

CONFIDENTIAL

May 2011

DEFINING CORRUPTION

1. THE DEFINITION OF CORRUPTION

Corruption can informally be described as the act of unfairly or illegally influencing a decision-making process through the giving or receiving of a benefit (gratification) for the person making the decision or a third party connected to the decision maker.

In terms of South African criminal law, corruption is defined as follows:

Anybody who (a) accepts any gratification from anybody else, or (b) offers or gives any gratification (benefit) to anybody else in order to influence the receiver to conduct herself or himself or itself in a way which amounts to the unlawful or irregular exercise of any duties, commits corruption.

- **Source:** Snyman, C.R. 2008, *Criminal Law* (Fifth Edition) Durban: Lexis Nexis, page 411.

2. SOUTH AFRICAN ANTI-CORRUPTION LEGISLATION

In South Africa, the Prevention and Combating of Corrupt Activities Act No 12 of 2004 criminalises corruption. This Act forms the basis of the information contained in module one.

- **Resource:** Download a full copy of the Act by following the link:
<http://www.info.gov.za/gazette/acts/2004/a12-04.pdf>

Apart from the Prevention and Combating of Corrupt Activities Act of 2004, two acts that also make specific provision for countering corrupt activities are the Promotion of Access to Information Act 2 of 2000 and the Promotion of Administrative Justice Act 3 of 2000.

The Promotion of Access to Information Act enables people to obtain information from government and business and may be used to verify whether corruption has taken place.

- **Resource:** Download the Act at:

<http://www.info.gov.za/view/DownloadFileAction?id=68186>

The Promotion of Administrative Justice Act requires government to follow fair procedures when making decisions that affect the public or an individual. In terms of this Act, individuals may request written reasons for decisions with which they disagree. This may enable a person to determine whether corruption influenced a decision.

- **Resource:** Download the Act at:

<http://www.info.gov.za/view/DownloadFileAction?id=68196>

2.1 AMBIT OF THE PREVENTION AND COMBATING OF CORRUPT ACTIVITIES ACT

The ambit of the Prevention and Combating of Corrupt Activities Act (the Corrupt Activities Act) is much wider than that of the previous Corruption Act of 1992. The common-law offence of bribery (which applied only to public officials) was reinstated in the Corrupt Activities Act. The Act criminalises corruption in the public and private sectors for action or inaction in the future (unlike the Corruption Act of 1992, which also applied to past acts, for example, to compensate a person for something already done).

The Corrupt Activities Act states that a benefit may include any form of gratification. Gratification is defined as any donation, gift, money, contract of employment or service and the avoidance of punishment or loss. The gratification or benefit does not have to accrue to the receiver. Even if the benefit goes to any third party (individual, group of persons or company) it still constitutes corruption.

The Act provides that a South African business or person who tries to corrupt officials of foreign countries will be guilty of corruption by South African law. The corruptor may be prosecuted and sentenced in South Africa even if it is not a crime in the country where the corruption took place. Extra-territorial jurisdiction applies.

The act of influencing a decision maker may require the decision maker to perform an act or an omission (for example not to perform a duty such as issuing a fine) that results in a benefit accruing to the person providing the benefit or to a third party connected to such person.

The person making the offer is always guilty of corruption even if the offer is not accepted. If the offer is accepted, BOTH parties will be guilty of corruption or entering into a corrupt relationship, as will any third parties who knowingly were part of such a relationship. An example is when a manager is aware that contractors pay bribes to secure jobs in his department and the manager turns a blind eye. The manager may also be guilty of corruption, together with the contractors and the employee who accepted the bribe.

2.1.1 When is an act or omission corrupt?

In order to distinguish a corrupt act from a normal business practice such as the giving of marketing material or paying for a business lunch, it should be remembered that ALL ELEMENTS of the definition of corruption should be present. In other words:

A person or group of persons (even a company) should have offered or given a benefit which is not legally due. A person or group of persons (even a company) should have accepted the benefit. The benefit should have been given with the intention of unduly influencing the receiver to do or not to do something that will amount to the unlawful or irregular exercise of a duty.

Both the giver and receiver of the benefit are equally guilty of corruption.

If the offered benefit is not accepted, only the offering party is guilty of the crime, for example when a bribe is offered to a traffic officer who refuses to accept it, the person making the offer is guilty of corruption.

In instances when a business lunch is meant purely to introduce parties or to discuss a business matter, without any criminal intent to influence the receiving party unduly, it is not a case of corruption. The same applies to common business practices such as the giving of Christmas gifts or marketing material.

Always consider the value of a benefit – it should be moderate and given without any hint or expectation of a counter-benefit or favour. A gift that is nominal in value will most probably not be perceived as a “corrupt benefit”.

3. EXAMPLES OF CORRUPTION

Corruption is not restricted to or initiated only by government officials. Business people in the private sector have also been known to encourage corrupt practices when they deal with government.

Corrupt practices may take the following form:

- Business people bribe decision makers in the public sector to award contracts to them.
- Business people form front companies with public officials in order to be awarded government contracts. A bribe is paid to the “insider”.
- Some public officials expect to be paid for services that are actually part of their normal duties, such as issuing passports, identity documents, permits or licences. If persons pay a bribe, they receive immediate attention, whereas if they do not pay a bribe, the service may be delayed or denied.
- Some business people accept money in order to influence decisions regarding promotions or appointments.
- Some officials receive free meals, services, holidays or trips abroad for themselves – and, sometimes, their families – from unscrupulous business people in exchange for special attention, or to influence decisions on, for example, granting of licences or permits to them.

Prisoners sometimes offer money to prison officials to allow them to escape. Similarly, police officers are sometimes offered money by criminals to “lose” their criminal files, or to “clear” their criminal records.

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