



CIVIL LITIGATION AT THE SPECIAL INVESTIGATING UNIT

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Introduction to the Special Investigating Unit (SIU)



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The Special Investigating Unit (“SIU”) of South Africa is an **independent statutory body** that was established in terms of the **Special Investigating Units and Special Tribunals Act, 1996 (Act No. 74 of 1996) (“SIU Act”)**. The Head of the Unit is Adv JL (Andy) Mothibi.

The primary mandate of the SIU is to **investigate serious allegations of corruption, malpractice and maladministration in the administration of State institutions, State assets and public money** as well as any conduct which may seriously harm the interests of the public or a category thereof, and to **recover any financial losses suffered by State institutions through civil litigation**. The SIU is empowered to take civil action to correct any wrongdoing it uncovers in its investigations.

The SIU investigations are dictated by the issuing of a Proclamation by the President of the Republic of South Africa (“RSA”), and then to institute civil litigation proceedings either in a Special Tribunal (which is a dedicated civil adjudication forum with similar standing than that of a High Court of RSA) or in any Court of law within the RSA for the prevention or recovery of financial losses suffered by the State. Once the investigation is completed, a final **report is submitted to the President** with an overview of the investigation and its findings, as well as the various recommendations made and their outcomes.

The SIU receives allegations from all sources, including through its whistle-blower hotline (which is managed by an independent service provider), directly from State institutions themselves, from the Auditor General of South Africa and/or through direct approaches from whistle-blowers, be it through walk-ins, telephone calls or emails.

On 27 August 2024, the Head of Unit for the SIU reported that: **The SIU has matters under investigation involving a total of R 194 billion (i.e. R 183 billion iro National State institutions; R 9.1 billion iro Provincial State institutions and R 1.7 billion iro Local Government State institutions)**

Introduction to SIU Continue

The **SIU has powers** to:

- (a) **Subpoena witnesses, and to question such witnesses under oath** (Section 5(2)(b)&(c) of SIU Act);
- (b) **Subpoena any book, document or object** relevant to any investigation conducted by the SIU (including records held by the State institution concerned, records held by any entity/person relevant to a SIU investigations, bank statements and cellphone records etc.);
- (c) **Apply for entry warrants for purposes of conducting search and seizure** of evidence (Section 6 of SIU Act); and
- (d) **Institute and conduct civil litigate for and on behalf of the State**, which the SIU can do **either in its own name or in the name of the State institution concerned** (Sections 4(1)(c) and 5(5) of SIU Act).

In line with SIU Act, **the SIU refers evidence pointing to criminal conduct** uncovered during its investigations **to the National Prosecuting Authority (NPA) to consider instituting criminal prosecutions** (Sections 4(1)(d) and 4(2) of SIU Act).

The SIU still has a power that many authors would consider to be draconian (Section 5(3) of SIU Act). **The SIU can subpoena a witnesses in terms of section 5(2)(b)&(c) of the SIU Act to appear in person before the SIU, to produce a book document or object to the SIU; and/or to be questioned under oath.** During such questioning, a witness may still object against answering any specific question on the basis that the answer may potentially incriminate the witness. Normally under a Bill of Rights and Constitutional regime, that would be the end of that question, but section 5(3) of the SIU Act states that “ (a) *The law regarding privilege as applicable to a witness subpoenaed to give evidence in a criminal case in a court of law shall apply in relation to the questioning of a person in terms of subsection (2):* **Provided that a person who refuses to answer any question on the ground that the answer would tend to expose him or her to a criminal charge, may be compelled to answer such question.** (b) **No evidence regarding any questions and answers contemplated in the proviso to paragraph (a), shall be admissible in any criminal proceedings, except in criminal proceedings where such person stands trial on a charge of perjury or on a charge contemplated in section 319 (3) of the Criminal**

⁴ Procedure Act, 1955 (Act No. 56 of 1955)” [Emphasis added].



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Introduction to the Civil Litigation Unit (CLU)

The CLU is a division within the portfolio of the Chief Legal Counsel (CLC) of the SIU, and it **comprises of a number of attorneys and advocates.**

The CLU is responsible for effective management of civil litigation to prevent losses and recover damages suffered by State institutions.

To supplement the limited human resources of the CLU, the CLU either makes use of **the Office of the State Attorney (“OSA”) in RSA or of private attorneys** procured via other means (e.g. the SIU’s own tender or Supply Chain Management (“SCM”) processes or by participation in the Legal panels established by other State institutions pursuant to SCM processes done by such other State institutions). OSA or such private attorneys will then follow a SCM process to identify and **brief counsel**. Considering the complexity or contract value of the SIU matters, the SIU normally briefs both a Junior Counsel and a Senior Counsel for SIU cases.

CLU Role **during investigations**

The CLU does not only institute and conduct civil proceedings, but members of the CLU also hold frequent **Project Review meeting** with the SIU **Investigating Teams to assist the investigators to identify potential civil cases as early as possible, and then works with the investigators to ripen such potential cases** for formal referral to the CLU. This includes: (a) providing advice and guidance on possible civil causes of action, and the evidence required to substantiate such potential cases; (b) assessing the evidence gathered by the investigators and provide input on the adequacy of such evidence; and (c) recommending additional or better evidence that needs to be gathered through investigation.

CLU Case Assessment Committee (“CAC”)

When a matter is deemed to be ripe for referral to the CLU, a **Referral Memo and Evidence pack are prepared by the investigators, for submission to the CLU CAC**. The CLU CAC consists of all or as many of the CLU members that may be available, where they then meet in committee to hear presentations made by the investigators and **to review and assess the proposed civil case and the available evidence**. If the CLU CAC is satisfied that civil proceedings must be instituted, then approval is sought from the Head of the Unit.



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Primary Civil Causes of Action

A large number (if not most) of the civil litigation conducted by the SIU relates to **irregular or unlawful SCM processes**, which must be **reviewed, declared invalid and set aside on the basis of legality**, where the SIU would also seek **just and equitable relief** in the form of a **disgorgement of profit** (section 172 of Constitution), which profit must then be paid back to the State institution concerned. These civil proceedings are normally based on non-compliance with the prescripts of **Section 217(1) of the Constitution of the Republic of South Africa, 1996 ("Constitution")**, which states "When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, **contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective**" [Emphasis added].

Section 2 of the Constitution states "**This Constitution is the supreme law of the Republic**; law or **conduct inconsistent with it is invalid**, and the obligations imposed by it must be fulfilled" [Emphasis added].

The system, as envisaged in section 217(1) of the Constitution is comprised of a number of prescripts, of which the following are prime examples: (a) **Public Finance Management Act, 1999 (Act No. 1 of 1999) ("PFMA")**, (b) **Treasury Regulations** made in terms of the PFMA; (c) **Practice Notes** issued by National Treasury in terms of the PFMA; (d) **Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000) ("PPPFA")**; (e) **Regulations issued in terms of the PPPFA**; and (f) **SCM Policy of the State institution concerned**. In addition to non-compliance with SCM prescripts, **the SIU also looks for fraud, corruption, misrepresentations and breaches of contract etc.** Although fraud is normally a criminal principle, it also applies in civil law, where it is trite that **fraud unravels all**. Corruption (i.e. the payment of bribes or provision of undue gratification) is not only a criminal offence in terms of the *Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004)*, but also undermines the principles set out in section 217(1) of the Constitution, which means it also results in a civil cause of action, while it also **breaches the trust relationship that expected between an employer and an employee, and such bribes can be claimed back as "secret profit"** (see *Ganes and another v Telecom Namibia Ltd* [2004 (3) SA 615 (SCA)]. Also, **Section 37D(1)(b)(ii) of the Pension Funds Act No. 24 of 1956**. **Misrepresentations** made negligently or even innocently results in a lack of consensus or agreement, which undermines the conclusion of a valid contract.



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Civil Litigation conducted by the SIU – SIU Act



Section 4(1)(c) of the SIU Act states "**Functions of Special Investigating Unit.**—(1) The functions of a Special Investigating Unit are, within the framework of its terms of reference as set out in the proclamation referred to in section 2 (1)— ... (c) **to institute and conduct civil proceedings in a Special Tribunal or any court of law for— (i) any relief to which the State institution concerned is entitled**, including the recovery of any damages or losses and the prevention of potential damages or losses which may be suffered by such a State institution; **(ii) any relief relevant to any investigation**; or (iii) any relief relevant to the interests of a Special Investigating Unit" [Emphasis added].

Section 5(5) of the SIU Act states "(5) Notwithstanding anything to the contrary in any law and for the performance of any of its functions under this Act, **a Special Investigating Unit may institute and conduct civil proceedings in its own name or on behalf of a State institution in a Special Tribunal or any court of law.**" [Emphasis added]

Section 5(7) of the SIU Act states "(7) Without limiting the provisions of subsection (5), **if, during the course of an investigation, any matter comes to the attention of the Head of the Special Investigating Unit which, in his or her opinion, justifies the institution of civil proceedings by a State institution against any person, he or she may bring such matter to the attention of the state attorney or the State institution concerned, as the case may be**" [Emphasis added].

Section 5(9) of the SIU Act states "(9)(a) **Any member of a Special Investigating Unit who is qualified and admitted as an advocate or an attorney, may perform such work in a Special Tribunal or any court of law on behalf of a Special Investigating Unit or a State institution as is by law, custom or practice performed by advocates and attorneys.** (b) The rights, privileges and duties of any member lawfully performing functions described in paragraph (a), shall, except as is specifically provided for by this Act, include any of the rights, privileges and duties possessed by or imposed on an attorney or an advocate practising in any court of law where such functions are being performed".

Civil Litigation conducted by the SIU – SIU & Tribunal Regulations



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Regulation 5 of the Special Investigating Units and Special Tribunals Regulations (Notice No. R.1263 of Government Gazette No. 42729 dated 26 September 2019) (“SIU & Tribunal Regulations”) states “**Civil Proceedings 5.1 The jurisdiction of the Tribunal is limited to civil proceedings emanating from any Investigation of any particular Special investigating Unit** in terms of section 2(1)(b) of the Act. 5.2 The words ‘civil proceedings’, wherever they appear in the Act, including in the preamble and in sections 2(1)(b), 4(1)(c), 5(1)(b), 5(5) and 8.2 of the Act, **shall include civil proceedings for any relief for the recovery of any damages or losses and the prevention of potential damages or losses which may be suffered by a state institution** under section 4(1)(c) of the Act, in the form of: (a) **an application for a restraint order** which may, in an appropriate case, be brought ex parte to the Tribunal for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property to which the order relates; (b) **an application for a preservation order** which may, in appropriate cases, be brought ex parte to the Tribunal for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property to which the order relates; (c) **an application for a forfeiture order** where a preservation of property order is in force and the order forfeiting to the state all or any of the property that is subject to the preservation of property order is legally competent; (d) **action proceedings for recovery of any damages or losses** suffered by a state institution concerned; or (e) **declaratory, interdictory or other forms of relief ancillary to any relief granted by the Tribunal...**” [Emphasis added]

Civil Litigation conducted by the SIU – Tribunal Rules



Rule 3 of the Rules for the Conduct of Proceedings in the Special Tribunals (Government Gazette No. 43647 dated 25 August 2020) (“Tribunal Rules”) defines:

- (a) “**Property**’ shall include corporeal, incorporeal, movable or immovable property irrespective of whether it is registered or located within, or outside, the Republic of South Africa”;
- (b) “**Deliver**’ shall mean the service of copies by way of physical delivery and **shall include inter alia, e-mail and electronic communications**; upon all the parties and the filing of the original with the Registrar.” [Emphasis added]. As such, the SIU mainly serves its papers, including the initiations Tribunal papers (e.g. Notice of Motion or Summons) by means of e-mail, and the SIU very rarely use Sheriffs of Court.
- (c) “**Unlawful activities**’ shall mean acts of serious maladministration in connection with the affairs of the state or any of its organs; **improper and unlawful conduct by employees of any state institution**, unlawful appropriation or expenditure of public money or property; Unlawful, irregular or unapproved acquisitive act, transaction, measure or practice having a bearing upon State property; intentional or negligent loss of public money or damage to public property; unlawful or improper conduct by any person which has caused or may cause serious harm to the interests of the public and includes **offences referred to in Part 1 to 4 or sections 17, 20 or 21 of Prevention and Combating of Corrupt Activities Act No. 12 of 2004 (PRECCA)**; and which offences were committed in connection with the affairs of any state institution” [Emphasis added].

Rule 19(1) of the Tribunal Rules states “**The primary objective of these Rules is to ensure the expeditious and cost-effective disposal of matters before the Tribunal which may, in a fitting case, include the abandonment of the application of any rules of evidence** in accordance with section 9(3) of the Act. (2) **All matters in the Tribunal shall be subject to judicial case management**” [Emphasis added]. **The moment the dies for opposition or defence have expired, the Tribunal calls for the first Case Management Meeting (“CMM”)**, where the timeline for the entire case is set out. **Because the SIU is the only initiating litigant in the Tribunal (i.e. no overburdened court rolls)**, and because of good case management by the Judges of the Tribunal, SIU civil proceedings can be done within a period of 4 to 6 months from start to finish.

Civil Litigation conducted by the SIU – Tribunal Rules Continue



Rule 23 of the Tribunal Rules states "**Preservation Orders** (1) The SIU may, by way of an **ex parte application** and in the form of a rule nisi, apply to the Tribunal in chambers or open hearing of the Tribunal, **for a preservation order, pending the final adjudication of the main application or action proceedings**, including appeals arising therefrom; **prohibiting any person**, subject to such conditions and exceptions as may be specified in the order, **from disposing of, interfering with or dealing in any other manner with any property to which the order relates**. (2) An application for a preservation order before the Tribunal is **limited only in** instances where there is **a need for the preservation of evidence of the proceeds of a crime or unlawful transactions, contracts or conduct** arising from any of the grounds listed in section 2 (2) of the Act; (3) **The preservation order shall be applied for only after or simultaneous with the institution of the main application or action proceedings in the Tribunal, or where there is an application or action proceedings pending in the High Court**. (4) The Tribunal may grant an application for a preservation order where it is proved, on a balance of probabilities that: (a) A prima facie case is made out in the main application or action proceedings pending; (b) The relief sought must be the only practicable mean of protecting the evidence; (c) The evidence to be attached must be material to the applicant's main application or action proceedings; (d) Reasons are provided for the belief that the evidence will be removed, disposed of or destroyed; (e) The order should go no further than is strictly necessary for the preservation of the evidence sought to be preserved. (5) **A preservation order may be made: (a) in respect of such property, movable and/or immovable as specified in the preservation order held, either within or outside the territory of the Republic of South Africa, and by the person against whom the preservation order is being made; (b) in respect of all realisable property held by the respondent or defendant, or in the possession of any other person regardless of title, whether specified in the preservation order or not; (c) in respect of all property which, if it is transferred to such person after the making of the preservation order, would be realisable property**. (6) The Tribunal may make a provisional preservation order having immediate effect and may simultaneously grant a rule nisi calling upon the defendant/respondent on a day mentioned in the rule to appear and to show cause why the preservation order should not be made final...".

Civil Litigation conducted by the SIU – Tribunal Rules Continue



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Preservation of proceeds of unlawful activity

Rule 24 of the Tribunal Rules states "**Interdicts concerning disputed property** located in the Republic of South Africa (1) Any interested person or party including the SIU may **by way of an ex parte application** apply to the Tribunal for an order prohibiting any person, subject to such conditions as may be specified in the order, **from dealing in any manner with any disputed property.** (2) The application must demonstrate that **the property concerned, constitutes the proceeds of unlawful activities** emanating from the findings of an investigation conducted by SIU, pursuant to a proclamation made by the President relevant to that investigation, in terms of section 2 of the Act. (3) The Tribunal, at the time of granting an interdict, **may at the same time make an order authorising the seizure of the property** concerned by an SIU official and **any other ancillary orders that the Tribunal considers appropriate** for the proper fair and effective execution of the prohibition order. (4) Property seized under this Rule shall be dealt with in accordance with the directions of the Tribunal. (5) Where the Tribunal orders an interdict on the use of a property, the SIU shall, as soon as is practicable after granting the order- (a) give notice of the order to all persons known to the SIU to have an interest in property which is subject to the order; and (b) publish a notice of the order in the Gazette. (6) A notice referred to in sub-rule 5 shall be served in the manner provided for in these Rules. (7) Any person who has an interest in the property which is subject to the interdict may deliver an appearance to oppose the interdict or deliver an application for an order excluding his or her interest in the property under such order of the interdict. (8) An appearance or application under this Rule shall be delivered to the SIU and in the case of— (a) a person upon whom a notice has been served under sub-rule 5, not later than 14 days after such service; or (b) any other person, not later than 14 days after the date upon which a notice referred to in sub-rule 5 (1) (b), was published in the Gazette. (9) An appearance or application under sub-rule 5 shall contain full particulars of the chosen address for the delivery of documents concerning further proceedings and shall be accompanied by an affidavit stating— (a) full particulars of the identity of the person delivering the application; (b) the nature and extent of his or her interest in the property concerned; and (c) the reasons upon which he or she intends to rely in opposing the interdict or applying for the exclusion of his or her interests from the operation thereof".

Civil Litigation conducted by the SIU – Tribunal Rules Continue



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Rule 26 of the Tribunal Rules states "**Forfeiture Orders** At the conclusion of the proceedings and on final determination of the dispute, depending on the outcome on the unlawful activities of the respondent or the defendant, as the case may be, **the Tribunal may make a final order for forfeiture to the State, of the property held under a preservation order or the interdict order where the respondent has been found to have participated in unlawful activities**". **Examples of cases:**

The Gauteng Department of Health / Ledla (PPE) Special Tribunal Case No. GP/07/2020: The SIU investigation found SCM irregularities in the procurement of PPE by the GDoH during the Covid-19 pandemic. The SIU learned that the GDoH had made a **payment of R 38 million to Ledla**. Since the SIU needed time to prepare papers for interim relief, the SIU requested the Financial Intelligence Centre ("**FIC**") to intervene and to issue blocking orders in terms of section 34 of the *Financial Intelligence Centre Act No. 38 of 2001* ("**FIC Act**"). The FIC was able to **block 34 bank accounts containing a total of R 26.4 million**. The blocking order of the FIC lapses (if not extended) after 10 working days. Within that 10 day period, the SIU brought an **ex parte Application for an interim Preservation Order or Interdict** in respect of the funds frozen in the 34 bank accounts. At the finalization of the **main Forfeiture or Review proceedings** that the SIU instituted later (30 to 60 court days later), the **Special Tribunal ordered forfeiture of a total of R 24 million**. The SIU collected a total of R 23.5 million. The remaining balance is still subject to appeal procedures. It is also in the Ledla case that the **Constitutional Court of RSA** (*Ledla Structural Development (Pty) Ltd and Others v Special Investigating Unit [2023] ZACC 8*) held that the **Special Tribunal does have the right to conduct legality reviews, even though the Special Tribunal is not a Court**.

The Transnet / Superfecta Special Tribunal Case No. GP06/2022: The SIU brought an **ex parte Application to Preserve or Interdict** the pay-out of pension benefits of R 1.9 million to a former Transnet official and to preserve the proceeds of unlawful activity in the form of immovable property to the value of approximately R 4.7 million. Attached assets makes settlement discussions far more productive. Ultimately, and after the **main Forfeiture or Review Proceedings** were instituted: (a) **Superfecta signed a settlement acknowledging its indebtedness to Transnet for R 21 million**, and Transnet set-off R 18 million against money owing by Transnet to Superfecta on an unrelated contract, while Superfecta paid the remaining balance of R 3 million to Transnet; (b) On 25 March 2025, an amount of **R 1.9 million was paid by pension fund** to Transnet in respect of the first former Transnet official, and **his remaining indebtedness of R 3.5 million must be recovered from the sale of his immovable properties in Rosebank**; (c) on 15 April 2025 an amount of **R 978,000 was paid by pension fund** to Transnet in respect of the second former Transnet official, and **his remaining indebtedness of R 6.6 million must be recovered from the sale of his immovable properties in Dainfern**; and (d) Value on contracts set aside or declared invalid: **R 215 million**.

Experiences, Challenges & Recommendations



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Experiences: Knowledge management, cooperation and sharing of information are crucial. The more you know, and the more information is shared between organs of State and other Law Enforcement Agencies (“LEAs”), the better, because it leaves little room for the culprits to hide or to hide their conduct or hide the proceeds of unlawful activities. The best results are achieved through cooperation with: (a) the State institutions concerned (e.g. Transnet and Eskom etc.); (b) other organ of State (e.g. Home Affairs, National Traffic Information System (eNatis) and Deeds Registry etc.); (c) other LEAs (e.g. South African Police Service (SAPS) etc.); (d) other institutions (e.g. Asset Forfeiture Unit (AFU), National Prosecuting Authority (NPA), South African Revenue Service (SARS) and Financial Intelligence Centre (FIC) etc.), including regulatory authorities (e.g. Private Security Industry Regulatory Authority (PSIRA), SA Health Products Regulatory Authority (SAHPRA) and SA Banking Risk Information Centre (SABRIC) etc.); (e) civil society (e.g. Corruption Watch etc.); and (f) even the private sector (e.g. competing bidders etc.).

Challenges: Over mean years a tendency has developed where organs of State, LEAs, investigators, legal and accountants etc. all seem to be competing with each other, and jealously seek to protect their perceived playing field (i.e. area of expertise/operation). This has resulted in LEAs being slow to share their information and records with other LEAs or organs of State. The only people who stand to benefit from this approach are the culprits.

Recommendations: (1) Know and understand the functions and powers of other LEAs and organs of State, so that you know when to ask them for information and assistance, and when to refer or hand-over matters to them to take forward – either on their own or in parallel with your own investigations/action. (2) Multi-disciplinary investigating teams comprising of *inter alia* investigators, legal and accountants at least, should be encouraged (more heads are better than one); and (3) Investigations should be conducted by more than one person/investigator. This provides a certain degree of security to the investigators, because they will not be caught alone. It makes it far more difficult to make a good case disappear by means of a corrupt payment or through the assassination of the investigator. It makes hand-over of a case or docket far easier, when an investigator leaves.

Outcomes

According to **SIU Annual Report for 2022/2023**, the SIU achieved the following outcomes:

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- (a) Rand value of potential cash and/or assets to be recovered: **R 846 million**;
 - (b) Rand value of actual cash and/or assets recovered: **R 389 million**;
 - (c) Rand value of contracts and/or administrative decisions/actions set aside or deemed invalid: **R 300 million**;
 - (d) Rand value of potential loss prevented: **R 2.1 billion**;
 - (e) Number of referrals made for disciplinary action against implicated officials/employees: **376**;
 - (f) Number of referrals made for administrative action (e.g. blacklisting or regulatory oversight action): **67,087**;
 - (g) Number of referrals made to the relevant prosecuting authority: **680**;
 - (h) Number of investigations closed: **70,537**;
 - (i) Rand value of matters in respect of which evidence was referred for the institution or defence/opposition of civil proceedings: **R 2.4 billion**;
 - (j) Number of civil cases issued in the Special Tribunal: **35**; and
 - (k) Number of Reports submitted to the President: **21**.



Outcomes - Continue

According to **SIU Annual Report for 2023/2024**, the SIU achieved the following outcomes:



- (a) Rand value of potential cash and/or assets to be recovered: **R 1.6 billion**;
- (b) Rand value of actual cash and/or assets recovered: **R 2.2 billion**;
- (c) Rand value of contracts and/or administrative decisions/actions set aside or deemed invalid: **R 2.1 billion**;
- (d) Rand value of potential loss prevented: **R 2.3 billion**;
- (e) Number of referrals made for disciplinary action against implicated officials/employees: **297**;
- (f) Number of referrals made for administrative action (e.g. blacklisting or regulatory oversight action): **190**;
- (g) Number of referrals made to the relevant prosecuting authority: **583**;
- (h) Number of investigations closed: **1,919**;
- (i) Rand value of matters in respect of which evidence was referred for the institution or defence/opposition of civil proceedings: **R 4.8 billion**;
- (j) Number of civil cases issued in the Special Tribunal: **43**; and
- (k) Number of Reports submitted to the President: **26**.

Question & Answer

Thank you and contact details



THANK YOU

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