Getting to grips with corruption

Forensics specialist Steven Powell warns firms about the long arm of international law.

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Steven Powell is concerned about companies' ignorance of their legal obligations. (Madeleine Cronjé, M&G)

An early career as a specialist white-collar crime prosecutor under advocate Billy Downer, the deputy director of public prosecutions for the Western Cape responsible for the conviction of businessperson Schabir Shaik, has greatly influenced Steven Powell’s choices.

Now the director of forensics for law firm Edward Nathan Sonnenberg, Powell’s early grounding in forensic research and his continued interest in it is one of the main reasons he is now considered one of the foremost anti-corruption experts in Africa.

Legal action and the resulting fines imposed by foreign governments on companies suspected of engaging in bribery or corrupt practices has raised the need for South African companies in the global marketplace to become compliant with international regulations. Two recent cases have brought home the importance of compliance, namely the US-based court case against MTN regarding its operations in Iran, and revelations this week that dual-listed Net1 UEPS Technologies

http://mg.co.za/print/2012-12-07-getting-to-grips-with-corruption
is being investigated in the US for corruption under the Foreign Corrupt Practices Act (FCPA). The investigating allegedly relates to the awarding of the social grant contract in South Africa.

Powell was approached a while ago to take part in an initiative introduced by the Organisation for Economic Co-operation and Development (OECD), the United Nations Office on Drugs and Crime and the Law Society of Southern Africa to train the South African legal profession in anti-corruption requirements.

These include the OECD’s recommendations on bribery, to which South Africa is a signatory, as well as the United Kingdom Bribery Act and the United States Foreign Corrupt Practices Act, two radical and far-reaching sets of anti-bribery laws that can apply to local companies doing business with companies in those countries.

What he found concerned him. “At one seminar, only three of 150 lawyers had ever read the OECD recommendations, which have to be implemented by South African companies.”

Powell’s main message to local companies is that they are bound by anti-corruption legislation, both locally and overseas, and as more enter the international arena they may find themselves facing large fines should they be found to have failed to comply with extraterritorial anti-corruption legislation.

The United States, in particular, has handed out hefty fines to erring companies in terms of the Foreign Corrupt Practices Act.

**Corruption-related charges**

The anticorruption educational initiative was prompted by concerns in the OECD and the UN about corruption in developing countries. South Africa has slid more than 20 places down the transparency index in the past five years, driven by the arms deal scandal, the conviction of former police commissioner Jackie Selebi on corruption-related charges and the removal of his replacement, Bheki Cele, in connection with a questionable police lease deal.

“South Africa occupies 64th position out of 189 countries that participate in the Transparency International Corruption Index,” said Powell.

“In the present global environment, South African companies can no longer afford to be ignorant of local and international anti-bribery and corruption legislation and I am not just referring to listed companies,” he said, pointing out that companies can now be held accountable for the illicit actions of a subsidiary, or an agent, and even if they are ignorant of such illicit conduct.

Powell said South Africa was under increased scrutiny internationally and so South African companies would need to be extra vigilant.

“The investigation regarding Net 1 shows that South African companies are on the radar screen of the US Department of Justice,” said Powell.

New regulations in the Companies Act bind unlisted and medium-sized companies as well as all state-owned companies to comply with anti-corruption measures.
“Dual-listed companies are often more aware of the legislation, but often do not realise that there is no double jeopardy in corruption law, so they can be prosecuted in a number of countries where they operate and there are cases where this has happened, such as the enforcement action against Siemens.”

**Specialised units**

Powell, who studied law, found himself in the justice department as a specialist white-collar crime prosecutor after being advised to get some court experience before looking for a pupillage.

“I learned so much about fraud and corruption under Downer and former attorney general Frank Kahn that I eventually joined Deloitte, which was looking for a forensic lawyer to complement its forensic team, at that stage comprised mainly of accountants. I was a bit arrogant when I saw Deloitte’s advert. I called them and said ‘I am your man’. Fortunately, they agreed,” Powell said.

Within six months he was head of the unit and two years later he was made a partner at Deloitte, where he remained for six years until moving to Sonnenberg, Hoffman and Galombik. It became the first law firm in South Africa to offer a dedicated forensic service to its clients. In 2006, Sonnenberg merged with Edward Nathan to form Edward Nathan Sonnenberg.

According to Powell, the firm’s forensics department offers a combination of legal, accounting and investigative services, which have flourished as a private-sector commercial crime team after the disbanding of the specialised units.

“The disbanding of elite units after the 1994 elections resulted in investigators moving into the private sector and the capacity of the police to investigate fraud being greatly reduced by a lack of resources and talent.”

The anti-corruption compliance needs of a major multinational client, spurred by the implications of the far-reaching UK Bribery Act, led Powell to studying the Act and other global anti-bribery legislation.

What he found was that any South African company associated with the UK, listed or otherwise, needed not only to be familiar with the Act, but also to take concrete action to comply with the legislation.

**Potential prosecution**

The most radical innovation brought about by the UK Bribery Act is the introduction of a new corporate offence called the failure by a commercial organisation to prevent bribery. This compels businesses to take proactive steps to prevent bribery or face potential prosecution.

The FCPA has proved successful in the US largely because of its substantial penalties for contravention and its provisions that reward whistle-blowers with a mandatory minimum bounty of between 10% and 30% of the penalties recovered from offending companies.

“Of course, critics of the Act argue that its penal provisions have been used as a revenue-generating mechanism by the US regulator to target non-US-based firms,” Powell said.
Siemens was fined $1.6-billion in 2010 for charges related to the conduct of its subsidiaries in Argentina, Venezuela and Bangladesh.

“It is important to note that the US has made it clear that it will found jurisdiction in respect of bribes paid to foreign government officials simply if payments are routed through US dollar accounts or emails are merely transmitted through US-based servers,” said Powell.

The new UK Bribery Act, which prohibits not only bribes to officials but also to anyone else, applies to companies not in the UK that are incorporated or formed in the UK, or a business that carries on business or part of its business in the UK.

Apart from the legal implications for corrupt practices, Powell is concerned about increasing corruption in South Africa, in general.

He has called for the government to create an independent body to fight corruption. Although admitting that the Scorpions team had its weaknesses, he said a prosecutor-driven, multi-disciplinary team comprising lawyers, accountants, investigators and digital forensic practitioners remained the best way to address these difficult cases.

“What I tell the South African companies I work with is that they should put anti-bribery procedures in place. It is good corporate governance and the right thing to do. It is a requirement of the South African Companies Act and, if you do business with the US or UK, it is an –absolute business imperative.”

Requirements for companies

The OECD

Among other things, the Organisation for Economic Co-operation and Development requires that companies not pay or demand bribes, have anti-bribery or anti-corruption policies in place, develop internal processes to mitigate the bribery risk, and perform due diligence on agents, intermediaries and consultants to ensure that they do not pay bribes on behalf of the company. Companies must also prohibit and discourage facilitation payments. They must educate employees, partners and agents on antibribery processes and procedures and should not make illegal political donations.

Companies Act regulations

This applies to every state-owned and listed company and medium-sized companies that qualify in terms of employees and income.

The regulations stipulate, among other things, the establishment of a social and ethics committee to monitor the company’s activities, ensure compliance with the OECD’s recommendations regarding corruption, uphold compliance of other acts, including the Employment Equity Act and the Broad-based Black Economic Empowerment Act, and report, through its members, to stakeholders.