

## Criminal Law

### South Africa's fight against Corruption in its Public Procurement Process

**Section 217 (1) of the Constitution** of South Africa provides for procurement, and that when an organ of state in the national, provincial or the local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is **fair, equitable, transparent, competitive, and cost-effective**.

Corruption and related corrupt activities undermine the said principles, endanger the stability and security of societies, undermine the institutions and values of democracy and ethical values and morality, jeopardize sustainable development, the rule of law and the credibility of governments, and provide a breeding ground for organized crime.

The prevention and combating of corruption and related corrupt activities is a responsibility of all States requiring mutual cooperation. South Africa's **legal framework on international cooperation** in criminal matters is governed by the International Cooperation in Criminal Matters Act, 1996 (ICCMA), and the Extradition Act, 1962. We can provide the necessary assistance to other States on the basis of reciprocity and having due regard to the provisions of the United Nations Convention against Corruption ("UNCAC") and domestic law.

South Africa in its fight against corruption became a States Party to the **UNCAC, 2004** and published the **Prevention and Combating of Corrupt Activities Act, Act 2004**.

Notwithstanding the above, the South African government has long been grappling with issues of corruption in public procurement, with reports of irregularities, bid rigging, and fraud undermining the integrity of the procurement process.

South Africa has experienced "20 years of frustration" that have "pitilessly exposed the flaws and weaknesses in the public procurement system", the report by the South African Judicial Commission of Inquiry into allegations of State Capture, Corruption and Fraud in the Public Sector, has said. The Commission was appointed in 2018 and during its work, it heard evidence from over 300 witnesses and held more than 400 days of hearings.

**The Report** on public procurement corruption in South Africa has found the practice to be so widespread that it is **calling for a complete overhaul of the system**. The Commission made several detailed recommendations with respect to procurement reform, which the government supports and accepts.

The President in his **response to the Commission's Report** mentioned that the Public Procurement Bill, which was expected to be finalized and submitted to Parliament by March 2023, will address many of the Commission's recommendations, which inter alia include the following:



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- The introduction of a Code of Conduct setting out the ethical standards for procurement;
- Protecting Accounting Officers from criminal or civil liability for acting in good faith;
- Harmonization of public procurement legislation;
- Making procurement more transparent;
- Establishing a professional body for public procurement officials;
- A process for the appointment of boards of state-owned enterprises that is not open to manipulation;
- Board members won't be allowed to be involved in procurement processes beyond playing an oversight role;
- Ministers will be prohibited from playing any role in procurement within state-owned enterprises or departments.

The proposed Bill is a step in the right direction in South Africa's fight against procurement corruption, but the success of the Bill will depend on its effective implementation and enforcement. The implications, of a lack of action, will ultimately destroy the future of pending generations.

While procurement corruption might never be fully eliminated, the government must implement effective controls to reduce the likelihood of it occurring. Such controls need to be well-considered and robust enough to be relevant to the ever-evolving modus operandi of how procurement corruption is committed.



## Practice Area News

**Enactment of key Anti-Money Laundering and Combating of Terror Financing Laws.** National Treasury welcomes the enactment of two key Acts of Parliament, designed to strengthen South Africa's system of **Anti-Money Laundering (AML)** and **Combating the Financing of Terrorism (CFT)**. These laws will strengthen the fight against corruption, fraud, and terrorism, and assist South Africa in meeting the international standards on AML/CFT, and to reduce the prospect of grey listing by the Financial Action Task Force (FATF).

**PETERSON V THE STATE (CASE NO 295/2021) (2023) ZASCA.** This was an appeal against a reconsideration of an indeterminate sentence imposed in terms of s 286B of the **Criminal Procedure Act 51 of 1977** (the Act). The SCA found that there were several glaring irregularities with the procedure followed by the High Court. Firstly, the court was obliged to consider whether the appellant was still "a dangerous criminal" posing a danger to society and to give reasons for its declaration. It failed to do so. Secondly, no report of a Parole Board was placed before court. The SCA held that the High Court was in no position to determine whether the indeterminate sentence should be converted into a determinate one or whether the appellant ought to be released. The SCA upheld the appeal and remitted the matter to the High Court for reconsideration.

**Business Email Compromise (BEC) a real risk for Legal Practitioners.** The South African Courts place a **duty of care on Legal Practitioners** to take necessary steps to mitigate the risk of Business Email Compromise (BEC). The courts won't hesitate to impose **liability for pure economic loss sustained** by a plaintiff if the duty of care was neglected.

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DRT SA is proud to announce that it became a member of the South African Diamond Producers Organization (SADPO) on 13 March 2023..