Corporate crime, fraud and investigations in South Africa: overview

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FRAUD

Regulatory provisions and authorities

1. What are the main regulatory provisions and authorities responsible for investigating corporate or business fraud?

Fraud is defined as the unlawful and intentional making of a misrepresentation that causes actual or potential prejudice to another. Fraud is a criminal offence and is regulated at common law, rather than by any specific legislation.

The South African Police Service (SAPS) is the investigative authority in cases of fraud. The National Prosecuting Authority (NPA) (headed by the National Director of Public Prosecutions (NDPP)) decides whether to prosecute matters where a criminal complaint has been made to the SAPS.

A duty to investigate and report suspected fraud is imposed by a number of statutes, including the:

- Protected Disclosures Act, 2000 (PDA).
- Prevention and Combating of Corrupt Activities Act, 2004 (PRECCA).

Reports can be made under section 34 of PRECCA by a person in a position of authority to the Directorate for Priority Crime Investigation (DPCI) of SAPS by completion of the required form found at www.saps.gov.za/dpci/reportingguide.php.

The South African Reserve Bank (SARB) acts as supervisory body for the Banks Act and the Inspection of Financial Institutions Act. The Financial Services Board (FSB) is the statutory supervisory body for financial services other than banking.

Offences

2. What are the specific offences relevant to corporate or business fraud?

There are no specific offences relevant to corporate or business fraud. The general offence of common law fraud is an all-encompassing fraud offence.

Fraud consists of four elements that must be satisfied in order to establish the offence. These elements are:

- Misrepresentation.
- Unlawfulness.
- Prejudice or potential prejudice.
- Intention.

Corporate criminal liability in South Africa is based on the derivative approach, under which the intention or negligence of a director or servant of the corporation is required to establish a particular criminal offence imputed to the corporation (section 332, Criminal Procedure Act, 1977).

Statutory offences

A supervisory body or enforcement authority that wishes to prosecute an offence must prove that the individual or corporation contravened a penal provision of the relevant statute. Financial crimes can include anything from wilful participation in fraudulent conduct to failing to report known or reasonably suspected crimes such as fraud or theft.

Enforcement

3. What are the regulator’s powers of investigation, enforcement and prosecution in cases of corporate or business fraud and what are the consequences of non-compliance?

There is no specific fraud regulator in South Africa. The South African Reserve Bank (SARB) and the Financial Services Board (FSB) serve as regulators to the banking and financial services industries. The South African Police Service (SAPS) has an all-encompassing duty to investigate suspected fraud in all other areas. These authorities all have investigative powers, including search and seizure powers. Once they have accumulated sufficient information, legal proceedings may be instituted at the appropriate Magistrates’ Court or High Court.

There is a distinction between civil and criminal proceedings. A victim and a number of regulatory and enforcement authorities can bring civil proceedings for fraud. Only the prosecution authority can bring criminal proceedings against offenders.

Common forms of court orders or interdicts (injunctions) that can be granted for fraud include freezing orders, interim interdicts and disclosure orders. The Asset Forfeiture Unit (AFU), a directorate of the National Director of Public Prosecutions (NDPP), is authorised under the Prevention of Organised Crime Act, 1998 (POCA) to seek temporary restraining orders or permanent forfeiture orders to restrain the use of the proceeds of crime or to permanently confiscate the proceeds for return either to the victim or for forfeiture to the state.
Proceedings are instituted by way of application (motion), with evidence presented by way of affidavit. Very urgent proceedings for temporary orders obtained without notice to the party against whom relief is sought may be granted overnight. Normal applications can vary widely depending on the nature of the matter and the extent of the opposition to the application. A typical opposed application can take about six to months to finalise.

The International Criminal Court Act 2002 (ICCA) grants South African courts extra-territorial jurisdiction over offences committed or affecting South African citizens or people ordinarily resident in South Africa (see Question 30).

Regulatory authorities increasingly interact with overseas regulators.

**Penalties**

4. What are the potential penalties or liabilities for participating in corporate or business fraud?

Civil/administrative proceedings or penalties

A number of statutes impose administrative penalties for fraud. One notable statute is the Competition Act, 1998, which prohibits fraudulent conduct, most notably price fixing and collusive trading. Administrative (civil) penalties under the Competition Act cannot exceed 10% of the corporation’s annual turnover during the preceding financial year.

Criminal proceedings or penalties

Criminal penalties for fraud range from fines for individuals and corporations to long terms of imprisonment for individuals.

Civil suits

A claim for damages can be brought in tort (delict). In such circumstances, the claimant would have to prove the five elements of a delict:

- Conduct.
- Wrongfulness.
- Fault.
- Causation.
- Damage (harm).

The courts decide on the amount of damages to be awarded on the facts of each particular case.

Class actions are possible.

South African law does not recognise punitive damages.

**Bribery and Corruption**

Regulatory provisions and authorities

5. What are the main regulatory provisions and authorities responsible for investigating bribery and corruption?

**Regulations**

The Prevention and Combating of Corrupt Activities Act (PRECCA) provides measures to prevent and combat corruption and corrupt activities in South Africa. It applies to both the public and private sector, including both legal entities and individuals. PRECCA creates the general offence of corruption, as well as a number of specific offences relating to corrupt activities. It also provides for investigative measures to be adopted by the South African Police Service (SAPS) in relation to corruption offences.

The following statutes also support the prevention and combatting of corruption in South Africa:

- Prevention of Organised Crime Act (POCA), which was introduced to combat organised crime, money laundering and related gang and racketeering offences. POCA applies to both organised crime and cases of individual wrongdoing.
- Special Investigating Units and Special Tribunal Act, 1996 (SIU Act), which empowers the Special Investigating Unit (SIU) to investigate maladministration in relation to state institutions, state assets and public money.
- Protected Disclosures Act (PDA), which protects whistleblower employees from occupational detriment by their employers.
- The Protection of Constitutional Democracy against Terrorism and Related Activities Act, 2004 (POCDATARA), which introduces laws to prevent terrorism (including financial support for terrorism) and aligns South African law with international conventions and treaties.
- The International Co-operation in Criminal Matters Act, 1996 (ICCMA) allows co-operation between South Africa and foreign countries to assist in the investigation into or freezing of assets that are suspected to be the proceeds of crime.
- The Companies Act 2008 incorporates anti-corruption measures through section 72(4), read with Regulation 43, which requires the establishment of social and ethics committees for certain companies, including all publically listed and state-owned companies. Social and ethics committees are required to perform a wide range of activities, including monitoring the company’s anti-corruption activities.

**Guidelines**

The National Anti-Corruption Forum (NACF) was established to assist with corruption reporting in South Africa. The NACF has published a Guide to the Prevention and Combatting of Corrupt Activities.

**Regulatory authorities:**

A number of regulatory bodies are empowered to investigate corruption in South Africa. These include, among others, the:

- Special Investigating Unit (SIU).
- The National Prosecuting Authority (NPA).
- Auditor General.
- Public Protector (an institution set up to investigate complaints against government agencies or officials).
- Public Service Commission.
- South African Police Service (SAPS).

A civil society organisation with no regulatory powers, Corruption Watch, has been established to gather, analyse and share information on corruption in South Africa. It acts as a watchdog and public interest lobbyist.

South Africa is increasingly seeing the prosecution of corruption offences, most notably in high profile cases.

6. What international anti-corruption conventions apply in your jurisdiction?

South Africa has ratified four international and regional conventions and protocols that bind the country to take action on preventing and combating corruption:

The United Nations Convention against Corruption (UNCAC) (ratified by South Africa in 2005).


**Offences**

7. **What are the specific bribery and corruption offences in your jurisdiction?**

**CORRUPTION**

The general offence of corruption stipulated in the Prevention and Combating of Corrupt Activities Act (PRECCA) is committed when any person, directly or indirectly, accepts or offers any gratification to improperly influence another person in the performance of his duties or functions or improperly induces that person to illegally exercise or fail to exercise a legal obligation.

There is no minimum monetary threshold for a bribe to constitute a criminal offence.

It is illegal for any person to attempt, conspire with another person or aid, abet, induce, incite, instigate, instruct, command, counsel or procure another person to commit any corruption offence under PRECCA.

**FOREIGN PUBLIC OFFICIALS**

Under PRECCA, it is illegal to directly or indirectly bribe or accept a bribe from a foreign public official. A foreign public official includes:

- Any person holding a legislative, administrative or judicial office of a foreign state.
- Any person performing public functions of a foreign state.
- Any official or agent of a public international organisation.

**DOMESTIC PUBLIC OFFICIALS**

It is illegal to directly or indirectly offer or give a bribe to a local public official.

A public officer is defined in PRECCA as any person who is a member, an officer, an employee or a servant of a public body, and includes:

- Any person in public service.
- Any person receiving any remuneration from public funds or from a public body.

A local public official does not include any member of the legislative authority, a judicial officer or a member of the prosecuting authority. However, it is a separate offence to bribe any of these persons.

**PRIVATE COMMERCIAL BRIBERY**

PRECCA stipulates criminal offences in respect of corrupt activities relating to:

- The receiving or offering of unauthorised gratification by or to a party to an employment relationship.
- Contracts.
- Procuring and withdrawal of tenders.
- Auctions.
- Sporting events.
- Gambling or games of chance.
- Acquisitions and contracts, agreements or investments by a public body.

**DUTY TO REPORT CORRUPT TRANSACTIONS**

Any person who holds a position of authority and who knows, or ought reasonably to have known or suspected, that any other person has committed any statutory corruption offence (under Chapter 2 of PRECCA, except in relation to the miscellaneous conflict of interest offences) or the common law offences of theft, fraud, extortion, forgery, involving an amount of ZAR100,000 or more, must report such knowledge or suspicion, or cause such knowledge or suspicion to be reported, to the police official in the Directorate for Priority Crime Investigation (DPCI) of the South African Police Service (SAPS) (also known as the Hawks).

Any person who fails to comply with this section is guilty of an offence.

**Defences**

8. **What defences, safe harbours or exemptions are available and who can qualify?**

Normal common law defences apply in South Africa, for example, a person offering a bribe can argue that he did not intend the offer to be a bribe.

However, whenever a person is charged with an offence of corruption, it is not a valid defence for that person to contend that he:

- Did not have the power, right or opportunity to perform or not to perform the act in relation to which the gratification was given, accepted or offered.
- Did not intend to perform or not to perform the act in relation to which the gratification was given, accepted or offered.
- Failed to perform or not to perform the act in relation to which the gratification was given, accepted or offered.

Indirect bribery is an offence under Prevention and Combating of Corrupt Activities Act (PRECCA) and it does not matter whether the bribe was offered or paid directly or indirectly.

South Africa does not allow any exemptions for facilitation or “grease” payments and these type of payments constitute an offence under PRECCA.

9. **Can associated persons (such as spouses) and agents be liable for these offences and in what circumstances?**

The general offence of corruption is widely formed. The offence is committed when any person, directly or indirectly, accepts or offers any gratification to improperly influence another person in the performance of his duties or functions or improperly induces that person to illegally exercise or fail to exercise a legal obligation.

The offence can include an act by third parties or agents.

The general offence of corruption also includes all legal persons (such as social entities, communities or associations that have an independent legal existence).

**Enforcement**

10. **What are the regulator’s powers of investigation, enforcement and prosecution in cases of bribery and corruption and what are the consequences of non-compliance?**

**INVESTIGATORY POWERS**

The NDPP may direct a Director of Public Prosecutions (such as the head of the Directorate for Priority Crime Investigations (DPCI) or
an Investigation Director) to conduct an investigation before instituting asset forfeiture or criminal proceedings (National Prosecuting Authority Act, 1998). This is undertaken when the National Director has reason to suspect that there may be property (in any place or in any person’s possession, custody or control), which may either:

- Have been used in the commission, or for the purpose of or in connection with any corruption offence.
- Have facilitated the commission of such an offence.
- Have enabled any person or entity to commission such an offence.
- Have provided financial or economic support to a person or entity in the commission of such an offence.
- Be the proceeds of such an offence.

**COMMON FORMS OF COURT ORDER OR INTERDICT**

Common forms of court orders or interdicts (injunctions) that can be granted for bribery and corruption include:

- Freezing orders.
- Interim interdicts.
- Disclosure orders.

The Asset Forfeiture Unit (AFU), a directorate of the NDPP, is authorised under the Prevention of Organised Crime Act (POCA) to seek temporary restraining orders or permanent forfeiture orders to restrain the use of the proceeds of crime or to permanently confiscate the proceeds for either return to the victim or forfeiture to the state.

Proceedings are instituted by application (motion). Very urgent proceedings for temporary orders obtained without notice to the party against whom relief is sought may be granted overnight. Normal applications can vary widely depending on the nature of the matter and the extent of the opposition to the application. A typical opposed application can take about six to months to finalise.

**EXTRA-TERRITORIAL JURISDICTION**

Liability under the Prevention and Combating of Corrupt Activities Act (PRECCA) extends to South Africans (individuals, companies or other entities) who commit offences outside of South Africa in certain instances, even if the commission of that offence is not a crime in the jurisdiction where it was committed.

Liability under PRECCA can also extend to individuals who are not South African citizens or residents but commit offences which affect South African companies or individuals and the perpetrator is arrested in or extradited to South Africa.

See Question 30.

**Penalties**

**11. What are the potential penalties for participating in bribery and corruption?**

**CRIMINAL PROCEEDINGS OR PENALTIES**

Chapter 5 of the Prevention and Combating of Corrupt Activities Act (PRECCA) sets out the penalties for committing any of the statutory corruption offences under PRECCA. For a majority of the offences, including the general offence of corruption, on conviction, the sentences are as follows:

- If imposed by a High Court: a fine or imprisonment up to a period of imprisonment for life.
- If imposed by a Regional Court: a fine or imprisonment period not exceeding 18 years.
- If imposed by a Magistrate’s Court: a fine or imprisonment period not exceeding five years.

In addition to any fine, a court may also impose a fine equal to five times the value of the gratification involved in the offence.

An additional potential consequence of committing an offence under PRECCA is that the relevant Director of Public Prosecutions may direct an investigation into any property (including cash or funds) in the possession, custody or control of any person, if that property is suspected of:

- Having been used in the commission of an offence.
- Having facilitated the commission of an offence.
- Being the proceeds of that offence.

The Prevention of Organised Crime Act (POCA) regulates the temporary restraint and permanent confiscation of assets. Generally, forfeited assets are used to compensate victims of the crime involved, or are otherwise forfeited to the state.

**Civil/administrative proceedings or penalties**

Both corporate entities and individuals can face civil liability. For example, a damages claim can be brought against a company or an individual, as a result of the loss, harm or damage caused by the corruption offence.

**Public tenders and contracts**

When a person is convicted of a criminal offence in respect of corrupt activities relating to public contracts or the procuring and withdrawal of public tenders, the South African courts have the power to set aside corruptly awarded tenders and to order that the tender process be run afresh.

A court convicting a person of an offence relating to contracts or procuring and withdrawal of tenders may also issue an order that the particulars of the convicted person or company, as well as the conviction and sentence be endorsed on the Register for Tender Defaulters, which sits with the office of the National Treasury. An endorsement on the register may also include the name of any partner, manager or director of an enterprise who wholly or partly exercises or may exercise control over that enterprise and who was involved in the offence concerned or who knows or ought reasonably to have known or suspected that the enterprise committed the offence concerned. An endorsement on the register means that the National Treasury may terminate any agreement with the person or enterprise, or impose restrictions such as debarment from public tenders for a set period.

The National Treasury may also, in addition to any other legal remedy, recover from the person or enterprise any damage incurred or sustained by the state as a result of the tender process or the conclusion of the agreement, or that the state suffered by having to enter into less favourable alternative arrangements.

**Tax treatment**

**12. Are there any circumstances under which payments such as bribes, ransoms or other payments arising from blackmail or extortion are tax-deductible as a business expense?**

No deductions can be made in respect of any expenditure incurred:

- Where the payment of that expenditure or the agreement or offer to make that payment constitutes one of the general and specific statutory corruption offences under Chapter 2 of the Prevention and Combating of Corrupt Activities Act (PRECCA) (see Question 7).
- Where the expenditure constitutes a fine charged or penalty imposed as a result of an unlawful activity carried out in:
  - South Africa; or
Another country, if that activity would have been unlawful had it been carried out in South Africa.

INSIDER DEALING AND MARKET ABUSE
Regulatory provisions and authorities

13. What are the main regulatory provisions and authorities responsible for investigating insider dealing and market abuse?

South African legislation prohibits three major forms of market abuse:

- Insider trading.
- Prohibited trading practices (market manipulation).
- The publication of false, misleading or deceptive statements related to listed companies (false reporting).

The prohibitions are contained in sections 73, 75 and 76 of the Security Services Act, 2004 (SSA) in respect of offences committed prior to 3 June 2013 and sections 78, 80 and 81 of the Financial Markets Act, 2001 (FMA) for offences committed after 3 June 2013.

This is because the FMA, which commenced on 3 June 2013, repealed the SSA. The Directorate Market Abuse (DMA) of the FSB is the main authority responsible for investigating the three forms of market abuse.

Offences

14. What are the specific insider dealing and market abuse offences?

Insider trading

An insider commits an offence if he knows that he has inside information and deals directly or indirectly or through an agent for his own account in securities listed on a regulated market to which the inside information relates or which are likely to be affected by it (section 78, FMA).

Inside information is specific or precise information that has not been made public and that if made public would likely have a material effect on the price or value of a security listed on a regulated market.

An insider is a person who has inside information through being a director, employee or shareholder of an issuer of securities listed on a regulated market to which the inside information relates or has access to such information, or a person who knows that the direct or indirect source of the information was such a director, employee or shareholder.

Market manipulation

It is prohibited to knowingly or negligently manipulate the price of a security (whether up or down), or to create a false impression of the volumes traded in any security (section 80, FMA).

False reporting

It is prohibited to directly or indirectly make or publish in respect of listed securities traded on a regulated market, or in respect of the past or future performance of a company whose securities are listed on the regulated market (section 81, FMA):

- Any statement, promise or forecast which is, to the knowledge of that person or if that person reasonably ought to have known, at the time and in the light of the circumstances, false or misleading or deceptive in respect of any material fact.
- Any statement, promise or forecast which is, by the reason of the omission of a material fact, rendered false, misleading or deceptive, either to the knowledge of that person or if that person reasonably ought to have known to be false, misleading or deceptive by reason of the omission of that fact.

Defences

15. What defences, safe harbours or exemptions are available and who can qualify?

An insider has the following defences, if he proves on the balance of probabilities that he either:

- Is an authorised user and was acting on specific instructions from a client, not knowing that the client was an insider at the time.
- Only became an insider after he had given the instruction to deal to an authorised user and the instruction was not changed in any manner thereafter.
- Was acting in pursuit of a transaction in respect of which all the parties to the transaction had possession of the same inside information, trading was limited to these parties and the transaction was not aimed at securing a benefit from exposure to movement in the price of the security resulting from the inside information (section 78(2)(b), FMA).

An insider is not guilty of the offence of disclosure of inside information to another person if the insider proves on a balance of probabilities that he disclosed the inside information because it was necessary to do so for the purpose of the proper performance of the functions of his employment in circumstances unrelated to dealing in any security listed on a regulated market and at the same time disclosed that the information was inside information (section 78(4)(b), FMA).

Enforcement

16. What are the regulator’s powers of investigation, enforcement and prosecution and what are the consequences of non-compliance?

The Directorate of Market Abuse (DMA) of the Financial Services Board (FSB) is authorised to investigate any matter relating to an offence or contravention relating to insider trading, market manipulation or false reporting.

In conducting an investigation, the DMA can summon any person who is believed to be able to furnish any information relevant to the investigation or to have relevant documents in his possession to produce documents or to appear before the DMA to be interrogated. In conducting an interrogation, the DMA has powers to examine a person under oath.

The DMA also has search and seizure powers in relation to investigations and can, on the authority of a warrant, without prior notice, enter any premises and require the production of any document, search any premises for any document, and against the issue of a receipt, seize any document and retain any seized document as may be necessary for criminal or other proceedings.

In exceptional circumstances, the DMA may proceed with search and seizure without a warrant, but this is subject to strict constitutional controls.

Any person who has been duly summoned commits an offence and is liable on conviction to a fine or imprisonment for a period not exceeding two years or to both a fine and imprisonment if he, without sufficient reason:

- Fails to appear when summoned to do so in an investigation.
- Fails to remain in attendance at an investigation.

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Country Q&A

Financial trade sanctions

POCDATARA provides at section 25 that the President must give notice by proclamation in the Government Gazette of entities sanctioned under Chapter VII of the Chamber of the United Nations by the United Nations Security Council.

Offences

19. What are the specific offences relating to money laundering, terrorist financing and breach of financial trade sanctions?

Money laundering

Section 4 of the Prevention of Organised Crime Act (POCA) provides that any person (corporate or natural) is guilty of an offence if he knows or ought reasonably to have known that property is or forms part of the proceeds of unlawful activities and either:

- Enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether such agreement, arrangement or transaction is legally enforceable or not.
- Performs any other act in connection with such property, whether it is performed independently or in concert with any other person.

If that has or is likely to have the effect of either:

- Concealing or disguising the nature, source, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof.
- Enabling or assisting any person who has committed or commits an offence, whether in South Africa or elsewhere:
  - to avoid prosecution; or
  - to remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence.

Section 29 of the Financial Intelligence Centre Act (FICA) provides that any person who carries on a business, is in charge of or manages a business, or who is employed by a business and who knows or ought reasonably to have known or suspected that the business was or is about to be party to a suspicious transaction, must report that knowledge or suspicion to the FIC. Failure to do so is an offence.

Terrorist financing

The Protection of Constitutional Democracy against Terrorism and Related Activities Act (POCDATARA) criminalises terrorism and actions that provide support or services to terrorism, including those of a financial nature.

Defences

20. What defences, safe harbours or exemptions are available and who can qualify?

Money laundering

A person charged with money laundering under the Prevention of Organised Crime Act (POCA) can use the fact that he has reported the transaction under the Financial Intelligence Centre Act (FICA) as a defence. Reports are made to the FIC through a portal of the FIC website (www.fic.gov.za).

If a person who is an employee, director or trustee of, or a partner in, an accountable institution is charged with the offence of failing

- Refuses to take the oath or fails to answer fully and satisfactorily any question lawfully put to him.
- Fails to furnish information or to produce any document in terms of an investigation by the DMA.

A person who contravenes the prohibition against insider trading may be ordered to pay an administrative sanction not exceeding the sum of:

- The equivalent of the profit that that person made or the loss avoided.
- A penalty of up to ZAR1 million plus three times the profit made or the loss avoided.
- Interest.
- Costs of enforcement.

A range of similar administrative sanctions are available, depending on the specific type of insider trading contravention.

The FSB can apply to court in relation to any matter involving insider trading, market manipulation or false reporting for a prohibitory interdict or for an order attaching assets or evidence to prevent their concealment, removal, dissipation or destruction (section 83, FMA).

Penalties

17. What are the potential penalties for participating in insider dealing and market abuse?

Criminal proceedings or penalties

A person who commits one of the three offences of insider trading, market manipulation or false reporting is liable on conviction to a fine of up to ZAR50 million, imprisonment for a period of up to ten years, or both a fine and imprisonment.

Civil suits

The party who suffered damages as a result of a person having committed a delict may sue that person for civil damages in the appropriate civil court. Punitive damages are not available.

Money laundering, terrorist financing and financial trade sanctions

18. What are the main regulatory provisions and authorities responsible for investigating money laundering, terrorist financing and/or breach of financial trade sanctions?

Money laundering

Money laundering is regulated by the Financial Intelligence Centre Act (FICA) and the Prevention of Organised Crime Act (POCA). The Financial Intelligence Centre (FIC) is responsible for anti-money laundering regulation and enforcement generally. FICA also identifies specific regulators, depending on the industry concerned. For example, the banking industry is also regulated by the South African Reserve Bank (SARB) and the attorneys' profession is regulated by the provincial law societies.

The FIC issues guidance periodically. The guidance does not have force at law but in practice is compiled with as it were mandatory.

Terrorist financing

Terrorist financing is regulated by the Protection of Constitutional Democracy against Terrorism and Related Activities Act (POCDATARA) and by FICA. The regulator responsible for investigating terrorist financing is the FIC.

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to report a suspicious transaction, they can raise as a defence the fact that they had either:

- Complied with the applicable obligations in terms of the internal rules relating to the reporting of information of the accountable institution.
- Reported the matter to the person with responsibility for ensuring compliance by the accountable institution with its duties under FICA.
- Reported the matter to their superior, if any, if:
  - the accountable institution had not appointed such a person or established such rules;
  - the accountable institution had not complied with its obligations in section 42(3) of FICA in respect of that person; or
  - the internal rules were not applicable to that person.

**Enforcement**

21. What are the regulator’s powers of investigation, enforcement and prosecution and what are the consequences of non-compliance?

Generally, the National Prosecuting Authority can apply for injunctions, freezing orders, confiscation orders and other court orders under the Criminal Procedure Act (CPA), read with the Prevention of Organised Crime Act (POCA). The NPA must apply to court for any such order and, depending on the level of urgency, the application may be heard within a week of being brought, or in the ordinary course, which can take a number of months.

**Money laundering**

Under the Financial Intelligence Centre Act (FICA), the Financial Intelligence Centre (FIC) can appoint inspectors with powers of routine inspection and who, subject to a warrant being obtained from court, can conduct inspections based on a suspicion of a failure to comply with FICA or any order, determination or directive made under FICA, or a contravention of FICA, and because the inspector suspects that information pertaining to such failure or contravention may be discovered during an inspection.

**Terrorist financing**

A High Court may, on application without notice by the National Director of Public Prosecutions to a judge in chambers, make an order prohibiting any person from engaging in any conduct concerning property in respect of which there are reasonable grounds to believe that the property is owned or controlled by or on behalf of, or at the direction of either:

- Any entity that has committed, attempted to commit, participated in or facilitated the commission of a specified offence under The Protection of Constitutional Democracy against Terrorism and Related Activities Act (POCDATARA).
- A specific entity identified in a notice issued by the President under POCDATARA.

**Financial/trade sanctions**

See Terrorist Financing above.

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**Penalties**

22. What are the penalties for participating in money laundering, terrorist financing offences and/or for breaches of financial/trade sanctions?

**Money laundering**

Under the Prevention of Organised Crime Act (POCA) money laundering is punishable by:

- Imprisonment not exceeding 30 years.
- A fine not exceeding ZAR100 million.

Failure to report a suspicious transaction, among other offences, under FICA may lead to:

- Imprisonment not exceeding 15 years.
- A fine not exceeding ZAR100 million.

**Terrorist financing**

The Protection of Constitutional Democracy against Terrorism and Related Activities Act (POCDATARA) provides for the following sanctions on conviction for the offence of terrorist financing:

- In a High Court or a Regional Court, a fine not exceeding ZAR100 million or imprisonment for a period not exceeding 15 years.
- In a Magistrates’ Court, a fine not exceeding ZAR250,000, or imprisonment for a period not exceeding five years.

**FINANCIAL RECORD KEEPING**

23. What are the general requirements for financial record keeping and disclosure?

A company must keep accurate and complete accounting records, in any official language, that enable the company to prepare its annual financial statements and that include accounting records kept in the prescribed manner and form (section 28, Companies Act). South Africa has 11 official languages.

Accounting records must be kept at or be accessible from the registered office of the company. Regulation 27 of the Companies Regulations, 2011 (Companies Regulations) provides that a company's records should be prepared in accordance with the relevant International Financial Reporting Standards (IFRS) or South African Generally Accepted Accounting Practice (SA GAAP), where appropriate.

These records, the financial statements and all the supporting and underlying documents must be kept for at least seven years.

Under regulation 25 of the Companies Regulations a company's accounting records must also include records:

- Of the company's assets and liabilities.
- Of any property held by the company.
- Of the company's revenue and expenditure.
- Of inventory and stock in trade, statements of annual stock taking.
- Enabling the value of the company’s shares at the end of the financial year to be determined.
24. What are the penalties for failure to keep or disclose accurate financial records?

Under the Companies Act, it is an offence for a person to:
- Falsify any accounting records or permit any person to do so.
- Fail to keep accurate or complete accounting records.
- Keep records other than in the prescribed manner.

The offender can be liable to a fine or imprisonment for a period not exceeding ten years or both. The offender may also be liable for an administrative penalty of up to SAR1 million imposed by the Registrar of Companies.

25. Are the financial record keeping rules used to prosecute white-collar crimes?

Prosecutors generally use these financial reporting rules to prosecute white-collar crimes.

DUE DILIGENCE

26. What are the general due diligence requirements and procedures in relation to corruption, fraud or money laundering when contracting with external parties?

Accountable institutions (banks, long-term insurance companies, estate agents, attorneys, auditors, financial advisors, and others) must undertake proper due diligence procedures in identifying and verifying customers, keeping records of transactions and reporting suspicious transactions.

These accountable institutions must also register with the Financial Intelligence Centre (FIC), formulate appropriate internal rules and appoint a compliance officer. All other businesses have reporting obligations for suspicious or unusual transactions.

Depending on the nature and size of the transaction, market practice dictates a due diligence review of a contracting party or acquisition including a review of a company's policies and procedures to prevent fraud, bribery and corporate corruption.

Parties generally also include rights of audit and inspection of both legal and financial matters during the negotiation phase. Representations and warranties against corruption and bribery are also often included in the transaction documents.

CORPORATE LIABILITY

27. Under what circumstances can a corporate body itself be subject to criminal liability?

Section 332 of the Criminal Procedure Act (CPA) provides that a corporate body can be held criminally liable for:
- An act performed with or without intention by or on the instruction or express or implied permission of a director or servant of that corporate body.
- An omission with or without intention of any act which ought to have been but was not performed by or on instruction of a director or servant of that corporate body.

The corporate body is also liable if the director or servant of that corporate body was acting in the exercise of his powers or in performance of his duties or further in the interests of that corporate body. If so, the acts of person are deemed to have been performed by that corporate body.

IMMUNITY AND LENIENCY

28. In what circumstances is it possible to obtain immunity/leniency for co-operation with the authorities?

Immunity or leniency may be granted for co-operating with authorities in the following circumstances:
- The President may grant a free pardon under section 327(6) of the Criminal Procedure Act (CPA).
- A plea and sentence agreement may be entered into with the prosecutor under Section 105(A) of the CPA. This section specifies the process and manner in which this may be done.
- Under section 204 of the CPA a witness who incriminates himself when giving evidence in criminal proceedings will be discharged from prosecution for that offence. This section only applies where the court is satisfied that the evidence given is frank and honest. A judge will allow the record to reflect this ruling.
- A court will also be informed of the mitigating factors during sentencing of the offence, which may include the fact that the offender co-operated with the authorities. A court may be lenient in these circumstances.

CROSS-BORDER CO-OPERATION

29. What international agreements and legal instruments are available for local authorities?

Obtaining evidence
The International Co-operation in Criminal Matters Act, 1996 (ICCMA) allows South Africa to respond to requests for assistance in obtaining evidence once the Director-General of the Department of Justice is satisfied that the proceedings have been instituted in a court or tribunal and that there are reasonable grounds for believing that the offence has been committed in the requesting state or an investigation is underway.

The ICCMA also provides for a reciprocal provision for South Africa as the requesting state.

South Africa has acceded to United Nations Convention against Transnational Organized Crime, 2000, together with its three supplementary protocols.

South Africa has Mutual Legal Assistance in Criminal Matters Treaties (MLA treaties) with the following countries: Canada, USA, Lesotho, Egypt, Algeria, Nigeria, France, China, and India. South Africa has also signed the Southern African Development Community (SADC) Protocol on Mutual Legal Assistance in Criminal Matters together with Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, Kingdom of Swaziland, Tanzania, Zambia and Zimbabwe.

Seizing assets
The ICCMA provides for the confiscation and transfer of assets obtained from criminal activities to be requested by South Africa or made to South Africa.

Sharing information
These are indications of increased cross-border co-operation between regulatory authorities, and South African authorities are no exception. In practice, information sharing does occur cross-border.
30. In what circumstance will domestic criminal courts assert extra-territorial jurisdiction?

The South African criminal courts have extra-territorial jurisdiction in circumstances where a core crime is committed by or against a South African citizen, or a person who is ordinarily resident in South Africa under the International Criminal Court Act (ICCA). The South African courts exercise their universal jurisdiction where an accused person is present in South Africa after the commission of a crime.

Under section 110A of ICCA, any South African citizen who commits an offence outside the jurisdiction of the South African courts and who cannot be prosecuted by a court of the country in which the offence was committed will be tried for the offence in a competent court if that person is found in South Africa. This only applies where the offence is considered to be an offence under South African laws and the NDPP instructs that the person be prosecuted. At the conclusion of the trial, all the court papers, certified by the court, are submitted to the Minister of International Relations and Co-operation.

31. Does your jurisdiction have any statutes aimed at blocking the assertion of foreign jurisdictions within your territory?

The Protection of Businesses Act, 1978 provides that some foreign court orders and arbitral awards are only enforceable with the consent of the Minister of Trade and Industry. The courts have interpreted this legislation narrowly as only being applicable to matters relating to the import or export of raw materials.

WHISTLEBLOWING

32. Are whistleblowers given statutory protection?

The Protected Disclosures Act (PDA) protects whistleblowers from being subjected to an occupational detriment. A disclosure in good faith to a manager or employer by the whistleblower is protected if the whistleblower has a reasonable suspicion that impropriety has occurred, is occurring or is likely to occur. There must be a reasonable belief that the disclosure is substantially true and the disclosure cannot be made for personal gain.

The Act also covers disclosures to certain regulatory bodies such as the Public Protector and the Auditor General.

There is currently an amendment bill to the PDA under consideration by Parliament, which if introduced would oblige companies to bring independent contractors, consultants, agents and service providers placed by temporary employment agencies within the ambit of the PDA. It would also oblige employers to have appropriate internal procedures for receiving and dealing with complaints.

REFORM, TRENDS AND DEVELOPMENTS

33. Are there any impending developments or proposals for reform?

Other than those mentioned above, there are no significant proposals for reform at present.

MARKET PRACTICE

34. What are the main steps foreign and local companies are taking to manage their exposure to corruption/corporate crime?

Increased regulatory scrutiny globally has led to an increased focus by companies from and anti-bribery and corruption perspective on due diligence, representations and warranties in agreements, formal policies and similar issues.
THE REGULATORY AUTHORITIES

National Prosecuting Authority (NPA)
W www.npa.gov.za

Status. The National Prosecuting Authority is a governmental organisation.

Principal responsibilities. The National Prosecuting Authority is responsible for prosecuting offences under South African law and to a limited extent on an extra-territorial basis.

Financial Services Board (FSB)
W www.fsb.co.za

Status. The FSB is a governmental organisation.

Principal responsibilities. The FSB is responsible for all non-banking related financial services.

The South African Reserve Bank
W www.reservebank.co.za

Status. The Reserve Bank is a governmental organisation.

Principal responsibilities. The Reserve Bank, the central bank of South Africa, plays an important role in banking regulation and supervision. The primary objective of the Reserve Bank is to protect the value of the South African currency. The Minister of Finance has delegated authority to the Bank to implement and administer exchange control policies on behalf of the South African government.

South African Police Services
W www.saps.gov.za

Status. The South African Police Services is a governmental organisation.

Principal responsibilities. The Police Services is responsible for investigating crimes.

Financial Intelligence Centre (FIC)
W www.fic.gov.za

Status. The FIC is a governmental organisation.

Principal responsibilities. The FIC is responsible for establishing and maintaining an effective policy and compliance framework and operational capacity to oversee compliance and to provide financial intelligence for use in combating crime, money laundering and terror financing.

ONLINE RESOURCES

South African Government Online
W www.gov.za

Description. Provides information on government structures and documents such as the Constitution, Acts, Bills, Regulations, Notices, policy documents, reports, the Government Tender Bulletin, annual reports, SA Yearbook, and so on. Access is also provided to documents that are available on provincial government websites, and to international reports referring to South Africa. The website is updated on a daily basis but the accuracy of the information is not guaranteed.

Polity
W www.polity.org.za/

Description. The website offers free access to South African legislation and policy documents.

South African Law Reform Commission (SALRC)
W www.justice.gov.za/salrc/

Description. The SALRC provides access to proposed legislation and reports detailing proposed amendments. It is published by the Department of Justice and maintained fairly regularly.

Southern African Legal Information Institute (SAFLII)
W www.saflii.org/za/

Description. SAFLII offers access to case law decided by the Higher Courts of South Africa. It also publishes the rules regulating the conduct of proceedings in the courts and is updated regularly.
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Professional qualifications. South Africa, Lawyer
Non-professional qualifications. BA (Law) and LLB degrees, University of Stellenbosch
Areas of practice. Mining law disputes, asset recovery and regulation and investigations work.
Recent transactions
- Conducting various internal investigations in respect of three different major infrastructure projects in Southern Africa with regard to anti-corruption issues.
- Advising one of South Africa’s leading construction groups with regard to matters relating to ongoing enforcement investigations relating to allegations of criminal offences involving multi-million Rand fraud, corruption and racketeering in the South African construction industry.
- Conducting internal investigation in respect of the operations of a Democratic Republic of Congo based business in respect of anti-corruption issues and advising South African based multi-national shareholder in regard to its related compliance obligations.
- Kumba Iron Ore Ltd, alongside Jeffrey Kron acting for Kumba Iron Ore relative to its complex dispute with ArcelorMittal South Africa Ltd, the Department of Mineral Resources and Imperial Crown Trading 289 (Pty) Ltd with regard to the mineral rights pertaining to the Sishen iron ore mine.
- Acting with Prof Michael Dale for Anglo American Platinum, Impala Platinum, Glencore Xstrata Coal, Optimum Coal and the Industrial Development Corporation with regard to internal administrative appeals and judicial review applications in the High Court in respect of the award of prospecting and mining rights.
- Multi-national aid agency (confidential): advising the aid agency in respect of an UNCITRAL arbitration relating to funds embezzled by former employees and obtaining arbitral award against respondents in an amount in excess of ZAR100 million.
- City of Johannesburg Metropolitan Municipality, advising the COJ with regard to dispute arising from insolvency of its contracted IT service provider Masana Technologies (Pty) Ltd (in liquidation), including insolvency related proceedings and judicial review application with regard to insolvency enquiry convened into the affairs of Masana (ongoing).
- DRD Gold, acting for client in respect of multi-million rand municipal rates dispute before specialised tribunal (Valuation Appeal Board).
Languages. English and Afrikaans
Publications.
- Article on role of ongoing education and training in corruption prevention, for BusinessBrief Magazine, April/May 2014.
- ASK – to comply? (why senior executives should take compliance seriously), BusinessBrief Magazine, October/November 2013.
- Interviewed for Commercial Dispute Resolution Magazine, for article in May – June 2013 issue on Africa and corruption challenges for multi-nationals.
- Online interviews in February and March 2012 with Ms Shannon De Rythoe, Deputy Editor: Polity on www.polity.org.za in respect of nationalisation of mines debate.

Professional qualifications. South Africa, Lawyer
Non-professional qualifications. Bachelor of Commerce (BCom) and Bachelor of Laws (LLB), Stellenbosch University, 2008
Areas of practice. Corporate and commercial litigation and arbitration
Recent transactions
- Part of the team acting for Kumba Iron Ore relative to its complex dispute with ArcelorMittal South Africa Ltd, the Department of Mineral Resources and Imperial Crown Trading 289 (Pty) Ltd with regard to the mineral rights pertaining to the Sishen iron ore mine.
- Part of the team advising a multi-national transport company relative to judicial review proceedings brought by another company in respect of the award of a tender.
- Advising a major South African state owned company on a number of procurement related matters.
- Advising major South African banks on various aspects of regulatory law and in particular the implementation of and their continued compliance with the Financial Intelligence Centre Act.
- Part of the team acting for Anglo American Platinum with regard to judicial review applications in the High Court in respect of the award of prospecting and mining rights.
Languages. English
Publications.
Mining companies operating in South Africa that would do well to ensure that their compliance programmes are up-to-date for Business Day Business Law and Tax Review, February 2014.
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Professional qualifications. South Africa, Lawyer

Non-professional qualifications. BA and LLB, Rhodes University in Grahamstown.

Areas of practice. General commercial and contractual litigation, including mining law, municipal law and banking law disputes, liquidations and insolvencies, as well as business ethics and anti-corruption advisory work, fraud and asset recovery and investigations work.

Recent transactions

- Advising one of South Africa’s leading construction groups with regard to matters relating to ongoing enforcement investigations relating to allegations of criminal offences involving multi-million SAR fraud, corruption and racketeering in the South African construction industry.
- Conducting internal investigation in respect of the operations of a Democratic Republic of Congo based business in respect of anti-corruption issues and advising South African based multi-national shareholder in regard to its related compliance obligations.
- Multi-national aid agency (confidential), advising the aid agency in respect of an UNCITRAL arbitration relating to an internal fraud committed by former employees and obtaining arbitral award against respondents in an amount in excess of ZAR100 million, as well as preparing witnesses for criminal court testimony, working closely with the state’s prosecutors on the criminal aspects of the matter and all aspects of the asset forfeiture procedure to obtain judgment against the former employees who committed the fraud.
- Conducting various internal investigations in respect of three different major infrastructure projects in Southern Africa with regard to anti-corruption issues.
- Advising curators appointed pursuant to POCA to administer restrained assets pending criminal prosecution.
- Assisting in the civil recovery of assets obtained fraudulently by an employee.
- Revising anti-fraud, whistleblowing and anti-corruption policies for a multi-national company.
- Conducting a review of potential business partners and agents for one of the world’s largest multi-national energy companies with regard to specific operations in Africa.
- Performing various anti-bribery and corruption due diligences, including a recent partner review for an international mining company’s BEE restructuring transaction.

Languages. English

Publications.

- Anti-bribery and corruption due diligence for Business Brief, October 2014
- The Supreme Court of Appeal tests the parameters of litigation privilege, Without Prejudice, August 2013.
- Piercing of the corporate veil: applicability to trusts?, Go Legal, November 2012
- Computer generated evidence – what evidential weight will be given to it and how best to prove it? Without Prejudice, December 2011

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