



corruption
watch



CORRUPTION AND THE LAW IN SOUTH AFRICA

A Quick Reference Guide

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TERMS/ GLOSSARY

AU	African Union
CPA	Criminal Procedure Act
DPCI	Directorate for Priority Crime Investigation
IPID	Independent Police Investigative Directorate
NACH	National Anti-corruption Hotline
NPA	National Prosecuting Authority
PAIA	Promotion of Access to Information Act
PDA	Protected Disclosures Act
PRECCA	Prevention and Combatting of Corrupt Activities Act
POCA	Prevention of Organised Crime Act
SCMP	Supply chain management policy
SIU	Special Investigating Unit
UNCAC	United Nations Convention Against Corruption

// INTRODUCTION

South Africa is a party to a number of international and regional conventions that set out obligations to fight corruption. In addition, South Africa has enacted domestic legislation in order to give effect to the commitments enshrined in these conventions.

2/1 INTERNATIONAL AND REGIONAL CONVENTIONS

The United Nations Convention Against Corruption

The United Nations Convention against Corruption (UNCAC) came into force in 2005. South Africa is a party to the Convention.

Some of the key features of the UNCAC are the requirements to take steps to:

- Prevent corruption;
- Criminalise corruption;
- Cooperate with other countries in the fight against corruption; and
- Recover assets.

The UNCAC, amongst other things:

- Requires state parties to promote active participation of individuals and groups, including civil society and community-based organisations in the prevention of and fight against corruption;
- Requires state parties to consider incorporating into their domestic legal systems appropriate measures to provide protection against unjustified treatment of persons who report corruption in good faith;

- Requires state parties to adopt measures to establish liability of legal persons for offences in accordance with the Convention;
- Requires state parties to endeavour to apply codes or standards of conduct for the correct, honourable and proper performance of public functions by public officials;
- Requires state parties to develop and implement anti-corruption policies that promote participation of society, reflect the principles of rule of law, proper management of public affairs, and public property, integrity, transparency and accountability;
- Requires state parties where appropriate to train public officials in order to perform their functions, including enhancing their awareness of the risks of corruption inherent in the performance of their functions.

State parties are required to take necessary measures, including legislative measures, to ensure the implementation of the obligations under the UNCAC.

South Africa's obligations in terms of this convention find expression in our domestic legislation, amongst others: the Prevention and Combatting of Corrupt Activities Act; the Prevention of Organised Crime Act; the Protected Disclosures Act and the Criminal Procedure Act.

The AU Convention Against Corruption

The African Union Convention Against Corruption (the AU Convention Against Corruption) was adopted in 2003 and came into force in 2005. South Africa ratified the Convention in 2004. The AU has a number of provisions similar to the provisions in the UN Convention Against Corruption. The AU Convention requires signatories to establish, maintain and strengthen independent, national anti-corruption authorities or agencies¹.

¹ See Article 5.3

The OECD Anti-bribery Convention

The OECD Anti-bribery Convention establishes legally binding standards to criminalise bribery of foreign public officials in international business transactions. Under the OECD Convention, parties are required to take measures to establish that it is a criminal offence under their own laws for any person to offer a foreign public official any pecuniary or other advantage in order to obtain an improper benefit in international business. Parties to the Convention are required to ensure that bribery of foreign public officials is punishable by effective, proportionate and dissuasive criminal sanctions.

South Africa is a non-member country of the OECD but has adopted this Convention. South Africa became a party to the Convention in 2007. The Convention establishes a monitoring mechanism to ensure that obligations under the Convention are carried out. Monitoring is carried out through the OECD Working Group on Bribery. Country Monitoring Reports and Recommendations are prepared, following country visits.

The SADC Protocol Against Corruption

The SADC Protocol against Corruption provides for the prevention, detection and punishment of corruption; as well as for cooperation between states. It covers corruption in both the public and private sectors. The Protocol recognises that demonstrable political will and leadership are essential in the fight against corruption. It affirms the need to garner public support for initiatives to combat corruption.

3// DOMESTIC LEGISLATION

The Constitution of the Republic of South Africa (1996)

The Constitution of the Republic of South Africa includes a Bill of Rights. The Bill of Rights encompasses socio-economic rights, as well as rights to dignity, equality and freedom amongst others. The state has a duty to respect, protect, promote and fulfil the rights in the Bill of Rights.

*CORRUPTION HAS THE
POTENTIAL TO UNDERMINE
THE RIGHTS IN THE BILL OF
RIGHTS.*

Section 217 of the Constitution enjoins organs of state in the national, provincial or local sphere of government to contract for goods or services in accordance with a system that is fair, equitable, transparent, competitive and cost effective. This requires the state to take positive steps to ensure transparency of all public procurement processes including through the investigation of allegations of corruption or improper conduct in procurement processes.

The Competition Act (1998)

The Competition Act provides for the establishment of the Competition Commission and the Competition Tribunal. The Commission is responsible for amongst other things, the investigation of prohibited practices.

*CERTAIN CONDUCT PROHIBITED
BY THE COMPETITION ACT
ALSO AMOUNTS UNDER CERTAIN
CIRCUMSTANCES TO CORRUPTION
UNDER THE PREVENTION
AND COMBATTING OF
CORRUPT ACTIVITIES ACT.*

For example, individuals who manipulate a tender process by way of cover pricing or any other form of collusion in contravention of the Competition Act may also be in contravention of sections 12 and 13 of PRECCA¹. Where firms, through their employees and directors, participate in a bid-rigging cartel and engage in cover pricing to favour one or more firms in exchange for, for example a 'loser's fee'², this may amount to an offence under PRECCA³.

In addition, where an individual participates in a bid-rigging cartel and it is agreed that his/her company will engage in cover pricing so that a rival firm can win the tender in exchange for a sub-contract, this too amounts to a corrupt activity under PRECCA⁴.

¹ Section 12 of PRECCA provides for offences in respect of corrupt activities relating to contracts.
Section 13 of PRECCA provides for offences in respect of corrupt activities relating to procuring and withdrawing tenders

² Which amounts to 'gratification' under PRECCA

³ Section 12 in particular

⁴ Section 13 in particular

The Prevention and Combatting of Corrupt Activities Act (2004)

The Prevention and Combatting of Corrupt Activities Act is the key statute on corruption in South Africa. It provides for the general offence of corruption as well as specific offences. It also provides for investigative measures, as well as preventative measures in the fight against corruption.

The offence of corruption under the PRECCA:

- In simple terms, corruption is the abuse of power for private gain. In terms of PRECCA, corruption has the following elements:
- Someone giving (offering to give) / Someone receiving (or agreeing to receive);
- Someone in a position of power;
- Gratification⁵;
- To use their power illegally or unfairly.

GRATIFICATION UNDER PRECCA INCLUDES: MONEY; A DONATION; A FEE; A REWARD; PROPERTY; THE AVOIDANCE OF LOSS; THE DISCHARGE OF A LOAN; A PRIVILEGE; A DISCOUNT ETC.

The person who offers to give or do something for someone to use their power unfairly will be guilty of the offence of corruption. If the person agrees to accept gratification to use his/her power in an unjustified manner, he/she too will also be guilty of corruption.

⁵ 'Gratification' is defined in the Act in section 1. Gratification includes amongst other things gifts; donations; fees; loans; the avoidance of loss; any status; honour; service; right or privilege amongst other things

INFLUENCING ANOTHER PERSON TO ACT IN A CERTAIN WAY

Corruption involves influencing someone to act in a certain way. PRECCA⁶ speaks of influencing another person to act in a manner that is illegal; dishonest; unauthorised or biased. It also speaks of influencing another person to misuse or sell information or material that was acquired in carrying out the performance of any powers. It also views any abuse of a position of authority; or breach of trust or violation of legal rules designed to achieve an unjust result as corruption.

The crime of corruption often involves the giving and receiving of money. But other forms of gratification in exchange for acting in a certain way are also prohibited. For example, receiving a gift or being excused from paying a debt also amount to 'gratification' under PRECCA.

Specific Offences Under the Act⁷

In addition to creating the general crime of corruption; PRECCA also criminalises specific corrupt activities:

- Offences involving contracts: it is a crime for anyone to accept gratification to influence who gets a contract.
- Offences involving a public official: if anyone in the private sector offers a public official any gratification to give them a benefit they will be guilty of corruption.
- Offences that involve members of legislative bodies: it is an offence to offer any member of a legislative authority any gratification to act in an illegal or biased manner.

⁶ See section 3 (b) on the Act

⁷ See sections 4 to 16 of the Act

- Offences relating to judicial officers: it is an offence to offer a magistrate or judge any gratification, including money to decide a case in a certain way. It is also an offence for a judicial officer to accept any gratification to violate any duty or abuse his/her position of authority.
- Offences that involve tenders: it is an offence to offer or accept gratification in order to influence the award of a tender.
- Crimes that involve corruption regarding foreign officials: it is an offence for any business to attempt to unduly influence an official in a foreign country.
- Offences by any party to an employment relationship: PRECCA makes it an offence for any party in an employment relationship to give or receive any unauthorised gratification in respect of that party doing any act in the scope of the party's employment relationship.

PRECCA provides for 'extraterritorial jurisdiction'. This means that even if an act of corruption was committed outside of South Africa, a court in South Africa will have jurisdiction in respect of the offence; as long as inter alia the person to be charged is a citizen of the Republic; is ordinarily resident in the Republic or is a corporate incorporated in the Republic.⁸

PENALTIES UNDER THE ACT

PRECCA imposes penalties for people who are convicted of corrupt activities.⁹ Hefty prison sentences can be imposed; as well as fines. If convicted in the High Court, one can receive up to life imprisonment. If convicted in the in a regional Magistrates' court, one can receive a sentence of up to 18 years in prison. If convicted in a district Magistrates' court, one can receive up to five years in prison.

⁸ See section 35 of the Act on extraterritorial jurisdiction

⁹ See section 26 of the Act dealing with penalties

REGISTER FOR TENDER DEFAULTERS

PRECCA requires the Minister of Finance to create a Register of Tender Defaulters to be kept by the National Treasury.¹⁰

The names of people or businesses who are convicted of offences relating to contracts or tenders are kept on this register. The Treasury also maintains a register of names of individuals and companies who have defaulted on state contracts.

The Prevention of Organised Crime Act (1998)

The Prevention of Organised Crime Act (POCA) is aimed at combatting organised crime; money laundering; criminal gang activities and racketeering activities.

A person can be charged with racketeering if they have any property in their possession which they know is linked to any illegal business activity. Anybody who buys or rents or is involved in any deal linked to property which they suspect has been illegally acquired (or contributes to unlawful activities) must report their suspicion within a reasonable time.

The POCA provides for the forfeiture of assets obtained through criminal activities. A person can only be convicted if they know / ought reasonably to have known that the property formed part of an unlawful activity.

Fines and/ or imprisonment can be imposed if a person is successfully convicted under POCA.

¹⁰ See Chapter 6 of the Act

The Criminal Procedure Act (1977)

The Criminal Procedure Act governs all procedures that relate to criminal proceedings. This includes procedures for search and seizure, arrest, charges, bail, pleas including plea bargaining, evidence, sentencing and appeal.

The Protected Disclosures Act (2000)

The Protected Disclosures Act creates a framework for employees to disclose information about criminal or other irregular conduct in the workplace, and provides for protection against any employment-related reprisals as a result of such disclosures.

The PDA applies to employees in both the public and the private sector. It does not extend to volunteers or independent contractors, it only applies to employees. It protects employees against 'occupational detriment' on account of having made a 'protected disclosure'.

A 'protected disclosure': is the disclosure of information, regarding the conduct of the employer or an employee of the employer that shows that a criminal offence is being committed or is likely to be committed; that a person has failed to comply with a legal obligation; that a miscarriage of justice has occurred; that the health or safety of a person is endangered; that the environment is likely to be damaged or that there is unfair discrimination.

*' OCCUPATIONAL DETRIMENT
UNDER THE PDA INCLUDES:
SUBJECTED TO DISCIPLINARY
ACTION; DISMISSED, SUSPENDED;
HARASSED; INTIMIDATED; REFUSED
A PROMOTION; TRANSFERRED
AGAINST YOUR WILL*

The PDA requires that a disclosure be made to:

- A legal advisor with the purpose of obtaining legal advice;
- Your employer;
- The Public Protector;
- The Auditor General;
- The Minister or the Member of the Executive Council of a Province, under certain circumstances¹¹;
- Any other person, as long as certain conditions are met, including that the disclosure is made in good faith and that you believed you could not make the disclosure to your employer.

The PDA requires public companies to encourage and facilitate disclosure.

The PDA is currently being reviewed by the South African Law Reform Commission, with the aim of strengthening the act and providing for increased protection for whistle-blowers.

¹¹ Where the employee's employer is appointed by the MEC or Minister in terms of legislation

The Promotion of Access to Information Act (2000)

This Act (PAIA) promotes transparency in Government, as well as in the private sector.

The PAIA regulates how to access recorded information from both public and private bodies. In terms of PAIA, if one wishes to access information from a private body, it is necessary to demonstrate that the information is required in order to exercise or protect a right¹². This requirement does not apply to records of public bodies. Public bodies can refuse access to information on certain grounds¹³.

The Promotion of Administrative Justice Act (2000)

The Promotion of Administrative Justice Act (PAJA) gives effect to the right to 'administrative action' that is lawful, reasonable and procedurally fair. It also provides for the right to request reasons for decisions taken.

'Administrative action' is any decision, or failure to take a decision, by an organ of state, when exercising a public power or function or power in terms of the Constitution. Decisions of natural and juristic persons also amount to administrative action when there is the exercise of a public power or a public function.

Where foul play in decision making is suspected, any person whose rights have been materially and adversely affected by the administrative action can invoke PAJA to request reasons for the decision¹⁴.

¹² See Section 50 of PAIA

¹³ See Sections 33 to 45 of PAIA

¹⁴ See Section 5 of PAJA

The Public Finance Management Act (1999) and Regulations

The Treasury Regulations enacted in terms of The Public Finance Management Act 1 of 1999 ('PFMA') set out specific obligations on organs of state to investigate corruption within the sphere of public procurement. The PFMA and Treasury Regulations are applicable to national or provincial government departments.¹⁵

Supply chain management officials 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 act¹⁶ and must assist accounting officers or accounting authorities in combating corruption and fraud in the supply chain management system¹⁷.

Treasury Regulations also provide that the "accounting officer", who in terms of section 36 of the PFMA is the head of the relevant government department, must:

- "INVESTIGATE ANY ALLEGATIONS AGAINST AN OFFICIAL OR OTHER ROLE PLAYER OF CORRUPTION, IMPROPER CONDUCT, OR FAILURE TO COMPLY WITH THE SUPPLY CHAIN MANAGEMENT SYSTEM, AND WHEN JUSTIFIED:
- (i) take steps against such an official or other role player and inform the relevant treasury of such steps; and
 - (ii) report any conduct that may constitute an offence to the South African Police Service.'

¹⁵ See section 3(1)(a) of the PFMA read with the definition of "department" in section 1 of the PFMA.

¹⁶ See in particular Regulation 16A9.1(b)(i).

¹⁷ See in particular Regulation 16A9.1(b)(ii).

The Municipal Finance Management Act (2003) and Regulations

The purpose of the MFMA is to secure sound and sustainable management of the financial affairs of *inter alia* municipalities in the local sphere of government.¹⁸ Chapter 11 of the act provides for a supply chain management system.

The Regulations require any SCMP to provide measures for the combatting of abuse and corruption in the supply chain management system.¹⁹ Amongst other things, the supply chain management policy must enable accounting officers to check the Treasury's database prior to awarding any contract to ensure that no bidder is prohibited from doing business with the public sector; as well as enable the accounting officer to reject the bid of any bidders who have been listed on the Register for Tender Defaulters in terms of section 29 of the Prevention and Combating of Corrupt Activities Act 12 of 2004.²⁰

The Regulations further provide that a supply chain management policy of a municipality or municipal entity must state that the municipality or municipal entity may not make an award to a person who is in the service of the state.

¹⁸ See Preamble to the Municipal Finance Management Act

¹⁹ See MFMA SCM Regulation 38

²⁰ See MFMA SCM Regulation 38 (g)

The Companies Act (2008) and Regulations

DUTY TO COMBAT CORRUPTION

Regulation 43 of the Regulations to the Companies Act makes it mandatory for certain companies²¹ to establish 'social and ethics' committees. A social and ethics committee must monitor the companies' activities, including the company's standing in terms of the OECD recommendations regarding corruption.

WHISTLE-BLOWING AND THE COMPANIES ACT

Section 159 of the Companies Act provides that disclosures of illegal activity can be made to a broader category of people and entities than under the Protected Disclosure Act, being: the Commission, the Companies Tribunal, the Panel, a regulatory authority, an exchange, a legal adviser, a director, prescribed officer, company secretary, auditor, board or committee of the company concerned.

Those who disclose information in terms of the Companies Act are given immunity from civil, criminal and administrative liability for that disclosure²².

The Companies Act requires the maintenance of systems and procedures for facilitating whistleblowing and to publicise these policies.

²¹ See Regulation 43 (1) – this regulation applies to state owned entities; every listed public company and 'any other company that has, in any two of the previous five years, scored 500 points in terms of regulation 26 (2) – which relates to 'public interest scoring'

²² See section 159 (4) (b)

The Public Service Act (1994)

The Public Service Act²³ provides for the organisation and administration of the public service. It also regulates conditions of employment and discipline within the public service.

Section 30 of the Public Service Act provides that employees in the public sector shall not perform remunerative work outside their employment except with the written permission of the executive authority of the Department. The Executive Authority must take into account whether the outside work could reasonably be expected to interfere with or impede the effective performance of the employee's functions in the department.

THE CODE OF CONDUCT FOR PUBLIC SERVANTS

In terms of the Code of Conduct for Public Servants, public servants must act in the best interests of the public, act honestly in dealing with public money and report fraud and corruption. The Code also prohibits employees from undertaking outside remunerative work without prior approval. A contravention of the Code amounts to misconduct.

²³ The Public Service Act is set to be overtaken by the new Public Administration Management Act. This is not yet in force.

The Executive Members Ethics' Act (1998) and Code

The Executive Members Ethics' Act provides for the establishing of a code of ethics for members of the Cabinet, Deputy Ministers and members of provincial executive councils.

The Code of Ethics prohibits MECS from: undertaking any outside paid work; acting in a way that is inconsistent with their office; exposing themselves to a situation of conflict between their public and private interests; using their position to enrich themselves or act in a manner that compromises the integrity of their office.

The Witness Protection Act (1998)

The Witness Protection Act provides for procedures for the protection of those who are witnesses who are giving evidence in commissions of enquiry, tribunals and criminal cases. People who blow the whistle on corruption are only protected under the Witness Protection Act if they are witnesses in criminal proceedings.

In order to be admitted to the Witness Protection Programme, application must be made by the prosecution, the police or the witness (through a witness protection officer). In assessing whether or not to grant protection, a number of factors are considered including the threat to the witness, the nature of the criminality involved, the availability of other protective means and the cost.

4/1 STATE CORRUPTION FIGHTING BODIES

South Africa has adopted a multi-pronged approach to fighting corruption. This includes a number of institutions and commissions that have the responsibility and mandate to tackle corruption.

The National Prosecuting Authority

The National Prosecuting Authority institutes criminal proceedings on behalf of the state. It has a number of specialised units, including the Specialised Commercial Crime Unit; the Asset Forfeiture Unit and the Witness Protection Unit.

*ALL NPA EMPLOYEES ARE GOVERNED
BY THE NPA'S CODE OF ETHICS,
WHICH INCORPORATES THE NPA'S
WHISTLE-BLOWING POLICY.*

The Public Protector

The Public Protector is mandated to investigate any conduct in state affairs, or in the public administration of any sphere of government where there is suspected impropriety. The Public Protector reports on such conduct and is empowered to take appropriate remedial action.

The Directorate for Priority Crime Investigation

The Directorate for Priority Crime Investigation is a division within the South African Police Service that focusses on serious organised crime, serious corruption and serious commercial crime. The DPCI manages, prevents, investigates and combats serious offences.

The Asset Forfeiture Unit

The Asset Forfeiture Unit is a unit within the Office of the National Director of Public Prosecutions. It was established in order to implement Chapters 5 and 6 of the Prevention of Organised Crime Act, which allow for the seizure of assets used in criminal activities.

The Special Investigating Unit

The Special Investigating Unit is a state body that fights corruption through quality investigations and litigation. The Special Investigating Unit is an independent statutory body that was established by the President. The SIU conducts investigations and reports the outcomes of its investigations to the President.

The Financial Intelligence Centre

The Financial Intelligence Centre is established in terms of the Financial Intelligence Centre Act. The Centre receives reports of suspicious financial transactions. The Centre aims to combat money laundering in South Africa.

The Auditor-General

The Auditor General has a mandate in terms of the Constitution to audit and report on accounts, financial statements and the financial management of all national and provincial departments, municipalities and any other institution required by legislation to be audited.

The Public Service Commission

The Public Service Commission was established in terms of Section 196 of the Constitution. The Commission is an independent, impartial body that seeks to enhance governance in the public service. It is regulated by legislation (Public Service Commission Act, 1997). The powers and functions of the Commission include investigating and monitoring the organisation and administration of the public service. The Commission is mandated by Cabinet to manage the national anti-corruption hotline (NACH). The NACH enables people to report corruption. Cases are then referred to departments and agencies for investigation and are required to provide feedback to the Commission.

Independent Police Investigative Directorate

The Independent Police Investigative Directorate (formerly the Independent Complaints Directorate) aims to ensure independent oversight of the South African Police Service. It conducts independent investigations of criminal offences allegedly committed by SAPS members. This includes investigations of individual acts of corruption as well as systemic corruption involving the police. The IPID is established in terms of the IPID Act. Its vision is to ensure the proper police conduct in line with the Constitution.

5/1 Bibliography

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 The Executive Members Ethics' Act No. 82 of 1998
 The Municipal Finance Management Act No. 56 of 2003
 The Prevention and Combatting of Corrupt Activities Act No. 12 of 1994
 The Prevention of Organised Crime Act No. 121 of 1998
 The Protected Disclosures Act No. 26 of 2000
 The Promotion of Access to Information Act No.2 of 2002
 The Promotion of Administrative Justice Act No. 3 of 2000
 The Public Finance Management Act No.1 of 1999
 The Public Service Act No. 103 of 1994
 The Witness Protection Act No. 112 of 1998

Useful links

Reporting Corruption – Corruption Watch:

<http://www.corruptionwatch.org.za/>

Reporting corruption in the Police – IPID:

<http://www.ipid.gov.za/>

Reporting fraud and corruption in the public service - The Public Service

Commission' Hotline:

<https://www.publicservicecorruptionhotline.org.za/>

Reporting corruption to SAPS as a person in a position of authority:

http://www.saps.gov.za/org_profiles/core_function_components/commercial/corruption.htm

The Office of the Public Protector:

<http://www.pprotect.org/>

Advice on whistle-blowing – The Open Democracy Advice Centre:

<http://www.opendemocracy.org.za/>

South African Human Rights' Commission (SAHRC) Guide to understanding the

Promotion of Access to Information Act:

<http://www.sahrc.org.za/home/index.php?ipkContentID=25&ipkMenuID=45>

The National Anti-Corruption Forum:

<http://www.nacf.org.za/>

The Chief Procurement Office within the National Treasury:

<http://www.treasury.gov.za/divisions/ocpo/>



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