

The duty to report suspected fraud and the consequences thereof

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Section 34 of the Prevention and Combating of Corrupt Activities Act, 2004 (PRECCA) places a duty on defined persons in a position of authority (i.e. director, manager, chief executive officer) to report certain offences over R100,000.



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In terms of section 34(1) of PRECCA, any person who holds a position of authority, who knows or ought reasonably to have known or suspected that any other person has committed an offence in terms of sections 3 to 16 or 20 to 21 of PRECCA or theft, fraud, extortion, forgery or uttering of a forged document involving an amount of R100,000 or more, must report such knowledge or suspicion or cause such knowledge or suspicion to be reported to any police official. The failure to report is an offence. We are of the view that the duty to report does not include self-incrimination, as if it did, it would violate the right to silence.

There is a difference in views as to whether persons who hold a position of authority have a duty to report a specified crime committed by any person or committed by a person falling within the sphere of relationship relevant to the person's position of authority. The one view is that the section does not limit the scope as it refers to any other person. The other view is that it must be restrictively interpreted as a failure to report constitutes an offence.

Further, there is no general duty to report outside statutory dictates (unless the person is a law enforcement officer) and it makes no sense to extend such a duty to demand on a person who holds a position of authority to even report a specified offence unrelated to the holding of the position of authority.

The Directorate for Priority Crime Investigation must investigate the matter and may then decide to elevate the investigation to a full criminal investigation. It is only when a decision has been taken to proceed with a criminal investigation that the National Prosecuting Authority will determine whether there is a sufficient case to prosecute premised on reasonable and probable cause to believe that a fraud has been committed.

Naturally of concern is that it may be found after a criminal investigation that the accused and/or the companies are innocent or the National Prosecuting Authority may elect not to prosecute the matter which may lead to the accused proceeding with a case of malicious prosecution/defamation against the reporting party.

Malicious prosecution consists of the wrongful and intentional setting of the law in motion. In *Canelli v Canelli and Others* (3 February 2021), the Supreme Court of Appeal (SCA) reaffirmed the requirements for a malicious prosecution claim, being that to succeed with such a claim, a claimant must allege and prove that:

- The defendant set the law in motion (instigated or instituted the proceedings);
- The defendant acted without reasonable and probable cause;
- The defendant acted with malice (the wrongful intention to defame or injure another's reputation or personality); and
- The prosecution failed.

The laying of a criminal charge against an individual is one of the main ways to jump start South Africa's criminal justice processes. The difficulty of this process comes in where the charge in question is made falsely and with malice. However, the duty to report in terms of section 34(1) of PRECCA is not a criminal complaint to set the law in motion but rather compliance with a statutory duty to report.

Accordingly, reasonable grounds to suspect that fraud has been committed must exist. The reporting statement must, as an example, not state that fraud was perpetrated but that reasonable grounds exist to suspect that fraud has been committed. Unless the allegations are frivolous and malicious with the intent to injure a person, reporting in terms of PRECCA is not a request to prosecute or to set a prosecution in motion but rather, a statutory duty to report as PRECCA places a duty on a person in a position of authority to report, inter alia, a reasonable suspicion of theft, fraud, extortion, forgery or uttering of a forged document involving an amount of R100,000.

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