

Plenty of laws to fight corruption

AFTER the much publicised arms deal scandal, estimations of the cost of white-collar crime and corruption to the South African economy have escalated from the conservative levels of about R50bn a year to a high, but questionable, projected impact of R150bn a year.

It is, however, impossible to determine the true impact of this scourge, as available statistics are notoriously unreliable and are heavily influenced by the fact that the bulk of the corruption cases that are committed on a daily basis in virtually all spheres of the private and public sector are seldom detected.

The prevalence of white-collar crime in any business invariably creates an impression of corporate governance failure, lack of oversight and proper control, and probable negligence which discourages managers and executives from reporting fraud or theft matters.

White-collar crimes are significantly under-reported in SA. The negative effect on share prices, damage to reputation, lack of confidence in the criminal justice process and sympathy for the offender have al-

ways been key considerations for organisations. However, the phenomenon of under-reporting was supposed to have been addressed by the introduction of the Prevention and Combating of Corrupt Activities Act which was promulgated in April 2004. This new anticorruption legislative initiative criminalises management's failure to report in certain circumstances.

Under section 34 of the act, any person in a position of authority who knows, ought reasonably to have known, or suspected that an act of corruption, fraud, theft, extortion, forgery or uttering of a forged document, has been committed, involving an amount of R100 000 or more, must report such knowledge or suspicion to any police official, failing which he or she is deemed to commit an offence carrying a maximum sentence of 10 years' jail.

The act is an extremely powerful legislative enactment, which is not only designed to help the state deal with the corruption cancer which threatens our economy, but is a powerful anticorruption statement by government. Its effectiveness is, however, being undermined by a



combination of business apathy and/or pragmatism.

The reporting obligation commenced at the end of July 2004. However, many managers and executives are blissfully ignorant of the criminality of their actions when they take the softer option of allowing white-collar crime offenders to simply resign rather than face the prospect of labour disputes, protracted investigation and lengthy court processes.

Creating awareness regarding the criminalisation of the failure to report white-collar crime matters to the police will help correct this; the prosecution of one or two executives is likely to encourage people to do the right thing.

The new corruption act has also broadened the definition of what

conduct constitutes corruption and it has criminalised a whole series of "corrupt activities".

The definition of corruption which is provided by the Prevention and Combating of Corrupt Activities Act is long and complicated, but the essence is that any person (including a company, partnership, board of trustees) who gives or accepts (including; agrees/offers/procures/solicits/demands etc to give or accept) (directly or indirectly) (for benefit of himself or another), any gratification in order to act (or omit to act) in an improper exercise or performance of a power or duty (improper includes dishonest, illegal, unauthorised, incomplete, biased), is guilty of the offence of corruption.

"Gratification" has been purposefully widely defined to include any

valuable consideration or benefit of any kind, such as money, property, office or employment.

Corruption is notoriously difficult to prove as the kickback is paid "off book" and is seldom detectable in books and records of either the provider or the recipient of a bribe. In situations where a positive money trail can be found, the corrupt parties invariably claim that the illicit benefit was a loan.

Section 24 of the act is designed to assist the state in overcoming this evidentiary obstacle (the loan excuse) in that it provides for a limited reversal of the burden of proof in relation to the mens rea element of corruption. In layman's terms this means that in certain circumstances a rebuttable presumption will arise that the gratification was given for a corrupt purpose.

The new corruption law not only focuses its attention on corrupt activities committed within our country, but also makes provision for extraterritorial jurisdiction in respect of acts of corruption committed outside the borders of SA. Criminal sanctions are provided for South African individuals or entities caught paying bribes in neighbouring states.

Another powerful aspect of this legislation is that it also makes provision for blacklisting of individuals and enterprises convicted of corrupt activities relating to tenders and contracts. Upon conviction in a criminal court, the clerk of the court is required to send the particulars of the offending entity or individual to the registrar at treasury who keeps a register of offenders. Prior convictions disqualify offenders from pursuing state tenders.

The Prevention and Combating

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