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*International Experience – The
Foreign Corrupt Practices Act
and its similarities with the
Prevention and Combating of
Corrupt Activities Act*

Adv T.J. Prins SC

“Fraud and deceit abound these days more than in former times”

**- Sir Edward Coke -
(1552 – 1634)**



CORRUPTION CORPORATION

OFFICIAL CORRUPTION CENTRE

THE WORST THING IS
EVENTUALLY IT
ALL BECOMES
NORMAL.

RIP-OFF MART

CHOP SHOP
NO QUESTIONS

DOCUFAKE
WE FAKE:
• I.D.'s
• C.V.'s
• DEGREES
• DRIVERS LICENCES
• PILOT'S LICENCES

FAST FRAUD

MONEY LAUNDRY

Match-Fixing Mall

One-stop Scam Shop

CROOKERY BOOKS

BRIBERY BAR

History of the Foreign Corrupt Practices Act (FCPA)

- The Securities Exchange Commission (SEC) in the USA discovered that over 400 US companies had paid bribes to foreign public officials
- The FCPA enacted in 1977 as American Congress wanted to restore public confidence in business system
- Many enforcement actions followed
- Realisation that American companies at disadvantage as foreign companies still routinely paid bribes and could even deduct bribes from tax as business expenses

History of the Foreign Corrupt Practices Act (FCPA)

(continued)

- USA obtained agreement from 33 most important trading partners to enact similar legislation
- Signed the Organisation of Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

Anti-bribery provisions (1)

Prohibits offers, gifts, payments or promises to pay to

- foreign officials
- foreign political party officials
- foreign candidates for office

made *corruptly* and for the *purpose of influencing official acts or decisions* in order to *obtain, retain* or *direct business*

Business does not need to be with a foreign government

Anti-bribery provision (1)

(continued)

- Illegal to make offer, gift or payment to any person while knowing that, directly or indirectly, it or part thereof will find its way to an official
- Prohibition includes payments to intermediaries
- “*Payments*” or anything of value

Anti-bribery provision (2)

Companies whose securities are listed in the US must keep *proper accounting books and records* that provide an *accurate and fair reflection of the transactions of the corporation*, and maintain an *adequate system of internal accounting controls*

Who enforces the anti-bribery provisions?

- The US Department of Justice (DOJ) responsible for
 - *all criminal investigations and prosecutions*
 - *all civil action against entities that are not public companies*
- The Securities and Exchange Commission (SEC) responsible for
 - *civil action against public companies and their agents*
 - *record-keeping provisions*

Who is subject to the anti-bribery provisions?

- **Any** company listed on a US stock exchange – irrespective of whether they are US or foreign companies
- Any “*domestic concern*”
- Includes foreign subsidiaries, wholly owned and otherwise

Why take note?

- **Thorough** due diligence prior to transactions – if not, liability in terms of “*wilful blindness*”
- Establish who the intermediaries are
- Purchaser may be held liable for actions of seller
- DOJ/SEC requires companies to train staff

Sanctions

- Criminal penalties for violations
 - \$2m in respect of companies and other business entities
 - \$100 000 and imprisonment for 5 years for officers, directors, employees and agents
 - Fines may be increased to twice the amount of the benefit sought in terms of Alternative Fines Act
- Civil penalties
 - AG or SEC may bring civil action for fine of \$10 000 against any firm, director, officer, employee etc on behalf of the firm
 - AG may bring an action to enjoin an act or practice of a firm if it appears that the firm is in violation of the FCPA

Sanctions

(continued)

- Other
 - Person or firm may be barred from doing business with the Federal government or to participate in any procurement or non-procurement activity
 - May be ruled ineligible to receive export licence
 - May be suspended or debarred from securities business

Sanctions

(continued)

- Private cause of action
 - Contravention of FCPA may give rise to a private cause of action for treble damages
 - Action may be brought by a competitor who alleges that foreign contact was won as a result of bribery
 - This remedy also results in possible source of information for authorities

Sanctions

(continued)

- Red Flags
 - Unusual payment patterns or financial arrangements
 - History of corruption in the particular country
 - Refusal by joint venture partner or representative to provide a certification that it will not take action in furtherance of any unlawful action
 - Unusually high commissions paid to agents compared to value of transaction
 - Lack of transparency in expenses and accounting records
 - Apparent lack of qualifications or resources to perform the services offered
 - Referral of agent by an official

Effect of FCPA on business activities of American listed company

- Huge global corporation desired to sell portion of business not regarded as mainstream
- Consortium wished to purchase
- Not prepared to buy unless satisfied that business clean
- Investigation in terms of FCPA mandated by company
- Work conducted in Europe, Scandinavia, Africa, UK, North and South America
- Evidence of bribery reported to DOJ in USA
- Massive fines imposed

Similarities in Legislation

- Corruption criminalised in the Prevention and Combating of Corrupt Activities Act No. 12 of 2004
 - Corruption of foreign public official an offence
 - Wording very similar – specific reference to using foreign public official's position to influence acts or decisions of the foreign state or obtaining or retaining a contract or business

Similarities in Legislation

(continued)

- Extra-territorial jurisdiction
 - The South African statute provides that our courts have jurisdiction in respect of corrupt activities committed outside the republic, notwithstanding the fact that such activities may not constitute offences at the place of commission thereof.

Similarities in Legislation

(continued)

Reporting Obligation



Similarities in Legislation

(continued)

The duty to report certain offences

- **WHAT?**
- Knowledge or suspicion of:
 - Corruption
 - The offences of theft, fraud, extortion, forgery or uttering of a forged document involving R100 000 or more must be reported or caused to be reported to a police official

Similarities in Legislation

(continued)

The duty to report certain offences

- **WHO?**
- “Person in Authority” who knows/ought reasonably to have know or suspected, including:
 - DG of National / Provincial Department
 - Any public officer in Senior Management Service of a public body
 - CEO / equivalent officer of any agency / authority / board / commission / committee / corporation / council / department / entity / financial institution / foundation / fund / institute / service / any other organisation established by contract, legislation or other legal means
 - Person in acting / temporary capacity included in above

Similarities in Legislation

(continued)

Reporting

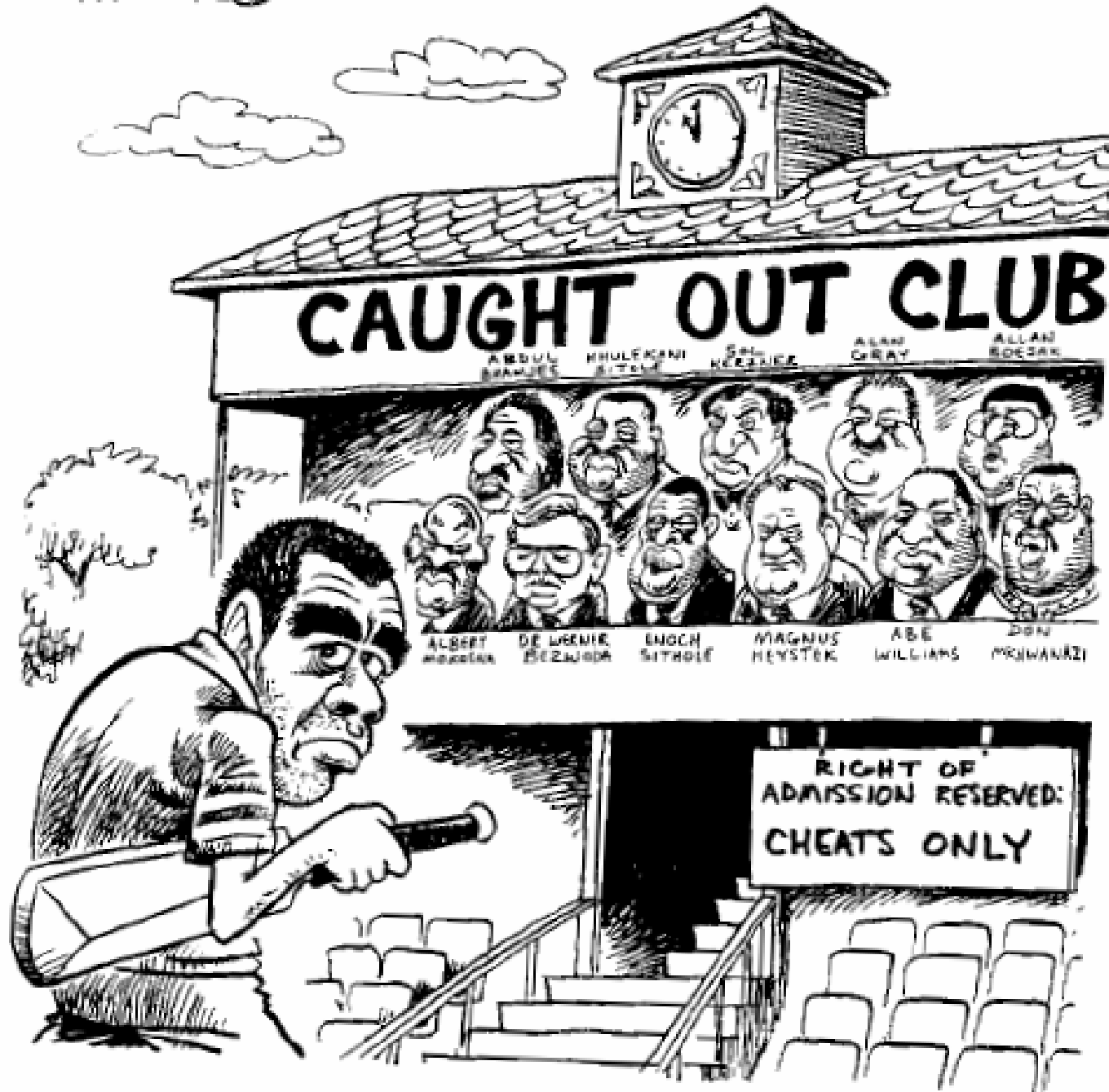
- Good corporate governance requires business policy regarding the reporting of improprieties in relation to business activities
- Culture should be created to sensitise staff to recognise and report impropriety
- Create mechanism to ensure reporting without fear of victimisation or occupational detriment
- Consider incentive scheme for staff reporting crime and irregularities

Similarities in Legislation

(continued)

- Blacklisting of companies / enterprises
 - Treasury may terminate an agreement concluded with a person or entity
 - Treasury, purchasing authority or government department **must** ignore any offer
 - Treasury, purchasing authority or government department **must** disqualify such person or entity from making an offer or obtaining procurement contract
- Heavy sentences

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