

South Africa

I. A Brief Introduction to the Legal System of South Africa

South African law derives from various authorities, which include the common law, statutory law, judicial precedents, constitutional law, and customary law. The common law of South Africa is a set of rules and principles which have not been codified. It is rooted in Roman Dutch law as influenced by English law and is recognised in section 39 of the Constitution of South Africa. The common law may be amended by legislation and is constantly being developed by the courts. Statutory law is codified law enacted by the legislative branch of government. In addition to the national legislature, there are provincial and local legislatures which can enact legislation at, respectively, the provincial or local level of government.

Judicial precedents are used by our courts when adjudicating matters. The general rule is that the precedents of the highest courts must be followed by all other courts. The Constitution is the supreme law of the Republic, and any law or judicial decision which is inconsistent with it is considered to be invalid and can be challenged. The Constitution provides the foundations for the three main components of the South African legal system; namely the legislative authority, the executive authority, and the judicial authority. It recognises the customary laws of the indigenous people of Southern Africa.

A fundamental and critical aspect of South African law is the principle of separation of powers between the three branches of government. Each branch is considered to be an independent and unbiased organ of the state which stands as a separate independent body. This system is in place to ensure that there is an equal balance of power shared among the three separate branches so as to allow for a democratic system of government.

II. South Africa's Anticorruption Laws

On June 19, 2007, South Africa acceded to the OECD Convention. This came into force and effect on August 19, 2007. On April 27 2004, South Africa promulgated legislation which gives effect to the OECD Convention. This law, the Prevention and Combating of Corrupt Activities Act 12 of 2004 ("The Act"), prohibits the act of all corrupt activities. Section 5 of The Act particularly relates to corrupt activities pertaining to foreign public officials.

Definition of foreign public official

The Act defines a foreign public official as:

- (a) any person holding a legislative, administrative or judicial office of a foreign state;
- (b) any person performing public functions for a foreign state, including any person employed by a board, commission, corporation or other body or authority that performs a function on behalf of the foreign state; or
- (c) an official or agent of a public international organization.

Bribery

The Act defines the offence of corruption relating to foreign public officials as follows:

- (5) Any person who, directly or indirectly gives or agrees or offers to give any gratification to a foreign public official, whether for the benefit of that public official or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner—
 - (a) that amounts to the—
 - (i) Illegal, dishonest, unauthorised, incomplete, or biased; or
 - (ii) misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;
 - (b) that amounts to—
 - (i) the abuse of a position of authority;
 - (ii) a breach of trust; or
 - (ii) the violation of a legal duty or a set of rules;
 - (c) designed to achieve an unjustified result; or



- (d) that amounts to any other unauthorized or improper inducement to do or not to do anything,

is guilty of the offence of corrupt activities relating to foreign public officials.

- (2) Without derogating from the generality of section 2 (4), “to act” in subsection (1) includes—
 - (a) the using of such foreign public official’s or such others person’s position to influence any acts or decisions of the foreign state or public international organization concerned; or
 - (b) obtaining or retaining a contract, business or an advantage in the conduct of business of that foreign state or public international organization.

Sanctions

Section 26 of the Act provides that, depending on the court before which the matter is prosecuted, the following penalties can be imposed: (i) a fine or maximum period of life imprisonment (High Court), (ii) a fine or maximum period of 18 years’ imprisonment (regional court), and (iii) a fine or maximum of 5 years’ imprisonment (magistrate’s court).

Legal persons

The law applies only to natural persons

Defenses

There are no defenses afforded to a person who has committed an offence under The Act or who has committed an act of corruption.

Facilitation payments

Facilitation payments are not permitted.

III. Assessment



South Africa, as a signatory to the OECD Convention, has been evaluated by the OECD Working Group. Its Phase 2 evaluation was completed in June of 2010 and the Phase 3 evaluation will be conducted in December of 2013. In its Phase 2 report the Working Group criticized South Africa for not having prosecuted any cases of bribery of foreign officials. Of the twenty eight recommendations of the Working Group, South Africa has successfully fully implemented thirteen, partially implemented eight, and five are still to be implemented. Two of the recommendations have been rendered obsolete. As an example of a successfully implemented recommendation, South Africa has raised awareness and provided training on foreign corruption. It has also taken measures to prevent foreign bribery in the context of official development assistance by referencing the Act in all official development contracts and has adopted training programs for investigators and prosecutors to help them detect and investigate foreign bribery. The Working Group recommended that this training program be extended to the judiciary.

South Africa was criticized by the Working Group for not adequately protecting whistleblowers and for failing to require companies to adopt adequate accounting, auditing, and internal control provisions. An Anti-Corruption Task Team (ACTT) was established to deal with particular cases of corruption, and includes foreign bribery. The ACTT focuses on better co-ordination, effective investigations and prosecutions of corruption cases, and working with other government departments, in line with recommendations of the Working Group. The Working Group noted that investigative tools in domestic bribery cases have yet to be used in a foreign bribery investigation. The Working Group also criticized South Africa for not having taken specific steps to implement measures to strengthen safeguards, which will in turn ensure that the exercise of investigative and prosecutorial powers is not influenced by considerations prohibited by the OECD Convention

The Extradition Bill that would provide for extradition in foreign bribery cases has not yet been passed as is recommended by the Working Group. But South Africa has introduced draft legislation to increase fines imposed for the offence of foreign bribery.

South Africa has signed and ratified the UN Convention. It is not a member of GRECO or IACA. The country ranks 69 on Transparency International's 2012 Corruption Perceptions Index.

IV. Texts



- Directorate for Financial and Enterprise Affairs. *“South Africa: Phase 2 Follow-up report on the implementation of the phase 2 recommendations. Application of the convention on combating bribery of foreign public officials in international business transactions and the 2009 recommendation for further combating bribery of foreign public officials in international business transactions”*. Organization for Economic Co-operation and Development. Ed. Cynthia Coutu. 3 October 2012.
<<http://www.oecd.org/daf/briberyininternationalbusiness/South%20Africa%20-%20Phase%202%20Web.pdf>>

- *“South Africa to join the OECD’s Anti-Bribery Convention”*. Organization for Economic Co-operation and Development. Ed. Cynthia Coutu. 3 October 2012.
<<http://www.oecd.org/daf/briberyininternationalbusiness/anti-briberyconvention/southafricatojointheoecdsanti-briberyconvention.htm>>

- *“OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions”*. Organization for Economic Co-operation and Development. Ed. Cynthia Coutu. 3 October 2012.
<<http://www.oecd.org/daf/briberyininternationalbusiness/anti-briberyconvention/oecdconventiononcombatingbriberyofforeignpublicofficialsininternationalbusinesstransactions.htm>>

- *“South Africa's fight against bribery.”* Organization for Economic Co-operation and Development. Ed. Cynthia Coutu. 3 October 2012.
<<http://www.oecd.org/southafrica/southafricasfightagainstbribery.htm>>