

What SA's new 'failure to prevent' corruption offence means for business

South African legislation has introduced a new offence of failure to prevent corrupt activities under the Prevention and Combatting of Corrupt Activities Act 2004 (Precca).



Image source: Valeriy Byelogub – 123RF.com

Under the new offence, any member of a private sector or incorporated state-owned entity is guilty of an offence if a person associated with them gives or agrees, or offers to give, any “gratification” prohibited under Chapter 2 of Precca to another person, intending to obtain or retain business or an advantage for the company concerned.

Examples of gratification include money, gifts, property, jobs or the forgiveness of debts. The definition is very wide and includes any benefit of any kind. Chapter 2 of Precca sets out a series of offences that all involve inappropriate giving, offering, accepting, or receiving of gratification. These offences remain stand-alone offences.

Anti-corruption law expert Edward James, partner at Pinsent Masons and the Corporate Crime Risk Lead for Africa, said this notable change should spur businesses to review the procedures they have in place to address corruption risk in their South African operations.

Zondo Commission influence

The change was prompted by recommendations made by the Zondo Commission, a judge-led inquiry that found there had been ‘state capture’ in South Africa during the period of Jacob Zuma’s presidency. The introduction of the new offence is aimed at making it easier for the state to prosecute companies for corruption, supplementing the existing powers of the state to raise such prosecutions under the Criminal Procedure Act.

According to James, the major change with the new offence is it introduces a strict liability regime for wrongdoing by associated persons – save where companies can satisfy an ‘adequate procedures’ defence.

The new offence is somewhat duplicative in that it requires an offence under Chapter 2 of Precca to be committed and it also requires the new elements of obtaining or retaining business or another advantage.

The new law will only apply to current, ongoing, and future acts of corruption. Historical corruption can, however, still be prosecuted under the Criminal Procedure Act.

Defence

However, included with the new offence is the introduction of a clear defence that does not exist under the current corporate criminal liability laws in the Criminal Procedure Act. In this regard, companies that can show they implemented “adequate procedures” to prevent people from bribing or other forms of corruption can raise this as an absolute defence against liability under the new law.

“Whilst I am delighted that the recommendation of the Zondo Commission has finally made its way into the law, for the change to be meaningful the South African state will need to overcome an acute credibility gap,” Edward James said. “There has not been a single high profile corruption conviction of the key actors implicated in state capture. If the state does not change this and show it is willing and able to hold people accountable, it runs the risk of the new law being ignored by companies that may see it as a paper law with no real teeth.”

“CEOs, general counsel and compliance heads should, however, not take the chance of missing the benefit of implementing adequate procedures. This will give companies a clear defense if they come into the crosshairs of the authorities for something done by an associated person. Companies that don’t know what to do and that have not yet implemented adequate corruption controls should seek professional advice and support,” James said.

James, who previously called for the introduction of a new corporate offence of failure to prevent bribery in South Africa, said the new offence that has been introduced largely mirrors the ‘failure to prevent’ bribery offence that exists under section 7 of the UK Bribery Act.

“There is currently no guidance on what will be considered ‘adequate procedures’,” James said. “We recommend that until this is clarified, companies look at guidance from developed systems like the UK and adopt controls in line with the six principles recommended by the Ministry of Justice.”