



## SOUTH AFRICA

### SURVEY QUESTIONS & RESPONSES<sup>1</sup>

Survey conducted as part of *Commerce, Crime, and Conflict: A Comparative Survey of Legal Remedies for Private Sector Liability for Grave Breaches of International Law And Related Illicit Economic Activities*.

#### **I. Disclosure requirements for business entities**

**1. What sort of material information are business entities required to provide to their shareholders and/or public under your jurisdiction's company law or securities laws that may be relevant to potential litigants? For example, are such entities required to provide information about:**

- **material civil litigation?**
- **risk factors that would impact a shareholder's investment in the company?**
- **any reported violations of law or pending proceedings arising from such violations?**
- **revenues received from, or amounts paid to or on account of, a government or its officials or agents?**

Business entities are required to provide various forms of material information to the public or their shareholders, which could be relevant to civil litigation or shareholders assessing risk factors that would impact on their investment.

Where a company, including an external company, puts out an offer of shares to the public such offer must be accompanied by a prospectus. Section 145(1) of **the**

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<sup>1</sup> The initial responses to this survey of South African law were provided by Charles Abrahams, practicing lawyer with Abrahams Kiewitz Attorneys, Capetown, South Africa. He holds an LLM degree in international law from Leiden University, the Netherlands. He specializes in constitutional and administrative law and international human rights litigation. The contents of this survey response are intended for research purposes only and continue to be revised in light of peer review. The contents of this survey response are in no way intended as comment on specific cases or judgements, nor are they intended as legal advice on any of the issues covered. Due to constraints of space, many responses in this text provide only a basic introduction to the issue and the complexities of specific cases or provisions may not be fully explicated. Readers seeking practical legal advice should consult a lawyer in the relevant jurisdiction. Citations and references to this survey response should adhere to the following format: "Survey Response, Laws of South Africa (Charles Abrahams), 'Commerce, Crime and Conflict: A Survey of Sixteen Jurisdictions' Fafo AIS, [date accessed] 2006". The contents of this survey response are published by Fafo AIS under a Creative Commons Attribution-Share Alike 2.5 License.

**Companies Act**<sup>2</sup> 61 provides that no person shall make any offer to the public for the subscription for shares unless it is accompanied by a prospectus, complying with the requirements of the Act and registered in the Companies Registration Office, and no person shall issue such a prospectus which has not been so registered. Any person that contravenes this requires shall be guilty of an offence.<sup>3</sup> This provision provides material information which prospective shareholders can rely on in order to assess the risk in the company.

Section 148(1)(a) provides that every prospectus issued in terms of the Act shall contain a fair representation of the state of the affairs of the company, the shares of which are being offered and shall state at least the matters specified in, and set out the reports referred to in, Part I and Part II of Schedule 3 of the Act.

Part I specify information which must be contained in the prospectus such as the name, address and incorporation of the company, details of the directors and management, name of the auditor, attorney, stockbroker, banker, underwriter and trustee, history, state of affairs and prospectus of the company, purpose of the offer and share capital of the company, loans, options or preferential rights in respect of shares, shares issued or to be issued otherwise than for cash, property acquired or to be acquired, amounts paid or payable to promoters, commission paid or payable in respect of underwriting, material contracts, interest of directors, particulars of the offer, issue price and maximum subscription and statement of adequacy of capital.

Part II in turn deals with various reports by company's auditors, such as a report on the profits or losses and assets and liabilities of the company and the rate of dividends if any paid by the company in respect of each class of shares of the company in respect of each of the five financial years preceding the prospectus. Other audit reports are where a business undertaking is to be acquired and where a body corporate will become a subsidiary.

Other than criminal liability, the public is provided with a civil remedy in the case of the issuance of a false prospectus. Section 160(1) provides that where shares are offered to the public for subscription in pursuance of a prospectus, every person who is, at the time of the issue of the prospectus, a director of the company, who becomes a director at any time between the issue of the prospectus and the holding of the first general meeting of the company at which directors are elected or appointed, who with his authority is named in the prospectus as a director or as having agreed to become a director either immediately or after an interval of time, who is a promoter of the company, who has authorized the issue of the prospectus, shall be liable to pay compensation to all persons who have acquired any shares on the faith of the prospectus for the loss or damage they may have sustained by reason of any untrue statement therein, or in any report or memorandum appearing on the face thereof or issued therewith, or by reference incorporated therein.

It is obligatory for every company to keep proper accounting records in terms of the Companies Act. Section 284(1) states that every company shall keep, in one of the official languages of the Republic, such accounting records as are necessary fairly to

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<sup>2</sup> Act 61 of 1973

<sup>3</sup> Section 145(2)

present the state of affairs and business of the company and to explain the transactions and financial position of the trade or business of the company. The Act provides for disclosure of comprehensive matters in accounting. These include but not limited to the following:

- Section 295 provides for the disclosure of loans to and security provided for benefit of directors and managers;
- Section 296 provides for the disclosure of loans to and security provided for benefits of directors and managers before their appointment;
- Section 297 provides for the disclosure of director's emoluments and pensions.

Section 258 provides for instances where a company can be investigated in certain instances. When a company by special resolution resolves or the Court by order declares that the affairs of a company ought to be investigated, the Minister shall appoint one or more inspectors to investigate the affairs of such company and to report thereon, in such manner as he may direct.<sup>4</sup> The Minister may appoint one or more inspectors to investigate the affairs of a company and to report thereon in such manner as he may direct, if it appears to him that there are circumstances suggesting-

- (a) that the business of the company is being conducted with intent to defraud its creditors or the creditors of any other person or otherwise for a fraudulent or an unlawful purpose or in a manner oppressive or unfairly prejudicial or unjust or inequitable to any part of its members or that it was formed for any fraudulent or unlawful purpose; or
- (b) that persons concerned with its formation or the management of its affairs have in connection therewith been guilty of any fraud, delict or other misconduct towards it or towards its members; or
- (c) that its members have not been given all the information with respect to its affairs they might reasonably expect.<sup>5</sup>

Information regarding material civil litigation is normally reported as a contingent liability in the balance sheet of a company. Particulars of any contingencies not already recognised in the financial statements shall be stated, including the nature of the contingency, the uncertain factors that may affect the future outcome and the estimated amount and its effect, before and after taxation.

Apart from the material requirements in terms of the Companies Act, corporations are also required to provide material disclosure of certain information under **the Securities Services Act**.<sup>6</sup> In terms of Section 15(1) of the Act, an exchange may require an issuer of listed securities to disclose to it any information at the issuer's disposal about those securities, or about the affairs of that issuer, if such disclosure is necessary to achieve one

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<sup>4</sup> Section 258(1)

<sup>5</sup> Section 258(2)

<sup>6</sup> Act 36 of 2004

or more of the objects of this Act referred to in section 2.<sup>7</sup> An exchange may require the issuer to disclose that information to the registered holders of the securities, within a period specified by the exchange.<sup>8</sup>

If the issuer refuses to disclose the information to the exchange or the registered holders of the securities, the exchange may, unless the issuer obtains a court order excusing it from such disclosure, suspend trading in those securities until such time as the required disclosure has been made to the satisfaction of the exchange.<sup>9</sup> When an issuer discloses information in terms of this section to the registered holders of securities that may influence the price of those securities, the issuer must at the same time make the information available to the public.<sup>10</sup>

There is also a requirement that a registered issuer of shares must file and/or publish annual or other periodic reports with the government or an exchange.

Section 285 of the Companies Act provides that for every financial year the directors of a company must cause annual financial statements to be made out and lay them before the compulsory annual general meeting of the company. These statements must consist of a balance sheet, an income statement, a director's report which complies with the requirements of the Companies Act and an auditors' report as required by the Act. Such annual financial statements must comply with the minimum requirements of matters prescribed by Schedule 4 to the Act, included herewith, as Annexure "A"

In terms of Section 302 of the Act, the Directors of a public company are under a duty to provide the Registrar of Companies and the following persons listed hereunder in the section with a copy thereof. Section 302(1) thereof provides that a copy of the annual financial statements of a company and the group annual financial statements, if any, shall not less than twenty-one days before the date of the annual general meeting of the company be sent to every member of the company and every holder of debentures of the company (whether or not such member or holder of debentures is entitled to receive notices of general meetings of the company) and to all persons other than members or holders of debentures of the company who are entitled to receive such notices: Provided that, if so authorized by a company's articles, a copy of its financial statements may be made available in electronic format to all persons who have agreed thereto in writing<sup>11</sup>

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<sup>7</sup> The aim of the Act is to-

- (a) increase confidence in the South African financial markets by-
  - (i) requiring that securities services be provided in a fair, efficient and transparent manner; and
  - (ii) contributing to the maintenance of a stable financial market environment;
- (b) promote the protection of regulated persons and clients;
- (c) reduce systemic risk; and
- (d) promote the international competitiveness of securities services in the Republic.

<sup>8</sup> Section 15(1)(b)

<sup>9</sup> Section 15(1)(c)

<sup>10</sup> Section 15(2)

<sup>11</sup> Section 302(2) provides that the provisions of subsection (1) shall not be construed as requiring a copy of the said statements to be sent-

- (a) in the case of a company not having a share capital, to any member or holder of debentures of the company who is not entitled to receive notices of general meetings of the company;
- (b) to any member or holder of debentures of a company who is entitled to receive such notices and whose address is not known to the company;
- (c) to more than one of the joint holders of any shares or debentures of a company none of whom is entitled to receive such notices;

Paragraph 35 of Schedule 4 provides for disclosure of the particulars of any contingencies not otherwise required to be disclosed in order to enable an investor or the public to know whether the issuer was subject to claims raised in connection with, for example, complicity in grave breaches of humanitarian law.

There is no specific requirement for a management analysis that would require disclosure of any contingent claims. However, in terms of paragraph 67 of Schedule 4, the directors' report shall generally review the business and operations of the company during the accounting period and the results thereof and shall deal with every fact or circumstance material to the appreciation of the state of affairs and financial position of the company by its members including a statement of the estimated proportion of net income or loss attributable to the various classes of business of the company. Paragraph 67(2) further provides for the report to deal with any material fact or circumstance which has occurred between the accounting date and the date of the report.

There are no regulations that spell out the circumstances under which a reserve must be created in order to recognise a contingent claim, such as an asserted claim or pending litigation.

There is an accounting board in South Africa previously called the Public Accountants' and Auditors' Board (PAAB), which is a statutory body enacted pursuant to the Public Accountants' and Auditors' Act 80 of 1991. Amongst others, the task of the Board is to provide the means and the regulatory framework for educating and training accountants and auditors and to protect and support registered accountants and auditors in the exercise

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(d) in the case of joint holders of any such shares or debentures of whom some are and others are not entitled to receive such notices, to any such joint holder who is not so entitled.

Section 302(3) thereof provides that any such copy not sent to members and debenture-holders and other persons referred to in subsection (1) at least twenty-one days before the date of the relevant meeting shall be deemed to have been so sent if it is so agreed by all the members entitled to attend and vote at the meeting.

Section 302(4) thereof provides that a public company shall on the day on which it sends such copies to its members as provided in subsection (1), send to the Registrar under cover of the prescribed form a copy, certified to be a true copy by a director and the secretary of the company-

(a) of the annual financial statements and group annual financial statements, if any; and

(b) of the annual financial statements of every private company which is a subsidiary of that public company.

Section 302(4A) (a) states that the Registrar may on application by any public company made to him on the prescribed form, on good cause shown and on payment of the prescribed fee, exempt such a public company from the requirements of subsection (4) (b).

(b) Any such exemption by the Registrar shall expire after two years but may be renewed on application by the company.

Section 302(5) provides that if default is made in complying with the provisions of subsection (1) or (4), the company concerned, and every director who knowingly is a party to the default, shall be guilty of an offence.

of their duties. However, this Act has now been replaced by the Auditing Profession Act in total <sup>12</sup> which came into being on 1 April 2006. The Public Accountants' and Auditors Board (PAAB) is replaced by the Independent Regulatory Board for Auditors. The difference between the two Act is that the Auditing Profession Act has shifted the focus mainly from a self regulated environment to a more independently regulated environment. One peculiar feature of the Act is that Section 45 thereof makes it obligatory for auditors to notify the newly created Independent Regulatory Board for Auditors (IRBA) of any "reportable irregularities" once uncovered, and then within three days advise the company's management board in writing that they have been reported. This differs from the previous Public Accountants' and Auditors' Act which obligated auditors to first report "material irregularities" to company management and give them 30 days to rectify the situation. If no action was taken by the company, it would then be reported to the Public Accountants' and Auditors' Board for further action.

The accounting standard in South Africa is the General Accepted Accounting Practice (GAAP). However, the International Financial Reporting Standard (IFRS) issued by the International Accounting Standards Board (IASB) is issued in South Africa as a Statement of GAAP. Therefore the original text of IAS 37 has been adopted without change.

As far as the provision of contingent liabilities are concerned, South Africa follows the international standard as provided for in the original text of IAS 37 which became effective on 1 July 1999. IAS37 prescribes the accounting and disclosure for all provisions, contingent liabilities and contingent assets.

Section 284(1) of the Companies Act does not contain an "accuracy in accounting" requirement, such as that found in the U.S. Foreign Corrupt Practices Act. The anti-bribery corollary to the FCPA is South Africa's Prevention and Combatting of Corrupt Activities Act,<sup>13</sup> adopted in order to be in compliance with and to become a Party to the United Nations Convention against Corruption adopted by the General Assembly of the United Nations on 31 October 2003. The prohibition on payments of bribes to foreign officials is provided for in the Prevention and Combatting of Corrupt Activities Act.<sup>14</sup> According to Section 5, any person who, directly or indirectly gives or agrees or offers to give any gratification to a foreign public official, whether for the benefit of that foreign public official or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner-

- (a) that amounts to the-
  - (i) illegal, dishonest, unauthorised, incomplete, or biased; or
  - (ii) misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;
  
- (b) that amounts to-

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<sup>12</sup> Act 26 of 2005

<sup>13</sup> Act 12 of 2004

<sup>14</sup> Id

- (i) the abuse of a position of authority;
  - (ii) a breach of trust; or
  - (iii) the violation of a legal duty or a set of rules;
- (c) designed to achieve an unjustified result; or
- (d) that amounts to any other unauthorised or improper inducement to do or not to do anything,

is guilty of the offence of corrupt activities relating to foreign public officials.

Financial statements are available to the public. The Companies and Intellectual Property Registration Office (CIPRO) came into effect on 1 March 2002 as a result of the merger of two offices, the South African Companies Registration Office (SACRO) and the South African Patents and Trademarks Office (SAPTO). The CIPRO website provides a comprehensive service to from online company registration, designs, copyright, patents and trademarks registration. In addition to this service, it also offers disclosure of corporate information in the form of statutory information and certainty about corporate entities' identities.

## **2. Is there a right to know statute enabling one to obtain information from your government?**

Section 32(1) of the Constitution of the Republic Act<sup>15</sup> provides that everyone has the right to access to any information held by the state and any information that is held by another person that is required for the exercise or protection of any rights. Section 32(2) furthermore provides that national legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

To this effect, the Promotion of Access to Information Act<sup>16</sup> was enacted and came into force on 9 March 2001. In terms of Section 11(1) of the Act a requester must be given access to a record of a public body if that requester complies with all the procedural requirements of the Act relating to a request for access to that record and access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4.<sup>17</sup> Public body is broadly defined as:

- (a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or
- (b) any other functionary or institution when-

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<sup>15</sup> Act 108 of 1996

<sup>16</sup> Act 2 of 2000

<sup>17</sup> Chapter 4 deals with instances of mandatory protection of privacy of a third party who is a natural person, certain records of the South African Revenue Services, commercial information of third parties, certain confidential information of third parties, mandatory protection of safety of individuals and property, protection of police dockets in bail proceedings and protection of law enforcement and legal proceedings, defence, security and international relations, economic interest, research information

- (i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or
- (ii) exercising a public power or performing a public function in terms of any legislation;

The definition envisages two types of 'public bodies' namely type (a) public bodies which are part of the State per se and type (b) public bodies which comprise other functionaries or institutions that are not part of the State, but which may, in undertaking certain activities, be subject to the same strictures and controls as would ordinarily apply to the State.

A request for access to information must be made in the prescribed form to the information officer of the public body concerned at his or her address or fax number or electronic mail address.<sup>18</sup> The form for a request of access must at least require the requester concerned-

- (a) to provide sufficient particulars to enable an official of the public body concerned to identify-
  - (i) the record or records requested; and
  - (ii) the requester;
- (b) to indicate which applicable form of access referred to in section 29 (2) is required;<sup>19</sup>
- (c) to state whether the record concerned is preferred in a particular language;
- (d) to specify a postal address or fax number of the requester in the Republic;
- (e) if, in addition to a written reply, the requester wishes to be informed of the decision on the request in any other manner, to state that manner and the necessary particulars to be so informed; and

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<sup>18</sup> Section 18(1)

<sup>19</sup> (2) The forms of access to a record in respect of which a request of access has been granted, are the following:

- (a) If the record is in written or printed form, by supplying a copy of the record or by making arrangements for the inspection of the record;
- (b) if the record is not in written or printed form-
  - (i) in the case of a record from which visual images or printed transcriptions of those images are capable of being reproduced by means of equipment which is ordinarily available to the public body concerned, by making arrangements to view those images or be supplied with copies or transcriptions of them;
  - (ii) in the case of a record in which words or information are recorded in such manner that they are capable of being reproduced in the form of sound by equipment which is ordinarily available to the public body concerned-
    - (aa) by making arrangements to hear those sounds; or
    - (bb) if the public body is capable of producing a written or printed transcription of those sounds by the use of equipment which is ordinarily available to it, by supplying such a transcription;
    - (iii) in the case of a record which is held on computer, or in electronic or machine-readable form, and from which the public body concerned is capable of producing a printed copy of-
      - (aa) the record, or a part of it; or
      - (bb) information derived from the record,
- by using computer equipment and expertise ordinarily available to the public body, by supplying such a copy;
- (iv) in the case of a record available or capable of being made available in computer readable form, by supplying a copy in that form; or
- (v) in any other case, by supplying a copy of the record.

(f) if the request is made on behalf of a person, to submit proof of the capacity in which the requester is making the request, to the reasonable satisfaction of the information officer.

However, the Act goes further and also deals with information held by a private body. Section 50(1) of the Act states that a requester must be given access to any record of a private body if that record is required for the exercise or protection of any rights, that person complies with the procedural requirements in the Act relating to a request for access to that record and access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4.

The expression 'required for the exercise or protection of any rights as contemplated in Section 32(1) of the Constitution of the Republic Act has been judicially considered as part of the transitional arrangements prior to the enactment of the Promotion of Access to Information Act. In the case of *Cape Metropolitan Council v Metro Inspection Services (Western Cape)* CC<sup>20</sup> Streicher JA held that information can only be required for the exercise or protection of a right if it will of assistance in the exercise or protection of the right. It follows that, in order to make out a case for access to information in terms of section 32, an applicant has to state what the rights is that he wishes to exercise or protect, what the information is which is required and how that information would assist him in exercising or protecting that right.

However, in ***Clutchco (Pty) Ltd v Davis***<sup>21</sup> decided in terms of the Promotion to Access of Information Act, the Supreme Court of Appeal reversed an earlier decision of the Cape High Court in which the Respondent, Mr. Davis sought access to the Appellant's books of first accounting. The Supreme Court of Appeal held that that in terms of s 50(1)(b) of the Act the 'requester' of access to the records of any private body had to assert that the information was 'required for the exercise or protection of (a) right'. In this context, 'required' meant 'reasonably required', as long as it connoted a substantial advantage or an element of need.

The Court firstly considered the provisions of the Companies Act to ascertain what type of disclosure it provides for. In terms of Sections 286, 302 and 309 of the Companies Act respectively, a member (director) is entitled to receive copies of the company's financial statements and obtain copies of the minutes of the company's general meetings (Sections 204 and 206). However, a shareholder is not entitled to sight of the minutes of directors' and managers' meetings maintained in terms of Section 242 of the Companies Act. A shareholder is also not entitled to inspect the accounting records of first entry maintained by the company in terms of Section 284 of the Companies Act, unless the articles of association provide otherwise. The court concluded that the Companies Act did not afford the Respondent the right of inspection or right of information he sought and it followed that he sought to rely on the provisions of the Promotion to Access to Information (PAI) Act to assert his right.

The court was however not prepared to grant Respondent the right to the information he requested under the (PAI) Act as it believed that viewing the Companies Act as a whole, it is replete with provisions designed to protect the interest of shareholders. Of particular

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<sup>20</sup> 2001 (3) SA 1023 (SCA)

<sup>21</sup> 2005 (3) SA 486 (SCA)

significant the Court held are the stringent duties placed on the directors in relation to the company's accounting records and financial statements. The court held that the machinery established by legislation and the common law for the protection of shareholders is in the opinion of the Court not lightly to be disregarded. Consequently, the court held that in enacting the PAI Act, Parliament could not have intended that the books of a company, great or small, should be thrown open to members on a whiff of impropriety or on the ground that relatively minor errors or irregularities have occurred. A far more substantial foundation would be required.

The law of the Republic contains an exception for deliberative documents. Section 44(1) of the Promotion of Access to Information Act provides that an information officer of a public body may refuse a request for access to a record of the body-

- (a) if the record contains-
  - (i) an opinion, advice, report or recommendation obtained or prepared; or
  - (ii) an account of a consultation, discussion or deliberation that has occurred, including, but not limited to, minutes of a meeting,
  - (iii) for the purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law; or
- (b) if-
  - (i) the disclosure of the record could reasonably be expected to frustrate the deliberative process in a public body or between public bodies by inhibiting the candid-
    - (aa) communication of an opinion, advice, report or recommendation; or
    - (bb) conduct of a consultation, discussion or deliberation; or
  - (ii) the disclosure of the record could, by premature disclosure of a policy or contemplated policy, reasonably be expected to frustrate the success of that policy.

The Act also contains a number of instances in which access to information may be withheld where such records are held by public and private bodies. See annexure "B" dealing with grounds for refusal to provide access to records held by a public body and annexure "C" dealing with grounds for refusal to provide access to records held by a private body.

However, in a different procedure, Rule 53 of the Supreme Court Act<sup>22</sup> provides for any party to any action or in so far as a court direct, to application proceedings, to require the other party to the proceedings, by notice in writing, to make discovery on oath within 20 day of all documents and tape recordings relating to any matter in question in such action or application which are or have at any time been in the possession or control of such other party. Rule 35(3) furthermore provides that if any party believes that there are, in addition to documents or tape recordings disclosed, other documents (including copies thereof) or tape recordings which may be relevant to any matter in question in the possession of any party thereto.

In addition to the above provisions Rule 53(1) also provides for any party to wanting to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions, by way of notice of motion, call for the record of such proceedings sought to be corrected or set aside, together with such reasons as he is by law required or desires to give or make.

Section 50<sup>23</sup> is not only meant to apply to issues of registered securities as in the case of **Clutchco (Pty) Ltd vs Davis**. It also provides for any instance where a requester requests the record from a private body in an instance where such a request is required for the exercise of protection of any rights and a requester has complied with the procedural requirements of the Act.

## **II. STATUS OF BUSINESS ENTITIES UNDER CRIMINAL LAW**

### **3. Does your penal code (or judicial interpretations thereof) provide that business entities may be prosecuted criminally for violations of such code?**

Yes. Section 332 of the Criminal Procedure Act 51 of 1977<sup>24</sup> provides for prosecution of corporations and members of associations. Section 332 (1) thereof provides:

For the purpose of imposing upon a corporate body criminal liability for any offences, whether under any law or at common law –

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<sup>22</sup> Act 59 of 1959

<sup>23</sup> Section 50 Right of access to records of private bodies

(1) A requester must be given access to any record of a private body if-

(a) that record is required for the exercise or protection of any rights;

(b) that person complies with the procedural requirements in this Act relating to

a request for access to that record; and

(c) access to that record is not refused in terms of any ground for refusal

contemplated in Chapter 4 of this Part.

(2) In addition to the requirements referred to in subsection (1), when a public body, referred to in paragraph (a) or (b) (i) of the definition of 'public body' in section 1, requests access to a record of a private body for the exercise or protection of any rights, other than its rights, it must be acting in the public interest.

(3) A request contemplated in subsection (1) includes a request for access to a record containing personal information about the requester or the person on whose behalf the request is made.

<sup>24</sup> Criminal Procedure Act 51 of 1977

(a) any act performed, with or without a particular intent, by or on instructions or with permissions, express or implied, given by a director or servant of that corporate body; and

(b) the omission, with or without a particular intent, of any act which ought to have been but was not performed by or on instructions given by a director or servant of that body corporate in the exercise of his powers or in the performance of his duties as such director or servant or in furthering or endeavouring to further the interest of that corporate body, shall be deemed to have been performed (and with the same intent, if any) by that corporate body or, as the case may be, to have been an omission (and with the same intent, if any) on the part of that corporate body.

Section 332 further deals with crimes committed by members belonging to an association. Section 332(7) provides that when a member of an association of persons, other than a corporate body, has, in carrying on the business or affairs of that association or in furthering or in endeavouring to further its interests, committed an offence, whether by the performance of any act or by the failure to perform any act, any person who was, at the time of the commission of the offence, a member of that association, shall be deemed to be guilty of the said offence, unless it is proved that he did not take part in the commission of the offence and that he could not have prevented it: Provided that if the business or affairs of the association are governed or controlled by a committee or other similar governing body, the provisions of this subsection shall not apply to any person who was not at the time of the commission of the offence a member of that committee or other body.

Since a partnership is not a separate legal entity under South African law it is arguable that a member of a partnership could be charged under the provisions of the Section 332(7) in his individual capacity. A similar provision is found in Section 143 of the Insolvency Act<sup>25</sup> which provides that any person, who is or was a member of a partnership and has done or omitted to do an act in relation to the affairs of the partnership that constitutes an offence under the Insolvency Act, shall be deemed to have committed an offence and could be charged personally.

#### **4. What type sanctions are applied to business entities, as opposed to natural persons?**

In terms of Section 332(5) of the Criminal Procedure Act, when an offence has been committed, whether by the performance of any act or by the failure to perform any act, for which any corporate body is or was liable to prosecution, any person who was, at the time of the commission of the offence, a director or servant of the corporate body shall be deemed to be guilty of the said offence, unless it is proved that he did not take part in the commission of the offence and that he could not have prevented it, **and shall be liable to prosecution therefore, either jointly with the corporate body or apart therefrom, and shall on conviction be personally liable to punishment therefore.** [Emphasis added].

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<sup>25</sup> Act 24 of 1936

In the case of the **State vs Shabir Shaik and 11 corporate accused**,<sup>26</sup> Mr. Shaik and the corporate accused were each charged with various counts of corruption, theft and fraud. Shaik was charged in his personal capacity and each of the corporate accused was represented by him as he was a director of each of them. All three offences fall within the ambit of the Criminal Law Amendment Act<sup>27</sup> which introduces minimum sentences in respect of specific offences.<sup>28</sup> Part II of Schedule 2 of the Act makes the minimum sentence applicable in the instance of any offence relating to exchange control, extortion, fraud, forgery, uttering, theft, or an offence in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004-

- (a) involving amounts of more than R500 000,00;
- (b) involving amounts of more than R100 000,00, if it is proved that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or
- (c) if it is proved that the offence was committed by any law enforcement officer-
  - (i) involving amounts of more than R10 000,00; or
  - (ii) as a member of a group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy.

The State alleged that Mr. Shaik and each of the corporate accused had a corrupt relationship with the former Deputy President of South Africa, Mr. Jacob Zuma, in that they unlawfully and corruptly gave benefits which were not legal due to Zuma, with the intention to influence Zuma to commit and/or omit any act in relation to his powers and /or duties to further the interest of the accused and/or the entities associated with the accused.<sup>29</sup> The court found Shaik and all 11 corporate accused guilty of all the charges and passed sentence as follows:

As for Shaik, on two counts of corruption, the court sentenced him to 15 years imprisonment of each count. On the count of fraud, he was sentenced to 3 years' imprisonment. However, the court allowed the one count of corruption and the other of fraud to run concurrently with the other count of corruption, effectively sentencing him to 15 years' imprisonment.

As for the corporate accused, the court held that from their legal nature, the only penalty that can be imposed on them is a fine. The court took into account the fact that some of

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<sup>26</sup> Nkobi Holdings (Pty) Ltd; Nkobi Investments (Pty) Ltd; Kobfin (Pty) Ltd; Kobitech (Pty) Ltd; Proconsult (Pty) Ltd; Pro Con Africa Consultants (Pty) Ltd; Clegton (Pty) Ltd; Kobitech Transport Systems (Pty) Ltd; Floryn Investments (Pty) Ltd; Chartley Investments (Pty) Ltd

<sup>27</sup> Act 105 of 1997

<sup>28</sup> Section 51(2) provides that notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court, including a High Court to which a matter has been referred under section 52 (1) for sentence, shall in respect of a person who has been convicted of an offence referred to in-

- (a) Part II of Schedule 2, sentence the person, in the case of-
  - (i) a first offender, to imprisonment for a period not less than 15 years;
  - (ii) a second offender of any such offence, to imprisonment for a period not less than 20 years;

and  
a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;

<sup>29</sup> As for the charge of fraud, the accused were charged that they unlawfully and with the intent to defraud, falsely and to the prejudice, either real or potential, of the shareholders and/or directors and/or accountants of the corporate accused, and/or the South African Receiver of Revenue.

the corporate accused before the court were dormant whilst other corporate accused assets were seized under the prevention of Organized Crime Act 121 of 1998. Consequently, the court imposed fines of between R 125 000.00 to R 1 million on some of the corporate accused for the charge of corruption, and fines of between R 33 000.00 to R 1.4 million for the charge of fraud.

**5. What are the standards applied in your jurisdiction for attributing liability to a business entity for the actions of individual servants?**

- a. What must one demonstrate in order to convince the court that the actions of the servants of the business entity to establish the guilt of the business? and;**
- b. If, in order to find a business entity guilty of a crime, the court must find that the business entity intended to carry out an activity that is a crime, how must the prosecution demonstrate that such intent (mens rea) was present?**
- c. What are the standards applicable in your jurisdiction for attributing the criminal liability of a business entity to the servants of the business entity?**

The standards applied in South Africa for attributing liability to a business entity for actions of individual servants is best described with reference to case law. In the case of **State v South African Broadcasting Corporation**<sup>30</sup> the Attorney-General appealed a decision of a magistrate. The South African Broadcasting Corporation (SABC) was charged with contravening S 44(1)(e)(iv) of the Prisons Act 8 of 1959 in that it had broadcast a photo of a prisoner during a news broadcast without the consent of the Minister of Prisons. Pursuant to Section 332(1) of the Criminal Procedure Act, the magistrate held that the employee responsible had acted unlawfully (onregmatig) and negligently (nalatig) and that the action was at least an attempt at furthering the interest of the respondent. The magistrate however found that the degree of the negligence of the employee could not be determined and that it had to be regarded as slight. He held that the legislature did not intend that in terms of the provisions of s 332(1) of Act 51 of 1977 the slightest negligence on the part of the employee was to be attributed to the juristic person and in the light of the fact that the respondent had not itself been negligent and its actions and control measures to prevent such an occurrence were reasonable it was entitled to its discharge. The magistrate also found that the SABC was not negligent nor did it act with intent.

On appeal to the Appellate Division<sup>31</sup> (now the Supreme Court of Appeal), the court had to consider whether it was the intention of the legislature to attribute fault and not only intent of a director or servant as referred to in Section 332(1) to a juristic person.

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<sup>30</sup> 1991 (2) SA 698 (W)

<sup>31</sup> Ex Parte Minister van Justisie: In re S v Suid Afrikaanse Uitsaaikorporasie 1992 (4) SA 804

The court held that as far as fault is concerned it is not a state of mind or attribute such as intent which is unique to the servant or director which could be projected to the juristic person. It requires a judgment that, according to objective criteria, has to be applied to actions. In this instance fault is similar to unlawfulness. Once the facts have been determined, the court must, where it is relevant, ascertain whether the specific action was unlawful and negligent.

By way of illustration, the appeal court referred to an instance where a juristic person is charged with murder because of the action of its director or servant. In terms of S 332(1) the action and intent (if there was intent) can be attributed to the juristic person. The unlawfulness of the action (e.g. absence of self-defence) is not something that attaches to the person who commits it and consequently attributable to the juristic person. The same applies to negligence. If there was no intent on the part of the servant or director only the act of the director or the servant can be projected to the juristic person. The juristic person cannot be found guilty of murder as there was no intent on the part of the director or servant but the court would still have to decide, depending on the nature of the action the circumstances where under it occurred, whether there was unlawfulness and negligence. If so, the juristic person could be guilty of culpable homicide. The result is not because the unlawfulness and fault of the person committing the act is projected on to the juristic person but because any person, according to objective criteria, committing this action under these circumstances, act unlawful and negligent.

Consequently, the standard for liability of a corporation for the actions or omissions of its servants or directors is merely to prove negligence on their part and not intent.

**6. Under your criminal law (penal code) what is the legal standard for convicting someone of being an accomplice to or aiding and abetting the commission of a crime by another (complicity)? What is the legal standard for convicting someone of plotting with another to commit a crime (criminal conspiracy)?**

Aiding and abetting is recognised in South African criminal law as complicity and a person can be found guilty of being **an accomplice**. An accomplice is defined as someone who takes part in the commission of the crime, other than the perpetrator and other than the accessory after the fact.<sup>32</sup>

In order for a person to be liable as an accomplice, somebody else must have committed a crime as the accomplice's liability is of an accessory or dependent nature. Apart from the accomplice's own act and mens rea, there must have been an unlawful act committed by someone else which corresponded with the definition of the proscription of the relevant crime, and was accompanied by the required mens rea.<sup>33</sup> The perpetrator need not be tried and convicted since it is sufficient that somebody else committed the crime as perpetrator.<sup>34</sup> Furthermore, in order to be guilty as an accomplice, a person must commit an act which amounts to a furthering of the crime committed by somebody else.<sup>35</sup> Lastly, to be liable as an accomplice a person must intentionally further the commission of a crime by somebody else. Negligence is not sufficient.<sup>36</sup> For instance, the shop assistance who simply forgets to close the shop window properly is therefore not an accomplice in

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<sup>32</sup> J Burchell & JJ Milton, Principles of Criminal Law, Juta & Co., Ltd 1991, at 349-350

<sup>33</sup> CR Snyman, Criminal Law, 2<sup>nd</sup> Edition, p. 266

<sup>34</sup> Id., at 267

<sup>35</sup> Id., at 269

<sup>36</sup> Id., at 269

respect of a burglary which follows as a result but he will be an accomplice if he intentionally left it open knowing that the burglary was planned.<sup>37</sup>

Joubert JA has set out the legal standard for being an accomplice in *S v Williams*<sup>38</sup> where he described it as follows:

“... an accomplice is not a perpetrator or co-perpetrator, since he lacks the *actus reus* of the perpetrator. An accomplice associates himself wittingly with the commission of the crime by the perpetrator or co-perpetrator in that he knowingly affords the perpetrator or co-perpetrator the opportunity, the means or the information which furthers the commission of the crime ...

According to general principles there must be a casual connection between the accomplice's assistance and the commission of the crime by the perpetrator or co-perpetrator. ...

He is ... liable as an accomplice to murder on the ground of his own conduct, either a positive act or an omission, to further the commission of the murder, and his own fault, viz the intent that the victim must be killed, coupled with the act (*actus reus*) of the perpetrator or co-perpetrator to kill the victim unlawfully.”<sup>39</sup>

In cases in other countries involving grave breaches of humanitarian law, plaintiffs have tried to argue that it is enough simply to show that the defendant was aware that the perpetrator intended to commit *a crime* (although not a particular crime) and that the defendant gave moral support, encouragement, etc. that contributed to the ultimate act (*actus reus*) of the perpetrator. This is what is intended by the doctrine of common purpose. See the discussion below on common purpose.

In the recent Second Circuit argument in the apartheid cases, mention was made from the bench that there is a U.S. Supreme Court case stating that aiding and abetting will be translated into the civil context only where there is specific statutory authority. In South African law, the standard applicable in criminal proceedings for aiding and abetting does not automatically translate as a standard in the civil context. The civil law standard in South African law is that of balance of probability. There is no statutory provision for aiding and abetting in the civil context.

As for **criminal conspiracy**, under South African law, a person can be convicted of conspiracy even if no act of consummation is carried out. In terms of Section 18(2) of the Riotous Assembly Act 17 of 1956: Any person who-

- (a) conspires with any other person to aid or procure the commission of or to commit; or
- (b) incites, instigates, commands, or procures any other person to commit, any offence, whether at common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.

Subsection 18(2)(b) of the Riotous Assembly Act 17 of 1956, which speaks of “incites, instigates, commands or procures . . . “ is a part of the standard for complicity, not

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<sup>37</sup> *Id.*, at 269

<sup>38</sup> 1980 (1) SA 60 (A)

<sup>39</sup> At 63

conspiracy, as it was intended. However, it is necessary to further elaborate on conspiracy in South African law. Before there can be a conspiracy there must be an agreement between at least two people to commit a crime. The act consists in entering into an agreement or as it is often held, there must be a meeting of minds.<sup>40</sup> The parties need not agree about the exact manner in which the crime is to be committed nor need they know the identity of all other conspirators. He should however be aware of their existence.<sup>41</sup>

The requirement of intention may be divided into two components. By way of example, firstly X must have the intention to conspire with another and secondly he must intend to commit a crime or to assist in its commission. Thus, if X sells Y an article which he knows will be used by Y to commit a crime, his mere knowledge is not sufficient ground for construing a conspiracy. A conspiracy may be construed only if a court is satisfied that Y was also aware of X's knowledge. Only then can one speak of a "meeting of minds."<sup>42</sup>

Furthermore, South African domestic law also recognises the Doctrine of Common Purpose. Where two or more people associate in a joint unlawful enterprise, each will be responsible for any act of his fellows which fall within their common design or object.<sup>43</sup> The doctrine is almost exclusively applied to the crime of murder. It is often difficult, where a number of people acting together killed Y, to find with certainty that the acts of each of them contributed in causally to Y's death. In order to overcome this difficulty, the courts apply the doctrine of common purpose to facilitate the conviction for murder of each separate member of the group.<sup>44</sup> The crucial requirement is that the persons must all have had the intention to murder and to assist one another in committing the murder.<sup>45</sup> Once that is proved, the act of X, who actually shot and killed Y, is imputed to Z, who was a party to the common purpose and actively associated himself with its execution, even though a casual relationship between Z's act and Y's death cannot readily be proved.<sup>46</sup> It is however, only X's act which is imputed to Z, not X's mens rea. Z's liability is based upon his own mens rea.<sup>47</sup>

However, for Z to have a common purpose with others to commit murder it is not necessary that his intention to kill be present in the form of *dolus directus*. It is sufficient if his intention takes the form of *dolus eventualis*, in other words, if he foresees the possibility that the acts of the participants with whom he associates himself may result in Y's death and reconciles himself to this possibility.<sup>48</sup>

The doctrine was recently expressed in the constitutional court case of *S vs Thebus and Another*.<sup>49</sup> The appellants had been convicted in a High Court on a count of murder and two of attempted murder. They unsuccessfully appealed to the Supreme Court of Appeal. In convicting the appellants the trial Court applied the doctrine of common purpose.

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<sup>40</sup> *Supra* 11, at 295

<sup>41</sup> *Id.*, at 296

<sup>42</sup> *Id.*, at 269

<sup>43</sup> *EJS Coertzn & AMSorgdrager, Criminal Law Case Book*, 1991 Butterworths Professional Publishers (Pty) Ltd., at 101,

<sup>44</sup> *Id.*, at 258

<sup>45</sup> *Id.*, at 259

<sup>46</sup> *Id.*, at 259

<sup>47</sup> *Id.*, at 259

<sup>48</sup> *Id.*, at 261

<sup>49</sup> 2003 (6)(SA 505(CC))

The Constitutional Court held that, ordinarily, in a consequence crime, a causal nexus between the conduct of an accused and the criminal consequence was a prerequisite for criminal liability. The doctrine of common purpose dispensed with the causation requirement. Provided the accused actively associated with the conduct of the perpetrators in the group that caused the death and had the required intention in respect of the unlawful consequence, the accused would be guilty of the offence. The principal object of the doctrine of common purpose was to criminalise collective criminal conduct and thus to satisfy the social need to control crime committed in the course of joint enterprises.

The phenomenon of serious crimes committed by collective individuals, acting in concert, remained a significant societal scourge. In consequence crimes such as murder, robbery, malicious damage to property and arson, it was often difficult to prove that the act of each person or of a particular person in the group contributed causally to the criminal result. Such a causal prerequisite for liability would have rendered nugatory and ineffectual the object of the criminal norm of common purpose and made prosecution of collaborative criminal enterprises intractable and ineffectual.

The doctrine of common purpose set a standard of criminal culpability. It defined the minimum elements necessary for a conviction in a joint criminal enterprise. The standard had to be constitutionally permissible. It could not unjustifiably invade rights or principles of the Constitution. Put differently, the norm could only impose a form of culpability sufficient to justify the deprivation of freedom without giving rise to a constitutional complaint. However, once the culpability norm passed constitutional muster, an appropriate deprivation of freedom was permissible.

According to the court, the definitional elements or the minimum requirements necessary to constitute a meaningful norm for a common-law crime were unique to that crime and were useful to distinguish and categorise crimes. Common minimum requirements of common-law crimes were proof of unlawful conduct, criminal capacity and fault, all of which had to be present at the time the crime was committed. Notably, the requirement of causal nexus was not a definitional element of every crime. Thus, under the common law, the mere exclusion of causation as a requirement of liability was not fatal to the criminal norm.

The court held that common purpose did not amount to an arbitrary deprivation of freedom. The doctrine was rationally connected to the legitimate objective of limiting and controlling joint criminal enterprise. It served vital purposes in the criminal justice system. Absent the rule of common purpose, all but actual perpetrators of a crime and their accomplices would be beyond the reach of the criminal justice system, despite their unlawful and intentional participation in the commission of the crime. Such an outcome would not have accorded with the considerable societal distaste for crimes by common design. Group, organised or collaborative misdeeds struck more harshly at the fabric of society and the rights of victims than crimes perpetrated by individuals. Effective prosecution of crime was a legitimate, pressing social need. In practice, joint criminal conduct often posed peculiar difficulties of proof of the result of the conduct of each accused, a problem which hardly arose in the case of an individual accused person. Thus there was no objection to this norm of culpability even though it bypassed the requirement of causation.

The State was required to prove beyond a reasonable doubt all the elements of the crime charged under common purpose. When the doctrine of common purpose was properly applied, there was no reasonable possibility that an accused person could be convicted

despite the existence of a reasonable doubt as to her or his guilt. The common purpose doctrine does not trench the right to be presumed innocent.

According to the court the two principal criticisms against the doctrine of common purpose, namely that, in some cases, the requirement of active association had been cast too widely or misapplied and that there were less invasive forms of criminal liability short of convicting a participant in common purpose as a principal, did not render unconstitutional the liability requirement of active association. Consequently, the court held that despite the evocative history of the application of the doctrine of common purpose in political and other group prosecutions, the common-law doctrine of common purpose in murder did pass constitutional muster and did not, in the context of the present case, require to be developed as commanded by s 39(2) of the Constitution.

**7. Are there any other practical considerations or factors that must be present when the defendant in a criminal proceeding is a business entity rather than a natural person?**

In the case of *S v Vandenberg and Others*<sup>50</sup> the court confirmed the principle that knowledge of the director or board of directors is generally imputed to the company. However, where a director or directors of a company are charged with defrauding the company and are themselves participants to a crime (*particeps criminis*), then the knowledge of the director or board of directors is not so imputed to the company. In that case, the court held that it will not be easy to apply this principle to the factual situation of the case. The abstruseness of the whole situation becomes apparent, the court held, when questions like the following are asked: If knowledge of the falsity of a representation is not to be imputed to the company in such a case, how is the representation itself to be construed? Or, where fraudulent concealment on the part of a board or directors is alleged, to whom on the company's behalf can it be said that the concealed facts were to be disclosed? The court held that these are questions to which there does not appear to be an answer.

**III. Status of International Law/International Humanitarian Law in your Country's Legal Framework**

**8. Which international crimes have been incorporated into your domestic criminal law? Please include any crimes enumerated in the Rome Statute of the International Criminal Court such as genocide, war crimes, crimes against humanity, and other relevant instruments.**

South Africa is a signatory of the Rome Statute of the International Criminal Court. In order to give effect to the Statute under domestic law, South Africa enacted the **IMPLEMENTATION OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT ACT** which came into force on 16 August 2002.<sup>51</sup> Prior to the act coming into force, South Africa had no municipal legislation on the subject of war crimes

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<sup>50</sup> 1979 (1) SA208 (D)

<sup>51</sup> Act 27 of 2002

or crimes against humanity and no domestic prosecutions of international crimes had taken place in South Africa.<sup>52</sup>

Section 4(1) of the statute states that despite anything to the contrary in any other law of the Republic, any person who commits a crime, is guilty of an offence and is liable on conviction to a fine or imprisonment, including imprisonment for life, or such imprisonment without the option of a fine, or both a fine and such imprisonment. The crime referred is defined as genocide, crimes against humanity and war crimes.

Schedule 1 of the act defines the crimes of genocide, crimes against humanity and war crimes in exactly the same manner in which it is defined in the Rome Statute of the International Criminal Court.<sup>53</sup>

**9. Do your country's laws modify the provisions of the ICC Statute, such as concepts of aiding and abetting and conspiracy or liability of business entities rather than only natural persons?**

No

**10. Do your criminal courts have jurisdiction over those international crimes that have not been incorporated into your domestic law?**

The international crimes of genocide, war crimes and crimes against humanity have all been incorporated into domestic law through the enactment of the IMPLEMENTATION OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT ACT.

**11. May a business entity be prosecuted for international crimes in the courts of your country, whether under domestic law or with reference to international law? If yes, under what circumstances?**

As it stands, under the IMPLEMENTATION OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT ACT, a business entity cannot be prosecuted for crimes as enumerated thereunder as the Act only makes provision for the prosecution of natural persons.<sup>54</sup>

**IV. Alternative Mechanisms**

**12. Can you think of any bases in your country's tort law (civil law) for suing individuals and /or business entities for violations of international criminal law, IHL, (whether or not incorporated into domestic law)?**

A crime committed under the Implementation Act may also be civilly actionable if it resulted in a "delict" or a violation of a constitutional right. The starting point is the Bill

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<sup>52</sup> John Dugard International Law, A South African Perspective, 3<sup>rd</sup> Edition 2005 (Juta), p. 196

<sup>53</sup> See Appendix "A"

<sup>54</sup> Section 4(3)

of Rights which is incorporated into the Constitution of the Republic of South Africa,<sup>55</sup> the supreme law of the country. Section 7 stipulates that the Bill of Rights is the cornerstone of democracy in South Africa and that it enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and freedom.

The Bill of Rights does not only bind the legislature, executive, judiciary and all organs of state<sup>56</sup> but the provisions of the Bill of Rights also binds natural and juristic persons to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.<sup>57</sup> Section 8(2) uses the language of ‘a provision of the Bill of Rights’ as opposed to ‘a right under the Bill of Rights’ when it is applicable to a natural or juristic person. In view hereof, it is possible and therefore quite reasonable that some of the provisions of the Bill of Rights, which give rise to criminal liability under the Implementation statute, may apply to the conduct of a private person or a juristic person.

It is perfectly conceivable that that the where private individuals perpetrate or juristic persons aid and abet crimes under the Implementation Act, such individuals or juristic persons could very well be held liable for a delictual action based on an infringement or violation of a plaintiff or class of plaintiffs’ constitutional rights. The crimes referred to under the Implementation Act overlap with some of the provisions under the Bill of Rights which may apply to private or juristic persons. The provisions which may find application to private and juristic persons are the right not to subject anyone to slavery, servitude or forced labour<sup>58</sup> and the right to freedom and security of a person, which are generally criminally punishable as crimes against humanity under the Implementation Act when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

Any person or group of person would be entitled to pursue such an action in terms of section 38. Section 38 of the Bill of Rights states that:

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are:

- i. anyone acting in their own interest;
- ii. anyone acting on behalf of another person who cannot act in their own name;
- iii. anyone acting as a member of, or in the interest of, a group or class of persons;
- iv. anyone acting in the public interest; and
- v. an association acting in the interest of its members.

South African courts are already moving towards awarding constitutional damages for violation of the Bill of Rights. Starting with the case of *Fose v Minister of Safety and Security*<sup>59</sup> the Constitutional Court recognised that there was no reason in principle why ‘appropriate relief’ should not include an award of damages where such an award was necessary to protect and enforce the rights contained in the Bill of Rights. Such awards,

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<sup>55</sup> Act 108 of 1996

<sup>56</sup> Section 8(1)

<sup>57</sup> Section 8(2)

<sup>58</sup> Section 13

<sup>59</sup> 1997 (3) SA 786 (CC)

the Court held, were made to compensate persons who had suffered loss as a result of the breach of a statutory right if, on a proper construction of the statute in question, it was the Legislature's intention that such damages should be paid. However, in this instant case, the Constitutional Court did not grant compensation.

In the two cases of **Modderfontein Squatters, Greater Benoni City Council and Others v Modderklip Boerdery (Pty) Ltd** and **Others and the President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd**,<sup>60</sup> the Supreme Court of Appeal was seized with an application for leave to appeal in both matters. The respondent, Modderklip Boerdery (Pty) Ltd, was the owner of a farm on which informal settlements of some 40 000 residents had been established. The Respondent brought an application relying on Section 7, 9, 25, 41(1), 165(4) and 205 of the Constitution wherein it sought an order compelling the State to enforce eviction orders which it previously obtained. The Respondent was successful in this enforcement application. On appeal, the Supreme Court of Appeal held that the Respondent's right to property was enshrined in Section 25 of the Constitution and that the court a quo in the enforcement application had correctly found that the squatters' refusal to obey the eviction order amounted to a breach of that right.

The Supreme Court of Appeal held that the duty of the Government to protect its citizens' rights included protecting them from damaging acts by third parties and since in this instance the State had failed in that duty in a material respect the only appropriate relief was to award constitutional damages to the Respondent due to a breach of a constitutionally entrenched right. The court held that no other remedy was apparent.

## **V. Jurisdiction and related issues**

### **13. On what bases do the courts of your country assert personal jurisdiction over criminal and civil defendants?**

High Courts in South African assert personal jurisdiction over civil and criminal defendants by virtue of Section 19(1)(a) of the Supreme Court Act, 59 of 1959. A provincial or local division of the High Court (previously known as the Supreme Court) shall have jurisdiction over all persons residing or being in and in relation to all causes arising and all offences triable within its area of jurisdiction and all other matters of which it may according to law take cognizance.

In order to determine whether a court will have personal jurisdiction to hear a matter in a civil case for instance, there must be some sufficient connection between the area within which the court operates and the dispute before it. Generally speaking, the plaintiff is dominus litis and has the power to choose the forum where to pursue the action against the defendant. The plaintiff is normally not debarred because he is not an incola himself. However, the court will exercise its power over the defendant provided there is some connection between the court and the cause of action or it has the necessary power over the defendant, such as residence or domicile, for instance.

In the case of **residence of natural persons**, and where residence is the connecting factor, South African courts have refused to equate 'residing' by mere physical presence

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<sup>60</sup> 2004 (6) SA 40 (SCA)

or residence.<sup>61</sup> The Supreme Court of Appeal has laid down three general principles for the guidance of the courts in respect of residence:

(b) domicile and residence are not the same;

(c) a person may not have more than one residence at the same time; and

(d) a person cannot be said to reside at a place which he is temporarily visiting.<sup>62</sup>

In the case of **Terblanche NO and Other v Damji and Another**<sup>63</sup>, the Cape High Court held that although a person (the defendant) may have more than one residence for the purposes of jurisdiction, a person could only reside in one place at any given moment.

The law governing the **residence of corporations** (as Defendants) has been clarified and recast by the Appellate Division in *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd.*<sup>64</sup> In an early Appeal Court decision of *Beckett & Company v Kroomer Ltd.*,<sup>65</sup> the Court decided that a domestic corporation resides at its principal place of business. Generally, the principal place of business is the office where the affairs of the company are controlled, and this will often coincide with the registered office of the company. Where the principal place of business and the location of the registered office do not coincide, then the question arises whether the company is resident in both these places or in only one.<sup>66</sup>

In the *Bisonboard* case, the court dealt with this crucial question when it had to decide whether the Witwatersrand Local Division had jurisdiction over a company (the Defendant) which was incorporated in South Africa and had a registered office in Johannesburg (the place over which the Witwatersrand Local Division had jurisdiction) but whose principal place of business was in Transkei (a former independent Apartheid homeland and outside of the jurisdiction of the Witwatersrand Local Division).<sup>67</sup> The court relied on a previously decided case of *Diary Board John T Rennie & Co (Pty) Ltd.*<sup>68</sup> Here the principal place of business of a company was in Durban and its registered office in Johannesburg. The court in that case held that the place of the registered office may also be treated as a place of residence for the purposes of jurisdiction. The appellate division on the strength hereof concluded that ‘a domestic South African company “resides” where its registered office is.’ The court also held that the company might also reside at its principal place of business. Thus, under South African law it is possible that a company might reside at more than one place.<sup>69</sup>

Forsyth<sup>70</sup> is of the view that in the light of the decision of the Supreme Court of Appeal in the case of *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd.*,<sup>71</sup> holding that

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<sup>61</sup> C F Forsyth, *Private International Law*, 4<sup>th</sup> Edition, 2003 Juta & Co. Ltd 1990, at

<sup>62</sup> *Id.*, at 165

<sup>63</sup> 2003 (5) SA 489 (C)

<sup>64</sup> *Id.*, at 194

<sup>65</sup> 1912 AD 324

<sup>66</sup> *Supra* 1, at 194

<sup>67</sup> *Id.*, at 194

<sup>68</sup> 1976 (3) SA 768 (W)

<sup>69</sup> *Supra* 1, at 195

<sup>70</sup> Christopher Forsyth is the leading authority on Private International Law and his textbook, *Private International Law* is extensively relied on in South Africa on the question of conflicts of law.

<sup>71</sup> 1991(1) SA 482 (A)

an artificial person can be resident in two places, the same should follow for natural persons.<sup>72</sup>

Under the Companies Act, legal process may also be served at the registered office of a corporation.<sup>73</sup>

As far as **residence of a foreign corporation** is concerned, if such a corporation has its principal place of business in a South African court's area of jurisdiction, it is submitted that it should be regarded as residence there – in other words, it should be treated as if it were a domestic corporation.<sup>74</sup> However, where a foreign company does not have its principal place of business in South Africa but conducts business in South Africa, case law suggests that such activity may amount to residence but that 'residence is recognised only in regard to a dispute which turns upon a cause of action arising out of the local business activities.'<sup>75</sup>

Another connecting factor for a court to exercise personal jurisdiction over a matter is by virtue of causes of action (*ratio jurisdictionis*)<sup>76</sup>. In the case of *ratio jurisdictionis*, a South African court will have jurisdiction over a matter if, for example, the *ratio delicti* or the *ratio contractus* occurred in its jurisdiction. However, it is not enough for the court merely to have jurisdiction by virtue of the cause of action. The court must also exercise some form of control over the defendant. The jurisdiction is incomplete if the Defendant is not a resident in the jurisdiction of that court. In order for that court to have complete jurisdiction over the matter (that is, both *ratio jurisdictionis* and jurisdiction *confirmandam*), a Plaintiff will have to apply for the arrest<sup>77</sup> of or attachment of the goods of the Defendant (*jurisdiction confirmandam*).<sup>78</sup>

By way of an example, where an *incola* Plaintiff<sup>79</sup> brings an action against a foreign *peregrinus* Defendant<sup>80</sup> and the cause of action arose within the jurisdiction of that court, that is to say the *ratio jurisdictionis* arose within the jurisdiction of that court, the Plaintiff may apply for an order for the arrest of the Defendant or attachment of his goods in order for the court to have complete jurisdiction over the matter and the person or property of the Defendant. The order for the arrest of the Defendant or the attachment of his property

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<sup>72</sup> *Supra* 1, at 192

<sup>73</sup> Section 170 of Act 61 of 1973

<sup>74</sup> *Id.*, at 196

<sup>75</sup> *ISM Inter Ltd v Maraldo & Another* 1983 (4) SA 112 (T)

<sup>76</sup> Also known as the ground for jurisdiction, that means to say a jurisdictional connecting factor

<sup>77</sup> This will be an arrest authorised by the court in civil proceedings where there is sufficient proof on oath that a person is about to flee the jurisdiction of the court, hence being referred to as a warrant of arrest *suspectus de fuga*

<sup>78</sup> *Ratio jurisdictionis* refers to a court's authority to hear a matter by virtue of the cause of action before such a court. However, this form of jurisdiction is not to be confused with jurisdiction *confirmandam* which confirms the court with physical jurisdiction over a person or his property. Such jurisdiction takes the form of either attachment of a person's property or his or her physical arrest in order to exercise jurisdiction *confirmandam* over that person. Both forms of jurisdictions are required in order for a court to have complete jurisdiction over the matter and Defendant

<sup>79</sup> An *incola* Plaintiff is someone who is either domiciled or resident in the court's area of jurisdiction

<sup>80</sup> There is a distinction between a local *peregrinus* Defendant and a foreign *peregrinus* Defendant. A local *peregrinus* Defendant is a person who is a peregrine of a division of the High Court in which a plaintiff brings a lawsuit but who is an *incola* of another division of the High Court in South Africa. In the case of a foreign *peregrinus* Defendant, such a person is not domiciled or resident in any part of South Africa.

is for the court to strengthen and confirm jurisdiction its jurisdiction, hence it being referred to as jurisdiction confirmandam.

Where the plaintiff is an incola, cause of action arose outside of the jurisdiction of the court and the Defendant is a foreign Peregrinus Defendant, the plaintiff may apply to the court for an order of arrest of the Defendant or attachment of his goods.<sup>81</sup> Similarly, in the case where the Plaintiff is a peregrine, the Defendant is a foreign peregrine and cause of action arose in the jurisdiction of the court, the peregrine Plaintiff may apply to the court for an order of arrest of or attachment of the goods of the Defendant.

However, where both the Plaintiff and Defendants are peregrines and the cause of action arose outside of the jurisdiction of the court, the court will not have jurisdiction over the matter even where the Plaintiff is able to effect an arrest of the Defendant or attachment of his goods.<sup>82</sup> The court will only exercise jurisdiction if the cause of action arose in its area of jurisdiction. Hence, in the case of *Siemans Ltd v Offshore Marine Engineering Ltd*<sup>83</sup> the Supreme Court of Appeal did not allow a local peregrine (an incola of the Witwatersrands Local Division) seeking to sue a foreign peregrine (an incola of the United Kingdom) in the Eastern Cape Division to attach the Defendant's property there as there was no recognised ratio jurisdictionis in the Eastern Cape.

However, this unfairness toward peregrine plaintiffs have been addressed through the enactment of Section 19(1)(c)<sup>84</sup> of the Supreme Court Act which allows for a foreign peregrine to attach another foreign peregrine's property anywhere in the Republic provide that only the cause of action arose within the jurisdiction of the court. Where the cause of action arose outside the jurisdiction of the court, the incola can secure the attachment of the foreign peregrine's property anywhere in the Republic.<sup>85</sup>

In terms of Section 326(1) of the Companies Act, every external company shall appoint and shall at all times have one or more persons resident in the Republic authorized by the company to accept on its behalf service of process and any notices required to be served on the company, notwithstanding the provisions of section 71.<sup>86</sup> Where a foreign company does not have its principal place of business in South Africa but conducts business in South Africa, case law suggests that such activity may amount to residence but that 'residence is recognised only in regard to a dispute which turns upon a cause of action arising out of the local business activities.

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<sup>81</sup> Supra 1, at 209

<sup>82</sup> Id., 210

<sup>83</sup> 1993 (3) SA 913 (A)

<sup>84</sup> Subject to the provision of section 28 and the powers granted under Section 4 of the Admiralty Jurisdiction Regulation Act, 1983 (Act no 105 of 1983), any High Court may issue an order for attachment of property or arrest for a person to confirm jurisdiction or order the arrest suspectus de fuga also where the property or person concerned is outside its area of jurisdiction and within the Republic: Provided that the cause of action arose within its area of jurisdiction; and where the plaintiff is resident or domiciled within its area of jurisdiction, but the cause of action arose outside its areas of jurisdiction and the property or person concerned is outside its area of jurisdiction, issue an order for attachment of property or arrest of a person to found jurisdiction regardless of where in the Republic the property or person is situated.

<sup>85</sup> Supra 1, at 212 -213

<sup>86</sup> Section 71 provides that any notice, order or other document which by this Act may be or is required to be served upon any company, including any external company, may be served by delivering it at or sending it by registered post to the registered office or postal address of the company.

Courts have jurisdiction in cases where either the plaintiff or the defendant is a resident where the cause of action arises in the jurisdiction.

If both plaintiff and defendant are residents of the jurisdiction, the court may hear a cause of action that arose outside of the jurisdiction. The court will have power by virtue of the presence of the Defendant in its jurisdiction. Section 19(1) of the Supreme Court Act provides that 'A provincial or local division shall have jurisdiction over all persons residing or being in and in relation to all causes arising and all offences triable within its area of jurisdiction and all other matters of which it may according to law take cognizance.' In this instance, residence or domicile of the Defendant is the connecting factor as opposed to the cause of action. The Defendant is the incola of the court's area of jurisdiction.

It is different if the Defendant was not resident in the court's area of jurisdiction. If only the Plaintiff is resident in the court's area of jurisdiction, but the cause of action arose outside of the court's jurisdiction and the Defendant is not to be found within the court's area of jurisdiction, then the Plaintiff will have to apply for an order of arrest of the peregrine Defendant or attachment of his goods for the court to have jurisdiction.

A human rights case that occurs in a foreign country may be brought in South Africa. It is certainly possible for such a case to be brought before a South African court provided that the court has jurisdiction over the Defendant. Where however, the Plaintiff and Defendant are not resident or domiciled in the court's area of jurisdiction and the cause of action did not arise within its jurisdiction, then the court will have no jurisdiction to hear the matter.

Should the court have jurisdiction by virtue of the Defendant being resident or domiciled there, a further question that the court will be seized with would be choice of law that would be applicable. South African authorities are unsettled as to whether there law where the delict took place (*lex loci delicti commissi*) should apply or application of the proper law, which is based upon the law with most significant connection with the chain of acts and consequences

**14. When parent and subsidiary entities are involved in a multinational setting, how does a court assert personal jurisdiction over parents or subsidiaries located out of country? What are the standards for overcoming limitations on jurisdictions over business entities within a multinational corporation?**

South Africa does not provide for a different jurisdictional regime for asserting personal jurisdiction over parents of subsidiary companies located outside of the country. Jurisdiction over domestic and foreign corporations, irrespective of whether they are parents of subsidiaries located outside of South Africa, are dealt with according to the answer given in 13 above. A subsidiary cannot be brought into a case by virtue of the actions of its parents and vice versa.

**15. How may a court attribute the actions of a subsidiary to a parent business entity, i.e. "pierce the corporate veil"?**

The expression “lifting the corporate veil” does not appear in the Companies Act and has no single, clear meaning.<sup>87</sup> However, the court has laid down some general principles which will affect the way in which a South African court will consider the actions of a subsidiary and attribute it, if necessary to a parent business entity. In the case of *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd*<sup>88</sup> the court held:

A court has no general discretion simply to disregard a company’s legal personality whenever it considers it just to do so;

A court should not lightly disregard a company’s separate personality but should strive to give effect to and uphold it;

Where fraud, dishonesty or other improper conduct is found to be present, the need to preserve the company’s separate personality would have to be balanced against policy considerations in favour of piercing the corporate veil. A court will then be entitled to look to substance rather than form and see whether there has been ‘a misuse of corporate personality, to disregard [the company’s separate corporate personality] and attribute liability where it should rightly lie.

It is not necessary that ‘a company should have been conceived and founded in deceit, and never have been intended to function genuinely as a company, before its corporate personality can be disregarded.’ If a company which was legitimately established and operated is misused in a particular instance to perpetrate a fraud, or for a dishonest or improper purpose, its separate legal personality can be disregarded in relation to the transaction in question in order to fix the individual or individuals responsible with liability, while giving full effect to the company’s separate personality in other respects.

One cannot pierce the corporate veil by bringing in a parent or a subordinate that is not otherwise subject to the court’s jurisdiction.

**16. What types of actions (civil and criminal) might be asserted against a business entity with respect to activities taking place outside of your jurisdiction by a business entity over which your courts have jurisdiction?**

The Prevention and Combating of Corrupt Activities Act<sup>89</sup> provides for extraterritorial jurisdiction in respect of the offence of corruption and offences relating to corrupt activities. Section 35(1) provides that even if the act alleged to constitute an offence under this Act occurred outside the Republic, a court of the Republic shall, regardless of whether or not the act constitutes an offence at the place of its commission, have jurisdiction in respect of that offence if the person to be charged-

- (a) is a citizen of the Republic;
- (b) is ordinarily resident in the Republic;
- (c) was arrested in the territory of the Republic, or in its territorial waters or on board a ship or aircraft registered or required to be registered in the Republic at the time the offence was committed;

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<sup>87</sup> RC Williams, *Concise Corporate and Partnership Law*, 2<sup>nd</sup> Edition, 1997, p.96

<sup>88</sup> 1995 (4) SA 790 (A)

<sup>89</sup> Act 12 of 2004

- (d) is a company, incorporated or registered as such under any law, in the Republic;  
or
- (e) any body of persons, corporate or unincorporated, in the Republic.

In terms of Section 35(2) any act alleged to constitute an offence under this Act and which is committed outside the Republic by a person, other than a person contemplated in subsection (1), shall, regardless of whether or not the act constitutes an offence or not at the place of its commission, be deemed to have been committed also in the Republic if that-

- (a) act affects or is intended to affect a public body, a business or any other person in the Republic;
- (b) person is found to be in South Africa; and
- (c) person is for one or other reason not extradited by South Africa or if there is no application to extradite that person.

Any offence committed in a country outside the Republic as contemplated in subsection (1) or (2) of Section 35, is, for the purpose of determining the jurisdiction of a court to try the offence, deemed to have been committed-

- (a) at the place where the accused is ordinarily resident; or
- (b) at the accused person's principal place of business.

There are numerous offences in respect of corrupt activities which constitute an offence under this Act. These are offences in respect of corrupt activities relating to specific persons such as public officers<sup>90</sup>, foreign public officials,<sup>91</sup> members of legislative authority,<sup>92</sup> judicial officers<sup>93</sup> and member of the prosecuting authority.<sup>94</sup> An extract of thereof is included as Annexure "A" hereto.

The Act defines the general offence of corruption as any person who directly or indirectly-

- (a) accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or
- (b) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner-
  - (i) that amounts to the-
    - (aa) illegal, dishonest, unauthorised, incomplete, or biased; or

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<sup>90</sup> Section 4

<sup>91</sup> Section 5

<sup>92</sup> Section 7

<sup>93</sup> Section 8

<sup>94</sup> Section 9

- (bb) misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;
- (ii) that amounts to-
  - (aa) the abuse of a position of authority;
  - (bb) a breach of trust; or
  - (cc) the violation of a legal duty or a set of rules;
- (iii) designed to achieve an unjustified result; or
- (iv) that amounts to any other unauthorised or improper inducement to do or not to do anything, is guilty of the offence of corruption.

Furthermore, the Act makes it an offence where any person, knowing that property or any part thereof forms part of any gratification which is the subject of an offence in terms of the Act, directly or indirectly, whether on behalf of himself or herself or on behalf of any other person, enters into or causes to be entered into any dealing in relation to such property or any part thereof or uses or causes to be used, or holds, receives or conceals such property or any part thereof.<sup>95</sup> It is also an offence for any person who attempts, conspires with any other person, or aids, abets, induces, incites, instigates, instructs, commands, counsels or procures another person, to commit an offence in terms of this Act.<sup>96</sup>

The Republic has anti-money laundering laws that prohibit bribery of foreign officials. The Financial Intelligence Centre Act<sup>97</sup> was enacted to establish a Centre whose principle objective is to assist in the identification of the proceeds of unlawful activities and the combating of money laundering activities and the financing of terrorist and related activities. To achieve this objective, the Centre must-

- (a) process, analyse and interpret information disclosed to it, and obtained by it, in terms of this Act;
- (b) inform, advise and cooperate with investigating authorities, supervisory bodies, the South African Revenue Service and the intelligence services;
- (c) monitor and give guidance to accountable institutions, supervisory bodies and other persons regarding the performance by them of their duties and their compliance with the provisions of this Act;
- (d) retain the information referred to in paragraph (a) in the manner and for the period required by this Act<sup>98</sup>.

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<sup>95</sup> Section 20

<sup>96</sup> Section 21

<sup>97</sup> Act 38 of 2001

<sup>98</sup> Section 4

In order to achieve its objective, the Act establishes a Money Laundering Advisory Council<sup>99</sup> who must on the Minister's request or at its own initiative, advise the Minister on policies and best practices to identify the proceeds of unlawful activities and to combat money laundering activities, advise the Centre concerning the performance by the Centre of its functions.

Chapter 3 of the Act provides that an accountable institution<sup>100</sup> may not establish a business relationship or conclude a single transaction with a client unless it has taken the prescribed steps to identify that person or client.<sup>101</sup> In terms of Section 22 whenever an accountable institution establishes a business relationship or concludes a transaction with a client, whether the transaction is a single transaction or concluded in the course of a business relationship which that accountable institution has with the client, the accountable institution must keep record of-

- (a) the identity of the client;
- (b) if the client is acting on behalf of another person-

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<sup>99</sup> Section 18

<sup>100</sup> LIST OF ACCOUNTABLE INSTITUTIONS

1. An attorney as defined in the Attorneys Act, 1979 (Act 53 of 1979).
2. A board of executors or a trust company or any other person that invests, keeps in safe custody, controls or administers trust property within the meaning of the Trust Property Control Act, 1988 (Act 57 of 1988).
3. An estate agent as defined in the Estate Agents Act, 1976 (Act 112 of 1976).
4. A financial instrument trader as defined in the Financial Markets Control Act, 1989 (Act 55 of 1989).
5. A management company registered in terms of the Unit Trusts Control Act, 1981 (Act 54 of 1981).
6. A person who carries on the 'business of a bank' as defined in the Banks Act, 1990 (Act 94 of 1990).
7. A mutual bank as defined in the Mutual Banks Act, 1993 (Act 124 of 1993).
8. A person who carries on a 'long-term insurance business' as defined in the Long-Term Insurance Act, 1998 (Act 52 of 1998), including an insurance broker and an agent of an insurer.
9. A person who carries on a business in respect of which a gambling licence is required to be issued by a provincial licensing authority.
10. A person who carries on the business of dealing in foreign exchange.
11. A person who carries on the business of lending money against the security of securities.
12. A person who carries on the business of rendering investment advice or investment broking services, including a public accountant as defined in the Public Accountants and Auditors Act, 1991 (Act 80 of 1991), who carries on such a business.
13. A person who issues, sells or redeems travellers' cheques, money orders or similar instruments.
14. The Postbank referred to in section 51 of the Postal Services Act, 1998 (Act 124 of 1998).
15. A member of a stock exchange licensed under the Stock Exchanges Control Act, 1985 (Act 1 of 1985).
16. The Ithala Development Finance Corporation Limited.
17. A person who has been approved or who falls within a category of persons approved by the Registrar of Stock Exchanges in terms of section 4 (1) (a) of the Stock Exchanges Control Act, 1985 (Act 1 of 1985).
18. A person who has been approved or who falls within a category of persons approved by the Registrar of Financial Markets in terms of section 5 (1) (a) of the Financial Markets Control Act, 1989 (Act 55 of 1989).
19. A person who carries on the business of a money remitter.

<sup>101</sup> Section 21

- (i) the identity of the person on whose behalf the client is acting; and
- (ii) the client's authority to act on behalf of that other person;
- (c) if another person is acting on behalf of the client-
  - (i) the identity of that other person; and
  - (ii) that other person's authority to act on behalf of the client;
- (d) the manner in which the identity of the persons referred to in paragraphs (a), (b) and (c) was established;
- (e) the nature of that business relationship or transaction;
- (f) in the case of a transaction-
  - (i) the amount involved; and
  - (ii) the parties to that transaction;
- (g) all accounts that are involved in-
  - (i) transactions concluded by that accountable institution in the course of that business relationship; and
  - (ii) that single transaction;
- (h) the name of the person who obtained the information referred to in paragraphs (a), (b) and (c) on behalf of the accountable institution; and
- (i) any document or copy of a document obtained by the accountable institution in order to verify a person's identity in terms of section 21 (1) or (2).

(2) Records kept in terms of subsection (1) may be kept in electronic form.

In terms of Section 23 an accountable institution must keep the records referred to in section 22 which relate to-

- (a) the establishment of a business relationship, for at least five years from the date on which the business relationship is terminated;
- (b) a transaction which is concluded, for at least five years from the date on which that transaction is concluded.

The Private Security Industry Regulation Act<sup>102</sup> similarly provides for extra-territorial jurisdiction. In terms of Section 39(1) any act constituting an offence in terms of this Act and which is committed outside the Republic by any security service provider, registered or obliged to be registered in terms of this Act, is deemed to have been committed in the Republic. Acts constituting an offence under this Act include improper conduct in terms of section 29 for which improper conduct proceedings may be instituted against a security

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<sup>102</sup> Act 56 Of 2001

service provider or other person who employs a security officer, on account of an allegation of improper conduct, whether such improper conduct was allegedly committed within or outside the borders of the Republic.

For the purpose of determining the jurisdiction of a court to try the offence, the Act deemed such acts to have been committed-

- (a) at the place where it was actually committed;
- (b) at the place where the accused is resident; and
- (c) at the place where the accused conducts his or her business.

It is a crime for a person to transfer the proceeds of a crime to or through one of the listed "accountable institutions." An "accountable institution" is required to report suspicious activity. Section 29 of the FICA provides:

(1) A person who carries on a business or 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-

(a) the business has received or is about to receive the proceeds of unlawful activities or property which is connected to an offence relating to the financing of terrorist and related activities;

(b) a transaction or series of transactions to which the business is a party-

(i) facilitated or is likely to facilitate the transfer of the proceeds of unlawful activities or property which is connected to an offence relating to the financing of terrorist and related activities;

(ii) has no apparent business or lawful purpose;

(iii) is conducted for the purpose of avoiding giving rise to a reporting duty under this Act;

(iv) may be relevant to the investigation of an evasion or attempted evasion of a duty to pay any tax, duty or levy imposed by legislation administered by the Commissioner for the South African Revenue Service; or

(v) relates to an offence relating to the financing of terrorist and related activities; or

(c) the business has been used or is about to be used in any way for money laundering purposes or to facilitate the commission of an offence relating to the financing of terrorist and related activities, must, within the prescribed period after the knowledge was acquired or the suspicion arose, report to the Centre the grounds for the knowledge or suspicion and the prescribed particulars concerning the transaction or series of transactions.

(2) A person who carries on a business or is in charge of or manages a business or who is employed by a business and who knows or suspects that a transaction or a series of transactions about which enquiries are made, may, if that transaction or those transactions had been concluded, have caused any of the consequences referred to in subsection (1)

(a), (b) or (c), must, within the prescribed period after the knowledge was acquired or the

suspicion arose, report to the Centre the grounds for the knowledge or suspicion and the prescribed particulars concerning the transaction or series of transactions.

(3) No person who made or must make a report in terms of this section may disclose that fact or any information regarding the contents of any such report to any other person, including the person in respect of whom the report is or must be made, otherwise than-

- (a) within the scope of the powers and duties of that person in terms of any legislation;
- (b) for the purpose of carrying out the provisions of this Act;
- (c) for the purpose of legal proceedings, including any proceedings before a judge in chambers; or
- (d) in terms of an order of court.

(4) No person who knows or suspects that a report has been or is to be made in terms of this section may disclose that knowledge or suspicion or any information regarding the contents or suspected contents of any such report to any other person, including the person in respect of whom the report is or is to be made, otherwise than-

- (a) within the scope of that person's powers and duties in terms of any legislation;
- (b) for the purpose of carrying out the provisions of this Act;
- (c) for the purpose of legal proceedings, including any proceedings before a judge in chambers; or
- (d) in terms of an order of court.

Section 52 of the Act makes it an offence for an accountable institution not to report a suspicious or an unusual transaction.

The records that accountable institutions keep are open to inspection by a governmental authority. Firstly, an accountable institution is obliged to keep records of persons with whom it establishes a business relationship.<sup>103</sup> Those records must be kept for a period of not less than 5 years from the date the business relationship is terminated and 5 years from the date a transaction was concluded.<sup>104</sup>

Section 26 governs the Financial Intelligence Centre's access to the records. The section reads:

(1) An authorised representative of the Centre has access during ordinary working hours to any records kept by or on behalf of an accountable institution in terms of section 22 or section 24, and may examine, make extracts from or copies of, any such records.

(2) The authorised representative of the Centre may, except in the case of records which the public is entitled to have access to, exercise the powers mentioned in subsection (1) only by virtue of a warrant issued in chambers by a magistrate or regional

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<sup>103</sup> Section 22

<sup>104</sup> Section 23

magistrate or judge of an area of jurisdiction within which the records or any of them are kept, or within which the accountable institution conducts business.

(3) A warrant may only be issued if it appears to the judge, magistrate or regional magistrate from information on oath or affirmation that there are reasonable grounds to believe that the records referred to in subsection (1) may assist the Centre to identify the proceeds of unlawful activities or to combat money laundering activities.

(4) A warrant issued in terms of this section may contain such conditions regarding access to the relevant records as the judge, magistrate or regional magistrate may deem appropriate.

(5) An accountable institution must without delay give to an authorised representative of the Centre all reasonable assistance necessary to enable that representative to exercise the powers mentioned in subsection (1).

d) Can a person who is harmed by money laundering (i.e. victims of a crime whose money is laundered) bring a civil action against an accountable person who facilitates the transfer?

The Act does not provide for such a course of action. Such a victim will have to pursue an ordinary civil remedy against such an accountable person or institution, having to prove all the elements of a delict.

2. Is there a civil cause of action against a security service provider who breaches the Private Security Industry Regulation Act?

The Act does not explicitly provide for such a remedy. However, a plaintiff would have to pursue the usual course of common law civil action against such a service provider.

3. Counterfeiting (S.A currency) slavery, etc. if committed extraterritorially, may it be punished in South Africa?

The Prevention of Counterfeiting of Currency Act, 16 of 1965 provides for the prevention of the counterfeiting of coin and the forging or altering of banknotes. The Act is short and I have included the text thereof as an annexure hereto. Section 3 of the Act deals with extradition of a person to the Republic in respect of the counterfeiting of currency.

As for slavery, the Implementation Act would be applicable. A South African court will have jurisdiction by virtue of Section 4 of the Implementation Act, where a person is guilty of an offence under the Implementation Act (of which slavery is part of) and

- a) that person is a South African citizen; or
- (b) that person is not a South African citizen but is ordinarily resident in the Republic; or
- (c) that person, after the commission of the crime, is present in the territory of the Republic; or
- (d) that person has committed the said crime against a South African citizen or against a person who is ordinarily resident in the Republic.

As for piracy, two Acts in the Republic are of importance. The one is the Defence Act 42 of 2002 which in terms of Section 24 thereof provides as follows:

(1) For purposes of this Act, piracy is-

- (a) any illegal act of violence or detention, or any act of depredation, committed for private ends by the crew, including the Master, or the passengers of a private ship or a private aircraft, and directed-
  - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
  - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any state;
- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a ship or aircraft contemplated in subsection (1); and
- (c) any act of inciting or of intentionally facilitating an act contemplated in paragraph (a) or (b).

(2) Any act of piracy committed by the crew of a warship or military aircraft, government ship or government aircraft which has mutinied and taken control of such ship or aircraft, must for purposes of this section be regarded as having been committed by the crew of a private ship or aircraft.

(3) Any person who commits an act of piracy is guilty of an offence, which may be tried in any court in the Republic designated by the Director of Public Prosecutions and, upon conviction, is liable to a fine or to imprisonment for any period, including life imprisonment.

In terms of Section 25(1) of the Defence Act, an officer of the Defence Force may seize a ship or aircraft and the property on board, and arrest any person on board, in accordance with articles 105 and 107 of UNCLOS. In terms of Section 25(3) any person who commits an act of piracy is guilty of an offence, which may be tried in any court in the Republic designated by the Director of Public Prosecutions and, upon conviction, is liable to a fine or to imprisonment for any period, including life imprisonment.

The other Act is the Admiralty Jurisdiction Regulation Act 105 of 1983. A maritime claim means any claim for, arising out of or relating to, amongst other, piracy, sabotage or terrorism relating to property mentioned in section 3 (5), or to persons on any ship. Section 3(5) states that an action in rem (an action against the property) shall be instituted by the arrest within the area of jurisdiction of the court concerned of property of one or more of the following categories against or in respect of which the claim lies:

- (a) The ship, with or without its equipment, furniture, stores or bunkers;
- (b) the whole or any part of the equipment, furniture, stores or bunkers;
- (c) the whole or any part of the cargo;
- (d) the freight;
- (e) any container, if the claim arises out of or relates to the use of that container in or on a ship or the carriage of goods by sea or by water otherwise in that container;
- (f) a fund.

**17. If plaintiffs wanted to sue a business entity in your jurisdiction, what are some of the jurisdictional and procedural obstacles that they (and their lawyers) might face?**

Refer to the answers to Questions 13 and 18

**18. Do the civil courts of your country sometimes decline to exercise jurisdiction over matters where the events occurred in another country and/or the majority of witnesses and the bulk of other evidence is outside of your country, thereby making it more convenient for the parties to litigate in the courts of another jurisdiction (sometimes referred to as the doctrine of forum non conveniens)?**

According to the legal authorities, it is uncertain whether the doctrine of forum non conveniens forms part of South African law.<sup>105</sup> However, at least in one instance the Appeal Court in the case of **Estate Agents Board v Lek**<sup>106</sup> held that in the present context of our unitary judicial system of having one Supreme Court with different divisions ... convenience and common sense, are, inter alia, valid considerations in determining whether a particular Division has jurisdiction to hear and determine the cause.<sup>107</sup>

Forsyth suggests that convenience factors and the type of policy considerations associated with the forum (non) conveniens have previously been articulated in our law on many occasion.<sup>108</sup> Section 9(1) of the Supreme Court Act provides that if, in any civil proceedings instituted in a provincial or local division, it appears to the court that the matter may be more conveniently or fitly heard or determined, in another division, the court seized of the matter may, on application by any party (and after hearing all the other parties) order the removal to another court.<sup>109</sup> The defence of *lis alibi pendens* also operates to prevent a plaintiff from suing when proceedings have already been instituted in another court. Furthermore, if both the Plaintiff and the Defendant are peregrines of South Africa, the court will not assume jurisdiction unless the cause of action arose within the area of its jurisdiction.<sup>110</sup>

In the case of **Maritime & Industrial Services Ltd. v Marcierta Compania Naviera SA**<sup>111</sup> the court held that “there seems to be no good reason why by mere attachment peregrine defendants should be put to the inconvenience and expense of defending actions in South African courts at the instance of peregrine plaintiffs, and why, in the process, the time of South African courts and State funds should be taken up with the dispute which are unconnected with South Africa and between persons who have no connection with South Africa.

**19. Are there any checks and balances on prosecutorial discretion or decision making (e.g. when a prosecutor declines to prosecute a case, are there any measures in place to review his or her decision or an appeals mechanism?)**

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<sup>105</sup> *Supra* 1, *Id.*, at 174

<sup>106</sup> 1979 (3) SA 1048

<sup>107</sup> *Id.*, at 174

<sup>108</sup> *Id.*, at 174

<sup>109</sup> *Id.*, at 175

<sup>110</sup> *Id.*, at 175

<sup>111</sup> 1969 (3) SA 28 (D)

No. However, in the instance where the State declines to prosecute private prosecution is permissible. In terms of Section 7(1) of the Criminal Procedure Act<sup>112</sup> in any case in which an attorney-general declines to prosecute for an alleged offence any private person who proves some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the commission of the said offence; a husband, if the said offence was committed in respect of his wife; the wife or child or, if there is no wife or child, any of the next of kin of any deceased person, if the death of such person is alleged to have been caused by the said offence; or the legal guardian or curator of a minor or lunatic, if the said offence was committed against his ward, may, either in person or by a legal representative, institute and conduct a prosecution in respect of such offence in any court competent to try that offence.

The Act provides for stringent requirements in respect of private prosecution. Section 7(2) thereof provides that no private prosecutor under this section shall obtain the process of any court for summoning any person to answer any charge unless such private prosecutor produces to the officer authorized by law to issue such process a certificate signed by the attorney-general that he has seen the statements or affidavits on which the charge is based and that he declines to prosecute at the instance of the State.

Furthermore, the attorney-general shall, in any case in which he declines to prosecute, at the request of the person intending to prosecute, grant the certificate. A certificate so issued shall lapse unless proceedings in respect of the offence in question are instituted by the issue of the process within three months of the date of the certificate.

A private prosecutor has to provide security as determined by the Minister from time to time in order to proceed therewith. Section 8 provides that no private prosecutor shall take out or issue any process commencing the private prosecution unless he deposits with the magistrate's court in whose area of jurisdiction the offence was committed-

(a) the amount\* the Minister may from time to time determine by notice in the Gazette as security that he will prosecute the charge against the accused to a conclusion without undue delay; and

(b) the amount such court may determine as security for the costs which may be incurred in respect of the accused's defence to the charge.

However, an accused may, when he is called upon to plead to the charge, apply to the court hearing the charge to review the amount whereupon the court may, before the accused pleads-

(a) require the private prosecutor to deposit such additional amount as the court may determine with the magistrate's court in which the said amount was deposited; or

(b) direct that the private prosecutor enter into a recognizance, with or without sureties, in such additional amount as the court may determine.

In the case where a private prosecutor fails to prosecute a charge against an accused to a conclusion without undue delay or where a charge is dismissed, the security shall be forfeited to the State.

The following sections deal with the following aspects of a private prosecution:

Section 10 Private prosecution in name of private prosecutor

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<sup>112</sup> Act 51 of 1977

- (1) A private prosecution shall be instituted and conducted and all process in connection therewith issued in the name of the private prosecutor.
- (2) The indictment, charge-sheet or summons, as the case may be, shall describe the private prosecutor with certainty and precision and shall, except in the case of a body referred to in section 8, be signed by such prosecutor or his legal representative.
- (3) Two or more persons shall not prosecute in the same charge except where two or more persons have been injured by the same offence.

#### Section 11 Failure of private prosecutor to appear

- (1) If the private prosecutor does not appear on the day set down for the appearance of the accused in the magistrate's court or for the trial of the accused, the charge against the accused shall be dismissed unless the court has reason to believe that the private prosecutor was prevented from being present by circumstances beyond his control, in which event the court may adjourn the case to a later date.
- (2) Where the charge is so dismissed, the accused shall forthwith be discharged from custody and may not in respect of that charge be prosecuted privately again but the attorney-general or a public prosecutor with the consent of the attorney-general may at the instance of the State prosecute the accused in respect of that charge.

#### Section 12 Mode of conducting private prosecution

- (1) A private prosecution shall, subject to the provisions of this Act, be proceeded with in the same manner as if it were a prosecution at the instance of the State: Provided that the person in respect of whom the private prosecution is instituted shall be brought before the court only by way of summons in the case of a lower court, or an indictment in the case of a superior court, except where he is under arrest in respect of an offence with regard to which a right of private prosecution is vested in any body or person under section 8.
- (2) Where the prosecution is instituted under section 7 (1) and the accused pleads guilty to the charge, the prosecution shall be continued at the instance of the State.

#### Section 13 Attorney-general may intervene in private prosecution

An attorney-general or a local public prosecutor acting on the instructions of the attorney-general, may in respect of any private prosecution apply by motion to the court before which the private prosecution is pending to stop all further proceedings in the case in order that a prosecution for the offence in question may be instituted or, as the case may be, continued at the instance of the State, and the court shall make such an order.

#### Section 14 Costs in respect of process

A private prosecutor, other than a prosecutor contemplated in section 8, shall in respect of any process relating to the private prosecution, pay to the clerk or, as the case may be, the registrar of the court in question, the fees prescribed under the rules of court for the service or execution of such process.

#### Section 15 Costs of private prosecution

- (1) The costs and expenses of a private prosecutor shall, subject to the provisions of subsection (2), be paid by the private prosecutor.
- (2) The court may order a person convicted upon a private prosecution to pay the costs and expenses of the prosecution, including the costs of any appeal against such conviction or any sentence: Provided that the provisions of this subsection shall not apply with reference to any prosecution instituted and conducted under section 8: Provided further that where a private prosecution is instituted after the grant of a certificate by an

attorney-general that he declines to prosecute and the accused is convicted, the court may order the costs and expenses of the private prosecution, including the costs of an appeal arising from such prosecution, to be paid by the State.

#### Section 16 Costs of accused in private prosecution

(1) Where in a private prosecution, other than a prosecution contemplated in section 8, the charge against the accused is dismissed or the accused is acquitted or a decision in favour of the accused is given on appeal, the court dismissing the charge or acquitting the accused or deciding in favour of the accused on appeal, may order the private prosecutor to pay to such accused the whole or any part of the costs and expenses incurred in connection with the prosecution or, as the case may be, the appeal.

(2) Where the court is of the opinion that a private prosecution was unfounded and vexatious, it shall award to the accused at his request such costs and expenses incurred in connection with the prosecution, as it may deem fit.

#### Section 17 Taxation of costs

(1) The provisions of section 300 (3) shall apply with reference to any order or award made under section 15 or 16 in connection with costs and expenses.

(2) Costs awarded under section 15 or 16 shall be taxed according to the scale, in civil cases, of the court which makes the award or, if the award is made by a regional court, according to the scale, in civil cases, of a magistrate's court, or, where there is more than one such scale, according to the scale determined by the court making the award.

Private prosecution is a fairly rare instance in South Africa.

## ANNEXURE “A” (Survey of Laws of South Africa)

### Part 2

Offences in respect of corrupt activities relating to specific persons (ss 4-9)

Offences in respect of corrupt activities relating to public officers

(1) Any-

(a) public officer who, directly or indirectly, accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or

(b) person who, directly or indirectly, gives or agrees or offers to give any gratification to a public officer, whether for the benefit of that public officer or for the benefit of another person,

in order to act, personally or by influencing another person so to act, in a manner-

(i) that amounts to the-

(aa) illegal, dishonest, unauthorised, incomplete, or biased; or

(bb) misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;

(ii) that amounts to-

(aa) the abuse of a position of authority;

(bb) a breach of trust; or

(cc) the violation of a legal duty or a set of rules;

(iii) designed to achieve an unjustified result; or

(iv) that amounts to any other unauthorised or improper inducement to do or not to do anything, is guilty of the offence of corrupt activities relating to public officers.

(2) Without derogating from the generality of section 2 (4), 'to act' in subsection (1), includes-

(a) voting at any meeting of a public body;

(b) performing or not adequately performing any official functions;

(c) expediting, delaying, hindering or preventing the performance of an official act;

(d) aiding, assisting or favouring any particular person in the transaction of any business with a public body;

(e) aiding or assisting in procuring or preventing the passing of any vote or the granting of any contract or advantage in favour of any person in relation to the transaction of any business with a public body;

(f) showing any favour or disfavour to any person in performing a function as a public officer;

(g) diverting, for purposes unrelated to those for which they were intended, any property belonging to the state which such officer received by virtue of his or her position for purposes of administration, custody or for any other reason, to another person; or

(h) exerting any improper influence over the decision making of any person performing functions in a public body.

Offences in respect of corrupt activities relating to foreign public officials

(1) Any person who, directly or indirectly gives or agrees or offers to give any gratification to a foreign public official, whether for the benefit of that foreign public

official or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner-

- (a) that amounts to the-
  - (i) illegal, dishonest, unauthorised, incomplete, or biased; or
  - (ii) misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;
- (b) that amounts to-
  - (i) the abuse of a position of authority;
  - (ii) a breach of trust; or
  - (iii) the violation of a legal duty or a set of rules;
- (c) designed to achieve an unjustified result; or
- (d) that amounts to any other unauthorised or improper inducement to do or not to do anything, is guilty of the offence of corrupt activities relating to foreign public officials.

(2) Without derogating from the generality of section 2 (4), 'to act' in subsection (1) includes-

- (a) the using of such foreign public official's or such other person's position to influence any acts or decisions of the foreign state or public international organisation concerned; or
- (b) obtaining or retaining a contract, business or an advantage in the conduct of business of that foreign state or public international organisation.

Offences in respect of corrupt activities relating to agents

Any-

- (a) agent who, directly or indirectly-
  - (i) accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or
  - (ii) gives or agrees or offers to give to any person any gratification, whether for the benefit of that person or for the benefit of another person; or
- (b) person who, directly or indirectly-
  - (i) accepts or agrees or offers to accept any gratification from an agent, whether for the benefit of himself or herself or for the benefit of another person; or
  - (ii) gives or agrees or offers to give any gratification to an agent, whether for the benefit of that agent or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner-
    - (aa) that amounts to the-
      - (aaa) illegal, dishonest, unauthorised, incomplete, or biased; or
      - (bbb) misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;
    - (bb) that amounts to-
      - (aaa) the abuse of a position of authority;
      - (bbb) a breach of trust; or
      - (ccc) the violation of a legal duty or a set of rules;
    - (cc) designed to achieve an unjustified result; or
- (ee) that amounts to any other unauthorised or improper inducement to do or not to do anything, is guilty of the offence of corrupt activities relating to agents.

Offences in respect of corrupt activities relating to members of legislative authority

(1) Any-

(a) member of the legislative authority who, directly or indirectly, accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or

(b) person who, directly or indirectly, gives or agrees or offers to give any gratification to a member of the legislative authority, whether for the benefit of that member or for the benefit of another person,

in order to act, personally or by influencing another person so to act, in a manner-

(i) that amounts to the-

(aa) illegal, dishonest, unauthorised, incomplete, or biased; or

(bb) misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;

(ii) that amounts to-

(aa) the abuse of a position of authority;

(bb) a breach of trust; or

(cc) the violation of a legal duty or a set of rules;

(iii) designed to achieve an unjustified result; or

(iv) that amounts to any other unauthorised or improper inducement to do or not to do anything, is guilty of the offence of corrupt activities relating to members of the legislative authority.

(2) Without derogating from the generality of section 2 (4), 'to act' in subsection (1) includes-

(a) absenting himself or herself from;

(b) voting at any meeting of;

(c) aiding or assisting in procuring or preventing the passing of any vote in;

(d) exerting any improper influence over the decision making of any person performing his or her functions as a member of; or

(e) influencing in any way, the election, designation or appointment of any functionary to be elected, designated or appointed by, the legislative authority of which he or she is a member or of any committee or joint committee of that legislative authority.

Offences in respect of corrupt activities relating to judicial officers

(1) Any-

(a) judicial officer who, directly or indirectly, accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or

(b) person who, directly or indirectly, gives or agrees or offers to give any gratification to a judicial officer, whether for the benefit of that judicial officer or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner-

(i) that amounts to the-

(aa) illegal, dishonest, unauthorised, incomplete, or biased; or

(bb) misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;

(ii) that amounts to-

(aa) the abuse of a position of authority;

- (bb) a breach of trust; or
- (cc) the violation of a legal duty or a set of rules;
- (iii) designed to achieve an unjustified result; or
- (iv) that amounts to any other unauthorised or improper inducement to do or not to do anything, is guilty of the offence of corrupt activities relating to judicial officers.

(2) Without derogating from the generality of section 2 (4), 'to act' in subsection (1) includes-

- (a) performing or not adequately performing a judicial function;
- (b) making decisions affecting life, freedoms, rights, duties, obligations and property of persons;
- (c) delaying, hindering or preventing the performance of a judicial function;
- (d) aiding, assisting or favouring any particular person in conducting judicial proceedings or judicial functions;
- (e) showing any favour or disfavour to any person in the performance of a judicial function; or
- (f) exerting any improper influence over the decision making of any person, including another judicial officer or a member of the prosecuting authority, performing his or her official functions.

Offences in respect of corrupt activities relating to members of prosecuting authority

(1) Any-

- (a) member of the prosecuting authority who, directly or indirectly, accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person;
- (b) person who, directly or indirectly, gives or agrees or offers to give any gratification to a member of the prosecuting authority, whether for the benefit of that member or for the benefit of another person,  
in order to act, personally or by influencing another person so to act, in a manner-
  - (i) that amounts to the-
    - (aa) illegal, dishonest, unauthorised, incomplete, or biased; or
    - (bb) misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;
  - (ii) that amounts to-
    - (aa) the abuse of a position of authority;
    - (bb) a breach of trust; or
    - (cc) the violation of a legal duty or a set of rules;
  - (iii) designed to achieve an unjustified result; or
- (iv) that amounts to any other unauthorised or improper inducement to do or not to do anything, is guilty of the offence of corrupt activities relating to members of the prosecuting authority.

(2) Without derogating from the generality of section 2 (4), 'to act' in subsection (1) includes-

- (a) performing or not adequately performing a function relating to the-
  - (i) institution or conducting of criminal proceedings;
  - (ii) carrying out of any necessary functions incidental to the institution or conducting of such criminal proceedings; or
  - (iii) continuation or discontinuation of criminal proceedings;

- (b) delaying, hindering or preventing the performance of a prosecutorial function;
- (c) aiding or assisting any particular person in the performance of a function relating to the institution or conducting of criminal proceedings;
- (d) showing any favour or disfavour to any person in the performance of a function relating to the institution or conducting of criminal proceedings; or
- (e) exerting any improper influence over the decision making of any person, including another member of the prosecuting authority or a judicial officer, performing his or her official functions.

PREVENTION OF COUNTERFEITING OF CURRENCY ACT 16 OF 1965  
[ASSENTED TO 10 MARCH 1965] [DATE OF COMMENCEMENT: 17 NOVEMBER  
1967]

(English text signed by the State President)

as amended by

Criminal Procedure Act 51 of 1977

South African Reserve Bank Act 90 of 1989

Justice Laws Rationalisation Act 18 of 1996

General Law Amendment Act 49 of 1996

Judicial Matters Amendment Act 34 of 1998

Judicial Matters Second Amendment Act 55 of 2003

ACT

To provide for the prevention of the counterfeiting of coin and the forging or altering of certain bank notes and for matters incidental thereto, to provide for certain persons being dealt with under the law relating to extradition, and to amend the Black Territories Penal Code (Act 24 of 1886 of the Cape of Good Hope), the Crimes Ordinance, 1904, of the Transvaal, the South African Reserve Bank Act, 1944, and the Criminal Procedure Act, 1955.

[a16y1965s1]1Definitions

In this Act, unless the context otherwise indicates-

'bank note' includes any paper money which is legal tender in the State or territory in which it is issued, irrespective of the name by which it is known, but does not include a bank note issued under section fourteen of the South African Reserve Bank Act, 1989 (Act 90 of 1989);

[Definition of 'bank note' amended by s. 4 of Act 18 of 1996.]

'counterfeit coin' means any coin, other than current coin, resembling or apparently intended to resemble or pass for current coin, and includes current coin prepared or altered so as to resemble or pass for coin of a higher denomination;

'current coin' means any coin the issue and circulation of which, in any State or territory, as money have been authorized by law;

'Republic' .....

[Definition of 'Republic' deleted by s. 1 of Act 49 of 1996.]

[a16y1965s2]2Offences relating to current coin and bank notes

Any person who-

(a) counterfeits or performs any part of the process of counterfeiting any current coin;

(b) forges or alters a bank note;

(c) utters, tenders or accepts any counterfeit coin, knowing it to be counterfeit, or a forged or altered bank note, knowing it to be forged or altered;

(d) without lawful authority or excuse-

(i) has in his or her possession any counterfeit coin or any forged or altered bank note;

(ii) imports or receives into the Republic any counterfeit coin or any forged or altered bank note; or

(iii) exports from the Republic or puts or takes or causes to be put or taken on board any ship, vessel, boat, aircraft or vehicle for the purpose of being so exported, any counterfeit coin or any forged or altered bank note;

[Para. (d) substituted by s. 2 of Act 34 of 1998.]

(e) with intent to counterfeit current coin or to forge a bank note, makes, mends, obtains, has in his possession or disposes of any tool, instrument or machine-

(i) intended for making any counterfeit coin or forged bank note;

(ii) intended for the marking of coin round the edges with letters, grainings or other marks or figures resembling letters, grainings, marks or figures round the edges of any current coin; or

(iii) capable of being used for preparing any material for receiving any impression resembling that on any current coin;

(f) gilds, silvers or colours any piece of metal of a size or figure fit to be coined, for the purpose of coining it into counterfeit coin;

(g) makes any piece of metal into a size or figure fit to be coined, with intent to facilitate the coining therefrom of counterfeit coin or for the purpose of coining therefrom counterfeit coin;

(h) buys, sells or is in possession of a piece of metal referred to in paragraph (f) or (g) for a purpose referred to therein;

(i) impairs, diminishes or lightens any current coin with intent that such coin when so impaired, diminished or lightened may pass as current coin;

(j) without lawful authority or excuse has in his possession or disposes of or in any way deals with any filing or clipping, or any gold or silver bullion, or any gold or silver in dust, solution or otherwise, produced or obtained by impairing, diminishing or lightening current coin, knowing that it has been so produced or obtained;

(k) with intent to defraud, utters, tenders, disposes of or otherwise uses as current coin any medal or piece of metal which is not current coin;

(l) without lawful authority or excuse defaces any current coin by stamping thereon any word, letter, device or mark,  
shall be guilty of an offence and liable on conviction-

(i) in the case of an offence referred to in paragraph (a), (b), (c), (e), (f), (g) or (i), to imprisonment for a period not exceeding fifteen years;

(ii) in the case of an offence referred to in paragraph (d) or (h), to imprisonment for a period not exceeding five years;

(iii) in the case of an offence referred to in paragraph (j), to imprisonment for a period not exceeding three years; and

(iv) in the case of an offence referred to in paragraph (k) or (l), to imprisonment for a period not exceeding twelve months.

[a16y1965s3]3Certain offences in respect of currency extraditable offences in certain circumstances

(1) If-

(a) the Republic has acceded to the Convention for the Suppression of Counterfeiting Currency drawn up at Geneva on the twentieth day of April, 1929; and

(b) a person is accused or has been convicted within the jurisdiction of a foreign State as defined in section one of the Extradition Act, 1962 (Act 67 of 1962), of one or more of such offences as are mentioned in subsection (2) of this section; and

(c) an extradition agreement which has been or is deemed to have been entered into under the said Act with such State or a State under whose sovereignty or protection such first-mentioned State is, is in force; and

(d) the State referred to in paragraph (b) or a State under whose sovereignty or protection such first-mentioned State is, has signed and ratified or acceded to the said Convention,

such person may, notwithstanding anything to the contrary contained in the said Extradition Act, 1962, or in the said agreement, but subject to the provisions of subsection (3) of this section, be surrendered, to the State in respect of which such agreement is so in force, in the manner prescribed by any law relating to extradition and in force in the Republic.

(2) The offences referred to in paragraph (b) of subsection (1) shall be the following, namely-

- (a) counterfeiting any current coin;
- (b) an offence referred to in paragraph (b) of section two;
- (c) an offence referred to in paragraph (c) of section two;
- (d) without lawful authority or excuse importing or receiving into the State or territory in question a counterfeit coin or a forged or altered bank note;
- (e) an offence referred to in paragraph (e) of section two; and
- (f) attempting to commit any offence referred to in paragraph (a), (b), (c), or (d) of this section.

(3) The provisions of subsection (1) shall cease to apply-

- (a) if the Convention referred to in the said subsection (1) is denounced on behalf of the Republic; or
- (b) in respect of a State or territory, if the said Convention is denounced on behalf of that State or the State under whose sovereignty or protection that territory is, as the case may be, and a period of at least one year has lapsed after such denunciation.

[a16y1965s4]4Evidence and onus of proof

(1) A certificate purporting to have been signed by the Director General: Foreign Affairs, or a person designated thereto by him, to the effect that a State mentioned therein has signed and ratified or acceded to the Convention referred to in subsection (1) of section three shall, upon its production by any person in any proceedings under any law relating to extradition, be admissible in evidence in such proceedings and be prima facie proof of the facts set forth therein.

[Sub-s. (1) amended by s. 4 of Act 18 of 1996.]

(2) If in any prosecution for a contravention of paragraph (d), (j) or (l) of section 2 the question arises whether any person had lawful authority or excuse for possessing or doing any thing referred to in the said paragraphs, in the absence of evidence to the contrary which raises reasonable doubt, proof of possession or conduct contemplated in the said paragraphs (d), (j) and (l) shall be sufficient evidence of the absence of lawful authority or excuse.

[Sub-s. (2) substituted by s. 3 of Act 55 of 2003.]

[a16y1965s5]5Repeals sections 228 to 230, inclusive, of the Black Territories Penal Code, Act 24 of 1886

of the Cape of Good Hope.

[a16y1965s6]6Amends section 3 of the Crimes Ordinance, 1904

(Ordinance 26 of 1904 of the Transvaal).

[a16y1965s7]7Repeals sections 18 to 28, inclusive, of the Crimes Ordinance, 1904 (Ordinance 26 of 1904 of the Transvaal).

[a16y1965s8 and 9]8 and 9 .....

Cases

[Ss. 8 and 9 repealed by s. 40 (1) of Act 90 of 1989.)

[a16y1965s10]10 .....

[S. 10 repealed by s. 344 (1) of Act 51 of 1977.]

[a16y1965s11]11 .....

[S. 11 repealed by s. 1 of Act 49 of 1996.]

[a16y1965s12]12 Short title and commencement

This Act shall be called the Prevention of Counterfeiting of Currency Act, 1965, and shall come into operation on a date to be fixed by the State President by proclamation in the Gazette.