

South Africa enacts new anti-corruption legislation

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Echoing similar legislation in the UK, a criminal offence of ‘failure to prevent corruption’ became effective in April in South Africa, but implementation and enforcement of the new law will be the real challenge.

South Africa has enshrined a ‘failure to prevent corrupt activities’ offence in law. It follows the [failure to prevent](#) model which has been adopted by other jurisdictions including the UK, which places considerably more onerous duties on stakeholders and further facilitates prosecution of bad actors.

Herbert Smith Freehills Johannesburg corporate crime and investigations partner **Cameron Dunstan-Smith** is emphatic that the new law is needed: “South Africa is a high-risk corruption jurisdiction, anyone doing business here is at increased risk of it.”

It forms part of South Africa’s Judicial Matters Amendment Act 2023 (JMMA), which received presidential assent on 3 April 2024. Arguably the most important component of the JMMA revises Act 12 of 2004, otherwise known as the Prevention and Combating of Corrupt Activities Act (PRECCA), by inserting a new section 34A entitled ‘Failure by members of private sector or incorporated state-owned entities to prevent corrupt activities’.

The genesis of the latest amendment can be traced back to the high-profile inquiry led by **Chief Justice (Raymond) Zondo**, [popularly known as the Zondo Commission](#), which resulted in a number of recommendations for legal reform.

Figures published by international non-governmental organisation Transparency International’s *Corruption Perceptions Index* show the country fell two places for 2023, placing it 83rd out of 180. Dunstan-Smith underlines: “The chances of dealing with government officials is usually high, and a lot of multi-national companies operating

here are required to have local partners – which would be considered associated persons for the purposes of the act – over whom they don't necessarily have full control, and could be caught under the new Act in the event that a partner is involved in a corrupt act linked to the business of a multi-national.”

IMITATION IS THE SINCEREST FORM OF FLATTERY

Dunstan-Smith says comparisons with the UK Bribery Act 2010 (UKBA)'s section 7 are on the mark: “We have basically taken what the UK has, not quite word-for-word but pretty close to it, and essentially replicated the concept for the purposes of our legislation – this is not a bad thing as it bolsters the legal mechanisms available to the prosecuting authorities.”

Under the old regime an entity would only be liable for actually perpetrating and committing an illegal act such as procuring a bribe; but the amended PRECCA, which applies to both government- and privately owned entities, creates obligations to prevent the conduct not only on the part of the organisation's employees, but also on the part of its 'associated persons'.

Section 34A's paragraph 2 provides for a broad definition of an associated person as one who “performs services for or on behalf of that member of the private sector or that incorporated state-owned entity, irrespective of the capacity in which such person performs services for or on behalf of that member of the private sector or that incorporated state-owned entity”, meaning that the law's effects are likely to extend considerably beyond a single organisation to encompass contractors and even entities down the supply chain.

“This law ups the ante because although you may not have known or have had a plausible reason for not knowing about an incident of bribery, failure to prevent corruption is now an offence – it has now crystallised the offence to make it harder to bury your head in the sand, so if you didn't do something to prevent it then you're on the hook,” explains Dunstan-Smith.

ON THE DEFENSIVE

The strict liability nature of the Act means active knowledge of the corruption need not be proved for a successful prosecution, but a complete defence is available under Section 34A's paragraph 1, clause b, meaning that no criminal liability will be imposed on those who can demonstrate 'adequate procedures' to prevent the corrupt conduct being perpetrated; unfortunately, the fly in the ointment is that the amended act lacks an accompanying list or description of what constitutes such adequate procedures.

But all is not lost, since the amended PRECCA resembles the UKBA so closely, meaning there is a high likelihood that any interpretation will adhere at least in part to the six principles enshrined in the UK law, namely: proportionality, top-level commitment, risk assessment, due diligence, communication, and monitoring and review. Dunstan-Smith says: "I recommend that corporates follow the guidance issued by the UK's Ministry of Justice on what constitutes adequate procedures, given the fact that South Africa's failure to prevent offence is influenced by UK legislation."

EARLY DAYS

Given the barely two months since the amended law came into force, it is perhaps too early to gauge results or forecast how effective it will be.

"A big challenge is that South Africa doesn't have a good track-record of prosecuting corporate bribery" notes Dunstan-Smith, referring to the **National Prosecuting Authority** (NPA)'s widely reported challenges during the government of former President Zuma, including insufficient resources, difficulty attracting and retaining personnel with the appropriate skill set, and the broader perception that those involved in corruption were being protected politically.

It was against this very backdrop that the Zondo Commission came into being, and the new law is just one of its recommendations being implemented as more resources are being directed to the NPA. So with the legal framework and appropriate human

resources being put into place, does the future look bright for reducing corruption in South Africa?

Dunstan-Smith remains cautiously optimistic but is under no illusions that challenges remain: “The Act itself is adequate and will put the onus back on companies, especially global companies to adhere to what is required; but how the law is implemented is going to be the real litmus test, rather than how it is drafted.” He gives this pithy advice to those with commercial interests in the country: “Know who you are doing business with and make sure they adhere to the same standards as you do, which is crucial to mitigating the risk of somebody paying a bribe.”