

CORPORATE GOVERNANCE INSTITUTE CONFERENCE

WEDNESDAY 11 OCTOBER 2023

“Good Corporate Governance - Lessons from the Zondo Commission”

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It is estimated that about R2 trillion has been stolen from South African fiscus over the past decade or so, much of it in an orchestrated fashion with global and local companies at the forefront of these misdeeds. Over and above these outflows has been the damage to South Africa’s institutions of governance, and its socioeconomic foundations, including the downgrading of its investment rating to ‘junk’ status. The economy is in a fragile state and the outlook is bleak, with record unemployment levels, grinding poverty and lacklustre growth forecasts. The Minister of Finance will no doubt deliver this gloomy outlook when he presents the Medium-Term Budget Policy Statement in Parliament on 1 November.

The Commission Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State to give it its full name was focused primarily on the public sector. The Commission sat for four years, hearing evidence and sifting through many thousands of pages of documentary evidence, producing six detailed Reports, consisting of 19 Volumes. It was a remarkable achievement for a Judicial Commission of Inquiry to be established to examine in forensic detail the workings of the governing party and its senior officials and their cronies. It is difficult to think of anywhere else in the world where this would be possible!

However, it said very little about the complicity of private entities, with a few exceptions such as McKinsey, Bain, EOH and BOSASA, and its recommendations in this regard were at best flimsy. That is not to unfairly criticise the Commission because they could not deal with every issue before them, and they were also constrained by their terms of reference.

There was therefore an understandable focus on the public sector and politicians. While the prosecution of those individuals who have been flagged by the Zondo Commission remains

important, we must also heed the caution sounded by the National Director of Public Prosecutions:

“... we cannot prosecute our way out of this crisis, and we cannot win the fight against corruption on our own. We need a societal response - what must be done upstream to enhance ethics and integrity especially in leadership positions, and good governance.”

We need to be clear that corruption engages all spheres of society, and not only the public sector. In the global discourse the problem of corruption was historically conceived in a narrow and restricted manner. It focused the gaze of attention on the recipient of the bribe, and this precipitated the racial and cultural stereotyping of corruption as an almost uniquely African phenomenon. This was further reinforced by the use of tools such as the Corruption Perception Index as a measure of corruption – this index surveyed the opinions of the private sector actors on public sector corruption.

A typical definition was that corruption signified the abuse and misuse of public power and public resources for private benefit, and that corruption involves behaviour on the part of the public sector, whether politicians or civil servants, in which they improperly and unlawfully enrich themselves, or those close to them, by the misuse of power and responsibility entrusted to them. This simplistic framing of the problem saw the politicians and public sector as the beneficiaries of corruption and the private sector as the victims. In fact, corruption often involves and benefits players in the private sector, as has come to light through the Zondo Commission and other exposes, in corruption scandals involving private companies.

Corruption needs to be understood as an unlawful arrangement between two or more parties – those who give and those who take – in exchange for mutually beneficial favours and gains. There is a supply side and a demand side to corruption. This definition also needs to recognise that corruption is a practice that takes place in the public sector, the private sector and even the civil society sector. It is also important to acknowledge that corruption is not restricted to purely commercial transactions but may also be present when citizens seek to access social services such as health, welfare, and education services. In these

instances, one party may be coerced into providing a benefit to another due to unequal power relations that continue to characterise our society.

A more appropriate definition of corruption sees corruption as a transaction or attempt to secure illegitimate advantage or private benefit or enrichment, through subverting or suborning a public official or any person or entity from performing their proper functions with due diligence and probity.

This is the issue that I want to focus on today – to understand and accept that private sector entities play a key role in corruption and state capture, whether as beneficiaries or as facilitators and intermediaries. Having established that we then need to ask, what should be the consequences of such practices and behaviour?

Will it be enough to prosecute and jail the politicians, public servants and their cronies, leaving the private sector to continue with business as usual? Those politicians, public servants and their cronies will simply be replaced by another set, as we saw with the large-scale theft of funds earmarked for PPE (Protective Personal Equipment) during the Covid-19 pandemic. There must also be private sector accountability for these corrupt practices.

Is it enough for companies who benefited from unlawfully or irregularly awarded contracts to simply repay the fees earned, sometimes without even apologising for their conduct? Should we accept the oft heard lament that it is a few rotten apples who were involved and the corporate entity itself is glibly “innocent”? Do these ‘consequences’ constitute a sufficient deterrent to prevent a recurrence of such behaviour? Or do companies’ wave this off as the risk and cost of doing business – if they get caught, they just repay the fees and move on!

I’m not talking about the various Gupta enterprises – companies that were set up with the sole and specific aim of looting state coffers. They diverted monies offshore through a labyrinthine network of shelf companies. While efforts should be made to locate and recover these assets (and prosecute the people involved), I think we will have to conclude that the chances of success may be remote. But more of that later.

The question I want to pose is what of the private sector enablers of corruption and state capture – in the book edited by Mbongiseni Buthelezi and Peter Vale, 'State Capture in South Africa – How and Why it Happened', Chereese Thakur and Devi Pillay's chapter on 'How Professionals Enabled State Capture begins with this:

“Capturing a state is neither simple nor easy. It is an enterprise with many moving parts: deals to be made, illicit funds to be channelled, tracks to be covered and regulators and watchdogs to be dodged. Such a project needs assistance from people with a special set of attributes: people who possess skills, knowledge and a questionable degree of commitment to integrity and ethics. This is where professional enablers played a role – the lawyers, auditors, consultants and others who used their expertise to oil the wheels of state capture in South Africa.”

To this list one can add banks, financial advisors and public relations agencies – Bell Pottinger springs to mind!

In a paper published by the NBI, Corruption Watch and ODI in July this year, 'Addressing Corporate Corruption in SA – the EOH Experience', Stephen Gelb writes:

“PwC's annual Global Economic Crime Survey (GECS) shows that South African business leaders accept corruption as part of the 'cost of doing business' in the country and may be an important feature of organisational culture in many South African corporations... The 2020 South Africa GECS showed that 34% of respondents reported senior management as the major perpetrator of fraud, and of all fraud incidents, more than two fifths (42%) were not investigated after discovery, around three fifths (59%) were not disclosed to the corporate board, two-thirds (66%) were not disclosed to regulators or law enforcement authorities, and almost three quarters (72%) were not disclosed to auditors.”

This is not a pretty picture of private sector collusion in corruption, which calls into question the roles of auditors, internal and external, company secretaries and highlights other ethical and governance lapses. At a conference on the Recommendations of the State Capture Commission hosted by CASAC and the Public Affairs Research Institute last year the CEO of BUSA, Cas Coovadia noted that the Zondo report provides organised business with the

opportunity to reflect on its role in corruption in a society that “appears to have lost its moral compass” and acknowledged that, where appropriate, firms named in the report must be prosecuted. However, he asserted that if systemic issues were not addressed, those bent on benefitting from corruption would undoubtedly find firms with which they would collaborate, thereby undermining business’ response to corruption. He said BUSA envisaged putting in place “guardrails and mechanisms,” including a code of practice, to bolster defenses against corporate corruption. However, as a voluntary organization BUSA has no control over the actions of its members. There is currently no mechanism to expel or suspend delinquent members although this could be written into a future code of practice.

Prosecuting private-sector actors is difficult; however, where possible this should be done, using mechanisms such as deferred prosecution agreements and settlement agreements to which HSBC, for instance, was subjected in the United States (the company nevertheless continued to be involved in large-scale money-laundering).

Professional Associations govern most of these professions through bodies such as the Legal Practice Council, IRBA, SAICA, SA Institute of Professional Accountants etc. They variously regulate admission to the profession, set standards, prescribe and monitor compliance with codes of conduct – they are expected to investigate suspicions of prohibited conduct either on receipt of a complaint, and in the case of IRBA and the LPC, proactively. As has been demonstrated at the Zondo Commission these self-regulatory mechanisms have not been effective in preventing deviant practices and nor have they investigated and penalised such conduct. Yet these professional bodies are there to provide an assurance of the credibility of their members and the profession as a whole. Just as we have seen a dwindling in the credibility of a range of institutions of governance, ranging from Parliament to law enforcement agencies and even the courts, public confidence in these professions is also on the wane. We need look no further than the Steinhoff and Tongaat Hulett debacles to question the integrity of the auditing profession.

In the case of the auditing profession, firms are caught in a conflict-of-interest predicament where they provide both auditing and other consulting services. Despite the opaque ‘Chinese walls’ that are meant to divide the two parts of the business, conflicts can and do

arise, especially given the quest for fee income across the business. This has led to calls for a total separation of audit functions in the big firms to protect the independence and integrity of this critical oversight mechanism.

It should be clear that the regulatory regimes of these professional bodies need an overhaul, especially regarding sanctions that can be imposed for violations of codes of conduct and unethical practices. Sanctions range from censure, fines, restitution and either permanent removal or temporary suspension from an association. Criminal charges may also be appropriate, but this does not lie solely within the domain of these professional bodies. It is encouraging to note that the Companies & Intellectual Property Commission (CIPC) has laid criminal complaints against KPMG, McKinsey and SAP although progress is slow.

Thakur and Pillay suggest that:

“fines pose no meaningful deterrent to unethical behaviour Many believe that restitution is the bare minimum, which is probably why the repayment of fees by KPMG, Bain and McKinsey has not been effective in advancing accountability at these firms.”

Disbarment or temporary suspension is a more draconian sanction but one which may be appropriate for persistent breaches, and a more effective deterrent for others.

Thakur and Pillay also canvass the issue of whether sanctions should be aimed at individuals or firms, and say:

“Professional associations should not be absolved of the responsibility to control and monitor each other’s work by scapegoating individuals... firms should be held vicariously liable where it is not possible to pinpoint who was responsible, particularly since most work is done in teams.”

A strengthening of the rules of these professional bodies must be a priority. But it is equally incumbent on these professionals to call out and ‘blow the whistle’ on their ethically challenged peers as a failure to do so will reflect poorly on their professions as a whole.

One area in which the Zondo Commission did delve into the role of private sector entities related to what it called ‘the flow of funds’ that were looted primarily by Gupta related enterprises. In this the Commission was greatly assisted by Michael Marchant from Shadow World Investigations who estimated that payments from state contracts tainted by the Gupta enterprise amounted to just over R57 billion. Of this the Guptas stole about R15,5 billion – these include payments made directly to Gupta enterprises by the state, by other state contractors (as a kick-back), and payments made to various ‘laundry vehicles’. This loot could not have been laundered without the complicity and connivance or weaknesses of a range of other actors, banks, other financial institutions, regulatory bodies such as the Financial Intelligence Centre (FIC).

Michael Marchant and Hennie van Vuuren in the book, ‘State Capture in South Africa’ pen a chapter in which they write:

“Experts suggest that money laundering worldwide is estimated to be worth \$2 trillion annually. In September 2020, the International Consortium of Investigative Journalists published a series of ‘suspicious activity reports’ filed by US banks to the US Treasury. This showed that several banks, including HSBC, JP Morgan Chase, Standard Chartered, Deutsche Bank and the Bank of New York Mellon, knowingly facilitated trillions of dollars in suspicious transactions, despite flagging them as possibly criminal. The role of the global banking sector in facilitating economic crime of this kind is not accidental but is, rather, systemic, purposeful and directed.”

This is the global context in which the fight against corruption and state capture must be waged. While we must get our own house in order, the weakest link in the chain of global money laundering may not be here in South Africa. We must however ensure that we are compliant with the Financial Action Task Force (FATF) guidelines to combat money laundering, organised crime and terror financing, and get removed from the FATF ‘greylist’. This is necessary both to equip ourselves in the fight against money laundering but also to regain our attractiveness as a safe place to do business.

As I said at the beginning there is a direct correlation between corruption and state capture on the one hand and our socio-economic well-being, the state of our institutions of governance, the strength of the rule of law and investor sentiment, on the other. As Prof Firoz Cachalia will no doubt tell you tomorrow this requires what the National Anti-Corruption Strategy calls a 'whole of society approach' to overcome it. We must all take responsibility for the plight we are in. As I have sought to demonstrate this must include the corporate sector and professionals. We must develop a framework for effective accountability in pursuit of social justice. The Zondo Report demonstrates the toothless nature of the King Codes, corporate ESG (Environmental, Social & Governance) charters. Stock Exchange Reporting Codes, etc. There is a need for a paradigm shift. As governments worldwide are getting weaker and ethically compromised, corporate accountability becomes more critical for social welfare and realisation of social justice.

Thank you.