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DISPUTE RESOLUTION ALERT

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My duty to report a suspicion of fraud and the consequences thereof

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My duty to report a suspicion of fraud and the consequences thereof

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

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

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

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

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

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

Malicious prosecution consists of the wrongful and intentional setting of the law in motion. In *Canelli v Canelli and Others* [2021] ZASCA 012 (3 February 2021), the Supreme Court of Appeal (SCA) reaffirmed

My duty to report a suspicion of fraud and the consequences thereof ...continued

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the requirements for a malicious prosecution claim, being that to succeed with such a claim, a claimant must allege and prove that:

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

The laying of a criminal charge against an individual is one of the main ways to jump start South Africa's criminal justice processes. The difficulty of this process comes in where the charge in question is made falsely and with malice. However, the duty to report in terms of section 34(1) of

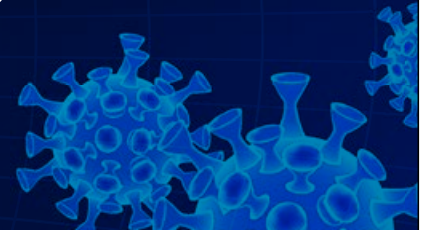
PRECCA is not a criminal complaint to set the law in motion but rather compliance with a statutory duty to report.

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

*Corné Lewis and
Lawrence-John Maralack*

CDH'S COVID-19 RESOURCE HUB

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2021 RESULTS

CHAMBERS GLOBAL 2017 - 2021 ranked our Dispute Resolution practice in Band 1: Dispute Resolution.

CHAMBERS GLOBAL 2018 - 2021 ranked our Dispute Resolution practice in Band 2: Insurance.

CHAMBERS GLOBAL 2017 - 2021 ranked our Dispute Resolution practice in Band 2: Restructuring/Insolvency.

CHAMBERS GLOBAL 2020 - 2021 ranked our Corporate Investigations sector in Band 3: Corporate Investigations.

Chambers Global 2021 ranked our Construction sector in Band 3: Construction.

Chambers Global 2021 ranked our Administrative & Public Law sector in Band 3: Administrative & Public Law.

Pieter Conradie ranked by CHAMBERS GLOBAL 2019 - 2021 as Senior Statespeople: Dispute Resolution.

Clive Rumsey ranked by CHAMBERS GLOBAL 2013-2021 in Band 1: Construction and Band 4: Dispute Resolution.

Jonathan Witts-Hewinson ranked by CHAMBERS GLOBAL 2021 in Band 3: Dispute Resolution.

Tim Fletcher ranked by CHAMBERS GLOBAL 2019 - 2021 in Band 3: Dispute Resolution.

Joe Whittle ranked by CHAMBERS GLOBAL 2020 - 2021 in Band 3: Construction

Tobie Jordaan ranked by CHAMBERS GLOBAL 2020 - 2021 as an up and coming Restructuring/Insolvency lawyer.



Cliffe Dekker Hofmeyr's Dispute Resolution rankings in THE LEGAL 500 EMEA 2020:

CDH's Dispute Resolution practice is ranked as a Top-Tier firm in THE LEGAL 500 EMEA 2020.

Tim Fletcher is ranked as a Leading Individual in Dispute Resolution in THE LEGAL 500 EMEA 2020.

Eugene Bester is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2020.

Jonathan Witts-Hewinson is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2020.

Pieter Conradie is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2020.

Rishaban Moodley is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2020.

Kgosi Nkaiseng is ranked as a Next Generation Partner in THE LEGAL 500 EMEA 2020.

Tim Smit is ranked as a Next Generation Partner in THE LEGAL 500 EMEA 2020.

Gareth Howard is ranked as a Rising Star in THE LEGAL 500 EMEA 2020.

CDH's Construction practice is ranked in Tier 2 in THE LEGAL 500 EMEA 2020.

Clive Rumsey is ranked as a Leading Individual in Construction in THE LEGAL 500 EMEA 2020.

Joe Whittle is recommended in Construction in THE LEGAL 500 EMEA 2020.

Timothy Baker is recommended in Construction in THE LEGAL 500 EMEA 2020.

Siviwe Mcetywa is ranked as a Rising Star in Construction in THE LEGAL 500 EMEA 2020.



CDH IS THE EXCLUSIVE MEMBER FIRM IN AFRICA FOR THE:

Insuralex Global Insurance Lawyers Group
(the world's leading insurance and reinsurance law firm network).

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BBBEE STATUS: LEVEL TWO CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

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