

Sentencing the corporate offender in South Africa: A comparative approach

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ABSTRACT

In terms of the Criminal Procedure Act a fine is the only sentencing option available to the court upon convicting a corporation for a criminal offence. The fine is imposed upon the individual representing the corporation at the trial in his representative capacity. The ordinary guidelines that regulate the imposition of a fine as punishment apply to the sentencing of corporations. Reported South African case law on corporate criminality, however, focuses primarily on the criminal liability of juristic persons and not so much on factors to be taken into account when the corporation (or, rather, its representative) is to be sentenced. This contribution therefore explores aggravating and mitigating factors that play a role in selected foreign jurisdictions. The United States Federal Sentencing Guidelines, the Canadian Criminal Code, as well as recommendations by the Law Reform Commission of the Australian State of New South Wales are considered. A consideration of these jurisdictions reveals the significance of the unique corporate character of the relevant corporate entity at the sentencing stage. In this regard courts may take into account the financial circumstances of the offender; the existence of effective compliance policies at the time of the offence; the reaction of the corporation to prior criminal conduct; the unique corporate character of the offender as well as the effect of the sentence on the community. South African courts may also find the consideration of these factors helpful.

1. Introduction

In South Africa the Criminal Procedure Act 51 of 1977 (CPA) provides that in any prosecution against a corporate body, a director or servant of the corporate body must be cited as the offender in his representative capacity. The court must deal with the representative as if he was the person accused of having committed the offence in question.¹ Upon conviction the court may not impose upon this individual, in his representative capacity, any punishment (whether direct or as an alternative) other than a fine. This is the case even if the

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¹ Section 332(2) of the Criminal Procedure Act 51 of 1977.

relevant law makes no provision for the imposition of a fine in respect of the offence in question.² The provisions of the CPA pertaining to corporate criminal liability and sentencing reflect an individualist approach to the legal nature of a corporate entity. In terms of this approach corporations are viewed as nothing more than collectivities of individuals.³

The Companies Act 71 of 2008 also provides for measures that can be regarded as punitive in cases where a company is linked to criminal behaviour. A court may order a solvent company to be wound up in certain circumstances. A shareholder may apply, with leave of the court, for an order to wind up the company on the grounds that the directors, prescribed officers or other persons in control of the company are acting in a manner that is fraudulent or otherwise illegal.⁴ The Companies and Intellectual Property Commission or Takeover Regulation Panel may also apply to the court for an order to wind up the company on the grounds that the company, its directors or prescribed officers or other persons in control of the company are acting or have acted in a manner that is fraudulent or otherwise illegal. Such an order, however, may only be granted in cases where the Commission or Panel had issued a compliance notice in respect of the fraudulent or illegal conduct, and the company has failed to comply with that compliance notice, and within the previous five years, enforcement procedures in terms of the above Companies Act or the Close Corporations Act 69 of 1984 were taken against the company, its directors or prescribed officers or other persons in control of the company for substantially the same conduct, resulting in an administrative fine or conviction for an offence.⁵ One or more directors or one or more shareholders may also apply for an order to wind up the company on the ground that it is just and equitable to do so.⁶ Conducting an unlawful business may fall within the ambit of this category.⁷

² Section 332(2)(c) of the Criminal Procedure Act 51 of 1977.

³ E Colvin 'Corporate personality and criminal liability' (1995) 6 *Criminal Law Forum* 1-2; B Fisse and J Braithwaite 'The allocation of responsibility for corporate crime: individualism, collectivism and accountability' (1988) 11 *Sydney Law Review* 468 at 474-488; and E Lederman 'Models for imposing corporate criminal liability: from adaptation and imitation toward aggregation and the search for self-identity' (2000) 4 *Buffalo Criminal Law Review* 641-708.

⁴ Section 81(e)(i) of the Companies Act 71 of 2008.

⁵ Section 81(f) of the Companies Act 71 of 2008.

⁶ Section 81(c)(ii) of the Companies Act 71 of 2008.

⁷ *Cuninghame v First Ready Development* 249 (*Association incorporated in terms of section 21*) [2010] 1 All SA 473 (SCA). This case also deals with the concept 'just and equitable' in general.

In some countries the incapacitation of a company, either by restraining its business activities or by dissolution, is a sentencing option in its own right.⁸ In the United States a federal court may set a corporate fine at the amount sufficient to divest the organisation of all its assets if the organisation operated primarily for a criminal purpose or by criminal means.⁹ In terms of the South African Companies Act 71 of 2008 a court, on application of the Commission or Panel, may also impose an administrative fine for the company's failure to comply with a compliance notice issued in terms of the Act.¹⁰ The sanctions provided for in the Companies Act are, however, not imposed by a criminal court upon the conviction of a company for an offence.

The focus of this contribution is on the factors that a court ought to take into account when considering an appropriate sentence for corporate offenders within the existing sentencing framework. Reported South African case law on corporate criminality focuses primarily on the criminal liability of juristic persons and not so much on factors to be taken into account when the corporation (or, rather, its representative) is to be sentenced. Factors that are uniquely linked to corporate sentencing will therefore be highlighted. Prior to discussing the specific aggravating and mitigating factors to be considered at the sentencing phase of corporations, some remarks will be made regarding corporate moral blameworthiness and the purposes of corporate punishment. The unique factors that are particularly relevant to the sentencing of corporations will thereafter be dealt with under different headings that relate to the general approach to sentencing in South Africa.

2. Comparative approach

The factors that are particularly relevant to the sentencing of corporations and which are discussed, have been gleaned from three primary sources, namely a report by the Law Reform Commission of

⁸ Law Reform Commission of New South Wales Report 102 (2003) *Sentencing: Corporate Offenders*, available at <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/r102toc>, accessed on 27 February 2012 at paras [8.1]-[8.37]. See also section 131-39 of the French Code Pénal of 1992.

⁹ § 8C1.1 United States Sentencing Commission *Federal Sentencing Guidelines Manual* (2011), available at http://www.ussc.gov/Guidelines/2011_guidelines/index.cfm, accessed on 27 February 2012. See also Law Reform Commission of New South Wales op cit (n8) at paras [8.1]-[8.37].

¹⁰ Section 175(1) of the Companies Act 71 of 2008. Section 171 of the Act provides for compliance notices.

the Australian State of New South Wales;¹¹ the United States Federal Sentencing Guidelines Manual¹² and the Canadian Criminal Code.¹³ In all these jurisdictions there have been attempts to refine corporate sentencing and to sensitize courts to particular factors that ought to be considered in the process.

In 2003 the Law Reform Commission of New South Wales issued a comprehensive report pertaining to the sentencing of corporate offenders. A number of recommendations were made to amend legislation pertaining to sentencing to ensure express provision is made for the sentencing of corporate offenders.¹⁴ The report formed part of an extensive overview of the reform of sentencing law in New South Wales at the request of the Attorney-General. The Commission was requested to inquire into and report on a number of issues such as the formulation of principles and guidelines for sentencing and the rationalisation and consolidation of sentencing procedures.¹⁵ Although these recommendations have not been implemented, the Law Reform Commission's report provides a thorough analysis of the subject of corporate sentencing. The Criminal Code of Canada, on the other hand, was amended in 2004 to modernise the law with respect to the criminal liability and sentencing of corporations. This followed upon the report of a public inquiry into a coal mining disaster urging the Canadian government to reconsider the accountability of corporate executives and directors for the wrongful and negligent acts of corporations.¹⁶ The amended Criminal Code did not only address the issue of corporate criminal liability and director's liability. It now also provides for courts to consider specific additional factors with the usual factors when a corporation is to be sentenced.¹⁷ Chapter

¹¹ Law Reform Commission of New South Wales op cit (n8). It should be noted that in many countries do not provide for corporate criminal liability. Some of these countries such as Greece, Germany and Sweden nevertheless have in place systems whereby administrative penalties may be imposed on juristic persons. See in this regard Allens Arthur Robinson (firm) *'Corporate Culture' as Basis for the Criminal Liability of Corporations* (2008) 4, available at <http://198.170.85.29/Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf>, accessed on 27 February 2012.

¹² US Federal Sentencing Guidelines Manual op cit (n9).

¹³ Criminal Code RSC 1985 c.C-46 (Canada), available at <http://laws-lois.justice.gc.ca/eng/acts/C-46/>, accessed on 27 March 2012.

¹⁴ Law Reform Commission of New South Wales op cit (n8). The recommendations are made in different sections of the report and are not summarised at the end of the report.

¹⁵ Law Reform Commission of New South Wales 'Sentencing' Discussion Paper 33 (1996), available at <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/dp33toc>, accessed on 30 August 2012.

¹⁶ Allens Arthur Robinson op cit (n11) at para [5.3].

¹⁷ Section 718.21 of the Criminal Code RSC 1985 c.C-46 (Canada).

8 of the United States Federal Sentencing Guidelines is applicable to organisations convicted of federal crimes. The United States Sentencing Commission was established in 1984 with the purpose of developing guidelines for the sentencing of individuals and organisations convicted of federal crimes.¹⁸ The sentencing guidelines for organisations were approved by the US Sentencing Commission in April 1991 and are reviewed from time to time.¹⁹ In 2005 the United States Supreme Court held that the guidelines were advisory and not mandatory. The Supreme Court held that a sentencing court is still required to consider the guidelines, but it may also consider other factors.²⁰ As is the case in South Africa, the fine is the main sentence that can be imposed in both New South Wales and Canada.²¹ According to the US Federal Sentencing Guidelines Manual corporate fines ought to be determined with regard to a fairly complex and rather mechanical system. A number of factors are listed that may increase or decrease the organisation's so-called 'culpability score' and thus the ultimate fine of the organisation in question.²²

Extensive reference is also made to the third King Report on Corporate Governance in South Africa (hereafter King III).²³ Although the report does not deal directly with corporate sentencing, it does provide useful insights into corporate ethical behaviour, corporate compliance and good corporate citizenship in general in the South African context. These factors may impact upon the sentence to be imposed.²⁴ Where sufficient South African jurisprudence does not exist suggestions will be made that are gleaned from the comparative sources.

¹⁸ HN Butler 'A national conference on sentencing of the corporation' (1991) 71 *Boston University Law Review* 189 at 189.

¹⁹ Butler op cit (n18) 191.

²⁰ *United States v Booker* 123 S. Ct. 785 (2005). The exact impact of this judgement on corporate sentencing has attracted divergent views of US federal courts. See in this regard JS Rakof, LR Blumkin and RA Sauber *Federal corporate sentencing: compliance and mitigation* (2005) (loose leaf) 1.17-1.21.

²¹ Law Reform Commission of New South Wales op cit (n8) at para [6.1] and s 735.1 of the Criminal Code RSC 1985 c.C-46 (Canada).

²² Chapter 8 Part C of the US Federal Sentencing Guidelines Manual op cit (n9).

²³ Institute of Directors of Southern Africa *King Report on Governance for South Africa 2009* (2009), (hereafter simply referred to as King III).

²⁴ See in this regard the discussion under the heading 'effective compliance policies', hereunder.

3. Corporate moral blameworthiness and the South African Constitution?

In *Mnsane v S*,²⁵ Mlambo JA stated that moral blameworthiness plays a critical role in the determination of an appropriate sentence. In business ethics and organisational theory opposing views exist on whether corporations can be regarded as entities with moral attributes.²⁶ King III refers to a company not only as an economic institution, but also as a corporate citizen and adds that '[a]s such it has social and moral standing in society, with all the responsibilities attached to that status.'²⁷ Whilst it is unlikely that the issue of an organisation's moral status can be fully resolved,²⁸ it cannot be gainsaid that companies are social entities with rights and responsibilities. The rights contained in the Bill of Rights must guide the actions of companies and impact upon society's moral views of companies.²⁹ The Constitution provides that a provision of the Bill of Rights binds a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.³⁰ Juristic persons are furthermore entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of the juristic person.³¹ It seems that the expression 'moral blameworthiness', as far as sentencing is concerned, would therefore refer at least to the court's and society's moral evaluation of the corporate criminal conduct in the light of all the aggravating and mitigating factors pertaining to the crime, the offender and society's interests.³²

4. Purposes of corporate sentencing

Views on the purpose of criminal punishment of corporations will be influenced by underlying assumptions regarding the legal nature of

²⁵ *Msane v S* [2009] 1 All SA 454 (SCA) at para [11]. See further *S v Roman* 1994 (1) SACR 436 (A) at 444f-g; *S v Ferreira* 2004 (2) SACR 454 (SCA) at para [44]; and *S v Mbatha* 2009 (2) SACR 623 (KZP) at 631f-j.

²⁶ PA French 'The corporation as a moral person' (1979) 16 *American Philosophical Quarterly* 207-215; M Velasquez 'Debunking corporate moral responsibility' (2003) 13 *Business Ethics Quarterly* 531-562 and J Sheppard 'The corporate moral person: the organization's personality and its board' (1994) 7 *Journal of Business & Society* 151-164.

²⁷ King III op cit (n23) Principle 1.2 at para [16].

²⁸ S Wilmot 'Corporate moral responsibility: What can we infer from our understanding of organizations?' (2001) 30 *Journal of Business Ethics* 161 at 165.

²⁹ King III op cit (n23) Principle 1.2 at para [23].

³⁰ Section 8(2) of the Constitution of the Republic of South Africa, 1996.

³¹ Section 8(4) of the Constitution of the Republic of South Africa, 1996.

³² WA Spurgeon and TP Fagan 'Criminal liability for life endangering corporate criminal conduct' (1981) 72 *Journal of Criminal Law and Criminology* 400 at 401.

juristic persons. The Australian scholars Clough and Mulhern are of the view that the punishment of corporations is 'purely utilitarian' and therefore deterrence and rehabilitation, rather than retribution, are the primary aims of sentencing corporate offenders. The main purpose of corporate punishment is to prevent the offender from re-offending and to discourage other corporate entities from re-offending. They argue that since corporations are inanimate objects which cannot suffer or feel shame, retribution in the sense of just desserts and moral condemnation of society cannot be exacted in any meaningful way.³³

Apart from the traditional purposes of punishment, recent works on corporate sentencing also emphasise the need for corporate rehabilitation.³⁴ This is mostly linked to the realist, as opposed to the individualistic, approach to corporate criminal liability. Corporate criminal conduct often results from inadequate monitoring and control systems or an unacceptable corporate culture or ethos. Internal corporate discipline must therefore be improved.³⁵ Corporate criminals must be induced to alter their future conduct by changing their internal structures, policies and procedures.³⁶ The Canadian Criminal Code, for instance, provides that a sentencing court may direct a corporation to implement new policies, standards and procedures; to ensure that these reforms are communicated within the corporation; to report to the court on implementation of the reforms; and identify a senior officer who will be charged with responsibility for compliance and reforms.³⁷ To effectively pursue this purpose of corporate sentencing it will, however, be necessary to broaden the range of sentencing options available to the courts by including, for example, corporate probation.³⁸ The US Federal Sentencing Guidelines Manual specifically aims to create a structural foundation to encourage corporations to conduct themselves ethically and to comply with all applicable laws.³⁹

³³ J Clough and C Mulhern *The prosecution of corporations* (2002) 185-187.

³⁴ W Meeks 'Corporate and White-Collar Crime Enforcement: Should regulation and rehabilitation spell an end to corporate criminal liability?' (2006) 40 *Columbia Journal of Law and Social Problems* 95-100 and Clough and Mulhern op cit (n33) 187.

³⁵ I Laing *The criminal liability and punishment of corporations in Canada* LLM (Dalhousie University) (2005) 168; PH Bucy 'Corporate ethos: a standard for imposing corporate criminal liability' (1991) 75 *Minnesota Law Review* 1095 at 1127-1128 and Lederman op cit (n3) 641-708.

³⁶ Clough and Mulhern op cit (n33) 187 and Laing op cit (n33) 168.

³⁷ Section 732.1 (3.1) of the Criminal Code RSC 1985 c.C-46 (Canada).

³⁸ Law Reform Commission of New South Wales op cit (n8) at para [9].

³⁹ US Federal Sentencing Guidelines Manual op cit (n9) Introductory Commentary.

5. Sentencing in South Africa

The general approach to sentencing in South African law is well-settled. In *Director of Public Prosecutions, Kwazulu-Natal v P*,⁴⁰ the Supreme Court of Appeal (SCA) restated these principles as follows:

‘The so-called traditional approach to sentencing required (and still does) the sentencing court to consider the “triad consisting of the crime, the offender and the interests of society”. In the assessment of an appropriate sentence, the court is required to have regard to the main purposes of punishment, namely, the deterrent, preventive, reformative and the retributive aspects thereof. To these elements must be added the quality of mercy, as distinct from mere sympathy for the offender.’

The interests of the victim of the crime should also be brought into the equation.⁴¹ At the sentencing stage, as much information as possible must be placed before the presiding officer regarding the perpetrator, the circumstances of the commission of the offence, and the victim’s circumstances (including the impact which the commission of the offence had on the victim). The prosecutor, defence counsel and the presiding officer are all under a duty to complete the picture as far as possible.⁴²

A perusal of reported South African case law, however, reveals little of the manner in which these principles are to be applied in cases of a corporate accused. Reported cases relating to corporate criminality are mainly concerned with the narrow issue of the criminal liability of the corporate entity for the offence in question. In *S v Shaik*,⁴³ Squires J simply stated with reference to the corporate accused:

‘It follows from their legal nature that the only penalty that can be imposed on them is a fine, nor are they subject to the provisions of the Criminal Law Amendment Act 105 of 1997. It is therefore the ordinary guidelines that regulate the imposition of a fine as a suitable punishment which can apply to them.’

Our courts have stated on numerous occasions with regard to individual offenders that, as a general rule, a fine that is patently beyond the means of an accused ought not to be imposed.⁴⁴ Such a fine has been described as ‘an exercise in futility, if not cynicism.’⁴⁵ The Appellate

⁴⁰ *Director of Public Prosecutions, KwaZulu-Natal v P* 2006 (1) SACR 243 (SCA) at para [13]. For a detailed discussion on the general principles of sentencing see SS Terblanche *Guide to Sentencing in South Africa* 2ed (2007) 137-178.

⁴¹ *S v Dyantyi* 2011 (1) SACR 540 (ECG) at para [18].

⁴² *S v Olivier* 2010 (2) SACR 178 (SCA) at para [8]. See also *S v Siebert* 1998 (1) SACR 554 (A) and Terblanche op cit (n40) 95-103.

⁴³ *S v Shaik* 2007 (1) SACR 142 (D) at 244f.

⁴⁴ *S v Sithole* 1979 (2) SA 67 (A) at 69G.

⁴⁵ *S v Kekana* 1989 (3) SACR 513 (T) at 518F.

Division, however, held that there is no inflexible rule in our law that a fine should not be imposed unless it is certain that the accused will be able to pay it.⁴⁶ An individual accused may still be able to avoid prison by being given the chance to raise money by selling assets or by borrowing money.⁴⁷

What follows is a discussion of some factors that may be of particular relevance in the context of the sentencing of corporate entities. Although these factors are discussed under headings that relate to the traditional broad factors pertaining to sentencing, it has to be emphasised that the specific mitigating and aggravating factors may overlap the traditional delimitation.⁴⁸

6. The crime

One of the factors identified by the report of the Law Reform Commission of New South Wales that relates to the objective seriousness of the offence, is the gravity with which the offence is viewed by the community.⁴⁹ The maximum penalty prescribed by law may be indicative of the gravity of the offence since it reflects the legislative view of the seriousness of the criminal conduct.⁵⁰ The actual harm or the potential risk of harm from the offence may also be indicative of the seriousness of the offence.⁵¹ Apart from obvious harm such as environmental and financial damage, courts should not lose sight of the ripple effect of the initial harm. Research has for instance pointed out that the Exxon Valdez Oil Spill of 1989 did not only affect the environment negatively, but had also resulted in changes to the socio-cultural fabric of the affected communities, a decline in subsistence activities and increased rates of depression, anxiety and post-traumatic stress-disorder.⁵² In the South African Constitutional Court case *S v Coetzee*,⁵³ Mokgoro J stated in this regard:

⁴⁶ *S v Van Rooyen* 1994 (2) SACR 823 (A). See also *S v Ntakatsane* 1990 (2) SACR 382 (NC).

⁴⁷ *S v Mlalazi* 1992 (2) SACR 673 (W).

⁴⁸ *S v RO* 2010 (2) SACR 248 (SCA) at para [30].

⁴⁹ Law Reform Commission of New South Wales op cit (n8) at para [4.10]. Terblanche op cit (n40) 187 refers with apparent approval to the approach adopted by the South African Law Commission to determine the seriousness of the crime. Consideration must be given to degree of harmfulness (or risk of harmfulness), and the degree of culpability of the offender.

⁵⁰ Law Reform Commission of New South Wales op cit (n8) at paras [4.11]-[4.12]. See also *S v Thembaletshu* 2009 (1) SACR 50 (SCA) at para [11].

⁵¹ Law Reform Commission of New South Wales op cit (n8) at para [4.13].

⁵² LA Palinkas, MA Downs, JS Petterson and J Russell 'Social, cultural and psychological impacts of the Exxon Valdez Oil Spill' (1993) 52 *Human Organization* 1-13.

⁵³ *S v Coetzee* 1997 (1) SACR 379 (CC) at para [139].

'Like my Colleagues, however, I am extremely concerned also by the potential for harm which can result from corporate recklessness, dishonesty and undue exploitation. Illegal toxic waste dumping and corporate recklessness in the area of health and safety in the work environment, particularly in situations of underground mining, are not remote possibilities in this country.'

If the offence involves a systematic and deliberate defiance of the law, it may be considered a more serious violation and may attract a higher penalty.⁵⁴ In terms of the Canadian Criminal Code, a court may take into account the degree of planning involved in carrying out the corporate offence as well as the duration and complexity of the offence.⁵⁵ South African courts are fully entitled to take into account the fact that a crime had been carefully planned and executed in deciding an appropriate sentence.⁵⁶ A further factor is the foreseeability of the commission of an offence and its consequences. If an offence is deemed to have been foreseeable, the court may view it as more serious, and the corporate offender as more morally blameworthy for allowing the event or its consequences to occur.⁵⁷ In this regard the question of whether the company had proper compliance and risk management processes in place will be an important factor. Furthermore a question is whether the company had identified, assessed and responded to the risk of damage or harm, arising from non-adherence to the law and regulations or whether it had preferred to close its eyes to possible harms.⁵⁸

7. The offender

7.1 Financial circumstances

The Law Reform Commission of New South Wales report on corporate sentencing also emphasized the corporate offender's financial circumstances, and particularly its ability to pay a fine, as important factors to consider in the sentencing process. The financial circumstances include the size of the corporate offender. The court will have to take into account whether the business enterprise is large in size and has substantial assets. A fine that would operate as no significant imposition on a large corporation might well ruin a smaller one.⁵⁹

⁵⁴ Law Reform Commission of New South Wales op cit (n8) at para [4.17].

⁵⁵ Section 718.21(b) of the Criminal Code RSC 1985 c.C-46 (Canada).

⁵⁶ *S v Engelbrecht* 2011 (2) SACR 540 (SCA) at para [29] and *Terblanche* op cit (n40) 187.

⁵⁷ Law Reform Commission of New South Wales op cit (n8) at para [4.21].

⁵⁸ *King III* op cit (n23) Principle 6.3at paras [14]-[15].

⁵⁹ Law Reform Commission of New South Wales op cit (n8) at para [4.28].

In *Sbaik* the South African court was confronted with a number of companies that had been convicted on charges of fraud and corruption relating to payments made to a high ranking politician. Some of the companies were either dormant or had no assets, or both. The matter was complicated by the fact that the Asset Forfeiture Unit of the National Prosecuting Authority had either seized or intended to seize part of or all the assets of the companies that were active and earning an income, or were investment or holding companies. The court held that, even though the imposition of a fine on the latter category of companies 'may cause some dislocation to their present arrangement', they would be able to pay a fine, particularly if given some time to raise the money. These companies, the court found, had either available or could raise from its resources the fines the court intended to impose. The court, however, held that it was not sensible to impose any fine that could not be recovered but 'since some sentence must be imposed' a fine was imposed but suspended on condition that these corporate accused were not found guilty of corruption, fraud or dishonesty committed during the period of suspension.⁶⁰ The SCA endorsed the approach of Squires J to the sentencing of the corporate offenders by simply pointing out that Squires J took care to ensure that fines were imposed only on the corporations that could afford to pay and that the correct balance was achieved between societal interests and the circumstances of the corporate offenders.⁶¹ A court could also, where appropriate, consider the payment of the fine in instalments or the deferment of the fine.⁶²

The Law Reform Commission of New South Wales also identified other financial circumstances including whether the company had gone through low profit years; was burdened with bad debts and had reinvested all profits back into the company; was paying back substantial debt; ran at a loss; or was experiencing deteriorating trading conditions.⁶³ In terms of the Canadian Criminal Code a court could further take into account any advantage realised by the organisation as a result of the offence.⁶⁴ In South Africa, in *Deal Enterprises (Pty) Ltd*,⁶⁵ a company was convicted of bribing a railway official with bribes totalling R44 900 over a period of eight years. The trial court had fined the company R100 000. The Appellate Division of the Supreme Court simply stated, without elaboration, that the trial

⁶⁰ *S v Sbaik* 2007 (1) SACR 142 (D) at 245a-b.

⁶¹ *S v Sbaik* 2007 (1) SA 240 (SCA) at para [212].

⁶² *S v Kika* 1998 (2) 428 (W); *S v Machete* 2007 (1) SACR 398 (T) and *S v Dandiso* 1995 (2) SACR 573 (W).

⁶³ Law Reform Commission of New South Wales op cit (n8) at para [4.30].

⁶⁴ Section 718.21(a) of the Criminal Code RSC 1985 c.C-46 (Canada).

⁶⁵ *S v Deal Enterprises (Pty) Ltd* 1981 (4) SA 29 (A).

judge's approach that the fine should not be less than the fruits of the bribery could not be faulted. Furthermore any regulatory penalty already imposed on the organisation or one of its representatives in respect of the conduct that formed the basis of the offence could also be taken into consideration.⁶⁶

7.2 Effective compliance policies

King III links good corporate governance with compliance with the law. According to the report, good governance is not something that exists separately from the law and it is inappropriate to unhinge governance from the law.⁶⁷ King III also states that ethics (or integrity) is the foundation of, and reason for, corporate governance. The ethics of corporate governance require the board to ensure that the company is run ethically. Corporate governance is, in essence, a company's practical expression of ethical standards.⁶⁸ Compliance with laws, rules, codes and standards should be incorporated in the code of conduct of a company to entrench a culture of compliance.⁶⁹

The presence or absence of an effective compliance or ethics programme in an organisation plays a significant role in the sentencing of corporate entities for federal offences in the United States. The absence of compliance systems is a factor which may aggravate the penalty, whilst the existence thereof may serve as a mitigating factor.⁷⁰ According to the US Federal Sentencing Guidelines Manual an effective compliance and ethics programme requires an organisation to exercise due diligence to prevent and detect criminal conduct and furthermore promote an organisational culture that encourages ethical conduct and a commitment to compliance with the law.⁷¹ The Manual identifies a number of minimum requirements before a compliance and ethics programme will be regarded as 'effective'.⁷²

Standards Australia is an independent, non-for-profit organisation, recognised by the Australian Government as the peak non-government standards body in Australia.⁷³ Standards Australia prepared a so-called 'Standard' to provide for the development, implementation and maintenance of an effective compliance programme within both public and private organisations. The principles are intended to help

⁶⁶ Section 718.21(f) of the Criminal Code RSC 1985 c.C-46 (Canada).

⁶⁷ King III op cit (n23) Introduction and Background para [4].

⁶⁸ King III op cit (n23) Principle 1.1 at paras [12]-[13].

⁶⁹ King III op cit (n23) Principle 6.4 at para [20].

⁷⁰ §8C2.5(f) of the US Federal Sentencing Guidelines Manual op cit (n9).

⁷¹ §8B2.1(a) of the US Federal Sentencing Guidelines Manual op cit (n9).

⁷² §8B2.1 of the US Federal Sentencing Guidelines Manual op cit (n9).

⁷³ See in this regard <http://www.standards.org.au/>.

organisations identify and remedy any deficiencies in their compliance with laws, regulations and codes, and develop processes for continual improvement in this area.⁷⁴ The Manual provides a useful summary of the features of effective compliance programmes, many of which are also to be found in the US Federal Sentencing Guidelines. For a compliance programme to be considered effective in terms of this Standard, it must comply with the following twelve principles. There must be a commitment by the governing body and top management to effective compliance that permeates the whole organisation.⁷⁵ The compliance policy must be aligned to the organisation's strategy and business objectives and be endorsed by its governing body.⁷⁶ Appropriate resources must be allocated to develop, implement, maintain and improve the compliance programme.⁷⁷ The objectives and strategy of the compliance programme must be endorsed by the governing body and top management.⁷⁸ The programme must identify and assess compliance obligations.⁷⁹ Responsibility for compliant outcomes should be clearly articulated and assigned.⁸⁰ Competence and training needs must be identified and addressed to enable employees to fulfil their compliance obligations.⁸¹ Behaviours that create and support compliance must be encouraged and behaviours that compromise compliance must not be tolerated.⁸² Control measures must be put in place to manage the identified compliance obligations and achieve desired behaviours.⁸³ Performance of the compliance programme must be monitored, measured and reported.⁸⁴ The organisation must be able to demonstrate its compliance programme through both documentation and practice.⁸⁵ The compliance programme must be regularly reviewed and continually improved.⁸⁶

According to King III, one of the principles of good corporate governance is that the board of the company should delegate the implementation of an effective compliance framework and processes

⁷⁴ Standards Australia Committee *Australian Standard: Compliance Programs* (AS 3806-2006 2ed) Foreward. (hereafter *Australian Standard: Compliance Programs*).

⁷⁵ *Australian Standard: Compliance Programs* (AS 3806-2006) Principle 1.

⁷⁶ *Australian Standard: Compliance Programs* (AS 3806-2006) Principle 2.

⁷⁷ *Australian Standard: Compliance Programs* (AS 3806-2006) Principle 3.

⁷⁸ *Australian Standard: Compliance Programs* (AS 3806-2006) Principle 4.

⁷⁹ *Australian Standard: Compliance Programs* (AS 3806-2006) Principle 5.

⁸⁰ *Australian Standard: Compliance Programs* (AS 3806-2006) Principle 6.

⁸¹ *Australian Standard: Compliance Programs* (AS 3806-2006) Principle 7.

⁸² *Australian Standard: Compliance Programs* (AS 3806-2006) Principle 8.

⁸³ *Australian Standard: Compliance Programs* (AS 3806-2006) Principle 9.

⁸⁴ *Australian Standard: Compliance Programs* (AS 3806-2006) Principle 10.

⁸⁵ *Australian Standard: Compliance Programs* (AS 3806-2006) Principle 11.

⁸⁶ *Australian Standard: Compliance Programs* (AS 3806-2006) Principle 12.

to management.⁸⁷ Management should develop a compliance policy which should be approved by the board.⁸⁸ The company's procedures and control framework should incorporate compliance with relevant laws, rules, codes and standards and the board should receive assurance on the effectiveness of the procedures and control framework.⁸⁹ Compliance with laws, rules, codes and standards should be incorporated in the code of conduct of the company to entrench a culture of compliance. Employees should be encouraged to understand and implement these codes.⁹⁰ The compliance culture should be encouraged through leadership, establishing the appropriate structures, education and training, communication, and measurement of key performance indicators relevant to compliance.⁹¹ The compliance function should have adequate resources to discharge its responsibilities.⁹² Each company should consider the suitable structure and size of its compliance function, considering what is appropriate for the adequate management of the compliance risk of the particular company and having regard for the legislative requirements that apply to the compliance function. The structure of the compliance function, its role and its position in terms of reporting lines, should reflect the company's decision on how compliance is integrated with its ethics and risk management.⁹³

The US Federal Sentencing Guidelines have due regard for the fact that the features of an organisation's actions to prevent and detect criminal conduct depends on the size of the organisation. Although small and large organisations must be equally committed to ethical conduct and compliance with the law, small organisations may meet the requirements with less formality and fewer resources than would be expected of large organisations.⁹⁴

In terms of the South African Companies Act the court may further consider to what extent the company's social and ethics committee, where applicable, has monitored the activities of the company having regard to legislation, other legal requirements and codes of best

⁸⁷ King III op cit (n23) Principle 6.4.

⁸⁸ King III op cit (n23) Principle 6.4 at para [17].

⁸⁹ King III op cit (n23) Principle 6.4 at para [19].

⁹⁰ King III op cit (n23) Principle 6.4 at para [20].

⁹¹ King III op cit (n23) Principle 6.4 at para [21].

⁹² King III op cit (n23) Principle 6.4 at para [24]. According to Terblanche op cit (n40) 152 the personal circumstances of the criminal in cases where the corporation is the true offender, refer to the 'personality' and "personal circumstances of the corporation and not of the director or servant.

⁹³ King III op cit (n23) Principle 6.4 at para [25].

⁹⁴ Commentary on §8B2.1 of the US Federal Sentencing Guidelines Manual op cit (n9).

practice.⁹⁵ It is submitted that the extent to which the absence of proper compliance systems has encouraged or allowed the corporate criminal conduct should be taken into account at the sentencing phase. In cases where an effective compliance program had been in place at the time of the commission of the offence, it should serve to mitigate the sentence.

7.3 Corporate character

Closely connected to the issue of good corporate governance is a corporation's 'character' or reputation. The corporate character may relate to the nature of the corporation's business, the contribution that its business makes to the community or to the particular industry to which it belongs, and the fact that it is generating employment.⁹⁶

Acceptance of responsibility and remorse may also be mitigating factors. This may include a plea of guilty; co-operation with investigators, regulators and prosecutors and stopping the offending conduct voluntarily.⁹⁷ A plea of guilty, however, is not necessarily an indication of remorse if the evidence leaves little option for the accused but to enter a plea of guilty.⁹⁸ The Canadian Criminal Code deals extensively with steps taken by the corporate entity after the occurrence of the offence that may serve to mitigate or aggravate the sentence. A court should for instance be able to consider whether the organisation has attempted to conceal its assets, or convert them, in order to show that it is not able to pay a fine or make restitution.⁹⁹ The sentencing court could also consider any penalty imposed by the organisation on a representative or employee for his or her role in the commission of the offence.¹⁰⁰ The court may also consider any restitution that the organization is ordered to make or any amount that the organisation has paid to a victim of the offence¹⁰¹ and any measures that the organisation has taken to reduce the likelihood of it committing a subsequent offence.¹⁰²

⁹⁵ Section 72(4) Companies Act 71 of 2008 and Regulation 43, Companies Regulations, 2011 GNR 351 of GG 34239 of 26 April 2011.

⁹⁶ Law Reform Commission of New South Wales op cit (n8) at para [40.47].

⁹⁷ Law Reform Commission of New South Wales op cit (n8) at para [40.38]. According to §8C4.1 of the US Federal Sentencing Guidelines Manual op cit (n9) 'substantial assistance' to authorities may lead to a downward departure from the so-called 'base fine' to be imposed.

⁹⁸ *Britz v S* [2010] JOL 25567 (SCA) at para [11].

⁹⁹ Section 718.21(c) of the Criminal Code RSC 1985 c.C-46 (Canada).

¹⁰⁰ Section 218.21(h) of the Criminal Code RSC 1985 c.C-46 (Canada).

¹⁰¹ Section 718.21(i) of the Criminal Code RSC 1985 c.C-46 (Canada).

¹⁰² Section 718.21(j) of the Criminal Code RSC 1985 c.C-46 (Canada). Law Reform Commission of New South Wales op cit (n8) at para [40.32].

In South Africa, the company's regard or disregard for fundamental rights entrenched in the Bill of Rights ought also to be considered. The responsibilities outlined in the Bill of Rights provide the legal framework within which companies must operate. The foundational values of dignity, freedom and equality should guide the company in its interaction with every stakeholder. The specific rights contained in the Bill of Rights provide important guidance to companies for the sustainability of their strategies and operations.¹⁰³ The court should also consider whether directors and other officers had sufficiently familiarised themselves with the general content of applicable laws, rules, codes and standards to be able to adequately discharge their fiduciary duties in the best interests of the company and their duty of care, skill and diligence.¹⁰⁴ A 'don't-care' attitude should be an aggravating factor. The court should ask itself what the company's ethical standing was at the time of the commission of the offence. Ethical standards should inform all company practices, procedures, policies and conduct.¹⁰⁵ The integration of ethical standards consists of management practices (for example, employment screening, awareness campaigns, training, regular communication, and a consistent disciplinary and reward system) and structures (such as an ethics committee, an ethics function and ethics champions).¹⁰⁶

7.4 Community

The sentencing court should also consider the effect of the sentence on the community, including the provision of public services and the impact that the sentence would have on the economic viability of the organisation and the continued employment of its employees.¹⁰⁷ Furthermore the costs of the investigation and prosecution may also be a relevant factor in determining a suitable sentence.¹⁰⁸ Companies cannot expect society and future generations to carry the economic, social and environmental costs and burdens of its operations. Companies should act with economic, social and environmental responsibility. A company itself should ensure that its impact on the economy, society and the natural environment is sustainable.¹⁰⁹

¹⁰³ King III op cit (n23) Principle 1.2 at para [23].

¹⁰⁴ King III op cit (n23) Principle 6.2 at para [13].

¹⁰⁵ King III op cit (n23) Principle 1.3 at para [45].

¹⁰⁶ King III op cit (n23) Principle 1.3. at para [48].

¹⁰⁷ Section 718.21(d) of the Criminal Code RSC 1985 c.C-46 (Canada).

¹⁰⁸ Section 718.21(e) of the Criminal Code RSC 1985 c.C-46 (Canada).

¹⁰⁹ King III op cit (n23) Principle 1.2 at para [18].

8. Conclusion

It is trite that sentencing is pre-eminently a matter falling within the discretion of the sentencing court. South African courts do not determine sentences according to a mechanical process. The sentencing court should, as far as possible, consider factors normally taken into account when sentencing individual offenders. Our courts will, however, also have to be sensitised to factors that are particularly relevant to the corporate reality. Companies are more than mere economic entities. They have social and moral standing in society and therefore also the responsibility to be good corporate citizens. The South African Bill of Rights provides the framework within which companies must operate. Corporate rehabilitation is an important aim of corporate punishment. This may require an improvement of corporate policies, corporate structures and the overall corporate ethos. Courts must therefore also individualise the sentence of each corporation. In this regard the sentencing court should consider the financial circumstances of the offender, including the size, assets and profitability of the corporation. The presence of compliance programmes and the corporation's effective reaction to criminal conduct may mitigate the blameworthiness of the corporation. Compliance with the requirements of the specific regulatory framework within which the company operates is an important indicator of its ethical standards. Courts should also carefully consider the effect of the sentence on the community and the employees of the company, especially in South Africa with its high rate of unemployment.