



UNIVERSITY of the  
WESTERN CAPE



# **POLICY BRIEF: The National Prosecuting Authority Directives for Corporate Alternative Dispute Resolution (CADRe)**

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## Executive summary

In January 2024 the National Prosecuting Authority (NPA) announced that the German software company SAP would pay restitution of R2.2 billion to South Africa and that the funds would be disbursed to a number of state-owned entities. This was in exchange for not being prosecuted for bribing South African officials to secure contracts. The agreement was made in terms of directives dated February 2024 and titled “Part 51: Corporate Alternative Dispute Resolution”. This was the first agreement under the directives and is thus worthy of closer examination.

This policy brief explores three broad issues:

- Was the agreement in line with the NPA’s Constitutional powers, mandate and the enabling legislation (i.e. the National Prosecuting Authority Act, Prevention of Organised Crime Act and Prevention and Combating of Corrupt Activities Act.
- What about the interests of third parties? Despite an agreement between the NPA and the offending corporate, another party with an interest in the matter may wish to institute a private prosecution, or opine that, for example, the alternative dispute resolution mechanism is not fair, or the agreement gives inadequate recognition to all the corporate’s wrongdoings, or it feels that the compensation was not sufficient.
- Corporate alternative dispute resolution appears to indicate a substantial shift in prosecution policy and it must therefore be asked if the current policy is sufficiently enabling?

The policy brief observes that as well-intentioned as the CADRe may be, there does not appear to be explicit legal provision for the conditional withdrawal of criminal charges where adults and corporates are concerned. The mechanism is well-developed in the Child Justice Act, but such a mechanism does not exist for adults or corporates.

There are substantial concerns around the transparency in decision-making, the substance of the agreement reached with the corporate, as well as the monitoring of compliance with such an agreement.

The directives are not firm in articulating a position where the prosecution of individuals remains a priority as mandated by the Constitution and the NPA Act.

The Prosecution Policy is dated 2013 and the Prosecution Policy Directives 2014. There is more than enough reason to undertake a thorough review of the substance of the Prosecution Policy and accompanying directives as well as the manner in which the NPA develops policy.

An agreement of this nature only has sufficient weight where there is a clear apprehension that prosecutions will occur and will be successful. The most likely outcome of these directives in the absence of concurrent prosecutions, is that companies will simply price into their corrupt operations the cost of a deferred prosecution agreement.

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## 1. Context

On 11 January 2024 the National Prosecuting Authority (NPA) announced that the German software company SAP would pay restitution of R2.2 billion to South Africa and that the funds would be disbursed to a number of state-owned entities:

Hours before the NPA announced the R2.2 billion payment, officials in the US said SAP had entered into a three-year deferred prosecution agreement with the US Department of Justice (DOJ).

"SAP paid bribes to officials at state-owned enterprises in South Africa and Indonesia to obtain valuable government business," said an official in the (US) DOJ. "The resolution - our second coordinated resolution with South African authorities in just over a year - marks an important moment in our ongoing fight against foreign bribery and corruption."<sup>1</sup>

The need to recover losses due to state capture is real. They are estimated to be as high as R 500 billion.<sup>2</sup> The Zondo Commission also emphasised the importance of recovering losses, emphasising the mandate and role to be played of the Asset Forfeiture Unit (AFU). Given the tremendous socio-economic needs of South African society, it would be logical and desirable for the state to pursue the monies lost due to corruption, maladministration and poor decision-making in public entities and enterprises.

The agreement with SAP, under the banner of Corporate Alternative Dispute Resolution (CADRe), was indeed a first and it is therefore worthwhile to examine it more closely.

The Constitution sets out the functions of the National Director of Public Prosecutions (NDPP) and in section 179(5)(a-b) the NDPP is mandated to, firstly, determine in concurrence with the Minister of Justice and the Directors of Public Prosecution (DPP), a prosecution policy to be observed in the prosecution process. The NDPP must also issue policy directives to be observed in the prosecution process. The agreement with SAP therefore had to be done in compliance with the prosecution policy, further guided by the applicable directives. The Directives used to enable the agreement with SAP are available from the NPA and are dated 2 February 2024 and titled: "Part 51: Corporate Alternative Dispute Resolution".<sup>3</sup>

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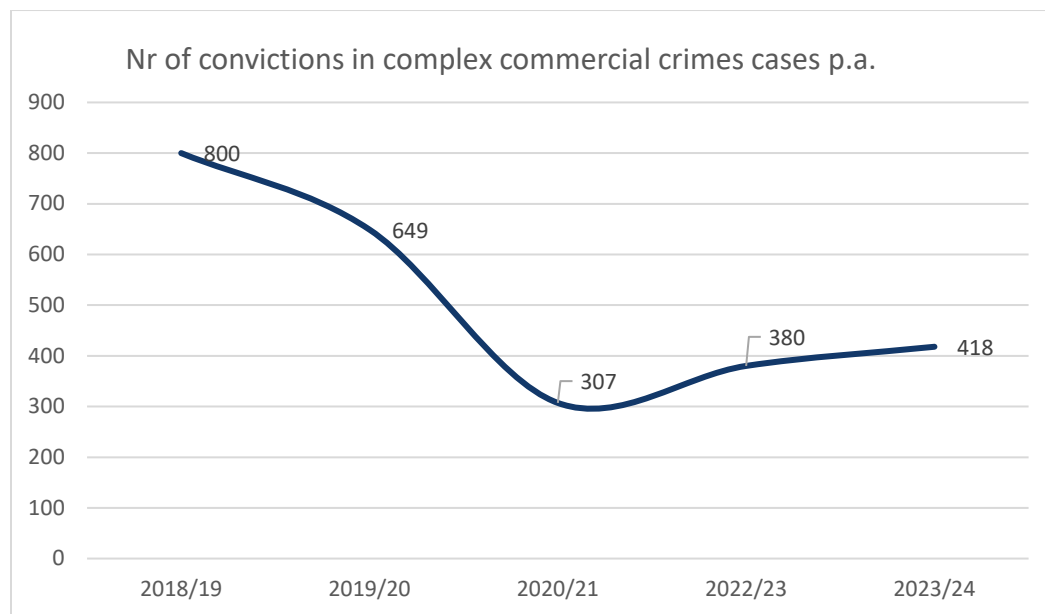
<sup>1</sup> J Cronje, "SAP to Pay R2.2bn in 'restitution' to SA Govt after Admitting to Bribes," *News24*, January 11, 2024, <https://www.news24.com/fin24/economy/sap-to-pay-r4bn-fine-admits-to-bribing-sa-officials-to-win-govt-business-20240111>.

<sup>2</sup> C Ryan, "State Capture Scorecard: R500bn Looted, Zero Assets Recovered," *Moneyweb*, July 5, 2022, <https://www.moneyweb.co.za/news/south-africa/state-capture-scorecard-r500bn-looted-zero-assets-recovered/>.

<sup>3</sup> National Prosecuting Authority, "Annexure A Part 51: Corporate Alternative Dispute Resolution - Prosecution Policy Directives - Policy Directives Issued by the National Director of Public Prosecutions" (Pretoria: National Prosecuting Authority, 2024),

The Zondo Commission sketched a picture of a prosecution service that was deeply reluctant to pursue prosecutions against high-profile cases, even when that evidence came from other state entities such as the Special Investigating Unit (SIU). Against this history and the trend of a general decline in the number of prosecutions as well as the slow progress in prosecutions following the recommendations of the Zondo Commission, it is not unreasonable to question a mechanism that would provide the NPA with a further means to avoid prosecuting suspects in high value corruption matters. The performance of the NPA has been wanting in this regard. For example, since 2018/19 there has been a steady decline in the number of convictions in complex commercial crimes (see Fig. 1 below), although a modest increase is shown in the past two years but it remains at half of what it was in 2018/19.<sup>4</sup> With regards to all prosecutions and convictions (see Fig. 2), in 2016/17 there were 341,666 prosecutions resulting in 321,166 convictions. By 2022/23 this had declined to 169,800 prosecutions and 157,880 convictions (see Fig. 2). In short, from 2016/17 the number of prosecutions instituted by the NPA declined by 50%. The rapid decline in convictions has been attributed to the decriminalisation of the possession of cannabis for personal use.<sup>5</sup> If this is indeed the case, it now revealed the high reliance placed by the NPA on cannabis convictions (and most likely guilty pleas) to prop up the numbers.

Figure 1

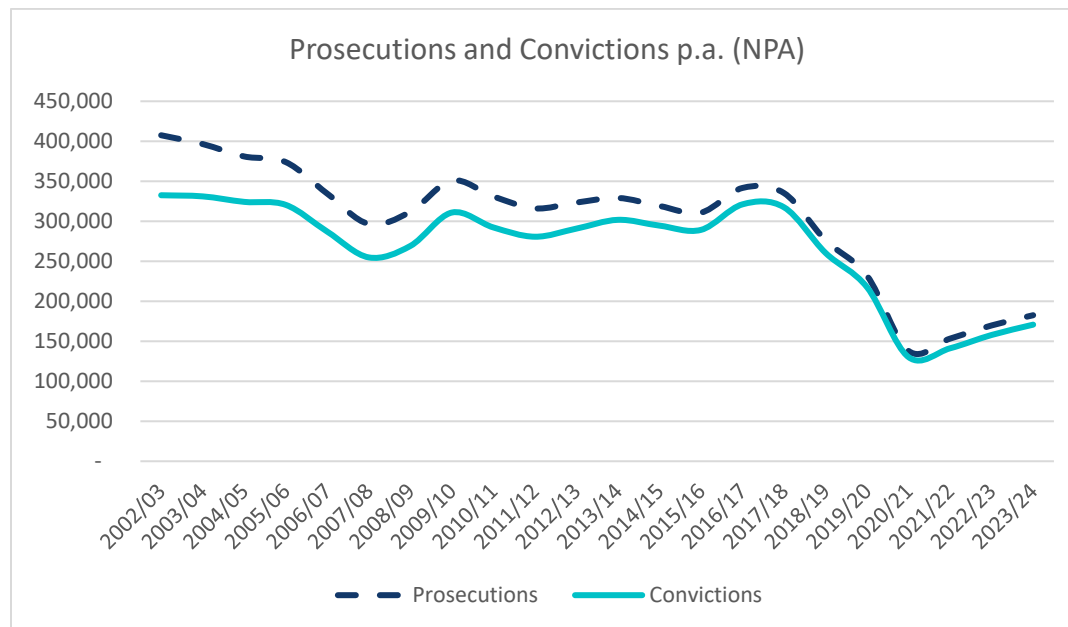


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<sup>4</sup> National Prosecuting Authority, “Annual Report 2023/24” (Pretoria: National Prosecuting Authority, 2024), 57.

<sup>5</sup> Minister of Justice and Constitutional Development and Others v Prince (Clarke and Others Intervening); National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton, No. (CCT108/17) [2018] ZACC 30; 2018 (10) BCLR 1220 (CC); 2018 (6) SA 393 (CC); 2019 (1) SACR 14 (CC) (Constitutional Court September 18, 2018).

Figure 2



Against this declining trend in prosecutions, the desirability of another mechanism to avoid prosecution must be questioned. The lack of prosecution against high profile individuals and companies also requires assessment against impact on the rule of law. A declining number of prosecutions in general and very low numbers for commercial cases and the creation of a mechanism for corporate entities to avoid prosecution in exchange for monetary compensation may not bode well for public trust in the rule of law, with particular emphasis placed on equality before the law. Despite the rhetoric on the rule of law being a collective effort,<sup>6</sup> the NPA appears to have opted unilaterally for a mechanism that enables special treatment of the select few.

## 2. The question

While the agreement with SAP is understandable given the pressure on the fiscus, it is also necessary to, firstly, ask if the agreement was in line with (a) the NPA’s Constitutional powers and mandate and (b) the enabling legislation. In the case of the latter, the NPA Act, Prevention of Organised Crime Act (POCA) and Prevention and Combating of Corrupt Activities Act (PRECCA) are relevant. Secondly, despite an agreement between the NPA and the offending corporate, another party with an interest in the matter (such as another company losing out on a tender due to the corrupt acts) may wish to institute a private prosecution since it is of the opinion that,

<sup>6</sup> V Cruywagen, “‘Trends in Rule of Law and Justice Do Not Bode Well’ — NPA Boss Shamila Batohi,” *Daily Maverick*, November 11, 2024, <https://www.dailymaverick.co.za/article/2024-11-11-trends-in-rule-of-law-and-justice-do-not-bode-well-prosecuting-boss-shamila-batohi/>.

for example, the alternative dispute resolution mechanism is not fair, or the agreement gives inadequate recognition to all the corporate's wrongdoings, or it feels that the compensation was not sufficient. Thirdly, corporate alternative dispute resolution appears to indicate a substantial shift in prosecution policy and it must therefore be asked if the current policy is sufficiently enabling?<sup>7</sup>

This brief will firstly, in Section 3, provide an overview of the content of the CADRe directives that reportedly governed the SAP agreement. In the following section, more focus will be placed on the current legal framework, and more specifically seeking the enabling legislation. Based on this, a number of concluding observations are made.

### **3. The CADRe Directives**

The CADRe directives consist of 16 sections listed below and each are described below:

- A. Introduction
- B. Definitions
- C. General principles
- D. Types of cases
- E. Criteria to be considered
- F. Authority to issue a Corporate ADR
- G. Issue of an invitation and undertakings
- H. Voluntary self-reporting
- I. Contents of a Corporate ADR
- J. Use of material in criminal and other proceedings
- K. Legal professional privilege
- L. Guidelines for calculating financial restitution
- M. Procedural arrangements
- N. Publication
- O. Reporting mechanisms
- P. General

#### **3.1 Section A Introduction**

The first paragraph of the CADRe likens the situation of offending corporates to the situation of adults and children in conflict with the law<sup>8</sup> to the extent that it may be in the interests of justice to resolve such matters through means other than criminal prosecution. No substantive motivation is provided for this purported similarity and it may be a conflation of the issues. In the

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<sup>7</sup> National Prosecuting Authority, "Prosecution Policy" (Pretoria: National Prosecuting Authority, 2013).

<sup>8</sup> National Prosecuting Authority, "Prosecution Policy Directives - Policy Directives Issued by the National Director of Public Prosecutions" (Pretoria: National Prosecuting Authority, 2014); "Child Justice Act," Pub. L. No. 75 of 2008 (2008).



case of children, there is a constitutional obligation that in all matters concerning the child that their best interest will be of paramount importance.<sup>9</sup> The best interests of the child requirement is also set out in the UN Convention on the Rights of the Child (UNCRC) and the African Charter on the Rights and Welfare of the Child (ACRWC)<sup>10</sup> and further confirmed in domestic constitutional jurisprudence.<sup>11</sup>

To liken the situation of a corporate entity engaging willingly in corrupt practices to children committing crimes such as shoplifting, is simply not a balanced and rational comparison. The drafters of the Child Justice Act went to great lengths to create a comprehensive and detailed legislative framework to deal with children in conflict with the law since it is accepted, as a point of departure, that children are different from adults and that this difference has an impact on their decision-making and the law must therefore treat them differently by framing their overall interests as paramount and not narrowly focus on the (allegedly offending) conduct in question. The Directives proceed to define CADRe as:

"the election, in suitable and applicable cases, of a manner of disposal of a criminal case against a company other than through normal criminal court proceedings. Criminal cases are diverted way [sic] from the formal criminal justice system at pre-trial stage, with a view to disposing of the case against the company, while still being able to proceed with a prosecution and asset forfeiture against the company's directors, employees or agents."<sup>12</sup>

It is important to note that the prosecution of individuals is not a requirement for CADRe, nor is it set as a desirable outcome. It merely requires that the NPA must be able to proceed with a prosecution, but what this threshold would mean in more practical terms is not defined.

### 3.2 Section B Definitions

The following concepts are defined in the Directives:

- 'benefits' means the proceeds of unlawful activities as defined in section 1 of the Prevention of Organised Crime Act, 121 of 1998 (POCA) as well as any commingled or substituted property;
- 'company' means a company incorporated in terms of the Companies Act, 71 of 2008, a corporate entity established under South African law, or a foreign corporation or corporate entity incorporated in terms of the applicable legislation in such other country;

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<sup>9</sup> "Constitution of the Republic of South Africa" (1996), sec. 28(2).

<sup>10</sup> CRC Committee on the Rights of the Child, "General Comment No. 7 (2005) Implementing Child Rights in Early Childhood" (Geneva: UNCRC, 2006); Committee on the Rights of the Child, "General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1)" (Geneva: UNCRC, 2013); "African Charter on the Rights and Welfare of the Child" (Addis Ababa: African Union, 1999).

<sup>11</sup> *M v S*, No. [2007] ZACC 18 (Constitutional Court 2007).

<sup>12</sup> National Prosecuting Authority, "Annexure A Part 51: Corporate Alternative Dispute Resolution - Prosecution Policy Directives - Policy Directives Issued by the National Director of Public Prosecutions," para. A.2.

- ‘compliance programme’ means an anti-corruption compliance programme; and
- ‘corruption’ has the meaning set out in the Prevention and Combating of Corrupt Activities Act, 12 of 2004 (PRECCAA).

### 3.3 Section C. General principles

The CADRe directives list the principles to apply to “a decision not to prosecute and utilise Corporate ADR in respect of a company suspected of committing corruption and/or offences related to corruption”.<sup>13</sup> **Principle 1** deals with **legality and rationality** and states that the aim of such a decision, to use CADRe, “is to uphold the rule of law by promoting corporate accountability for corruption and/or offences related to corruption”. The second listed sub-principle is that “Decisions shall be made within the confines of the power and authority conferred by law on the NPA and members of the NPA.”<sup>14</sup> However, no reference or description is provided as to which law or laws would so confer this authority on the NPA to make such decisions in respect of CADRe.

**Principle 2** refers to **public interest** considerations as set out in the *Prosecution Policy* and *Prosecution Policy Directives*. The *Prosecution Policy* and *Prosecution Policy Directives* are discussed in more detail below at section 4(a), but as already noted, the NDPP must with the concurrence of the Minister of Justice and after consultation with the Directors of Public Prosecution determine a prosecution policy. The NDPP must also issue directives to be followed in the prosecution of cases. The *Prosecution Policy* (2013) is a public document, but the *Prosecution Policy Directives* (2014) is not. The confidential status of the *Prosecution Policy Directives* (2014) is not a legal requirement but the choice of the NPA. In the case of the *Prosecution Policy* the guidelines dealing with public interest, address the nature and seriousness of the offence, the interests of the victim and the broader community and the circumstances of the offender.<sup>15</sup>

The first issue is that these guidelines were evidently written with natural persons as suspects in mind and not juristic persons or companies (see Farisani<sup>16</sup>). While the Criminal Procedure Act in section 332 provides for the prosecution of corporate bodies there are differences between natural persons and juristic persons, such as companies. For example, differences highlighted by

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<sup>13</sup> National Prosecuting Authority, para. C.1.

<sup>14</sup> National Prosecuting Authority, para. C.1(a)(ii).

<sup>15</sup> National Prosecuting Authority, “Prosecution Policy,” 7.

<sup>16</sup> D Farisani, “The Regulation of Corporate Criminal Liability in South Africa: A Close Look (Part 1),” *Obiter* 27, no. 2 (2006): 263–76; D Farisani, “Corporate Criminal Liability in South Africa: What Does History Tell Us about the Reverse Onus Provision?,” *Fundamina* 23, no. 1 (2017): 1–19, <https://doi.org/10.17159/2411-7870/2017/v23n1a1>.

Du Toit refer to the right to privacy, vicarious liability, as well as the special positions and responsibilities of both directors and the state.<sup>17</sup>

The second is that, and flowing from the first, that where it concerns corporates, there may be other public interests involved, additional to that already listed. For example, this may relate to board membership or other board governance matters.<sup>18</sup> It may also include the competence and fitness of board directors.<sup>19</sup> Where it concerns corporate governance, there is indeed a much wider range of public interests and concerns that would fall outside the scope of the NPA.

The Prosecution Policy Directives do not deal with public interest in a substantial way save for a number of specific applications, such as plea and sentence agreements<sup>20</sup> and the mental health of suspects.<sup>21</sup>

Under the heading “Prosecution in the public interest” the NPA Prosecution Policy sets out three broad considerations with regard to the issue prefaced by “a prosecution should normally follow, unless public interest demands otherwise” and it is necessary to cite it here in full:

The nature and seriousness of the offence:

- The seriousness of the offence, taking into account the effect of the crime on the victim, the manner in which it was committed, the motivation for the act and the relationship between the accused person and the victim.
- The nature of the offence, its prevalence and recurrence, and its effect on public order and morale.
- The impact of the offence on the community, its threat to people or damage to public property, and its effect on the peace of mind and sense of security of the public.
- The likely outcome, in the event of a conviction, having regard to sentencing options available to the court.

The interests of the victim and the broader community:

- The attitude of the victim of the offence towards a prosecution and the potential effects of discontinuing it. Care must be taken when considering this factor, since public interest may demand that certain crimes should be prosecuted - regardless of whether or not a complainant wishes to proceed.

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<sup>17</sup> E Du Toit, *Commentary on the Criminal Procedure Act* (Cape Town: Juta, 1987), chap. 33 p. 5; Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others, No. (CCT1/00) [2000] ZACC 12 (Constitutional Court August 25, 2000).

<sup>18</sup> R Chuene, Z Demarthe, and S Mokoena, “Directors Beware! The Court Declares Dudu Myeni (Former SAA Chair) a Delinquent Director - AfricanLii,” *AfricanLii* (blog), 2020, <https://africanlii.org/articles/2020-07-03/a-hrefusersfasken1069a/directors-beware-the-court-declares-dudu-myeni-former-saa-chair-a-delinquent-director>.

<sup>19</sup> Organisation Undoing Tax Abuse and Another v Myeni and Others, No. (15996/2017) [2020] ZAGPPHC 169 (Gauteng High Court (Pretoria) 2020).

<sup>20</sup> National Prosecuting Authority, “Prosecution Policy Directives - Policy Directives Issued by the National Director of Public Prosecutions,” chap. 24.B.3 and 4.

<sup>21</sup> National Prosecuting Authority, chap. 25.21 and 22.

- The need for individual and general deterrence, and the necessity of maintaining public confidence in the criminal justice system.
- Prosecution priorities as determined from time to time, the likely length and expense of a trial and whether or not a prosecution would be deemed counter-productive.

The circumstances of the offender:

- The previous convictions of the accused person, his or her criminal history, background, culpability and personal circumstances, as well as other mitigating or aggravating factors.
- Whether or not the accused person has admitted guilt, shown repentance, made restitution or expressed a willingness to co-operate with the authorities in the investigation or prosecution of others. (In this regard the degree of culpability of the accused person and the extent to which reliable evidence from the said accused person is considered necessary to secure a conviction against others will be crucial).
- Whether the objectives of criminal justice would be better served by implementing non-criminal alternatives to prosecution.
- Whether there has been an unreasonably long delay between the date when the crime was committed, the date on which the prosecution was instituted and the trial date, taking into account the complexity of the offence and the role of the accused person in the delay.<sup>22</sup>

The Prosecution Policy limits public interest to a finite list, which is at odds with thinking from elsewhere. The first issue is that the guidelines in the Prosecution Policy do not seem to be alive to the broader substantive issues, such as South Africans' experience of crime, but rather individualises decisions to prosecute or not with reference to the offence, the offender and the victim. The key concern here is the systemic and prevalent nature of crime in South Africa (including corruption), and further that victimisation may not be direct, but is very often indirect such as was the case in the so-called state capture years. There then seems to be a disjuncture between how the Prosecution Policy interprets public interest compared to, for example, the Constitutional Court. The Constitutional Court has dealt with a range of issues brought by public interest litigants, such as the rights of the homeless, refugees, prisoners on death row, prisoners generally, prisoners imprisoned for civil debt, the landless, gender equality, the rights of the child, the constitutional rights of gay men and lesbian women, and in relation to freedom of expression.<sup>23</sup> The jurisprudence from the Constitutional Court shows the open-ended nature of the notion of public interest and its link to constitutional rights, especially where it concerns vulnerable groups. This understanding of public interest does not seem to breach the surface in the Prosecution Policy. One may indeed argue that if the Prosecution Policy were to contain guidelines on prosecutions in the public interest, then priorities should be the prosecution of corrupt politicians and government officials, prosecutors who cause harm to victims through

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<sup>22</sup> National Prosecuting Authority, "Prosecution Policy," 10.

<sup>23</sup> *Biowatch Trust v Registrar Genetic Resources and Others*, No. (CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC) ; 2009 (10) BCLR 1014 (CC) (June 3, 2009).

negligence,<sup>24</sup> and law enforcement officials implicated in human rights violations, to name a few. Based on crime trends and those crimes instilling the most public fear one may similarly add other priority areas. In short, what one would consider to be in the public interest is not reflected in the Prosecution Policy and what is reflected, provides little substantive guidance.

Secondly, the question arises as to whether public interest can be defined, and if it is even desirable to attempt to define it? The Australian Law Reform Commission advised against it: “‘Public interest’ should not be defined, but a list of public interest matters could be set out in the new Act. The list would not be exhaustive, but may provide the parties and the court with useful guidance, making the cause of action more certain and predictable in scope. This may in turn reduce litigation.”<sup>25</sup>

The Australian Federal Court gave further insight into the complexities and that an open mind must be maintained:

The public interest is not one homogenous undivided concept. It will often be multi-faceted and the decision-maker will have to consider and evaluate the relative weight of these facets before reaching a final conclusion as to where the public interest resides. This ultimate evaluation of the public interest will involve a determination of what are the relevant facets of the public interest that are competing and the comparative importance that ought to be given to them so that “the public interest” can be ascertained and served. In some circumstances, one or more considerations will be of such overriding significance that they will prevail over all others. In other circumstances, the competing considerations will be more finely balanced so that the outcome is not so clearly predictable.<sup>26</sup>

Acting in the public interest has two separate components. Firstly, objectives and outcomes - the objectives and outcomes of the decision-making process are in the public interest. Secondly, the process and procedure, noting that the process adopted and procedures followed by decision-makers in exercising their discretionary powers are in the public interest, which would include:

- Complying with applicable law (both its letter and spirit)
- Carrying out functions fairly and impartially, with integrity and professionalism
- Complying with the principles of procedural fairness/natural justice
- Acting reasonably
- Ensuring proper accountability and transparency
- Exposing corrupt conduct or serious maladministration

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<sup>24</sup> Carmichele v Minister of Safety and Security, No. (CCT 48/00) [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) (August 16, 2001).

<sup>25</sup> Australian Law Reform Commission, “Serious Invasions of Privacy in the Digital Era (ALRC Report 123)” (Sydney: Australian Law Reform Commission, 2014), para. 9.36, <https://www.alrc.gov.au/publication/serious-invasions-of-privacy-in-the-digital-era-alrc-report-123/>.

<sup>26</sup> McKinnon v Secretary, Department of Treasury, No. [2005] FCAFC 142 (Federal Court of Australia 2005).

- Avoiding or properly managing situations where their private interests conflict or might reasonably be perceived to conflict with the impartial fulfilment of their official duties, and
- Acting apolitically in the performance of their official functions (not applicable to elected public officials).<sup>27</sup>

Succinctly put, “‘The public interest’ is best seen as the objective of, or the approach to be adopted, in decision-making rather than a specific and immutable outcome to be achieved. The meaning of the term, or the approach indicated by the use of the term, is to direct consideration and action away from private, personal, parochial or partisan interests towards matters of broader (i.e. more ‘public’) concern.”<sup>28</sup>

Working in the public interest then seems to be as much about procedure as it is about outcome. South African courts have recognised that procedure is important and that it is in the public interest to decide on specific issues.<sup>29</sup> Without predetermining the outcome, the courts recognise that dealing with an issue is of itself in the public interest. Not making decisions when one is mandated to make decisions works against public interest and there are few better examples than the NPA not making decisions on 686 cases referred to it since 2013 by the Special Investigating Unit (SIU).<sup>30</sup>

The preceding then raises the question as to whether the decision to enter into a CADRe with SAP was indeed done substantially and procedurally in the public interest?

**Principle 3** of the CADRe is titled “**Guided discretion**” and covers the counter-performance by the corporate, e.g. voluntary and effective disclosure; full cooperation, the absence of pervasive wrong-doing and so forth. It is noted that the willingness to identify or actual identification of the individuals responsible for the corporate wrong-doing is not required or listed as a principle or guideline, but is addressed to some extent in Section E(3)(a). It reads

The exercise of discretion shall be guided by several principles and practical considerations, including inter alia whether there is—

- (i) Voluntary and effective disclosure of wrongdoing by the company and proactive remediation including, where appropriate, compensating victims.

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<sup>27</sup> NSW Public Service Commission, “Behaving Ethically: A Guide for NSW Government Sector Employees” (Sydney: NSW Public Service Commission, 2014), 124, <https://www.psc.nsw.gov.au/sites/default/files/2020-10/Behaving%20Ethically%20Guide.pdf>.

<sup>28</sup> NSW Public Service Commission, 44.

<sup>29</sup> *The Public Protector v Mail & Guardian Ltd and Others*, No. (2011)(4) SA 420 (SCA) [2011] ZASCA 108; 422/10 (June 1, 2011); *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others*, No. (CCT59/04A) [2005] ZACC 25; 2006 (8) BCLR 872 (CC) (September 30, 2005); *Affordable Medicines Trust and Others v Minister of Health and Another*, No. (CCT27/04) [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) (March 11, 2005).

<sup>30</sup> “NPA ‘Sitting on 686 Cases,’” *City Press*, September 9, 2018.

- (ii) Full cooperation by the company with current and future investigations, asset forfeiture proceedings in terms of POCA and prosecution, of individuals and/or other implicated companies.
- (iii) Willingness and capacity of the company to implement and monitor an effective compliance programme and internal controls.
- (iv) No pervasive wrongdoing within the company.
- (v) Whether there is a likelihood that conviction might result in significant adverse collateral effects on the company's employees, shareholders, creditors or the economy.

**Principle 4** deals with **transparency** and requires that a summary of the agreement with the NPA be published on its website. At the time of writing (November 2024), this has not yet been done in the SAP case. In the absence of details, it leaves it wide open as to what exactly constitutes a summary and who determines that a particular summary does indeed meet the requirement of transparency as set in the Constitution, and has been noted by the Constitutional Court and reflected on in the literature.<sup>31</sup>

In a constitutional democracy the public service must function in a transparent manner. It means that officials have a duty to act **visibly, predictably** and **understandably**.<sup>32</sup> Nothing must be hidden from public scrutiny, especially when human rights and governance concerns are at stake. The actions of officials must be predictable as guided by policy, legislation, regulations, standing orders and good practice. The actions and decisions of officials must be motivated, rational and justifiable. It needs to be known what officials are doing, and when asked, they must be able to provide an understandable and predictable answer. However, without knowing what officials are doing and how decisions are made, accountability is impossible: there can be no accountability without information.<sup>33</sup>

Given the high stakes and absence of judicial oversight when CADRe is used, it follows that transparency is a critical requirement of the highest standard. Opacity will undermine trust in the mechanism and ultimately the NPA and its leadership. The standard set in the directives is clear, but compliance is lacking.

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<sup>31</sup> Constitution of the Republic of South Africa, sec. 195(1); J Klaaren, "The Human Right to Information and Transparency," in *Transparency in International Law*, ed. A Bianchi and A Peters (Cambridge University Press, 2010), 223–38; *Brümmer v Minister for Social Development and Others*, No. (CCT 25/09) [2009] ZACC 21; 2009 (6) SA 323 (CC) ; 2009 (11) BCLR 1075 (CC) (Constitutional Court 2009).

<sup>32</sup> Transparency International, "Transparency - Corruptionary A-Z," Transparency.org, accessed July 19, 2024, <https://www.transparency.org/en/corruptionary/transparency>.

<sup>33</sup> W De Maria, "Commercial-in-Confidence: An Obituary to Transparency?," *Australian Journal of Public Administration* 60, no. 4 (2001): 92.

### 3.4 Section D Types of cases

This section notes that CADRe only applies to companies and narrows the scope to corruption and corruption-related offences. Although not impossible, it is expected that the overwhelming majority of such cases will involve companies doing business with the state. There is no threshold set with reference to the possible amount involved. For example, PRECA sets a threshold of R100,000 for a person in a position of authority to report a reasonable suspicion that the crimes of fraud and/or corruption may have been committed.<sup>34</sup> There is a further requirement that the Asset Forfeiture Unit (AFU) must be consulted in all cases.

Corporations are also not static and neither are their boards or senior management. Ownership and shareholding may change, raising complex issues. For example, if the company unbundles, or restructures substantially, what happens with the liabilities emanating from the agreement, e.g. the monitoring and compliance plan?

### 3.5 Section E. Criteria to be considered

The criteria to be considered place much emphasis on timely, voluntary and full disclosures as well as cooperation with the investigation. Section E.3(a) places more emphasis on the identification of individuals involved or suspected of being involved in the corrupt acts. These appear to be reasonable requirements in exchange for the potential benefit of avoiding prosecution.

Section E(4) deals with “Fair, reasonable and proportionate restitution”. There are seven categories of requirements set to consider and it is worthwhile to dwell on this. In brief, these relate to the following:

- the amount that the company is willing to pay
- the nature, seriousness and complexity of the unlawful activities
- the pervasiveness of wrongdoing
- the history of prior misconduct or wrongdoing
- the existence of an effective compliance program
- the likelihood of significant negative collateral effect in the event of a conviction, and
- the interest of the victims.

As described above, restitution takes on a monetary form and it is not apparent if other measures are also contemplated to bolster redress. By way of comparison, in the human rights field (see UN Convention against Torture), redress contains at least the following components and even if not directly applicable, are useful to reflect upon:

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<sup>34</sup> “Prevention and Combatting of Corrupt Activities Act,” Pub. L. No. Act 12 of 2004 (n.d.), sec. 34.



- **Restitution** is a form of redress designed to re-establish the victim’s situation before the violation of the Convention was committed, taking into consideration the specificities of each case.
- **Compensation**, but it is emphasised that monetary compensation alone may not be sufficient redress for a victim of torture and ill-treatment.
- **Rehabilitation** means for as full rehabilitation as possible for anyone who has suffered harm as a result of a violation of the Convention and should be holistic.
- **Satisfaction and the right to truth**, requires firstly that satisfaction should cover any or all of the following remedies: effective measures aimed at the cessation of continuing violations; verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim.
- **Guarantees of non-repetition** constitute specific preventive measures that the States parties deemed essential to prevent violations. To guarantee non-repetition of torture or ill-treatment, States parties should undertake measures to combat impunity for violations of the Convention.<sup>35</sup>

It is noteworthy that the *National Anti-Corruption Strategy 2020 – 2030* pays hardly any attention to redress as part of the strategy.<sup>36</sup> A key punitive measure that is also omitted from the Directives is that an offending company be barred (“blacklisted”) from doing business with the state for a specified period, or any other restrictions deemed appropriate. This has happened in some instances. For example, Bain & Co. South Africa Incorporated are restricted until September 2032.<sup>37</sup> Despite this, Bain is reportedly doing ‘pro bono’ work for a state entity.<sup>38</sup> Given the opportunities for further wrongdoing that consulting of this nature offers, this seems to be unwise in the extreme. Recall that Bain was responsible for actions and advice which harmed SARS. Companies listed on the Johannesburg Stock Exchange (JSE) may also have punitive or regulatory measures imposed on them. It is noted that SAP is not listed on the JSE, but on Frankfurt DAX and NYSE. In April 2024 it was reported that SAP shares were doing well.<sup>39</sup> There is furthermore scope to bar the responsible individuals from doing business with the state, being a director of a company doing business with the state and so forth. Placement on the restricted-suppliers data base maintained by National Treasury would be in line with this suggestion.<sup>40</sup>

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<sup>35</sup> UNCAT, “General Comment No. 3 - Implementation of Article 14 by States Parties” (UN Committee Against Torture, 2012).

<sup>36</sup> Government of South Africa, “National Anti-Corruption Strategy 2020-2030” (Pretoria: Government of South Africa, 2019).

<sup>37</sup> National Treasury, “Restricted Supplier and Tender Defaulter Report” (Pretoria: National Treasury, 2024), <https://vulekamali.gov.za/datasets/procurement-portals-and-resources/blacklisted-suppliers>.

<sup>38</sup> L Steyn, “SA Energy Council Appoints Scandal-Hit Bain to Run Project Management Office,” *Business*, December 12, 2024, <https://www.news24.com/fin24/companies/sa-energy-council-appoints-bain-to-run-project-management-office-20241212>.

<sup>39</sup> “SAP SE (SAP) Stock Price Increased Significantly in Q1,” *Yahoo Finance*, April 19, 2024, <https://finance.yahoo.com/news/sap-se-sap-stock-price-164712726.html>.

<sup>40</sup> National Treasury, “Pages - Restricted Suppliers,” 2024, <http://ocpo.treasury.gov.za/Pages/RestrictedSuppliers.aspx>.

The current factors to be considered needs to be assessed against the components of redress if proper expression is to be given to recognising victims' interests. The current framework is too focussed on monetary compensation of which the state only will be the beneficiary and little attention is paid to restricting trade and thus the income of offending companies. Further, it feeds the perception that the rich can buy themselves out of criminal accountability.

### **3.6 Section F. Authority to issue a Corporate ADR**

Section F states that only a DPP or an Investigating Director (ID) can issue a CADRe. The Directives do not, however, explain or establish a procedure as to how this decision is made and how it can be appealed or reviewed. There does not appear to be a mechanism by which representations from affected parties can be heard, nor does there seem to be an obligation on the DPP/ID to disclose to anybody that a process of CADRe is being engaged in. While it may be impractical to consult the general public on a large and complex case, there will be no harm in the NPA seeking the inputs of affected stakeholders; be that a person that was directly or indirectly harmed as a result of the corrupt actions. There is furthermore scope for the NPA to consult with statutory structures (e.g. the South African Human Rights Commission) in the event that there are no clearly definable victims. The facts of the case may also identify other stakeholders.

Noting that DPP's are appointed by the President under the current dispensation, it does raise questions about mandating a DPP (and ID) to issue a CADRe since there does not appear to be a quality control or oversight mechanism in the Directives granting the NDPP intervening powers. However, the NPA Act does grant the NDPP intervening powers when Directives are not complied with, and the NDPP may review a decision to prosecute or not to prosecute.<sup>41</sup>

### **3.7 Section G. Issue of an invitation and undertakings**

In the event that a prosecutor has a suspicion that a company has committed corruption or related offences and that the public interest may be served by a CADRe, the prosecutor may recommend to the DPP or an ID that an invitation be issued to the company. The directives consequently set out certain requirements for the invitation, such as a description of the allegations, a description of CADRe and that the NPA is considering the use of CADRe and that it is inviting the company to make representations in this regard. In the event that the company expresses its intentions to make representations, the prosecutor will then set out the manner in which discussions will take place and also set out the undertakings by the NPA. For example, that representations will be confidential and that information disclosed may be used for further prosecution. Companies making representations will be required to provide a number of

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<sup>41</sup> "National Prosecuting Authority Act," Pub. L. No. Act 32 (1998), sec. 22(2)(b-c).

undertakings, such as the information provided by the prosecutor during the engagements will be treated as confidential and will not be disclosed to any other party. Section G.7 requires that the individuals acting on behalf of the company must have the necessary authority to do so. At least at face value these reciprocal undertakings appear to be of sound reasoning for such a negotiation process.

The directives, however, do not state what the role and responsibilities of the company board are and what must be reflected in board minutes and how directors can be held accountability in the event of non-compliance.

### **3.8 Section H. Voluntary self-reporting**

A company may also approach the NPA of its own volition and request that CADRe be considered and then the process outlined immediately above in section G would apply.

### **3.9 Section I Contents of a CADRe agreement**

A CADRe must be reduced in writing and the requirements for that agreement are set out in the directives. In effect it covers a description of the allegations and that the company acknowledges responsibility, and in turn the NPA has decided not to prosecute for the offences in question. The amount of financial compensation and due date for payment must also be included as well as a description of the company's existing and future compliance programme. An important feature is that the decision not to prosecute the company does not provide any protection against prosecution of any individuals or proceedings in terms of POCA against individuals and should the NPA learn of information that materially changes its assessment of any of the criteria set out in the CADRe, it may proceed with a prosecution. The level of detail disclosed to the public will of course be important to firstly demonstrate that the alleged crimes were fully disclosed but the extent to which implicated individuals may be identified may be curtailed. It is not provided for in the Directives, but a publicly accessible register of CADRe agreements will enhance transparency.

Section I.2 states that restitution can be paid prior to a CADRe being issued. This raises concerns about the impartiality of the DPP/IDs decision-making, especially if such agreements, or the recovering of losses is a performance indicator for the DPP/ID. Section I.3 notes that the company may need to consent to a POCA-order before a CADRe is issued. Seemingly sensible, it does, nonetheless, continue to place the emphasis on monetary compensation.

### **3.10 Section J Use of material in criminal and other proceedings**

Section J refers to information and evidence that may be used in investigations and prosecutions in terms of POCA. The directive does, however, not specify if employees or directors of the company may be required to testify in court at a later stage in support of the prosecution of individuals.

### **3.11 Section K. Legal professional privilege**

The directives set out the expected requirements, noting that the company has a right to legal representation and that the NPA has no right to information which is subject to legal professional privilege. The company may waive privilege, but the NPA will not require a company to waive professional privilege in order to be considered to be cooperating.

### **3.12 Section L. Guidelines for calculating financial restitution**

The amount for financial restitution should be calculated on a case-by-case basis and must be done by the National Prosecution Service or the ID on the advice from the AFU. Moreover, the NPA may require that the company pay for the services of an independent accountant or auditor to assess the value of the proceeds of unlawful activities, but that the NPA will not be bound by the opinion of that person. The directives proceed to list a number of provisions in the POCA to determine the upper limit of the amount of disgorgement and further to determine an appropriate amount of disgorgement. This is followed by a list of additional factors to be considered to determine the appropriate amount of disgorgement.

Corruption unfortunately has unquantifiable costs as well, such as a loss of trust in government,<sup>42</sup> institutional decay,<sup>43</sup> undermined service delivery,<sup>44</sup> and investor confidence<sup>45</sup> to name a few.

### **3.13 Section M. Procedural arrangements**

This section of the directives deals with procedural matters relevant to the substantive issues covered in the preceding.

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<sup>42</sup> StatSA, "Statistical Release - P0340 Governance, Public Safety and Justice" (Pretoria: StatSA, 2023).

<sup>43</sup> R Zondo, "Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State (Part 6)," Judicial Commission of Inquiry (Pretoria, 2022).

<sup>44</sup> Duja Consulting, "The Impact of Corruption on Municipal Service Delivery: A Forensic Perspective," August 19, 2024, <https://www.duja.co.za/the-pressing-issue-of-corruption-in-south-african-municipalities/>.

<sup>45</sup> S Foley, "McKinsey Pays \$122mn to Resolve Probes into South Africa Bribes," *Financial Times*, December 5, 2024, <https://www.ft.com/content/98dbb5af-1ca0-4507-abd3-11f1e69d0c62>.

### **3.14 Section N. Publication**

Section N requires the publication of a summary of the CADRe on the NPA website. This has, as far as could be established, not yet been done in the SAP case. This requirement does come with a condition in the sense that the summary must be worded in such a manner as to avoid compromising any investigation or trial. While the motivation for this is understandable, the risk of misuse, or at least obfuscation, is also real.

### **3.15 Section O. Reporting mechanisms**

Section O states that quarterly reports must be submitted to the NDPP on CADRes as well as compliance with CADRes. There is no requirement that this must be reported to Parliament separately or as part of the annual report. This is a shortcoming. Placing this information in the public domain, especially before the Parliament, will promote greater transparency and improve accountability. It will also enable greater analysis of decision-making as well as the substance of and compliance with agreements.

### **3.16 Section P General**

As it stands now, it seems that the two options are CADRe or prosecution (see Section P.1). It is not inconceivable that a corporate may be held accountable by means of a prosecution (which may result in a plea and sentence agreement) and CADRe; with the latter dealing with some less serious charges, or charges where the NPA has a weaker case.

## **4. The legal framework**

The purpose of this section is to assess the legal basis, or not, for CADRe. Of particular significance is the power to withdraw criminal charges conditionally.

### **4.1 The Constitution and requirement for a prosecution policy**

The Constitution mandates the NPA to “institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.”<sup>46</sup> The Constitution also provides, as noted already, that the NDPP

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<sup>46</sup> Constitution of the Republic of South Africa, sec. 179(2).

“- must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, prosecution policy, which must be observed in the prosecution process”.<sup>47</sup>

Furthermore, the NDPP “must issue policy directives which must be observed in the prosecution process”.<sup>48</sup> The Prosecution Policy is publicly available in full, but the Directives are only selectively available in the public domain. It is indeed the case that the bulk of the directives are classified by the NPA as confidential.<sup>49</sup> The NPA Act requires that the initial version of the prosecution policy must be tabled in Parliament, but that changes thereafter only need to be noted in the annual report of the National Director to Parliament.<sup>50</sup> This raises some concerns about the scope and consequences of later amendments for which no consultation is evidently required, nor does Parliament need to be consulted, but only informed of changes. There is also no requirement that the public needs to be consulted on the prosecution policy or the accompanying directives.

The Constitution further requires that all other matters must be determined by national legislation.<sup>51</sup> The Constitution does, however, not specify what the prosecution policy needs to or should cover with reference to particular rights enumerated in the Bill of Rights, or priority crimes that may affect public safety, or the overall integrity of the state. By way of comparison, the Constitution requires that the Minister responsible for police must formulate a policing plan that is at least informed by provincially identified priorities: "The national policing policy may make provision for different policies in respect of different provinces after taking into account the policing needs and priorities of these provinces."<sup>52</sup> There are no similar requirements in respect of the prosecution policy and the implication is that, at least in law, the prosecution policy and the policing plan are detached from each other.

The Prosecution Policy does not in substance cover particular priorities, but rather hastily dives into guiding operational decision-making.

As outlined in the Criminal Procedure Act,<sup>53</sup> a prosecution starts when the suspect is charged, implying that the NPA's actions must be linked to pursuing a prosecution. It may of course, based

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<sup>47</sup> Constitution of the Republic of South Africa, sec. 179(5)(a).

<sup>48</sup> Constitution of the Republic of South Africa, sec. 179(5)(b).

<sup>49</sup> National Prosecuting Authority, “Prosecution Policy Directives - Policy Directives Issued by the National Director of Public Prosecutions.”

<sup>50</sup> National Prosecuting Authority Act, sec. 21(2).

<sup>51</sup> Constitution of the Republic of South Africa, sec. 179(5).

<sup>52</sup> Constitution of the Republic of South Africa, sec. 206(2).

<sup>53</sup> “Criminal Procedure Act,” Pub. L. No. 51 (1977), sec. 76.

on the facts of the case, decide not to prosecute, but those are the two options provided for in law. The Constitution grants the prosecution the discretion to prosecute or not.<sup>54</sup> Prosecution is not mandatory, as is the case in some other jurisdictions [e.g. see *Legalitätsprinzip* (principle of legality) in the German Code of Criminal Procedure]. The NPA has the power to prosecute on behalf of the state and the Constitution does not, as already noted, oblige the NPA to always prosecute, but it also does not give the NPA more powers than to prosecute and matters incidental thereto. The particular provision reads “to carry out any necessary functions incidental to instituting criminal proceedings”. The wording of section 179(2) of the Constitution is such that it empowers the prosecution service to prosecute on behalf of the state and perform the necessary functions in pursuit of such prosecutions. There is no explicit mention here that the prosecution service may conditionally withdraw charges against a suspect or an accused *in lieu* of compensation or any other counter-performance by the accused. Withdrawing charges, conditionally or not, is the opposite of prosecution. The withdrawal of charges cannot therefore be regarded as an action “incidental to instituting criminal proceedings”.

As noted already, the Constitution requires the NDPP to develop a prosecution policy and issue accompanying directives. The term “policy” does, however, not have a uniform and inflexible meaning. The term may refer to a policy on the implementation of legislation, such as a policy on the arrest of suspects for minor offences. Policy may also be presented in the form of a Green or White Paper (e.g. the White Paper on Corrections in South Africa). In the case of the former the purpose is more akin to a “how to” – approach, or differently put – a guide to operational discretion. In the case of the latter, the focus is typically on high-level assumptions and a description of strategic priorities. The National Development Plan is an example in this regard. The intention is that such high-level strategic priorities will give rise to, if not require, enabling legislation. At issue is the meaning being attached to the word “policy” within the context of CADRe and whether the technical and operational requirements for CADRe to happen, as set out in the Directives, can be derived from what is provided for in the Prosecution Policy? In short, can one trace the Directives for CADRe back to the mandate in the prosecution policy? The Prosecution Policy is, however, lacking in specific guidance on this. As an ancillary point, it is noted that if CADRe is a policy, it requires the concurrence of the Minister while Directives falls within the sole discretion of the NDPP.

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<sup>54</sup> Constitution of the Republic of South Africa, sec. 179(2).

## 4.2 The legislation

### 4.2.1 Criminal Procedure Act

The Criminal Procedure Act enables the prosecution to withdraw the charges either before plea or thereafter, but does not provide for a conditional withdrawal.<sup>55</sup> The Criminal Procedure Act also provides for a plea and sentence agreement following a guilty plea and conviction.<sup>56</sup> Plea and sentence agreements are further subject to confirmation by the court. The seldom-used section 300 provides that a court may award compensation to the victim following conviction. Section 332 of the Criminal Procedure Act deals with the prosecution of corporates. It is noted that the NPA has for several years now practiced what it refers to as “Alternative Dispute Resolution Mechanisms” and in particular informal mediation often resulting conditional withdrawals. It is submitted that this has and continues to occur unregulated.

According to Du Toit the criminal responsibility of a corporate body is wider than the vicarious liability of a natural person.<sup>57</sup> It is further noted that “The acts of its directors and servants are deemed to be its own acts as is the intention of the director or servant.”<sup>58</sup> The corporate body can commit crimes and thus invoking intent, negligence and strict liability. It is not necessary here to go into the detail, but worthwhile to note that in *S v Coetzee* it was recognised that:

Directors, of course, occupy a special position of responsibility, not only in relation to the corporate body but also with regard to the public in general. The state consequently has an important interest in ensuring that the affairs of corporate bodies are properly and honestly conducted. The corporate body itself has to be protected against the dishonesty and other criminal conduct of those in charge of its affairs or who are involved with them. It would not in itself be unreasonable to provide special measures to enable the prosecution to overcome the difficulty of gathering evidence about corporate activities. This would be consistent with the state’s duty to protect society.<sup>59</sup>

The observation by the Constitutional Court in *Coetzee* then suggests not only that directors have a special responsibility to ensure that the corporate is managed and run in line with legislative requirements, but also that the state has a special interest and responsibility to ensure that corporates are managed honestly and in line with the law, because the state has a duty to protect the public.

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<sup>55</sup> Criminal Procedure Act, sec. 6.

<sup>56</sup> Criminal Procedure Act, sec. 105A.

<sup>57</sup> Du Toit, *Commentary on the Criminal Procedure Act*, chap. 33 p. 5.

<sup>58</sup> Du Toit, chap. 33 p. 5.

<sup>59</sup> *S v Coetzee and Others*, No. (CCT50/95) [1997] ZACC 2 (Constitutional Court March 6, 1997).



#### 4.2.2 National Prosecuting Authority Act

Section 20 of the National Prosecuting Authority Act (NPA Act) reads:

*20. Power to institute and conduct criminal proceedings.* - (1) The power, as contemplated in section 179 (2) and all other relevant sections of the Constitution, to –

- (a) institute and conduct criminal proceedings on behalf of the State;
- (b) carry out any necessary functions incidental to instituting and conducting such criminal proceedings; and
- (c) discontinue criminal proceedings,

vests in the prosecuting authority and shall, for all purposes, be exercised on behalf of the Republic.

The NPA Act does not provide any mechanism for the conditional withdrawal or suspension of a prosecution against individuals or corporates. The wording in the NPA Act links directly back to the wording in the Constitution, noting the power to prosecute and the power to withdraw charges. The phrase is used “institute and conduct” prosecutions and there is no specific mention in the NPA Act of a power to suspend or conditionally withdraw charges. Whereas the Prosecution Policy mentioned the discretion to divert, this is absent from the NPA Act and there has not been an attempt to amend the NPA Act in this regard either since the Act predates the Prosecution Policy by some 15 years. It should furthermore be noted that once a plea has been entered, the accused is entitled to a verdict.

As noted with reference to the Constitution and in the NPA Act in section 20(b) that the NPA has the power to perform “any necessary functions incidental to instituting and conducting such criminal proceedings”. It refers to incidental matters relating to the instituting and conducting of a criminal prosecution, not to mediation or conditional withdrawals. Investigating a crime (as under the Investigating Directorate) would then be seen as “incidental to instituting” a prosecution, even if the ultimate decision may be not to prosecute.<sup>60</sup> If there was indeed phrasing to the effect that the prosecution may halt or suspend a prosecution to investigate alternatives to prosecution, that would have in principle empowered the prosecution to consider such mechanisms as diversion or mediation. This is, however, not provided for in section 20.

#### 4.2.3 Child Justice Act

It is necessary to mention the Child Justice Act here since the CADRe directives draw on it as part of its motivation. The Child Justice Act established diversion as a part of the criminal justice

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<sup>60</sup> “National Prosecuting Authority Amendment Act,” Act 10 of 2024 § (2024).

process for children.<sup>61</sup> Typically in such matters, the charges are withdrawn on the condition that the child accepts responsibility and participate in a programme that would be beneficial to the child, for example, a life skills programme. The Child Justice Act created a mechanism whereby the prosecution service can conditionally withdraw a criminal charge against a child and this is at least in part motivated by the Constitution since in all decisions, the best interests of the child shall be paramount.<sup>62</sup> The Child Justice Act goes to considerable lengths to set out in law the procedure to be followed when considering a child for diversion, the diversion options and the monitoring of the agreement. It is important to note that this is set out in principal legislation and not left to regulation and standing orders. In addition to this, the Department of Social Development (the responsible department) has also developed a policy framework and a set of minimum standards for diversion programme service providers.<sup>63</sup> The Child Justice Act, where it concerns diversion, necessitated the creation of a comprehensive framework to encourage the use of diversion, but also regulate its use for children in conflict with the law, and went further to set standards for service providers to ensure that children benefiting from diversion programmes are indeed protected and that there is monitoring and oversight. The inclusion of diversion as a mechanism for dealing with children in conflict with the law was of course built on an extensive body of empirical research that alerted the drafters of the Child Justice Act to good practices as well as risks which need to be managed.<sup>64</sup> The Child Justice Act also mandated the establishment of a diversion register. It is submitted that much can indeed be learnt from the Child Justice Act with reference to CADRe.

#### 4.2.4 Other legislation

The Prevention of Organised Crime Act (POCA) does not create a mechanism by which the NPA can engage in mediation or alternative dispute resolution (ADR) with criminal suspects. It rather sets up a mechanism by which the forfeiture of assets which are the proceeds of crime or instrumentalities of offences, is enabled. In this the NPA can and does play a role, in that the AFU is an entity of the NPA. Both civil and criminal forfeiture are provided for – the former does not require a criminal conviction, but the latter does. It is no surprise that the former is preferred by the NPA.

The Prevention and Combating of Corrupt Activities Act (PRECCA) does not create a mechanism by which the NPA can engage in mediation or alternative dispute resolution with criminal

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<sup>61</sup> Child Justice Act, secs. 41 and 51.

<sup>62</sup> Constitution of the Republic of South Africa, sec. 28(3).

<sup>63</sup> Department of Social Development, “Policy Framework for the Accreditation of Diversion Services in South Africa” (Pretoria: Department of Social Development, 2010), [https://www.gov.za/sites/default/files/gcis\\_document/201409/policy-framework-adssa-10.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/policy-framework-adssa-10.pdf).

<sup>64</sup> South African Law Commission, “Juvenile Justice Report” (Pretoria: South African Law Commission, 2000).

suspects. PRECCA does, however, require the approval of the NDPP, a DNDPP or a DPP for the prosecution of certain matters, but does not create an alternative procedure.<sup>65</sup>

### **4.3 The Prosecution Policy and Policy Directives (2014) on diversion**

#### **4.3.1 The 2013 Policy**

The Prosecution Policy, in Section 3, notes that the prosecution has the discretion to divert a matter, but does not indicate the source in law. Section 3A of the policy then notes that the prosecutor can “decline to prosecute and to opt for pre-trial diversion or other non-criminal resolution”. Similarly, the source in law is not indicated. Moreover, there is no indication in the prosecution policy that the drafters had mediation with corporate suspects in mind when these two provisions were included to seemingly enable some form of diversion. It is more than likely that individuals, and not corporates, were regarded as candidates for diversion.

The Prosecution Policy, under the heading “The Role of the Prosecutor” reads:

The prosecutor has a discretion to make decisions which affect the criminal process. This discretion can be exercised at specific stages of the process, for example - . . . the decision whether or not the case should be diverted.<sup>66</sup>

Under the same heading and the sub-heading “General” the policy reads:

The prosecutor must consider whether to -

- request the police to investigate the case further;
- institute a prosecution;
- enter into a plea or sentence agreement;
- decline to prosecute and to opt for pre-trial diversion or other non-criminal resolution; or
- decline to prosecute without taking any other action.<sup>67</sup>

In the subsequent sections of the policy, substantive guidance is provided with regard to the requirements for a prosecution, i.e. to pursue a prosecution. For example, see the section on “Factors to be considered when evaluating evidence”.<sup>68</sup> The Prosecution Policy is, however, silent on “pre-trial diversion or other non-criminal resolution” referred to above. The Prosecution Policy mentions diversion twice,<sup>69</sup> but these are general descriptions, stating that prosecutors have the discretion to divert. However, diversion is not defined nor are any conditions or standards described under which diversion would be appropriate. If the purpose of the

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<sup>65</sup> Prevention and Combatting of Corrupt Activities Act, sec. 27.

<sup>66</sup> National Prosecuting Authority, “Prosecution Policy,” 4.

<sup>67</sup> National Prosecuting Authority, 5.

<sup>68</sup> National Prosecuting Authority, 6.

<sup>69</sup> National Prosecuting Authority, 4 and 5.

Prosecution Policy is to foster greater consistency in decision-making, as it proclaims to do,<sup>70</sup> it is clearly not helping prosecutors to do so.

In the preceding it has been pointed out that in the legislation, and in particular the NPA Act, there is no mention of a power to divert matters or some form of conditional withdrawal. This wording appears for the first time in the Prosecution Policy. The power to divert or conditionally withdraw charges *in lieu* of a counter performance, is a considerable expansion of the prosecution's mandate.

If the decision is to not prosecute or withdraw existing charges, there are no consequences for the accused. Other affected parties may of course question the motivation for such a withdrawal and indeed take it upon review if there is reason to believe that a prosecution should have been pursued. In such instances the legislation does provide for a private prosecution as an option when the prosecution service declined to prosecute. On the other hand, if a decision is made to prosecute the trial will have the effect of reviewing that decision in establishing the guilt or innocence of the accused. The decision to resolve the matter in the absence of judicial review, such as through CADRe or diversion, places it outside the existing powers of the prosecution.

#### **4.3.2 The 2014 Prosecution Policy Directives**

It is noted that the Prosecution Policy Directives are classified by the NPA as confidential and thus not open to the public. The reason for this is not clear. The copy which was reviewed is dated 2014 and it is unknown if these directives have been revised or amended. Diversion is not defined in the Prosecution Policy nor the NPA Act, but in the Prosecution Policy Directives and reads:

1. Diversion is an alternative dispute resolution mechanism. By "diversion" is understood the election, in suitable and applicable cases, of a manner of disposal of a criminal case other than through normal court proceedings. Cases are diverted away from the formal criminal justice system, usually at pre-trial stage, with a view to disposing of these cases outside of the criminal justice system.
2. When a case is diverted, charges against the accused person may only be withdrawn after the accused person participates successfully in a particular diversion programme and/or makes reparation to the complainant/victim. Diversion is preferable to the mere withdrawal of cases as the offender is held responsible for his or her actions.
3. It is important that the prosecutor consult the complainant before a decision is made to divert an accused, as the case is withdrawn upon successful completion of the diversion programme and prosecution on that charge may not later be reinstated.
4. The reasons for withdrawal of the case must be furnished to the presiding officer and must also be recorded on the police docket.<sup>71</sup>

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<sup>70</sup> National Prosecuting Authority, 3.

<sup>71</sup> National Prosecuting Authority, "Prosecution Policy Directives - Policy Directives Issued by the National Director of Public Prosecutions," pt. 7A.

This should also be read together with the types of cases to be considered for diversion as set out in the Prosecution Policy Directives. It is indicated that diversion is generally suitable for less serious offences which would qualify for an admission of guilt finds. More serious crimes such as murder, robbery with aggravating circumstances or rape are deemed inappropriate for consideration for diversion. A particular exclusion refers to charges laid in terms of section 17(a) of the Domestic Violence Act of 1998 (a violation of a protection order).<sup>72</sup>

The directives deal with “Diversion, restorative justice and informal mediation in respect of adult offenders” in Part 7. The *lacuna* identified in respect of the Prosecution Policy also applies here in that this is entirely unregulated as there is no legal provision creating the mechanism for it. Part 7 F covers informal mediation and it seems that this is primarily targeted at adults and data from the NPA indicate that mediation is used extensively. For example, in 2018/9 some 149,000 cases were dealt with through alternative dispute resolution mechanisms (ADRM) and informal mediation and in the following year some 136 000 cases.<sup>73</sup> Following the 2019/20 annual report, the NPA has simply stopped reporting on the use of ADRM. The scale of ADRM use becomes apparent when compared to the total number of verdict cases (cases where there was either a conviction or an acquittal). In 2018/19 there were, as noted, some 149,000 ADRM cases compared to 276,000 verdict cases. In the following year there were as noted 136,000 ADRM cases and nearly 232,000 verdict cases.<sup>74</sup> The figures indicate the widespread and systematic use of ADRM to deal with criminal matters in the absence of a proper regulatory framework, with the exception of the relatively low number of children being diverted annually under the Child Justice Act. In 2018/19 some 4 400 children were diverted and in the following year some 3 200.<sup>75</sup> Part 48 of the Directives deals with children in conflict with the law and covers, as described in the Child Justice Act, the diversion or conditional withdrawal of charges against children.

## 5. Conclusion

The 2024 CADRe directives then appear to have been developed as an urgent add-on to deal with pressure from the US Department of Justice in the SAP case which had implications for South Africa and Indonesia. The result seems to be a set of ill-fitting directives in the context of the current regulatory framework and the powers of the NPA. This is not to argue that there may indeed be a time and place for corporate alternative dispute resolution, but such a mechanism needs to be adequately mandated in law and carefully and thoroughly assessed against the

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<sup>72</sup> National Prosecuting Authority, pt. 7B.

<sup>73</sup> National Prosecuting Authority, “Annual Report 2019/20,” 2020, 78.

<sup>74</sup> National Prosecuting Authority, 73.

<sup>75</sup> National Prosecuting Authority, 79.

existing legal framework. Furthermore, it should anticipate in detail the problems that may arise, especially with stakeholders external to the bilateral negotiations between the offending corporate and the NPA.

The preceding has shown that as well-intentioned as the CADRe are, there does not appear to be explicit legal provision for the conditional withdrawal of criminal charges where adults and corporates are concerned. The mechanism is well-developed in the Child Justice Act, but such a mechanism does not exist for adults or corporates.

The CADRe directives raise a number of concerns around the transparency in decision-making, the substance of the agreement reached with the corporate, as well as the monitoring of compliance with such an agreement. To this should be added that the corporate may be implicated in other misdeeds that may not be the focus of the engagement with the NPA, but that those affected may not be privy to the negotiations with the NPA. It remains the situation that the NPA can engage in negotiations in total secrecy until an agreement is reached. One may further argue that there could be a real incentive for the NPA to keep a particular focus to reach an agreement, and not involve other parties that may complicate matters further.

It is ultimately individuals who commit the crimes, but management or the board of directors must also take responsibility. A company is an entity consisting of a system of checks and balances. A company that fails in preventing itself from committing crimes may not be able to point to a single individual. While in some instances there may be clear culpability of individuals, in others the situation may be more diffuse. It is therefore important to ask questions about how the relationship between the individuals committing the criminal acts and the board of directors are viewed. To this end attention is drawn to principles 6 and 13 of the King IV Report:

6. The governing body could serve as the focal point and custodian corporate governance in the organisation.

13. The governing body should govern compliance with applicable laws and adopted, non-binding rules, codes and standards in a way that support the organisation being ethical and a good corporate citizen.<sup>76</sup>

The CADRe directives do not mention the board of directors or any other governing structure or entity of the corporate concerned, save for the following:

Conversely, a Corporate ADR may be favourably considered where the offending represents isolated actions by individuals, for example a rogue director or officer or employee, and where such offending is not recurrent, or where the company has

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<sup>76</sup> Institute of Directors of South Africa, “King IV Report on Corporate Governance for South Africa” (Johannesburg: Institute of Directors of South Africa, 2016).

substantially changed its board or management team or has merged with or been acquired by another company.<sup>77</sup>

The directives are not firm in articulating a position where the prosecution of individuals remains a priority as mandated by the Constitution and the NPA Act. If, indeed, a pattern develops where the NPA enters into CADRe agreements, but few, if any, prosecutions result therefrom, this would be cause for concern. The impression is rather that CADRe is there to avoid prosecution in general. It would at least confirm a stereotypical misgiving that the rich (e.g. senior company executives and board members) can buy themselves out of prosecution. This would provide further support for a regime of maximum transparency where it concerns the conditional withdrawal of criminal charges against corporates and implicated individuals.

Even if the Prosecution Policy provides for diversion, there is no other provision in law, with the exception of the Child Justice Act (and thus applying to children), that empowers the prosecution service to conditionally withdraw a charge against an adult individual or company in lieu of a counter-performance. The implication is that the Prosecution Policy Directives and the CADRe Directives give powers to the prosecution that it does not have in law.

The Prosecution Policy is dated 2013 and the Directives 2014. Given the findings of the Zondo Commission, decisions from the courts, performance data on the criminal justice system as well as analyses from the research community, there is more than enough reason to undertake a thorough review of the substance of the Prosecution Policy and accompanying directives as well as the manner in which the NPA develops policy. Policy needs to be developed in an inclusive, transparent and accountable manner – an approach that has been sorely lacking.

Finally, any kind of agreement of this nature only has sufficient bargaining power for the state, where there is a clear apprehension that prosecutions will occur and will be successful. Currently, there appears little for companies to fear to in this regard. While R1.1bn to be paid by McKinsey may seem like a large amount, it is a mere fraction of the total profits of the company and of the harm ultimately caused to South Africa and South Africans. Indeed, the most likely outcome of these directives in the absence of concurrent prosecutions, is that companies will simply price into their corrupt operations the cost of a deferred prosecution agreement. If all companies have to lose by their corrupt behaviour is the ill-gotten fraction of their gains, then they have nothing to lose at all by being corrupt.

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<sup>77</sup> National Prosecuting Authority, “Annexure A Part 51: Corporate Alternative Dispute Resolution - Prosecution Policy Directives - Policy Directives Issued by the National Director of Public Prosecutions,” sec. E.6(b).





## Sources

Affordable Medicines Trust and Others v Minister of Health and Another, No. (CCT27/04) [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) (March 11, 2005).

“African Charter on the Rights and Welfare of the Child.” Addis Ababa: African Union, 1999.

Australian Law Reform Commission. “Serious Invasions of Privacy in the Digital Era (ALRC Report 123).” Sydney: Australian Law Reform Commission, 2014. <https://www.alrc.gov.au/publication/serious-invasions-of-privacy-in-the-digital-era-alrc-report-123/>.

Biowatch Trust v Registrar Genetic Resources and Others, No. (CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC) ; 2009 (10) BCLR 1014 (CC) (June 3, 2009).

Brümmer v Minister for Social Development and Others, No. (CCT 25/09) [2009] ZACC 21; 2009 (6) SA 323 (CC) ; 2009 (11) BCLR 1075 (CC) (Constitutional Court 2009).

Carmichele v Minister of Safety and Security, No. (CCT 48/00) [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) (August 16, 2001).

Child Justice Act, Pub. L. No. 75 of 2008 (2008).

Chuene, R, Z Demarthe, and S Mokoena. “Directors Beware! The Court Declares Dudu Myeni (Former SAA Chair) a Delinquent Director - AfricanLII.” *AfricanLii* (blog), 2020. <https://africanlii.org/articles/2020-07-03/a-hrefusersfasken1069a/directors-beware-the-court-declares-dudu-myeni-former-saa-chair-a-delinquent-director>.

*City Press*. “NPA ‘Sitting on 686 Cases.’” September 9, 2018.

Committee on the Rights of the Child. “General Comment No. 7 (2005) Implementing Child Rights in Early Childhood.” Geneva: UNCRC, 2006.

———. “General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1).” Geneva: UNCRC, 2013.

Constitution of the Republic of South Africa (1996).

Criminal Procedure Act, Pub. L. No. 51 (1977).

Cronje, J. "SAP to Pay R2.2bn in 'restitution' to SA Govt after Admitting to Bribes." *News24*, January 11, 2024. <https://www.news24.com/fin24/economy/sap-to-pay-r4bn-fine-admits-to-bribing-sa-officials-to-win-govt-business-20240111>.

Cruywagen, V. "'Trends in Rule of Law and Justice Do Not Bode Well' — NPA Boss Shamila Batohi." *Daily Maverick*, November 11, 2024. <https://www.dailymaverick.co.za/article/2024-11-11-trends-in-rule-of-law-and-justice-do-not-bode-well-prosecuting-boss-shamila-batohi/>.

De Maria, W. "Commercial-in-Confidence: An Obituary to Transparency?" *Australian Journal of Public Administration* 60, no. 4 (2001): 92–109.

Department of Social Development. "Policy Framework for the Accreditation of Diversion Services in South Africa." Pretoria: Department of Social Development, 2010.

[https://www.gov.za/sites/default/files/gcis\\_document/201409/policy-framework-adssa-10.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/policy-framework-adssa-10.pdf).

Dsouza, M. "The Corporate Agent in Criminal Law – an Argument for Comprehensive Identification." *The Cambridge Law Journal* 79, no. 1 (2020): 91–119. <https://doi.org/10.1017/S0008197320000021>.

Du Toit, E. *Commentary on the Criminal Procedure Act*. Cape Town: Juta, 1987.

Duja Consulting. "The Impact of Corruption on Municipal Service Delivery: A Forensic Perspective," August 19, 2024. <https://www.duja.co.za/the-pressing-issue-of-corruption-in-south-african-municipalities/>.

Farisani, D. "Corporate Criminal Liability in South Africa: What Does History Tell Us about the Reverse Onus Provision?" *Fundamina* 23, no. 1 (2017): 1–19. <https://doi.org/10.17159/2411-7870/2017/v23n1a1>.

———. "The Regulation of Corporate Criminal Liability in South Africa: A Close Look (Part 1)." *Obiter* 27, no. 2 (2006): 263–76.

Foley, S. "McKinsey Pays \$122mn to Resolve Probes into South Africa Bribes." *Financial Times*, December 5, 2024. <https://www.ft.com/content/98dbb5af-1ca0-4507-abd3-11f1e69d0c62>.

Government of South Africa. "National Anti-Corruption Strategy 2020-2030." Pretoria: Government of South Africa, 2019.

Institute of Directors of South Africa. “King IV Report on Corporate Governance for South Africa.”  
Johannesburg: Institute of Directors of South Africa, 2016.

Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others, No. (CCT1/00) [2000] ZACC 12 (Constitutional Court August 25, 2000).

Klaaren, J. “The Human Right to Information and Transparency.” In *Transparency in International Law*, edited by A Bianchi and A Peters, 223–38. Cambridge University Press, 2010.

M v S, No. [2007] ZACC 18 (Constitutional Court 2007).

McKinnon v Secretary, Department of Treasury, No. [2005] FCAFC 142 (Federal Court of Australia 2005).

Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others, No. (CCT59/04A) [2005] ZACC 25; 2006 (8) BCLR 872 (CC) (September 30, 2005).

Minister of Justice and Constitutional Development and Others v Prince (Clarke and Others Intervening); National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton, No. (CCT108/17) [2018] ZACC 30; 2018 (10) BCLR 1220 (CC); 2018 (6) SA 393 (CC); 2019 (1) SACR 14 (CC) (Constitutional Court September 18, 2018).

National Prosecuting Authority. “Annexure A Part 51: Corporate Alternative Dispute Resolution - Prosecution Policy Directives - Policy Directives Issued by the National Director of Public Prosecutions.” Pretoria: National Prosecuting Authority, 2024.

[https://www.npa.gov.za/sites/default/files/uploads/Annexure%20A%20PART%2051%20Corporate%20ADR\\_0.pdf](https://www.npa.gov.za/sites/default/files/uploads/Annexure%20A%20PART%2051%20Corporate%20ADR%200.pdf).

———. “Annual Report 2019/20,” 2020.

———. “Annual Report 2023/24.” Pretoria: National Prosecuting Authority, 2024.

———. “Prosecution Policy.” Pretoria: National Prosecuting Authority, 2013.

———. “Prosecution Policy Directives - Policy Directives Issued by the National Director of Public Prosecutions.” Pretoria: National Prosecuting Authority, 2014.

National Prosecuting Authority Act, Pub. L. No. Act 32 (1998).

National Prosecuting Authority Amendment Act, Act 10 of 2024 § (2024).

National Treasury. "Pages - Restricted Suppliers," 2024.

<http://ocpo.treasury.gov.za/Pages/RestrictedSuppliers.aspx>.

— — —. "Restricted Supplier and Tender Defaulter Report." Pretoria: National Treasury, 2024.

<https://vulekamali.gov.za/datasets/procurement-portals-and-resources/blacklisted-suppliers>.

NSW Public Service Commission. "Behaving Ethically: A Guide for NSW Government Sector Employees."

Sydney: NSW Public Service Commission, 2014. <https://www.psc.nsw.gov.au/sites/default/files/2020-10/Behaving%20Ethically%20Guide.pdf>.

Organisation Undoing Tax Abuse and Another v Myeni and Others, No. (15996/2017) [2020] ZAGPPHC 169 (Gauteng High Court (Pretoria) 2020).

Prevention and Combatting of Corrupt Activities Act, Pub. L. No. Act 12 of 2004 (n.d.).

Ryan, C. "State Capture Scorecard: R500bn Looted, Zero Assets Recovered." Moneyweb, July 5, 2022.

<https://www.moneyweb.co.za/news/south-africa/state-capture-scorecard-r500bn-looted-zero-assets-recovered/>.

S v Coetzee and Others, No. (CCT50/95) [1997] ZACC 2 (Constitutional Court March 6, 1997).

South African Law Commission. "Juvenile Justice Report." Pretoria: South African Law Commission, 2000.

StatSA. "Statistical Release - P0340 Governance, Public Safety and Justice." Pretoria: StatSA, 2023.

Steyn, L. "SA Energy Council Appoints Scandal-Hit Bain to Run Project Management Office." *Business*, December 12, 2024. <https://www.news24.com/fin24/companies/sa-energy-council-appoints-bain-to-run-project-management-office-20241212>.

The Public Protector v Mail & Guardian Ltd and Others, No. (2011)(4) SA 420 (SCA) [2011] ZASCA 108; 422/10 (June 1, 2011).

Transparency International. "Transparency - Corruptionary A-Z." Transparency.org. Accessed July 19, 2024. <https://www.transparency.org/en/corruptionary/transparency>.

UNCAT. "General Comment No. 3 - Implementation of Article 14 by States Parties." UN Committee Against Torture, 2012.

Yahoo Finance. "SAP SE (SAP) Stock Price Increased Significantly in Q1," April 19, 2024.

<https://finance.yahoo.com/news/sap-se-sap-stock-price-164712726.html>.

Zondo, R. "Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State (Part 6)." Judicial Commission of Inquiry. Pretoria, 2022.

