

Corruption

An anti-corruption guide for South African SMEs



An anti-corruption guide for South African Small and Medium Enterprises

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Produced on behalf of BUSA by the Ethics Institute of South Africa



**Ethics Institute
of South Africa**

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www.ethicsa.org.za

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Disclaimer: This guide is intended as overview information only, and should not be used as a comprehensive legal guideline. For business decisions you should get independent legal advice.

August 2009

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Why we published this guide

As organised business we believe that ethical business practice is good business practice. Not only does it build solid businesses, but also a stable business environment. We believe that the majority of business owners understand that corruption is detrimental to the stability of the business environment and, in that way, it impacts on all of us.

World Bank studies have found that Small and Medium Enterprises (SMEs) are more vulnerable to corruption. Yet SME owners and managers have fewer resources to help them understand corruption and how corruption laws could affect them.

Business Unity South Africa (BUSA) has therefore, with the support of the German Agency for Technical Cooperation (GTZ), developed this guide to assist SMEs in making sense of corruption and to understand how they can contribute in promoting ethical business practices in South Africa.

2

Why should I be concerned about corruption?

As an SME owner / manager you should be aware of the risks of being involved in corruption, as well as the potential benefits of not being involved.

Risks if your company is caught being involved in corruption –

- You can face significant fines or jail time. Sentences of up to 5 years can be given by a magistrate's court, and up to life imprisonment by a High Court.
- You and your company can be listed on the register for tender defaulters (if you have been involved in corruption relating to tenders), which means that you will be banned from doing business with all government entities for between 5 and 10 years. This register will also be open to the public.
- The reputational damage and loss of business could result in the closure of your business – leading to loss of employment for many.

A traffic officer was recently sentenced to 5 years in prison for accepting bribes. This same sentence could just as easily be given to a member of the public who offers a bribe to a traffic officer.

just for interest...

Benefits of promoting ethical business practices –

- You can attract more ethical staff – thereby reducing your internal fraud risks.
- You can attract more ethical business partners and customers.
- You could be seen as a preferred service provider for large companies and government departments who have strict internal anti-corruption rules.
- You would be helping to build a more stable business environment that benefits all businesses in the long term.

3

What is corruption?

Imagine the scenario -

Your daughter has trained hard for athletics this season, doing everything she can to improve her performance. She is doing really well in the 100m event, and stands a good chance of winning. However, after your neighbour paid for the headmaster's holiday in Mauritius, the headmaster decided that the neighbour's daughter would start the next race with a lead of 10 meters.

It sounds ridiculous, doesn't it? It is blatantly unfair and makes a mockery of what athletics is supposed to be about. We would never accept such behaviour. Why then do we sometimes accept it when business people give gifts, kickbacks or bribes to ensure that they are given an unfair advantage?

All of these 'incentives' which some people give to others to unfairly decide or do things in their favour, are acts of corruption.

We are often inclined to think that only people in government are involved in corruption, but this is not the case. For example – if you were to offer a bribe to a health and safety inspector, you would be just as guilty of corruption as the inspector if he accepted it.

There are many examples where business people could be involved in corruption – for instance, paying a bribe to get a tender awarded to their company, or accepting a kickback for illegitimately arranging a contract for someone else. Government does not even have to be involved - corruption can also happen between two companies.

The common definition of corruption as used by Transparency International is –

“The abuse of entrusted power for personal gain.”

In South Africa, corruption is however defined by the Prevention and Combating of Corrupt Activities Act (no. 12 of 2004).

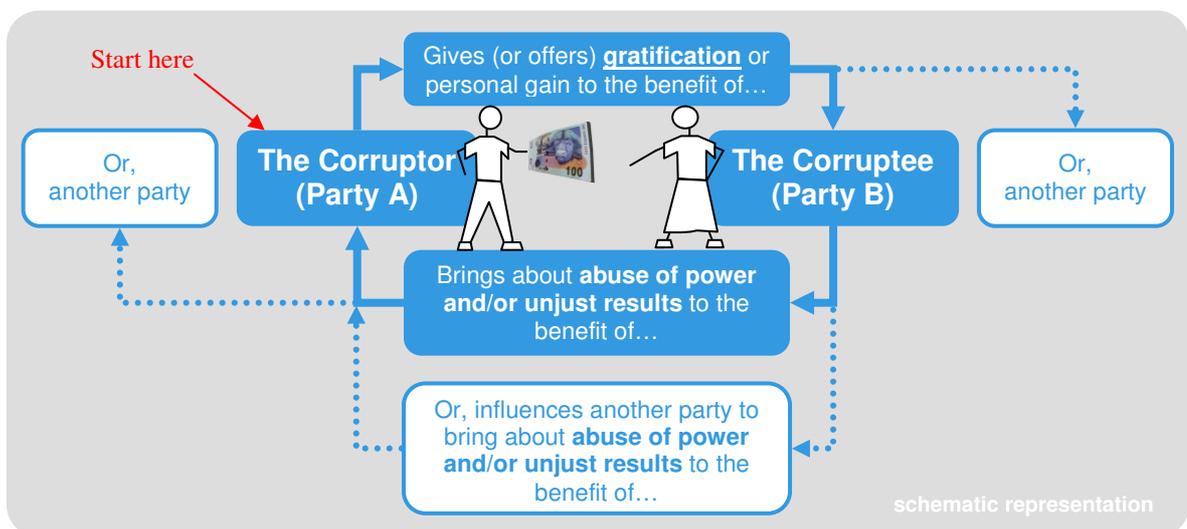
backhandler – kickback – bribe – boodle – facilitation payment – inducement – deal sweetener – palm greasing – fix – graft – payola – payoff – backhandler – kickback – bribe – boodle – facilitation payment – inducement – deal sweetener – palm greasing – fix – graft – payola – payoff – backhandler – kickback – bribe – boodle – facilitation payment – inducement – deal sweetener – palm greasing – fix – graft – payola – payoff – backhandler – kickback – bribe – boodle – facilitation payment – deal sweetener – palm greasing – fix – graft – payola – payoff – backhandler

3.1. What does the law say?

In short the Prevention and Combating of Corrupt Activities Act says that:

Corruption occurs when one party gives another party **anything of value** with the purpose of influencing them to **abuse their power**.

The most common business example of corruption would be when a person pays a bribe or kickback to be awarded a contract. In this case the item of value (which the Act calls 'gratification') is usually money, and the abuse of power is that a contract is awarded to someone who is not the best or cheapest. The person who offers the bribe (the corruptor) as well as the person who accepts a bribe (the corruptee) will be guilty of corruption.



Some other things in the act which you might not know:

- The parties can be **people or organisations**.
- If you bribe a public official in **another country** you can also be charged for corruption in South Africa.
- 'Gratification' **does not have to be money**. It can also be gifts, entertainment, loans, employment, or any other benefit.
- You don't actually have to hand over any 'gratification'. If you **merely offer** a bribe you are already guilty of corruption. Of course, this works both ways – if you simply ask for bribe you are also guilty of corruption.
- If you are a business owner or senior manager, and you know of corruption, fraud, or extortion involving **more than R100 000** and don't report it, you are guilty of a crime.
- The Act specifically criminalises corruption relating to **tenders, contracts, agents, public officers** and a number of other matters.

Prevention and Combating of Corrupt Activities Act:

- www.info.gov.za/acts/2004/a12-04/index.html

An easy-to-understand guide on the Act – published by the National Anti-Corruption Forum (NACF)

- www.nacf.org.za/guide-prevention-combating-corrupt-activities/index.html

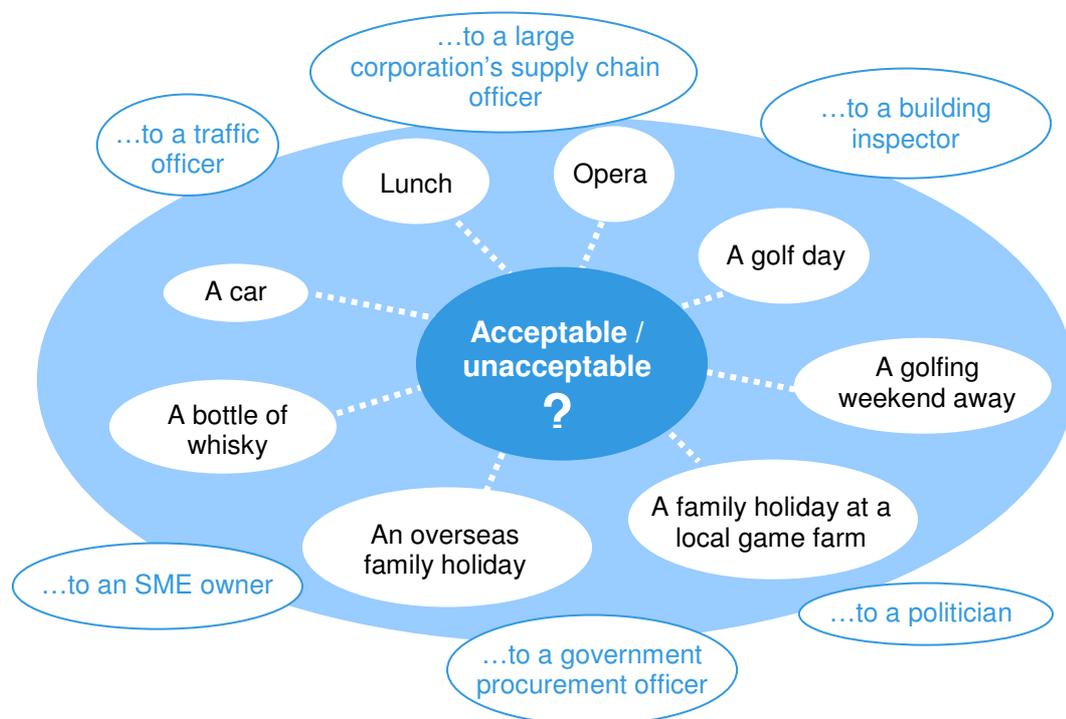
3.2. Examples of corruption

SMEs are probably most pressurised to get involved in corruption when it comes to getting contracts. They often feel they have to give ‘gifts’ or do ‘favours’ for people who have the ability to influence who gets the job.

One of the ways in which this happens is through kickbacks. This is when someone arranges for you to unfairly get a contract, and you give them a portion of the profits, or a kickback.

Gifts and entertainment could also be used corruptly. This is a confusing area, because businesses are often not sure where the line is drawn between normal relationship building and corruption.

Which of the following do you think are legitimate? (Think what you would regard as corrupt if you read about it in the news.)



You will see that it is difficult to know where to draw the line. However, according to the law it is not important what the value of the ‘gratification’ is. If there is intent to improperly influence someone you are guilty of corruption. It does not matter whether you paid R100 to get out of a fine, or whether you gave someone a car to get a big contract – it stays illegal.

Does this mean that you cannot take potential clients to lunch? No. Relationship building is an important part of business - especially for SMEs. But relationship building does not have to mean extravagant gifts and entertainment. Ask yourself the following questions:

- Am I trying to make the person indebted to me with the gift, or is it just a small token to ensure my company is remembered?
- Am I trying to buy influence with expensive entertainment, or does it merely provide an opportunity to network?
- How would I feel if my competitor did the same? Would I be comfortable if they found out what I did?

If you think that you will lose a contract if you do not continue with the gifts and entertainment, the warning signs of corruption are already there.

Also consider to whom you want to give the gift or entertainment. Some people, like government officials and procurement officers, have a stronger duty to remain impartial.

The court will consider the surrounding circumstances in each case. Among other things it will apply the test of whether there was intent to influence a person to bring about an unfair outcome.

3.2.1. How will I most likely see corruption?

As an SME owner / manager you could be confronted with corruption in a number of ways. The following are some of the more likely **examples**:

- A member of your sales-team says that he can make a sale to a large company, but only if you agree to sponsor a golfing weekend away for the procurement team at the other company.
- You apply for a government business grant. You agree to pay the private school-fees of one of the adjudicating officer's children if he will promote your case.
- You need a business license, but you have left your application too late. The licensing officer mentions that he has had a small car accident this morning. You offer to have his car fixed if he will speed up the process.
- A customs officer asks for a few cartons of cigarettes to speed up the import process at the border.

*Some will argue that they are entitled to the service anyway, and that they are merely speeding up a process that will go their way inevitably. Such small payments to facilitate routine administrative processes are sometimes called **facilitation payments**. Some countries' laws even allow facilitation payments. **According to South African law however, facilitation payments are illegal.***

- Your company manages sub-contractors for a construction project. One of your project managers is accepting kickbacks in return for appointing the sub-contractors.
- A computer sales representative secretly approaches your IT manager and offers to give her a kickback on each computer that your company buys.

*The IT manager is supposed to act in the best interest of your company. If she accepts the kickback she will have a **conflict of interest**. This means that she will probably act in her own best interest (by buying unnecessary and expensive computers so that she can get her 'commission'), rather than in the best interest of your company (by supporting the supplier that gives the best value for money).*

- You are negotiating a large deal with a business development officer at a large company. You offer him a job with a big salary if he ensures that the deal goes through on your terms.

3.3. Related crimes

3.3.1. Anti-competitive practices (Price-fixing)

Price fixing - Agreeing with competitors to keep prices at a specific level.

Competition between competitors is necessary to keep prices at a fair level. Where competitors agree to set their prices at a specific level, it is illegal. It is a specific form of corruption, but it also has its own law:

- The Competition Act (No. 89 of 1998)

There are also other forms of anti-competitive practices set out in the Competition Act.

Other anti-competitive practices:

- Agreeing not to approach each other's clients and markets.
- Colluding during tender processes – such as agreeing that everyone will win some tenders at high prices.

additional resources

The Competition Act (No. 89 of 1998):

- www.info.gov.za/view/DownloadFileAction?id=70747

The Competition Act: A guide to prohibited practices - published by the Competition Commission:

- www.compcom.co.za

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“The accomplice to the crime of corruption is frequently our own indifference.” - Bess Myerson

3.3.2. Fraud

Fraud: *Deliberately deceiving or misleading someone to cause them some financial loss or other harm.*

Fraud differs from corruption in the following ways:

- One party is unknowingly deceived. With corruption both parties know what is going on and willingly participate.
- There is a perpetrator (the fraudster) and a victim (the person who is defrauded). With corruption both parties are guilty if they participate in the crime.

Examples:

- *Paying with a forged cheque.*
- *The well-known 419 e-mail scams.*
- *Falsifying your accounting records to pay less tax.*
- *Making false insurance claims.*

Fraud and corruption often go hand in hand – for example: *Submitting a false insurance claim (which is fraud) and paying the assessor to back up your submission (which is corruption).*

3.3.3. Extortion

Extortion: *If someone tries to get some advantage from you by intimidating or threatening you.*

Extortion differs from corruption as follows:

- With corruption both parties agree to the act, but with extortion the one only agrees because he/she is being threatened or intimidated. There is therefore only one guilty party in extortion.

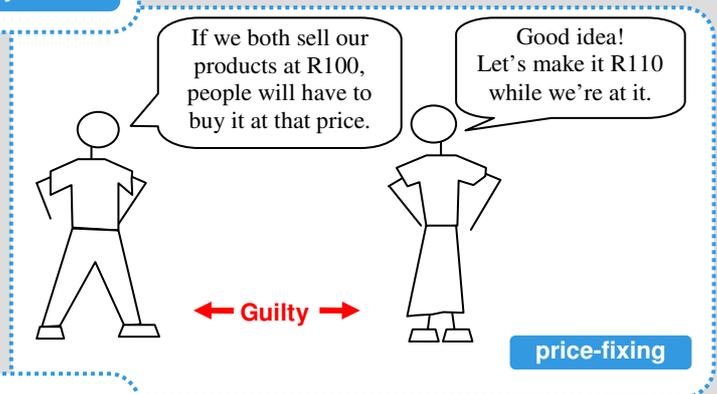
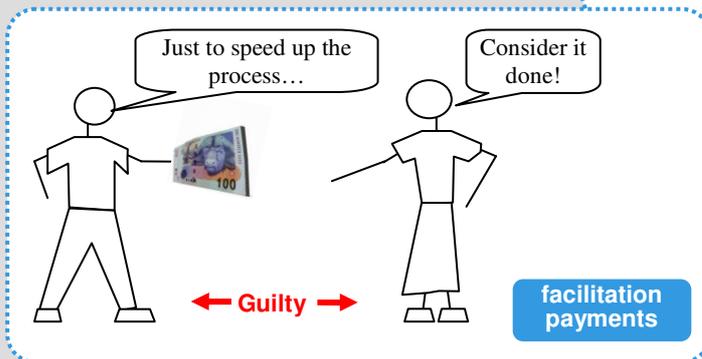
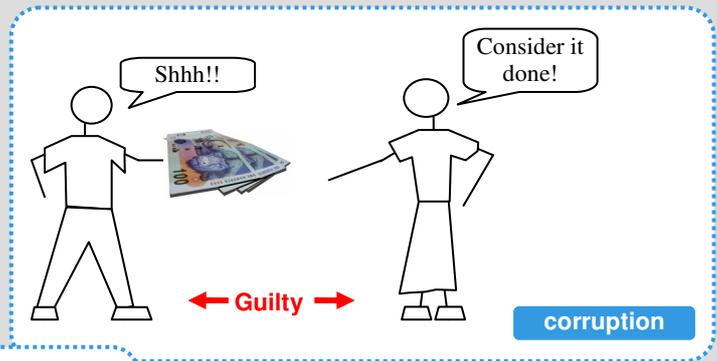
Examples:

- *'Blackmailing' someone.*
- *Knowing that you are innocent, a police officer says he will arrest you unless you give him money.*

You can see that many cases which seem to be corruption are actually extortion. For example, you have a truck of fresh vegetables that you want to take across the border, but the customs official says that he will keep the vegetables there for a week unless you pay him a bribe. Clearly the threat is that your produce will perish if you don't pay the bribe. This is extortion.

But, you cannot later claim that you were threatened if you do not lay a charge with the police against that person at the first available opportunity. If you do not lay a charge it will seem as if you are doing it out of your own free will, and there could be a perception of corruption.

3.3.4. To recap



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When you are unsure

If you are not sure whether something is corrupt or not, it might be best to get an independent legal opinion. This might however not be possible for all situations. So, when you are confronted with a grey area, ask yourself the following:

- Am I required to be objective?
 - Does this impact on my objectivity?
 - Could someone else think that it will?
- Is the person I'm entertaining / giving a gift to required to be objective?
 - Does this impact on their objectivity?
 - Could someone else think that it will?

Also perform the **transparency** and **reputation** tests. Ask yourself:

- Can I do this openly – telling everyone involved about it?
- Would I be happy to see it in tomorrow's newspaper?

5

What can we do as an SME?

5.1. **Commit to ethical business practices**

This sounds almost too logical to mention, but many employees do not know what their boss's stance on corruption is. Unless you lead by example and make a point of openly committing to ethical business practices, your employees might never know that this is important in the business – and will act accordingly.

5.2. **Talk to your employees**

If you want to change practices you first need to find out what the current situation is. Talk to your employees and managers with a view to find out:

- what the current practices are around gifts, entertainment and even bribes;
- whether they are being approached for bribes;
- where they believe the biggest corruption risks are;
- which customers, business partners, or deals are ethically risky; and
- where they are experiencing difficulties, or are finding it challenging to stay ethical.

Consider whether it would be best to have these conversations in a group, or individually.

Building an ethical culture

1. *Commit to ethical business practices*
2. *Talk to your employees*
3. *Make rules and communicate them*
4. *Make it part of everyday business practice*
5. *Have an open door*
6. *Apply discipline*
7. *Recognise ethical behaviour*
8. *Report corruption*
9. *Consider collective action*

5.3. *Make rules and communicate them*

Once you have identified potential risks, clarify how employees should act in these situations. This does not have to be a complicated process, but it is important to have something in writing. You can simply put the rules in an e-mail to staff, but companies often formalise their rules in a Code of Ethics.

Such a Code says how your company will do business. It mentions those things that your business will aspire to do and things it will not do. A Code applies to the business as a whole and to all employees. Don't be too worried about not getting it right - it is always better to have a Code (or even just some basic rules) than not having it.

Codes are helpful to your employees when they are confronted with requests for bribes. Instead of engaging in an argument they can simply say – “My company's rules do not allow that and I could lose my job”.

additional resources

To get an idea of what a Code could deal with, have a look at the BUSA Charter for Ethical Business Practice.

- www.busa.org.za

Merely having rules will do little to change behaviour. It doesn't help to write a Code and put it in a drawer somewhere. You have to tell employees about it and talk to them about what it means in practice. Once again, this does not have to be costly or complicated. They need to know:

- What behaviour is acceptable and what is not.
- What to do in a difficult situation.
- That if they are uncertain they can ask for guidance.
- That if they are involved in unethical practices (even if it is to the benefit of the company) they will face severe disciplinary action.

You can have individual conversations with people, but at some point it will be best to discuss it in a group. This shows that it is fine to talk about corruption openly. You can also clarify any questions and brainstorm on potential challenges.

5.4. ***Make it part of everyday business practice***

The purpose of communicating with your staff is to ensure they change the way they do business. For example:

- If you make use of excessive entertainment, revisit this practice and find alternative (and legitimate) ways of building relationships.
- Also communicate with your business partners – old and new. Ensure that they subscribe to the same standards you do.
- If your sales staff are incentivised to make the sale “at all cost”, make sure they know they will lose their incentive if they use kickbacks or bribes – and they will face disciplinary action.

Work with your staff to change old practices. It might not be easy for them to change the way they do things, but you need to find a way to communicate openly about these issues.

Know what your business partners' Codes say

If you are not sure whether the activity that you are about to be engaged in is acceptable or not, check the Code of Ethics or the Gift Policy of the organisation you are dealing with. It is becoming more and more common for companies to have such policies. You may even find that if you don't stick by their rules they could cancel your contract.

When working with private sector companies you will have to check each company's code individually.

When working with government, things are more standardised. The Public Service and Municipal Codes of Conduct are all clear that employees may not use their official position to get any gifts, benefits or favours.

additional resources

Code of Conduct for the Public Service – Chapter 2 of the Public Service regulations

- www.info.gov.za/gazette/regulation/2001/21951.pdf

Code of Conduct for Councillors – Schedule 1 of the Municipal Systems Act

Code of Conduct for Municipal Staff Members – Schedule 2 of the Municipal Systems Act

- www.info.gov.za/gazette/acts/2000/a32-00.pdf

5.5. *Have an open door*

Provide ongoing advice and a way to blow the whistle

Where your employees are uncertain about what to do in a situation – or whether something is acceptable or not – you want to make sure that they will feel free to ask for advice. There may sometimes be sensitive issues, so it is best to guarantee their confidentiality.

If there is corruption, fraud or any other unethical or illegal behaviour in your company – you would want to know about it. First prize is that employees trust you enough to come to you directly, but they may sometimes want to stay anonymous. Large companies often have anonymous hotlines, but this could be too expensive for small companies. Consider alternatives – such as receiving anonymous letters – and tell employees about this.

If you do know who made a report, remember – **never shoot the messenger!** If you do act against employees who make reports in good faith, they would be protected by the Protected Disclosure Act.

[additional resources](#)

Protected Disclosures Act – No. 26 of 2000

- www.info.gov.za/view/DownloadFileAction?id=68192

5.6. *Apply discipline*

If you don't act when someone goes against the company's ethics standards, you are sending a message that their actions are acceptable. If you don't apply your standards, what you say in codes and policies becomes irrelevant after a while.

5.7. *Recognise ethical behaviour*

You can also uphold your company values by recognising people for exemplary behaviour. It might be through an annual trophy which is awarded to the person who best lived out the business's values.

5.8. *Report corruption*

In some situations you will be confronted by people who make it clear that they will be open to accepting bribes. In some cases they might be saying that you will not be helped unless you pay a bribe. Strictly speaking this is extortion, but if you go along with it, it could be seen as corruption.

Many companies these days have hotlines for whistleblowers where you can report corruption anonymously.

It is always difficult to prove corruption. When you phone a hotline they will need some proof before they can investigate. If you don't have any proof it might still be worth reporting it. If the company gets many reports about the same individual they will have to consider pro-active investigations which could include integrity testing. This might not be sufficient for a criminal prosecution (where they will have to prove guilt 'beyond a reasonable doubt'), but it might be enough for internal disciplinary action (where they only have to prove guilt 'on a balance of probabilities').

If you have sufficient proof you should also report the matter to the SA Police Services.

Remember, if you are in a position of authority and know of corruption involving R100 000 or more, it is a crime not to report it to the police.

You can report corruption, extortion and associated crimes anonymously to:

- **Crime Stop** – the South African Police Services' anonymous hotline
 - 08600 10111
 - Any corruption
- **The Public Service Anti-Corruption Hotline**
 - 0800 701 701
 - Public Sector Corruption
- **The South African Revenue Service's Anti-Corruption Hotline**
 - 0800 00 28 70
 - For any complaints related to corruption and extortion at ports or borders (for example - related to importing and exporting), or related to tax officials.

5.9. Consider 'collective action'

In some corrupt environments competitors get tired of having to pay bribes to get jobs. They realise that if they come together and refuse to pay bribes it will bring their cost of doing business down significantly and they will compete fairly.

Collective action against corruption can be a long-term agreement, or it can relate to a specific contract. Where it relates to a contract, all parties interested in tendering can come together and sign a Code of Ethics stating they will not engage in illicit activities. It might even involve the client. An external observer could also be appointed to ensure the process is without incident.

[additional resources](#)

For more information on using this strategy, see the World Bank Institute's handy guide:

"Fighting Corruption through Collective Action - A guide for business"

- <http://info.worldbank.org/etools/antic/Guide.asp>

6

Where to go for more information

Transparency International has a number of useful resources. You might be specifically interested in their *Business Principles for Countering Bribery – SME Edition*. This gives more specific guidance on difficult issues such as gifts, conflicts of interest, and facilitation payments, as well as implementing new practices in your business. **This is a very handy guide!**

www.transparency.org/content/download/29197/443933/file/BusinessPrinciples_SME30Jan2008.pdf

The Corruption Perception Index gives an indication of which countries are perceived to be most corrupt by business people, but there is a host of other reports and surveys.

www.transparency.org

The **Business Anti-Corruption Portal** provides anti-corruption resources specifically for SMEs. There are some sample policies and procedures which you can adapt to suit your organisation. Look specifically at the ‘Integrity System’ and ‘Due Diligence Tools’ sections. The ‘Country Profiles’ section might be of interest to people who work or trade internationally.

www.business-anti-corruption.com

The United Nations Industrial Development Corporation (**UNIDO**) and the United Nations Office on Drugs and Crime (**UNODC**) compiled a research report on corruption in SMEs. This is a more academic publication and could be of interest to people working specifically with corruption.

www.unido.org/fileadmin/user_media/Services/PSD/CSR/UNIDO-UNODC_Publication_on_Small_Business_Development_and_Corruption.pdf

“Corruption is worse than prostitution. The latter might endanger the morals of an individual, the former invariably endangers the morals of the entire country.” - Karl Kraus