



College of Law and Management Studies  
School of Law

**A CRITICAL ANALYSIS OF THE CURRENT LEGAL FRAMEWORK FOR  
THE INVESTIGATION AND PROSECUTION OF WHITE-COLLAR CRIMES IN  
SOUTH AFRICA**

By

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of

**Master of Laws in Advanced Criminal Justice**

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## **DEDICATION**

This dissertation is dedicated to individuals impacted by White-Collar Crimes, including fraud, corruption, theft by false pretence, and money laundering.

It also serves as a plea to national and international government authorities, political parties, legal experts, academics, and organisations to advocate for improvements in the legal framework for investigating and prosecuting white-collar crime in South Africa

## **ACKNOWLEDGEMENTS**

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## LIST OF ACRONYMS

ACRONYM	DESCRIPTION
ACASA	ANTI-CORRUPTION AGENCY SOUTH AFRICA
ACU	SAPS ANTI-CORRUPTION UNIT
AU	AFRICAN UNION
AUCPCC	AFRICAN UNION CONVENTION ON PREVENTING AND COMBATING CORRUPTION
BRICS	BRAZIL, RUSSIA, INDIA, CHINA AND SOUTH AFRICA
CCU	COMMERCIAL CRIME UNIT
CPA	CRIMINAL PROCEDURE ACT
DPA	DEFERRED PROSECUTION AGREEMENT
DPCI	DIRECTORATE OF PRIORITY CRIME INVESTIGATIVE UNIT “HAWKS”
DSO	DIRECTORATE OF SPECIAL OPERATIONS “SCORPIONS”
FICA	FINANCIAL INTELLIGENCE CENTRE ACT
ID	INVESTIGATIVE DIRECTORATE
IMF	INTERNATIONAL MONETARY FUND
NACS	NATIONAL ANTI-CORRUPTION STRATEGY
NPA	NATIONAL PROSECUTING AUTHORITY
NPAA	NATIONAL PROSECUTING AUTHORITY ACT
SA	SOUTH AFRICA
PFMA	PUBLIC FINANCE MANAGEMENT ACT
POCA	PREVENTION OF ORGANISED CRIME ACT
PRECCA	PREVENTION AND COMBATING OF CORRUPT ACTIVITIES ACT
SAPS	SOUTH AFRICAN POLICE SERVICE
SCCC	SPECIALISED COMMERCIAL CRIMES COURT
SCCU	SPECIALISED COMMERCIAL CRIMES UNIT
SIU	SPECIAL INVESTIGATIVE UNIT
UN	UNITED UNIONS
UNCAC	UNITED NATIONS CONVENTION AGAINST CORRUPTION

## **ABSTRACT**

The concept of white-collar crime was first introduced by Sutherland in 1939 during his presidential address to the American Sociological Society. It refers to sophisticated offences typically committed by professionals occupying high positions of authority, both private and public. White-collar crime encompasses both common law and statutory offences, requiring a thorough analysis for informed decisions by courts and commissions globally. Each country, including South Africa (SA), has its own legal framework for addressing white-collar crimes.

White-collar crime has been a longstanding issue in SA, with the courts recognising its prevalence. It is important to assess whether SA has the necessary resources, skills, and manpower to effectively address the increasing incidences of white-collar crime.

This study examined the current legal framework in place for investigating and prosecuting white-collar crime in SA. It considered the perspectives of the courts, prominent academics, and their recommendations on how society understands white-collar crimes, as well as the effectiveness of SA's legal mechanisms for addressing these crimes. The study also evaluated the need for improving the current legal framework and identified which components of the existing system could be improved.

The study concluded by providing recommendations for improving the investigation and prosecution of white-collar crimes within SA's legal system, including suggestions for enhancing the existing legal framework.

**Key Terms:** White-Collar Crimes, Legal Framework, Investigation and Prosecution.

# CHAPTER 1

## INTRODUCTION

### 1.1. INTRODUCTION AND BACKGROUND

White-collar crime as a concept was first coined by Sutherland in 1939 during his presidential address to the American Sociological Society.<sup>1</sup> White-collar crime is also known as commercial crime, but for the purpose of this research, the researcher uses the phrase ‘white-collar crime’. White-collar crime is often difficult to detect due to its concealment within occupational and organisational processes. Offenders may go unnoticed by victims, bystanders, or law enforcement, resulting in limited investigation, prosecution and accountability. White-collar crime has received less attention from the public and academic discussions of ‘crime’ and criminal justice.<sup>2</sup>

According to a report issued by the SA Human Rights Commission, released in 2008, white-collar crimes are rampant and impact negatively on SA citizens’ rights. The report states that “the scourge of crime in SA is by no means limited to violent crimes”.<sup>3</sup>

White-collar crime encompasses a variety of offences commonly committed by corporations, executives, employees, government officials, and professionals. These offences can include fraud, corruption, embezzlement, misappropriation, tax fraud, intellectual property theft, insider trading, money laundering, “Ponzi” schemes, misrepresentation of financial statements, price-fixing, illegal cartels, collusion, and violations of environmental, health, and safety regulations.<sup>4</sup>

SA’s *National Anti-Corruption Corruption Strategy 2020-2030* projections suggest that “[c]orruption as major white-collar crime, whenever it presents itself, it signifies the degradation of our value system as a nation”.<sup>5</sup> White-collar crime incorporates both common and statutory offences which require a thorough analysis of evidence to be made by the courts in order make informed decisions. Each country has its own existing legal framework for dealing with white-collar crimes. In most countries, the legal framework includes the country’s constitution, legislation, policy, regulations, and contracts.<sup>6</sup>

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<sup>1</sup> A Wall-Parker ‘Measuring white collar crime’ in Rorie, ML (ed) *The Handbook of White-Collar Crime* (2019) 32-44.

<sup>2</sup> H Croall ‘White-collar crime: an overview and discussion’ in Davies, P, Francis, P & Jupp, V (eds) *Invisible Crimes: their Victims and their Regulation* (1999) 29-53.

<sup>3</sup> SA Human Rights Commission *Human Rights Development Report* (2008) 46. See also ‘Report shows white-collar crime impacts on rights’ *Mail & Guardian*, 22 May 2008, available at <https://mg.co.za/article/2008-05-22-report-shows-white-collar-crime-impacts-on-rights/>.

<sup>4</sup> H Berghoff & U Spiekermann ‘Shady business: On the history of white-collar crime’ (2018) 60(3) *Business History* 289-304.

<sup>5</sup> ‘The National White Paper on Safety and Security’ (2015) 7.

<sup>6</sup> E Pernot-Leplay ‘China’s approach on data privacy law: A third way between the US and the EU?’ (2020) 8 *Penn State Journal of Law & International Affairs* 49.

SA courts have expressed concerns regarding how white-collar crime has been dealt with to date. In *S v Sadler*, Marais JA stated the following:<sup>7</sup>

“So-called 'white-collar' crime has, I regret to have to say, often been visited in SA courts with penalties that are calculated to make the game seem worth the candle. Justifications often advanced for such inadequate penalties are the classification of 'white-collar' crime as non-violent crime and its perpetrators (where they are first offenders) as not truly being 'criminals' or 'prison material' by reason of their often ostensibly respectable histories and background.”

Three years later, in the case of *S v Makhudu*, the SCA stated that “[w]hite collar crime had become notoriously prevalent, and Courts of high authority had lamented a tendency on the part of some courts to impose sentences which were rightly generally regarded as being too lenient.”<sup>8</sup>

White-collar crime is not new in SA but has become more prominent in the public discourse because of the wide media coverage.<sup>9</sup> It has also been recognised by SA courts that it is on the increase. For example, in *S v Blank* the court held that ‘the increase in white-collar crime is of such a magnitude that it was not a surprise that this court hear this case.’<sup>10</sup> In the case of *S v Brand*, it was recognised that there is a rising prevalence of white-collar crime in SA.<sup>11</sup> In *S v Asante*, the SCA confirmed this increase, stating that ‘judicial notice can be taken of the fact that white-collar crime is on the increase’.<sup>12</sup>

According to the Minister of Police, the commercial crimes statistics increased by 11.2% between the 2021/2022 and 2022/2023 reporting periods.<sup>13</sup>

Therefore, this study seeks to analyse the existing legal framework established for the investigation and prosecution of white-collar crime in SA. SA’s legal framework includes legislation relevant to the investigation and prosecution of white-collar crime, as well as investigation units established for the combating of white-collar crimes. The relevant legislation includes the final Constitution of 1996, the Criminal Procedure Act 51 of 1977, the National Prosecuting Authority Act 32 of 1998, the Prevention and Combating of Corrupt Activities Act 12 of 2004 (PRECCA), the Witness Protection Act 112 of 1998, the Protected Disclosure Act 26 of 2000, the Prevention of Organised Crime Act 121 of 1998 (POCA), and the Financial Intelligence Centre Act 38 of 2001 (FICA).

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<sup>7</sup> 2000 (1) SACR 331 (SCA) at 335G - 336B

<sup>8</sup> 2003 (1) SACR 500 (SCA) at para 13.

<sup>9</sup> S Joubert ‘Corporate crime: a criminologist's perspective’ (1993) 6(2) *Acta Criminologica: African Journal of Criminology & Victimology* 9-15.

<sup>10</sup> 1995 (1) SACR 62 (A) at 24

<sup>11</sup> 1998 (1) SACR 296 (CPD).

<sup>12</sup> 2003 (2) SACR 117 (SCA) at para 8.

<sup>13</sup> SAPS *Annual Crime Statistics 2022/2023* (2024) 46.

These pieces of legislation can be applied along with the common law to white-collar crimes such as fraud, forgery and uttering, and theft by false pretence, as well as statutory law white-collar crimes such as corruption, money laundering and racketeering. The investigative units include the Special Investigative Units (SIU), Investigative Directorate (ID), and Directorate of Priority Crime Investigation Unit (DPCI).

## **1.2. AIM AND OBJECTIVES OF THE STUDY**

The primary aim of this study is to analyse whether the existing legal framework for investigation and prosecution serves its purpose and goals in relation to white-collar crimes in SA.

Therefore, the objectives of this study are:

- 1.2.1. To examine the existing SA legal framework for the investigation and prosecution of white-collar crimes.
- 1.2.2. To provide the empirical evidence of white-collar crimes in SA; and
- 1.2.3. To recommend strategies/ methods for enhancing the investigation and prosecution of white-collar crimes under SA law.

## **1.3. RESEARCH QUESTIONS**

Conducting research allows one to explore a topic, build knowledge, identify gaps in the research literature and it can lead to surprising findings that may challenge one's current ideas and beliefs. If one intends to produce a good research study, it is important to be open-minded about both the questions one asks and the objectives one wants to achieve.<sup>14</sup> Therefore, in light of the preceding objectives, this study was guided by the following research questions.

- 1.3.1. What is the nature, purpose and objective of the existing legal framework governing the investigation and prosecution of white-collar crimes in SA?
- 1.3.2. Does the current legal framework serve its purpose and goal in achieving the successful investigation and prosecution of white-collar crime in SA?
- 1.3.3. What recommendations can be made for enhancing the investigation and prosecution of white-collar crimes under SA's legal framework?

## **1.4. PROBLEM STATEMENT**

A well-written problem statement defines the problem and helps identify the variables investigated in the study. The problem statement provides the rationale for the study, and uses the information researched to confirm the need to address the problem in the study.<sup>15</sup> Therefore this study will be guided by the following problem statement.

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<sup>14</sup> P White *Developing Research Questions* (2017).

SA drafted the National Anti-Corruption Strategy for the years 2020-2030. During the launch of this National Strategy, President Ramaphosa emphasised that: “corruption undermines SA’s national values and ethical standards. If left unchecked, it poses a grave threat to the country’s democratic values and dream of being an ethical and developmental state.”<sup>16</sup> However, President Ramaphosa further suggested:

“If we work together in a focused, collaborative, and decisive manner, we will overcome the scourge of corruption in SA. We are fully committed to our international obligations that seek to mobilise the global community to fight corruption on all fronts.”<sup>17</sup>

The National Anti-Corruption Strategy launched by the President is not the only initiative of the Government to fight white-collar crimes, it is an addition to the existing legislation and investigative units that were developed and implemented to fight against white-collar crime in SA.

This study appreciates that white-collar crime has been recognised in SA, and the Government has undertaken initiatives to develop the legal framework for the investigation and prosecution of white-collar crime. The question is whether this legal framework effectively serves its purpose and goals for the investigation and prosecution of white-collar crimes in SA. Civilians are living in fear about the future of SA because of the daily reports of white-collar crimes, allegedly being committed by people entrusted to change the lives of SA communities for the better.<sup>18</sup>

It is not only SA that has been struggling to prosecute the perpetrators of white-collar crimes. The United States and the United Kingdom are among many countries that are battling to prosecute white-collar criminals despite having strong legislation.<sup>19</sup> As a result, the low conviction rate is one of the reasons why white-collar crime has rapidly increased over the past two decades.<sup>20</sup> The PwC Global Economic Crime Survey of 2016 indicates that the level of white collar crime in SA has reached pandemic status, with 70% of SA respondents stipulating that local law enforcement agencies are inadequately resourced and trained to handle incidences of these crimes.<sup>21</sup> Ultimately, one of the reasons for the failure to prosecute white-collar criminals are the insufficient number of investigators, who are overworked and, in some cases, poorly trained. The use of political power by politicians to manipulate/capture the custodians of the legal frameworks is also making it difficult for the successful investigation and prosecution of white-collar crime.<sup>22</sup>

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<sup>15</sup> DA Miles ‘Problem statement development: How to write a problem statement in a dissertation’ *Workshop: Confessions of a Dissertation Chair Part 1: The Six Mistakes Doctoral Students Make With the Dissertation*. Presented at the 5th Annual 2017 Black Doctoral Network Conference in Atlanta, GA on October 26-29 2017.

<sup>16</sup> ‘The National White Paper on Safety and Security’ (2015) 7.

<sup>17</sup> Department of Planning, Monitoring and Evaluation *The National Anti-Corruption Strategy 2020-2030* (s.n.) 7.

<sup>18</sup> M Shaw & L Camerer *Policing the Transformation: New Issues in X's Crime Debate* (1996).

<sup>19</sup> M Levi ‘The media construction of financial white-collar crimes’ (2006) 46(6) *British Journal of Criminology* 1037-1057.

<sup>20</sup> SS Simpson ‘Reimagining Sutherland 80 years after white-collar crime’ (2019) 57(2) *Criminology* 189-207.

<sup>21</sup> PWC *Economic Crime: A South African Pandemic: No Sector or Region is Immune* 5<sup>th</sup> ed (2016) 2.

## 1.5. RESEARCH METHODOLOGY

This study employed a desktop research approach whereby a review of the literature was conducted to answer the underlying research questions. Empirical evidence of what is happening in the practical environment. This approach allowed data collection from local, regional, and international perspectives. Moreover, this approach was employed to further broaden the understanding of whether an existing legal framework for investigation and prosecution serves its purpose and goals in relation to white-collar crimes in SA. All sources of information used are referenced.

## 1.6. OVERVIEW OF CHAPTERS

- 1.6.1. **Chapter Two** proffers a literature review that discusses the views of the SA courts, and leading academics, and their suggestions regarding the understanding of white-collar crimes in society and the existing SA legal framework for the investigation and prosecution of white-collar crimes.
- 1.6.2. **Chapter Three** contains a detailed analysis of the previous and current legislative frameworks established for the investigation and prosecution of white-collar crimes in SA. This chapter provides an insight into whether the repealing of certain previous legal frameworks was necessary, as well as which pieces of the existing legal framework are being utilised effectively or ineffectively in the investigation and prosecution of white-collar crimes in SA.
- 1.6.3. **Chapter Four** contains a detailed discussion of the SA's commitment to International Agreements to fight white-collar crime. The chapter outlines the international agreements that SA has commitment to prove/show the initiatives implemented to fight white collar crime within the country.
- 1.6.4. **The Fifth and concluding chapter**, will recommend possible strategies/methods for enhancing the investigation and prosecution of white-collar crimes under SA's legal framework.

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<sup>22</sup> P Von Doepp *Judicial Politics in New Democracies: Cases from Southern Africa* (2009).

## **LITERATURE REVIEW AND HISTORICAL BACKGROUND TO WHITE-COLLAR CRIME**

### **2.1. INTRODUCTION**

White-collar crime is a complex offence typically committed by individuals in businesses or government positions. According to Croall, white-collar crime is commonly associated with individuals of high status and respectable backgrounds, often involving powerful entities or corporations.<sup>23</sup> As a result, ordinary communities remain victims because of the untrustworthiness of the governmental and corporate structures that are entrusted with the responsibility of serving communities. The perpetration of such offences may be driven by financial incentives and can be carried out by individuals either in a personal or professional capacity. Additionally, organisations, companies and other institutions may also be involved in committing such offences. Sutherland's classic definition states that 'white-collar crime' is 'committed by a person of respectability and high social status in the course of his occupation'.<sup>24</sup> Whilst it is true that individuals in lower-level positions such as accountants or traders have been known to inadvertently cause significant financial harm, as in the case of Nick Leeson and the collapse of Barings Bank in 1995, it is important to note that defendants in these situations typically come from more privileged backgrounds. These individuals have often received education from reputable schools and universities, have no prior criminal history, and exhibit traits commonly associated with the middle to upper-middle class.<sup>25</sup>

“Although there is a general perception that white-collar crime does less harm than violent crimes, this is not true.”<sup>26</sup> According to a report issued by the SA Human Rights Commission, released in 2008, white-collar crimes are rampant and impact negatively on SA citizens' rights. The report says that the scourge of crime in SA is by no means limited to violent crimes.<sup>27</sup> White-collar criminals are often as powerful, callous and dangerous as other violent criminals. These heartless, selfish super-predators are wreaking havoc in SA society.<sup>28</sup>

Studies worldwide have extensively researched and published on the topic of white-collar crime, yet despite these efforts, a universally accepted and precise definition of white-collar crime remains elusive.

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<sup>23</sup> H Croall 'Who is the white-collar criminal?' (1989) 29(2) *The British Journal of Criminology* 157-174.

<sup>24</sup> EH Sutherland *White Collar Crime: The Uncut Version* (1983).

<sup>25</sup> H Berghoff & U Spiekermann 'Shady business: On the history of white-collar crime' (2018) 60(3) *Business History* 289 at 291 Greener 'Nick Leeson and the collapse of Barings Bank: Socio-technical networks and the 'rogue trader' (2006) 13(3) *Organization* 421-441?

<sup>26</sup> K Geldenhuys 'White collar crime is affecting everyone' (2020) 113(8) *Servamus* 12.

<sup>27</sup> SA Human Rights Commission *Human Rights Development Report* (2008) 30, available at <https://mg.co.za/article/2008-05-22-report-shows-white-collar-crime-impacts-on-rights/>.

<sup>28</sup> Geldenhuys 'White-collar is affecting everyone' (2020) 113(8) *Servamus* 12-17.

In SA, notable scholars such as Kotie Geldenhuys and Chris Magobotiti have contributed to the awareness about white-collar crimes through various articles. Geldenhuys, in “*White-collar crime is affecting everyone*”, touches on how white-collar crime has dominated various institutions in SA, including big business, and on the negative impact this has had on society. She described the situation in the following words:

“Over the last couple of years, far too many institutions and businesses in SA have taken on the unmistakable stench of moral rot. Corporate giants such as VBS Mutual Bank, Bosasa and Steinhoff have traded blue chip credibility for white-collar callousness. Although there is a general perception that white-collar crime does less harm than violent crimes, it is not true. White-collar criminals are often as powerful, callous and dangerous as other violent criminals. These heartless, selfish super predators are wreaking havoc in the SA society.”<sup>29</sup>

Chris Magobotiti, in his journal article titled “*An assessment of sentencing approaches to persons convicted of white-collar crime in SA*” assessed the appropriateness of sentences imposed for white-collar crimes within the proportionality principle in SA. Magobotiti further argues that “there is a public perception that courts are generally lenient in sentencing white-collar offenders. However, white-collar crimes add another immeasurable element to the harm, in the sense of reputation and the economic damage.”<sup>30</sup>

White-collar crimes impact on various aspects of modern society. Financial scandals involving major banks, like the VBS Bank and Steinhoff scandals, raise concerns about the credibility of the financial industry.<sup>31</sup> In addition, the prevalence of unethical behaviour in politics has become a significant topic of discussion and resulted in the Zondo Commission of Inquiry into state capture.<sup>32</sup> Fraud taking place at the highest levels of Government has significant effects on the availability and distribution of resources for basic needs such as health, education, and infrastructure of the general community.<sup>33</sup> Although these activities are considered crimes and are subject to the criminal justice system, they are often not prosecuted with the same vigour as other general crimes. One can use the fraud charges against the former President JG Zuma as an example of how differently politicians are treated within the same law to ordinary citizens.

The damaging impact of actions linked to white-collar crime has been widely acknowledged. White-collar crime is often perceived as less serious due to its nonviolent nature and may not be considered a direct threat to public safety or order.

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<sup>29</sup> Ibid.

<sup>30</sup> CD Magobotiti ‘An assessment of sentencing approaches to persons convicted of white-collar crime in South Africa’ (2021) 46(2) *Journal for Juridical Science* 102-119.

<sup>31</sup> T Motau ‘VBS Bank: The great bank heist: Investigator’s report to the prudential authority’ *Corruption Watch*, 2018, available at <https://www.corruptionwatch.org.za/wp-content/uploads/2018/10/VBS-Mutual-Bank-The-Great-Bank-Heist.pdf>

<sup>32</sup> ‘The Judicial Commission of Inquiry into allegations state capture, corruption and fraud in the public sector’ 4v, available at <https://www.statecapture.org.za/>.

<sup>33</sup> H Croall *Understanding White Collar Crimes* (2001).

Consequently, crimes with physical violence are more feared by potential victims.<sup>35</sup> White-collar crimes violate trust, and therefore, create distrust, which lowers social morale and produces social disorganisation on a large scale, yet other crimes may have relatively little effect on social institutions or social organisation. However, research into white-collar crime victimisation has been relatively underdeveloped in victimology and in research on white-collar crime.<sup>36</sup> Much work is needed in ‘exposing’ the extent of the impact of white-collar crime in terms of the ‘human misery’ and victimisation associated with it.

## 2.2. CONCEPTUALISATION OF WHITE-COLLAR CRIME

There has been much uncertainty regarding the conceptualisation of white-collar crime. Magobotiti supports Sutherland’s conceptualisation by stating the following;

“In the SA context, this conceptualisation is useful, as it points to various categories of white-collar crime, including fraud, forgery, corruption, money laundering, racketeering and tax evasion, perpetrated by businesses, the political elite, or people of high status.”<sup>37</sup>

This study suggests that there is confusion in differentiating between white-collar crime and corruption in SA. It has been noted that in SA any criminal activity that involves money and persons occupying high positions is called corruption. The following explains the difference.

Corruption is a sub-category of white-collar crime. Corruption is defined as “any person who gives or accepts or offers to give or accept any gratification amounting to an unauthorised or improper inducement to act or not to act in a particular manner is guilty of an offence.”<sup>38</sup> This definition makes it clear that corruption usually involves more than one person.

White-collar crimes include many different types of offences and not all of them require the involvement of more than one person such as in activities of theft, tax evasion, forgery & uttering etc. Below, for clarity, I will discuss examples of white-collar crimes and corruption in SA.

The case against the multinational holding company called Steinhoff is an example of white-collar crime in the form of fraud (corporate fraud). The Financial Sector Conduct Authority (FSCA) of SA highlighted that the alleged violations were related to issues reported in Steinhoff’s annual financial statements and reports for 2014, 2015, and 2016.<sup>39</sup> “The FSCA has been tasked to investigate Steinhof insider trading, false and misleading statements and price manipulation.

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<sup>35</sup> S Joubert ‘Corporate crime: a criminologist's perspective’ (1993) 6(2) *Acta Criminologica: African Journal of Criminology & Victimology* 9-15.

<sup>36</sup> H Croall ‘The victims of white-collar crime’ in S-A Lindgren (ed) *Old Views and Future Potentials Lectures and Papers from a Scandinavian Seminar* (2001) 35-54.

<sup>37</sup> CD Magobotiti ‘An assessment of sentencing approaches to persons convicted of white-collar crime in South Africa’ (2021) 46(2) *Journal for Juridical Science* 102-119.

<sup>38</sup> Prevention and Combating of Corrupt Activities Act 12 of 2004 s1.

The FSCA also noted that it identified 194 suspicious trades in Steinhoff shares and examined 56 accounts.” It has also been revealed that Steinhoff was indulging in misleading financial reporting and accounting irregularities.

“The Steinhoff scandal is SA’s largest corporate fraud, resulting in over 250 billion rands (US\$13.97 billion) in losses for investors who had entrusted their hard-earned savings to the company through various investment vehicles, including unit trusts, endowments, retirement annuities, and pension and provident fund.”<sup>40</sup>

The Steinhoff case is a good example of white-collar crime that does not reflect elements of corruption, instead there are elements of theft, money laundering, tax invasion, forgery and uttering etc.

The case against Tongaat Hulett involved charges for alleged fraudulent activity between March 2015 and September 2018 related to the alleged backdating of land sale agreements, which had a significant impact on the company's financial results and led to a loss of value to shareholders.<sup>41</sup> “Their actions of inflating the company’s profits increased their productivity bonuses by millions of rands because of the fraudulent sales.”<sup>42</sup> The group of former executives charged over the fraud included Deloitte audit partner Gavin Kruger, who was responsible for auditing Tongaat’s books. The Tongaat Hulett case is a good example of white-collar crime including the categories of fraud, theft, money laundering, forgery and uttering, as well as elements of corruption. The fact that another company, which was supposed to do the audit, ended up conspiring with the executives to commit crimes means there was an offer “to give or accept any gratification amounting to an unauthorised or improper inducement to act” which this company accepted to do what it was not supposed to do. White-collar crime remains on the agenda of criminal justice systems around the world. This shows the inability of the existing legal frameworks to effectively investigate and prosecute white-collar crimes across the world.

The damage caused by white-collar crime significantly outweighs that from all other forms of criminal activity.<sup>43</sup> The cost and harm should be understood in order to identify possible effective solutions that can supplement the existing legal frameworks for the adequate investigation and prosecution of white-collar crimes. Ultimately, the history of white-collar crime highlights the relationship between business and legal regulations, the impact of innovation and ethical practices, public perception, and evolving state policies over the last two centuries.<sup>44</sup> Despite the increased attention surrounding white-collar crime in recent years, there has not been a substantial decrease in the number of reported cases.

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<sup>39</sup> KE van der Linde ‘The Steinhoff corporate scandal and the protection of investors who purchased shares on the secondary market’ (2022) 25 *Potchefstroom Electronic Journal* 1023, available at <https://www.saflii.org/za/journals/PER/2022/25.pdf>.

<sup>40</sup> P Naudé ...et al ‘Steinhoff saga’ *Stellenbosch Business School*, 1 June [2018], available at <https://www.stellenboschbusiness.ac.za/management-review/news/2018-06-01-steinhoff-saga>.

<sup>41</sup> P Du Toit *The Great South African Land Scandal* (2004).

<sup>42</sup> P Harper ‘Former Tongaat Hulett bosses in court for fraud’ *Mail & Guardian*, 11 February 2022, available at <https://mg.co.za/news/2022-02-11-former-tongaathulett-bosses-in-court-for-fraud/>

### 2.3 HISTORICAL OVERVIEW OF WHITE-COLLAR CRIME

Historically, it took a long time for administrations to categorise the white-collar types of illegal activities and include them in their regulations established to deal with crime. This was because people who committed white-collar crimes were not perceived as ‘typical criminals’ who engaged in theft, manslaughter, or murder.<sup>45</sup> In some countries, white-collar criminals can still expect much lower sentences than other types of criminals. Ultimately, the assessment of the offences committed in the corporate world began to change in light of the theories of sociologist and criminologist, but also made clear that crimes were not exclusively committed by lower-class offenders.<sup>46</sup> He additionally emphasised that the financial impact of white-collar crimes far exceeds that of all other criminal offences combined. Other definitions of white-collar crime include:

“White-collar crimes refer to illegal activities driven by the desire for financial gain. These activities may involve individuals, groups, or corporations intentionally engaging in unlawful practices to obtain financial benefits that cannot be obtained through legal channels.”<sup>47</sup>

“Individuals engaged in white-collar crime often associate themselves with reputable and lawful businesses. It is important to differentiate between white-collar crime and organized crime, as the latter typically involves illicit activities and violence. Moreover, they operate mainly in legal markets and do not regard violence as a standard operating procedure.”<sup>48</sup>

White-collar crime is frequently ingrained within a system, often stemming from the culture within a company or its external environment, such as when dealing with corrupt governments. In situations where corporate control mechanisms are inadequate, whether by design or by accident, preventing and investigating economic crimes becomes challenging. This lack of control also makes it difficult to pinpoint individual accountability. Defendants routinely deny responsibility and point to their superiors who made them commit crimes, or to their inferiors who engaged in shady practices without their knowledge or authorisation. Effective economic transactions rely on a foundation of trust, as excessive transaction costs can hinder economic activity. White-collar criminals manipulate the trust of stakeholders, including customers, the public, shareholders, and authorities. As a result, white-collar crime often involves a breach of trust. Often individuals affected by white-collar crimes may not be readily identifiable as the harm is frequently widespread.

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<sup>43</sup> FPT Britz *White-Collar Crime in South Africa* (MCom, University of Johannesburg, 2014).

<sup>44</sup> H Berghoff & U Spiekermann ‘Shady business: On the history of white-collar crime’ (2018) 60(3) *Business History* 289-304.

<sup>45</sup> Berghoff and Spiekermann ‘Shady business: On the history of white-collar crime’ (2018) 60(3) *Business History* 289-304.

<sup>46</sup> EH Sutherland ‘White-collar criminality’ (1940) 5(1) *American Sociological Review* 1-12. The term itself was already in use in 1939 by Louis Rothschild, director of the Better Business Bureau in Washington, DC.

<sup>47</sup> B McCarthy & LF Cohen ‘Economic crime: Theory’ in J Dressler (ed) *Encyclopaedia of Crime and Justice* 2<sup>nd</sup> ed (2002) available at <https://www.encyclopedia.com/law/legal-and-political-magazines/economic-crime-theory>.

<sup>48</sup> P Reuter & L Paoli ‘How similar are modern criminal syndicates to traditional mafias?’ (2020) 49(1) *Crime and Justice* 223-287.

White-collar crimes can manifest as instances of overcharging in public projects, leading to increased taxes for all citizens of a country. Due to the covert nature of these activities, economic crimes may seem victimless, but they ultimately result in significant harm, albeit spread out amongst many individuals.

In the SA context, white-collar crime results in significant financial losses each year. According to Steven Powell, director of ENS Forensics, in an article published in December 2023, the estimated cost of white collar crime to the SA economy is R150 billion a year.<sup>50</sup> This can be observed in public opinion surveys, law enforcement resource allocations, and criminal justice system sanctioning. This study aims to explore the discrepancy between the harmful effects of these actions, the perception of their seriousness, and the level of punishment desired. As a result, this study introduces a critical analysis of SA's existing legal framework, and the analysis of white-collar crime as seen rising in government oversight and penalties in recent times.<sup>51</sup>

#### **2.4. THE IMPLICATIONS OF WHITE-COLLAR CRIME FOR SOUTH AFRICA'S CITIZENS AND COMMUNITIES**

The findings by the PWC Global Economic Crime survey for year 2020 highlighted that white-collar crime carries a significant financial burden. The report revealed that about 7% of respondents in SA who were victims of fraud in the previous 24 months reported total losses exceeding \$50 million, with 4% reporting direct losses over \$100 million. The incidents of losses surpassing \$100 million due to economic crimes have doubled amongst SA respondents since the 2018 survey, increasing from 1% to 2%.<sup>52</sup>

SA has identified various forms of statutory white-collar crimes, with money laundering, racketeering and corruption being the most prominent. It is important to note that most ordinary citizens are unaware that not all white-collar crimes are corruption. White-collar crime, which encompasses corruption, is prevalent across various sectors of society. It disproportionately affects the less fortunate and undermines the national values and principles of democracy.<sup>53</sup> Both governmental organisations and civil society are facing challenges in managing the limited resources essential for promoting economic prosperity, equality, and overall well-being. The occurrence of white-collar crime is on the rise, resulting in significant financial losses. Moreover, it is evident that white-collar crime proliferates during periods of economic expansion and escalates significantly during economic downturns.<sup>54</sup> The increase in white-collar crime poses a threat to a developing economy like SA. For example, in the case of the National Lotteries Commission (NLC), an estimated amount of about R1.4 billion was received by perpetrators pretending to be assisting the poor, when they were enriching themselves.<sup>55</sup>

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<sup>49</sup> S Yochelson & S Samenow *The Criminal Personality: A Profile for Change (Vol. 1)* (1976).

<sup>50</sup> S Dippenaar 'White collar crime is not victimless' *Simon & Dippenaar & Associates*, 18 December 2023, available at <https://www.sdlaw.co.za/blog/white-collar-crime-is-not-victimless/>.

<sup>51</sup> D Friedrichs 'Responding to the challenge of white-collar crime as a social problem: Implications for Caribbean states' (1997) 2(2) *Caribbean Journal of Criminology and Social Psychology* 84-99.

The case against the former secretary-general of the ANC, Mr. Magashule, related to a government contract to survey low-income houses built with asbestos is another instance. The contract, worth R225 million rand, or around \$14.4 million, was awarded in 2014 while Mr. Magashule was still the Premier of the Free State Province. Ten years on, many residents state that their homes were never checked or fixed.<sup>56</sup> Such crimes make a significant contribution to the lack of resources for integrated and socio-economic development. As a result, white-collar crime has negative implications for the public at large and individual civilians. There is a need to urgently address the financial, emotional, and physical implications of white-collar crime for the ordinary citizens of the Republic.

White-collar crime involves the use of a significant position of power for illegal gain that results in damage or harm to victims as measured by financial loss, physical harm, and damage to the community's moral climate.<sup>57</sup> Hence, it includes, but is not limited to, societal values regarding this type of illegality, the development of norms proscribing white-collar offences, enforcement of these norms, the disposition and sanctioning of illegal behaviour, and priority considerations and trade-offs.<sup>58</sup> White-collar crime in government is perceived as the biggest threat to business and investment, overtaking unemployment, the infrastructure backlog and labour instability.<sup>59</sup>

Currently, there is significant emphasis on understanding the effects of white-collar crime on individuals and communities, yet there is a lack of research on the implications of white-collar crimes. This lack of research is concerning, especially considering the perceived increase in these types of crimes and the growing concerns about declining ethical standards in the business and public sectors, as evidenced by apprehension about political corruption.<sup>60</sup> It is further argued that white-collar crime may significantly contribute to the high level of unemployment and poverty.<sup>61</sup>

Tax evasion and fraud within the public sector result in a depletion of government funds designated for essential services such as health, education, and welfare. Furthermore, the unethical actions of corporations pose risks to the safety of employees, customers, and travellers, ultimately impacting on public health and the environment on a larger scale.<sup>62</sup> However, such activities are subject to criminal law and criminal justice, but they are not regarded as crime in the same way as burglary, robbery, and assault, and they are less likely to prompt calls for tougher policing and punishment.

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<sup>52</sup> PW C *Economic Crime - When the Boardroom Becomes the Battlefield: PWC's Global Economic Crime Survey: South Africa* 7<sup>th</sup> ed (2020), available at <https://www.pwc.co.za/en/press-room/global-economic-crime-and-fraud-survey-2020>.

<sup>53</sup> K Malherbe 'Stretching solidarity too far: the impact of fraud and corruption on social security in South Africa' (2001) 5(1) *Law, Democracy & Development* 109-126.

<sup>54</sup> M Schoeman 'Commercial crime is serious crime-a South African perspective' (2017) 110(8) *Servamus* 44-49.

<sup>55</sup> V NemaKonde 'Lotto heist: SIU almost done with second phase of R1.4bn NLC corruption probe' *The Citizen*, 14 February 2024, available at <https://www.citizen.co.za/news/siu-second-phase-r1-4bn-nlc-corruption-probe/>.

<sup>56</sup> T Nakhetha 'Ace Magashule and co-accused's asbestos trial set for April 2024' *TimesLive*, 5 May 2023, available at <https://www.timeslive.co.za/news/south-africa/2023-05-05-ace-magashule-and-co-accuseds-asbestos-trial-set-for-april-2024/>.

The issue of white-collar crime often receives less attention compared to conventional crime, despite evidence showing its significant economic and physical impacts.<sup>63</sup> The concerning aspects about the implications of white-collar crime is that it impacts more on those with a lower standard of living, whilst being mostly committed by those with a higher standard of living.

The significance of white-collar crime in SA was highlighted by the Supreme Court of Appeal in the case of *Britz v S*.<sup>64</sup> In this case, Ms Karin Britz was found guilty in the Gauteng Specialised Commercial Crimes Regional Court, Johannesburg, on 81 counts of theft amounting to R3.9 million. She pleaded guilty to all charges in accordance with section 112(2) of the Criminal Procedure Act 51 of 1977. She was sentenced to 15 years in prison with a non-parole period of ten years imposed under section 276B of the Act. Tshiqi JA, with Theron JA and Fourie AJA concurring, made the following statement:

“As emphasised by the trial court, white-collar crime has significant ramifications for the economy and can impact not only individual victims, but also everyday citizens whose livelihoods may be jeopardised by the financial instability caused by such offenses. A review of past cases indicates that the courts view white-collar crime as a grave matter and are willing to impose incarceration when deemed appropriate.”

This type of crime can have a subtle, yet significant impact on societal norms and values, making it challenging to quantify. In addition to its economic implications, white-collar crime can result in reputational damage and has long-term negative financial consequences.<sup>65</sup>

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<sup>57</sup> LS Schrager & JF Short ‘Toward a sociology of organizational crime’ (1978) 25(4) *Social problems* 407-419.

<sup>58</sup> RA Bierschbach & S Bibas ‘Rationing criminal justice’ (2017) 116 *Michigan Law Review* 187.

<sup>59</sup> Geldenhuys ‘White-collar crime is affecting everyone’ (2020) 113(8) *Servamus* 12-17.

<sup>60</sup> Croall ‘Victims of white collar and corporate crime’ (2007) 6(2) *Victims, Crime and Society* 78-108.

<sup>61</sup> IM Carr ‘Corruption, the Southern African Development Community Anti-Corruption Protocol and the Principal-Agent-Client Model’ (2009) 5(2) *International Journal of Law in Context* 147-177.

<sup>62</sup> P Kagias...et al ‘The fraud triangle—an alternative approach’ (2022) 29(3) *Journal of Financial Crime* 908-924.

<sup>63</sup> D Friedrichs ‘Responding to the challenge of white-collar crime as a social problem: Implications for Caribbean states’ (1997) 2(2) *Caribbean Journal of Criminology and Social Psychology* 84-99.

<sup>64</sup> (889/2015) [2016] ZASCA 86 (31 May 2016).

<sup>65</sup> CD Magobotiti ‘An assessment of sentencing approaches to persons convicted of white-collar crime in South Africa’ (2021) 46(2) *Journal for Juridical Science* 102-119.

**LEGAL FRAMEWORKS FOR THE INVESTIGATION AND PROSECUTION OF  
WHITE-COLLAR CRIME IN SA**

**3.1 INTRODUCTION**

This chapter looks at the creation, criticisms and demise of the Directorate of Special Operations as one of the major white-collar crime-fighting mechanisms in SA, before focusing on the growing crime situation that necessitates the creation of an independent investigation and prosecution body.

**3.2 THE DIRECTORATE OF SPECIAL OPERATIONS (DSO)**

In recognition of the increase in the level of organised crime, particularly, white-collar crime in SA, in 1999 the Government initiated certain measures to try and combat such crimes. President Thabo Mbeki announced the establishment of the Directorate of Special Operations (DSO) in June 1999, promising “a special and adequately staffed and equipped investigative unit to deal with all national priority crime, including police corruption”. It was formally launched in Gugulethu, Cape Town on 1 September 1999. The DSO was known as “The Scorpions”.<sup>66</sup> The DSO was established in terms of the National Prosecuting Authority Act 32 of 1998 (NPAA) and the same Act provided the Directorate with investigative powers.<sup>67</sup> The DSO was overseen by a Deputy National Director of Public Prosecutions and consisted of two primary directorates: Strategic and Investigative Support, and Operations. The duties and authority of the DSO included the prevention of criminal activities, corruption within the justice system, significant commercial crimes, and crimes against the state, including violent offences. The primary objective of the DSO was to conduct thorough investigations and manage all aspects related to the gathering, documentation, retention, and analysis of information pertaining to criminal activities. Additionally, the DSO was responsible for initiating legal proceedings and executing necessary actions following the commission of a crime or criminal act, as determined by the President. The DSO's role was specifically focused on national and organised crime. According to Berning and Montesh, the DSO was a multi-disciplinary agency responsible for investigating and prosecuting crime and corruption, and consisted of SA's top police, financial, judicial and intelligence units.<sup>68</sup> The DSO was criticised for supposedly choosing to handle cases only where they knew the prosecution would be successful.<sup>69</sup>

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<sup>66</sup> J Berning & M Montesh ‘Countering corruption in South Africa: The rise and fall of the Scorpions and the Hawks’ (2016) 39 *SA Crime Quarterly* 3-10.

<sup>67</sup> Chs 4 and 5 of the Act.

<sup>68</sup> M Montesh & J Berning ‘A need for a single anti-corruption agency in South Africa: A comparative study’ (2012) 1 *Acta Criminologica* 117 at 119.

In December 2007, the ANC held its 52<sup>nd</sup> National Conference in Polokwane, Limpopo to elect its leaders. On their Peace and Stability agenda, the resolution was taken that:

“The Constitutional imperative that there be an implantation of the single Public Service and single Police Service. The municipal, metro and traffic police, were to be placed under the command and control of the National Commissioner of the SAPS as a force multiplier.”

The same resolution further stated that the DSO should be incorporated into the SAPS. During the second sitting of Parliament in 2008, the National Assembly (NA) approved the dissolution and the incorporation of the DSO into the SAPS’ Directorate of Priority Crime Investigation Unit (DPCI).<sup>70</sup>

In SA, special organisations such as the DSO/Scorpions were created “because it was clear that standard investigations and prosecution were not suitable for complex cases and difficult-to-decide financial crimes and corruption, and convictions are difficult to obtain.”<sup>71</sup> Thus, a huge gap was created by the dissolution of the DSO and to date SA has not had a unit that has achieved success like the DSO. Even if the DSO is not reinstated, the creation of another unit that will be able to adopt a few aspects from the DSO strategy could help enhance the legal framework for the investigation and prosecution of white-collar crimes in SA. The dissolution of the Scorpions was challenged in Court.

“In 2010 the dissolution of the DSO was challenged in *Hugh Glenister v President of the Republic of SA*.<sup>72</sup> The key question in this case was whether the national legislation that created the Directorate for Priority Crime Investigation (DPCI), known as the Hawks, and disbanded the Scorpions, was constitutionally valid.”<sup>73</sup>

In the *Glenister* case,<sup>74</sup> the complaint related to the disbanding of the DSO, and its replacement with the Hawks, which is attached to the SAPS.<sup>75</sup> The Helen Suzan Foundation also joined Glenister in this battle against the disbanding of the DSO. However, the reasons for the Helen Suzman Foundation’s interest in the case were that the decision went against SA’s international obligation to establish an independent anti-corruption unit.<sup>76</sup> Glenister based his constitutional challenge on several grounds. The first ground was the absence of a rational basis for the enactment of the challenged laws.

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<sup>69</sup> Ibid

<sup>70</sup> The 52<sup>nd</sup> National Conference of the African National Congress was held in Polokwane, Limpopo, South Africa from 16 to 20 December 2007.

<sup>71</sup> G Wannenburg ‘Putting paid to the untouchables: The effects of dissolving the Directorate of Special Operations and the Specialised Commercial Crime Units’ (2008) 24 *SA Crime Quarterly* 17 at 18.

<sup>72</sup> (CCT 48/10) [2011] ZACC 6; 2011(3) SA347 (CC); 2011 (7) BCLR 651 (CC) (17 March 2011).

<sup>73</sup> J Berning & M Montesh ‘Countering corruption in South Africa: The rise and fall of the Scorpions and Hawks’ (2012) 39 *SA Crime Quarterly* 3-10.

<sup>74</sup> Supra (n72 above)

<sup>75</sup> In terms of section South African Police Service Act 68 of 1995.

<sup>76</sup> ‘*Helen Suzman Foundation v President of the Republic of South Africa and others; In re: Glenister v President of the Republic of South Africa and Others* [2013] ZAWCHC’ available at <https://hsf.org.za/litigation/cases/helen-suzman-foundation-v-president-of-the-republic-of-south-africa-and-others-in-re-glenister-v-president-of-the-republic-of-south-africa-and-others-2013-zawchc>.

Other grounds included the failure to meet constitutional obligations concerning accountability, human resource management practices, labour relations, international obligations, public involvement, protection of values outlined in the Bill of Rights, and the proper execution of functions by the National Prosecuting Authority (NPA) were alleged. The Helen Suzman Foundation further argued that having the DPCI within the SAPS and the statutory provisions governing it simply meant that it was not independent as required by international obligations.

The majority and minority opinions of the court in the *Glenister* case had many points of agreement. Importantly, they both agreed that the state was under an obligation to establish an anticorruption institution that had a degree of political independence. The Court agreed that the obligation was provided by the international anti-corruption instruments to which SA is a signatory.

The Helen Suzman Foundation had a strong argument about the DPCI not being independent. The investigation and prosecution of white-collar crimes committed by high-profile persons, particularly politicians, might be selective and biased as the DPCI is obliged to take instructions from the National Commissioner of Police, who is also politically appointed. The disbandment of the DSO and its replacement with the DPCI created doubts in the community about the seriousness of government in investigating and prosecuting white-collar crimes. The reason people were complaining about the disbanding was because the DSO had a good success rate. Corruption Watch suggests that “where the Scorpions had a conviction rate between 82% and 94%, the Hawks are managing detection rates of around 50% and Court-ready percentages that are lower.”<sup>77</sup> Parliament did a disservice to the country when the Scorpions were disbanded. In the *Glenister* case, the Court pointed to the meaning of independence as follows: The amicus submitted that for an anti-corruption agency or body to be independent, it must:

“Have the power to initiate its own investigations; allow investigators and prosecutors autonomous decision-making powers in handling cases; not be subject to undue influence from any of the branches of government or any third- party; and have structural and operational autonomy.”<sup>78</sup>

Moreover, it has been suggested that the operational mandate of the DSO was envisaged as being somewhat narrower and negotiated. It was envisaged that the DSO would discuss and negotiate the kinds of cases it would take on, both with the Minister of Justice and the SAPS.<sup>79</sup> However, this study suggests that the DSO was established to complement and, in some respects, supplement the efforts of existing legal frameworks in fighting complex and national priority crimes. Thus, white-collar crime was not specified as part of the mandate of DSO, but this study suggests that its mandate fell within the ambit of complex crimes. Unlike SA, some countries such as Britain have established anti-corruption agencies that are independent in the sense that they do not form part of the police services or national prosecuting authorities.

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<sup>77</sup> J Clark ‘Switching Scorpions’ cases to Hawks’ *Corruption Watch*, 11 September 2012, available at <https://www.corruptionwatch.org.za/switching-scorpions-cases-to-hawks/>

<sup>78</sup> *Glenister* supra (n72 above) at para [19].

Britain, for instance, established its Serious Fraud Office in 1988. The Office has a mandate that includes anti-corruption investigations, and has prosecutorial as well as investigative responsibilities.<sup>80</sup> This study notes in particular the conclusion by the Court in the *Glenister* case about the obligation of SA to establish an anti-corruption institution that has a degree of political independence. This author suggests that such an independent unit/body should deal with all white-collar crimes.

### **3.3. THE NEED FOR THE ESTABLISHMENT OF AN INDEPENDENT UNIT FOR INVESTIGATION AND PROSECUTION OF WHITE-COLLAR CRIME**

In recent times SA has seen a number of high-profile white-collar crime cases reported through the media and arrests being made, but one hears less of convictions. The media has been reporting on the VBS Bank scandal since 2018.<sup>81</sup>

“More than R2-billion was stolen from the bank in an elaborate fraud heist, and KPMG was hauled to Court by the liquidator on the grounds that it had signed off on the fraud. Rooplal had initially claimed damages of R864-million plus interest but was sworn to secrecy following the out-of-Court settlement. Such settlements are usually labelled “confidential”, effectively gagging both parties until the matter is signed off with a Court order.”<sup>82</sup>

This action by KPMG and the VBS Bank is a clear indication that there is ineffectiveness in the criminal justice system of SA. Therefore, there should be mechanisms in place to avoid such situations. This study suggests that this agreement should have been used as a plea of guilty by the KPMG and the NPA should have taken the matter to a Court of law. They have agreed on a far lesser amount than what was fraudulently taken, and it is highly possible that there is political influence in this because some politicians implicated.

“Many politicians such Julius Malema and Floyd Shivambu as well as other high profile business people were also implicated in this pyramid scheme employed in destroying VBS whose clientele was almost the poorest, working Black communities.”<sup>83</sup>

Former President Jacob Zuma was also implicated.

“Rooplal, the VBS liquidator has been trying to recoup money from Zuma since he was appointed in November 2018 to oversee the liquidation of the bank. In 2022, Roopal won a legal debacle against Zuma, in which the Pietermaritzburg high Court gave an order allowing the troubled bank to attach Zuma's assets to recoup money owed.”<sup>84</sup>

The VBS scandal shows the level of involvement of politicians in white-collar crime in SA. “It was also reported that President Cyril Ramaphosa was informed of the looting spree ... but did nothing about it.”<sup>85</sup>

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<sup>79</sup> Montesh & Berning ‘A need for a single anti-corruption agency in South Africa: A comparative study’ (2012) 1 *Acta Criminologica* 117 at 119-120.

<sup>80</sup> Serious Fraud Office website: <http://www.sfo.gov.uk/>.

<sup>81</sup> D Van Rensburg ‘A timeline of how the VBS Mutual Bank scandal unfolded’ *City Press*, 31 December 2018, available at <https://www.news24.com/citypress/business/a-timeline-of-how-the-vbs-mutual-bank-scandal-unfolded-20181230>.

<sup>82</sup> E Stoddard & N Moodley ‘Confidential out-of-Court settlement between VBS and KPMG was R500m: source’ *Daily Maverick*, 1 February 2024

### 3.4 CURRENT LEGAL FRAMEWORK FOR INVESTIGATION AND PROSECUTION OF WHITE-COLLAR CRIME IN SOUTH AFRICA

SA has a robust decentralised anti-white-collar crime framework. This has implications for the development of anti-white-collar crime institutions and the methods used to evaluate their effectiveness.<sup>86</sup> The existing legal framework established for the investigation and prosecution of white-collar crime in SA has to deal with a multiplicity of diversions and dimensions in its effort to detect, dissect, investigate and prosecute commercial crimes.<sup>87</sup> There are a number of differences in the legislative framework determining the structure, functions and operations of such organisations in SA. In a sense, there is no single organisation that is solely responsible for fighting against white-collar crime. The responsibility lies with a network of institutions designed to function in such a way that they each contribute towards the reduction of white-collar crime as an outcome.<sup>88</sup>

In SA, white-collar crime has often been seen as less damaging and disturbing than violent street crime, and the criminal legal system tends to punish more visible, violent crimes, while white-collar crimes are dealt with in a more administrative fashion.<sup>89</sup> As a result, one of the most concerning issues for law enforcement officials is the ability to investigate, apprehend and prosecute both corporate and government officials who abuse their positions of power for their personal gain.<sup>90</sup> While criminal investigation remains a key priority for the SAPS, there are various specialised investigative agencies in SA dedicated to handling and prosecuting intricate crimes, particularly those related to white-collar offences. Such bodies include the SIU and ID.<sup>91</sup> Although these units/bodies are independent from the SAPS, they still answer to the SA government.<sup>92</sup>

Crimes hurt the poor disproportionately through the diverting funds intended for development, undermining a government's ability to provide basic services, and thereby feeding inequality and injustice and discouraging foreign aid and investment. White-collar crime is a key element in economic underperformance and a major obstacle to poverty alleviation and development.<sup>93</sup> White-collar crime perpetuates social inequality<sup>94</sup> as mentioned earlier. Meanwhile, the existing legislation and anti-corruption agencies in SA have been unable to curb this phenomenon efficiently. Studies that have been conducted indicate that from 1995 to 2022, the legal framework established to fight white-collar crime is failing in SA.<sup>95</sup> SA's legal framework responsible for the investigation and prosecution of white-collar crime is operational, but the question of its effectiveness remains.

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<sup>83</sup> C Lötter 'Does economic restructuring during Covid-19 in South Africa amount to disaster capitalism?' (2022) 23(1) *Phronimon* 1-25.

<sup>84</sup> S Schreiber 'Liquidators told FNB to stop payments as Zuma defaults on VBS loan' *Times Live*, 20 March 2024, available at <https://www.timeslive.co.za/politics/2024-03-20-liquidators-told-fnb-to-stop-payments-as-zuma-defaults-on-vbs-loan/>.

<sup>85</sup> 'Zuma and Ramaphosa dragged into VBS scandal' *LegalBrief*, 31 October 2024, available at <https://legalbrief.co.za/diary/legalbrief-today/story/the-vbs-saga-and-the-zuma-connection/print/>

<sup>86</sup> P Jackson... et al. *South African Governance in Review: Anti-Corruption, Local Government, Traditional Leadership* (2009).

<sup>87</sup> P Pillay 'Anti-Corruption agencies in South Africa and Brazil and challenges' (2017) 9(8) *African Journal of Public Affairs* 1-14.

<sup>88</sup> Open Society Initiative for Southern Africa 'Effectiveness of anti-corruption agencies in Southern Africa' (2017).

<sup>89</sup> S St-Georges.... et al. 'Jobs and punishment: Public opinion on leniency for white-collar crime' (2023) 76(4) *Political Research Quarterly* 1751-1763.

One of the key reasons for such failure has been the modus operandi of the existing legal framework established for dealing with white-collar crime, which throughout the years has faced serious changes (political, legal, administrative, and organisational) in their fight against a multi-faceted, complicated, and multi-layered reality.<sup>96</sup> Below is a brief discussion of white-collar crimes and the existing legal framework for its investigation and prosecution in SA.

### 3.4.1 TYPES OF WHITE-COLLAR CRIMES

#### 3.4.1.1. COMMON-LAW WHITE-COLLAR CRIME

The primary sources of criminal law in SA include legislation, common law. Unlike many other countries, criminal law in SA is not consolidated into a single act or Code. Therefore, legal guidance must be sought from multiple pieces of legislation. The common law in SA is based on Roman-Dutch Law, which has been incorporated and clarified through case law. It is essential to understand that SA follows the principle of judicial precedent. In terms of white-collar crimes, SA has a range of domestic legislation that governs the offences that are associated with white-collar crime, which stand alongside common law offences. The following are some of the crimes that fall under the umbrella term white-collar crime:<sup>97</sup>

- a) **Fraud** can be defined as the unlawful and intentional making of a misrepresentation, with fraudulent intent, which causes actual prejudice, or which is potentially prejudicial to another.<sup>98</sup> There are various examples of fraud, such as insurance fraud, tax fraud, procurement fraud, etc.
- b) **Forgery** is unlawfully and intentionally making a false document to the actual or potential prejudice of another.<sup>99</sup>
- c) **Uttering** entails unlawfully and intentionally passing off a false document (forged) to the actual or potential prejudice of another.<sup>100</sup>
- d) **Theft by false pretence** is a special form of theft that consists of the unlawful and intentional appropriation of movable corporeal property by means of misrepresentation (e.g. false statements).<sup>101</sup>
- e) **Extortion** is the wrongful use of actual or threatened force, violence, or intimidation to gain money or property from an individual or entity. Extortion generally involves a threat being made to the victim's person or property, or to their family or friends.<sup>102</sup>

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<sup>90</sup> AW Alschuler 'Two ways to think about the punishment of corporations' (2009) 45 *American Criminal Law Review* 1359.

<sup>91</sup> The Constitution of the RSA, 1996.

<sup>92</sup> J Chetty *An Analysis of the Independence the Special Investigating Unit as an Anti-Corruption Agency in South Africa* (Doctoral dissertation, Stellenbosch University, 2017).

<sup>93</sup> UN 'United Nations Convention Against Corruption' (2004) iii, available at [https://www.unodc.org/documents/brussels/UN\\_Convention\\_Against\\_Corruption.pdf](https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf)

<sup>94</sup> E Serfontein & E De Waal 'The corruption bogey in South Africa: Is public education safe?' (2015) 35(1) *South African Journal of Education* 1-12.

<sup>95</sup> TD Labik Amanquandor 'Limitations of the international approach to anti-corruption: A systematic review of South Africa's compelling case of failing anti-corruption' (2024) 82 *Crime, Law and Social Change* 1.

<sup>96</sup> P Pillay 'Anti-Corruption agencies in South Africa and Brazil and challenges' (2017) 9(8) *African Journal of Public Affairs* 1-14.

### 3.4.1.2. STATUTORY LAW WHITE-COLLAR CRIMES

Statutory law white-collar crimes are created and regulated by the following statutory laws, the Prevention of Organised Crime Act (POCA), the Financial Intelligence Centre Act (FICA), the Public Finance Management Act (PFMA) and the Protected Disclosures Act.

- a) **Money laundering** can be defined as the methods used to hide the proceeds of crime and include transporting cash out of the country, purchasing businesses through which funds can be channelled, buying easily transportable valuables, transfer pricing, and using “underground banks”.<sup>103</sup>
- b) **Racketeering** can be defined as an act of acquiring a business through illegal activity, or a threat of continued illegal operations with an illegally derived income or using a business to commit illegal acts in order to gain control of a legitimate business.<sup>105</sup>
- c) **Tax evasion** is the use of illegal means with the intention to avoid paying taxes, or assisting another person to evade tax, or to obtain an undue refund under the Tax Administration Act 28 of 2011.<sup>106</sup>
- d) **Corruption** can be defined as any person who gives or accepts or offers to give or accept any gratification amounting to an unauthorised or improper inducement to act or not to act in a particular manner is guilty of an offence. It should be noted that the offence of corruption cannot be committed by one person as the Act indicates. In the case of *Zuma v NDPP*, the Court stated that “corruption is a bilateral (between two parties) offence and that it cannot be committed by a person alone.”<sup>107</sup>

## 3.4.2 LEGISLATION

### 3.4.2.1. PUBLIC FINANCE MANAGEMENT ACT 1 of 1999 (PFMA)

The PFMA was established “to regulate financial management in the national government and provincial governments; to ensure that all revenue, expenditure, assets and liabilities of those governments are managed efficiently and effectively; to provide for the responsibilities of persons entrusted with financial management in those governments; and to provide for matters connected therewith.”

### 3.4.2.2. PROTECTED DISCLOSURES ACT 26 of 2000 (WHISTLEBLOWER ACT)

The Protected Disclosures Act 26 of 2014 as amended by the Protected Disclosures (Amendment) Act 2017, protects workers in the public, private and not-for-profit sectors from retaliation if they speak up about wrongdoing in the workplace.<sup>108</sup> This Act is designed to protect workplace whistleblowers and other whistleblowers from being victimised. This law allows people to report crimes without identifying themselves. They can remain anonymous.

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<sup>97</sup> ICFP ‘Financial crimes’ *ICFP*, [n.d.], available at <https://www.icfp.co.za/commercial-crime/>

<sup>98</sup> C Joubert *Applied Law for Police Officials* 4th ed (2016) 170-174.

<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.*

<sup>101</sup> Joubert op cit (n98 above) 148.

<sup>102</sup> Joubert op cit (n98 above) 136-138.

<sup>103</sup> Financial Action Task Force ‘Money laundering & terrorist financing typologies 2004-2005’ (2005) 79.

### **3.4.2.3. FINANCIAL INTELLIGENCE CENTRE ACT 38 of 2001 (FIC)**

The FIC was established in 2003 and it is regulated by the Financial Intelligence Centre Act 38 of 2001. The FIC is SA's financial intelligence unit, mandated to assist in identifying the proceeds of crime, and in combating money laundering, terrorist financing and the financing of the proliferation of weapons of mass destruction, thereby helping to make SA's financial system intolerant to abuse.

According to the FIC annual report for the 2022/2023 financial year, the FIC has been instrumental in the recovery of more than R5.8 billion in criminal proceeds in the last financial year.<sup>109</sup> Between 1 April 2022 and the end of March 2023, the FIC produced 3 424 intelligence reports upon request and based upon its own analysis. Most of the intelligence produced related to money laundering, fraud, bribery and corruption.

### **3.4.2.4. PREVENTION AND COMBATING OF CORRUPT ACTIVITIES ACT 12 of 2004 (PRECCA)**

The PRECCA was established in 2004 in order to make provisions for several specific corruption offences as well as ancillary offences, such as being an accessory to corruption and attempting or conspiring to commit an offence under PRECCA. This Act covers offences committed by a private individual within the private sector and/ public sector.<sup>110</sup>

## **3.5. INVESTIGATION UNITS**

### **3.5.1. INTRODUCTION**

The SA government has taken initiatives to deal with white-collar crimes in the country. It has established various investigation units that can assist in the investigation and the prosecution of white-collar crime. As early as in 1999 the increase in the level of organised crime, particularly, white-collar crime in SA was recognised and the Government initiated certain measures to try and combat such crimes by establishing of the DSO and promised that the DSO will be "a special and adequately staffed and equipped investigative unit to deal with all national priority crime, including police corruption. However, the DSO was later disbanded and started establishing various units. Even though these units are labelled as specialising in corruption, in most instances, these same unit deals with other forms of white-collar crimes. Below is a discussion of these units.

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<sup>105</sup> A Jones, J Satory & T Mace 'Racketeer influenced and corrupt organizations' (2002) 39 *American Criminal Law Review* 977.

<sup>106</sup> P Grabosky 'Globalization and white-collar crime' in Simpson, SS & Weisburd, D *The Criminology of White-Collar Crime* (2009) 129-151.

<sup>107</sup> (865/08) [2008] ZAKZNHC at paras 149-150.

<sup>108</sup> Act 5 of 2017.

### **3.5.1.1. SAPS ANTI-CORRUPTION UNIT (ACU)\_**

The National Anti-Corruption Unit (ACU) was established within the SAPS in January 1996. The mandate for the SAPS ACU is to investigate allegations of corruption amongst SAPS members as well as to investigate any “serious offence” within SAPS. Of concern is that what constitutes a “serious offence” can be determined by the national and provincial commander of the ACU. This unit is situated within the SAPS and has no separate legislation underpinning its existence. This Anti-Corruption Unit is not independent but forms part of SAPS. This arrangement is one of the contributing factors making this unit ineffective as police members are investigating other police members, who might have attended the same basic police training college. The rank structure and seniority also hamper the proper execution of the mandate by members of this unit. This study suggests that this unit’s mandate is a repetition of that of other units, like the Independent Police Investigative Directorate (IPID) which has the powers to investigate and arrest police members, and that they may be more impartial than the internal ACU. The DPCI (Hawks) also has powers to investigate and arrest police members, therefore the ACU should be converted into a unit that can deal with white-collar crime. Most arrests of police members have been affected by the DPCI or IPID.

### **3.5.1.2. THE DIRECTORATE FOR PRIORITY CRIMES INVESTIGATIONS (DPCI)**

Geldenhuis K., (2019), suggest that DPCI, also called the “Hawks”, was established as an independent directorate within the SAPS in terms of Section 17C of the SAPS Act 68 of 1995, as amended by the SAPS Amendment Act 57 of 2008.

Under amended sections 17B and 17D of the SAPS Act 1995, the DPCI is now responsible for the investigation, prosecution and prevention of serious national offences such as serious crime, serious business crime and serious corruption. The SAPS Amendment Act 10 of 2012 introduced a reporting procedure under section 34(1) of the Prevention and Control of Crime Act 2004, by which reports must be made to the police. Under the latest change, all crimes must now be reported to members of the Serious Crime Unit. As part of the DPCI mandate, it cooperates with other law enforcement agencies, including the SARS and ID. In January 2023, DPCI and SARS signed a memorandum of understanding to promote collaboration between the two organisations. According to the second quarter report for the 2023/2024 financial year, DPCI arrested 210 white-collar criminals and sentenced 77 people. Reports indicate that DPCI's relationship with SARS played an important role in combating tax crimes. Between April 1, 2023 and August 30, 2023, the DPCI issued a total of 35 orders for tax violations. The defendants are legal entities, and the judgments include orders to pay SARS in the region of the amount of R11 654 445, 33.

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<sup>109</sup> See a summary in FIC ‘Media release: Financial Intelligence Centre instrumental in recovery of more than R5.8 billion in criminal assets’ *Financial Intelligence Centre*, 29 September 2023, available at <https://www.fic.gov.za/wp-content/uploads/2023/10/Media-Release-FIC-annual-report-2022-23.pdf>.

<sup>110</sup> Prevention and Combating of Corrupt Activities Act 12 of 2004 (PRECCA).

The DPCI is currently investigating 716 SARS cases. Of these, 223 cases are still pending in court, 263 cases are at the investigation stage, and 230 cases are awaiting a decision by the National Prosecuting Authority. The DPCI is one of SA's largest organisations tackling white-collar crime. The problem is that it is not fully independent as the head of the department is appointed by the President, who is the political leader, and therefore can easily obstruct DPCI investigations and decisions.

### **3.5.1.3. SPECIAL INVESTIGATING UNIT (SIU)**

This study suggests that SIU is a white-collar crime unit because of its mandate and powers. However, its powers are limited to investigating government departments and state-owned companies. There are very serious corporate white-collar cases in SA that have damaged the country's economy very badly, such as the Steinhoff and Tongaat Hulett sagas, and this study argues that there may have been greater asset recoveries if the SIU had been involved in the investigations and prosecution. Former president, Thabo Mbeki, established a SIU in terms of Section 2 (1) of the SIU and Special Tribunals Act.<sup>111</sup> In terms of Section 2(1)(a)(ii) of this Act, the SIU is to exercise or perform the powers, duties and functions assigned to or conferred to it, to investigate any

- (a) Serious maladministration in connection with the affairs of any State institution;
- (b) Improper or unlawful conduct by employees of any State institution;
- (c) Unlawful appropriation or expenditure of public money or property;
- (d) Unlawful, irregular or unapproved acquisitive act, transaction, measure or practice having a bearing upon State property;
- (e) Intentional or negligent loss of public money or damage to public property;
- (f) Corruption in connection with the affairs of any State institution; or
- (g) Unlawful or improper conduct by any person which has caused or may cause serious harm to the interests of the public or any category thereof.

According to the SIU official website it is stated that “The SIU is empowered to take civil action to correct any wrongdoing it uncovers in its investigations. SIU investigations are dictated by the issuing of a Presidential Proclamation, and then institute civil litigation proceedings either in a Special Tribunal or a High Court for the prevention or recovery of financial losses suffered by the State”. Once the investigation is completed, a final report is submitted to the President with an overview of the investigation and its findings, as well as the various recommendations made and their outcomes. In line with the SIU Act, the SIU refers evidence pointing to criminal conduct uncovered during its investigations to the attention of the NPA for prosecution. According to the SIU annual performance plan for the 2022/2023 financial year, the SIU has achieved the following during the period 2021/2022: the Covid-19 investigations and Personal Protection Equipment (PPE) contracts, which were irregularly awarded and declared unlawful and invalid; recovery of more than R1.57 billion from Asea Brown Boveri (ABB).

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<sup>111</sup> Act 74 of 1996. <https://www.siu.org.za/about-us/>

SA emanating from the SIU investigation at ESKOM and the R10.1 million tender that was irregularly awarded by the Eastern Cape Department of Health to Fabkomp (Pty) Ltd for the delivery of 100 scooter ambulances. More recoveries are expected to be realised.<sup>112</sup> In 2022/23 alone, the SIU recovered more than R388 million in cash and/or assets, while preventing the state from losing more than R2.1 billion.

#### **3.5.1.4. INVESTIGATIVE DIRECTORATE (ID)**

Section 7(1) of the NPA Act 32 of 1998 provides that the “President may, by proclamation in the Gazette, establish one or more ID in the Office of the National Director, in respect of such offences or criminal or unlawful activities as set out in the proclamation”. In early 2019, President Ramaphosa exercised his powers in terms of the NPAA and established the ID in a proclamation in Government Gazette 42383 of 4 April 2019, as an instrument in the fight against corruption. The President addressed the following:

“The ID will focus on the investigation of corrupt activities in the following instances:

- a. Common law offences including fraud, forgery, uttering, theft and any offence involving dishonesty;
- b. Statutory offences including but not limited to:
  - The Prevention and Combating of Corrupt Activities Act 6 of 2000;
  - The Prevention of Organised Crime Act 121 of 1988;
  - The Public Finance Management Act 1 of 1999;
  - The Municipal Management Act 56 of 2003;
  - The Financial Intelligence Centre Act 38 of 2001; and

Any other statutory offence involving dishonesty; and, any unlawful activities relating to serious, high profile or complex corruption including but not limited to offences or criminal or unlawful activities arising from identified commissions and inquiries”.

It was envisaged that the ID will be responsible for only a very small portion of corruption cases currently being investigated and prosecuted in the criminal justice system and priority cases within each of the focus areas will be carefully selected. This is to ensure that the cases that are authorised for investigation by the ID are focused at the correct level.<sup>113</sup>

According to the Government Gazette 42383 of 4 April 2019, “the following factors may be taken into account when cases are considered for investigation by the Directorate:

- The apparent corruption has undermined (or threatens to undermine): the integrity of the state itself, the economy and/or the reputation and integrity of the country; the performance of a government function;

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<sup>112</sup> SIU *Annual Performance Plan 2022/23 Financial Year* (2022) available at <https://www.siu.org.za/wp-content/uploads/2022/05/Annual-Performance-Plan-2022-2023.pdf>.

<sup>113</sup> SA Government ‘President Cyril Ramaphosa: 2018 State of the Nation Address’ 16 February 2018, available at <https://www.gov.za/news/speeches/president-cyril-ramaphosa-2018-state-nation-address-16-feb-2018>.

- the operations of a governmental unit, rather than only tarnishing a small number of individual officials serving at low or mid-level;
- a public or private sector institution from accomplishing its institutional mandate and functions or would change one or more aspects of government processes, procedures, rules, policies, regulations, or laws in ways intended to serve private interests rather than the public interest; and,
- the complexity and nature of the offence warrants the application of specialist skills (analysis, forensic accounting, etc.), powers (section 28 of the NPA Act powers), and resources (dedicated and/or co-location of personnel); and whether the apparent criminality is a new species of corruption.”

This was a good initiative by the Government in order to enhance the existing legal framework for the investigation of white-collar crime. However, during the launch, the President stated that this unit will deal with the Zondo Commission cases in particular. This author suggests that this unit is also not independent as recommended by the Zondo Commission because the NPA reports to the Minister of Justice and Development, who is politically appointed. Therefore, there are possibilities of political influence on the ID. According to the NPA Annual Performance report for the 2022/2023 financial year, it was indicated that the ID has enrolled 18 new matters this financial year – meaning that a total of 34 matters have been enrolled with 203 accused over the last four years. Thirteen new investigations were authorised, totalling 97 matters authorised over the last four years.<sup>114</sup>

### **3.5.1.5. THE ASSET FORFEITURE UNIT (AFU)**

The AFU was established in May 1999 in the Office of the National Director of Public Prosecutions to focus on the implementation of Chapters 5 and 6 of the Prevention of Organised Crime Act, 1998.<sup>115</sup> The AFU is empowered by POCA to seize assets or proceeds identified as being the rewards of criminal behaviour.

Over and above its role as litigators, the AFU is required to:

- Build capacity to successfully litigate and set precedents for future legal recourse, and,
- Establish relationships with local partners – SAPS and SARS – and global organisations that will aid in their mandate.<sup>116</sup>
- The AFU's mandate focuses on cases of crime and corruption in the private and public sectors.

When applying to seize assets, the AFU and NPA must prove a direct link between the assets in question and the crime. Cooperation with foreign, state and local governments, regulatory bodies, and the private sector would make the Unit more effective. Despite battles with opposition experts, the Department has been effective in identifying, recovering and protecting assets obtained through crime.

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<sup>114</sup> NPA *Reaching New Heights: Annual Report 2022/2023* (2023), available at <https://www.npa.gov.za/sites/default/files/uploads/NPA%20Annual%20Report%202022-23.pdf>.

<sup>115</sup> 121 of 1998.

<sup>116</sup> NPA ‘Asset Forfeiture Unit’ [n.d.], available at <https://www.npa.gov.za/asset-forfeiture-unit>.

According to the NPA's 2022/2020 annual performance report, “the AFU obtained a freezing order worth R570 million last year as part of its strategy to track money stolen by corrupt criminals and individuals operating in the state of plunder. The closure of two high-profile corruption cases will help the AFU achieve R2.83 billion in recoveries for corruption and related matters in the financial year. A cumulative R10.2 billion was frozen in the last four years of the five-year Medium Term Expenditure Framework period. The NPA recovered R2.55 billion from state arrests alone”.<sup>117</sup>

## **3.6. PROSECUTIONS**

### **3.6.1. INTRODUCTION**

The process of the criminal justice system in SA is that a crime is firstly reported to the SAPS. Thereafter the police respond to a crime, such as attending the crime scene and securing evidence, up until the investigation phase where the case docket is handed over to the investigation unit. The investigation will continue from where the police left off, and once the investigation has been finalised, the investigation unit will then hand over the case docket to the NPA. The NPA has the responsibility of deciding whether the investigation unit has adequately investigated the case and presented enough evidence for the case to be heard to a court.<sup>118</sup> The proper functioning of the criminal justice system depends on the critical responsibility of the NPA.

Section 179(1) & (2) of the Constitution (which should be read with Schedule 6 item 18(1) of the Constitution and Section 108 of the interim Constitution) provides that:

- “There is a single NPA in the Republic, structured in terms of an Act of parliament, and consists of;
- A National Director of Public Prosecutions, who is the head of the NPA, and is appointed by the President, as of the National Executive; and
- Director of Public Prosecutions and prosecutors as determined by an Act of Parliament.

The NPA has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.”

Although a number of units have been established for the investigation of white-collar crime in SA, these units have to co-ordinate with the NPA as the only body responsible for prosecuting crimes including white-collar crimes. The NPA determines prosecution policy and issues policy directives. This study suggests that there is a high possibility that the NPA is overloaded with cases to deal with.

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<sup>117</sup> Ibid.

<sup>118</sup> I Matthews ‘The National Prosecuting Authority’. in ISS *Criminal (in) Justice in South Africa: A Civil Society Perspective* (2009) 98-123.

In *S v Yengeni* the court stated that

“The Constitution guarantees the professional independence of the National Director of Public Prosecutions and every professional member of his staff, with the obvious aim of ensuring their freedom from interference in their functions by the powerful, the well-known and connected, the rich and the peddlers of political influence.”<sup>119</sup>

In that case,

“...Tony Yengeni...the appellant and the former Chief Whip of the ANC, was contesting a 4-year custodial sentence for fraud convictions. His appeal rested largely on a plea agreement that had been reached that he would be given a non-custodial sentence if he pleaded guilty to ‘watered-down’ charges. This agreement was reached as a result of a meeting held at the home of the Minister of Justice, with the Minister in attendance along with the then NDPP and the appellant. The Court held that this meeting was highly improper, given the constitutional and legislative provisions guaranteeing prosecutorial independence. [I]t was indubitably ill-advised for the former NDPP to be seen to engage in a discussion with the Minister and the appellant. The independence of the office that he held, and the fearless and unfettered exercise of the extensive powers that this office confers, are incompatible with any hint or suggestion that he might have lent an ear to politicians who might wish to advance the best interests of a crony rather than the search for the truth and the proper functioning of the criminal justice system. The Court further censured the Minister’s involvement in the discussion, saying it was ‘unwise... precisely because it might create the perception that he was exerting improper political pressure on the [NDPP].’<sup>120</sup>

This study suggests that some high profile politicians have been involved in white-collar crime in SA and very few have been prosecuted. Of those that were prosecuted, very few have been convicted.

The NPA has made decisions that raise concerns about its independence. Most of these uncertain concerning involved high profile politicians and government officials who were, allegedly, involved in illegal and corrupt activities and practices, but were either not prosecuted, or credible cases against them are being suspiciously withdrawn. This state of affairs has caused uncomfortable allegations and counter allegations, all of which question the independence of the NPA, and these can no longer be ignored.<sup>121</sup> The NPA, in its 2022/2023 annual performance review, indicated the following in terms of white-collar crime: “conviction rates in serious complex tax verdicts increased by 20% (115 to 138). The NPA successfully prosecuted 134 government officials on charges related to corruption.”<sup>122</sup> The small number of white-collar crimes reported in SA reflects the incapacity of the NPA to deal with white-collar crimes. Therefore, the need to enhance the current legal framework to deal with white-collar crime is emphasised.

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<sup>119</sup> 2006(1) SACR 405 (T).

<sup>120</sup> H Woolaver & M Bishop ‘Submission to the Enquiry into the National Director of Public Prosecutions’ (2008) 21(2) *Advocate* 26 at 27.

<sup>121</sup> BC Selabe *The Independence of the National Prosecuting Authority of South Africa: Fact or Fiction?* (Doctoral dissertation, University of the Western Cape, 2015) v.

### 3.6.2. THE SPECIALISED COMMERCIAL CRIME COURT

Court specialisation is the way of appreciating the importance of advancing the development of a successful judicial system. It also means that the authorities have realised that certain types of cases need to be handled somewhat differently, possibly even separately from the rest.<sup>123</sup>

The SA Government acknowledges the growing concern surrounding white-collar crime within the country. The complexities involved in investigating and prosecuting these crimes require specialised attention from prosecutors. As a result, a special court known as the Specialised Commercial Crimes Court (SCCC) was established in November 1999 through a collaborative effort between the SAPS, NPA, Department of Justice, and Business against Crimes.

A few months later the similarly named Specialised Commercial Crime Unit (SCCU) was established. The unit consists of a team of prosecutors led by a Deputy Director of Public Prosecutions and is tasked with bringing cases of commercial criminality to trial.<sup>124</sup> The SCCU is mandated to investigate and prosecute commercial crimes and organised commercial crimes. The complexity of commercial crimes requires a more methodical and collaborative investigatory approach if investigations are to lead to a positive result for the State. For this reason, the relationship between the commercial investigative branches of SAPS, especially the DPCI/Hawks, and the NPA is more interactive.<sup>125</sup> The SCCU employs experienced prosecutors to understand, investigate and prosecute these diverse individuals committing white-collar crimes.

As an active participant in the Anti-Corruption Task Team (ACTT), the SCCU actively identifies, investigates and fast-tracks corruption cases for prosecution in the private and public sectors. Beyond investigating and prosecuting white-collar crimes, the SCCU team is required, through ongoing engagements with local and international colleagues, to keep abreast of international white-collar crime trends. Interactions are designed to inform the SCCU on specific issues related to cross-border crime.

The complex and transnational nature of certain commercial crimes presents challenges in terms of investigation and prosecution. Prosecutors at the SCCU are equipped with the necessary training to comprehend the intricacies of these offences and are adept in navigating the global banking system utilised for concealing unlawfully obtained profits.

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<sup>122</sup> L Muntingh 'Key issues in the NPA: In search of strategy issue paper 1' (2022). See also NPA *Reaching New Heights: Annual Report 2022/2023* (2023), available at <https://www.npa.gov.za/sites/default/files/uploads/NPA%20Annual%20Report%202022-23.pdf>.

<sup>123</sup> H Gramckow & B Walsh 'Developing specialized court services: International experiences and lessons learned' (2013).

<sup>125</sup> NPA 'Specialised Commercial Crime Unit' available at <https://www.npa.gov.za/specialised-commercial-crime-unit>.

<sup>125</sup> Ibid.

## ***SOUTH AFRICA'S COMMITMENT TO INTERNATIONAL AGREEMENTS TO FIGHT WHITE-COLLAR CRIME***

### **4.1. INTRODUCTION**

The investigation and prosecution of white-collar crime appears on the agenda of any legislator. Since major commercial enterprises now operate transnationally, efforts to investigate and prosecute white-collar crimes are increasingly shifted into an international fight.<sup>126</sup> Corruption is one of the components of white-collar crime which is very dominant in the minds of the general public and is the focus of the current study. To clarify the link between the two, one can define corruption as the abuse of entrusted power for personal benefits and white-collar crime as any crime which is non-violent in nature characterised by deceit to obtain or avoid losing money, or to gain a personal or business advantage, e.g., fraud, theft, tax fraud including corruption. Therefore, there is no single description for corruption as it takes on different shapes according to specific cultures, ethnicity, government type and scale, economic development, and public behaviour.<sup>127</sup>

Studies that have been conducted suggest that organised crime and corruption which includes white-collar crimes, are the outcomes of bad governance and discriminatory economic and financial regulations, and poor judicial systems are the drivers of bad governance leading to corruption and crime.<sup>128</sup> SA has been facing a lack of effectiveness when it comes to investigating and prosecuting white-collar crime cases. Nevertheless, investigating and prosecuting white-collar crimes is not unique in SA and it seems to be a global challenge for criminal justice systems authorities.<sup>129</sup> As a result, this poses a dilemma for the shortage of resources in order for countries like SA to deal with such complex cases.

The current SA legal framework to investigate and prosecute white collar-crime needs some improvements because in the current state, there are many high-profile white-collar crime cases which are unreasonably delayed. For example, the case of Eskom executive Mr. Matshela Koko and his co-accused who were involved in a R2.2-billion-rand contract for the construction of Kusile Power Station. It is alleged that the accused irregularly appointed a Swiss engineering company, Asea Brown Boveri (ABB) to do the work.<sup>130</sup>

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<sup>126</sup> R Hefendehl 'Addressing white collar crime on a domestic level: Any lessons learned for international criminal law?' (2010) 8(3) *Journal of International Criminal Justice* 769-782.

<sup>127</sup> YH Ho & CJ Huang 'The corruption-economic growth nexus: Evidence from Four BRIC countries, based on the panel data approach' (2011) 7(2) *Journal of Global Business and Technology* 44.

<sup>128</sup> E Buscaglia, S Gonzalez Ruiz & W Ratliff 'Undermining the foundations of organized crime and public sector corruption: An essay on international best practice' (2005).

<sup>129</sup> R Brown & S Gillespie 'Overseas financial investigation of organised crime: Examining the barriers to effective implementation' (2015) 18(3) *Journal of Money Laundering Control* 371-381.

<sup>130</sup> 'SIU welcomes the arrest of former Eskom executive and seven others' *SIU*, 28 October 2022, available at <https://www.siu.org.za/siu-welcomes-the-arrest-of-former-eskom-executive-and-seven-others/>.

Former Mayor of eThekweni Municipality, Ms Zandile Gumede and her co-accused are involved in a deal worth R320 million regarding the Durban Solid Waste tender.<sup>131</sup> Former President Jacob Zuma's case involves 783 payments from a former financial advisor convicted of fraud that started in early 2000, but to-date is not finalised.<sup>132</sup>

In recent years, other high-profile white-collar crimes which took years to come to light and prosecute include the Steinhoff and Sharemax scandals and the case involving Barry Tannenbaum. Tannenbaum has been dubbed SA's Bernie Madoff for his role in orchestrating the biggest Ponzi scheme in SA history, which resulted in a loss of more than R12 billion.<sup>133</sup> There are many more white-collar crime cases that have not been mentioned which have affected the public, yet there are still no outcomes in terms of investigation and prosecution. As SA has an international relationship with other countries, SA may look into how those countries are progressing in terms of the investigation and prosecution of white-collar crime in order to re-shape its legal framework for tackling white-collar crime cases.

As a member of the BRICS alliance, SA is part of a group that includes Brazil, Russia, India, and China. This alliance was formed in 2010 with the addition of SA to its predecessor, BRIC. The main objective of the BRICS alliance is to strengthen the relationships between member nations and collaborate on economic growth, particularly in terms of trade. The presence or increase of white-collar crime in SA has the potential to harm its relationships with other BRICS countries in terms of economic development and trade. As a result, studies suggest that corruption negatively impacts a nation's competitiveness by not only decreasing financial investments, economic growth, and government expenditures on education and health, but also leading to imbalanced expenditures, misguided market incentives and poorly allocated national resources.<sup>134</sup>

Speaking at the launch of National Anti-Corruption Strategy (NACS), President Ramaphosa highlighted SA's commitment to combating corruption through various international conventions and agreements. These include the United Nations Convention Against Corruption (2003) (UNCAC), the Organization for Economic Co-operation and Development (1997) agreements on international trade, as well as the African Union Convention on Corruption Prevention (AUCPCC). In order to effectively address corruption, it is essential for SA to enforce these laws and ensure compliance through the National Anti-Corruption Commission (NACC). The intervention was created in accordance with United Nations guidelines.

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<sup>131</sup> D Erasmus 'Inside the 2,786-count fraud and corruption indictment against former eThekweni mayor Zandile Gumede and her co-accused' *Daily Maverick*, 23 March 2021, available at <https://www.dailymaverick.co.za/article/2021-03-23-inside-the-2786-count-fraud-and-corruption-indictment-against-former-ethekweni-mayor-zandile-gumede>

<sup>132</sup> K Maughan 'Zuma trial scheduled for April to September 2025 – 20 years after Arms Deal charge' *News24*, 16 May 2024, available at <https://www.news24.com/news24/southafrica/news/zuma-trial-scheduled-for-april-to-september-2025-20-years-after-arms-deal-charge-20240516>.

<sup>133</sup> A Nyide 'South Africa's "Bernie Madoff" faces second bail hearing amidst BHI ponzi scandal' *BizNews*, 29 November 2023, available at <https://www.biznews.com/intelligence/2023/11/29/south-africas-bernie-madoff-faces-second-bail-hearing>.

<sup>134</sup> V Tanzi & H Davoodi 'Corruption, public investment, and growth' (1998) 41-60.

Hence, collaboration with partners and public engagement is important. Duties and responsibilities are diverse, and there is a broad commitment to fighting corruption in the country.<sup>135</sup> White-collar crime in African countries is greatly hindering economic, political, and social progress. This criminal activity poses a substantial obstacle to economic development, governance effectiveness, and fundamental liberties, such as the freedom of expression and the ability of citizens to hold their governments accountable.<sup>136</sup> At the Eighth Session of the Conference of the States Parties to the United Nations Convention against Corruption, held in Abu Dhabi, 16-20 December 2019, the then Minister of Justice and Correctional Services, Mr R Lamola, stressed SA's commitment to fight corruption and strengthen international cooperation and coordination in this regard.<sup>137</sup> He also suggested that corruption is the greatest obstacle to economic and social development the world over, and the fight against this calls for concerted efforts by the citizens.<sup>138</sup> As a result, white-collar crime in African countries is negatively impacting on economic, political, and social development.

#### **4.2. AFRICAN UNION CONVENTION ON PREVENTION AND COMBATING CORRUPTION (AUCPCC)**

The AUCPCC is the regional anti-corruption framework in Africa, representing regional consensus on what African states should do in the areas of prevention, criminalisation, international cooperation, and asset recovery. In 2003, the African Union (AU) adopted AUCPCC, a shared roadmap for states to implement governance and anti-corruption policies and systems at a national and regional level.<sup>139</sup> The objectives of this Convention include:

- Promoting and strengthening development in Africa by each State Party, of mechanisms required to prevent, detect, punish, and eradicate corruption and related offences in the public and private sectors.
- Promoting, facilitating, and regulating cooperation amongst the State Parties to ensure the effectiveness of measures and actions to prevent, detect, punish; and eradicate corruption and related offences in Africa.
- Coordinating and harmonising the policies and legislation between State Parties for the purposes of the prevention, detection, punishment; and eradication of corruption on the continent.
- Promoting socio-economic development by removing obstacles to the enjoyment of economic, social, and cultural rights, as well as civil and political rights; and,
- Establishing the necessary conditions to foster transparency and accountability in the management of public affairs.<sup>140</sup>

<sup>135</sup> *National Anti-Corruption Strategy 2020-2030* [2020] Introduction, available at [https://www.gov.za/sites/default/files/gcis\\_document/202105/national-anti-corruption-strategy-2020-2030.pdf](https://www.gov.za/sites/default/files/gcis_document/202105/national-anti-corruption-strategy-2020-2030.pdf).

<sup>136</sup> AU 'African Union Convention on Preventing and Combating Corruption' (2003), available at <https://au.int/en/treaties/african-union-convention-preventing-and-combating-corruption>.

<sup>137</sup> UNODC see text at <https://www.unodc.org/unodc/en/corruption/COSP/session8.html>; Excerpts of Lamola's speech can be found at 'Media Release: Excerpts of the submissions made by Minister RO Lamola, MP, at the Eighth Session of the Conference of the States Parties to the United Nations Convention against Corruption, Abu Dhabi, UAE' *Department of Justice and Constitutional Development*, 19 December 2019, available at [https://www.justice.gov.za/m\\_statements/2019/20191219-UN-CAC.html](https://www.justice.gov.za/m_statements/2019/20191219-UN-CAC.html).

<sup>138</sup> *Ibid.*

<sup>139</sup> AU 'African Union Convention on Preventing and Combating Corruption' (2003).

SA is a signatory to the African Union Convention Against Corruption (AUCAC), adopted in 2004. Article 5 of this Convention provides that, for the purposes of Article 2 (Objectives of the Convention), States Parties undertake to establish, maintain and promote the independence of the National Anti-Corruption Authority or its body.

This study seeks to support the AUCPCC objectives, in particular Article 5 where it is suggested that each party undertakes to:

“Strengthen national control measures to ensure that the setting up and operations of foreign companies in the territory of a State Party shall be subject to the respect of the national legislation in force. Establish, maintain and strengthen independent national anti- corruption authorities or agencies.”

There are units established to fight white-collar crime such as the ID, Hawks, and the SIU. However, this study suggests that these are not independent, as suggested by the *Glenister* case, and Zondo Commission. The ID reports to the Minister of Justice. The SIU can only deal with matters upon receiving the proclamation from the President, and the Hawks report to the Minister of Police. This suggests that they can be influenced by politics. Therefore, SA has not yet complied with the provisions of the AUCPCC.

#### **4.3. UNITED NATIONS CONVENTION AGAINST CORRUPTION (UNCAC)**

The UNAC was signed by 178 countries and entered into force on 14 December 2005. SA ratified the Convention on 22 November 2004.<sup>141</sup> The UNCAC covers five main areas: prevention, criminalisation and law enforcement measures, international cooperation, asset recovery and technical assistance and information exchange. The UNCAC provides a comprehensive global framework to prevent and combat corruption. All countries in the Southern African Region are party to the UNCAC including SA and are undergoing review of the implementation of the Convention.

The purposes of this Convention are:

- To promote and strengthen measures to prevent and combat corruption more efficiently and effectively.
- To promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery; and,
- To promote the integrity, accountability, and proper management of public affairs and public property.

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<sup>140</sup> Ibid.

<sup>141</sup> United Nations Convention Against Corruption (UNCAC) in 2004 and the Convention came into force in 2005, available at <https://www.icfp.co.za/2022/03/29/united-nations-convention-against-corruption>.

Minister Lamola, at the 8<sup>th</sup> Session of the Conference of the States Parties to the United Nations Convention against Corruption, noted that:

“SA ratified the United Nations Convention Against Corruption (UNCAC) in 2004 and the Convention came into force in 2005. As a result, SA is further responsible for conducting reviews of other member states and significant strides and progress have been made in this regard. SA; therefore, remains unwavering in its commitment to the fight against corruption. Lamola further highlighted that corruption is the greatest obstacle to the economic and social development of the world over and the fight against this, calls for concerted efforts by all of us.”<sup>142</sup>

In addition, the Public Service and Administration Minister, Ms Noxolo Kiviet at the 10<sup>th</sup> session of the Conference of the State Parties to the UNCAC in Atlanta, USA, stated that corruption perpetuates inequality and poverty, which negatively affects the welfare of SA to access basic services.<sup>143</sup>

In 2019, Minister Lamola expressed his views on the lack of progress in investigating and prosecuting corruption in SA. More recently, in December 2023, Minister Kiviet reiterated similar concerns, highlighting a lack of improvement over the past five years. Despite these statements, there has been no mention of establishing an independent body to address white-collar crime. This study suggests that the current legal framework in SA may be ineffective in addressing these issues.

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<sup>142</sup> ‘Media Release: Excerpts of the submissions made by Minister RO Lamola, MP, at the Eighth Session of the Conference of the States Parties to the United Nations Convention against Corruption, Abu Dhabi, UAE’ Department of Justice and Constitutional Development, 19 December 2019, available at [https://www.justice.gov.za/m\\_statements/2019/20191219-UN-CAC.html](https://www.justice.gov.za/m_statements/2019/20191219-UN-CAC.html).

<sup>143</sup> N Gambara ‘Corruption perpetuates inequality – Minister Kiviet’ *The Public Servant*, 12 December 2023, available at <https://www.dpsa.gov.za/thepublicservant/2023/12/12/corruption-perpetuates-inequality-minister-kiviet/>.

***DISCUSSION OF FINDINGS, CONCLUSION AND RECOMMENDATIONS***

**5.1. INTRODUCTION**

Since the early 2000s, there has been much publicity about the increase in white-collar crime in SA. However, police statistics show an 11% drop in business crime since 2014.<sup>144</sup> Independent research by “PricewaterhouseCoopers” PwC shows fraud, money laundering, corruption, collusion and bribery decreased slightly between 2014 and 2020, but percentages were still higher than global averages. Higher value serious economic crime had however doubled and there has been a marked increase in the involvement of senior management in such crime. Customer fraud, bribery and corruption, asset misappropriation, procurement fraud, cybercrime and accounting crime were the most prevalent.<sup>145</sup> The central aim of this study was to analyse the current legal framework and literature informing this contemporary issue, especially considering that the major catalyst of white-collar crime in SA is that the perpetrators know that they are unlikely to be caught. Hence, the lack of investigation and prosecution is of concern to businesses in SA. Meanwhile, investigators of white-collar crime attempt to put together dockets, with other experts’ assistance, which are then submitted to the NPA. However, prosecuting services lack resources to effectively investigate white-collar crimes. This raises the (main research) question of whether there is a need to create independent units to supplement the existing legal framework to ensure effectiveness in the investigation and prosecution of white-collar crime in SA. These narratives are integral to enabling the study to reach a meaningful conclusion.

There is no doubt that the problem and seriousness of white-collar crime arise from the fact that the current legal mechanisms in SA do not provide sufficient capacity to investigate and prosecute such crime. The white-collar crime problem in SA is fuelled by an overstretched and inefficient justice system, which affects the ability of existing institutions and the NPA to investigate and prosecute white-collar crime; exacerbated by the shortage of detectives within the SAPS and other investigative agencies. The current law supporting the investigation and prosecution of white-collar crime in SA does not deter human and business crime as such.

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<sup>144</sup> PWC *Global Economic Crime Survey 2016: Economic Crime: A South African Pandemic* 5th (ed) (2016).

<sup>145</sup> PWC *Economic crime- when the boardroom becomes the battlefield: PWC’s Global Economic Crime Survey: South Africa* 7th ed (2020), available at <https://www.pwc.co.za/en/press-room/global-economic-crime-and-fraud-survey-2020>.

## 5.2. DISCUSSION OF PRIMARY FINDINGS FROM THE STUDY

White-Collar crime, and in particular corporate crime, is becoming dominant in SA and it has a negative impact on our economy and reputation. This study suggests that it is time government, investigation experts, law experts and any other relevant stakeholders come together and strategize on how white-collar crimes can be investigated and prosecuted effectively and efficiently. The current delay in investigating and prosecuting and/or finalising of these cases is also creating possibilities of not being able to get convictions and recoveries.

This study has established that most of the specialised investigation units in SA such as the DPCI, the SIU and the ID are designed to focus on corruption, which is one of the components of white-collar crime. SA has developed a statutory legal framework to deal with corruption but not corporate crimes, tax invasion, money laundering and fraud schemes which are the crimes contributing the most in damaging our economy and its reputation, i.e. PRECCA. This study has also established that SA has international agreements with other countries which focus on corruption and drugs but talk less of white-collar crime including corporate crimes. This study suggests the establishment of an independent body to deal with the investigation and prosecution of white-collar crime in SA.

This study set out to examine the evolution of the existing legal framework for the investigation and prosecution of white-collar crime in SA and its efficacy in doing so. The study was guided by the following research questions:

- a) What is the nature, purpose and objectives of the existing legal framework governing the investigation and prosecution of white-collar crimes in SA?.
- b) Does the current legal framework serve its purpose and goal in achieving the successful investigation and prosecution of white-collar crime in SA?
- c) What are potential recommended strategies/methods of recommendations can be made for enhancing the investigation and prosecution of white-collar crimes under SA' s legal framework?

The study considered the particular nature of white-collar crimes and criminals and various definitions of white-collar crime. White-collar crime is an international phenomenon and covers a plethora of illicit activities. The study then examined the various pieces of SA legislation promulgated over time to deal specifically with white-collar crimes. In particular the study examined the role of the numerous investigative units that have been created and, in some cases, disestablished, to deal with this form of crime. The study found that white-collar crime has consistently required increased legislative attention due to its ever-expanding and complex nature and the inability of existing criminal law and agencies to effectively deal with it.

Research has shown that over time, the pervasive and damaging effects of white-collar crimes on the socio-economic development of a country and its diversion of precious resources meant for the wellbeing of a nation have required more active intervention.

SA has made significant strides in promulgating legislation specifically designed to deal with white-collar crimes. The success in dealing with white-collar crimes however, rests not with legislation alone but on an efficient criminal justice system, with well trained and sufficient investigative personnel and an effective police force. SA has been found wanting in all these aspects.

Because of the complex nature of white-collar crime, the creation of special investigative agencies has been deemed necessary but their location within existing law enforcement agencies has meant they are not always able to be impartial and lend themselves to political influence. This study examined the nature, role and issues surrounding the work of investigative units such as the DSO; the SIU; the ID, the SAPS ACU, the DPCI, AFU, None of these units have been fully independent in terms of international obligations. The Zondo Commission recommended the establishment of a fully independent specialised unit to deal specifically with corruption in procurement processes. The study also considered SA's responsibilities in terms of its commitment to international anti-corruption agreements.

### **5.3. CONCLUSION AND RECOMMENDATIONS**

Successful investigating and prosecuting of white-collar crime require various strategies, including political good will, robust legislation and effective legal frameworks, good governance and a dedicated judiciary. A dedicated community is also required in support of government initiatives to investigate and prosecute white-collar crime. Law enforcement dealing with white-collar crime should be well remunerated so that they can fight white-collar crime without being compromised as most white-collar crime criminals tend to fight back using money and dirty tricks.<sup>146</sup>

The main finding of this study is the importance of prioritising the establishment of an independent unit for the investigation and prosecution of white-collar crime cases in SA. Most of the units established have been linked to existing state agencies such as SAPS and the NPA. The independence of the unit should be as explained in the *Glenister* case and be free from any political influence. The Zondo Commission reported that at least R10 million was lost by the State through these criminal activities. It is evident that additional investigators or prosecutors may need to be included in a thorough investigation of white-collar crime to avoid any perception of bias. The Government and the Zondo Commission concurred that it is imperative for the state to establish an impartial anti-corruption entity with limited political influence.

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<sup>146</sup> P Mwakio, G Mathenge & G Maroko 'Assessing the preparedness of law enforcement agents in dealing with white-collar crimes in Kenya: A case of Nairobi City County' (2020) 2(1) *Journal of Modern Law and Policy* 1 at 9.

It is true that SA has been losing lots of its resources and this undermines the stability of institutions such as the NPA. Poor leadership in these institutions undermines the overall integrity of the country.<sup>147</sup>

In the *Glenister* case, the majority and minority opinions of the Court agreed on several points. The Court agreed that the obligation is provided by the international anti-corruption instruments to which the SA is a signatory.

The Court pointed to the meaning of independence as follows:

“The amicus submitted that for an anti-corruption agency or body to be independent, it must: have the power to initiate its own investigations; allow investigators and prosecutors autonomous decision-making powers in handling cases; not be subject to undue influence from any of the branches of government or any third party; and have structural and operational autonomy.”<sup>148</sup>

This study supports the Helen Suzman Foundation’s position in the *Glenister* case, namely, that having the DPCI within the SAPS and simply means that it is not independent as required by the international obligation.<sup>149</sup>

The Zondo State Capture Commission recommended the creation of an autonomous entity to address corruption in public procurement. The Commission determined that, as a necessary step towards reform, the establishment of a singular, versatile, adequately funded, and independent body is crucial to proactively combat corruption in tandem with existing anti-corruption efforts. This office will be known as the Anti-Corruption Agency or Agency for SA (ACASA). The Zondo State Capture Commission provides the following guidelines for the independent agency:<sup>150</sup>

- The Government introduce legislation for the establishment of an independent public procurement ACASA.
- The ACASA should be established through the introduction of new legislation.
- For ACASA to be properly funded, it must be allocated funds by Parliament and a fee must be paid by all bidders wishing to bid for public contracts. Other financing options should also be considered.
- ACASA should comprise of a Council, Inspectorate, Litigation Unit, Tribunal and Court.

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<sup>147</sup> R Mathekga ‘South Africa’ in OSISA (ed) *Effectiveness of Anti-Corruption Agencies in Southern Africa* (2017) 221.

<sup>148</sup> *Glenister v President of the Republic of South Africa* (CCT 48/10) [2011] ZACC 6; 2011 (3) SA347 (CC); 2011 (7) BCLR 651 (CC) (17 March 2011) at para 117.

<sup>149</sup> *Glenister* supra at para 118.

<sup>150</sup> R Zondo ‘Judicial Commission of Inquiry into State Capture Report: Vol 6 part vi: Recommendations’ [n.d.], available at <https://www.statecapture.org.za/>.

- To be independent, the Council must be chaired by a legal expert and consist of four members responsible for accounting, finance, business and public procurement, and appointed by panel members comprising the Chief Justice. The Auditor General and the Minister of Finance must follow public procedures.
- The Inspectorate is expected to have a substantial and ongoing presence in overseeing operations. Zondo explains the Inspectorate's responsibilities, with a focus on monitoring community activities, collecting reports, and conducting investigations into fraud and corruption, specifically with regards to tenders, contracts, and relationships.
- Clearly, the role of the court is to act as the legal arm of ACASA, in particular, it will be responsible for issuing subpoenas to assist investigators, conduct investigations, negotiate motions for judicial orders (DPAs) and bring them back to court; and,
- ACASA's decision-making process will involve collaboration between the courts and tribunals. One proposed framework, presented by Zondo, suggests that courts should be tasked with reviewing and deciding on petitions; approving or rejecting Deferred Prosecution Agreements (DPAs), and determining whether an Organisation or individual should be prohibited from participating in public events. It is emphasised that the judiciary should oversee these responsibilities. The Constitution mandates that decisions made by the courts in civil and arbitration cases be upheld.

In response to the state capture recommendation, the government established the ID which is governed by section 7 of NPA Act 32 of 1998. This study suggests that the ID is not independent and can be easily influenced because the head of the unit is politically appointed by the President who is the head of the political party.<sup>151</sup>

This study partially supports the recommendation by the Zondo Commission but suggests that the independent body should not only be responsible for corruption in the procurement space. The independent body should be mandated to investigate and prosecute all white-collar crime. The Zondo Commission did not only reveal procurement corruption during its process, but also various white-collar crimes such as fraud, forgery and uttering. Even though Judge Zondo suggested that the new legislation should be developed for the independent body, this study suggests that the new independent body should fall under the Chapter 9 institutions of the Constitution. This study suggests that the establishment of an independent body to investigate and prosecute white-collar crime in SA should be in line with section 181 of the Constitution which provides for the establishment and governing principles of state institutions.<sup>152</sup> These state institutions strengthen constitutional democracy in the Republic as they are independent and only subject to the Constitution and accountable to the National Assembly.

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<sup>151</sup> NPA 'Investigating Directorate' [n.d.], available at <https://www.npa.gov.za/investigating-directorate>.

This study recognises that establishing a new Chapter 9 institution would involve various stakeholders for expert advice about the structure and functioning of such a unit to ensure it is in line with the Constitution and thus improve the public trust in the ability to fight white-collar crimes. Importantly, it would signal the government's genuine commitment to the unit's independence. It would also mean that the investigation and prosecution of white-collar crime would be less accessible to political and/or executive interference.

The effective investigation and prosecution of white-collar, as well as law enforcement and deterrent action in respect of this kind of crime, is complicated by several challenges as discussed above. White-collar crime is more dynamic and develops new patterns on a regular basis. The often-faceless nature of white-collar crime today complicates traditional methods of investigation and prosecution. Modern technology offers benefits to criminals and heightens the constraints for investigation and prosecution, as evidence can disappear quickly.

The main challenge with white-collar crimes is that they do not come in one mode or in one sphere of life, but they tend to evolve over time as the world evolves in technological innovations. Therefore, there is a need to enhance the current legal framework by establishing an independent body with specialised experts to deal with white-collar crimes.

As the study indicated above, there is an existing legal framework established for the investigation and prosecution of white-collar crimes in SA. There are various investigative units, namely the, SIU, ID, SAPS ACU, and DPCI, but they are not focused solely on white-collar crimes and often lack the expertise and resources to deal with such. There are also special commercial courts to deal with white-collar crimes to support the effectiveness of the current legal framework. SA has also developed various legislation to enhance the current legal framework in dealing with white-collar crime. Unfortunately, they are not perfect. White-collar crimes take extensive investigation and there are many white-collar crime cases that should have been finalised long ago and this study has made it clear that this non-finalisation is due in some measure to the ineffectiveness of the current legal framework, both for the investigation and the prosecution of white-collar crime. This study emphasised the establishment of an independent unit in terms of section 181 of the Constitution of the Republic that will be responsible for the investigation and prosecution of white-collar crime in SA.

The fact that the government has established these specialised units to deal with corruption shows that there is a need to prioritise these crimes. There should be a single unit, independent from the government, responsible for white-collar crime investigation.

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<sup>152</sup> Constitution of the Republic of South Africa Act , 1996.

The establishment of an independent body for the investigation and prosecution of white-collar crime will improve the public trust in government's initiative to fight crime. The improvements will minimise the political/ executive influence in any investigation and in the prosecution of white-collar crime. This study further suggests that the establishment of this unit will ensure easy accountability and assessment for every investigation and prosecution of white-collar crime. According to the 2023/2024 SAPS crime statistics, white-collar crime has increased by 18.2% compared to previous years.<sup>153</sup> The statistics presented by the SAPS in terms of white-collar crimes (which they call commercial crimes) reflects everything that is of monetary value and there is no focus on these serious white-collar crimes which have a significant impact on our economy. It is suggested that, in order to address the shortcomings, there be the;

“Establishment of a single crime unit dedicated to large-scale or very serious instances of financial white-collar crime in the private sector, in relation to its complexity, seriousness, impact or repercussions. This unit ought to have a wide discretion to decide which matters to investigate and ought to be equipped with the intelligence gathering, investigative powers, and prosecution capabilities previously held by the DSO. It would be suitably located under the NPA, as the only State agency with both investigative and prosecuting powers.”<sup>154</sup>

The independent investigation and prosecution unit should have powers that are equivalent to the SAPS so that they can start and finish the investigation and are able to prosecute the matter. The courts/ judges can still be independent and fall under the judiciary to ensure the Bill of Rights is not violated. Its powers should include the authority to enter and search any premises, to seize evidence during the course of an investigation, and to arrest and detain a suspect or suspects. It should also have the power to subpoena witnesses, intercept communications, access financial data and freeze assets.<sup>155</sup>

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<sup>153</sup> SAPS ‘Public recorded crime statistics: Republic of South Africa 2023-2024 financial year’ (2023), available at <https://www.saps.gov.za/services/crimestats.php>.

<sup>154</sup> G Van Niekerk & F Ponelis ‘Strengthening law enforcement to address white-collar financial crime in South Africa's private sector’ (2024) *PER/PELJ* 1 at 25.

<sup>155</sup> C Reeves ‘After Glenister: The case for a new dedicated agency’ (2012) 39 *SA Crime Quarterly* 23-32.

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Mr Benedict Zimisele Hlophe (218083965)  
School Of Law  
Howard College

Dear Mr Benedict Zimisele Hlophe,

**Original application number:** 00013001

**Project title:** CRITICALLY ANALYZING THE IMPACT OF THE SOUTH AFRICAN POLICE SERVICE IN A FIGHT AGAINST COMMERCIAL CRIMES IN SOUTH AFRICA

**Amended title:** A critical analysis of the current legal framework for the investigation and prosecution of white-collar crimes in South Africa

## Exemption from Ethics Review

In response to your **amendment** application received on 25 march 2024 , your school has indicated that the amendment has been granted **EXEMPTION FROM ETHICS REVIEW**.

Any alteration/s to the exempted research protocol, e.g., Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through an amendment/modification prior to its implementation. The original exemption number must be cited.

For any changes that could result in potential risk, an ethics application including the proposed amendments must be submitted to the relevant UKZN Research Ethics Committee. The original exemption number must be cited.

In case you have further queries, please quote the above reference number.

### PLEASE NOTE:

Research data should be securely stored in the discipline/department for a period of 5 years.

I take this opportunity of wishing you everything of the best with your study.

Yours sincerely,

A black rectangular box redacting the signature of Dr. Jaciritha Deleane Toohey.

Dr. Jaciritha Deleane Toohey  
pp Academic Leader Research  
School Of Law