

DO YOU KNOW YOUR ABC'S?

namely Anti-Bribery & Corruption

By: Stella Nolan

It is often seen as a victimless crime for those engaging in bribery and corruption. However, in reality, it reduces efficiency and increases inequality. The truth is that the cost of corruption is colossal, with tangible consequences.

According to the World Bank, the corrupt pay more than \$1 trillion in bribes annually¹.

The World Economic Forum estimates that the cost of corruption equates to more than 5% of global GDP, or \$2.6 trillion. Essentially, corruption is one of the core obstacles to sustainable economic, political and social development in emerging and developed economies alike.

To clarify, 'corruption' is any illegitimate use of office and includes crimes like nepotism or cronyism and misdirecting funds. 'Bribery' is limited to the giving or acceptance of payment for leverage. South Africa has international commitments and obligations to curb the scourge of corruption. Furthermore, the Constitution mandates compliance with international law and requires the country to comply with its international obligations. South Africa has ratified several international conventions and treaties and participates in forums that need the government to implement measures to prevent and combat corrupt activities, like:



- > The United Nations Convention against Corruption (UNCAC), which promotes the prevention and criminalisation of corruption. It highlights the need for international cooperation in the fight against corruption and the return of assets associated with corrupt activities.
- > The African Union's Convention on Preventing and Combating Corruption.
- > The SADC Protocol Against Corruption.
- > The Financial Action Task Force (FATF).
- > The Group of 20 (G20) Anti-Corruption Working Group, where South Africa participates, thus provides an accountability report.
- > United Nations Convention Against Corruption (2003).
- > The Organisation for Economic Cooperation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997),
- > The United Nations Convention against Transnational Organised Crime (2000) and its associated protocols.

What is clear is that South Africa is internationally committed to preventing and combating corruption and has a legislative framework that paves the way. Each convention and treaty ratified by South Africa compels action to prevent and combat corruption. The National Anti-Corruption Strategy (NACS) is the driving force overseeing compliance in the public and private sectors. Other significant local anti-corruption laws include the Prevention and Combating of Corrupt Activities Act (12 of 2004), The Prevention of Organised Crime Act 121 of 1998 and the Financial Intelligence Centre Act (38 of 2001).

Many organisations address corruption by implementing remedial measures and controls to identify it. However, without public and private intervention, the scourge of bribery, extortion and/or bribe solicitation will continue with impunity. The OECD Recommendations, The Public Services Act, The Companies Act and the NACS all address the preventing and combating of corruption in public and private sectors.

OECD Recommendations

In 2010 there was a positive step forward in the fight against corruption when the OECD Recommendations on Combating Bribery, Bribe Solicitation and Extortion (2011) were introduced in terms of regulation 43 of the South African Companies Act (71 of 2008) as amended. Hence, South African organisations are obliged to:

- > not pay or demand bribes;
- > have an anti-bribery policy;
- > develop internal processes and controls to mitigate the bribery risk;
- > keep fair and accurate books and records;
- > perform an anti-bribery risk assessment to identify the risks of bribery;
- > perform due diligence on agents, intermediaries and consultants to ensure that they do not pay bribes on behalf of an organisation;

- > educate employees and agents on anti-bribery processes;
- > publicise their anti-bribery initiatives; and
- > avoid unlawful political contributions.

To adhere to the OECD Recommendations, organisations across all sectors must implement robust anti-bribery and corruption programmes. The recommendations' core objective is to neutralise people's ability to pay bribes in the private sector. The ripple effect would halt public sector corruption, as those in the private sector invariably pay bribes. Organisations should regard the OECD Recommendations as a normal business practice. They amount to good corporate governance and commitment to doing ethical business and mitigating the risks associated with bribery.

Public Sector Legislation

The amendment of the Public Service Act (Act 103 of 1994) and the Public Service Regulations aim to protect procurement processes and send a strong message to the ruthless breed of capitalists intent on keeping corruption thriving. The amendments include:

- > Prohibiting public officials from undertaking other remunerative work outside their employment. Public officials performing other remunerative work outside their employment should seek permission from senior officials. When participating in additional work and receiving remuneration, they must obtain a Certificate of Approval, which must be attached to the public service employee's Financial Disclosure Form, allowing for easy verification;
- > Prohibiting public officials from conducting business with any organ of state, whether in their capacity as individuals or through companies in which they are directors;
- > Prohibiting public officials from accepting gifts from any employee or person in return for performing their duties;
- > Compelling designated public officials to disclose their financial interests, which is essential in managing any conflict of interest; and
- > Establishing an ethics infrastructure, such as ethics committees, ethics officers or ethics champions in public organisations.

The Companies Act

Any South African organisation falling under the jurisdiction of the Companies Act must adopt the OECD Recommendations. Those falling within the ambit include:

- > State-owned enterprises;
- > All listed public entities;
- > In two of the previous five years, any other company that scored more than 500 points relevant to regulation 26(2).

Regulation 43 of the Companies Act mandates that an organisation establishes a social and ethics committee. Among many duties in promoting sound corporate citizenship and ethics, the responsibilities include reducing corruption and ensuring the organisation adopts and implements the OECD Recommendations.

A summary of the duties of the nominated social and ethics committee, based on the OECD Recommendations on combating bribery, bribe solicitation and extortion, is:

- > Monitoring an organisation's activities against relevant legislation, legal requirements, or prevailing codes of best practice in social and economic development matters. It includes an organisation's standing in terms of its goals and includes:
 - o the tenth principle set out in the United Nations' Global Compact, which stipulates that organisations should work against corruption in all its forms, including extortion and bribery⁶;
 - o the OECD Recommendations regarding corruption;
 - o the Employment Equity Act; and
 - o the B-BBEE Act.
- > Ensuring good corporate citizenship by promoting equality, preventing unfair discrimination and reducing corruption;
- > Contributing to the developing communities in areas where an organisation operates or where it markets products or services;
- > Maintaining a record of sponsorship, donations and charitable giving;
- > Overseeing issues relating to the environment, health and public safety, as well as the impact of an organisation's activities, products or services;
- > Ensuring that an organisation's advertising and public relations align with consumer protection laws;
- > Addressing labour and employment issues:
 - o Evaluating the organisation's standing in terms of the International Labour Organization Protocol on decent work and working conditions;
 - o Appraising an organisation's employment relationship and contributions with regard to the educational development of its employees;
 - o Drawing matters within its mandate to the board's attention, as the occasion requires; and
 - o Reporting to shareholders at the organisation's annual general meeting on the matters within its mandate.

National Anti-Corruption Strategy 2020-2030

The South African Government developed and published the NACS, a strategic framework and action plan for the country which seeks to create a society that:

- > Reinforces the government's administrative and procurement processes to ensure greater monitoring, accountability and transparency.
- > Educates the public about what constitutes corruption, thus empowering them to respond when or where necessary.
- > Encourages support and protection of the public and whistleblowers who report corruption.
- > Holds public officials accountable for providing inadequate services.
- > Creates a culture of zero tolerance toward corruption in any sector by holding those involved in corrupt activities accountable.
- > Holds organisations and civil society accountable for bribery and corruption.

The premise of the NACS principle is the emphasis on preventing corruption through good governance, transparency, integrity and accountability. An integrated approach to fighting corruption will help mitigate the risk of costly commissions of inquiry, forensic investigations and other legal processes.

The government built the strategy on the following six pillars:

- ① Promote and encourage active citizenry, whistleblowing, integrity and transparency in all spheres of society.
- ② Enhance employee professionalism to optimise their contribution towards creating corruption-free workplaces.
- ③ Enhance governance, oversight and accountability in organisations across all sectors.
- ④ Improve the integrity, transparency and credibility of the public procurement system.
- ⑤ Strengthen dedicated anti-corruption agencies to resource and coordinate transnational cooperation, performance, accountability and independence.
- ⑥ Protect vulnerable sectors most prone to corruption and unethical practices with effective risk management⁹.

Prevention and Combating of Corrupt Activities Act

This legislation applies to organisations based in South Africa, including international ones conducting business in the country. Facilitation payments have always been illegal in South Africa. In terms of the Prevention and Combating of Corrupt Activities Act (12 of 2004), it is a criminal offence to provide any form of 'gratification' to an official if it is not lawfully due. The Act regulates bribery as: "any person who directly or indirectly gives or accepts or agrees or offers to give or accept any gratification from another person to act personally or influence another person to act in a manner that amounts to an illegal, dishonest, or unauthorised action or an abuse of authority, a breach of trust or a violation of a legal duty, is guilty of the act of corruption." In addition to the general offence of corruption, the Act sets out an entire series of corrupt activities, including the bribery of public and foreign

government officials. It addresses corruption related to, among others, tenders, contracts, agents, members of the legislature and judiciary, sporting events and games of chance. On a global front, the Act imposes lengthy periods of imprisonment on individual offenders convicted of corrupt activities. The mandatory minimum sentence for corruption in the South African sentencing guidelines is direct imprisonment for 15 years.

The Prevention of Organised Crime Act 121 of 1998

The main objective of this legislation is to provide for the recovery of the proceeds from unlawful activities. The High Court has jurisdiction to make a forfeiture order as per section 50(1)(b) of the Prevention of Organised Crime Act, 1998, in respect of property situated outside the territory of South Africa and belonging to persons who are presently resident elsewhere. An order can be made upon reasonable grounds to believe the property concerned is an 'instrumentality of an offence' referred to in Schedule 0 (s 38(2)(a)) or is the 'proceeds of unlawful activities' (s 38(2)(b)).

The definitions of the terms 'instrumentality of an offence' and 'proceeds of unlawful activities' feature prominently in the Act. The former relates to any property concerned with the commission of an offence, irrespective of where it occurred. The latter applies to any form of property of direct or indirect benefit from any unlawful activity.

The legislation aims:

- > to combat organised crime, money laundering and criminal gang activities;
- > to prohibit certain activities relating to racketeering activities;
- > to provide for the prohibition of money laundering and for an obligation to report certain information; to criminalise certain activities associated with gangs;
- > to provide for the recovery of the proceeds of unlawful activity;
- > to ensure the civil forfeiture of criminal assets that the corrupt used to commit an offence or assets that are the proceeds of illegal activity;
- > to provide for the establishment of a Criminal Assets Recovery Account;
- > to amend the Drugs and Drug Trafficking Act, 1992;
- > to amend the International Co-operation in Criminal Matters Act, 1996;
- > to repeal the Proceeds of Crime Act, 1996; and
- > to incorporate the provisions contained in the Proceeds of Crime Act, 1996.

The Prevention and Combating of Corrupt Activities Act and the Prevention of Organised Crime Act are a strong foundation for addressing corruption, an acceptable overall anti-corruption

legal framework, an independent judiciary, a robust media and an active, battle-hardened civil society. Essentially these are the critical ingredients for a relatively corruption-free society, yet corruption is burgeoning.

Notwithstanding, it is well documented that the decade leading up to the Zondo Commission of Inquiry robbed taxpayers of billions of Rands, creating a catastrophic loss to the GDP. Prodigious looting and money laundering would not have been possible without the connivance of government officials or global and national financial institutions, auditors and management consultants. All of these profited, hid and spent stolen funds otherwise destined for essential South African public spending. The result is the depletion of public finances and infrastructure⁶.

But where did the billions go? Today, the corrupt use a global web of anonymous companies, trusts and other legal entities across multiple jurisdictions to transfer and hide illicitly sourced funds. Perpetrators launder their illicit money, making the funds available to fund lavish lifestyles. However, a darker side is that the corrupt launder money to finance crime syndicates or terrorism.

The definition of money laundering is the criminal practice of making funds from illegal activities appear legitimate. Although money laundering is a diverse and often complex process, it generally involves three stages: placement, layering, and/or integration of the funds. The method of money laundering is not a lone one, but one that consists of a chain of people or organisations. As the global fight to eradicate corruption continues, mandated checks endeavour to uncover the source of the previously untraceable funds. Another factor is that the number of people involved in the money laundering chain substantially increases the risk for all corrupt parties involved. The core to fighting the corrupt is a regulator that has the stomach to implement the full force of the law, both globally and within the South African borders.

The global fight to combat corruption

As many organisations and individuals fly under the radar of culpability inside South African borders, the global playing field of accountability for corruption has changed drastically in the last few years.

For some time, anti-corruption campaigners and activists have urged South African authorities to consider adopting legislation similar to the United Kingdom Bribery Act (UKBA) that came into effect in July 2014. Through its innovation, a new corporate offence, "the failure by a commercial organisation to prevent bribery," has been compelling organisations associated with the United Kingdom (UK) to take robust anti-corruption measures.

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The UKBA is similar to the Foreign Corrupt Practices Act (FCPA), a United States (US) statute containing anti-bribery prohibitions and accounting requirements. Like US legislation, the UKBA provides extra-territorial jurisdiction to the UK regulators regarding acts of corruption committed by organisations associated with the UK. It is irrelevant whether the Act of corruption occurs in the UK or elsewhere, or where the organisation in question is registered or located globally. Unique to the UKBA is that it applies to both the public and private sectors and criminalises facilitation payments. The legislation is not only aggressive, but it has more far-reaching consequences for South African organisations, as it gives the Serious Fraud Office the power to impose fines for failing to prevent bribery.

The US remains the most robust global enforcer of corruption violations. A critical factor for South African organisations is that the US Department of Justice adopts a comprehensive approach to jurisdiction and has cautioned that it will find jurisdiction regarding bribes paid to foreign government officials. It does so if payments route through US dollar accounts or e-mails, where transmission happens through US-based servers. Accordingly, South African organisations that may not ordinarily regard themselves as subject to the international regulators may inadvertently become subject to their extra-territorial jurisdictional reach. For example, if an employee in a subsidiary in South Africa pays a bribe to a foreign government official, a prosecution could occur there. However, the perpetrators could face prosecution in the US as well. It is only a question of time before the South African government implements drastic measures against corruption, similar to those of the UK and US. Therefore, as part of being a good corporate citizen, South African organisations should initiate robust anti-corruption programmes to comply with and avoid prosecution by international regulators and, of course, conform with the South African Companies Act.

In today's global and local anti-corruption compliance environment, it would be reckless for any board of any organisation not to pay serious attention to creating an anti-bribery culture. Non-compliance with anti-corruption requirements has far-reaching consequences and is a risk that organisations must appropriately manage.

Despite South Africa being a signatory to international conventions and treaties, as well as having robust legislation in place, it has not fared well in the Transparency International Corruption Index. In 2015 it ranked 61st out of 167 participating countries, and in 2021 ranked 70th out of 180 participating countries.

Food for thought, the cost of corruption far exceeds that of mitigating it.

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Source of reference:

1. <https://www.oecd-ilibrary.org/docserver/9789264205376-3-en.pdf?expires=1652235259&id=id&accname=guest&checksum=2DF340281451C25004E19B4F931EBB29>
2. <https://www.gov.za/anti-corruption-E>
3. https://www.gov.za/sites/default/files/gcis_document/202105/national-anti-corruption-strategy-2020-2030.pdf
4. https://tfm.co.za/wp-content/uploads/2020/06/TFM_issue-09_2016_Corruption-copy.pdf
5. <https://www.unglobalcompact.org/what-is-gc/mission/principles>
6. <https://www.ft.com/content/29e192d3-a8dc-4be7-a80f-b006fa4091f1>
7. https://www.transparency.org.uk/corruption-south-africa-view-front-line?gclid=EAlalQobChMI7c7Lo_Kr-AIVGLLCh2f4whREAAyAAEgKzPD_BwE