Avoiding the Corporate Death Penalty: Exploring Alternatives for Punishing Corrupt Companies in South Africa*

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SUMMARY

Given that many state-capture cases involving companies are likely to go to court, it is important to understand the legal issues involved in holding a company criminally liable for corruption. Unlike individual offenders, companies may present complexities for the National Prosecuting Authority (NPA) and the courts when it comes to prosecution and punishment.

This article focuses on the different options available to the courts once the NPA has successfully prosecuted a company for corruption. While financial penalties are the default response, the question is whether their imposition is still viable in an economy where South Africa's future relies on the continued operation of companies. Accordingly, courts must balance the severity of the crime, the company's circumstances and the interests of society, while avoiding the imposition of ineffective fines or fines that could lead to total divestiture. In this context, courts must aim to impose penalties that not only prevent future corruption, but also potentially reform companies so as to reduce the risk of misconduct. The goal should be to find a balance between holding companies accountable and ensuring their long-term sustainability, so that they can continue contributing to the economy. This balance may even be struck pre-prosecution, considering the impact of the criminal proceedings on the country's fiscus and third parties, as well as the company's willingness to cooperate with relevant authorities to address the corruption.

KEYWORDS: corporate corruption, corporate punishment, financial penalties, alternative measures

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1 INTRODUCTION

The punishment of companies for corruption is restricted by section 332 of the Criminal Procedure Act (CPA).[1] The CPA provides a clear framework for conducting criminal proceedings, with the aim of pursuing swift and equitable administration of criminal justice. The CPA states that upon a company's conviction, a court may not impose any punishment other than a fine.[2] Evidently, in catering for an instance in which a company is convicted of corruption, the Prevention and Combating of Corrupt Activities Act[3] (PRECCA) provides for the imposition of a fine that can only be recovered from the company concerned.[4] Owing to increased corporate corruption, the effectiveness of a fine in deterring and preventing companies from engaging in corrupt activities is questioned. The reliance on a financial penalty for the punishment of companies not only limits judicial discretion, but in modern South Africa may be ineffective and impracticable. Furthermore, there are objections to sole reliance on a fine when punishing a company because the fines are often low, unguided and do not achieve the objectives of punishment.[5]

Against this background, this article first examines the general sentencing considerations influencing the imposition of criminal sanctions in South Africa, and these considerations are reconciled with the punishment of companies. Secondly, the punishment of companies in terms of South African law is evaluated, and the appropriateness of a fine as the sole penalty is considered. Thirdly, the article considers other existing measures in South African law that could be used to punish a company. Finally, flexibility in corporate punishment is proposed. It is argued that courts, both post-conviction and pre-prosecution, should exercise wider discretion to order reformative measures in companies. If properly implemented, this approach may still serve the objectives of criminal justice by providing for retribution, deterrence, prevention and reformation.

2 FACTORS INFLUENCING THE IMPOSITION OF CRIMINAL PENALTIES IN SOUTH AFRICA

2 1 Penalising corporate entities as opposed to individuals

While PRECCA, read with the Criminal Law Amendment Act[6] (Amendment Act), prescribes minimum terms of imprisonment imposable on individuals convicted of corruption, there is no guidance on imposing corporate fines. The Amendment Act excludes companies from its operation: while it prescribes terms of imprisonment applicable to individuals who have

1 51 of 1977.
2 S 332(2)(*c*) of the CPA.
3 12 of 2004.
4 S 26 of PRECCA; Terblanche *A Guide to Sentencing in South Africa* 3ed (2016) 167.
5 Jordaan "Sentencing Corporations: The Need for Reform" in Joubert (ed) *Essays in Honour of CR Snyman* (2008) 181–195.
6 105 of 1997.

contravened PRECCA,[7] companies cannot be imprisoned. Nonetheless, the severity of fines imposed for corruption can be inferred from certain provisions of PRECCA. For instance, courts may impose a fine amounting to R250 000 where a company fails to disclose its conviction resulting from PRECCA.[8] Furthermore, courts can impose a fine of five times the value of the gratification received or accepted by the company in committing the corruption.[9] Despite this, the imposition of corporate fines is highly discretionary, meaning that it is unclear what considerations inform the determination of the eventual fine.

2 2 Principles of punishment

What is clear is that sentencing courts are required to determine an appropriate fine based on long-standing principles of punishment. These principles demand that the sentence imposed must fit the criminal, the crime and the interests of the community (*Zinn* triad).[10] In addition, the sentence must serve a particular purpose, and it should at least achieve deterrence, retribution, prevention or reformation.[11] Therefore, in imposing corporate fines, courts should consider the gravity of the corruption, societal interests and the "personal" circumstances of the company concerned[12] – that is, the sentence must be based on the company's culpability rather than on the agent(s) who inform its liability.[13] A company is guilty of corruption only if the offence can be linked to individuals in the company.[14]

2 3 Sentencing considerations and their relevance to companies

Although a financial penalty against a company cannot give effect to all objectives of punishment, its imposition must be justified in accordance with relevant sentencing principles.[15] However, by their nature, some of the objectives of punishment are inapplicable to companies. For instance, Buell argues that although companies can be blameworthy, their nature supposes that they cannot be retributively punished and are incapable of receiving their just desserts.[16] In support of this, Buell explains:

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7 S 51(2)(*a*), read with Part II Schedule 2 of the Amendment Act.

8 Ss 28(6)(*b*) and 26(1)(*c*) of PRECCA.

9 S 26(3) of PRECCA.

10 *S v Zinn* 1969 (2) SA 537 (A) 540G–H.

11 *Director of Public Prosecutions, KwaZulu-Natal v P* 2006 (3) SA 515 (SCA) par 13; *S v Mhlongo* 2016 (2) SACR 611 (SCA) par 9; *S v Horn* 2018 (1) SACR 685 (WCC) par 12; *S v RO* 2010 (2) SACR 248 (SCA) par 30; *S v Van Loggenberg* 2012 (1) SACR 462 (GSJ) par 6; *S v Zinn supra* 542D; *S v M* 2007 (2) SACR 539 (CC) par 10; *S v Tsotetsi* 2019 (2) SACR 594 (WCC) par 29; *S v Bodibe* [2021] ZAGPPHC 715 par 2 and 4–7; *S v Malgas* [2001] 3 All SA 220 (A) par 12; *S v Scott-Crossley* 2008 (1) SACR 223 (SCA) par 35.

12 Terblanche *A Guide to Sentencing in South Africa* 142, 145 and 167.

13 Du Toit "Sentencing the Corporate Offender in South Africa: A Comparative Approach" 2012 25(2) *South African Journal of Criminal Justice* 240–251.

14 Kemp, Walker, Palmer, Baqwa, Gevers, Leslie and Steynberg *Criminal Law in South Africa* 3ed (2018) 255–260.

15 Hoctor *Snyman's Criminal Law* 7ed (2020) 16–17.

16 Buell "Retiring Corporate Retribution" 2020 83(4) *Law and Contemporary Problems* 25–45.

> "Corporations easily can be punished. Legal process can do things to corporations that are costly and influential, which may cause corporations, through their agents, to change how they act. Thus, the literature is brimming with consequentialist arguments for corporate criminal liability and corporate punishment. But corporations cannot be *retributively* punished because they cannot be harmed or set back in ways that could satisfy the requirement to answer a wrong against persons with an equivalent or fitting deprivation against the wrongdoer. Even if it were possible to imprison a corporation, or flog it, or stop its heart, such a punishment could not be retributive."[17]

Buell's submissions may be founded on the idea that companies have "no soul to damn and no body to kick" and, unlike human beings, they have no psyche that can suffer, or feel pain or hard treatment.[18] However, he submits that corporate punishment yields societal benefits because it may lead to institutional changes in corporate culture, monitoring systems and internal policies, which in turn may prevent the company from engaging in criminality.[19] This implies that corporate punishment has both a reformative and preventative effect.[20] The reformation of companies presents complexities because reformation is premised on the assumption that individuals can be rehabilitated and their criminal propensity reduced.[21] In fact, criminologists have linked criminal behaviour to biological abnormalities, resulting in questions about how, or in what context, the notion of reformation may apply to companies, in particular because a company has no mind of its own that can be reformed.[22] Henning notes that the reformation of companies is possible, not as the personal rehabilitation of a juristic person, but as institutional reform. Sanctions may encourage companies to adopt appropriate levels of monitoring, resulting in the agents of the company policing one another and fostering a "law-observant" corporate culture.[23]

Despite this support for corporate reformation, deterrence is the predominant justification for both corporate prosecutions and corporate punishment. The imposition and calculation of a fine is often meant to deter the concerned company, as well as other companies.[24] However, deterrence may not always be achieved by the imposition of a financial penalty because the efficacy of the fine depends largely on the size of the company and the impact its payment will have on it. Often, the payment of a criminal fine affects not the company, but rather third parties (shareholders, employees

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17 Buell 2020 *Law and Contemporary Problems* 26 and 38–40 (footnotes omitted); Jordaan in Joubert *Essays in Honour of CR Snyman* 183.

18 Buell 2020 *Law and Contemporary Problems* 26–27 and 39. See also Coffee "'No Soul to Damn: No Body to Kick': An Unscandalized Inquiry into the Problem of Corporate Punishment" 1981 79(3) *Michigan Law Review* 386.

19 Buell 2020 *Law and Contemporary Problems* 27 and 41.

20 Thomas "Incapacitating Criminal Corporations" 2019 72(3) *Vanderbilt Law Review* 927.

21 Robinson and Crow *Offender Rehabilitation: Theory, Research and Practice* (2009) 2.

22 Robinson and Crow *Offender Rehabilitation: Theory, Research and Practice* 5.

23 Henning "Should the Perception of Corporate Punishment Matter?" 2010 19(1) *Journal of Law and Policy* 87–93; Alschuler "Two Ways to Think About the Punishment of Corporations" 2009 46(4) *The American Criminal Law Review* 22.

24 Diamantis "Clockwork Corporations: A Character Theory of Corporate Punishment" 2018 103(2) *Iowa Law Review* 518; Jordaan in Joubert *Essays in Honour of CR Snyman* 183.

and consumers) and therefore is ineffective.[25] Diamantis argues that relying on financial penalties may be inappropriate, as companies may start to "price crimes", with the consequence that criminality is regarded as permissible so long as the benefits outweigh the expected fine.[26] For those companies engaged in profit maximisation, the end will justify the means.[27] According to Coffee, deterrence can be achieved only where courts impose fines that exceed expected gains, regardless of whether such fines may drive companies out of business.[28] However, once a fine surpasses a company's overall means, it cannot achieve deterrence because the company is not at risk of paying it.[29] Although deterrence cannot be the aim in cases of total divestitures, fines resulting in such divestiture may arguably be justified based on the prevention theory because the companies are permanently prevented from engaging in future wrongdoing.

Thomas contends that corporate fines can prevent future misconduct through restraint, thus effectively incapacitating companies in a manner consistent with the incapacitation of individual offenders.[30] In support of this, he refers to the US sentencing guidelines. These provide for the imposition of a fine that is calculated "to divest the organisation of all its net assets" if such a company is "operated primarily for a criminal purpose or primarily by criminal means".[31] The effect of the fine is that it permanently restrains the company from pursuing future business, thereby preventing it from engaging in further criminal wrongdoing.[32] Admittedly, although such financial penalties are not always effective, in certain instances they can be appropriate when punishing companies operated solely for criminal purposes. However, in cases where this does not apply, and considering the role of companies in sustainable development and the need for their continued operation,[33] it is imperative that criminal fines do not result in divestiture. Therefore, it is proposed that instead of criminal fines, alternative measures with retributive, deterrent, reformative or preventative effects should be considered against companies that are convicted of corruption.

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25 Henning 2010 *Journal of Law and Policy* 86–87; Diamantis 2018 *Iowa Law Review* 518; Jordaan in Joubert *Essays in Honour of CR Snyman* 184–186.

26 Diamantis 2018 *Iowa Law Review* 524–525.

27 *Ibid*; Jordaan in Joubert *Essays in Honour of CR Snyman* 185–186.

28 Coffee 1981 *Michigan Law Review* 389–390.

29 Coffee 1981 *Michigan Law Review* 389–390; Jordaan in Joubert *Essays in Honour of CR Snyman* 184.

30 Thomas 2019 *Vanderbilt Law Review* 940 and 947.

31 Thomas 2019 *Vanderbilt Law Review* 947; US Sentencing Commission *Guidelines Manual* (2023) ch 8, s 8C1.1.

32 Thomas 2019 *Vanderbilt Law Review* 947.

33 Muhanika "The Business Environment and Economic Development: How the Ease of Doing Business in Sub-Saharan Africa Relates to Its Economic Growth" 2021 *SA-TIED* 1; Wheeler and McKague *The Role of Business in Development* Paper presented at conference on Post-Johannesburg: New Strategies for Sustainable Livelihoods, York University (27 September 2002).

3 CORPORATE PUNISHMENT ACCORDING TO RELEVANT SOUTH AFRICAN LEGISLATION

While section 276(1) of the CPA also restricts the discretion of courts in imposing corporate punishment, it provides for additional sanctions that may be effective when punishing a company for corruption. In addition to imposing a fine, a court may use forfeiture orders,[34] issue a caution (warning/reprimand), or suspend or postpone any sentence, conditionally or unconditionally.[35] Furthermore, where the offence concerned has caused damage to or loss of property (including money), a court may order compensation and restitution.[36] These additional measures are discussed below.

3 1 Fines as default punishment

In *S v Shaik*[37] and *S v Scholtz*,[38] the court affirmed that a company can be sentenced only to a financial penalty. In *S v Shaik*, Squires J stated that in deciding an appropriate fine, the ordinary guidelines that regulate the imposition of a fine should be applicable.[39] Although he did not provide clarity on these guidelines, it can be assumed that he was referring to the general principles of sentencing and the Adjustment of Fines Act (AFA).[40] The latter is important in the adjustment of all fines emanating from a statute that mentions a maximum term of imprisonment but excludes a maximum fine imposable.[41] Accordingly, where legislation refers only to the maximum term of imprisonment without mentioning the maximum fine, the term of imprisonment is used to determine the value imposable. Currently, the general ratio used is R40 000 per 12 months' (or one year's) imprisonment.[42] Therefore, in imposing a financial penalty in respect of corrupt companies, a sentencing court ought to apply the AFA, read together with section 26(1) of PRECCA. The adjustment applied as per the AFA is specifically determined with reference to the sentencing jurisdiction applicable to a district court. Arguably, despite not being expressly mentioned, High Courts may also use the AFA for guidance where an undisclosed monetary fine is to serve as an alternative to a specified imprisonment term.[43] In fact, the AFA may be the reason for the exclusion of companies from the Amendment Act; courts may still apply the AFA in determining an appropriate fine – one that is comparable to the terms of imprisonment prescribed in the Amendment Act.

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34 S 276(2)(*b*) of the CPA.

35 S 297 of the CPA.

36 S 300 of the CPA.

37 *S v Shaik* 2007 (1) SACR 142 (D); 2007 (1) SA 240 (SCA).

38 *S v Scholtz* [2016] ZANCHC 90; 2018 (2) SACR 526 (SCA).

39 *S v Shaik* (HC) *supra* 244.

40 101 of 1991.

41 Terblanche *A Guide to Sentencing in South Africa* 36.

42 S 1(1)(*a*) of the AFA; Terblanche *A Guide to Sentencing in South Africa* 37; *S v Tseko* 2024 (1) SACR 208 (NWM) par 13–17; *S v Shongwe* [2015] ZAGPPHC 870 par 6–7; *S v Siduna* [2023] ZANWHC 201 par 21–22.

43 See *Uzani Environmental Advocacy CC v BP Southern Africa (Pty) Ltd* [2024] ZAGPPHC 1387 par 32–33.

However, despite the strict application of the Amendment Act in respect of sentencing individual offenders,[44] the court in *S v Shaik* did not reference the AFA in imposing fines on the companies involved. This may be because the Amendment Act does not make explicit provision for the imposition of a fine as an alternative, and therefore it cannot be said that the legislature intended to impose a financial penalty for offences falling within its operation. Even so, there is nothing in law precluding the courts from applying the AFA to determine a fine that bears a relationship to the imprisonment terms outlined. After all, companies may only be sentenced to the payment of a fine, even if the relevant law makes no provision for it in respect of the offence in question.[45] In fact, to achieve a consistent and severe response to corrupt activities, the AFA should be read into the Amendment Act when sentencing companies. On sentencing the companies, the court in *S v Shaik* imposed varying fines but, with close scrutiny, the court cannot be said to have taken the AFA into consideration.[46] The fines payable were in excess of or below the amounts that would have been applicable had the AFA been applied alongside the Amendment Act.[47] Of course, a "downward" departure may be permissible given that the Amendment Act provides minimum terms of imprisonment from which a court may depart if there are substantial and compelling circumstances.[48] Importantly, nothing in the Amendment Act suggests that a court may not impose a sentence higher than the prescribed minimum term. The Act does not provide maximum sentences but instead uses the words "not less than" when prescribing the sentences.[49] Furthermore, the imposition of punishment involves a balancing of conflicting factors,[50] and this exercise can ultimately lead to varying sentences for different co-offenders.

Of note in *S v Shaik*, however, is that while the court emphasised the seriousness of corruption and the interests of society in sentencing the individual offenders,[51] in relation to the companies, it merely emphasised their "personal" circumstances. The court considered their ability to pay the fines, which the appeal court did not regard as an irregularity.[52] Although there is no clear justification for the values eventually imposed, the court indicated that when sentencing a company, the process becomes complicated when the company is dormant and/or lacks assets, or when the Asset Forfeiture Unit (AFU), acting under the Prevention of Organised Crime

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44 *S v Shaik* (SCA) *supra* par 49, 55 and 224; *S v Shaik* (HC) *supra* 238 and 244. In terms of s 51(2)(*a*)(i), read with Part II of Schedule 2 of the Amendment Act, a minimum term of 15 years' imprisonment for a first offender, or a minimum term ranging between 20 and 25 years' imprisonment for a repeat offender is imposable, unless substantial and compelling circumstances warrant a departure.

45 S 332(2)(*c*) of the CPA.

46 *S v Shaik* (SCA) *supra* par 56–59; *S v Shaik* (HC) 244–245.

47 At the time of this case, the general ratio applicable was R20 000 per 12 months' (or one year's) imprisonment. See generally, King "Commentary on the Adjustment of Fines Act, 1991 (Act 101 of 1991)" (21 May 2007) http://www.justiceforum.co.za/JET/JET-LTN/e-Mantshi%20issue%2018%20July%202007.pdf (accessed 2025-05-11) 5–11.

48 S 51(3) of the Amendment Act.

49 *S v Malgas supra* par 25.

50 *S v Khasibe* [2022] ZAKZPHC 41 par 16; *S v Mvela* [2025] ZAGPJHC 226 par 27–29.

51 *S v Shaik* (SCA) *supra* par 223–229.

52 *S v Shaik* (SCA) *supra* par 212; *S v Shaik* (HC) *supra* 244.

Act (POCA),[53] has already seized part or all of its assets,[54] thereby limiting the court's ability to impose a sentence that gives proper effect to the objectives of punishment. Similarly, in *S v Scholtz*, the court provided little justification for the fines it imposed.[55] Although it emphasised the gravity of the offence and applied the Amendment Act in sentencing the individuals,[56] the fines imposed against the companies were relatively low. In sentencing the companies, the court imposed a fine of R150 000. It considered the companies' ability to pay the fine, the circumstances under which they committed the offence, the proceeds they derived from the offence and the confiscation orders issued against them.[57] Troublingly, however, in both judgments, the fines imposed were low and lacked clear guiding principles, thus highlighting the need for greater flexibility in the sentencing of companies. Flexibility would help avoid the imposition of ineffective fines that do not address the severity of corporate corruption or benefit society, but which instead are based primarily on the company's circumstances.

3 2 Alternative measures for punishing companies

3 2 1 Asset seizures and compensation orders

In *S v Scholtz*, the court also considered whether a confiscation order could serve as punishment.[58] Section 18(1) of POCA empowers a court to make an order of confiscation if, upon conviction, it is established that an offender derived benefits from the offence.[59] In this regard, the court emphasised that the purpose of a confiscation order is to "remove the incentive for crime by stripping offenders of the proceeds of their misdemeanours".[60] This position was confirmed in *National Director of Public Prosecutions v Gardener*,[61] where Cachalia JA said:

> "It is plain that confiscation and sentence are to be treated separately – for good reason. The purpose of sentencing is to punish an offender for his or her criminal wrongdoing. The severity of a sentence is primarily intended to reflect the defendant's culpability in relation to the offence for which he or she is being punished. The main purpose of a confiscation order is to deprive offenders from deriving any benefit from their ill-gotten gains. The achievement of this purpose may have a punitive effect but this is not its rationale."[62]

A confiscation order issued in terms of POCA therefore cannot be regarded as a sentence.[63] Even where the value of the confiscation order is

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53 121 of 1998.

54 *S v Shaik* (HC) *supra* 244.

55 *S v Scholtz* (HC) *supra* par 34.

56 *S v Scholtz* (HC) *supra* par 25–26.

57 *S v Scholtz* (HC) *supra* par 28–33.

58 *S v Scholtz* (SCA) *supra* par 201–202; *S v Scholtz* (HC) *supra* par 16.

59 S 18(1)(*a*) of Act 121 of 1998. This is arguably an expression of s 276(2)(*b*) of Act 51 of 1977.

60 *S v Scholtz* (SCA) *supra* par 203.

61 *National Director of Public Prosecutions v Gardener* 2011 (1) SACR 612 (SCA).

62 *National Director of Public Prosecutions v Gardener supra* par 19 and 23.

63 *National Director of Public Prosecutions v Gardener supra* par 23; *S v Scholtz* (SCA) *supra* par 204.

substantial, a court may only consider its value in mitigation of the intended sentence, but cannot give it undue weight.[64] Thus, although a confiscation order issued against a company may have a punitive effect, in particular if its value is substantial, it should be considered alongside other factors as it can only serve to mitigate the final sentence.[65] In *S v Scholtz*, the confiscation order exceeded R60 million, but the cumulative effect of the aggravating factors meant it had little to no influence on the final sentence.[66] The Constitutional Court in *S v Shaik* confirms this position. It acknowledged that despite having a punitive effect, the primary purpose of asset seizures or confiscation orders is not to punish, but rather to ensure that persons do not benefit from the proceeds of their wrongful conduct.[67] However, asset seizures may arguably deter people from engaging in criminality through the realisation that assets and/or profits may be forfeited or confiscated in the event of a conviction. This further ensures that people do not have the means to commit further crimes (deterrence/ prevention).[68] Therefore, asset seizures remain appropriate in corporate transgressions.

Arguably, the confiscation order granted in *S v Scholtz* could have functioned as compensation or restitution for the loss incurred by the South African government in its dealings with the appellants. In terms of section 300 of the CPA, a compensation and/or restitution order may be granted where corruption results in damage to or loss of property (including money). A court, however, may only grant such an order on the application of a victim or, alternatively, on the application of a prosecutor acting on the instructions of a victim.[69] Like a confiscation order, compensation is not a criminal sentence and, as a result, can be granted in addition to any other appropriate punishment. This is because it has the effect of a civil judgment and is payable directly to the victim. Therefore, the remedies relating to a civil judgment follow *ex lege* in an instance of a default in payment.[70] The payment of compensation can be made either as a lump-sum down payment or in instalments.[71]

In deciding whether to grant compensation, the court will often consider the financial means of the offender; compensation as a remedy can be effective only if the offender is capable of making payment.[72] The order serves to place the victim of the crime in the same position that they would have been in, but for the offence.[73] In respect of corporate corruption,

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64 *S v Scholtz* (SCA) *supra* par 204.

65 *S v Scholtz* (SCA) *supra* par 204–205.

66 *S v Scholtz* (SCA) *supra* par 202–211.

67 *S v Shaik* 2008 (2) SA 208 (CC) par 51 and 57. See also *National Director of Public Prosecutions v Botha NO* 2020 (1) SACR 599 (CC) par 36. Although *Botha* dealt with civil forfeiture under Ch 6 of POCA and not post-conviction confiscation, it remains relevant because it confirms that POCA's asset-seizure measures are aimed at removing unlawful benefits rather than primarily as punishment.

68 *S v Shaik* (CC) *supra* par 52.

69 S 300(1) of the CPA; *S v King* [2014] ZAECGHC 109 par 6–7; *Raymond Daniel de Villiers v S* 2023 (2) SACR 221 par 10.

70 Ndlovu "Compensation Orders in Criminal Proceedings" 2018 587 *De Rebus* 16; *S v Williams* [2016] ZAFSHC 20 par 3 and 4.

71 *S v Williams supra* par 3 and 4; *S v Williams* 2023 (2) SACR 221 (SCA) par 25–27.

72 *Vaveki v S* [2010] ZAWCHC 598 par 46–47 and 58.

73 *Vaveki v S supra* par 46.

section 300 of the CPA would arguably be appropriate in a case of identifiable victims – those directly affected by the offence. Corruption is evidently not a victimless crime, but its nature is such that the victims are often difficult to identify. Often, the victims may be the general population, thus presenting particular challenges in identifying the exact victims entitled to compensation.[74] The matter, however, is less complicated if the corruption involves state institutions, state property and public money; the State is an easily identifiable victim of the offence. Therefore, on application by the State, a court may grant compensation in its favour, provided the company concerned has the means to pay. The latter proviso, however, seemingly precludes courts from imposing substantial fines against companies.

A compensation order can also be made in terms of section 297 of the CPA. Compensation is granted at the prerogative of the court and as a condition of a suspended sentence. In this regard, the purpose of compensation is twofold: it keeps the offender out of prison and makes the offender realise the impact of their conduct, while simultaneously compensating the victim for loss incurred.[75] In this instance, the compensation aligns with the concept of restorative justice and, to some extent, effectively recognises the victim of the crime in the sentencing process. In *Stow v Regional Magistrate, PE NO, Meyer v Cooney NO*,[76] the court distinguished between compensation granted in terms of sections 297 and 300 of the CPA:

> "Compensation as a condition of suspension is an integral part of the sentence which has its purpose as described in *S v Tshondeni* (*supra*). It is a flexible condition which can be adapted to a person's means and the length of time it will take to make full restitution. Its imposition is subject to the safeguards mentioned above. Section 300 on the other hand is a convenient means of recovering a debt without having to institute a civil action. The order will be made for the full amount determined as compensation for the damage or loss and would be executable for the full amount. Section 300 can only be utilised if the victim or the state, applies for such an order. The victim can renounce the order, which impacts on the effectiveness of the order, whereas compensation as a condition of suspension remains the prerogative of the court and will serve a more meaningful purpose in the sentencing process. Section 300 is therefore only available in restricted circumstances and lacks the flexibility which can be used in shaping a suitable sentence. If it was the only means of ordering compensation, a valuable sentencing option would be lost."[77]

Therefore, when sentencing a company, section 297 may be appropriate. A court may propose a specific fine, but order that the fine be suspended for a certain period on condition that compensation is paid to the victim of the crime.[78] In order to effect compensation, the company may use the monies available to it at the time of sentencing, or alternatively, the relief from the suspended sentence may provide the company with time to raise the money.

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74 OECD "Resolving Foreign Bribery Cases With Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention" (20 March 2019) https://web-archive.oecd.org/temp/2020-08-27/511938-Resolving-foreign-bribery-cases-with-non-trial-resolutions.pdf (accessed 2025-05-11) 97 and 126.

75 *Stow v Regional Magistrate, PE NO, Meyer v Cooney NO* 2017 (2) SACR 96 (ECG) par 24.

76 *Stow v Regional Magistrate, PE NO, Meyer v Cooney NO supra*.

77 *Stow v Regional Magistrate, PE NO, Meyer v Cooney NO supra* par 64.

78 S 297(*b*) read with s 297(1)*(a)*(i)(aa) of the CPA.

The company's financial position, however, will still inform the court's discretion on whether to impose compensation in terms of section 297 of the CPA.[79] The financial status of a company has already been recognised as an impediment to imposing appropriate financial sanctions. Granting a compensation order is in accordance with South Africa's obligations under the UN Convention Against Corruption (UNCAC),[80] which provides for a non-criminal sanction.[81]

3 2 2 Disbarments or "blacklisting"

PRECCA provides for a further order that may be issued against a company convicted of corruption. On conviction, a court has the discretion to disbar a company from dealing with the State. The effect is that the company is prevented from securing state contracts for up to 10 years.[82] However, the order may be made only for convictions under sections 12 and 13 of PRECCA – that is, the company must have corruptly obtained a contract or tender deal. If a case falls outside of these sections, the disbarment sanction is not available. Currently, there are no disbarments in the register established under PRECCA, possibly because there are no corporate convictions under the specified sections.[83] By contrast, there do appear to be companies disbarred in terms of the Preferential Procurement Regulations.[84] The Regulations provide for a database aimed at "blacklisting" suppliers that have obtained a government contract corruptly or fraudulently or that have failed to perform in respect of a government contract. This database, however, is not dependent on a court order or conviction. In other words, any aggrieved organ of state can submit names

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79 *Stow v Regional Magistrate, PE NO, Meyer v Cooney NO supra* par 57 and 64; *Vaveki v S supra* par 47.

80 UN General Assembly *United Nations Convention Against Corruption* 2349 UNTS 41; 43 ILM 37 (2003). Adopted: 31/10/2003; EIF: 14/12/2005.

81 Art 26(4) of the UNCAC. South Africa is a party to the UNCAC and by ratification, it agreed to adhere to specific standards and practices.

82 S 28 of PRECCA; Corruption Watch "Procurement Watch Report on Procurement Risk Trends" (3 August 2022) https://www.corruptionwatch.org.za/wp-content/uploads/2022/08/ProcurementWatch-report-2022-04.08.22.pdf (accessed 2025-05-12) 13–14; Corruption Watch "Procurement Watch Report on Procurement Risk Trends" (11 November 2021) https://www.corruptionwatch.org.za/wp-content/uploads/2021/11/ProcurementWatch-report-revised-version-11Nov.pdf (accessed 2025-05-12) 12–13; Williams and Quinot "To Debar or Not to Debar: When to Endorse a Contractor on the Register for Tender Defaulters" 2008 125(2) *South African Law Journal* 248; Williams and Quinot "Public Procurement and Corruption: The South African Response" 2007 124(2) *South African Law Journal* 339.

83 National Treasury "Register for Tender Defaulters" (undated) http://www.treasury.gov.za/publications/other/ Register%20for%20Tender%20Defaulters.pdf (accessed 2025-05-12); Corruption Watch "Criminal Justice Partly Responsible for Empty Tender Defaulters Register" (12 December 2022) https://www.corruptionwatch.org.za/criminal-justice-partly-responsible-for-empty-tender-defaulters-register/ (accessed 2025-05-12); Quinot "An Institutional Legal Structure for Regulating Public Procurement in South Africa" (March 2014) http://africanprocurementlaw.org/wp-content/uploads/2016/01/OCPO-Final-Report-APPRRU-Web-Secure.pdf (accessed 2025-05-12) 34–35.

84 GN R725 in *GG* 22549 of 2001-08-10 emanating from the Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA Regulations).

for inclusion in the database.[85] To the extent the database prevents a company from operating as it usually does, it arguably has the same effect as that contemplated under PRECCA. Interestingly, despite the procurement malfeasance that occurred during the era of state capture and under the Covid-19 emergency regulations, the database has few corporate restrictions.[86]

For consistency in corporate disbarments, it could be argued that the current mechanisms should be consolidated into a single register, including both judicial and extra-judicial restrictions. As it stands, both registers are managed by National Treasury and serve the same purpose.[87] Therefore, there is no legal justification for their separation, as the same safeguards applicable to restrictions under PRECCA apply to extra-judicial disbarments. For instance, an extra-judicial disbarment must be rational and procedurally fair, meaning that all allegations of misconduct must be duly investigated, and those targeted for restriction must be given an opportunity to defend their case.[88] Although disbarments are designed to protect the State from potential corruption risks by barring unsuitable companies from engaging with it,[89] the system has loopholes, as the number of restricted companies does not accurately reflect the actual level of corporate misconduct.[90] In fact, misconduct identified in the private sector does not lead to restrictions in the relevant databases, meaning that without a record of such companies, they

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85 Corruption Watch https://www.corruptionwatch.org.za/criminal-justice-partly-responsible-for-empty-tender-defaulters-register/; Corruption Watch https://www.corruptionwatch.org.za/wp-content/uploads/2021/11/ProcurementWatch-report-revised-version-11Nov.pdf; Corruption Watch https://www.corruptionwatch.org.za/wp-content/uploads/2022/08/ProcurementWatch-report-2022-04.08.22.pdf.

86 National Treasury "Restricted Supplier and Tender Defaulter Report" (18 March 2025) http://ocpo.treasury.gov.za/RestrictedSupplier/RestrictedSuppliersReport.pdf (accessed 2025-05-12).

87 Van Zyl and Du Toit "Unfriended! Exploring National Treasury's Lists of Restricted Suppliers" 2023 3 *The Forensic Practitioner* 5.

88 Quinot "Control and Litigation in Public Contracts in South Africa" in Folliot-Lalliot and Torricelli (eds) *Contrôles et Contentieux des Contrats Publics: Oversight and Challenges of Public Contracts* (2018) 232; *Chairman, State Tender Board v Supersonic Tours (Pty) Ltd* 2008 (6) SA 220 (SCA) par 14; *Chairman of the State Tender Board v Digital Voice Processing (Pty) Ltd, Chairman of the State Tender Board v Sneller Digital (Pty) Ltd* 2012 (2) SA 16 (SCA) par 31.

89 See generally, Bolton "The Exclusion of Contractors From Government Contract Awards" 2006 10(1) *Law, Democracy and Development* 25–48; Shannon "Debarment and Suspension Revisited: Fewer Eggs in the Basket?" 1995 44(2) *Catholic University Law Review* 363–435; Williams-Elegbe "An Uncertain Future for Debarment in South Africa: An Analysis of the Debarment Provisions in the 2019 Draft Public Procurement Bill" 2020 7(1) *APPLJ* 34–44; Yukins and Kania "Suspension and Debarment in the US Government: Comparative Lessons for the EU's Next Steps in Procurement" 2019 19(2) *UrT* 47–73.

90 DefenceWeb "Register for Tender Defaulters Empty" (9 December 2009) https://www.defenceweb.co.za/joint/logistics/register-for-tender-defaulters-empty/ (accessed 2025-05-14); Cronje "Tender Blacklist 'Empty', But Mabuza Says New Bill Will Make It Obligatory to Name and Shame" (18 November 2021) https://www.news24.com/fin24/economy/tender-blacklist-empty-but-mabuza-says-new-bill-will-make-it-obligatory-to-name-and-shame-20211118 (accessed 2025-05-14); Parliamentary Monitoring Group "Blacklisting of Companies: National Treasury & SIU Briefing, With Deputy Minister" (9 March 2022) https://pmg.org.za/committee-meeting/34528/ (accessed 2025-05-14).

are still eligible to bid for government contracts.[91] Accordingly, the legal framework should also permit institutions in the private sector to submit the names of those they have already r disbarred to National Treasury because this omission may make the State vulnerable to fraud and corruption risks. Arguably, to strengthen the enforcement of disbarment measures, a single unit should be responsible for identifying companies to be disbarred. Such a unit must not only be in a position to apprise itself of court judgments involving corruption, but must also be able to ascertain whether contracting authorities follow procurement processes, including statutory requirements. The Auditor-General of South Africa and the Special Investigating Unit could play a key role in such a unit as they are already mandated to report on public maladministration.[92] The current processes require accounting officers of the respective branches of government to submit the names of restricted companies. This is the case even where a restriction arises out of a court order; the accounting officer responsible for initiating the investigation that led to the prosecution must inform National Treasury of the resultant conviction.[93]

Beyond these considerations, it is submitted that disbarments are an appropriate tool for deterring and preventing corporate corruption. Accepting that companies can be reformed as described above,[94] disbarments may be viable in promoting corporate reformation. This is particularly the case where they are imposed with specific conditions requiring companies to implement effective reformative measures and/or undergo appropriate monitoring. If such steps are adopted, a company's restriction would be temporary and would be lifted upon proof that it has implemented effective anti-corruption strategies. For instance, EOH, a company listed on the Johannesburg Stock Exchange and Africa's largest IT service provider, was implicated in conduct such as bid-rigging in the public sector, share-price manipulation and defrauding suppliers and customers.[95] Following restrictions imposed by various private-sector companies, EOH took steps to reform and repair its reputation. It implemented an anti-corruption strategy that included a complete corporate restructuring, new institutional rules and processes, and a commitment to "proactive transparency" in dealings with both public and private regulatory agencies. This introduced a complete shift in its corporate

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91 See Wasserman "50 Companies Blacklisted After EOH Finds Almost R1bn in Fake Work and Overbilling" (15 October 2019) https://www.news24.com/fin24/companies/ict/50-companies-blacklisted-after-eoh-finds-almost-r1bn-in-fake-work-and-overbilling-20191015 (accessed 2025-05-14).

92 Chapter 2 of the Public Audit Act 25 of 2004; Quinot in Folliot-Lalliot and Torricelli (eds) *Contrôles et Contentieux des Contrats Publics: Oversight and Challenges of Public Contracts* 245–246; s 4 of the Special Investigating Units and Special Tribunals Act 74 of 1996.

93 Van Zyl and Du Toit 2023 *The Forensic Practitioner* 5.

94 See the discussion under 2 3.

95 Gelb "Addressing Corporate Corruption in South Africa: The EOH Experience" (July 2023) https://www.corruptionwatch.org.za/wp-content/uploads/2023/08/NBI-Addressing-Corporate-Corruption-in-South-Africa-The-EOH-Experience_29-Aug-2023.pdf (accessed 2025-05-14) 19–18; Ward, Mthombeni and Moore "EOH Holdings Ltd: From Blacklist to Market Confidence Through Corporate Structure and Governance" (26 October 2021) https://www.thecasecentre.org/products/view?id=180877 (accessed 2025-05-14) 2–3.

culture.[96] Interestingly, despite the company's acknowledgement of wrongful conduct in the public sector and resultant restrictions in the private sector,[97] it was not recorded in the database concerning the Preferential Procurement Regulations.

3 2 3 Negotiated settlements

With the escalation in corporate corruption, the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State recommended the enactment of legislation that has the effect of deferring the prosecution and investigation of companies. In response, the NPA adopted the Corporate Alternative Dispute Resolutions (CADRs) mechanism, mimicking the approach of Deferred Prosecution Agreements (DPAs) used in the United Kingdom (UK) and the United States of America (US).[98] Although these agreements are used in some foreign jurisdictions, they are new to South Africa and therefore need further investigation to reveal their effectiveness.[99]

CADRs are aimed at enforcing the law related to corruption and promoting corporate accountability where corruption is committed. The decision to conclude such an agreement is within the prerogative of the NPA without judicial review or intervention. However, if a prosecution is already pending in court, the court will be notified of a decision to conclude an agreement, although it appears that it merely rubber-stamps the agreement.[100] The decision is made on a case-by-case analysis, with the public interest being central to the inquiry. In exercising its discretion, the NPA is guided by various factors, namely the seriousness of the corruption, the personal circumstances of the company and the interests of society.[101] To promote transparency and accountability, a summary of the agreement is published on the NPA's website. The summary must be worded cautiously to avoid

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96 See Gelb https://www.corruptionwatch.org.za/wp-content/uploads/2023/08/NBI-Addressing-Corporate-Corruption-in-South-Africa-The-EOH-Experience_29-Aug-2023.pdf 24–33; Zondo *Report of the Judicial Commission of Inquiry Into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State* (2022) part iv vol 1; Ward *et al* https://www.thecasecentre.org/products/view?id=180877 4–10.

97 Gelb https://www.corruptionwatch.org.za/wp-content/uploads/2023/08/NBI-Addressing-Corporate-Corruption-in-South-Africa-The-EOH-Experience_29-Aug-2023.pdf 20–24; Zondo *Report of the Judicial Commission of Inquiry Into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State* part iv vol 1; Ward *et al* https://www.thecasecentre.org/products/view?id=180877 10.

98 NPA "Annual Report NPA 2021/2022" (1 June 2022) https://www.npa.gov.za/sites/default/files/uploads/NPA%20Annual%20Report%202022_web.pdf (accessed 2025-05-17) 15–16; NPA "Prosecution Policy Directives (2014) Part 51" (2 February 2024) https://www.npa.gov.za/sites/default/files/uploads/Annexure%20A%20PART%2051%20Corporate%20ADRM.pdf (accessed 2025-05-17).

99 Du Toit and Aslett "Deferred Prosecution Agreements as a Possible Mechanism to Combat Corporate Crime in South Africa" in Schwikkard and Hoctor (eds) *Essays in Honour of Steph Van der Merwe* (2023) 109. See generally South African Law Reform Commission https://www.justice.gov.za/salrc/dpapers/DP165-Project151-Non-TrialResolutions.pdf (accessed 2025-05-11).

100 NPA https://www.npa.gov.za/sites/default/files/uploads/Annexure%20A%20PART%2051%20Corporate%20ADRM.pdf par C, F and M.

101 NPA https://www.npa.gov.za/sites/default/files/uploads/Annexure%20A%20PART%2051%20Corporate%20ADRM.pdf par E.

compromising any ongoing investigations or trials against implicated companies or individuals.[102] Notably, this mechanism is applicable only when a company self-discloses its misconduct or when the NPA issues an invitation to the company to conclude a CADR.[103] This implies that not all companies will qualify for a CADR and, presumably, eligibility requires the company to be financially capable of meeting the CADR's financial obligations and/or willing to make the necessary payments. This raises the question of what happens to companies in poor financial situations, especially considering that South Africa has many small and medium-sized enterprises (SMEs)[104] that may not have the same financial resources or capacity as multinational companies. Furthermore, given that the NPA exercises its discretion in extending an invitation to enter into a CADR, the question remains as to how to ensure impartial decision-making.

To date, the NPA has used this mechanism in a limited number of high-profile matters involving multinational companies. In the settlements, the companies took responsibility for their wrongful conduct, committed to cooperating with investigating agencies, making restitution, paying punitive fines and implementing reformative measures. The settlements fell within the discretion of the NPA and outside of judicial supervision or intervention. The NPA could only finalise these settlements if, based on its examination of the circumstances, it was deemed in the public interest. The settlements suspended the investigation or prosecution of the companies, while requiring them to implement effective compliance programmes, adhere to standards of good practice and uphold good corporate governance. This approach emphasised corporate reform, going beyond just criminal prosecutions and the imposition of sanctions.[105]

CADRs may be criticised for being lenient, as they allow companies to avoid the typical consequences of criminal justice. However, they undeniably provide an effective means of enforcing corrective actions to prevent future misconduct, thus benefiting the company, its employees, shareholders and society. Furthermore, CADRs expedite the resolution of corporate

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[102] NPA https://www.npa.gov.za/sites/default/files/uploads/Annexure%20A%20PART%2051%20Corporate%20ADRM.pdf par N.

[103] NPA https://www.npa.gov.za/sites/default/files/uploads/Annexure%20A%20PART%2051%20Corporate%20ADRM.pdf par G and H.

[104] See generally, International Finance Corporation "The Unseen Sector: A Report on the MSME Opportunity in South Africa" (November 2018) https://www.ifc.org/content/dam/ifc/doc/mgrt/2019-01-msme-opportunity-south-africa.pdf (accessed 2025-05-14).

[105] Muntingh and Redpath "Policy Brief: The National Prosecuting Authority Directives for Corporate Alternative Dispute Resolution (CADRe)" (23 December 2024) https://dullahomarinstitute.org.za/siteworkspace/policy-brief-cadre-23-12-2024.pdf (accessed 2025-05-17) 3–8; TimesLIVE "IT Giant SAP to Pay R2.2bn Reparations, Helps NPA Probe Gupta-Linked Officials" (11 January 2024) https://www.timeslive.co.za/news/south-africa/2024-01-11-it-giant-sap-to-pay-r22bn-reparations-helps-npa-probe-gupta-linked-officials/ (accessed 2025-05-17); NPA "A Step Towards Accountability for State Capture Corruption at Eskom: ABB to Pay Over R2.5 Billion in Punitive Reparations to South Africa" (1 December 2022) https://www.npa.gov.za/media/step-towards-accountability-state-capture-corruption-eskom-abb-pay-over-r25-billion-punitive (accessed 2025-05-17); NPA "Corporate-Alternative Dispute Resolution: Mckinsey" (28 April 2026) https://www.npa.gov.za/sites/default/files/uploads/Mckinsey%20Summary%20April%202026.pdf (accessed 2026-06-29).

investigations and prosecutions because companies are required to take responsibility and provide evidence that can help conclude investigations and prosecute other offenders. Through CADRs, the interests of victims can be restored by providing compensation or restitution. Furthermore, CADRs reduce the need for costly trials, thus conserving prosecutorial resources while fostering self-policing and monitoring within companies.[106] In fact, since most measures currently rely on financial penalties, CADRs offer South Africa a way to address corruption without relying on punitive fines. For example, the NPA could conclude CADRs that include temporary disbarment, reformative action, suspension of operational licences, or mandates for investments in corruption awareness or social responsibility initiatives. Asset seizures could also be considered if substantial benefits were gained from wrongdoing. In cases with identifiable victims, compensation or restitution could also be imposed.[107] However, while negotiated settlements represent progress in combating corporate corruption, their effectiveness requires further investigation so that they can align with the general objectives of criminal justice and South Africa's constitutional principles.[108]

4 CONCLUSION

This article has examined South African law and questioned whether a company's punishment should be based exclusively on the imposition of fines. As indicated, fines are often not feasible because of a company's financial status at the time of conviction and, importantly, they do not always give effect to the general purposes of punishment, such as deterrence, retribution, prevention and reformation. Considering the role that companies play in South Africa's economic sustainability, the article has explored alternative measures that may be more effective in punishing companies. In addition to commercial disbarments, asset seizures and compensatory orders, it has shown that South Africa can benefit from negotiated settlements. The settlements could enforce punitive, remediation and reparation efforts. Through negotiated settlements, companies pay penalties within their means, compensate victims, and adopt a culture of compliance or re-evaluate their compliance measures.

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[106] OECD https://web-archive.oecd.org/temp/2020-08-27/511938-Resolving-foreign-bribery-cases-with-non-trial-resolutions.pdf 118; NPA "Reaching New Heights: Annual Report 2022/23" https://www.npa.gov.za/sites/default/files/uploads/NPA%20Annual%20Report%202022-23.pdf 16.

[107] See US Department of Justice "Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines" (15 December 2008) https://www.justice.gov/archive/opa/pr/2008/December/08-crm-1105.html (accessed 2025-05-14); World Bank "Siemens to Pay $100 Million to Fight Fraud and Corruption as Part of World Bank Group Settlement" (2 July 2009) https://www.worldbank.org/en/news/press-release/2009/07/02/siemens-pay-million-fight-fraud-corruption-part-world-bank-group-settlement (accessed 2025-05-14); US Securities and Exchange Commission "SEC Charges Siemens AG for Engaging in Worldwide Bribery" (15 December 2008) https://www.sec.gov/news/press/2008/2008-294.htm (accessed 2025-05-14).

[108] See generally, Muntingh and Redpath https://dullahomarinstitute.org.za/siteworkspace/policy-brief-cadre-23-12-2024.pdf.