



## Tshebeletso' Sepolesa Afrika Borwa

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Private Bag  
Privaatsak X20501  
Mokotla' Poso

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My reference 2/1/8  
My verwysing  
Tshupo ya ka

THE PROVINCIAL COMMISSIONER  
DIE PROVINSIALE KOMMISSARIS

Enquiries Lieutenant General Mpmembe  
Navrae Colonel Lane  
Batlisa ho

FREE STATE PROVINCE  
PROVINSIE VRYSTAAT

Tel [051] 507 6534  
Fax / Faks [051] 507 6536

BLOEMFONTEIN  
9300

2016-06-02

Provincial Head  
Visible Policing  
Free State Province

All Cluster Commanders  
All Station Commanders  
All Detective Commanders  
Free State Province

**THEFT OF NON-FERROUS METALS : COMING INTO OPERATION OF THE  
CRIMINAL MATTERS AMENDMENT ACT NO. 18 OF 2015**

1. The President has declared **1 June 2016 as the date on which the abovementioned Criminal Matters Amendment Act no. 18 of 2015** (hereinafter referred to as the Amendment Act), **comes into operation**. The promulgation was done in Government Gazette notice 40010, dated 24 May 2016. This Act amends several sections of other pieces of legislation, which in essence, has the effect **of imposing certain minimum sentences in respect of offences involving ferrous or non-ferrous metal which formed part of essential infrastructure, like communication services, railway transport, electricity supply, etc.**
2. **“Essential infrastructure”** is defined in the Amendment Act as **any installation, structure, facility or system, whether publicly or privately owned, the loss or damage of, or the tampering with, which may interfere with the provision or distribution of a basic service to the public.**

A “**basic service**” means *a service, provided by the public or private sector, relating to energy, transport, water, sanitation and communication, the interference with which may prejudice the livelihood, well-being, daily operations or economic activity of the public.*

“**Tamper**”, includes: *to alter, cut, disturb, interfere with, interrupt, manipulate, obstruct, remove or uproot by any means, method or device.*

The content of the Amendment Act must be read with the abovementioned definitions in mind, in order to interpret the offences, etc., created by the Amendment Act.

### **3. Bail in respect of Essential Infrastructure-related Offences**

Section 2 of the Amendment Act determines that, notwithstanding the provisions of sections 59 and 59A of the Criminal Procedure Act no. 51 of 1977, **an accused person who is in custody in respect of –**

- (a) any offence involving **ferrous or non-ferrous metal which formed part of essential infrastructure**; or
- (b) an offence referred to in **section 3** of this Act,

**may only be released on bail in accordance with section 60 of the Criminal Procedure Act.**

**This means that neither a police official nor a prosecutor may grant bail to an arrested suspect for these types of offences.** Such accused persons must be **detained until they appear in court for bail application in terms of section 60 of the Criminal Procedure Act** (not later than 48 hours after arrest as determined in section 50).

### **4. New Offence relating to Essential Infrastructure**

**Section 3(1) of the Amendment Act creates a new offence** (not catered for in the Second-hand Goods Act 2009). In terms of this section, a person is **guilty of an offence if he unlawfully and intentionally –**

- (a) **tampers with, damages or destroys essential infrastructure**; or
- (b) **colludes with or assist another person** in the commission, performance or carrying out of an activity referred to in paragraph (a),

and such person **knows or ought reasonably to have known or suspected that it is essential infrastructure.**

The penalty for the above offence upon conviction is a **maximum of 30 years imprisonment** or, in the case of a **corporate body** as contemplated in section 332(2) of the Criminal Procedure Act, a **fine not exceeding R100 million**.

To **interpret whether** a person **ought reasonably to have known or suspected** a fact for the purposes of section 3(1), it is stated in section 3(2) that a person **ought reasonably to have known or suspected such fact if the conclusions that he or she ought to have reached are those which would have been reached by a reasonably diligent and vigilant person having both –**

- (a) **the general knowledge, skill, training and experience that may reasonably be expected of a person in his position; and**
- (b) **the general knowledge, skill, training and experience that he in fact has.**

Therefore, an adult person with the general knowledge of the average man in regard to the fact that communication services are reliant upon telephone cable, for instance, will not be able to argue that he had not known that the theft of hundreds of metres of cable, will affect the supply of communication services to the public. Such a person does not have to be an expert on the subject, he needs only to know what the average person with his general knowledge, training and experience, should have known or suspected. This conclusion will be reached even easier if the suspect is not a first offender of non-ferrous related offences.

## **5. Amendment of Schedule 5 of the Criminal Procedure Act**

The **offences listed in Schedule 5 of the Criminal Procedure Act, are relevant in the consideration of the granting of bail** by the court in terms of sections 58, 60(11) and 60(11A). Schedule 5 contains a list of **serious offences which must be taken into account by the court before bail is granted to an offender**.

**Section 60(11)(b)** states that, **where an accused is charged with an offence referred to in Schedule 5, the court shall order that the accused be detained in custody** until he or she is dealt with in accordance with the laws, **unless the accused**, having been given a reasonable opportunity to do so, adduces evidence which **satisfies the court** that the interests of justice permit his release.

**Section 60(11A)(a)** determines that, if the attorney-general (Director of Public Prosecutions) **intends charging any person with an offence in Schedule 5 or 6, he may**, irrespective of the charge on the charge sheet, **before such person pleads to the charge, issue written confirmation that he intends to charge the accused with a Schedule 5 or 6 offence**.

Section (11A)(b) states that, when the question arises in a bail application or during bail proceedings whether a person is charged or to be charged with a Schedule 5 or 6 offence, a **written confirmation issued in terms of par (a), shall, upon mere production at such proceedings, be prima facie proof of the charge** to be brought against the person.

The Amendment Act adds a list of offences to Schedule 5, which means that the court should not grant bail in respect of these offences, unless the accused satisfies the court that the granting of bail would be in the interests of justice, as required in section 60(11)(b).

The offences which are included into Schedule 5 of the Criminal Procedure Act, by the Amendment Act, are explained in the following table:

<b><i>Offences added to Schedule 5</i></b>	<b><i>Explanation of offences added</i></b>
<b>Any offence referred to in section 2, 4, 5, 6 or 9 of the Prevention of Organised Crime Act no. 121 of 1998</b>	<p><b>Section 2</b> of this Act deals with offences relating to Racketeering Activities.</p> <p><b>Section 4</b> deals with offences relating to Proceeds of Unlawful Activities.</p> <p><b>Section 5</b> creates an offence of assisting another person to benefit from the proceeds of unlawful activities.</p> <p><b>Section 6</b> states that it is an offence to acquire, use or possess property knowing it to be part of the proceeds of another person's unlawful activities.</p> <p><b>Section 9</b> deals with Gang related offences.</p>
<p><b>Any offence referred to in –</b></p> <p><b>(a) section 54(1) of the <u>International Trade Administration Act no. 71 of 2002</u>;</b></p> <p><b>(b) section 32(1)(a), (b), (c), (d), (k) (in so far as it relates to section 21(1)), (l), (m) or (o) of the <u>Second-hand Goods Act no. 6 of 2009</u>; or</b></p>	<p>The <u>International Trade Administration Act regulates import of goods into the Republic and export of goods out of the Republic and related matters</u> (permits, customs duty, etc.) In terms of section 54(1) of this Act, <u>it is an offence to fail to comply with a notice</u> issued under section 6 (notice in Government Gazette prohibiting import or export of certain goods), a <u>condition of a permit</u> issued under Part B of Chapter 4 (import, export and rebate permits) a <u>directive</u> under section 28 (to provide information to the Commission in regard to import, export or trade in goods) and an <u>interim or final order</u> made in terms of this Act.</p> <p>Section 32(1) of the Second-hand Goods Act deals with offences under that Act.</p> <p>32(1): A person is guilty of an offence if he -</p>

	<p>(a) fails to comply with section 2(1) <b>(carries on business without registration)</b></p> <p>(b) fails to apply for registration of all premises in terms of section 3(2);</p> <p>(c) furnishes false information in support of an application in terms of section 4 <b>(application by natural person)</b>;</p> <p>(d) furnishes false information in support of an application under section 5 <b>(application by other than natural person)</b>;</p> <p>(k) <b>contravenes or fails to comply with section 21(1), (3), (4), (5), (6) or (7)</b> <i>(21(1): failure to keep register in prescribed form of goods acquired and disposed of; 21(3): failure to keep separate registers for different classes of goods, if registration certificate so requires; 21(4): failure to provide name, address and ID to dealer when buying from or selling to dealer; 21(5): failure by dealer to keep copy of ID; 21(6): failure to retain register and copies of documents in subsection (4); 21(7): failure to make entry in registers at the same time of acquisition or disposal)</i></p> <p>(l) <b>fails to comply with section 22(1) or (3)</b>. <i>(22(1) a dealer must immediately report to the SAPS if he suspects that a name, address or document furnished to him is false or that goods offered to him is stolen goods or that the appearance of an item offered to him has been tampered with or there was an attempt to alter the appearance thereof to conceal the identity of the item; 22(3) a person required to make a report under 22(1) that a person is suspected of committing an offence, he may not continue with the transaction to which the suspicion relates).</i></p> <p>(m) <b>fails to comply with section 23</b>. <i>(23(1) No dealer may – (a) acquire or accept goods from a person under 18; (b) store goods elsewhere than on the premises for which a certificate was issued; (c) take goods into possession unless he is on reasonable grounds convinced that the seller of the goods is the owner /titleholder /authorised to dispose thereof; (d) deliver goods to a person or change the appearance thereof before 7 days have expired from date of acquisition thereof; or (e) accept firearms or ammunition in pawn; 23(2) during the 7 days</i></p>
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<p>(c) section 36 or 37 of the <u>General Law Amendment Act no. 62 of 1955</u>, - if it is alleged that ferrous or non-ferrous metal which formed part of essential infrastructure, as defined in section 1 of the <u>Criminal Matters Amendment Act, 2015</u>, is involved.</p>	<p>referred in 23(d), the items must be kept separate from all other goods of the same or similar kind);</p> <p>(o) <b>fails to comply with section 25(1), (4) or (5).</b> (25(1) a dealer who recycles controlled metal, must be registered as recycler, in addition to having a section 2 registration; <b>25(4)(a)</b> no person may have apparatus used for recycling of controlled metal in his possession <b>unless he is registered as a recycler</b> (b) no person acquire or dispose of cable consisting of <b>controlled metal of which the cover has been burnt</b>, unless the seller is able to provide a <b>reasonable explanation for the burnt cover</b>, and only after reporting it to the SAPS as in section 22(1); (c) no person may <b>be in possession of cable consisting of controlled metal of which the cover has been burnt</b>, unless he is able to provide reasonable explanation for the burnt cover; <b>25(5)</b> if a recycler suspects or should suspect on reasonable grounds that the appearance of scrap metal offered to him has been tampered with or there was an attempt to alter the appearance in order to conceal the identity of the scrap metal, he must make a report contemplated in section 22(1))</p> <p><b>General Law Amendment Act 62/1955: Section 36:</b>  <u>Any person who is found in possession of any goods, other than stock or produce defined in the Stock Theft Act, in regard to which there is reasonable suspicion that they have been stolen and is unable to give satisfactory account of such possession, shall be guilty of an offence.</u></p> <p><b>Section 37:</b>  (a): A person who in any manner, other than at a public sale, <u>acquires or receives into his possession from any other person stolen goods, other than stock or produce defined in the Stock Theft Act, without having reasonable cause for believing at the time of such acquisition or receipt, that such good are the property of the person from whom he receives them, or that such person has been duly authorised by the owner thereof to deal with or to dispose of them,</u> shall be guilty of an offence.</p>
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	(b): in the absence of evidence to the contrary which raises reasonable doubt, proof of such possession shall be sufficient evidence of the absence of reasonable doubt.
<p><b><u>Theft of ferrous or non-ferrous metal which formed part of essential infrastructure</u>, as defined in section 1 of the Criminal Matters Amendment Act, 2015 –</b></p> <p>(a) if it is alleged that the offence caused or has the potential to cause –</p> <p>(i) <b><u>interference with or disruption of any basic service, as defined in section 1 of the aforementioned Act, to the public; or</u></b></p> <p>(ii) <b><u>damage to such essential infrastructure; or</u></b></p> <p>(b) if it is alleged that the offence was committed by or with the collusion or assistance of –</p> <p>(i) <b>a law enforcement officer, as defined in section 51(8) of the Criminal Law Amendment Act no. 105 of 1997;</b></p> <p>(ii) <b>a security officer, as defined in section 1 of the Private Security Industry Regulation Act no 56 of 2001, who was required to protect and safeguard such essential infrastructure;</b></p> <p>(iii) <b>an employee of, or contractor appointed by, the owner or the person in charge of such essential infrastructure; or</b></p> <p>(iv) <b>a group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy.</b></p>	<p>For the purpose of the offence in par. (a), the <u>theft of ferrous or non-ferrous metals which formed part of an essential infrastructure should have caused interference with / disruption of a basic service to the public or caused damage to such essential infrastructure.</u></p> <p>This <u>allegation must form part of the A1 statement. The complainant (Telkom, Transnet, Centlec, etc.) must indicate that a basic service to the public had been disrupted due to the theft</u> of the metal which formed part of the essential infrastructure, <u>or that damage was caused to essential infrastructure due to such theft.</u></p> <p>For the purpose of the offence in par.(b), the theft of ferrous or non-ferrous metal which formed part of an essential infrastructure should have allegedly been committed in collusion with or the assistance of –</p> <ul style="list-style-type: none"> <li>- a member of the State Security Agency (previously NIA) or the SA Secret Service, or a correctional officer (as mentioned in section 51(8) of Act 105 of 1997),</li> <li>- or, a security officer employed to guard such essential service;</li> <li>- or, an employee of or contractor for the essential infrastructure, for instance employed by Telkom, Transnet, etc.;</li> <li>- or, by an organised group or syndicate acting to promote a common purpose.</li> </ul>
<p><b><u>An offence referred to in section 3 of the Criminal Matters Amendment Act, 2015</u></b></p>	<p>This is the offence created in that Act, namely the <u>unlawful and intentional tampering with, damaging of or destruction of an essential infrastructure, or the collusion with or assisting of</u></p>

	<p><u>another in such an offence</u>, if such person knows or ought reasonably to have known or suspected that it is essential infrastructure. (see explanation in this document, above)</p>
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**6. Minimum Sentences for certain Serious Offences: amendment of section 51 of Criminal Law Amendment Act no. 105 of 1997**

The Amendment Act also amends section 51 of the Criminal Law Amendment Act no. 105 of 1997. This section determines **minimum sentences** for certain listed offences.

**Subsection 51(2)(d) is inserted, but subsections (2)(a) and (2)(c) are also affected by amendments and therefore, the provisions of section 51(2) affected by amendments, are depicted hereunder, with the insertion of subsection (2)(d):**

51(2) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court **shall sentence a person who has been convicted of an offence referred to in –**

(a) **Part II of Schedule 2**, in the case of –

- (i) a first offender, to imprisonment for a period not less than 15 years;
- (ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and
- (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;

(b) ..... (not relevant / affected by amendments)

(c) **Part IV of Schedule 2**, in the case of –

- (i) a first offender, to imprisonment for a period not less than 5 years;
- (ii) a second offender of any such offence, to imprisonment for a period not less than 7 years; and
- (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 10 years; and

(d) **Part V of Schedule 2**, in the case of –

- (i) a first offender, to imprisonment of a period not less than 3 years;
- (ii) a second offender of any such offence, to imprisonment for a period of not less than 5 years; and
- (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 7 years.

In terms of the above provisions of section 51(2) of the General Law Amendment Act, **the Court must impose the prescribed minimum sentences for the offences listed in the aforementioned Parts of Schedule 2.**

The **Amendment Act, however, also amends Parts II and IV of Schedule 2 and inserts the whole Part V.** The imposition of the abovementioned minimum sentences in respect of Parts II and IV, and the newly inserted Part V, added hereunder, will have to be applied to all the new offences added under those parts, as reflected hereunder.

The relevant Parts of Schedule 2 and the offences listed in these Parts, including the amendments inserted by the Amendment Act, are as follows:

<b>Schedule 2 (Criminal Law Amendment Act, 1997)</b>	
<b><u>Part II offences</u></b>	<b><u>Comments / Explanation</u></b>
<b>Murder in circumstances other than those referred to in Part I</b>	Therefore, murder other than when – <ul style="list-style-type: none"> <li>• it was planned / premeditated;</li> <li>• the victim was a law enforcement officer performing his functions or a witness in trial relating to Schedule 1 offence of the Criminal Procedure Act;</li> <li>• the death was caused during or after raping the victim or during or after committing robbery with aggravating circumstances;</li> <li>• it was committed by a person or group for a common purpose or in a conspiracy;</li> <li>• the victim was killed to unlawfully remove a body part;</li> <li>• death resulted from an offence in the Witchcraft Suppression Act.</li> </ul>
<b>Robbery when there are aggravating circumstances or robbery involving the taking of a motor vehicle.</b>	The theft of ferrous or non-ferrous metals sometimes also amounts to robbery with aggravating circumstances, and less often, involves the taking of a motor vehicle. ( <b>note:</b> not the <u>use</u> of a vehicle, but the <u>taking/theft</u> )
Any offence in section 13(f) of the Drugs and Drug Trafficking Act, where the value was more than R50 000, or more than R10 000 if committed by a group or syndicate with a common purpose, or when committed by a law enforcement officer.	These are offences of possession of and dealing in drugs. This is not relevant for the purpose of this document.
Any offence relating to the dealing in smuggling of ammunition, firearms, explosives or armament or the possession of an automatic or semi-automatic firearm, explosives or armament.	Not relevant for the purpose of this document.
Any offence relating to exchange control,	Not relevant for the purpose of this document.

<p>extortion, fraud, forgery, uttering, theft, or an offence in Parts 1 to 4, or sections 17, 20 or 21 of the Prevention and Combating of Corrupt Activities Act, involving certain minimum amounts or committed by a law enforcement officer. (full description not quoted here)</p>	
<p>Any offence in sections 2, 5 – 10 or 14 of the Protection of Constitutional Democracy against Terrorist and Terrorist Activities Act in circumstances other than in Part 1.</p>	<p>Not relevant for the purpose of this document.</p>
<p><b>Any offence referred to in section 2, 4, 5 or 6 of the Prevention of Organised Crime Act which relates to an offence involving ferrous or non-ferrous metal which formed part of essential infrastructure, as defined in section 1 of the Criminal Matters Amendment Act, 2015. (new insertion)</b></p>	<p>See notes in the first table under par. 5 above, in relation to these offences. – BUT: those offences must, in this instance, relate to an offence involving ferrous or non-ferrous metal which formed part of an essential infrastructure.</p>
<p><b>Theft of ferrous or non-ferrous metal which formed part of essential infrastructure, as defined in section 1 of the Criminal Matters Amendment Act, 2015 –</b></p> <p><b>(a) if it caused –</b></p> <p><b>(i) interference with/or disruption of any basic service, as defined in section 1 of that Act, to the public; or</b></p> <p><b>(ii) damage to such essential infrastructure; or</b></p> <p><b>(b) if the offence was committed by or with the collusion or assistance of-</b></p> <p><b>(i) a law enforcement officer, as defined in section 51(8) of the Criminal Law Amendment Act no. 105 of 1997;</b></p> <p><b>(ii) a security officer, as defined in section 1 of the Private Security Industry Regulation Act no 56 of 2001, who was required to protect and safeguard such essential infrastructure;</b></p> <p><b>(iii) an employee of, or contractor appointed by, the owner or the person in charge of such</b></p>	<p>For this offence, it is necessary that the theft should have formed part of essential infrastructure AND –</p> <ul style="list-style-type: none"> <li>• that it caused the interference or damage under par (a)(i) or (ii); or</li> <li>• was committed with collusion or assistance of the persons listed under par (b)(i) to (iv).</li> </ul>

<p>(iv) <b>essential infrastructure; or a group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy.</b></p>	
<b><u>Part IV offences</u></b>	<b><u>Commentary / Explanation</u></b>
<p>Any of the following offences, if the accused had with him at the time a firearm, which was intended for use as such, in the commission of such offence:</p> <ul style="list-style-type: none"> <li>- treason</li> <li>- sedition</li> <li>- public violence</li> <li>- robbery (other than in Part II)</li> <li>- kidnapping</li> <li>- an offence involving assault where a dangerous wound is inflicted with a firearm, other than in Part I, II or III</li> <li>- breaking or entering any premises, whether under the common law or statutory provision, with the intent to commit an offence;</li> <li>- escaping from lawful custody</li> </ul>	<p>No explanation required for the purpose of this document</p>
<p><b>Any offence referred to in –</b></p> <p><b>(a) section 54(1) of the International Trade Administration Act, 2002; or</b></p> <p><b>(b) section 32(1)(a), (b), (c), (d), (k) in so far as that paragraph relates to section 21(1), (l), (m) or (o) of the Second-hand Goods Act, 2009 involving ferrous or non-ferrous metal which formed part of essential infrastructure, as defined in section 1 of the Criminal Matters Amendment Act, 2015.</b></p>	<p>See explanation in the first table under par. 5 above</p> <p>See explanation in table under par. 5 above</p>
<b><u>Part V offences (newly inserted)</u></b>	<b><u>Commentary / Explanation</u></b>
<p><b>Any offence referred to in section 36 or 37 of the General Law Amendment Act, 1955, involving ferrous or non-ferrous metal which formed part of essential infrastructure, as defined in section 1 of the Criminal Matters Amendment Act.</b></p>	<p><b>General Law Amendment Act 62/1955:</b>  <b><u>Section 36:</u></b>  Any person who is <u>found in possession of any goods</u>, other than stock or produce defined in the Stock Theft Act, <u>in regard to which there is reasonable suspicion that they have been stolen and is unable to give satisfactory account of such possession</u>, shall be guilty of an offence.</p>

	<p><b><u>Section 37:</u></b>  (a): A person who in any manner, other than at a public sale, <u>acquires or receives into his possession from any other person stolen goods</u>, other than stock or produce defined in the Stock Theft Act, <u>without having reasonable cause for believing at the time of such acquisition or receipt, that such good are the property of the person from whom he receives them, or that such person has been duly authorised by the owner thereof to deal with or to dispose of them</u>, shall be guilty of an offence.</p> <p>(b): in the absence of evidence to the contrary which raises reasonable doubt, proof of such possession shall be sufficient evidence of the absence of reasonable doubt.</p>
<p><b><u>Theft involving ferrous or non-ferrous metal which formed part of essential infrastructure, as defined in section 1 of the Criminal Matters Amendment Act, 2015, which is not covered in Part II of this Schedule</u></b></p>	<p>This simply refers to <u>any theft of ferrous or non-ferrous metals which formed part of an essential infrastructure</u>. (therefore, it is not necessary that this theft involve the damage / collusion referred to theft of such metals under Part II above: see notes under Part II)</p>

7. **Amendment of Schedule 1 to the Prevention of Organised Crime Act, no. 121 of 1998.**

The Amendment Act also amends **Schedule 1 to the Prevention of Organised Crime Act**, by adding the following offence, to Schedule 1, (below item 33A):

**“33B: Any offence referred to in section 3 of the Criminal Matters Amendment Act, 2015.”**

**Schedule 1 offences** in terms of Act 121 of 1998, **are offences included for the purpose** of the definitions of a **“*pattern of criminal gang activity*”** and a **“*pattern of racketeering activity*”**.

A **pattern of criminal gang** activity includes the commission of two or more criminal offences referred to in Schedule 1: Provided that at least one of those offences occurred after the date of commencement of Chapter 4 and the last of those offences occurred with three years after a prior offence and the offences were committed –

- (a) on separate occasions; or
- (b) on the same occasion, by two or more persons who are members of, or belong to the same criminal gang.

A **pattern of racketeering activity** is defined as the planned, ongoing, continuous or repeated participation or involvement in any offence in Schedule 1 and includes at least two offences in Schedule 1, of which one of the offences occurred after the commencement of this Act and the last offence occurred within 10 years after the commission of such prior offence in Schedule 1.

The effect of the addition of the **offence in section 3** of the Amendment Act to Schedule 1, is that this offence must **now be taken into account in determining a “pattern of racketeering activity”** for the purpose of the offences in section 2, namely, amongst others: receiving property on behalf of an enterprise knowing that it was derived through a pattern of racketeering activity; and using or investing property on behalf of an enterprise or for the operation or activities of an enterprise, knowing that it was derived through a pattern of racketeering activity. (note: simplified explanation)

**Section 3 of the Amendment Act must also be taken into account in determining a “pattern of criminal gang activity”** for the purpose of the offences in section 9, namely: performing an act aimed at causing or contributing towards a pattern of criminal gang activity; and inciting, aiding, commanding or procuring any other person to commit or participate in a pattern of criminal gang activity.

Section 38 of the Prevention of Organised Crime Act also makes reference to Schedule 1 offences. In terms of this section the High Court must make an order preventing a person from dealing in property (preservation of property order), on application by the NPA, if there are reasonable grounds to believe that the property concerned is an instrumentality of an offence referred to in Schedule 1. (This will be done by the Asset Forfeiture Unit)

This means that, **by the insertion of section 3 of the Amendment Act into Schedule 1 of Act 121 of 1998, the Court must make a preservation of property order if property is an instrumentality of the offence referred to in section 3 of the Amendment Act** (implicating property concerned in the commission of such offence).

Such property can include movable or immovable property, corporeal or incorporeal things or any rights, claims or interests in the property and its proceeds. The Court can therefore make a preservation of property order against the personal or business property of an offender to prevent him to sell it or trade therein, if the property is an instrumentality of an offence in Schedule 1.

The High Court must also make a forfeiture order in terms of section 50 of Act 121 of 1998, if the Court finds on a balance of probabilities that the property concerned is an instrumentality of an offence in Schedule 1. A forfeiture order is made while a preservation of property order is in force, on application by the NPA. A forfeiture order is an order forfeiting to the State all or any of the property that is subject to a preservation of property order.

From the above provisions, it is therefore clear that the addition of the offence in section 3 of the Amendment Act to Schedule 1 of Prevention of Organised Crime Act, has far-reaching implications for offenders of ferrous and non-ferrous related offences in so far as such offences form part of a pattern of racketeering activity or a pattern of criminal gang activity, as well as in relation to the property of such offenders if it is an instrumentality of an offence.

## **8. Factors to be brought to the attention of Investigators, Complainants and Prosecutors**

- 8.1 In order to ensure that the provisions of the Amendment Act, 2015, is implemented and applied to its full extent and also to give effect to the intention of the legislature in adopting this Act, it is **important that some changes are made and some factors are highlighted in investigations and prosecution against offenders.**

The **Preamble to the Amendment Act** clearly recognises the importance of essential infrastructure in providing basic services. It also takes regard to the **unacceptably high incidence of crime relating to essential infrastructure which poses a risk to the public safety, electricity supply, communications and transportation.**

The Preamble to the Amendment Act also states that essential infrastructure-related offences are **on occasion relatively minor, but causes considerable damage to such infrastructure** and recognises the negative impact of these types of offences on our economy and peace and stability in the country.

In view of the above factors, it is important that **any investigation and prosecution of offenders of ferrous and non-ferrous metal related offences, are, from the onset, focused on the effect and impact of the offence on basic services to the public due to fact such metals formed part of an essential infrastructure.**

- 8.2 **It should therefore, be mentioned in every statement of the complainant (Telkom, Transnet, Centlec, Vodacom, etc.) –**
- that the offence is related to essential infrastructure;
  - what the impact of the offence is on basic service to the public;
  - what the actual value of the items stolen, destroyed, tampered with or damaged, is, and
  - what the cost of replacement of the items will be (including all incidental costs to the complainant)

With regard to the arrest of suspects, note should be taken that such persons, after having been charged, **must be detained in custody and bail can only be given by a court in terms of section 60, with special reference to section 60(11) and (11A) explained above.**

Investigating officers must bring the factors mentioned in par. 8.2 above to the attention of the prosecutor and the court for the purpose of opposing bail.

All other relevant factors to be taken into account when opposing bail, should also be brought to the attention of the court, including previous arrests and criminal convictions, any weapons used in the commission of the offence, any damage to other property in the commission of the offence, for instance damage caused to gain access to the premises where the crime was committed, the possibility of flight risk, etc. (see section 60 of the Criminal Procedure Act relating to factors to be taken into account in considering release on bail)

Prosecutors should also be made aware of the provisions of the Amendment Act, where they are not aware and they must give guidance to investigating officers to ensure that the Act is properly applied, all relevant evidence and statements are obtained and proper investigation is conducted, to ensure successful prosecution.

9. **This document must be brought to the attention of all members under your command and every Designated Police Officer dealing with Non-ferrous metal theft must be handed a copy hereof. All detectives must also be supplied with a copy of this document.**
10. A **certificate** that the instructions par. 9 has been complied with, must be forwarded to the office of the Provincial Head, Legal Services, for attention of Colonel Lane, at: FS:PH Legal Services or [LaneL@saps.gov.za](mailto:LaneL@saps.gov.za), by **not later than Friday 10 June 2016.**
11. **All Cluster commanders must also report on the PCCF meeting on Monday 13 June that the abovementioned instructions have been complied with.**

*Original signed* **LIEUTENANT GENERAL**  
**PROVINCIAL COMMISSIONER**  
**FREE STATE PROVINCE**  
**T S MPEMBE**