officials, including the Royal Police Force, had effectively obstructed any attempts to implement measures to eradicate corruption. With the systemic level of corruption in Hong Kong, together with the influence of those who were in power, many were caught in a far-reaching web of corruption, and the only means by which to avoid being consumed by it was to engage in corrupt activities and to obstruct any efforts implemented to expose them, in order to survive.[61]

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[60] Transparency International "Corruption Perceptions Index 2019", available at https://www.transparency.org/country/ZAF accessed on 2 February 2020

[61] See David op cit note 28 at 403, where the author notes the view of a previous police officer in Hong Kong, who stated that there were significant pressures that a government official faces to be corrupt, such that "*[i]t was not possible to fight the system, and having served with the Hong Kong police force, I know. There are therefore many serving officers who have been forced to commit offences to survive, and it is for this reason that I say that the Governor is right in giving them a chance to start again [by granting them amnesty]*".

As noted by Manion,[62] the amnesty relieved ICAC investigators of many lengthy, costly, and difficult investigations into past offenses, allowing the organization to focus its resources on more recent offences. ICAC investigators could attack ongoing corruption with greater proportionate force, a result by no means undesirable for anticorruption work. The amnesty also produced a second desirable practical result: Without the fear of investigation and prosecution for past activities, an increasing number of officials showed a new willingness to assist ICAC investigators. Consequently, without the amnesty process, the task of ameliorating corruption in Hong Kong may well have been impossible.

Given the widespread and systemic nature of corruption in South Africa in general, and also allegedly within the ranks of South Africa's government officials, the situation in South Africa is not so different to that of Hong Kong in the 1970s. Thus, much like Hong Kong, the systemic nature of corruption in South Africa, together with the influence and power of many of its (corrupt) government officials, has effectively prevented any tangible success from being obtained by conventional anti-corruption measures. We submit, therefore, that South Africa should adopt a comprehensive amnesty process in order to facilitate a rapid institutional, political and cultural change that will enable South Africa to commence a long-term process of corruption eradication.

We emphasise that an amnesty process ought not to be the primary anti-corruption measure in South Africa. On the contrary, in order to eradicate corruption, a more long-term solution is necessary, in which robust and professional investigation and

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Further, Peters op cit note 35 noted a retired superintendent's experience of interacting with a one of his corrupt senior officers. In the interaction, he was threatened that '*"[This job is] like a bus. You can get on board or run alongside, [just] don't stand in front of it*"'.

62 Manion op cit note 6.

prosecution of corruption offences, committed post a determined cut-off date, will be paramount. We instead maintain that, as matters stand, the eradication of corruption in South Africa may not be possible without an amnesty for corruption offences in order to 'jump-start' the machinery required to uproot the rampant and systemic corruption that plagues the country. By granting amnesty to those who have engaged in corrupt activities, we argue that South African bureaucracy and politics can start afresh, with its officials free from the threat of exposure, investigation and prosecution, and with a renewed allegiance to the establishment of a constitutional democracy that espouses respect for the rule of law and a repudiation of corruption.

Over and above the renowned Hong Kong amnesty example, our suggestion of an amnesty process for corruption is not unprecedented. Indeed, other countries in the world have either debated, or commenced the implementation of, corruption amnesty laws (including Mozambique;[63] Tunisia, Romania, Moldova and Mongolia,[64] and Lebanon[65]). Further, there are also compelling South African voices who have previously called for the adoption of corruption amnesty laws.[66] In an African context, Vera Cruz and Mullet suggest, from a study undertaken in Mozambique, that:

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[63] Vera Cruz & Mullet op cit note 28 at 91

[64] mLex "A Malaysian corruption amnesty looks unlikely, but the idea deserves a fair hearing", available at https://mlexmarketinsight.com/insights-center/editors-picks/anti-bribery-and-corruption/asia/a-malaysian-corruption-amnesty-looks-unlikely-but-the-idea-deserves-a-fair-hearing, accessed on 12 January 2020.

[65] Federica Marsi "Lebanon's elite seeks legal loopholes to evade justice for corruption - A proposed amnesty bill could further protect the country's political elite from legal scrutiny" *Middle East Eye,* available at https://www.middleeasteye.net/news/lebanons-elite-seeks-legal-loopholes-evade-calls-corruption-crackdown, accessed on 12 January 2020.

[66] See, for example, Geoff Budlender '20 years of democracy: The state of human rights in South Africa' (2 October 2014) *The Annual Human Rights Lecture, Faculty of Law, University of Stellenbosch* at 22-23; and Pierre Faure ' A call for optimism – and an amnesty for the corrupt (if they pay back the money)' (2019) *Daily Maverick,* available at https://www.dailymaverick.co.za/opinionista/2019-10-02-a-call-for-optimism-and-an-amnesty-for-the-corrupt-if-they-pay-back-the-money/.

> "*in Mozambique, and possibly in other African countries severely affected by corruption, temporary amnesty laws may be considered provided that they involve (a) preliminary consultations through national public interest associations about the conditions that applicants must fulfil (e.g. to refund at least part of the embezzled money), the level of transparency of the process, and the length of time such laws would be in force; and (b) the creation of a credible anti-corruption body that would be independent of governments, and that would be empowered with the material, legal and coercive means necessary to prosecute all individuals presumed guilty of a corruption offences, regardless of their level of wealth or power.*"[67]

Consequently, it is evident that the introduction of a corruption amnesty process is likely to require extensive engagement with the citizens of South Africa, together with public interest associations, to agree on the conditions required to be fulfilled by an applicant for amnesty, the extent of the privacy for the amnesty process, and duration for which the amnesty is available to the public. Such engagement will be paramount in order to generate sufficient public support for any amnesty process adopted in South Africa, and to ensure its legitimacy. We do, however, suggest that the amnesty application process - whereby applicants for amnesty confess to the crime(s) that they have committed, and make disclosure of their corrupt acts and the individuals involved - be private and not public, made to an independent body similarly to the process and body established in terms of the Tax Amnesty Act. In our view, a private amnesty process will likely be more conducive to incentivising individuals to apply for amnesty and to make full disclosure of their corrupt acts than would a public amnesty process. A private amnesty process is not a pre-requisite for the ultimate success of the amnesty process, however. A crucial issue such as this,

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[67] Vera Cruz & Mullet op cit note 28 at 98.

which we anticipate will be controversial, will require both political and public support, and, thus, must ultimately be left to public debate and parliamentary determination.

Further, although a discussion in respect of the creation of an independent and credible anti-corruption body falls beyond the scope of this paper, we stress that the adoption of an amnesty process is not a panacea for corruption. Thus, the establishment of alternative, long-term anti-corruption measures will be essential in order to eradicate corruption in South Africa. One such method must surely be the creation of an institution, with substantial legal powers of investigation and prosecution, and which, crucially, is independent of the government.

VI THE CONDITIONS OF APPLYING FOR AMNESTY

South Africans anxiously await the prospect of corruption becoming a problem of the past. The cost of corruption to the South African economy is not limited merely to looted State money and what it will cost to recover not only such funds but also to restore State institutions, it extends to an ever-increasing emigration of entrepreneurial South Africans due to a fear for their, and their children's, economic futures. South Africa, accordingly, urgently needs to expose the perpetrators of State capture and to move on to critical economic matters, for the benefit of society as a whole.

As will be clear from the above, a corruption amnesty has clear parallels to the TRC process, which recognised the need to heal and put the past behind, so that South Africans could progress with the very challenging task of building a democratic South Africa. Corruption amnesty also has parallels with the exchange control amnesty in

that it offers not only a clean slate, but also the possibility of recovering illicit assets obtained through corrupt acts.

It is, however, important to emphasise that the granting of amnesty for corruption offences would not, and must not, amount to a get-out-of-jail-without-consequences card. Saliently, fixed prerequisite in the process would require that applications for amnesty would be conditional on full disclosure of the relevant corrupt activities and the parties involved. Consequently, those who admit to corruption, but are later revealed not to have made (full) disclosure, would either not be granted amnesty or have their applications revoked. In our view, the records garnered through the amnesty process would also need to be made available to prosecution authorities without preconception.

As a penalty for corrupt acts, a wide range of options are available, from a complete disgorgement of profits made through corrupt acts, to the use of alternative financial sanctions (such as penalties in the form of significant fines). It can be anticipated that the issue of penalties for applicants of the proposed amnesty process will likely be the most controversial aspect of a corruption amnesty in South Africa. It is for this reason that public debate on the issue of penalties, especially at a parliamentary level, will be crucial.

The question of penalties must, however, be considered with caution. For any penalties imposed must neither be too moderate nor too severe, as neither will yield optimal results from the amnesty process. Thus, if an errant company that applies for corruption amnesty is met with an unsubstantial fine, the moral and political justification for the amnesty falls into question; and so too if the same company is met with too severe a penalty (for example a complete disgorgement of all proceeds

from the corrupt act, such as the gross price of a contact procured by corrupt means), then such a sanction would inevitably lead to the financial ruin of the company, would likely be detrimental to the economy at large, and act as a significant disincentive to applicants who would otherwise opt to participate in the amnesty process.

Without being prescriptive, in our view, therefore, it may be best that a range of penalties for corrupt acts be available, depending on the type of corrupt act engaged in, whether the person involved is the "giver" or "receiver", and the benefits (if any) that were derived by the applicant. For example, for a company that obtained a state contract in terms of a tender procedure because it offered a bribe to state officials, either a disgorgement of *profits*, or a significant fine commensurate with the scale of the ill-gotten gains, may be appropriate. And for a state official who received the bribe, a fine of a similar kind may be appropriate, given that he or she is unlikely to have retained the full amount of the benefit received, which would make a complete disgorgement of the bribe impossible. Thus, we suggest that those charged with implementing the amnesty process would need to have the flexibility to impose an appropriate penalty from a range of financial sanctions, which may include anything from a complete disgorgement of profits to alternative penalties, such as hefty fines of the kind envisaged above. Given the controversial nature of the issue of penalties, however, the precise parameters and types of penalties available will be best left for public debate and consideration.

Nevertheless, we do note that in the area of anti-cartel law and legislation in the United States, the Department of Justice reformed its amnesty policies in 1993 to provide for a structured amnesty involving payment of fines. Its Corporate Leniency

Policy (amnesty program) has been described as the "*most effective generator of cartel cases and is believed to be the most successful program in U.S. history for detecting large commercial crimes*".[68] Before the new program, the government received one application each year from firms willing to expose a cartel, in exchange for leniency. Currently, however, the government is receiving three applications each month.

Commenting on the US and making use of game theory, and in particular the prisoners' dilemma,[69] Christopher R. Leslie notes that it is intuitive that if the government offers an incentive to confess, then confessions will increase[70]. The mechanism by which the amnesty program works is nevertheless far more complicated and nuanced than simply offering amnesty in return for disclosure and full disgorgement of all funds, assets and profits generated through participation in corrupt activities.

In light of this, it may be that, likewise in South Africa, a system of significant fines for corrupt acts (much like those imposed by the local competition authorities) would better serve the goals of an amnesty process, than would a rigid full disgorgement approach.

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68 Christopher R. Leslie, *Antitrust Amnesty, Game Theory and Cartel Stability*, 31 J. CORP. L, p 453.

69 A prisoner's dilemma exists when two parties pursue their own individual interests and act in a rationally selfish manner, which results in both parties ending up in a worse position than if they had cooperated and pursued the group's interests instead of their own. In the case of cartel investigations, the language of the model maps the reality of our inquiry. Antitrust prosecutors are attempting to secure confessions from price-fixing suspects. The prosecutors offer each suspect a deal: cooperate in exchange for leniency. They also announce that every suspect is being offered the same deal. (Leslie op cit note 68 at 455).

70 Leslie op cit note 68 at 454.

VI CONCLUSION

We noted at the outset that the task confronting the State from a corruption perspective is epic in scale. Ridding South Africa of deep-rooted corruption and State capture will require a multifaceted approach, which also makes use of innovation. A structured corruption amnesty is thus one such measure that we argue would work effectively alongside ordinary law enforcement and prosecutorial mechanisms, going forward. For South Africans, the granting of amnesty will, of course, inevitably be a tough pill to swallow. In the aftermath of the amnesty process in Hong Kong, as is to be expected, many argued against the amnesty process and actively fought against it. Once amnesty had been granted, however, those that came to accept it realised that *"[i]t was not going to be possible to bring all those who had behaved improperly in the past to justice, but as least we could strive for the future. We just had to accept the fact that no society is perfect*."[71] So too, we argue that the time has come for South Africans to realise that, although, in an ideal society, all those involved in corrupt activities and the looting of the state coffers ought to be tried, convicted and incarcerated for their actions, in the current state of affairs, it simply is not possible to bring all individuals involved in corruption to justice. However, if South Africa embarks on an amnesty process that permits government officials, and the general population, to start afresh, free from the web of corruption that is the legacy of State capture, the country can strive for the future, and rather commit its focus towards reinvigorating the South African economy, for the benefit of society as a whole.

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[71] Peters op cit note 35.

VII EPILOGUE

It is necessary to note that a corruption amnesty in South Africa need not (and indeed should not) operate to the exclusion of other anti-corruption methods. Thus, the workings of a general amnesty of the type we have argued for above is not proposed as an alternative to the existing initiatives to uncover the extent and nature of State capture in the Zuma years of governance. That is largely the province of the current commission of inquiry into State capture, chaired by the Deputy Chief Justice of South Africa, Judge Raymond Zondo ("**the Zondo Commission**"),[72] which though broad in process, clearly has in its remit the investigation of fraud and corrupt activities around the Zuma-Gupta relationship.[73] Nevertheless, to a certain extent, the purpose of an amnesty process and the Zondo Commission will overlap, in that they both intend to uncover the extent and nature of State capture in South Africa.

A significant distinction, however, is that the Zondo Commission itself cannot impose fines and sanctions; it can merely make findings and recommend their imposition and identify those who should be subject to this sort of penalty. Commissions of inquiry serve an advisory purpose to the President.[74] The scope of their investigations and recommendations are limited by their terms of reference. Still less so can the Zondo Commission require that both the recovery of ill-gotten gains and testifying openly and honesty before the Commission be preconditions to receiving amnesty. Indeed, as has been acknowledged by Deputy Chief Justice Zondo,[75] the

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[72] Proclamation 3 of 2018, *GG* 41403 (25 January 2018) Terms of reference of the judicial commission of inquiry into allegations of State capture, corruption and fraud in the public sector including organs of State, available at https://sastatecapture.org.za/uploads/Terms_Of_Reference.pdf, accessed 17 February 2020.

[73] Ibid.

[74] *President of the Republic of South African and Others v SARFU* 2000 (1) SA 1 (CC) para 147.

[75] Brian Sokutu 'Why the Zondo Commission needs more time' *The Citizen* (24 January 2020), available https://citizen.co.za/news/south-africa/state-capture/2232804/why-the-zondo-commission-needs-more-time, accessed 17 February 2020.

commission only has the power to *recommend* the granting of amnesty to witnesses who assisted in revealing all of the scourge of corruption before it. An amnesty process of the kind contemplated in this paper would, however, uniquely have the capacity to grant amnesty itself, impose sanctions on individuals who are granted amnesty, and to recommend the prosecution of individuals who are not.

We anticipate that, at its conclusion, should the Zondo Commission successfully achieve its intended purpose, it would include in its findings a recommendation that key actors implicated in the fraud, corruption and State capture that occurred under the years of the Zuma administration be prosecuted.[76] This would only be the case, however, *presuming* that sufficient facts are found to support such a finding. The success of any subsequent prosecution(s) would also depend on whether sufficient evidence can be established to prove that corrupt acts had indeed taken place in order to satisfy the criminal standard of culpability.[77] Moreover, those individuals would still then be able to have resort to the full panoply of Stalingrad defences in order to avoid or substantially delay their day in court, as this country has seen on multiple occasions in respect of political prosecutions.

Of course, our critics may well argue that the Zondo Commission ought not to be interrupted in fulfilling its mandate, and that the amnesty process would merely be a duplication of similar processes currently underway via the Zondo Commission. In our view, however, the Zondo Commission and the amnesty process need not be viewed as antagonistic or mutually exclusive. Rather, we argue that the Zondo Commission and the amnesty process can be complementary to one another.

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[76] Zondo Commission Terms of reference supra note 72.

[77] The criminal standard of liability is generally that the state must prove the accused guilt (that being every element of the crime in question) beyond a reasonable doubt.

Indeed, the prospect of criminal prosecution against those who have been subjected to the scrutiny of the Zondo Commission would, we suggest, incentivise precisely such individuals to give a fulsome account of their participation in illegal activities and to make restitution, in terms of the amnesty process, rather than engaging in protracted defensive litigation on the basis that they have nothing to lose.

In this manner, the Zondo Commission and the amnesty process could work together to achieve an outcome (greater disclosure, and a larger number of confessions, including restitution) that neither the commission nor the amnesty process could have achieved on their own. Indeed, there is every reason why the terms of a general amnesty should complement the workings and ultimate recommendation of the Zondo Commission and not hinder it. Nevertheless, so as to avoid procedural overlap, the amnesty process could, for example, simply be structured in a manner that ensures that applications would not be processed in respect of those individuals who are yet to testify before the Zondo Commission or until such time as their testimony had been completed. Thus no individual who is the subject of the Zondo Commission's ambit would be prevented from testifying before the commission and being implicated in its findings.