THE ESCALATION OF CORPORATE CORRUPTION DURING THE COVID-19 PANDEMIC: IS THE ANTI-CORRUPTION FRAMEWORK OF THE COMPANIES ACT 71 OF 2008 ADEQUATE?

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Abstract

During the Covid-19 pandemic, corruption in South African companies, both state-owned and privately-owned, reached staggering proportions. This included bribery, procurement irregularities, overpricing and fraudulent deals between government officials and companies. This article identifies provisions of the Companies Act 71 of 2008 that may be used to address corporate corruption. This is done with a view to ascertaining whether the anti-corruption framework of the Companies Act is adequate to counteract corporate corruption. It concludes that the Act contains a fairly comprehensive framework to tackle corruption in companies registered under it. In spite of this framework the level of corporate corruption remains high, and increased substantially during the Covid-19 pandemic. The article makes recommendations to reduce these high levels of corporate corruption.

Keywords: *Companies Act 71 of 2008; corporate corruption; bribery; social and ethics committee; disqualification of directors; whistle-blowers*

1 Introduction

The pandemic caused by SARS-CoV-2 (the coronavirus disease 2019 (Covid-19)) created uncertain economic conditions for many South African companies. The forced shutdown of non-essential businesses and services caused many companies to rely on remote working,[1] one effect of which may have been a lower level of oversight or even a failure to carry out due diligence. As compliance requirements in South Africa were suspended in the context of emergency state procurement, many companies benefited from

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1 A national state of disaster was declared on 15 March 2020 under the Disaster Management Act 57 of 2002 (in terms of GN R 313 in *GG* 43096 of 15-03-2020). The lockdowns imposed in response to the pandemic were implemented from 26 March 2020, in terms of GN R 398 in *GG* 43148 of 25-03-2020.

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corrupt transactions.[2] In the course of the national lockdowns in 2020 the scale of corruption in South African companies reached staggering proportions. An audit of Covid-19 expenditures in South Africa reveals overpricing, fraud, and corruption.[3] While the Covid-19 pandemic remains the greatest global concern, many South Africans are more concerned about the distressing levels of corruption in the country.[4]

In 2020, Corruption Watch recorded the second highest number of reports of corruption received in a year, most of them from Gauteng.[5] The most reported forms of corruption in 2020 and 2021 in state institutions and companies were maladministration, compliance issues, procurement irregularities, soliciting of kickbacks, bribery and fraud.[6] Corruption Watch recorded a high level of corruption in the private sector during the Covid-19 pandemic. Malpractices by companies included fraudulent deals between government officials and companies to provide medical equipment which they had no licences to sell or distribute;[7] inflated prices to supply personal protective equipment ("PPE") by companies[8] (such as Dis-Chem Pharmacies Limited);[9] irregular contracts with companies to decontaminate schools in Gauteng during the Covid-19

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2 Corruption Watch "In South Africa, Covid-19 Has Exposed Greed and Spurred Long-Needed Action against Corruption" (04-09-2020) *Transparency International* <https://www.transparency.org/en/blog/in-south-africa-covid-19-has-exposed-greed-and-spurred-long-needed-action-against-corruption> (accessed 04-07-2022).

3 Transparency International "Corruption Perceptions Index 2021" (2022) *Transparency International* <https://www.transparency.org/en/cpi/2021> (accessed 04-07-2022). The Corruption Perceptions Index published by Transparency International ranks 180 countries according to their perceived levels of public sector corruption. Zero indicates a highly corrupt state while 100 indicates a very clean state. South Africa scored a fail mark of 44 in 2021 (it received the same score in 2019 and 2020 as well). In 2020, South Africa had a ranking of 69 (out of 180 countries surveyed) on the global scale in terms of its perceived level of public sector corruption, but slipped down to a ranking of 70 in 2021.

4 Business Insider SA "Survey Shows South Africans Are More Worried about Corruption than Covid" (22-01-2021) *Business Insider SA* <https://www.businessinsider.co.za/survey-south-africans-are-more-worried-about-corruption-than-covid-2021-1> (accessed 04-07-2022).

5 Corruption Watch "Annual Report 2020: From Crisis to Action" (2020) *Corruption Watch* <https://www.corruptionwatch.org.za/wp-content/uploads/2021/05/Corruption-Watch-AR-2020-DBL-PG-20210324.pdf> (accessed 04-07-2022). In 2021 the number of corruption reports received by Corruption Watch decreased slightly compared to 2020 but it still remains a significant figure. The highest number of reports of corruption came again from Gauteng in 2021 (Corruption Watch "Annual Report 2021: Ten Years Pushing for Change" (2021) *Corruption Watch* <https://www.corruptionwatch.org.za/wp-content/uploads/2022/03/cw-2021-annual-report-10-years-20220330-spreads.pdf> (accessed 04-07-2022)).

6 Corruption Watch "Annual Report 2020: From Crisis to Action" *Corruption Watch* 18; Corruption Watch "Annual Report 2021: Ten Years Pushing for Change" *Corruption Watch* 31.

7 M Heywood "Scandal of the Year: Covid-19 Corruption" (27-12-2020) *Maverick Citizen* <https://www.dailymaverick.co.za/article/2020-12-27-scandal-of-the-year-covid-19-corruption/> (accessed 04-07-2022).

8 The Special Investigating Unit ("SIU") estimates that the amount of irregular expenditure on Personal Protective Equipment ("PPE") in Gauteng was R2 billion (Heywood "Scandal of the Year: Covid-19 Corruption" *Maverick Citizen*). The SIU estimates further that, as at June 2021, the estimated costs of its investigations into irregular and corrupt procurement of PPE by government departments was R351 million, while the potential amount recoverable was R1.39 billion. As at the end of June 2021 there were 4 302 Covid-19 PPE contracts under investigation involving 2 421 service providers, but new cases were continually being added (L Ensor "SIU: As Much As R1.39bn Can Be Recouped After PPE Probes" *Business Day* (02-09-2021 2)).

9 Dis-Chem Pharmacies Limited was found guilty by the Competition Tribunal of the excessive pricing of surgical face masks and material price increases (in the magnitude of between 43% to 261%) during the Covid-19 pandemic without any corresponding increases in costs. It was ordered to pay an administrative penalty of R1 200 000 (*Competition Commission of South Africa v Dis-Chem Pharmacies Limited* (CR008Apr20) 2020 Competition Tribunal of South Africa (7 July 2020) *Competition Tribunal South Africa* <https://www.comptrib.co.za/case-detail/9112> (accessed 04-07-2022)).

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lockdowns;[10] and the abuse of the temporary employer/employee relief scheme ("TERS") by many private companies claiming benefits on behalf of unknowing employees and deceased people.[11] It was also reported that companies that were not registered with the South African Health Products Regulatory Authority ("SAHPRA") had provided PPE to frontline healthcare workers.[12]

The United Nations ("UN") Convention against Corruption,[13] to which South Africa is a signatory, describes corruption as "an insidious plague that has a wide range of corrosive effects on societies" and a "key element in economic underperformance".[14] In South Africa, the Preamble to the Prevention and Combating of Corrupt Activities Act 12 of 2004 ("PRECCA") recognises that corruption endangers the security and stability of societies, undermines ethical values and morality, jeopardises sustainable development and the rule of law, and is equally destructive in the public and private spheres. In *South African Association of Personal Injury Lawyers v Heath*[15] and *Glenister v President of the Republic of South Africa*[16] the Constitutional Court stressed that corruption is inconsistent with the fundamental values of the Constitution of the Republic of South Africa, 1996 (the "Constitution") – it undermines the constitutional commitment to human dignity, the achievement of equality, and the advancement of human rights and freedoms.

Several statutes form part of South Africa's legal framework governing corruption. These include PRECCA, the Prevention of Organised Crime Act 121 of 1988, the Competition Act 89 of 1988, the Public Finance Management Act 1 of 1999, the Protected Disclosures Act 26 of 2000, the Financial Intelligence Centre Act 38 of 2001, and the Companies Act 71 of 2008.[17] This article concentrates on the last one, the Companies Act, and identifies its salient provisions that may be used to address corporate corruption. Rather than examining them comprehensively, the article ascertains whether the anti-corruption framework in the Companies Act is adequate to counteract corporate

[10] Contracts to decontaminate 237 schools in Gauteng during the Covid-19 lockdowns in 2020 were irregularly awarded to several companies, in the amount of R63.5 million. The recipient companies refused to reimburse the funds but got rid of them with the intention of frustrating any claim by the SIU or the Gauteng Education Department. It is not clear whether the schools had been cleaned by these companies (G Hosken "'Cleansing' Deals Funded Shopping" *Sunday Times* (06-06-2021) 2).

[11] Corruption Watch "Annual Report 2020: From Crisis to Action" *Corruption Watch* 18. It was found that an amount of R228 million was fraudulently claimed by employers (L Mkentane "Minister Admits to the State's 'Incapacity' over Relief Funding" *Business Day* (14-06-2021) 2).

[12] Heywood "Scandal of the Year: Covid-19 Corruption" *Maverick Citizen*.

[13] (New York, adopted on 31-10-2003) 2349 *UN Treaty Series* 41, entered into force 14-12-2005 ("UNCAC").

[14] United Nations ("UN") *United Nations Convention against Corruption* (2004) iii.

[15] 2001 1 SA 883 (CC) para 4.

[16] 2011 3 SA 347 (CC) para 166.

[17] South Africa has also signed several anti-corruption conventions, such as the UNCAC, the UN Convention against Transnational Organized Crime (New York, adopted on 15-11-2000) 2225 *UN Treaty Series* 209, entered into force 29-09-2003; the Southern African Development Community ("SADC") Protocol Against Corruption (Blantyre, adopted on 14-08-2001), entered into force 23-07-2005; the Organisation for Economic Co-operation and Development ("OECD") Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Paris, adopted on 17-12-1997) 2802 *UN Treaty Series*, entered into force 15-02-1999; and the African Union Convention on Preventing and Combating Corruption (Maputo, adopted on 11-07-2003) 2860 *UN Treaty Series*, entered into force 05-08-2006. These conventions are discussed in *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) paras 183-189.

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corruption. Some general recommendations are also made for mitigating the high level of corporate corruption in South African companies.

It is important to note that virtually all South African state-owned entities are nowadays registered as companies in terms of the Companies Act or are made subject to that Act even if they are incorporated under other legislation.[18] For the purpose of this article it is therefore irrelevant whether the legal person involved in the corruption is owned by the state or by private shareholders.

2 Corporate corruption

The term "corruption" does not appear in the Companies Act but PRECCA defines it and designates it a criminal offence.[19] PRECCA governs the public and private sectors, and even transactions involving only private parties.[20] The "private sector" is defined in PRECCA as including individuals, partnerships, and companies, but excluding public officers, public bodies, and the legislative, judicial, and prosecuting authorities.[21] In *S v Shaik*[22] the court said that corruption is penalised in the public sector because society has an interest in the transparency and integrity of public administration,[23] and in the private sector because corruption undermines the principles of lawful competition and free enterprise.[24]

Under section 3 of PRECCA, corruption involves a person (directly or indirectly) accepting, agreeing, or offering to accept any gratification from any person or giving, agreeing, or offering to give any gratification to any person, in order for that person to act or influence someone else to act in a manner:

(i) that is illegal, dishonest, unauthorised, incomplete or biased in the exercise of any powers, duties, or functions arising out of a constitutional, statutory, contractual, or any other legal obligation;
(ii) that amounts to the abuse of a position of authority, a breach of trust, or the violation of a legal duty or set of rules;
(iii) that is designed to achieve an unjustified result; or

[18] Eg the South African Broadcasting Corporation SOC Limited is incorporated by the Broadcasting Act 4 of 1999, but s 8A(5) of that Act applies the Companies Act 71 of 2008 to it "as if it had been incorporated in terms of the Companies Act."

[19] In an *obiter dictum* in *Scholtz v The State* 2018 4 All SA 14 (SCA) paras 126-127, the court cast doubt on whether the Prevention and Combating of Corrupt Activities Act 12 of 2004 ("PRECCA") had repealed the common-law crime of bribery in its entirety. See further D Lambrechts "The Prevention and Combating of Corrupt Activities Act as an Investigative Instrument Pertaining to Bribery and Corruption" (2018) 17 *Acta Criminologica* 106 107. See s 26(1) of PRECCA.

[20] See s 2 of PRECCA. For a detailed discussion of PRECCA, see T Budhram & N Geldenhuys "Corruption in South Africa: The Demise of a Nation? New and Improved Strategies to Combat Corruption" (2018) 31 *SACJ* 26.

[21] S 1 of PRECCA.

[22] 2007 1 SACR 142 (D) 156I-157B.

[23] S 195(1) of the Constitution of the Republic of South Africa, 1996 (the "Constitution") requires the administration in every sphere of government, organs of state, and public enterprises to be governed by the values and principles enshrined in the Constitution, with a high standard of professional ethics being maintained, and services being provided impartially, fairly, equitably, and without bias.

[24] Eg, the corruptor may offer a bribe to obtain preference over a competitor whose product or service is actually better, but who does not resort to bribery (see *S v Shaik* 2007 1 SACR 142 (D) 156I-157A).

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(iv) that amounts to any other unauthorised or improper inducement to do or not to do anything.

Simply put, corruption is committed if anyone accepts any gratification from anyone else, or gives any gratification to anyone else, in order to influence the receiver to behave in a way that amounts to the unlawful exercise of any duties.[25] Both the giver and receiver of the gratification commit the crime of corruption.[26] A gratification is widely defined in section 1 of PRECCA to include money, a gift, fee, reward, status, employment, a right or privilege, a service, favour, advantage of any description, or any valuable consideration or benefit of any kind.

Corporate corruption is the misuse of formal power by a corporate representative for personal benefit or for the company's benefit.[27] It may occur in a single company, between companies, or between a company and the state (for example, in connection with the award of government contracts or a director bribing a public official for a certain favour).[28] So there may be some overlap between corruption in the private and public sectors. Corporate corruption has generally taken the form of bribery, fraud in state procurement, collusion between a company insider and an external third party for the insider's benefit, and the misappropriation of corporate assets.[29] Companies involved in corrupt transactions may face many consequences: legal risks, reputational damage, commercial consequences, criminal and civil sanctions, and the erosion of trust and confidence from employees, shareholders, customers, and the public.[30] It is trite that corporate corruption offends against the principles of good governance.[31] Many companies still do not report corruption because of the stigma attached to admitting governance failures.[32]

The King IV Report[33] regards a company's board as the key entity to mitigate corporate corruption. The King IV Code requires the board to lead ethically and effectively,[34] and to govern the ethics of the company in a way that supports the establishment of an ethical culture.[35] In *South African Broadcasting Corporation Ltd v Mpofu*[36] the court emphasised the integrity and ethical

[25] *Scholtz v The State* 2018 4 All SA 14 (SCA) para 123.
[26] Para 124.
[27] A Castro, N Phillips & S Ansari "Corporate Corruption: A Review and an Agenda for Future Research" (2020) 14 *Academy of Management Annals* 935 938.
[28] 938.
[29] South African Government *National Anti-Corruption Strategy Discussion Document* (2016) 11. Corporate cartel activities involving price fixing and collusive tendering have also become prevalent in recent years (T Budhram & N Geldenhuys "Combating Corruption in South Africa: Assessing the Performance of Investigating and Prosecuting Agencies" (2018) 31 *Acta Criminologica* 23 27)).
[30] UN Global Compact "Principle Ten: Anti-Corruption" *UN Global Compact* <https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-10> (accessed 04-07-2022).
[31] *S v Shaik* 2007 1 SA 240 (SCA) para 223.
[32] South African Government *National Anti-Corruption Strategy Discussion Document* 13.
[33] Institute of Directors Southern Africa ("IoDSA") *King IV Report on Corporate Governance for South Africa* (2016). The legal status of this report is that of a set of voluntary principles and leading practices (35), but compliance with certain provisions is mandatory for listed companies (see paras 7.F.8 to 7.F.9 and para 8.63(a) of the JSE Listings Requirements).
[34] Principle 1 of the King IV Code. The Code is found in part 5 of IoDSA *King IV Report*.
[35] Principle 2 of the King IV Code.
[36] 2009 4 All SA 169 (GSJ) para 64.

behaviour expected of the board. The King IV Code also requires the board to ensure that the company is, and is seen to be, a responsible corporate citizen.[37] Corporate citizenship recognises the company as an integral part of the broader society in which it operates, with rights but also with responsibilities and obligations.[38] This combination entails that the board should oversee and continuously monitor how the consequences of the company's activities and outputs affect its status as a responsible corporate citizen, a status that includes the company's detection of and response to fraud and corruption.[39]

3 Anti-corruption framework of the Companies Act

3 1 Introduction

The key provisions of the Companies Act that may be used to address corporate corruption are canvassed below.

3 2 The social and ethics committee

While absent from the Companies Act, the term "corruption" appears twice in regulation 43(5) of the Companies Regulations, 2011 ("Companies Regulations"),[40] setting out the functions of the social and ethics committee. Section 72(4) of the Companies Act read with regulation 43(1) requires a social and ethics committee to be appointed by state-owned companies, listed public companies, and companies that have in any two of their previous five years scored above 500 points in their public interest score.[41]

One function of the social and ethics committee is monitoring the company's activities with regard to social and economic development, including the company's standing in terms of the goals and purposes of the ten principles of the UN Global Compact Principles[42] and the Organisation for Economic Co-operation and Development ("OECD") recommendations regarding corruption (the "OECD Corruption Recommendations").[43] Another function is monitoring the company's activities in matters relating to good corporate citizenship, including the company's measures to reduce corruption.[44] As

37 Principle 3 of the King IV Code.

38 IoDSA *King IV Report* 11.

39 45 para 14b.

40 Companies Regulations, 2011 GN R 351 in *GG* 34239 of 26-04-2011, as amended by GN R 619 in *GG* 36759 of 20-08-2013 and GN R 82 in *GG* 37299 of 05-02-2014 (the "Companies Regulations").

41 See reg 26(2) for guidance on calculating the public interest score.

42 UN Global Compact "The Ten Principles of the UN Global Compact" (date unknown) *UN Global Compact* <https://www.unglobalcompact.org/what-is-gc/mission/principles> (accessed 05-07-2022).

43 The OECD recommendations regarding corruption, entitled "Combating Bribery, Bribe Solicitation and Extortion" (the "OECD Corruption Recommendations") are contained in Ch VII of Part 1 of the OECD *OECD Guidelines for Multinational Enterprises*, *2011 Edition* (2011) 47. The guidelines provide non-binding principles and standards for responsible business conduct which are aligned with internationally recognised standards (OECD *OECD Guidelines* 3). The UN Global Compact Principles and the OECD recommendations are referred to in the Companies Regulations in reg 43(5)(a)(i)(aa) and (bb) respectively. For a general discussion of the functions of the social and ethics committee, see HJ Kloppers "Driving Corporate Social Responsibility (CSR) through the Companies Act: An Overview of the Role of the Social and Ethics Committee" (2013) 16(1) *PELJ* 165 <https://perjournal.co.za/article/view/2307/2098> (accessed 05-07-2022).

44 Reg 43(5)(a)(ii)(aa) of the Companies Regulations.

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corporate corruption in South Africa has reached distressing proportions, monitoring a company's anti-corruption activities is vital.

The UN Global Compact Principles is a non-binding UN pact devised to encourage businesses globally to adopt sustainable and socially responsible policies. This pact sets out ten universal principles in the areas of human rights, the environment, labour, and anti-corruption. Under Principle 10 "businesses should work against corruption in all its forms, including extortion and bribery".[45] This principle requires companies to develop policies and concrete programmes to address corruption internally and within their supply chains.[46]

The non-binding OECD Corruption Recommendations also prohibit enterprises from offering, promising, giving, or demanding a bribe or other undue advantage to obtain or retain business or other improper advantage.[47] This document contains many specific anti-corruption recommendations. These include not requesting or accepting undue pecuniary or other advantages from public officials or the employees of business partners; not using third parties to channel undue pecuniary or other advantages to public officials, employees of business partners, or relatives of business associates; developing and adopting internal controls, ethics and compliance programmes and measures to prevent and detect bribery; and ensuring that a properly documented due diligence is undertaken on the appointment and oversight of agents.[48]

Other functions of the social and ethics committee are to draw matters within its mandate to the board's attention as the occasion requires, and to report to the shareholders at the annual general meeting on matters within its mandate.[49] In *Ex parte Links Golf Club (RF) Limited*,[50] the Companies Tribunal said that this function is intended to ensure that the board and shareholders recommend and take any appropriate corrective action which may be necessary because of the report. Consequently, the social and ethics committee must bring to the attention of the board and shareholders any failure of the company to comply with the anti-corruption provisions of the UN Global Compact Principles and the OECD Corruption Recommendations so that appropriate corrective action may be taken.

3 3 Standards of directors' conduct

Section 76, which partially codifies directors' fiduciary duties, is an important anti-corruption provision of the Companies Act, as it has the effect of prohibiting directors from accepting bribes and secret commissions. The common-law fiduciary duties that are not expressly amended by section 76 or

[45] The UNCAC is the underlying legal instrument for the tenth principle of the UN Global Compact Principles (see UN Global Impact "Principle Ten: Anti-Corruption" *UN Global Compact*).
[46] UN Global Impact "Principle Ten: Anti-Corruption" *UN Global Compact*.
[47] OECD *OECD Guidelines* 47.
[48] Principles 1, 2, and 4 of the OECD Corruption Recommendations.
[49] Regs 43(5)(b) and (c) of the Companies Regulations.
[50] (CT00550ADJ2020) 2020 Companies Tribunal of South Africa (19 March 2021) *Companies Tribunal* para 26 <https://www.companiestribunal.org.za/wp-content/uploads/2021/03/ct00550adj2020.pdf> (accessed 05-07-2022).

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are not in conflict with section 76, still apply.[51] Section 76 applies not only to directors but also to prescribed officers (such as the chief executive officer and the chief financial officer)[52] and members of board committees – irrespective of whether they are board members.[53]

The Supreme Court of Appeal made it clear in *Extel Industrial (Pty) Ltd v Crown Mills (Pty) Ltd*[54] that no court of law will countenance bribery, a form of corrupt conduct. As the Privy Council in *Attorney General for Hong Kong v Reid*[55] stressed, "bribery is an evil practice which threatens the foundations of any civil society". Secret commissions are also objectionable since they undermine trust in the commercial world.[56] When bribes are accepted by a fiduciary, loss and damage are caused to the principal whose interests have been betrayed.[57]

Section 76(2)(a) of the Companies Act states that a director must not use the position of director, or any information obtained while acting in the capacity of a director, to gain an advantage for the director or another person other than the company or a wholly-owned subsidiary of the company, or to knowingly cause harm to the company or a subsidiary of the company. Section 76(2)(a) encapsulates the no-profit rule, in terms of which directors may not retain any profit made by them in their capacity as directors while performing their duties as directors.[58] This rule applies even if the company would not itself have made the profit, and even if the director did not profit at the company's expense.[59] As affirmed by the Supreme Court of Appeal in *Modise v Tladi Holdings (Pty) Ltd*,[60] profit in this context is not confined to money but includes every advantage or gain obtained by the offending director.[61] If directors use their positions to solicit bribes for themselves, they contravene section 76(2)(a) by breaching the no-profit rule. Profits made by directors by reason of and in the course of their directorship must be disgorged to the company, unless the

[51] *Mthimunye-Bakoro v Petroleum and Oil Corporation of South Africa (SOC) Ltd* 2015 6 SA 338 (WCC) para 61; *Omar v Inhouse Venue Technical Management (Pty) Ltd* 2015 3 SA 146 (WCC) para 61; *CDH Invest NV v Petrotank South Africa (Pty) Ltd* 2018 1 All SA 450 (GJ) para 61 (this decision was confirmed on appeal in *CDH Invest NV v Petrotank South Africa (Pty) Ltd* 2019 4 SA 436 (SCA)); *Modise v Tladi Holdings (Pty) Ltd* 2020 4 All SA 670 (SCA) para 35.

[52] See reg 38 of the Companies Regulations for the definition of a "prescribed officer".

[53] S 76(1) of the Companies Act.

[54] 1999 2 SA 719 (SCA) 728B.

[55] 1994 1 All ER 1 (PC) 4.

[56] *FHR European Ventures LLP v Cedar Capital Partners LLC* 2014 UKSC 45 para 42.

[57] *Attorney General for Hong Kong v Reid* 1994 1 All ER 1 (PC) 4.

[58] *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 paras 177-178; *Regal (Hastings) Ltd v Gulliver* 1942 1 All ER 378 (HL) 386; *Dorbyl Ltd v Vorster* 2011 5 SA 575 (GSJ) para 25; FHI Cassim "The Duties and the Liability of Directors" in FHI Cassim (man ed) *Contemporary Company Law* 3 ed (2021) 681 742.

[59] *Modise v Tladi Holdings (Pty) Ltd* 2020 4 All SA 670 (SCA) para 36; Cassim "The Duties and Liability of Directors" in *Contemporary Company Law* 725.

[60] 2020 4 All SA 670 (SCA) para 36.

[61] In *Novoship (UK) Ltd v Mikhaylyuk* 2012 EWHC 3586 (Comm) 21 (14 December 2012) para 106 *BAILII* <http://www.bailii.org/cgi-bin/markup.cgi?doc=ew/cases/EWHC/Comm/2012/3586.html> (accessed 05-07-2022) the Queen's Bench Division Commercial Court also held that a bribe may encompass not just the payment of money but also the conferring of any advantage or benefit, and may be an actual benefit or merely the promise or expectation of one.

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majority of shareholders in a shareholders' meeting consent to the director's retaining the profit.[62]

The duty to account for profits is aimed at stripping the fiduciary of his ill-gotten profits.[63] This is illustrated in *Dorbyl Ltd v Vorster*.[64] An executive director who represented the company during the disposal of its assets, secretly acted on behalf of the purchasers of these assets, and was amply rewarded by both sides. The court held that the benefits received by the director from the purchaser were secret profits or bribes in the classic sense.[65] It ruled that the director failed to disclose to the company the benefit to himself in terms of sections 234 and 235 of the Companies Act 61 of 1973 (the equivalent of section 75 of the current Companies Act dealing with a failure to disclose personal financial interests) and had taken the benefit without the company's consent.[66] The court held that the secret profits must be disgorged to the company.[67]

This duty to account for secret profits or bribes may apply outside the established categories of fiduciary relationships if, upon a consideration of all the facts, it is clear that reliance by one party upon the other was justified.[68] For example, in *Ganes v Telecom Namibia Ltd*[69] the Supreme Court of Appeal held that bribes or secret commissions received by employees in the course of their employment or by means of their employment in breach of their fiduciary duty to the employer are deemed to have been received by the employer. In *Volvo (Southern Africa) (Pty) Ltd v Yssel*[70] the same court ordered a manager of a division of the company to disgorge secret commissions to the company even though he was not employed by the company but by a labour broker, which assigned him to provide his services to the company. The court ruled that the manager was in a position of trust, and was thus not entitled to allow his own interests to prevail over those of the company.[71] It held that it was the position to which the manager had been appointed – rather than the nature of the contractual relationship – that defined what the company could expect of him.[72] From this it follows that it is not only directors, prescribed officers, and board committee members who must disgorge their secret profits or bribes to the company. This requirement extends much further to include the company's employees and any other persons assessed to be standing in a fiduciary relationship to the company.

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62 *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 para 178; *Regal (Hastings) Ltd v Gulliver* 1942 1 All ER 378 (HL) 392; *Boardman v Phipps* 1966 3 All ER 721 (HL) 737, 744; *Phillips v Fieldstone Africa (Pty) Ltd* 2004 3 SA 465 (SCA) para 31; *Dorbyl Ltd v Vorster* 2011 5 SA 575 (GSJ) para 25.

63 *Modise v Tladi Holdings (Pty) Ltd* 2020 4 All SA 670 (SCA) para 42.

64 2011 5 SA 575 (GSJ).

65 Para 27.

66 Para 28.

67 Para 29.

68 *Volvo (Southern Africa) (Pty) Ltd v Yssel* 2009 6 SA 531 (SCA) para 17.

69 2004 3 SA 615 (SCA) para 29.

70 2009 6 SA 531 (SCA).

71 Para 20.

72 *Volvo (Southern Africa) (Pty) Ltd v Yssel* 2009 6 SA 531 (SCA) para 19. See further *Phillips v Fieldstone Africa (Pty) Ltd* 2004 3 SA 465 (SCA) and *Daewoo Heavy Industries (SA) (Pty) Ltd v Banks* 2004 4 SA 458 (C) paras 7-9.

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Section 75(4) of the Companies Act provides for directors (and prescribed officers and board committee members) to disclose to the board any personal financial interest in advance. A "personal financial interest" is a direct material interest of a financial, monetary, or economic nature or to which a monetary value may be attributed.[73] If a director acquires a personal financial interest in an agreement or other matter in which the company has a material interest after this has been approved by the company, under section 75(6), the director must promptly disclose the details of this interest to the board. A decision by the board or a transaction or agreement approved by the board is valid despite any personal financial interest of a director only if it was approved following disclosure of that interest, or despite having been approved without this disclosure, it has subsequently been ratified by an ordinary resolution of the shareholders following the disclosure, or has been declared to be valid by a court.[74] Even though a bribe may be treated as a secret profit and may comprise a personal financial interest, the board and shareholders may not approve or ratify the director's acceptance of a bribe, since the acceptance of a bribe is a criminal offence.[75] This outcome is fortified by section 78(2) of the Companies Act, which states that any provision of an agreement, the memorandum of incorporation or rules of a company, or a resolution adopted by a company is void to the extent that it directly or indirectly purports: (i) to relieve a director of a duty contemplated in section 75 or section 76 or a liability contemplated in section 77; or (ii) negates, limits, or restricts any legal consequence arising from an act or omission that constitutes wilful misconduct or wilful breach of trust by the director.

Other relevant fiduciary duties in the context of corruption by directors, as embodied in section 76(3)(a) of the Companies Act, are the duty to exercise their powers and perform their functions as directors in good faith and for a proper purpose. "Proper purpose" is generally understood to mean that directors must exercise their powers for the objective purpose for which the power was given to them, and not for a collateral or ulterior purpose or motive.[76] Section 76(3)(b) of the Companies Act is also a relevant anti-corruption provision since it states that directors have a duty to exercise their powers and perform their functions in the best interests of the company. This is the overarching fiduciary duty of directors from which all the other fiduciary duties flow.[77]

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[73] S 1 of the Companies Act.

[74] S 75(7).

[75] A person convicted of an offence under PRECCA is liable to a fine or to imprisonment, which may range from five years to life imprisonment, depending on the offence committed. A court may also impose a fine equal to five times the value of any gratification involved in the offence (ss 26(1) and 26(3) of PRECCA).

[76] *Hogg v Cramphorn Ltd* 1967 Ch 254 268-269; *Extrasure Travel Insurances Ltd v Scattergood* 2003 1 BCLC 598 (ChD) 619; *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd* 2014 5 SA 179 (WCC) para 80; *Eclairs Group Ltd v JKX Oil & Gas plc* 2016 3 All ER 641 (UKSC) para 15; *CDH Invest NV v Petrotank South Africa (Pty) Ltd* 2019 4 SA 436 (SCA) para 24; Cassim "The Duties and Liability of Directors" in *Contemporary Company Law* 709.

[77] *Fisheries Development Corporation of SA Ltd v Jorgensen; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd* 1980 4 SA 156 (W) 163E; *Da Silva v CH Chemicals (Pty) Ltd* 2008 6 SA 620 (SCA) para 18; *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty)* 2014 5 SA 179 (WCC) para 80; *CDH Invest NV v Petrotank South Africa (Pty) Ltd* 2018 1 All SA 450 (GJ) para 47; *Modise v Tladi Holdings (Pty) Ltd* 2020 4 All SA 670 (SCA) para 35.

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Under section 77(2)(a) of the Companies Act, a director may be held liable in accordance with the common-law principles relating to breach of a fiduciary duty for any loss, damages, or costs sustained by the company as a consequence of any breach of a duty contemplated in sections 76(2), 76(3)(a) or 76(3)(b). A director who acquiesces in the carrying on of the company's business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose, or who was a party to an act or omission by the company despite knowing that it had a fraudulent purpose, may be held personally liable by the company for any loss, damages or costs sustained by the company.[78]

The Companies Act does not expressly prohibit a director from taking bribes. In sharp contrast, section 176 of the Companies Act 2006 in the United Kingdom ("UK Companies Act") expressly contains an anti-bribery clause. It prohibits directors from accepting a benefit from a third party conferred by reason of being a director or doing or not doing anything as a director.[79] A "third party" is a person other than the company, an associated body corporate or a person acting on behalf of the company or an associated body corporate.[80] The connection of this rule with the no-conflict principle is underlined by section 176(4) of the UK Companies Act which states that the duty is not infringed if the acceptance of the benefit cannot reasonably be regarded as likely to give rise to a conflict of interest.[81] It is submitted that it is not essential for the South African Companies Act to have an express anti-bribery clause equivalent to section 176 of the UK Companies Act since the acceptance of a bribe may be dealt with under section 76 of the Companies Act — but such a clause may well serve as a stronger anti-corruption deterrent.

3 4 Disqualification and removal of corrupt directors

A director convicted of corruption is automatically disqualified from holding office as a director. Section 69(8)(b)(iv) of the Companies Act states that a person is disqualified to be a director of a company if he or she has been convicted, in South Africa or elsewhere, and imprisoned without the option of a fine, or fined more than the prescribed amount (being R1 000),[82] for theft, fraud, forgery, perjury or an offence –

(i) involving fraud, misrepresentation, or dishonesty;
(ii) in connection with the promotion, formation, or management of a company;
(iii) under the Companies Act, the Insolvency Act 24 of 1936, the Close Corporations Act 69 of 1984, the Competition Act, the Financial

[78] Ss 22, 77(3)(b) and 77(3)(c) of the Companies Act.
[79] S 176(1) of the United Kingdom Companies Act 2006 ("UK Companies Act").
[80] S 176(2) of the UK Companies Act. An "associated body corporate" is the company's holding or subsidiary company or a fellow subsidiary of the same holding company (s 256).
[81] See further *Kings Security Systems Ltd v King* 2021 EWHC 325 (Ch) (18 February 2021) para 150 *BAILII* <http://www.bailii.org/ew/cases/EWHC/Ch/2021/325.html> (accessed 05-07-2022).
[82] Reg 39(4) of the Companies Regulations.

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Intelligence Centre Act, the Financial Markets Act 19 of 2012, [83] or chapter 2 of PRECCA.[84]

A disqualification under any of the above grounds does not last for the director's lifetime. It ends at the later of five years after the date of removal from office or the completion of the sentence imposed for the relevant office, or at the end of one or more extensions, as determined by a court from time to time, on application by the Companies and Intellectual Property Commission ("CIPC").[85]

A director involved in a corrupt transaction may also be declared delinquent or placed under probation in terms of section 162 of the Companies Act. A delinquent director is disqualified for the duration of the court order from holding office as a director,[86] while a director under probation may serve as a director but only under the conditions of the probation order.[87] The delinquency remedy is an innovative civil remedy[88] that enables stakeholders to hold corrupt directors accountable.

While an automatic disqualification ends five years after the completion of the relevant sentence (or at the end of any extension), a director must be declared delinquent for at least seven years from the date of the order.[89] A court

[83] S 69(8)(b)(iv)(cc) of the Companies Act refers to the Securities Services Act 36 of 2004, but this Act has been repealed and replaced by the Financial Markets Act 19 of 2012.

[84] S 69(8)(b)(iv)(cc) of PRECCA refers to the "Prevention and Combating of Corruption Activities Act, 2004" but this is an error since the correct name is the "Prevention and Combating of Corrupt Activities Act, 2004". The disqualification applies specifically to ch 2 of PRECCA. This chapter deals with the general offence of corruption; offences in respect of corrupt activities relating to specific persons; receiving or offering unauthorised gratifications; corrupt activities relating to contracts in the public and private sectors; offences relating to the procuring and withdrawal of tenders; offences relating to the acquisition of private interests in contracts or investments of a public body, and inducing another person to commit an offence.

[85] S 69(9) of the Companies Act. A court may extend the disqualification for no more than five years at a time if it is satisfied that this is necessary to protect the public, having regard to the disqualified person's conduct up to the time of the application (s 69(10)).

[86] S 69(8)(a).

[87] S 162(9).

[88] *Msimang NO v Katuliiba* 2013 1 All SA 580 (GSJ) para 29; *Grancy Property Limited v Gihwala* 2014 JDR 1292 (WCC) para 155; *Gihwala v Grancy Property Limited* 2017 2 SA 337 (SCA) para 144; *Lewis Group Limited v Woollam* 2017 2 SA 547 (WCC) para 40. Despite being a civil remedy, a delinquency order may lead to a criminal conviction. Eg, in *Organisation Undoing Tax Abuse v Myeni* 2020 3 All SA 578 (GP) para 285, the court recommended that the National Prosecuting Authority ("NPA") should investigate the evidence presented in the trial regarding possible criminal conduct against Myeni, a former non-executive director and chairperson of South African Airways SOC Ltd ("SAA"). For an analysis of this case see R Cassim "Declaring Directors of State-Owned Entities Delinquent: *Organisation Undoing Tax Abuse v Myeni*" (2021) 138 *SALJ* 1-20.

[89] S 162(6)(b)(ii) of the Companies Act.

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may in its discretion impose a delinquency order for longer than seven years,[90] and even for a director's lifetime.[91]

It is submitted that the delinquency grounds set out in section 162(5)(c) of the Companies Act that are best suited to declare delinquent a director involved in bribery or other corrupt transactions are the following:

(i) grossly abusing the position of director;
(ii) taking personal advantage of information or an opportunity contrary to section 76(2)(a) of the Companies Act;
(iii) intentionally inflicting harm upon the company, contrary to section 76(2)(a);[92]
(iv) acting in a manner that amounts to misconduct or breach of trust in relation to the performance of the director's functions within, and duties to, the company;
(v) acting in the company's name, signing anything on behalf of the company, purporting to bind the company or authorising the taking of any action by the company while knowing that he or she lacks the authority to do so (as contemplated in section 77(3)(a));[93]
(vi) acquiescing in the carrying on of the company's business despite knowing that it was being conducted in a manner prohibited by section 22(1), that is, recklessly or for any fraudulent purpose (as contemplated in section 77(3)(b)); and
(vii) being a party to an act or omission by the company despite knowing that it had a fraudulent purpose (as contemplated in section 77(3)(c)).

A suitable probation ground in the context of corporate corruption is acting in a manner materially inconsistent with the duties of a director.[94] Persons who may apply for a delinquency or probation order are the company, a shareholder, director, company secretary, prescribed officer, a registered trade union that represents employees of the company or another employee representative, the

[90] S 162(6)(b)(ii) of the Companies Act. A delinquency order may be subject to any conditions a court considers appropriate. Examples of these conditions include remedial education and carrying out a designated programme of community service (see ss 162(6)(b)(i) and 162(10)). Under s 162(11), a delinquent director may apply to court after three years to suspend the delinquency order and substitute it with a probation order. The applicant must meet certain criteria before a court may consider doing this (s 162(12)). A probation order subsists for a period not exceeding five years (s 162(9)(b)). On delinquency orders see further R Cassim "Delinquent Directors under the Companies Act 71 of 2008: G*ihwala v Grancy Property Limited* 2016 ZASCA 35" (2016) 19(1) *PELJ* 1 <https://perjournal.co.za/article/view/1246/2650> (accessed 05-07-2022); J du Plessis & P Delport "'Delinquent Directors' and 'Directors under Probation': A Unique South African Approach Regarding Disqualification of Company Directors" (2017) 134 *SALJ* 274 and R Cassim *The Removal of Directors and Delinquency Orders under the South African Companies Act* (2020) 227-330.

[91] Eg, in *Organisation Undoing Tax Abuse v Myeni* 2020 3 All SA 578 (GP) the court imposed an unconditional lifelong declaration of delinquency on Myeni.

[92] See eg, *Profica (Pty) Ltd v Dunkley* 2012 JDR 2394 (GSJ) and *Demetriades v Tollie* (1995/2014) 2015 ZANCHC 17 (18 September 2015) *SAFLII* para 60 <http://www.saflii.org/za/cases/ZANCHC/2015/17.html> (accessed 05-07-2022).

[93] See eg *Organisation Undoing Tax Abuse v Myeni* 2020 3 All SA 578 (GP) para 247 where the court held that the signing of a letter by Myeni had contravened s 77(3)(a) read with s 162(5)*(c)*(iv)(bb) of the Companies Act, as she had acted in SAA's name and signed a letter on its behalf despite knowing that she lacked the authority to do so. Other delinquency grounds breached in this case were grossly abusing the position of director and intentionally inflicting harm on the company.

[94] S 162(7)(a)(ii) of the Companies Act.

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CIPC, the Takeover Regulation Panel, and an organ of state responsible for the administration of any legislation.[95] Furthermore, a person acting in the public interest may, with leave of the court, bring a delinquency application against a director under section 157(1)(d) of the Companies Act.[96]

The Public Investment Corporation SOC Limited ("PIC"), a shareholder of the former VBS Mutual Bank Ltd ("VBS"),[97] is an example of a company that successfully obtained a delinquency order against two of its former non-executive directors involved in corrupt transactions. The directors had been appointed to the VBS board as PIC's shareholder representatives. PIC sought to have the directors declared delinquent following an investigation into the collapse of VBS that implicated the directors in corruption.[98] The court declared the directors delinquent because they had taken bribes worth millions of rands, through the use of front companies, in exchange for turning a blind eye to the looting of municipal, stokvel, and pension funds at VBS.[99]

Under section 71 of the Companies Act, shareholders and the board may also remove from office directors who are involved in corrupt transactions. According to this provision, a director may be removed from office at any time by an ordinary resolution of the shareholders passed at a shareholders' meeting. The board may remove a director from office only on the grounds specified in section 71(3) of the Companies Act. It is submitted that a relevant ground on which the board may rely to remove a director involved in corrupt transactions is that of having been derelict in the performance of the functions of a director.[100]

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[95] Ss 162(2), 162(3) and 162(4). Note that an organ of state may apply for a delinquency order but not a probation order.

[96] This was successfully done by the Organisation Undoing Tax Abuse ("OUTA") in *Organisation Undoing Tax Abuse v Myeni* 2020 3 All SA 578 (GP). OUTA's public interest in this matter arose from its primary objectives, which include the protection and advancement of the Constitution, the promotion of effective and enforceable taxation policies which are free from corruption, and the proper management of all major public entities (para 2).

[97] VBS Mutual Bank Ltd ("VBS") was placed into final liquidation on 13 November 2018.

[98] See T Motau "The Great Bank Heist: Investigator's Report to the Prudential Authority (Volume 1)" (10-10-2018) *South African Reserve Bank* paras 21.4, 21.5 and 49 <https://www.resbank.co.za/en/home/publications/publication-detail-pages/media-releases/2018/8830> (accessed 05-07-2022).

[99] D Botha "PIC Executive Head Resigns, Forensic Investigator to be appointed on VBS Bank investment" (13-07-2018) *PIC Media Release* <https://www.pic.gov.za/DocMedia/PIC-Executive-Head-resigns-forensic-investigator-to-be-appointed-on-VBS-Bank-investment.pdf> (accessed 05-07-2022); W Thompson "PIC's VBS Directors Declared Delinquent" (26-08-2019) *Business Day Live* <https://www.businesslive.co.za/bd/national/2019-08-26-pics-vbs-directors-declared-delinquent> (accessed 05-07-2022); D Botha "PIC welcomes Court Decision declaring Former Employees and VBS Directors Delinquent" (26-08-2019) *PIC Media Release* <https://www.pic.gov.za/DocMedia/MEDIA%20STATEMENT_PIC%20Welcomes%20the%20order%20declaring%20former%20employeesand%20VBS%20directors%20delinquent.pdf> (accessed 05-07-2022).

[100] S 71(3)(b) of the Companies Act. A detailed discussion of the removal of directors is beyond the scope of this article, but see further *Pretorius v PB Meat (Pty) Ltd* (1057/2013) 2017 ZAWCHC 104 (14 June 2017) *SAFLII* <http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZAWCHC/2017/104.html> (accessed 05-07-2022); R Cassim "A Critical Analysis of the Grounds of Removal of a Director by the Board of Directors under the Companies Act 71 of 2008" (2019) 136 *SALJ* 513; R Cassim "Removing Directors of State-owned Companies: *SOS Support Public Broadcasting Coalition v South African Broadcasting Corporation SOC Limited* (81056/14) [2017] ZAGPJHC 289" (2019) 40 *Obiter* 147 and Cassim *The Removal of Directors* 47-150.

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3 5 Whistle-blowing

Whistle-blowing is regarded as an effective and inexpensive measure to curb corruption.[101] It encourages transparency and high standards of corporate governance, which is stated to be one of the purposes of the Companies Act, in section 7(b)(iii). In *Tshishonga v Minister of Justice and Constitutional Development*,[102] the court said that whistle-blowing is healthy for companies because managers must be alert to their actions being monitored and reported. Enabling whistle-blowing in companies deters corruption. It also allows companies to manage corruption proactively and thus mitigate its potential impact.[103]

Although the Protected Disclosures Act protects employees who make disclosures about criminal or other irregular conduct, section 159 of the Companies Act (which also applies to employees)[104] encourages a wider range of persons to make disclosures – shareholders, directors, prescribed officers, company secretaries, registered trade unions that represent employees of the company (or another employee representative), suppliers of goods or services to a company, and employees of these suppliers.[105] The protection may not be negated or limited by a company's memorandum of incorporation, rules, or an agreement.[106]

The protective measures apply to the categories of whistle-blowers listed in section 159 of the Companies Act only if they disclose information in good faith.[107] To enjoy protection, the disclosure must be made to one of the following persons: the CIPC, the Companies Tribunal, the Takeover Regulation Panel, a regulatory authority, an exchange, legal adviser, director, prescribed officer, company secretary, auditor, a person performing the function of an internal audit, the board, or a committee of the company.[108] Furthermore, the whistle-blower must reasonably believe at the time of the disclosure that the information showed or tended to show that the company, director or prescribed officer acting in that capacity had (*inter alia*): (i) contravened the Companies Act or any law mentioned in Schedule 4 of the Companies Act;[109] (ii) failed to comply with any statutory obligation to which the company was subject; or (iii) contravened any other legislation in a manner that could expose the

[101] *Tshishonga v Minister of Justice and Constitutional Development* 2007 4 SA 135 (LC) para 166.
[102] Para 166.
[103] EQS Group "White Paper – Whistleblowing Programmes Today and Tomorrow: 17 Key Questions Answered" (2021) *EQS Group* 5 <https://www.eqs.com/en-us/compliance-knowledge/white-papers/whistleblowing-programmes> (accessed 05-07-2022).
[104] To the extent that s 159 of the Companies Act creates any rights or establishes any protection for employees, the right or protection is in addition to that provided by the Protected Disclosures Act 26 of 2000.
[105] S 159(1) and (4) of the Companies Act.
[106] S 159(2).
[107] S 159(3)(a).
[108] S 159(3)(a).
[109] Sch 4 of the Companies Act sets out a list of legislation that may be enforced by the Companies and Intellectual Property Commission ("CIPC").

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company to an actual or contingent risk of liability or is inherently prejudicial to the company's interests.[110]

If these requirements are satisfied, the whistle-blower will acquire qualified privilege in respect of the disclosure, and will be immune from any civil, criminal, or administrative liability for the disclosure.[111] The whistle-blower may claim compensation for any damages suffered from any person that victimises him or her as a result of the disclosure, such as causing detriment to the whistle-blower or threatening to do so.[112] Section 159(6) usefully embodies a rebuttable presumption that any such conduct or threat occurred because of the possible or actual disclosure by the whistle-blower. The onus is on the other person to produce satisfactory evidence to support another reason for engaging in this conduct or making the threat.[113] Victimisation is not a criminal offence under the Companies Act, so the whistle-blower's only remedy under the Companies Act is a civil one.[114]

Section 159(7)(a) of the Companies Act requires public and state-owned companies to establish and maintain a system to receive disclosures confidentially and to act on them.[115] The companies must also routinely publicise this system to the group of persons protected by section 159.[116] To this end, the company must conspicuously display a notice about this system at the company's registered office, the principal places of conducting business, any workplace where the company's employees are employed, on the company's website, and, if it is a listed company, on any applicable electronic system.[117]

3 6 Criminal offences

Even though the approach of the Companies Act is to decriminalise company law, certain acts still attract criminal liability.[118] For example, it is a criminal offence for a company, with an intention to deceive or mislead any person, to fail to maintain accurate and complete accounting records, or to keep records other than in the prescribed manner and form.[119] It is also a criminal offence to be a party to the preparation, approval, dissemination, or publication of any financial statements knowing that they fail in a material way to comply with the prescribed requirements of financial statements set out in section 29(1) of the Companies Act or are materially false and misleading.[120] A person

[110] S 159(3)(b)(i), (ii) and (v) of the Companies Act. Two other relevant grounds are: (i) engaging in conduct that endangered or was likely to endanger the health or safety of any individual or had harmed or was likely to harm the environment; and (ii) unfairly discriminating or condoning unfair discrimination against any person as contemplated in s 9 of the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (s 159(3)(b)(iii) and (iv)).

[111] S 159(4) of the Companies Act.

[112] S 159(5).

[113] S 159(6).

[114] P Delport *Henochsberg on the Companies Act 71 of 2008 I* (RS 27 2021) 560(21).

[115] S 159(7)(a) of the Companies Act.

[116] See s 159(7)(b).

[117] Reg 131 of the Companies Regulations.

[118] Instead of criminal offences, the Companies Act now uses a system of administrative enforcement to ensure compliance, such as the issuing of compliance notices by the CIPC.

[119] S 28(3)(a)(i) of the Companies Act.

[120] S 29(6) read with s 214(2).

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convicted of these offences is liable to a fine or to imprisonment for a period not exceeding twelve months, or to both a fine and imprisonment.[121]

Other criminal offences, for which a person may face a fine or imprisonment for a period not exceeding ten years (or both), are that of a company's falsifying its accounting records or permitting any person to do so;[122] knowingly being a party to an act or omission by a company that has a fraudulent purpose;[123] and with a fraudulent purpose knowingly providing false or misleading information in any circumstances in which the Companies Act requires a person to provide information or give notice to another person.[124] These stringent penalties are designed to improve corporate accountability and may deter corporate corruption.

4 Recommendations to mitigate corporate corruption

4 1 Introduction

In essence, the anti-corruption framework of the Companies Act comprises the following elements:

(i) the establishment of a social and ethics committee tasked with monitoring and reporting on the company's anti-corruption activities;
(ii) fiduciary duties which have the effect of prohibiting various fiduciaries from accepting bribes and engaging in other corrupt transactions;
(iii) the automatic disqualification of directors convicted of corruption;
(iv) remedies empowering stakeholders to apply to court to declare directors delinquent, place them under probation, or remove them from office for engaging in corrupt transactions;
(v) provisions protecting internal and some external whistle-blowers; and
(vi) the criminalisation of certain corrupt acts.

It is submitted that the anti-corruption framework above is sufficiently comprehensive to counteract corporate corruption. Yet the scale of corruption

[121] See s 216(b) and s 29(6) read with s 214(2).

[122] S 28(3)(a)(ii) read with s 216(a) and s 214(1)(a) of the Companies Act. It has been alleged that Steinhoff International Holdings (Pty) Ltd and Steinhoff International Holdings NV have contravened many of the financial reporting provisions in the Companies Act that attract criminal liability. A report prepared by PricewaterhouseCoopers Advisory Services (Pty) Ltd ("Overview of Forensic Investigation" (15-03-2019) *Steinhoff International* <https://www.steinhoffinternational.com/downloads/2019/overview-of-forensic-investigation.pdf> (accessed 06-07-22)), reveals that former directors of Steinhoff International Holdings NV implemented various transactions over many years that substantially inflated the profit and asset values of the Steinhoff group over an extended period. In *De Bruyn v Steinhoff International Holdings NV* (29290/2018) 2020 ZAGPJHC 145 (26 June 2020) *SAFLII* para 197 <http://www.saflii.org/za/cases/ZAGPJHC/2020/145.html> (accessed 06-07-2022), the court did not certify a shareholder's class action against Steinhoff's directors, but it was alleged in that case that Steinhoff, acting through its directors, had failed to keep accurate or complete accounting records as required by s 28(1) of the Companies Act; had falsified or permitted the falsification of the company's accounting records in contravention of s 28(3)(b); had failed fairly to present the state of affairs and business of the company as required by s 28(1)(b); had failed accurately to show the assets liability, equity, income and expense of the companies as required by ss 29(1)(c) and 29(6)(a); and had prepared financial statements that were false, misleading and materially incomplete in contravention of s 29(2)(a) and (b). See also *Du Toit NO v Steinhoff International Holdings (Pty) Ltd* 2020 1 All SA 142 (WCC) para 21.5.2.

[123] S 214(1)(c) of the Companies Act.

[124] S 214(1)(b).

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in South African companies remains high, and increased substantially during the Covid-19 pandemic. Without the effective enforcement of these anti-corruption provisions, companies will of course be vulnerable to corruption. Some recommendations are set out below to mitigate the high level of corporate corruption in South African companies.

4 2 Enhanced use of remedies by stakeholders to hold directors accountable

At the outset, relevant stakeholders must take firm steps as soon as possible to enforce the anti-corruption provisions of the Companies Act against company representatives involved in corrupt transactions. The Companies Act provides stakeholders with several remedies that may be used for this purpose.

For example, if the company refuses to bring an action for breach of fiduciary duties against a director engaged in bribery or other corrupt activities, relevant stakeholders may use the derivative action in section 165 of the Companies Act to require the company to commence legal proceedings against the miscreant director. In terms of section 165(2)(a), a shareholder, director, prescribed officer, registered trade union or another employee representative, or a person granted leave of the court to do so, is empowered to serve a demand on a company to commence legal proceedings or to take related steps to protect the company's legal interests. The demand is a precursor to the possible institution of derivative proceedings under section 165(5).[125]

It is submitted that shareholders and boards of directors must use section 71 of the Companies Act more often to remove from office those directors who are found to have engaged in corrupt transactions. If a director is successfully removed from office, shareholders and the directors may, in addition, apply to court for an order declaring the director delinquent.[126]

In this regard, it is submitted that directors, prescribed officers, and the company secretary, who have direct knowledge of corruption by directors, must take the initiative as soon as possible to apply to court to declare such directors delinquent or to place them under probation.[127] This recommendation applies particularly to directors of state-owned entities, since corruption in these entities may have severe consequences for the public and the South

[125] On the derivative action see *Mouritzen v Greystones Enterprises (Pty) Ltd* 2012 5 SA 74 (KZD); *Amdocs SA Joint Enterprise (Pty) Ltd v Kwezi Technologies (Pty) Ltd* 2014 5 SA 532 (GJ); *Mbethe v United Manganese Kalahari (Pty) Ltd* 2017 6 SA 409 (SCA); *Lewis Group Ltd v Woollam* 2017 2 SA 547 (WCC); *Larrett v Coega Development Corporation (Pty) Ltd* 2019 3 SA 510 (ECG) and MF Cassim *The New Derivative Action under the Companies Act: Guidelines for Judicial Discretion* (2016). While the derivative action may not always be feasible in practice due to the legal costs involved, it is noteworthy that s 165(10) of the Companies Act empowers a court to make any order it considers appropriate about the costs of the person who applied for or was granted leave to bring the derivative action, the company or any other party to the proceedings. Thus, if a shareholder is successful in bringing derivative proceedings under s 165 of the Companies Act, a court may order the company to bear the legal costs. Even if a shareholder is not successful, a court may, in its discretion, order the company to nevertheless bear the costs of the proceedings if the shareholder's application was meritorious and he or she had acted in good faith (see R Cassim "The Launching of Delinquency Proceedings under the Companies Act 71 of 2008 by means of the Derivative Action: *Lewis Group Limited v Woollam* 2017 (2) SA 547 (WCC)" 2017 38 *Obiter* 673 681).

[126] See s 71(10) of the Companies Act.

[127] Cassim (2016) *SALJ* 8.

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African economy. The state, as the shareholder of state-owned entities, also has a responsibility to take steps against directors of state-owned entities involved in corrupt transactions. As the court in *Organisation Undoing Tax Abuse v Myeni*[128] ("*OUTA*") emphasised, to serve on the board of a state-owned entity "should not be a privilege of the politically connected",[129] and the "[g]overnment has, as custodian of the common good, an obligation to ensure that suitably qualified persons, with integrity are appointed in these positions".[130]

While OUTA's initiative of acting in the public interest is commendable, it is questionable why the directors, prescribed officers, and the company secretary of South African Airways ("SAA"), who had first-hand knowledge of directorial misconduct, failed to apply to court to declare Myeni delinquent at a much earlier stage. Perhaps they were reluctant to do this because of a fear of personal repercussions and concerns about the legal costs of court proceedings. But, as the recent history of SAA shows, delaying these proceedings had dire consequences for SAA and the economy.[131] If the delinquency application is successful, a court may, as it did in *OUTA*,[132] award costs in favour of the plaintiff, even on an attorney and client basis.

There are other remedies in the Companies Act on which stakeholders may rely to hold accountable directors involved in corrupt activities. For example, under section 20(6)(a) shareholders may claim damages from any person who intentionally or fraudulently causes the company to do anything inconsistent with the Companies Act. In addition, under section 20(4) a company's shareholders, directors, prescribed officers, or a trade union representing the company's employees may apply to the High Court for an appropriate order to restrain the company from doing anything inconsistent with the Companies Act. Stakeholders may also rely on section 218(2), which provides that a person who contravenes any provision of the Companies Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention. Section 218(2) applies if the plaintiff suffered damages or loss as a result of the contravention, and there is proof of a causal link between the contravention and the liabilities for which the person may be held liable.[133] But section 218(2) cannot be relied on by shareholders to recover reflective losses

[128] 2020 3 All SA 578 (GP).
[129] Para 276.
[130] Para 276.
[131] Para 271. The court's decision to impose a lifelong delinquency declaration against Myeni appears to have been influenced by its finding that Myeni contributed significantly to the position in which SAA and the economy finds itself today.
[132] Para 285.
[133] *Burco Civils CC v Stolz* 2017 JOL 39331 (GP) para 47; *Motor Industry Bargaining Council v Botha* (34198/2013) 2016 ZAGPPHC 615 (10 June 2016) *SAFLII* para 61 <https://www.saflii.org/za/cases/ZAGPPHC/2016/615.html> (accessed 06-07-2022).

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suffered by them as a result of the fall in the market value of their shares caused by some wrongful act of the directors.[134]

It is notable that listed technology services company EOH Holdings Limited, which has been implicated in state capture in one of the biggest corporate scandals in South Africa, instituted legal action against four of its former executive directors for failing to fulfil their fiduciary duties, and for creating an enabling environment for corruption or turning a blind eye to a culture of corruption and financial irresponsibility, that tarnished the company's image.[135] The company has also applied to have its former chief executive officer declared delinquent.[136] The company claimed a total of R6.4 billion but it has conceded that while it may not recoup this amount, the legal action was brought to avoid getting blacklisted from doing business with government because of a tender fraud scandal in 2018.[137]

4 3 Development of anti-corruption programmes

It is submitted that Parliament should enhance the effectiveness of the social and ethics committee in three respects. First, the legislature must clarify the uncertainty surrounding whether this committee is a board or a company committee.[138] This distinction is critical because if it is the former, the board may delegate powers and authority to the committee over and above those set out in the Companies Act, which it may not do if it is a company committee (in which case it is limited to the powers and authority set out in the Companies Act).[139] The classification of the committee also affects the liability of its members because section 76(1)(b) of the Companies Act states that members of board committees are subject to the same duties as directors, while section 77(1)(b) similarly provides that members of board committees are subject to the same liabilities as directors, irrespective of whether the person is also a member of the company's board.

Although it is arguable that the heading "Board committees" in section 72 of the Companies Act points to the social and ethics committee being a board committee, this indication is not conclusive.[140] Adding to the confusion is the fact that the social and ethics committee must report to the shareholders

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[134] See further on s 218(2) of the Companies Act, *Rabinowitz v Van Graan* 2013 5 SA 315 (GSJ) paras 9 and 11; *Grancy Property Limited v Gihwala* 2014 JDR 1292 (WCC) para 104; *Sanlam Capital Markets (Pty) Ltd v Mettle Manco (Pty) Ltd* 2014 3 All SA 454 (GJ) para 42; *Blue Farm Fashion Limited v Rapitrade 6 (Pty) Ltd* 2016 JOL 35613 (WCC) para 12; *Hlumisa Investment Holdings RF Ltd v Kirkinis* 2020 5 SA 419 (SCA) para 21; *De Bruyn v Steinhoff International Holdings NV* 2022 1 SA 442 (GJ) paras 180-219.

[135] M Gavaza "EOH Files R1.7bn Lawsuit against its Former CEO" *Business Day* (29-06-2021) 1.

[136] The company alleged that its former chief executive officer oversaw unlawful and corrupt payments in the form of bribes and was involved in tender-fixing, unlawfully obtaining confidential tender information and engaging middlemen to influence tender processes (M Toyana "Tender Turmoil: EOH Slaps Former Chief Executive with R1.7 bn Damages Lawsuit" (29-06-2021) *Business Maverick* <https://www.dailymaverick.co.za/article/2021-06-29-tender-turmoil-eoh-slaps-former-chief-executive-with-r1-7bn-damages-lawsuit/> (accessed 06-07-2022)).

[137] M Gavaza & G Theunissen "Scandal at EOH likened to Steinhoff's" *Business Day* (30-06-2021) 9.

[138] The confusion arises because reg 43(2) of the Companies Regulations refers to "the company" appointing this committee (unless certain exemptions apply), while reg 43(3) refers to "a board" appointing the first members of this committee.

[139] Delport *Henochsberg on the Companies Act 71 of 2008 1* 283.

[140] 283.

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at the company's annual general meeting on the matters within its mandate, but it is merely required to draw matters within its mandate to the board's attention as and when required.[141] A further indication that the social and ethics committee is a company committee instead of a board committee is that its powers (as set out in section 72(8) of the Companies Act) and its functions (as set out in regulation 43(5) of the Companies Regulations) are a closed list. It is notable that section 72 of the Companies Act contains no provision equivalent to section 94(7)(i) of the Companies Act which provides that an audit committee has the duty to "perform such other oversight functions as may be determined by the board". Despite this omission, the King IV Report states that the responsibilities of the social and ethics committee should include its statutory duties "and any other responsibilities delegated to it" by the board,[142] a provision which points to the committee's being a board committee. Yet, in the recent case of *Ex parte Nitro Securitisation 6 (RF) Ltd*,[143] the Companies Tribunal stated that the social and ethics committee is a "statutory company committee". Clarity on the nature of the social and ethics committee must be provided by the legislature.

Secondly, to enhance the effectiveness of the social and ethics committee in dealing with corruption, the legislature should provide clarity on the role of ethics in this committee. Beyond a reference to the word "ethics" in the name of the committee, currently the ethics role of the social and ethics committee is not addressed in the Companies Act or the Companies Regulations.[144]

Thirdly, more emphasis should be given by the legislature to the anti-corruption role of the social and ethics committee. This could be done by explicitly requiring companies to adopt suitable anti-corruption programmes based on the nature and complexity of the company's business operations, the industry in which it operates, its size, and the specific corruption risks it faces. The adoption of anti-corruption programmes is recommended by both the UN Global Compact Principles and the OECD Corruption Recommendations.

The OECD Corruption Recommendations also suggest that companies should enhance the transparency of their activities in the fight against bribery.[145] These measures could include companies' making public commitments against bribery, and disclosing their internal controls, ethics and compliance programmes adopted to honour these commitments.[146] In addition to adopting these measures, it is suggested that South African companies should publicise their anti-corruption compliance programmes to their employees through training programmes.[147]

The UK and Malaysia go so far as to use the threat of criminal liability to induce companies to implement adequate anti-corruption programmes for

[141] See regs 43(5)(b) and (c) of the Companies Regulations.
[142] IoDSA *King IV Report* 57 para 69.
[143] (CT00478ADJ2020) 2020 Companies Tribunal of South Africa (29 October 2020) *Companies Tribunal* para 15 <https://www.companiestribunal.org.za/cases/ct00478adj2020/> (accessed 06-07-2022).
[144] IoDSA *King IV Report* 29.
[145] Principle 5 of the OECD Corruption Recommendations.
[146] Principle 5.
[147] See further Principle 6 of the OECD Corruption Recommendations.

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the company. In the UK, section 7(1) of the Bribery Act 2010 ("UK Bribery Act") imposes criminal liability on companies for failing to prevent bribery by a person associated with the company (such as an employee or agent of the company)[148] if such person intended to obtain a business advantage for the company. It is a complete defence for the company to prove that, despite a particular case of bribery, it had in place adequate procedures designed to prevent persons associated with it from bribing.[149]

Similarly, under section 17A(1) of the Malaysian Anti-Corruption Commission Act 2009 ("MACC Act")[150] companies may be held criminally liable for corrupt practices if a person associated with the company (such as a director, employee, agent, or consultant) corruptly gives, agrees to give, promises, or offers to any person any gratification either for the benefit of that person or another person with intent to obtain or retain business for the company or an advantage in the conduct of business for the company.[151] It is a full defence for the company to prove that it had in place adequate procedures to prevent associated persons from undertaking corrupt activities in relation to its business activities.[152]

For the purposes of this defence and under section 9(1) of the UK Bribery Act, the UK Ministry of Justice published guidelines on procedures that companies may put in place to prevent persons associated with them from engaging in bribery[153] (the "UK Guidance"). Similar guidance on adequate procedures were published under section 17A(5) of the MACC Act[154] (the "Malaysian Guidance"). The guidance is not prescriptive but should be applied practically, in proportion to the scale, nature, industry, risk, and complexity of the company.[155] The onus is on the company to prove that it had in place adequate procedures for purposes of the defence.[156] The guiding principles are as follows:

[148] See s 8 of the Bribery Act 2010 ("UK Bribery Act") for the definition of an "associated person".

[149] S 7(2). A person found guilty of an offence under this section is liable on conviction on indictment to a fine (s 11(3)).

[150] This provision came into force in June 2020.

[151] A company guilty of an offence under s 17A of the Malaysian Anti-Corruption Commission Act 2009 ("MACC Act") may be liable to a fine of not less than ten times the sum or value of the gratification which is the subject matter of the offence (where the gratification is of a pecuniary nature) or one million Ringgit, whichever is the higher, or to imprisonment for a term not exceeding twenty years or both (s 17A(2)).

[152] S 17A(4).

[153] UK Ministry of Justice "The Bribery Act 2010: Guidance To Help Commercial Organisations Prevent Bribery" (11-02-2012) *GOV.UK* <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf> (accessed 06-07-2022) (the "UK Guidance").

[154] Prime Minister's Department Guidelines on Adequate Procedures Pursuant to subsection (5) of section 17A under the Malaysian Anti-Corruption Commission Act 2009" (01-06-2020) *National Centre For Governance, Integrity and Anti-Corruption (GIACC)* <https://f.datasrvr.com/fr1/119/75252/Prime_Ministers_Department_-_Guidelines_on_Adequate_Procedures.pdf> (accessed 06-07-2022) (the "Malaysian Guidance").

[155] UK Ministry of Justice UK Guidance 6; Prime Minister's Department Malaysian Guidance 2. See also principle 1 of the UK Ministry of Justice UK Guidance.

[156] UK Ministry of Justice UK Guidance 6; Prime Minister's Department Malaysian Guidance 2.

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(i) Top level commitment: the directors should foster a culture within the company in which bribery is never acceptable;[157]
(ii) Risk assessment: the company should carry out comprehensive risk assessments periodically to identify and evaluate its internal and external corruption risks;[158]
(iii) Due diligence: the company should apply due diligence procedures with regard to persons who will perform services for it;[159]
(iv) Communication and training: the company's anti-corruption procedures should be communicated both internally and externally, and training should be provided to ensure a proper understanding of its anti-corruption position;[160] and
(v) Monitoring and review: the company should regularly monitor and review its procedures to prevent bribery, assess the effectiveness of its anti-corruption programme, and ensure that it is being enforced.[161]

The UK Guidance and Malaysian Guidance are commendable for both encouraging and inducing companies to take measures to ensure that their businesses are free from corruption. It is submitted that the social and ethics committee of South African companies should use the core principles above as guidance to develop and implement an effective anti-corruption programme which is suitable for the particular company.[162]

It is further submitted that anti-corruption programmes should be implemented by all companies, including those that are not statutorily required to establish a social and ethics committee. It is noteworthy that the King IV Report encourages even companies that are not legally required to establish a social and ethics committee to consider appointing one.[163] A laudable

[157] Principle 2 of UK Ministry of Justice UK Guidance; principle 1 of Prime Minister's Department Malaysian Guidance.

[158] Principle 3 of UK Ministry of Justice UK Guidance; principle 2 of Prime Minister's Department Malaysian Guidance. Commonly encountered corruption risks are country risks, sectoral risks, transaction risks, business opportunity risks and business partnership risks (see para 3.5 of the commentary on principle 3 in the UK Ministry of Justice UK Guidance).

[159] Principle 4 of UK Ministry of Justice UK Guidance; principle 3 of Prime Minister's Department Malaysian Guidance.

[160] Principle 5 of UK Ministry of Justice UK Guidance; principle 5 of Prime Minister's Department Malaysian Guidance.

[161] Principle 6 of UK Ministry of Justice UK Guidance; principle 4 of Prime Minister's Department Malaysian Guidance.

[162] See also CIPC "Guideline for Corporate Compliance Programme" (19-11-2018) *Companies and Intellectual Property Commission* <http://www.cipc.co.za/files/1715/4263/3270/Guideline_1_of_2018.pdf> (accessed 06-07-2022), which sets out guidelines to be followed in formulating an effective corporate compliance programme.

[163] IoDSA *King IV Report* 57 para 68. Other board committees that should play a role in preventing corporate corruption are the audit and risk committees, which should focus on the risks and controls for preventing and detecting bribes. The IoDSA *King IV Report* 56 para 59e recommends that the audit committee should disclose its views on the nature and extent of any significant weaknesses in the design, implementation or execution of internal financial controls that resulted in fraud and corruption. The nomination committee should play a role too by conducting a thorough due diligence on proposed board appointments (IoDSA "Boards – Governance Considerations Relating to Corruption" (2015) *IoDSA* 4, 5 <http://www.aepf.co.za/Documents/CGN_Position_Paper_8_Boards_-_Governance_Considerations_Relating_to_Corruption.pdf> (accessed 06-07-2022)).

amendment proposed by the Companies Amendment Bill, 2021[164] is that the mandatory requirement to appoint a social and ethics committee should be extended to all public companies. If this proposal is implemented, it will have the effect that unlisted public companies which score below 500 points in their public interest score will also be required to appoint a social and ethics committee. This proposed amendment has merit because public companies by their very nature have a greater responsibility to a wider public.

4 4 Enhanced measures to protect whistle-blowers

Despite the protection given to whistle-blowers by section 159 of the Companies Act, the reporting rates in South African companies are low.[165] The main reasons given for not reporting wrongdoing in companies are the fear of being victimised, believing that the company will not act on the disclosure, believing that the disclosure will not be anonymous, fear of losing one's job, and not knowing to whom the disclosure must be made.[166] There have been many reports of whistle-blowers who have suffered adverse professional or personal consequences.[167] This situation inevitably also discourages persons from making disclosures.

Section 159 of the Companies Act fails to explicitly address the consequences of a failure by a public and state-owned company to comply with its obligations under section 159(7) of the Companies Act of establishing and maintaining a system to receive disclosures confidentially and acting on them, and of routinely publicising the availability of this system.[168] It is essential for companies to establish a confidential whistle-blowing management system in order to assure potential whistle-blowers that any disclosures will be treated confidentially

[164] GN R 586 in *GG* 45250 of 01-10-21. For a discussion of the amendments proposed by the legislature to the social and ethics committee, see D Mahhumane & R Cassim "A Critical Analysis of the Amendments Proposed to the Social and Ethics Committee by the Companies Amendment Bill, 2018" (2021) 33 *SA Merc LJ* 153-175.

[165] See S Lubisi & H Bezuidenhout "Blowing the Whistle for Personal Gain in the Republic of South Africa: An Option for Consideration in the Fight against Fraud?" (2016) 18 *SAJAAR* 49 51 and L Groenewald *Whistleblowing Management Handbook* (2020) 39-43.

[166] *Tshishonga v Minister of Justice and Constitutional Development* 2007 4 SA 135 (LC) para 167; Lubisi & Bezuidenhout (2016) *SAJAAR* 56-57; Groenewald *Whistleblowing Management Handbook* 39-42.

[167] For examples of the retaliation and victimisation faced by whistle-blowers, see *Tshishonga v Minister of Justice and Constitutional Development* 2007 4 SA 135 (LC) and *Magagane v MTN South Africa (Pty) Ltd* 2013 8 BLLR 768 (LC). In a further example, the chief director of financial accounting of the Gauteng Department of Health, who was a whistle-blower in an enquiry into corruption relating to Covid-19 PPE, faced intimidation and fabricated misconduct charges, and was gunned down outside her home in August 2021. She was a witness in the SIU investigation into corrupt Covid-19 PPE deals worth R332 million in the Gauteng Department of Health (F Haffajee "SIU confirms Babita Deokaran, Mowed Down after Dropping Child at School, was a Witness in the R332m PPE Scandal" (24-08-2021) *Maverick Citizen* <https://www.dailymaverick.co.za/article/2021-08-24-whistle-blower-slain-after-dropping-her-child-at-school-siu-confirms-babita-deokaran-was-a-witness-in-the-r332m-ppe-scandal/#:~:text=Special%20Investigating%20Unit%20spokesperson%20Kaizer,and%20her%20death%20by%20shooting> (accessed 06-07-2022)).

[168] If the CIPC is aware of a company's failure to comply with these requirements, it could probably issue a compliance notice under s 171(1) of the Companies Act requesting the company to comply with these requirements (Delport *Henochsberg on the Companies Act 71 of 2008* 560(20)). In general, the failure to comply with the compliance notice could result in an administrative fine being imposed on the company or a criminal prosecution if the CIPC refers the matter to the NPA for prosecution in terms of s 214(3) of the Companies Act (s 171(7)).

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and that they will not be identified by their personal attributes.[169] Companies must ensure that this system is accessible to stakeholders working from home (during the Covid-19 pandemic and beyond) and that there is no risk of disclosures made from home being accessible.[170] It is also vital for companies to publicise these systems and to commit to acting on disclosures made by whistle-blowers in an appropriate manner. Doing so will enhance the belief of potential whistle-blowers that the company is committed to ethical conduct, eradicating corruption and protecting the whistle-blower.[171] Importantly, it will create a culture of accountability and transparency in the company. For these reasons, it is submitted that the Companies Act should expressly address the consequences of a failure by public and state-owned companies to comply with the requirements of section 159(7) of the Companies Act, and that stringent penalties should be imposed for failures by companies to comply with these requirements.[172]

It is prudent for companies to appoint a board member, such as a non-executive director, to oversee their whistle-blowing system and to report to the board on its successes and failures.[173] This will enable the board to remedy any weaknesses in the whistle-blowing system. Companies should provide clear and detailed guidelines about how disclosures may be made, and train the relevant persons in the company who are authorised to receive disclosures so that they will manage the disclosures properly. It is further suggested that companies should conduct regular training about their whistle-blowing systems, including online training for those stakeholders working from home during the Covid-19 pandemic, as the education of stakeholders about whistle-blowing is necessary to ensure its success.[174]

If a director, company secretary, manager, or chief executive officer of the company fails to report corrupt transactions in the company, he or she commits an offence under PRECCA. Under section 34(1), a person who holds a position of authority and who knows or ought reasonably to have known or suspected that any person has committed an offence under parts 1, 2, 3, or 4 or sections 20 or 21 of chapter 2 of PRECCA[175] or the offence of theft, fraud, extortion, or forgery or uttering of a forged document, involving an amount of R100 000 or more, must report this knowledge or suspicion to the police

[169] Groenewald *Whistleblowing Management Handbook* 40.

[170] EQS Group "White Paper – Whistleblowing Programmes Today and Tomorrow: 17 Key Questions Answered" *EQS Group* 19.

[171] Groenewald *Whistleblowing Management Handbook* 5.

[172] It is debatable whether whistle-blowers should be rewarded financially for making disclosures. This is done in the USA under the False Claims Act of 1986, which gives whistle-blowers a percentage of the moneys recovered following a disclosure relating to the defrauding of the government. While providing financial rewards may encourage whistle-blowers to speak up about corruption and reduce the financial risks they may face, it is morally questionable and may encourage false claims. On this debate see further Lubisi & Bezuidenhout (2016) *SAJAAR* 51-57.

[173] EQS Group "White Paper – Whistleblowing Programmes Today and Tomorrow: 17 Key Questions Answered" *EQS Group* 9.

[174] 19.

[175] These offences relate to the general offence of corruption; offences in respect of corrupt activities relating to specific persons; receiving or offering of unauthorised gratifications; offences in respect of corrupt activities relating to specific matters; being an accessory to or after an offence; and attempting, conspiring, or inducing another person to commit an offence.

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official in the Directorate for Priority Crime Investigation (which is located within the South African Police Service). A person who fails to do so will be guilty of an offence and liable to a fine or imprisonment for a period of up to ten years if the sentence is imposed by a High Court, or three years if the sentence is imposed by a Magistrate's Court.[176] Under section 34(4)(e) and (h) of PRECCA, directors, company secretaries, managers, and the chief executive officer are regarded as persons in a position of authority.

A limiting factor of this requirement is that it applies only to offences involving R100 000 or more, and not to lower-level offences.[177] Another limiting factor is that the provision imposes no time frame within which the corruption must be reported.[178] Section 34(1) of PRECCA is nevertheless commendable as it encourages the compulsory reporting of corporate corruption. Companies must ensure that the relevant persons are aware that their failure to report corrupt transactions in the company constitutes an offence under PRECCA.

5 Conclusion

This article identified provisions of the Companies Act that may be used to address the high scale of corruption in South African companies. It was argued that the Companies Act contains a fairly robust anti-corruption framework. The scale of corruption in South African companies nevertheless remains high, and has increased significantly during the Covid-19 pandemic. The following series of submissions are suggested to mitigate these high levels of corporate corruption.

Stakeholders must make use of the remedies in the Companies Act more often to enforce the anti-corruption provisions. This includes using the derivative action to require the company to commence legal proceedings against directors who breach their fiduciary duties by taking bribes or getting involved in other corrupt transactions. It also includes relevant stakeholders taking steps at an early stage to declare delinquent those directors involved in corrupt transactions, or to place them under probation or even to remove them from office. To enhance the effectiveness of the social and ethics committee in addressing corruption, the legislature must provide clarity on the nature of this committee, and on its ethics and anti-corruption roles. Parliament should expressly require companies to develop suitable anti-corruption programmes in line with the specific corruption risks faced by the companies. Companies should enhance the transparency of their activities in the fight against bribery, disclose their internal controls, and publicise their anti-corruption programmes. To enhance the low level of reporting by whistle-blowers, the legislature should expressly address the consequences of a failure by public and state-owned companies to establish a system to receive disclosures confidentially and act on them, and to publicise the availability of this system. Companies should ensure that their whistle-blowing systems are safely accessible to

[176] S 34(2) read with s 26(1)(b) of PRECCA.
[177] Budhram & Geldenhuys (2018) *SACJ* 53.
[178] 53.

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stakeholders working from home during the Covid-19 pandemic, appoint a director to oversee their whistle-blowing system, provide clear guidelines about how disclosures may be made, train the relevant persons in the company who are authorised to receive disclosures, and conduct regular training about their whistle-blowing systems.

Corruption is a "pervasive and insidious evil"[179] that eats away at the very fabric of society and lowers the moral tone of a nation.[180] It must be rooted out of our society because if it is left unchecked, or punished inadequately, it would have a demoralising effect on business standards and fair trading.[181] Although the Companies Act has a fairly comprehensive anti-corruption framework, it is hoped that the suggestions above would serve to mitigate the high levels of corporate corruption in South African companies.

[179] *S v Shaik* 2007 1 SACR 142 (D) 240D.
[180] *S v Shaik* 2007 1 SA 240 (SCA) para 223.
[181] *Scholtz v The State* 2018 4 All SA 14 (SCA) para 199.

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