

Corruption lingering with intent

The Prevention and Combating of Corrupt Activities Act No 12 of 2004 was signed into law in April 2004, and eight rocky years on, little has changed, with white collar crime rearing its ugly head all too often

To delve deeper into the epidemic, *Blue Chip* invited specialist fraud attorney, Peter Feuilherade, a Partner at Cox Yeats Attorneys, to unpack the Act and rate its effectiveness or lack thereof.

Any party who accepts or agrees to accept any gratification from another person or gives or agrees or offers to give to any other person gratification so as to influence another person to act in a manner that amounts to illegal, dishonest or incomplete or bias behaviour and where this amounts to the abuse of a position of authority or breach of trust or the violation of a legal duty or set of rules, is guilty of corruption.

The definition of gratification under the Act is widely interpreted to include money in cash or otherwise, but also donations; gifts; loans or fees; forfeiture of penalties; granting of any contract or service; the release or discharge of a loan; discounts; rebates; bonuses and commission.

The effect of this is that companies which give generous gifts to clients, could very well be guilty of corruption. Much will depend on the circumstances and whether such gifts gave rise to any bias or dishonest act.

The Act also provides that a register of tender defaulters is to be established with the National Treasury. All persons who have been involved with corrupt activities are recorded in the register. This information is kept for up to ten years. Any person or company listed on that register may not do any business with a government department while listed in the register.

It is of concern that although this register exists there are companies which have perpetrated fraud and corruption previously who appear to be used again by the government or provincial departments.

The efficacy of this register must be called into question and it certainly needs to be tightened up. Ominously, there is also a provision in the Act that requires that even in the absence of corruption, where a person in a position of authority knows that an offence of theft, fraud, extortion, forgery or offering of forged documents involving a sum of R100 000 or more has been perpetrated in their organisation, this has to be reported through a specific police reporting mechanism.

Failure to do so can lead to ten years imprisonment. It appears that this has been included in the act to prevent a common practise of employers dismissing dishonest employees without criminal prosecution.

This can happen several times before anyone decides to take action. Persons in authority include an executive manager of any bank, a partner in a partnership, a chief executive officer or managing director or equivalent officer of any agency,

authority, board, commission, council, foundation, a manager, secretary or director of a company registered under the Companies Act and a director-general of any national or provincial department of the government. The National Director of Public Prosecutions has wide powers to investigate corruption and to obtain search and seizure orders and issue subpoenas on any person suspected of corruption.

The Act provides that if the corrupt act took place outside South Africa, a court in South Africa still has the right to try the perpetrator if that person is either a citizen of South Africa, is ordinarily resident in South Africa, or is a company that is incorporated or registered under any law in South Africa.

This gives the South African authorities the right to prosecute a South African registered company that may have perpetrated a corrupt act in another country.

Penalties are extremely harsh. Perpetrators can be sentenced to life imprisonment, and courts have the power to impose fines equal to five times the value of gratification involving the offence.

There are certain presumptions of guilt which shift the onus to an accused to prove that they did not accept or offer gratification.

This is a change from the fundamental principle that the State must prove all crimes beyond a reasonable doubt. The Act also provides that it is not a defence to argue that the person or party receiving gratification did not actually have the power, right or opportunity to perform, or not to perform, an act.

The Act is a comprehensive piece of legislation which, if implemented properly, could go a long way to defeating corruption in South Africa. The problem, however, is that the offence of corruption is notoriously difficult to prove, and in the absence of apprehending a perpetrator in the act, for example in a sting operation, it can be very difficult to secure a conviction. Most of our perceptions revolve around corrupt government officials and politicians without the recognition that for such corruption to occur it requires more than one party.

Often that other party is a member of the business community. He or she may argue that they have little choice but to offer a bribe or some other type of gratification to secure a contract but unless this practise is stopped in its tracks, it becomes a vicious circle that eventually engulfs the entire country. My view is that, in order to secure more convictions, the police authorities must conduct more sting undercover operations to catch both government and private sector officials involved in this practise.

A few sentences of fifteen years or more in prison will, I believe, serve as a costly reminder that corruption does not pay.