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Laws in the Pipeline – Curbing the Construction Mafia

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Introduction

The Critical Infrastructure Protection Act, 8 of 2019 ("**CIPA**") and the National Infrastructure Plan ("**NIP**"), to be gazetted under the National Infrastructure Development Act, 23 of 2014, are two pieces of legislation that could be essential in the fight against, and the prevention of, construction site extortion syndicates, colloquially known as the 'construction mafia'.

The Critical Infrastructure Protection Act

CIPA repeals the National Key Points Act, 102 of 1980 in its entirety and while not being fully operational as yet, the majority of its provisions came into effect on 30 April 2022 with the full act to be proclaimed law in due course.

Unlike its predecessor, CIPA does not merely focus on securing a select list of landmarks, but rather aims to secure sites, projects and developments in the interest of the economy, public safety and the continuous provision of basic public services.

In furtherance of its aims, CIPA falls within the purview of the Department of Police and not the Department of Defence and while the Minister of Police (the "**Minister**") still has a discretion in declaring a site Critical Infrastructure (as defined in CIPA), CIPA makes provision for interested parties to apply to have a site declared Critical Infrastructure and a multi-disciplinary council (the "**Critical Infrastructure Council**") to advise and make certain recommendations to the Minister.

CIPA categorically sets out the procedures, requirements and factors to be considered when declaring a site Critical Infrastructure.

The owner of the Critical Infrastructure, which in most instances would be the state, has the responsibility of ensuring that the necessary measures are in place to protect and secure the Critical Infrastructure, but the Police Commissioner can and should (in the event that the owner fails to secure the site) take this responsibility upon itself, at the cost of the owner.

The Minister published, for public comment, the Interim Critical Infrastructure Regulations on or about 22 April 2022 ("**Interim Regulations**").

In terms of the Interim Regulations, the Minister, *inter alia* –

- establishes the Critical Infrastructure Council and sets out its functions and procedures; and
- establishes and sets out the functions of the Critical Infrastructure Protection Regulator, a body that is to ensure the maintenance of the administrative systems and procedures necessary for the implementation and enforcement of CIPA.

CIPA contemplates that the Critical Infrastructure Council should be made up of, *inter alia*, various delegates from the Justice, Crime Prevention and Security Cluster as well as the Department of Public Works.

Accordingly, considering all of the above and seeing that CIPA envisions a more transparent process for the identification and declaration of Critical Infrastructure and the fact that breaching the provisions of CIPA by, *inter alia* –

- hindering, obstructing or disobeying a person in control of a Critical Infrastructure in taking in relation to the security of any critical infrastructure;

- gaining access to critical infrastructure without the consent of the security manager or person in control of that Critical Infrastructure;
- damaging, endangering or disrupting Critical Infrastructure or threatening the safety or security at Critical Infrastructure or part thereof;
- threatening to damage Critical Infrastructure; or
- colluding with or assisting another person in the commission, performance or carrying out of an activity referred to above,

would result in an in offence punishable by a fine and/or imprisonment, it is possible for contractors and/or the state to apply to have a specific construction project or site declared Critical Infrastructure. If successful, the enforcement of CIPA and the regulations thereunder as highlighted above, could assist in staving off construction site extortion.

The National Infrastructure Plan

On or about 21 October 2022, the Minister of Public Works, gazetted phase 2 of the Draft National Infrastructure Plan ("**Draft NIP 2050 Phase 2**"), for public comment by 9 December 2022. For the purposes of this article, we will discuss certain provisions in the section entitled "Cross-Cutting Support to the Infrastructure Plan – Crime and Corruption".

In the Draft NIP 2050 Phase 2, it is submitted that the challenges posed by infrastructure-related crime in South Africa appears to be more severe than in other jurisdictions, therefore, the continued reassessment of risks and strategic responses becomes a necessity. Four types of infrastructure-related threats are identified, as follows –

1. *"Crime affecting the provision of infrastructure, especially corruption in the procurement process and in the extortion of service providers";*
2. *"Crime directed at infrastructure itself, especially theft of copper and steel";*
3. *"theft of infrastructure services, such as non-payment of electricity or water"; and*
4. *"Crime directed at users of infrastructure".*

The fact that the interest and incentives of State-Owned Enterprises ("**SOEs**") are not aligned with that of the public is highlighted as a factor that contributes to the high levels of infrastructure-related crime.

The Draft NIP 2050 Phase 2 stipulates that the cost of these crimes are borne by the public rather that the state as the owner of the infrastructure and because SOEs are not cost-minimising businesses, they tend to under-invest in the protection of their assets.

The **Draft NIP 2050 Phase 2** also makes no secret of the fact that extortion usually occurs at the point of delivery and this could lead to delays, non-delivery of products and higher project costs.

The Draft NIP 2050 Phase 2 proposes, *inter alia*, that there must be a demonstrated capacity to successfully identify, arrest and prosecute offenders, and there must be integrity of internal controls in institutions that own or provide infrastructure to reduce corruption and complicity with criminality and infrastructure must be physically secured and protected from violence, vandalism and theft.

It is envisioned that by enforcement of the NIP, the aforegoing will be achieved as follows –

- state infrastructure entities will be held to account for having robust internal controls to reduce the opportunity for corruption and collusion between syndicates and rogue state representatives
- owners of infrastructure will be required to protect it from theft and destruction; and
- more technologically advanced strategies to protect infrastructure will be implemented.

Conclusion

There is clear synergy between **CIPA** and the **NIP** as ventilated by the Draft NIP 2050 Phase 2.

The ever-growing threat posed by construction site extortion syndicates will continue to negatively affect the economy and disturb public safety unless it is subdued with the appropriate countermeasures.

In this article, we highlighted how CIPA and the NIP, in their current form, could be used as the appropriate countermeasures, but like many other things, it will all depend on the resilience and strength of state institutions.

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