

Bribery & Corruption

First Edition

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South Africa

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Overview of the law and enforcement regime

The most important sources of criminal law in South Africa are legislation, common law and case law. South Africa is one of the few countries in the world in which the substantive criminal law has not been set out in a single act or code. One must accordingly turn to various pieces of legislation when seeking guidance on the legal regime in South Africa. The common law of South Africa is Roman Dutch Law which has, over the years, been adopted and set out in our case law. It is important to note that in South Africa, the principle of judicial precedent is followed.

The Constitution of the Republic of South Africa is the supreme law of the land, and all laws must be compatible with the Bill of Rights as set out in the Constitution. If a rule of law is incompatible with the Bill of Rights it may be struck down by a court as null and void. This applies also to the rules governing criminal law.

The Criminal Procedure Act of 1977 governs all procedures and related matters in criminal proceedings.

South Africa is party to a number of international agreements and conventions aimed at combating corruption. An example of these is the Southern African Development Community Protocol Against Corruption. Arising from these various protocols and conventions, South Africa has obligations to take various steps to stamp out corruption. These are to:

- establish an independent anti-corruption agency;
- ensure that steps are taken to investigate and prosecute corruption;
- prevent corruption by removing obvious opportunities for corruption;
- educate the public on the harm caused by corruption;
- ensure transparency and access to information when combating corruption;
- establish mechanisms that encourage participation by the media, civil society and non-governmental organisations in the fight against corruption;
- adopt measures that address corruption in the public and private sector; and
- co-operate with and assist other states in criminal matters.

In line with these obligations South Africa has passed various pieces of anti-corruption legislation. The main anti-corruption law is the Prevention and Combating of Corrupt Activities Act 2004 (PACCA). PACCA creates a general offence of corruption that is extremely broadly defined. It also criminalises certain specified corrupt activities. PACCA applies to both the public and private sector.

Generally speaking, a person is guilty of an offence in terms of PACCA if he directly or indirectly accepts or offers to accept a gratification (as defined) from another person, or gives or agrees to give a gratification to any other person for his benefit, or that of another. The giving or acceptance must be done in order to induce the other party to act in an improper manner, in the performance of that individual's duties.

The underlying principle is that guilt will be determined by intention. The test is a subjective one which takes into account all surrounding circumstances, the particular conduct of the parties, and any other relevant information to decide the intention. The fact that the corrupt activity was unsuccessful is not relevant. It is sufficient that there is merely a threatened infringement of an interest. How far the corruption has extended for the parties to reach accord, may have a bearing on the sentence. This

is the same principle which applies to an attempt to commit a crime which is generally punished more leniently than the actual commission of the crime.

The fact that the recipient of the gratification does not have the power or right to do what the giver wishes him/her to do, is also irrelevant. If for example, X gives Y a gratification in the belief that Y will give him/her a tender to which he or she is not entitled, but it transpired that it is not Y who will decide upon the award of the tender, such a mistake will afford neither X nor Y a defence to a prosecution for corruption.

Corruption is a crime of double intent. The recipient of a gratification must not only have the intention of accepting the gratification, but also have the intention of acting in a certain way in return for the gratification.

PACCA sets out specific categories of offences of corruption. These include corrupt activities relating to:

- public officers;
- foreign public officials;
- agents;
- members of legislative authorities;
- judicial officers; and
- members of prosecuting authorities.

Furthermore, PACCA provides that corrupt activities relate to various specific matters, including:

- witnesses;
- contracts;
- tenders;
- auctions;
- sporting events; and
- gambling or games of chance.

There is also a miscellaneous category of offences which include acquisition of a private interest in a contract, and interfering with or obstructing the investigation of an offence.

PACCA does have extra-territorial jurisdiction if certain requirements are met. Thus a South African citizen, or someone who ordinarily resides in South Africa, as well as companies incorporated or registered in South Africa, can be prosecuted in terms of PACCA regardless of whether the offensive act constitutes an offence at the place of its commission.

A provision which is unique to PACCA is the provision dealing with the failure to report corruption. A person in a position of authority who has knowledge or suspicion of an offence of corruption, theft, fraud, extortion, forgery or uttering a forged document, under PACCA, has a duty to report this to the South African Police Services. The theft, fraud, extortion, forgery and uttering, must involve an amount of R100,000.00 or more. If he fails to do so, he himself is guilty of an offence and can be imprisoned for a period of up to 10 years.

The particular section lists persons who are regarded as persons who hold a position or authority. For example, partners in a partnership, and persons responsible for the overall management and control of the business of an employer, would be regarded as holding a position of authority.

The section refers to anyone “who knows or ought reasonably to have known”. Accordingly, the form of culpability required for this particular offence is either intention or negligence.

Whilst PACCA is the primary anti-corruption legislation in South Africa, there are a number of other pieces of legislation dealing with corruption and crimes of dishonesty. These include the Financial Intelligence Centre Act (FICA), the Prevention of Organised Crime Act (POCA), the Public Finance Management Act (PFMA), the Municipal Finance and Management Act (MFMA), the Protected Disclosures Act (PDA), and the Companies Act. Briefly, the important provisions in these pieces of legislation are as follows:

- FICA provides for a framework to identify suspicious proceeds possibly derived from illegal activities. It is designed primarily to stamp out money laundering activities and terrorist financing.
- The Financial Intelligence Centre established in terms of FICA does not have any investigative

powers, but it has been established to support the existing investigative bodies and other role-players in the intelligence and criminal justice system. Its principal objective is to assist in identifying the proceeds of unlawful activities and then to combat money laundering, terrorist financing and related activities. As such, it makes information collected by it available to investigating authorities, the Intelligence Services and the South African Revenue Services to assist in the administration and enforcement of South Africa's laws. It also exchanges information on money laundering activities and similar offences with similar bodies in other countries.

- In terms of FICA, certain reportable and accountable institutions are obliged to report suspicious transactions of money laundering to the Financial Intelligence Centre. The obligation of the report is triggered when an institution or individual either has actual knowledge or reasonably suspects that it has received, is about to receive, or about to facilitate receiving or moving proceeds of unlawful activity, including money laundering. What constitutes reasonable suspicion is determined by the facts of each matter.
- The PFMA and MFMA provide for measures to deal with corruption in the procurement context in the public sector. Furthermore, these pieces of legislation hold government officials accountable for unauthorised, and fruitless or wasteful expenditure.
- The PDA and Companies Act provide for the protection of whistle-blowers. The PDA only applies to employees, whereas the Companies Act extends the protection to shareholders, directors, prescribed officers, company secretaries as well as any registered trade union that represents employees of the company, as well as suppliers of goods or services to a company or an employee of such suppliers.
- The Companies Act provides for the declaration by a court of individuals as delinquent directors. Included in the grounds of delinquency are gross negligence, wilful misconduct, and breach of trust in relation to the performance of the director's functions within, and duties to the company. Furthermore, the Companies Act provides for the disqualification as directors of a company of individuals on certain grounds, which include removal from an office of trust on the grounds of misconduct involving dishonesty, as well as convictions anywhere in the world for theft, fraud, forgery, perjury or an offence involving fraud, misrepresentation or dishonesty.
- POCA provides for the preservation of, and subsequent forfeiture to the state, of property concerned in the commission or suspected commission of an offence, where the court is of the view that forfeiture is proportional and appropriate for the offence committed. POCA covers a wide range of criminal activities and also applies to cases of individual wrongdoing. Topics covered by POCA include racketeering, gangs, money laundering, and asset forfeiture. All concern serious crimes usually committed by groups or syndicates. Money laundering by definition arises from criminal activity, usually conducted by a syndicate or gang.

The codes of conduct for public officials, as provided for in various acts such as the Public Service Act and Executive Members Ethics Act, provide for the management of gifts and hospitality.

There are also codes of conduct applicable to specific industries, such as the Construction Industry, which aim to further good corporate governance.

The National Prosecuting Act, the South African Police Service Act, the Special Investigating Units and Special Tribunals Act, the Public Protector Act and Public Audit Act all impose specific duties and provide legislative tools for dealing with corruption.

The Promotion of Access to Information Act assists individuals wishing to gain access to information from a public body in order to enforce a right. This can be another useful tool in dealing with suspected acts of corruption, as it ensures that public agencies cannot hide information that should be available to the public.

Enforcement

The South African Police Service is the primary law enforcement body in South Africa. It is the first port of call for anybody wishing to report a suspected act of corruption, or indeed any other crime.

Formerly, the Directorate of Special Operations known as the Scorpions was a multi-disciplinary agency that investigated and prosecuted organised crime and corruption. It was a unit contained in the National Prosecuting Authority of South Africa.

The Scorpions were officially disbanded in January 2009. Whilst abolishing the Scorpions, the South African Government established the police's directorate for priority crime investigations, known as the HAWKS. This body forms part of the SA Police Services. However, the South African Constitutional Court has ruled that the legislation replacing the Scorpions with the HAWKS was constitutionally invalid, as the HAWKS are vulnerable to political interference. The legislation has since been amended but a constitutional challenge to the amended legislation remains, as there is a strong view that the HAWKS are still vulnerable to political interference.

Further bodies utilised in the fight against corruption are the Special Investigations Unit, the Asset Forfeiture Unit, and the National Prosecuting Authority (NPA). In 2010 the National Director of Public Prosecutions issued a directive prioritising the prosecution of corruption. A specialised commercial crimes unit has also been established as part of the National Prosecuting Authority, with specialised commercial crime prosecutors and specialised commercial crime courts.

The NPA is South Africa's centralised prosecuting authority. It has the power to initiate criminal proceedings on behalf of the State. The Asset Forfeiture Unit forms part of the NPA. It has a specific mandate to take cases of organised crime and money laundering to court in terms of POCA. The AFU has had notable successes against drug dealers, smugglers as well as fraudsters.

The South African Reserve Bank is responsible for supervising the banking sector, and it also administers foreign exchange policies and the currency (rand). As such, it has the necessary statutory authority as provided for in the Banks Act to investigate any irregularity in those areas in which it has responsibility. This includes fraud and Ponzi schemes and the like.

The Financial Services Board (FSB) has various statutory authority and obligations, and is responsible for supervising the non-banking financial services sector. This includes the regulatory functions for pension funds, collective investment schemes, and long- and short-term insurance. It must ensure compliance with myriad statutes such as the Collective Investment Schemes Control Act of 2002, the Financial Institutions Protection of Funds Act of 2001, the Pension Funds Act of 1956, the Short Term Insurance Act and many others. As white collar criminals often utilise fraudulent methods to evade compliance with these acts, the FSB's enforcement committee has the powers of enforcement to ensure compliance.

The Auditor General of South Africa (AGSA) is appointed by the National Assembly and has its independence guaranteed by the Constitution. The AGSA reports to the National Assembly through the Standard Committee on Public Accounts (SCOPA) and there are also counterparts at provincial level. The mandate of the AGSA is to audit and report on the accounts, financial statements and financial management of national and provincial state departments and administrations, municipalities, as well as all other institutions legally authorised to receive money for public purposes. As such, the AGSA plays an important role in the control of economic crime in South Africa, including the prevention of corruption.

The South African Revenue Service (SARS) is legally mandated to collect tax revenues and ensure compliance with tax law. It has a national fraud and anti-corruption hotline and a special task team which works closely with other law enforcement agencies to investigate tax refund fraud and the like.

The Office of the Public Protector has the power to investigate any suspected misconduct or prejudice in state affairs, or in public administration in any sphere of government.

Penalties

Penalties for those convicted of an offence as set out in the various pieces of legislation discussed above can range from limitless fines up to life imprisonment. Traditionally South African Courts have viewed convictions for fraud and corruption as serious, and sentences of 15 years or more are not uncommon.

Other consequences

PACCA provides for a tender register blacklisting companies and individuals convicted of acts of corruption, with the consequence being that such entities and individuals cannot do business with the

Government for 10 years. Over and above this, it is a criminal offence for an individual or enterprise applying for a tender not to disclose their involvement in a company that has been blacklisted.

A recent innovation is that of publicly naming and shaming individuals convicted of crimes of corruption. The names and identity numbers have been released to the public, and the intention is to publish the details on the websites of government departments falling under the justice, crime prevention, and security cluster.

Hospitality and gifts

There is no statutory limit on corporate gifts and entertainment. However, PACCA deals with gifts and hospitality in the definition of gratification, which includes *inter alia*, gifts. The general offence of corruption includes three elements: namely, a giver, an acceptor, and a gratification. As such, a person giving a gift to another would be guilty of the act of corruption where the purpose of the gift is to induce the other party to do or not to do anything which is not authorised. Accordingly, corporate gifts and hospitality in the private sector are not unlawful *per se*, as long as the gifts are not given as being a form of gratification for an unauthorised or improper inducement to do, or not to do, anything. In practice, most companies have their own internal gift policy which regulates the acceptance and offering of gifts. Furthermore, most corporations maintain a gift register to record and monitor gifts and entertainment of executives. As a general principle, when a gift is considered “lavish”, it could be construed to amount to a gratification which immediately places the organisation and individuals concerned at risk for being prosecuted for acts of corruption.

As far as the public and government sector are concerned, treasury regulations in terms of the Public Finance Management Act provide that supply chain management officials or other role-players must ensure that they do not compromise the credibility or integrity of the supply chain management system through the acceptance of gifts or hospitality or any other acts. Further, treasury regulations specify how gifts, donations and sponsorship should be dealt with. In essence they are required to be approved by the accounting officer (generally the Head of Department), and all gifts, donations and sponsorships are required to be disclosed as a note to the annual financial statements.

Furthermore, public service codes of conduct, and the parliamentary code of ethics, provide generally that employees should not use their official positions to obtain private gifts or benefits for themselves during the performance of their official duties and, specifically they should not accept any gifts or benefits which could be construed as bribes. Cabinet ministers, deputy ministers, and members of provincial executive committees who are ministers in the provincial cabinets, must obtain the permission of the president or relevant provincial premier to accept gifts worth more than R1,000.00. Furthermore, they are obliged to disclose gifts to the value of more than R350.00, or gifts from a single source which cumulatively exceed R350.00 in value during any calendar year. In general, the offering of gifts to public servants is discouraged.

Facilitation payments

PACCA does not allow for facilitation payments (otherwise known as grease payments) and such payments would fall squarely within the definition of an unauthorised gratification, and as such could be seen to amount to corruption.

Overview of enforcement activity and policy during the past two years

There have been a few high-profile cases that have been in the media spotlight over the last few years in South Africa. These have involved the State President himself (charges of fraud were controversially withdrawn against him after the abolition of the Scorpions, as set out above) as well as other high-ranking Government officials including the Minister of Police. Unfortunately the public perception in South Africa is that well connected individuals will simply not be prosecuted. Political interference is taken as a given for cases involving well connected officials. Furthermore, the largest Ponzi scheme in South Africa, involving an individual known as Barry Tannenbaum, has tied up State resources for a number of years with little visible progress.

However, the Competition Commission has had notable successes in weeding out cartel activity, and significant fines have been levied against corporations guilty of collusion, price-fixing and the like. Furthermore the asset forfeiture unit has struck heavy blows against criminals in the form of seizing, preserving and ultimately disposing of assets obtained through the proceeds of crime.

Key issues relating to investigation, decision making and enforcement procedures

PACCA provides for an obligation to report to the South African Police Services, acts of corruption and dishonesty. Failure to do so can result in a jail sentence of up to 10 years. There are no reported cases of successful prosecutions under this section to date, and it appears to be underutilised.

Companies involved in price-fixing and cartel activity can obtain what is known as corporate leniency if they make full disclosure to the authorities. This provision is widely used by corporations in an effort to limit the financial exposure to extreme penalties. However, the risk they face is that by reporting their illegal conduct to the authorities they expose themselves to prosecution in terms of PACCA. In other words, by pleading guilty and making full disclosure of their illegal conduct on the one hand, they receive a reduced or no penalty, but the flip side is that it gives the State access to information which facilitates prosecution for corruption.

A body corporate in South Africa can be found guilty of bribery and corruption, as the Companies Act does provide for the conviction for crimes of corporates, as it provides for various statutory offences. The Criminal Procedure Act also makes provision for the prosecution of a body corporate, and the State need merely cite any director or employee of the body corporate as representative of the body corporate, as the offender. However, unlike the UK, South Africa has no provision for specific corporate offences of failing to prevent bribery.

Enforcement bodies will often follow the civil route of asset forfeiture and, as stated already, the AFU has had significant successes over the years. As in any other jurisdiction, decisions as to whether to prosecute, accept plea bargains, and other related issues are influenced by many factors. The availability of witnesses, the quality of evidence and complexity of proving the crime would be just three of the factors that authorities would take into consideration.

Overview of cross-border issues

Many high-level investigations in South Africa do cross borders, which requires the co-operation of law enforcement agencies. This is common practice, and South Africa is party to many mutual legal assistance treaties. This enables law enforcement agencies to assist each other across borders, to both preserve assets and to obtain information necessary for investigating corruption. Furthermore, corporations in South Africa with the necessary links to the USA and the UK are subject to those jurisdictions' corruption laws, such as the UK Bribery Act and the Foreign Corrupt Practices Act. This has had the effect of many South African corporations reviewing their practices to fall in line with the requirements of these pieces of legislation.

The year ahead

There are various controversial matters pending in South Africa. For example, there has been much public outcry over the President's private residence in Nkandla, KwaZulu Natal, in the development of which an amount of more than R200m has been spent over the past few years. Another issue facing the State President is that of the records related to a corruption case against him that followed the successful prosecution of his financial advisor. Although the charges against the President were dropped by the NPA in 2009, a Supreme Court of Appeals order was issued to the prosecutions body to make certain records available to ascertain whether the decision not to prosecute was rational. These developments will be watched closely.

Furthermore, various other high-profile politicians are facing charges of fraud, corruption and money laundering. These include the ANC Northern Cape chairman and employees of the South African Social Security Agency. The former State President ally now discarded by the ANC, Mr Julius Malema, will also face his day in court to face charges of fraud and money laundering. Another

case that might take place in 2013 involves Cash Paymaster Services, a company contracted by the Department of Social Development to distribute social grants to millions of South Africans monthly. It was a successful bidder against another company known as AllPay. Whilst AllPay successfully went to court to appeal against the awarding of the contract on the grounds of irregular processes by Cash Paymaster, Cash Paymaster was not barred from distributing the grants. The court ruled that in the interest of keeping the grant system rolling, Cash Paymaster should go on providing its Government service. In an interesting twist, the parent company of Cash Paymaster, the American Net 1, is being investigated by that country's Federal Bureau of Investigations regarding the matter, which might have an interesting impact on the South African matter during the year.

Sadly, most of the interesting cases facing South Africa in the near future involve the State and procurement processes.

The general consensus in South Africa is that there is no real need to reform the laws, as they are perfectly adequate. What is needed is an investment in recruiting and training competent people to staff the various law enforcement and prosecutorial agencies.

A highly controversial piece of legislation was adopted by the National Assembly on April 25, 2013. It is the Protection of State Information Act (colloquially known as the Secrecy Act). It has been widely condemned by the media, civil society and various political groups because of provisions that undermine the right to access to information of public interest. Critics are of the view that the Act would expose whistle-blowers and journalists seeking to expose certain sensitive issues such as corruption, to imprisonment. The Act is awaiting the State President's signing into law, but he is under extreme pressure to refer the Act to the Constitutional Court directly for review.

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Dave Loxton joined Werksmans Attorneys in 2009 to establish the firm's Business Crime & Forensics Practice, and is still the head of the practice area. Dave specialises in white collar crime, forensic investigations, fraud detection and prevention, and money laundering. His experience extends to regulatory compliance, corporate governance and employment law. He is a Certified Fraud Examiner with the Association of Certified Fraud Examiners (in both the United States and South Africa), a member of the South African Chapter of the Association of Certified Fraud Examiners, and a member of the South African Institute of Commercial Forensic Practitioners. Dave is a regular speaker at national seminars and conferences on white collar crime, corruption and corporate compliance. He has a BCom LL.B. and an MBA from the University of Cape Town.

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