

which denotes the cleanest country, to 0 which denotes the highly corrupt. Denmark, Singapore and New Zealand were at the top of the list in 2010 at 9.3 while at the bottom was Somalia with a score of 1.1.¹² In 2010, with a score of 3.2, Swaziland ranked number 91 out of 123.¹³

In tackling corruption, Swaziland has used a multifaceted approach. The three arms of government have all been involved in the fight against corruption. At the centre of the strategy is a formally independent body, the Anti-Corruption Commission (ACC). Realising that this is a newly formed body that will have teething problems, the state has made use of other avenues, including *ad hoc* Commissions. In some instances, the King himself has been involved.

One would expect that with such efforts and with all the branches of government harnessed to combat this disease, corruption would be a thing of the past in Swaziland. However, as suggested above, it clearly is not. Instead, the trend of corruption has been on the rise. It is in this context that the study seeks to assess the adequacy of the approach against corruption by the state and how it may be improved.

1.3 Research questions and objectives of the study

Since the government has realised that a significant portion of its funds is lost through corruption, the study aims to understand what it has done to alleviate the problem. The paper raises the following questions:

- What methods are being employed by the state in response to corruption?
- Could these methods be blamed for the exacerbation of the crime of corruption?
- The Kingdom of Swaziland may have avenues for combating corruption but if these are toothless, the battle is far from being won. The economy is collapsing and corruption is significantly to blame. What can Swaziland do to alleviate this problem?

In this regard, the paper takes an expository approach to reveal the cases of corruption that have been reported by the local newspapers in Swaziland. The aim is to render visible the magnitude of grand corruption and to analyse the state's response thereto. It is only by studying the state's

¹² Transparency International Corruption Perceptions Index (2010).

¹³ Transparency International Corruption Perceptions Index (2010).

response to each of the individual cases to be discussed that the overall approach of the state can be comprehended. This approach will assist also in identifying the shortcomings of the government in its approach to preventing and combating corruption. Conclusions will be drawn on the effectiveness of the system adopted and recommendations will be made on how best the system may be improved.

1.4 Significance of the study

Corruption is a buzz word in Swaziland. Some are ambivalent about its presence because of ignorance of the situation and the lack of prosecutions, while others are left wondering why prosecutions are not being carried out because corruption is self-evident. Either way, the failure to prosecute corruption does not mean that it does not exist.

The existence of a body such as the ACC shows acknowledgement of the penetration of corruption in the economy and constitutes evidence that efforts are being made to prevent or combat it. Nonetheless, reports indicate that instead of the situation getting better, it is getting worse by the day. Questions arise as to how this could be happening despite the existence of the ACC as well as a body of anti-corruption legislation.

The study is necessary to collect the cases of grand corruption that have been randomly reported in the print media and consolidate them in one document to show the existence and extent of the problem in Swaziland. It is crucial to analyse the approach of the state in tackling corruption and the anti-corruption measures it has employed. It is through understanding the mandate of the ACC and the adequacy of the legislative framework that we can comprehend the reasons for the escalating rate of corruption and how best Swaziland can improve its efforts to bring to justice those responsible for the crime.

Thus, the study will contribute to identifying the loop-holes in the criminal justice system and contribute to their rehabilitation through the recommendations that it will propose. It will be an academic exercise in classifying the different scenarios encountered as forms of grand corruption to explicate further the concept of corruption in relation to the case of Swaziland. This will enable a

scholar in Swaziland to relate to and appreciate the concept in a richer way. Hence, the research will be an addition to the scanty literature available on Swaziland.

1.5 Research Methodology

The study will be qualitative and library-based. It will be a critical-analytical reading of the primary sources to be consulted. These include the different types of cases of corruption reported in the media, the few decided cases, the legislative framework, as well as the documents of the bodies responsible for anti-corruption efforts in Swaziland. Also, the study will attempt an assessment of Swaziland's compliance with international standards, to which end international anti-corruption instruments will be analysed as well.

The research will rely also upon academic publications which include books, journal articles and commentaries for analyses and knowledge of the concept of grand corruption and measures to alleviate it.

1.6 Scope of the study

Corruption takes many forms. However, the focus of the study will be on grand corruption, since politicians take without regard to the effects it has on the 'overall pie of the economy'.¹⁴ Hence, the research will concern itself with how Swaziland has responded to the evil of grand corruption and its dire effects on the economy, both as regards preventing and combating it. The study identifies the different pillars that constitute the anti-corruption integrity system. However, it is restricted analytically to the ACC as the foundation of the anti-corruption integrity system.

1.7 Preliminary chapter framework

The study consists of four more chapters. Chapter two will be a definitional chapter, attempting to define the concept of corruption, in particular grand corruption and its constituent elements. It will give practical examples in relation to Swaziland to demonstrate how the constituent elements of grand corruption are manifested.

¹⁴ Hope (2000:1).

Having established the presence and extent of corruption, the response of the state to it will be assessed. The third chapter will be an analytical journey into the present anti-corruption legislative framework and the role of the pillars of the anti-corruption system in the fight against grand corruption. The fourth chapter will contain an assessment of the response of the state to grand corruption, with particular reference to the ACC. A summary of the findings and the author's conclusions on the findings will be made in the fifth chapter.



CHAPTER 2

THE CONCEPT OF CORRUPTION

'Corruption, like an elephant, is difficult to describe but not difficult to recognise when observed.' – Vito Tanzi¹⁵

2.1 Introduction

Many scholars and legal instruments have defined the term corruption, albeit differently. Hence, there is no universally accepted definition of corruption and it is unlikely that consensus will be reached in this regard.¹⁶ However, this chapter reviews the legal and academic literature to develop a suitable definition of corruption for the research while also making specific reference to the notion of grand corruption. It will give the constituent elements of grand corruption and cite practical examples in Swaziland. Also, this chapter will highlight the possible effects grand corruption has on the economy of Swaziland.

2.2 Attempts at defining corruption

Corruption is a chameleon-like term that changes in relation to the context in which it is used. What one society may view as corrupt, another may not. It is the indignation and disgust towards the practice, as shaped by the moral values of the society, which will determine a corrupt practice in that society. Hence, it has been difficult to settle upon a universally accepted definition of the term and various legal instruments have tended to define the term differently. However, common amongst them is agreement on what constitutes corruption.

Due to the controversies of the definition of corruption, the United Nations Convention against Corruption (UNCAC) has opted not to define the term. Instead, it lists the constituent crimes of corruption, including bribery and embezzlement in the public and private sectors, trading in influence, illicit enrichment, abuse of functions, laundering of criminal proceeds and concealment.¹⁷

¹⁵ Tanzi (1998: 564).

¹⁶ De Maria (2005: 6).

¹⁷ Khemani (2009: 4).

Choosing a somewhat more modest approach, the African Union Convention on the Prevention and Combating Corruption (AU Convention) defines corruption as acts and practices, including related offences, proscribed in the Convention.¹⁸ The acts proscribed in the AU Convention include soliciting and accepting bribes, granting or offering of bribes, illicit enrichment and laundering of corruption proceeds by a public official or any person in exchange for an undue advantage.¹⁹ The SADC Protocol against Corruption has defined corruption to include:

bribery or any other behaviour in relation to persons entrusted with responsibilities in the public and private sectors which violates their duties as public officials, private employees, independent agents or other relationships of that kind and aimed at obtaining undue advantage of any kind for themselves or others.²⁰

The Swaziland Prevention of Corruption Act of 2006 (POCA) also gives a list of offences that constitutes corruption in its Part III.²¹ It further defines what corruption entails in general, providing that a corrupt act would be accepting a benefit or giving an advantage by one person, acting in dishonesty, to another in the carrying out of his or her public duties.²²

Common to all these definitions is the idea that corruption entails, as bodies like Transparency International define it, 'the abuse of entrusted power for private gain'.²³ This definition has been widely cited and accepted. It encapsulates all the offences of corruption in simpler terms. Thus, in essence and in the context it is to be understood in this paper, corruption is the utilisation of official positions and titles for personal or private gain at the expense of the public and in violation of the established rules and ethical considerations.²⁴

¹⁸ Art 1 of the AU Convention.

¹⁹ Art 4 of the AU Convention.

²⁰ Art 1 of the SADC Protocol against Corruption.

²¹ Like the international instruments, the list of offences include bribery, offences with regard to contracts and tenders, corrupt transactions by or with public or private bodies, conflicts of interests, possession of property without reasonable explanation, amongst others.

²² Art 42 of POCA.

²³ Transparency International 'Defining corruption'.

²⁴ Hope (2000: 18).

2.3 Grand corruption

This term is used to describe cases where senior public officials derive wealth from state funds using corrupt means.²⁵ Adopting the formula developed by Klitgaard in defining corruption; grand corruption may be defined as:

$$\text{GC (Grand corruption)} = M (\text{Monopoly power}) + D (\text{Discretion}) - A (\text{Accountability}).^{26}$$

The senior officials normally have monopoly and discretionary powers over decision-making and are not accountable for their decisions. Hence, the U4 Anti-Corruption Resource Centre (U4) defines grand corruption as that type of corruption which takes place at the policy formulation end of politics.²⁷ Such officials, in the abuse of their positions, pursue their private interests by granting preferential treatment to certain individuals who will collaborate with them at the expense of the interests of society.²⁸ Igbiniedion distinguishes it from other forms of corruption by the scale of wealth appropriated by the officials and their seniority in the hierarchy of the civil service.²⁹

Grand corruption is rampant where government trades with the private sector.³⁰ The high officials, who are normally ministers, leaders of government departments or, better still, heads of state, have discretionary power over the granting of large public contracts. Hence, they will require payment or commission before approving major purchases and developments.³¹

Moody-Stuart states that the motivation to engage in grand corruption for top officials lies in three factors. First, 'the size of the project will mean that the bigger the project, the bigger the slice to take home'.³² Consequently, sometimes, projects not necessary for development will be approved but not seen to fruition. Even where they are necessary, they will be left unfinished for the funds would have been exhausted unproductively before completion. For them to be completed there will be need to dig into national funds again, thereby depleting them further. This pattern has seen

²⁵ Nicholls *et al* (2006: 3).

²⁶ Khemani (2009: 5)

²⁷ U4 'Grand Corruption'.

²⁸ Lambsdorff (2007: 82).

²⁹ Igbiniedion (2009: 58).

³⁰ Moody-Stuart G 'Grand corruption in third world countries'.

³¹ Moody-Stuart G 'Grand corruption in third world countries'.

³² Moody-Stuart G 'Grand corruption in third world countries'.

more governments approving supplementary budgets they can barely afford, further draining their economies.

Second, the immediacy of the rewards is luring.³³ Politicians know that their terms of office may be brief, so they need a source that will guarantee immediate payment once the funds are released.³⁴

With grand corruption, such payment is always guaranteed.

Last, mystification also plays a role.³⁵ 'The more technical a transaction, the less likely that questions will be asked'.³⁶ A high technological content, therefore, will be attractive because it makes a price comparison difficult.³⁷ This has made military, aviation and telecommunication projects the most attractive as sources of corrupt funds.

2.3.1 Corrupt acts involved in grand corruption

Almost all the corrupt acts proscribed by many conventions and statutes, whichever way they describe them, are consonant with grand corruption. The most prevalent offences in Swaziland criminalised by POCA are embezzlement or diversion of funds³⁸, trading in influence³⁹ and abuse of functions. Additionally, section 31 of POCA includes 'offences in respect of corruption relating to politicians' that consolidate the above offences and makes reference to grand corruption.⁴⁰ Section 31 provides as follows:

A person who, directly or indirectly –

- (a) Being a politician, demands or accepts or agrees or offers to accept any advantage from another person, whether for the of that politician or for the benefit if any other person; or
- (b) Gives or agrees or offers to give any advantage to a politician, whether for the benefit of that person of for the benefit of another person, in order for that politician or that other person to act or to influence another person to act, in a manner,
- (c) That amounts to the –

³³ Nicholls *et al* (2006: 3).

³⁴ Moody-Stuart G 'Grand corruption in third world countries'.

³⁵ Moody-Stuart G 'Grand corruption in third world countries'.

³⁶ Nicholls *et al* (2006: 3).

³⁷ Moody-Stuart G 'Grand corruption in third world countries'.

³⁸ Section 24 of POCA. The offence is described as 'cheating the public revenue'.

³⁹ Section 22 of POCA. The offence is described as 'offences with regard to contracts and tenders'.

⁴⁰ The Act lists politicians as Senators, Members of Parliament, Regional Administrator, King's Advisory Counsellors, Municipal Councillors, Chiefs and chiefs' Councillors.

- (i) Illegal, dishonest, unauthorised, incomplete, biased; or
 - (ii) Misuse or selling of information or material acquired in the course of the exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation
 - (d) That amounts to the –
 - (i) Abuse of a position of authority,
 - (ii) A breach of trust, or
 - (iii) The violation of a legal duty or a set of rules;
 - (e) Designed to achieve an unjustified result; or
 - (f) That amounts to any other unauthorised or improper inducement to do or not to do anything,
- Commits an offence of corrupt activities relating to politicians.

This is not to exclude illicit enrichment⁴¹ and laundering of the proceeds of corruption.⁴² Also, akin to grand corruption is kleptocracy, defined as a situation where leaders take money from state funds for their personal benefit or anyone close to them without regard for the economic system and welfare of their citizens.⁴³

A discussion of each of the acts common in Swaziland will ensue with illustrations to elucidate the gravity of the situation. It is through the response of the state to these cases and others that the adequacy of its anti-corruption system will be assessed later on.

2.3.2 Diversion of property

Diversion of property may be through embezzlement, misappropriation of funds, theft or fraud. Langseth argues that in the context of corruption, diversion of property will entail the illicit appropriation of money, property or valuable items by an individual who is not entitled to them, but has access to them due to his or her position or employment.⁴⁴ In such instances, the person will acquire the property through legal means but will divert it for his or her benefit in an illegal manner.⁴⁵

⁴¹ Section 34 of POCA. The offence is described as 'possession of property, e.t.c. without reasonable explanation'.

⁴² Section 41 of POCA. The offence is described as 'money laundering'.

⁴³ Hartman (1997: 157).

⁴⁴ Langseth (2006: 11).

⁴⁵ Fontaye (2004: 173).

The greatest episode of embezzlement and fraud, that sent shock waves throughout Swaziland and attracted the attention on the international community, was the E50 million scandal in 2007.⁴⁶ The 19 suspects, who were either top government employees or close to the King, have been released on bail.⁴⁷ They are alleged not only to have embezzled the capacity-building initiative funds which were to empower locals in business establishment and administration, but also to have exceeded the government limit that was to be spent on such exercise, which was E10 million.⁴⁸

It is unlikely that this case will ever go to trial. The arrests were made on the strength of recommendations of a report of the Commission of Inquiry that uncovered the fraud. The investigations by the police were poorly conducted and there was not sufficient evidence to establish a *prima facie* case. The assets that were seized have been released to the suspects. Citizens who were beneficiaries of the fund were short-changed of its benefits and the culprits were never held accountable.

In 2010, another high profile case arose in which the Central Transport and Administration General Manager, Polycarp Dlamini, Industrial Court Judge President, Sifiso Nsibande and others were charged with 24 counts of fraud, corruption and money laundering.⁴⁹ They are alleged to have defrauded government of E24 million and the prosecution is expected to call 135 witnesses to make its case. The case is pending and will continue in February 2012, to enable the prosecution to conduct more investigations. The suspects are currently out on bail.

2.3.3 Trading in influence

Trading in influence is a bribe-like offence that is committed through a tripartite agreement. An instigator will offer an undue advantage to a public official to abuse his influence to obtain an

⁴⁶ *S v Qhawe Mamba, Them bani Simelane, Musa Fakudze & Others* unreported HC case no 42 of 2007. The suspects include: the former Principal Secretary to the Ministry of Finance, Musa Fakudze; the former Examinations Council Registrar, Dr Ben Dlamini; the King's former praise man and Channel Swazi boss, Qhawe Mamba; finance ministry official, Nonhlanhla Dlamini; and author, Sebenzile Tango.

⁴⁷ Mamba (9 November 2007).

⁴⁸ United States Country Reports on Human Rights Practices - Swaziland (2008).

⁴⁹ *S v Polycarp Dlamini, Sifiso Nsibande, Sandile Dlamini and Another* unreported HC Case No 148 of 2010.

undue benefit from a public or administrative authority.⁵⁰ Trading in influence is common in government procurement procedures. The public official who abuses his office will be privy to information that outsiders have no access to, for example, access to terms on government decision-making.⁵¹ The benefit will be two-fold. The public official will peddle his influence to derive an undue advantage from a government authority for the benefit of a third party and the third party will grant him or her an undue benefit in return. Rose-Ackerman states that many trading-in-influence scandals will be prevalent where the tendering process is overruled by rent-seeking officials or is unregulated.⁵²

A company owned by the Swazi Minister of Communications and Information Technology, Nelisiwe Shongwe, was accused of tender irregularities early in 2011. Upon auditing the Auditor-General's report of 2009, the Public Accounts Committee (PAC) reported that the Minister allegedly colluded with the regional government accountant who awarded her company, Jenny Investments (PTY) Limited, a contract for which she had not tendered.⁵³

In the report tabled before Parliament, the PAC alleged that the regional committee had concluded the tender-awarding decision but the regional accountant-general reversed the decision and awarded the tender to the Minister's company, thereby flouting procurement procedures.⁵⁴ The tender was for the construction of boreholes; instead, Jenny Investment (PTY) Limited changed the order to that of purchasing plumbing material.⁵⁵ Such plumbing material was delivered 13 months after payment was made to the company, despite the rule that, for government tenders, payment is made after delivery.⁵⁶ To conceal the corruption, the Minister instructed Manzi Drillers to build the borehole under the pretext that it was a generous gesture from her company.⁵⁷ The outcome of the

⁵⁰ Art 18 of UNCAC.

⁵¹ Langseth (2006: 10).

⁵² Rose-Ackerman (1999: 59).

⁵³ Sukati (18 August 2011).

⁵⁴ Sukati (18 August 2011).

⁵⁵ Sukati (18 August 2011).

⁵⁶ Sukati (18 August 2011).

⁵⁷ Sukati (18 August 2011).

investigations by the PAC was that the Minister had indeed colluded with the regional accountant and the matter was transmitted to the ACC for further investigation.⁵⁸

In another tender case, a company owned by the Minister of Natural Resources and Energy, Princess Tsandzile Dlamini, has left the public perplexed as to how it got the sole rights to distribute blank plates for the new SADC registration plates. The company, Eco-Rev Distributors, was owned by the Minister, who had a 44% shareholding. Her husband, also a senior government employee as Under-Secretary to Ministry of Education, holds 50% of the shares and one Richard Gwebu holds 6% of the shares.⁵⁹ The contract is estimated to be worth E10 million.⁶⁰

The company sells the plates, which are bought at around E30 in South Africa, at double the price (for E65) to the embossers,⁶¹ who print the plates and sell them to the public. By the time the public purchases the plates, the price is obviously exorbitant. There is still a public outcry about how the company was given a monopoly over the plate distribution and how a politician could compete with other businesses in the award of a government tender.

When questioned on how the Minister could be tendering for a government contract, the husband claimed that his wife had resigned from the company.⁶² The SADC registration plates programme was implemented in June 2010 and the Minister is alleged to have resigned from the company three months after its commencement, in September 2010.⁶³ However, that does not negate the fact that politicians are expected not to tender for government projects as they might resort to peddling influence.

Even so, politicians were resolute in trading with government. In a parliamentary debate on the Procurement Bill of 2010, the Minister of Finance had difficulty convincing parliamentarians that politicians were expected not to tender for government projects due to the influence they have.⁶⁴

⁵⁸ Ndlamandla (18 August 2011).

⁵⁹ Sukati (12 July 2011).

⁶⁰ Sukati (12 July 2011).

⁶¹ Sukati (12 July 2011).

⁶² Sukati (12 July 2011).

⁶³ Sukati (12 July 2011).

⁶⁴ Shaw (8 July 2011).

His concerns were disregarded as the Bill was sent for assent without a clause prohibiting politicians from tendering for government contracts.⁶⁵ It was, however, not assented to and brought back for debate with a clause that politicians were not to tender for government contracts inserted as section 60(2).⁶⁶ In this regard, many MPs absented themselves from the sitting and the Bill could not be debated because a quorum was not reached.⁶⁷ Parliamentarians have lost sight of the fact that cabinet ministers are also politicians who are wielding monopoly and discretionary powers in procurement procedures. Whenever there are business tenders to be awarded they are likely to influence the tendering process.

2.3.4 Abuse of functions

The crime of abuse of functions is committed when a public official performs or omits to perform an act in the discharge of his or her duties for the purposes of obtaining an undue advantage for himself or herself, a third party or an entity.⁶⁸ Snider and Kidane assert that abuse of functions will be any act by a public official in the carrying out of his or her duties illicitly to gain an advantage that may accrue to him- or herself or another.⁶⁹ Thus, an official may abuse his functions to ensure that the result of such abuse will afford him- or herself or a third party an undue advantage. At times, an omission, for instance, intentional failure to monitor compliance with some laws, may amount to abuse of functions.

In a scandal that caused a rage of words in the media between the Minister of Public Works and Transport, Nthuthuko Dlamini, and MP Robert Magongo, it was revealed how the latter was allegedly abusing his functions in the consideration of an award of a tender of E30 million for the supply of earth-moving equipment to the government.⁷⁰ The MP, who is chairman of the Parliament

⁶⁵ Shaw (8 July 2011).

Though it was not stated expressly that politicians may conduct business with government, it was not excluded expressly either. Section 39(1) of the Procurement Bill of 2010 states that 'a tenderer may not be not be excluded from participating in public procurement on the basis of nationality, race, religion, gender or any other criterion not related to its eligibility or qualifications except to the extent provided for in the Act or procurement regulations'.

⁶⁶ Sukati (19 August 2011).

⁶⁷ Sukati (19 August 2011).

⁶⁸ Art 19 of UNCAC.

⁶⁹ Snider & Kidane (2007: 725).

⁷⁰ Magagula (3 July 2011).

Portfolio Committee on Public Works and Transport, is alleged to have preferred a South African company supplying refurbished equipment, over local ones supplying new equipment.⁷¹

Barloworld, the local company, accused the MP of soliciting about E8 400, which he claimed would be the subsistence allowance for a team of 10 Committee members he was to lead to inspect a sister branch in South Africa.⁷² The company further alleged that Magongo had requested that it pay an unspecified amount for food and accommodation for the Portfolio Committee as an incentive, as the Committee had been to South Africa to inspect the premises of another company.⁷³ The Minister of Public Works and the Principal Secretary to the same ministry dissociated themselves from any of the MP's actions, stating that no one had mandated him to find suppliers on behalf of government.⁷⁴

The MP may not have succeeded in his quest to derive an undue advantage but allegedly he did abuse his functions. Section 39 of POCA criminalises an attempt to commit any of the offences proscribed in the Act. Thus legal action ought to have been taken against the Minister. The Minister of Public Works and Transport only promised to probe the matter.⁷⁵

The Prime Minister and five other Ministers have been involved in yet another scandal, a land scam that attracted attention internationally and that illustrates abuse of functions. In this scam, however, the Minister for Housing and Urban Development (HUD), Pastor Lindiwe Dlamini, who abused her functions, derived no benefit but did it for third parties.

The land in question is regulated by the Crown Land Disposal Regulations of 2003. In terms of Schedule 1 of the Regulations, only low income earners are eligible to apply to purchase the land at discounted prices and the applicant's purchasing power should be traceable. The Prime Minister bought a portion of the land at a 50 per cent discount while the Ministers were given 30 per cent

⁷¹ Magagula (3 July 2011).

⁷² Magagula (3 July 2011).

⁷³ Magagula (3 July 2011).

⁷⁴ Magagula (3 July 2011).

⁷⁵ Dlamini (21 July 2011).

discounts.⁷⁶ Effectively, the Prime Minister bought land measuring 6 084 square metres, which is valued at E608 000, for E304 000.⁷⁷ In terms of Schedules 4 and 5 of the Regulations, high income earners should pay the full price of the land. Thus, the approval of the sale by the Minister of HUD suggests that the Prime Minister is a low income earner. On the contrary, the Prime Minister is not a low income earner; hence he and his fellow colleagues robbed the Swazi citizenry of the opportunity of becoming land owners.

Parliament realised the fallacy in the judgment of the Minister for HUD and requested her to table a report, in which she confirmed the above facts. Parliament then convened a Land Selection Committee to probe the matter further. Indeed, the matter was probed and before the Committee could table its report in Parliament, the Prime Minister applied to court for an interdict ordering the Committee to refrain from tabling the report.⁷⁸ Parliament, in complete defiance of the interdict, went ahead and debated the matter, claiming that it was seized of the matter first. Hence, Parliament argued that the courts should allow it to finalise the matter.⁷⁹ Such action created a constitutional crisis.

The King intervened to harmonise the three arms of government. In this intervention, he issued a directive that Parliament stop any debate surrounding the land sale and that the Prime Minister and the Ministers should return the land.⁸⁰ The Prime Minister was directed also to withdraw any court process that was pending.⁸¹ The King's directive finalised the matter. The land was to be returned and Parliament was silenced. However, whoever had attempted to derive or actually derived any undue benefit in this incident of abuse of functions was never held accountable.

2.3.5 Kleptocracy

Kleptocracy is grand corruption on a grand scale. Former US President, George W. Bush, once described it as a grave and corrosive abuse of power which represents the most invidious type of

⁷⁶ Nxumalo (11 February 2011).

⁷⁷ Nxumalo (11 February 2011).

⁷⁸ Moahloli (1 June 2011).

⁷⁹ Dlamini (31 May 2011).

⁸⁰ Dlamini & Sukati (7 June 2011).

⁸¹ Dlamini & Sukati (7 June 2011).

corruption.⁸² Kleptocracy is the plundering of state funds by a ruler, his immediate family and associates with the aim of enriching themselves at the expense of the general population.⁸³ Kleptocratic leaders have no regard for the welfare of society and are interested only in enriching themselves. Hence, Grean asserts that the tendency of kleptocratic leaders is that they favour policies that transfer most of the resources to their pockets, leaving the entire population destitute.⁸⁴

Swaziland has been warned by the IMF of reckless expenditures on its budget and a huge wage bill. To decrease its expenditure, a Fiscal Adjustment Roadmap (FAR) was designed, which will see the government, *inter alia*, cutting down the civil service, and reducing and freezing salaries for the next three years. Surprisingly, the Royal Emoluments and Civil List budget has been left untouched. According to the Royal Emoluments and Civil List Act of 1992 (as amended in 1998) the yearly sum of E15 million shall be allocated in the national budget for the upkeep of royalty for a decade after 1998⁸⁵ and shall be charged from the consolidated fund.⁸⁶ The consolidated fund is financed by shares which the government owns in big investor companies in the country, such as Swaziland Royal Sugar Corporation and MTN.

The royalty of Swaziland has been known for lavish spending. Five of the King's thirteen wives were sent on a E45 million shopping extravaganza around the world in 2009.⁸⁷ Earlier that year, the King had bought 20 armoured Mercedes Benz vehicles, each with a market value of E1,6 million, to ferry the dignitaries who had attended the 40/40 celebrations.⁸⁸

In the 2010/11 budget, government had set aside E170 million for royal upkeep and for 2011/2012, E210 million have been set aside.⁸⁹ Both budgets are very much more than the E15 million stipulated in the Royal Emoluments and Civil List Act and there has been no decrease in the

⁸² Webster (2008: 816).

⁸³ Hartman (1997: 157).

⁸⁴ Grean (2010: 69).

⁸⁵ Section 3 of the Royal Emoluments and Civil List Act.

⁸⁶ Section 8 of the Royal Emoluments and Civil List Act.

⁸⁷ Clayton (21 August 2009).

⁸⁸ Clayton (21 August 2009).

⁸⁹ 'Swaziland Budget' 2011-2014.

budget in line with the FAR. Budget estimates for last year showed that E503 million were spent on royalty, which was 5 per cent of the E10 billion budget for 2010/2011.⁹⁰

Despite the country being in an economic crisis, in August 2011 the princes invited a group of females, who were on a private visit in the kingdom, to a drinking orgy of the most expensive whisky in one of the prestigious hotels.⁹¹ When the incensed guests complained of the waste of funds on the unnecessary imbibing in the light of the economic crisis, they were told not to be troubled. The guests, of South African origin, were assured that there were more funds from the princely source than the E2,4 billion loan to be given by South Africa.⁹² Their source of funds is the Royal and Emoluments Civil List budget which has been unaffected by the budget cuts.

The King of Swaziland has been relentlessly criticised previously for the purchase of a private jet in 2002 worth E400 million then, when 70 per cent of the population was living below the poverty line on less than US\$1 a day.⁹³ The life expectancy was 38 years and around 34 per cent of the population was dying of HIV/AIDS.⁹⁴ When interviewed on the rationale of the purchase of the jet, the King simply said that cabinet had wanted to buy him a jet.⁹⁵ The Minister of Finance, who then was and still is Majozi Sithole, talked of getting a refund but to date none has been forthcoming.

WESTERN CAPE

The socio-economic situation in Swaziland has not improved since 2002. Today still, 70 per cent of the population of 1,2 billion lives below the poverty line and 79 per cent of the population lives in rural areas.⁹⁶ Kleptocratic rulers are known to support interventions that provide personal benefits to them even though they do not increase the overall national income.⁹⁷ This statement depicts the situation in Swaziland. There has been an outcry in Swaziland over the building of an airport, Sikhuphe International Airport, in the middle of nowhere, where neither an industrial city nor capital city is nearby. Worst of all, the country does not own a single airline. But because it is the King's

⁹⁰ Nxumalo (08 April 2011).

⁹¹ Bikitsha (26 August 2011).

⁹² Bikitsha (26 August 2011).

⁹³ Leithead (1 August 2002).

⁹⁴ 'HIV/AIDS in Swaziland' available at <http://www.avert.org/aids-swaziland.html>.

⁹⁵ Leithead (1 August 2002).

⁹⁶ 'Swaziland demographics profile' available at http://www.indexmundi.com/swaziland/demographics_profile.html.

⁹⁷ Rose-Ackerman (199: 115).

wish to have an international airport and reach first-world status by 2022, construction has to proceed despite the austere times. Hence E299 million were allocated for the completion of the airport in 2011.⁹⁸ Even more urgent, as viewed by government, was the Mbadlane-Sikhuphe Highway which has been allocated E139 million.⁹⁹

While the cabinet was enthusiastic and optimistic about the completion of the airport by year end, crucial sectors of society have had to take a back seat. The health sector, which should be a priority of any government, is in dire need of rehabilitation because the infrastructure has become dilapidated and the resources are not sufficient.¹⁰⁰ However, government has stated that the upgrading of the health sector will be done in phases due to financial constraints. The education sector has been affected as well. The commencement of studies in the 2011 academic year was delayed for over a month at the country's only university because government had no funds for tuition.¹⁰¹ The scholarship policy had to be reviewed in 2011. Scholarships were awarded to only 500 prospective university students with preference given to those opting for education, science and commercial studies.¹⁰² Moreover, the opening of primary schools in the country was delayed by three weeks because the government had not met its obligation of funding the Free Primary Education programme and the programme for orphaned and vulnerable children.¹⁰³

2.4 Conclusion

There may be no consensus universally on the accepted definition of corruption. However, we are all agreed on what constitutes corruption. It may be difficult to describe corruption but Tanzi rightly asserts that it is not difficult to recognise it when observed due to its dire effects on the economy. Grand corruption has crippled many economies by stifling economic growth, lowering investment and increasing the levels of poverty. Corrupt leaders have compromised good governance all in

⁹⁸ Sithole (2011: 24).

⁹⁹ Sithole (2011: 24).

¹⁰⁰ Sithole (2011: 20).

¹⁰¹ Dlamini (1 September 2011).

¹⁰² 'Ministerial statement on Tertiary scholarship policy 2011/2012' *Government Press Office*.

¹⁰³ Magagula (6 August 2011).

furtherance of their ulterior motives and interests in complete disregard for the people who put them in power.

Swaziland has not been left unscathed by grand corruption. Its effects are seen vividly, touching all aspect of life. Such an abuse of discretionary power by those in authority can never be left unchecked or unfettered. It is for that reason that the international community has made concerted efforts to fight corruption. States, inclusive of Swaziland, are expected to join in the quest to prevent and combat corruption in their domestic settings. True, corruption may never be rooted out completely but its levels may be lowered. Thus, the next chapter discusses the methods employed by the Swazi government in the fight against corruption.



CHAPTER 3

TACKLING CORRUPTION: THE ANTI-CORRUPTION SYSTEM IN SWAZILAND

3.1 Introduction

The relationship between society and the leadership is one of trust. Accountability and transparency in a government system preserves the relationship. To ensure the promotion of accountability and transparency, states have developed national integrity systems. The system is used as an anti-corruption strategy. This chapter explores the anti-corruption strategy adopted by Swaziland.

3.2 Historical background

The fight against corruption in Swaziland is not a novel phenomenon. By the 1980s, the country had realised the adverse effects corruption has on the economy. The first attempt to mitigate its deleterious effects was the establishment of the office of the ombudsman in 1983.¹⁰⁴ An ombudsman is an independent office tasked with the investigation of maladministration by public officials and abuse-of-power complaints by citizens against such officials.¹⁰⁵ However, its existence (from 1984 – 1987) was cut short by the Coronation of King Mswati III in 1986, whose first decree abolished the office.¹⁰⁶

Even before the abolition of the office of the ombudsman, its success as an efficient body was doubted. It was criticised rigorously in academic circles for its poor constitution. Hatchard cites lack of independence as its major shortcoming and uses it as an example of 'how *not* to organise and run an anti-corruption institution'.¹⁰⁷ The ombudsman was a person who also held a post as the secretary to the *Liqoqo* (Supreme Council of State).¹⁰⁸ The *Liqoqo* was the authority entrusted with

¹⁰⁴ Hatchard (1991a: 938).

¹⁰⁵ Hatchard (1991b: 54).

¹⁰⁶ Section 8 of the King's Proclamation Decree.

¹⁰⁷ Hatchard (1991b: 55).

¹⁰⁸ Hatchard (1991b: 60).

'policy-making and policy-issuing'.¹⁰⁹ In essence, the ombudsman's office was controlled by the executive arm of the government.

In 1993, another effort to combat corruption was made with the promulgation of the Prevention of Corruption Order. It provided for the establishment of an Anti-Corruption Commission which began its operation in 1998. The ACC was also a futile attempt in the fight against corruption as its success was hindered by a number of factors, including the limitations placed on its operations – it could not investigate cases or charge suspects.¹¹⁰ It also lacked independence, resources and the political will from the state to support it.¹¹¹

Also, there was controversy surrounding the legitimacy of the statute that created it. In 2002, the High Court declared the Prevention of Corruption Order of 1993 unconstitutional since it was not enacted by Parliament and, as such, was invalid.¹¹² The Commission halted its operations as there was no longer any enabling statute legitimising it. For three years it did not function. It was only in 2005 that the then Court of Appeal reversed the decision of the High Court and the Commission resumed its operations.¹¹³ However, the zeal to work was lost and little work was done until the enactment of the Prevention of Corruption Act, 2006 which established the current Anti-Corruption Commission and terminated its predecessor.¹¹⁴

3.3 Current anti-corruption legal framework

3.3.1 International legislation

Swaziland joined the international community in the fight against corruption by becoming signatory to three legal instruments. These are:

¹⁰⁹ Daniel & Vilane (1986: 58).

The *Liqoqo* played a major role in the executive functioning of the state then since the King was vested with supreme powers, enjoying executive, legislative and judicial powers. Nowadays, it is an advisory council to the King, appointed from a membership of chiefs and senior princes (*bantfwabenkhosi (eMalangeni)*) by the King.

¹¹⁰ ACC Annual Report (2009/2010: 7).

¹¹¹ ACC Annual Report (2009/2010: 7).

¹¹² *Crown v Mandla Ablon Dlamini* unreported HC Criminal Case No 7 of 2002.

¹¹³ ACC Annual Report (2009/2010: 7).

¹¹⁴ ACC Annual Report (2009/2010: 7).

- United Nations Convention against Corruption of 2005;¹¹⁵
- African Convention on Preventing and Combating Corruption of 2003;¹¹⁶
- Southern African Development Community Protocol against Corruption of 2005.¹¹⁷

The instruments portray one spirit in the fight against corruption, hence their essence will be summarised in relation to public officials and grand corruption. They provide for the development of policies that promote good governance and mandate states to establish well-resourced independent anti-corruption bodies.¹¹⁸

In relation to the conduct of public officials, states are encouraged to set integrity standards that will bind officials to promote integrity, honesty and accountability.¹¹⁹ Hence, when officials violate any of the standards, a state is encouraged to have whistle blowing mechanisms and further protect those whistle blowers.¹²⁰

To ensure transparent public funds management, states are encouraged to establish procurement procedures which reflect accountability and transparency according to fair rules and further ensure low risk management and timeous government accounting.¹²¹

To strengthen the above efforts, what is needed is an independent judiciary which ought to act as a check upon the government and ensure compliance with the measures it has adopted in preventing and combating corruption.¹²² States should also facilitate mechanisms that recognise the media and civil society as stakeholders in the fight against corruption.¹²³ Importantly, UNCAC

¹¹⁵ It came in to force 14 December 2005, having been adopted on 31 October 2003. Swaziland became signatory to it on 15 September 2005. As of 1 May 2011, it had 140 signatories.

¹¹⁶ The AU Convention was adopted on 11 July 2003 and entered into force in 5 August 2006. As of 6 August 2010, it had 45 signatories and 31 ratifications. Swaziland signed it on 7 December 2004.

¹¹⁷ The SADC Protocol was adopted on 14 August 2001 and it entered into force on 6 July 2005. It has 14 signatories and 9 ratifications. It is the first international anti-corruption instrument to which Swaziland became signatory, on 14 August 2001.

¹¹⁸ See art 6 of UNAC, art 5(3) of the AU Convention and art 4(1)(g) of the SADC Protocol.

¹¹⁹ See art 8 of UNCAC, art 7(1) & (2) of the AU Convention and art 4(1)(a) of the SADC Protocol.

¹²⁰ See art 32 & 33 of UNCAC, art 5(5) – (7) of the AU Convention and art 4(1)(e) & (f) of the SADC Protocol.

¹²¹ See art 9 of UNCAC, art 7(4) of the AU Convention and art 4(1)(b) of the SADC Protocol.

¹²² See art 11 of UNCAC.

¹²³ See art 13 of UNCAC, art 12 of the AU Convention and art 4(1)(j) of the SADC Protocol.

makes the recovery of assets stolen through corruption a fundamental principle by mandating states parties to adopt measures that will facilitate and ensure asset recovery domestically or internationally through mutual legal assistance.¹²⁴

3.3.2 Domestic legislation

The current anti-corruption framework of Swaziland began in 2005, which also marked a new dawn in the politics of Swaziland. The country welcomed its first autochthonous constitution which is the supreme law of the country and embraces the spirit of democracy. In response to the scourge of corruption, it was determined to soldier on in the fight against it by providing for anti-corruption policies. Thereafter, a new body of laws against corruption was promulgated and is continuously being developed.

The legal framework regulating public officials in the fight against corruption includes the following statutes:

- The Constitution of Swaziland Act of 2005;
- The Prevention of Corruption Act of 2006 (POCA);
- Other ancillary statutes.¹²⁵



3.3.2.1 The Constitution of Swaziland

The state has made it its policy to 'expose, combat and eradicate corruption'.¹²⁶ In this regard, it has provided for the establishment of anti-corruption agencies involving all arms of government to assist in the prevention and combating of corruption. Through the legislature, it has provided for the Public Accounts Committee (PAC)¹²⁷ and *ad hoc* Commissions of Inquiry that may be

¹²⁴ Chapter V of UNCAC.

¹²⁵ These include the Money Laundering/Financing of Terrorism (Prevention) Act of 2011, the Audit Act of 2005 and the Procurement Act of 2011.

¹²⁶ Section 58(5) of the Constitution.

¹²⁷ Section 209 of the Constitution.

assembled to investigate maladministration by the executive.¹²⁸ The office of the Auditor-General, linked to the executive yet independent, is to audit all government accounts.¹²⁹

To regulate the conduct of public officials, chapter XVI of the Constitution provides for the Leadership Code of Conduct and the establishment of the Integrity Commission to enforce it. It also obliges public officials to declare any conflict of interest in the carrying out of their duties and avoid any conduct that exposes them to corruption.

Moreover, chapter VIII of the Constitution provides for an independent judiciary that will carry out its functions without fear or favour and subject only to the Constitution. The judiciary includes all the courts of the land, the office of the Attorney-General and the Director of Public Prosecutions (DPP).

3.3.2.2 The Prevention of Corruption Act (POCA)

The Act establishes the ACC as an independent body and provide for its functions, powers and the appointment of commissioners.¹³⁰ Part III criminalises offences related to corruption but short-sightedly concentrates on public sector corruption. It implies that a crime related to corruption will occur where a person gives an undue influence to a public official or where a public official solicits same. The focus of politicians on grand corruption is too narrow; hence, it limits the scope of public officials that could be accountable for the crime.¹³¹

It only provides for the protection of informers during a trial and such protection is only in relation to their identity.¹³² Asset recovery is implemented only once a conviction has been secured and such powers are limited to the DPP.¹³³ The ACC only has the power to seize property for investigation purposes.¹³⁴

¹²⁸ Section 129 of the Constitution.

¹²⁹ Section 207 of the Constitution.

¹³⁰ Section 3 of POCA.

¹³¹ See fn. 40 above.

¹³² Section 56 of POCA.

¹³³ Section 50 of POCA.

¹³⁴ Section 13 of POCA.

3.4 The anti-corruption strategy

There is no single strategy that is considered to be the best in tackling corruption. A multilateral approach that encompasses different mechanisms is always proposed as the best one. Langseth *et al* argue that while anti-corruption strategies differ across the world, they should encompass one or more of the following:

- a) Public sector corruption agencies;
- b) 'Watchdog' agencies;
- c) Public awareness on the role of civil society;
- d) Accountability of the judicial process;
- e) The media;
- f) Private sector and international business;
- g) International cooperation.¹³⁵

A strategy may not uproot corruption totally.¹³⁶ But Pope states that its ultimate goal must be to make corruption a 'high risk and low return undertaking'.¹³⁷ It has to decrease the chances of engaging in corruption, especially amongst public officials, and increase transparency and accountability. Thus, its emphasis is on the prevention of corruption rather than relying on the penalties afterwards.¹³⁸ The pillars of the strategy should be interdependent but will be of varying strengths. Langseth *et al* caution that if any of these pillars weakens, it overburdens the others, thereby increasing corruption and undermining sustainable development.¹³⁹ Ultimately the whole system collapses.

Swaziland uses a multi-pronged approach in the fight against corruption. The mechanisms employed in this regard include the ACC, Auditor-General, Commissions of inquiry and the judiciary.

¹³⁵ Langseth *et al* (1997: 508)

¹³⁶ Udombana (2007: 448).

¹³⁷ Pope (2000: 35).

¹³⁸ Pope (2000: 35).

¹³⁹ Langseth *et al* (1997: 508).

3.4.1 The Anti-Corruption Commission

At the heart of the anti-corruption strategy is the ACC, an independent body created by POCA. The ACC mainly functions on the 'multi-purpose with law enforcement powers'¹⁴⁰ model. Meagher terms it the single-agency strategy as it encompasses all the key responsibilities and resources under one entity, as does Hong Kong's Independent Commission against Corruption (ICAC).¹⁴¹ According to Khemani such a model embarks on preventative, investigative and education mandates, focusing on, amongst other things, investigation of violations of laws, training the public and private sectors and raising awareness of corruption through campaigns and societal educational programmes.¹⁴²

To fulfil its investigative mandate, the ACC investigates cases reported to it then remits them to the DPP for prosecution.¹⁴³ Since inception in 2007, 249 cases have been reported to the ACC and 178 of those cases have been authorised for investigation.¹⁴⁴ By August 2011, 115 cases were still under investigation while 18 cases have been forwarded to the DPP's offices and 9 currently are pending in court.¹⁴⁵ One case resulting in a conviction was concluded.¹⁴⁶

The Commission also works with other enforcement agencies. It has a memorandum of understanding with the Central Bank's Anti-Money Laundering Supervisory Authority. These agencies cooperate with each other and share information relating to fiscal crimes. The supervisory authority transmits suspicious money laundering reports relating to corruption as the predicate offences to the ACC for further investigations.

¹⁴⁰ Khemani (2009: 16).

¹⁴¹ Meagher (2004: 17).

¹⁴² Khemani (2009: 17).

¹⁴³ Section 10(b) of POCA.

¹⁴⁴ ACC Annual Report (2009/2010: 27).

¹⁴⁵ ACC Annual Report (2009/2010: 27). One of the cases in court is the grand corruption case of Judge Nsibandé, CTA boss, and others – See 2.3.2 above.

¹⁴⁶ *S v Koli Joel Ndlovu* unreported Pigg's Peak Magistrate Court case No. 428 of 2010. The accused was charged with attempt to commit an offence under section 39 (a) of POCA in that he tried to defraud the government of Swaziland E243 000 in the resettlement programme of homesteads affected by the construction of Mliba – Msahweni public road. However, the state could not prove the crime of corruption and was convicted on the alternative charge of fraud. He was sentenced to two years imprisonment or a fine of E2 000.

The ACC is empowered to arrest people who do not cooperate with it during investigations. In 2009, the ACC issued a warrant for the arrest of the former Managing Director of the Swaziland Post and Telecommunications Corporation, Nathi Dlamini, for obstructing its investigations by not releasing documents which were in his possession and pertinent to the investigations. He challenged the arrest through the hierarchy of courts until the Supreme Court, which confirmed the decisions of the courts *a quo* of the power of arrest of the ACC and dismissed the application.¹⁴⁷

In the year 2009/2010, nine interactive presentations were made to public bodies while eight were made to private bodies in line with the ACC's education function. As a preventative mechanism, it also conducts educational awareness programmes around the country, sensitising civil society to the problem and encouraging it to join in the quest against corruption and report any corrupt practices. In this regard, nine communities were visited, 25 media programmes were hosted across all media channels and two schools were visited.¹⁴⁸

The noticeable challenges that hinder the progress of the ACC are similar to those experienced by the previous commission, which partially accounted for its failure. The ACC mainly lacks resources and funding. In the year 2009/2010, the ACC reported that it had difficulty carrying out its mandate because of poor information technology infrastructure which is needed for research and its day-to-day functions.¹⁴⁹ The available local area network is connected to the government server, which compromises the security and confidentiality of its functions.¹⁵⁰ It also lacked the funds to upgrade its in-house capacity-building programmes.¹⁵¹ Moreover, despite the ACC not having adequate office space to accommodate the current personnel, it is still understaffed, thus compromising on productivity.¹⁵²

The complexity of corruption cases lengthens the investigative process. The success of a case lies in the assets recovered from the criminal more than in the imprisonment of one. To punish

¹⁴⁷ *Dlamini v The Commission of The Anti-Corruption Unit and Another* unreported AC case No. 44 of 2009.

¹⁴⁸ ACC Annual Report (2009/2010: 26).

¹⁴⁹ ACC Annual Report (2009/2010: 24).

¹⁵⁰ ACC Annual Report (2009/2010: 24).

¹⁵¹ ACC Annual Report (2009/2010: 24).

¹⁵² ACC Annual Report (2009/2010: 24).

economic criminals effectively, one has to hit them where it hurts the most, which is depriving them off the proceeds of their crimes. This will depend on the asset recovery programme of an ACC. Immediate seizure of the assets guarantees that there will be evidence of the crime and assets to be confiscated for repatriation. However, the Swazi ACC is empowered to seize assets only for the purposes of investigations, subject to satisfying the Court that there exists a *prima facie* case against the suspect.¹⁵³ Only the DPP is empowered to confiscate the assets once a conviction has been secured.¹⁵⁴ By the time a conviction is secured, invariably, the criminal would have disposed of the assets and the state would recover nothing.

3.4.2 The Integrity Commission

This agency, established by the Constitution, is housed under the Commission on Human Rights and Public Administration for the purposes of receiving written declarations of assets and liabilities of public officials and enforcing the Leadership Code of Conduct.¹⁵⁵ The Constitution provides for the promulgation of the Leadership Code of Conduct to ensure that those in leadership do not abuse office or engage in corrupt practices.¹⁵⁶ Hence, within six months of assuming office, senior public officials are expected to declare any assets and liabilities they have to the Integrity Commission, and further declare them every two years whilst in office and at the end of their term.¹⁵⁷ Moreover, it is expected of them to declare any conflict of interest in the execution of their functions so as to avoid corruption.¹⁵⁸

However, the Integrity Commission has not had any productive operations since the enabling legislation required for it to operate has not been promulgated. Both the Human Rights Bill and the Leadership Code of Conduct are pending in Parliament for debate. Nonetheless, the Integrity

¹⁵³ Section 13 of POCA.

¹⁵⁴ Section 50(2) of POCA.

¹⁵⁵ Section 243 of the Constitution.

¹⁵⁶ Section 239 of the Constitution.

The Constitution gives a list of public officials who are to declare their assets including the Prime Minister, Deputy Prime Minister, Ministers, Secretary to the Cabinet, Heads of ministry of governments or departments, Members of Parliament including presiding officers and members of the King's Advisory Council (*Liqoqo*)

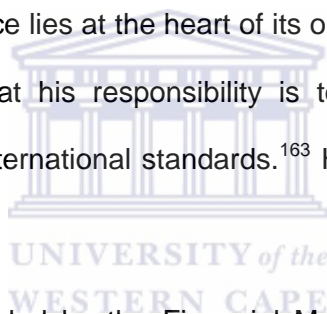
¹⁵⁷ Section 241(1) of the Constitution.

¹⁵⁸ Section 240 of the Constitution.

Commission has received some declarations from the politicians, although these have not been made public and 'it is not clear whether there is a requirement that they be made public'.¹⁵⁹

3.4.3 The Office of the Auditor-General

The office of the Auditor-General (A-G) is fundamental in the accountability of the financial management of government. It is normally an independent body that acts as an external auditor of government accounts. It ensures that the executive arm of government is accountable for the funds appropriated by the legislature.¹⁶⁰ McGee states that the role of the A-G is to ensure that government expenditures are accounted for adequately by an extensive independent audit.¹⁶¹ Therefore, the A-G promotes transparency and accountability, which are integral tenets of good governance, resulting in the prevention and combating of corruption. The Constitution provides for the establishment of the A-G as an independent body auditing all public accounts of Swaziland.¹⁶² Hence, the independence of the office lies at the heart of its operations. In his 2010 report, the A-G buttressed this point by stating that his responsibility is to express an independent audit of government accounts in line with international standards.¹⁶³ However, the office of the A-G is not an independent entity in Swaziland.



The operations of the A-G are guided by the Financial Management and Audit Act, 1967 (as amended) which stipulates guidelines on the reporting and accounting procedures of government's revenue and expenditure accounts.¹⁶⁴ In the execution of his functions, the A-G is to inspect the public accounts and satisfy himself that the management measures taken 'ensure that resources are procured economically and are utilized efficiently and effectively'.¹⁶⁵ He examines the accounts and where he encounters inconsistencies, he requests the internal controlling officers of the government departments under review to give further explanations.¹⁶⁶ In the year ending in March

¹⁵⁹ Human Rights report (2010: 19).

¹⁶⁰ Langseth *et al* (1997: 515).

¹⁶¹ McGee (2002: 11).

¹⁶² Section 207 of the Constitution.

¹⁶³ Hadebe (2010: 5)

¹⁶⁴ Section 18 of the Financial Management and Audit Act.

¹⁶⁵ Section 9(3) (c) of the Audit Act.

¹⁶⁶ Hadebe (2010: 31).

2010, only 59 per cent of the requests remitted to internal controlling officers were brought back with responses.¹⁶⁷ In comparison with the previous years, it was an improvement as in 2008 the response rate was only 37 per cent while in 2009, a 54 per cent response rate was recorded.¹⁶⁸

The conduct of the controlling officers has not been overlooked, for Parliament has resorted to imposing fines upon them to deter them from future misconduct. While the statistics show an improvement, the deterrent effect of the fines imposed is questionable. In one case, a controlling officer of the Ministry of *Tinkhundla* Administration and Development was fined a meagre E400 for losing E5 million, which fine is determined by statute.¹⁶⁹ Of note is that many of the statutes in Swaziland are archaic, hence the fines imposed will be out-dated. Thus, in weighing pleasure against pain, the controlling officer might choose not to give explanations and face the charge.

If the A-G is not satisfied with the explanations rendered and suspects that there are elements of fraud and corruption, he refers the matter to the Minister of Finance who, further, reports the matter to the Public Accounts Committee (PAC). In the case involving Minister Nelisiwe Shongwe, the Auditor-General referred the matter to the PAC which found that the Minister had colluded with the regional accountant and defrauded government.¹⁷⁰ The matter was referred to the ACC and the PAC recommended further that the controlling officer in the department that suffered the loss should surcharge the regional accountant the sum of E63 520 to be paid with 90 days.¹⁷¹

To reinforce the competence of the internal controlling officers and auditors, the government has enlisted the services of an external audit company, KPMG. This company is expected to advise and work closely with the internal audit unit.¹⁷² While this is a good initiative, its success is undermined by the fact there is no skill-sharing between the two. In such initiatives, it is expected

¹⁶⁷ Hadebe (2010: 31).

¹⁶⁸ Hadebe (2010: 31).

¹⁶⁹ Ndlangamandla (18 August 2011).

The Ministry of *Tinkhundla* Administration and Development facilitates the traditional government structure by creating an administration system of the 55 constituencies which are composed of 350 chiefdoms to ensure implementation of government policies and service delivery at constituency or community level. (www.gov.sz).

¹⁷⁰ See 2.3.3 above.

¹⁷¹ Ndlangamandla (18 August 2011).

¹⁷² Sithole (2011: 15).

that there will be capacity building, with the local staff gaining knowledge from the foreign experts. However, the government auditors felt that they were not part of the process but spectators, and complained that the KPMG experts were using them as messengers rather than colleagues; hence, they were not learning anything from them.¹⁷³

The A-G is expected to table a report within six months of the close of every financial year (ending in March).¹⁷⁴ However, akin to the other agencies, the office has been plagued by challenges that hinder its effective functioning. The A-G noted in his 2010 report that his office faced budgetary constraints and recruitment deficiencies.¹⁷⁵ The Minister of Finance was aware of the problem as he reported in the FAR that 'the extent of the A-G's work is limited by inadequate capacity – number of staff, professional qualification and budget allocations'.¹⁷⁶

So dire was the situation that it affected the training of staff. The employees are to be trained regularly for effective performance. The A-G's office, however, could not afford the trainings and the staff embarked on private training funded from personal funds. The A-G also noted that there was a continuous decrease in the budget of the office, yet it was expected to audit large budgets and activities of various government ministries and departments. Consequently, the office underperformed and the levels of corruption increased. Both the A-G and the Finance Minister noted that these challenges could be rectified by the amendment of the Audit Act to ensure that the office had greater independence in its functions. The PAC has called also for the amendment of the Audit Act to give the office of the A-G autonomy over its functions.¹⁷⁷

3.4.4 Public Accounts Committee (PAC)

The PAC is a parliamentary committee tasked with considering the report of the Auditor-General. Wehner describes it as the wing of the legislature that will scrutinise the report as the House of Assembly does not delve into the details of the report.¹⁷⁸ The PAC helps Parliament hold the

¹⁷³ Magagula (2 October 2011).

¹⁷⁴ Section 14 of the Audit Act.

¹⁷⁵ Hadebe (2010: 13).

¹⁷⁶ Sithole (2011: 15).

¹⁷⁷ Ndlangamandla (18 August 2011).

¹⁷⁸ Wehner (2006: 88).

executive accountable for public funds by calling the members of the executive to answer before it on allegations of corruption and fraud based on the report, and on comments and recommendations by the A-G.

In Swaziland, section 209 of the Constitution establishes the PAC and it provides for the regulation of the PAC through Standing Orders of Parliament. It is constituted of 12 members elected from the House of Assembly.¹⁷⁹ The mandate of the PAC includes 'investigating and reviewing past, current and committed expenditures of government and organisations receiving funds from government corporations'.¹⁸⁰ In executing this mandate, it may call, *mero motu*, upon the A-G to review some government departments, gain access to all financial information necessary for its investigations (except privileged information) and call witnesses.¹⁸¹ Moreover, the PAC may call upon the Principal Secretaries of ministries under review or the Ministers themselves to clarify issues in the report of the A-G.¹⁸²

The role of the PAC is mainly dependent on the report of the A-G, in that the PAC acts as a parliamentary follow-up to the report of the A-G whilst it also uses the report as a source for its enquiries.¹⁸³ Hence, its effectiveness depends on the timeous reporting of the A-G, who is expected to make such reports within six months after the year ends. However, McGee warns against the PAC being a 'mere mirror of the A-G' by waiting upon the A-G's report to facilitate its work.¹⁸⁴ He suggests that it ought to initiate investigations of its own accord where it suspects corruption, instead of waiting for the report of the A-G.¹⁸⁵ Such early intervention will ensure that corruption is nipped in the bud. Thus, in the land scam involving the Prime Minister, the PAC intervened early and investigated the malfeasance in November 2010 before the year ended in March 2011 and hence, before the A-G tabled his report.¹⁸⁶

¹⁷⁹ Standing Order No. 125 of 2006.

¹⁸⁰ Hadebe (2010: 17).

¹⁸¹ Hadebe (2007: 17).

¹⁸² African Development Bank Report (2005: 19).

¹⁸³ McGee (2002: 31).

¹⁸⁴ McGee (2002: 57).

¹⁸⁵ McGee (2002: 57).

¹⁸⁶ See 2.3.4 above.

While the PAC may investigate cases of maladministration by the government, it must be noted that it has no power to pronounce upon the criminal culpability of the offenders where it suspects fraud and corruption.¹⁸⁷ It merely identifies the wrongdoing and transmits the matter to the ACC for further investigations. However, it may impose fines on the wrongdoers where it feels that their conduct was below the standards expected of them.¹⁸⁸

3.4.5 Commissions of inquiry

Working together with the PAC in Parliament are the *ad hoc* Commissions of Inquiry tasked with investigating allegations of government maladministration. Section 129 of the Constitution provides for establishment of sessional committees by Parliament to investigate and inquire into the administrative activities of government.

A significant Commission of Inquiry was the Land Select Committee which was convened in 2010 for investigating the alleged purchase of 25 hectares of land, situated at Ezulwini and worth E31 million, by the Minister of Housing and Urban Development, Lindiwe Dlamini, who apportioned part of the money to herself.¹⁸⁹ The Minister was found to have abused her power and flouted procedure and, thus, was ordered to reverse the transaction.¹⁹⁰ Parliament initially suggested that a vote of no confidence be moved against her but later sentenced her to 60 hours of community service.¹⁹¹

The sentence raises questions as to the legality of its status. A parliamentary committee ordinarily does not determine the criminal culpability of a person but in this case it did and the matter was considered to have been resolved. It would be expected that a court should determine her criminal liability. But, in this instance, adjudicating on the matter would amount to double jeopardy for the sentence meted out by the Committee is considered to have by-passed the issue of the Minister's criminal liability. No other legal action has been moved against the Minister, despite her action being a clear case of corruption. It would seem, therefore, either that the allegations by the

¹⁸⁷ McGee (2002: 76).

¹⁸⁸ McGee (2002: 76).

¹⁸⁹ Lushaba (22 January 2011).

¹⁹⁰ Nkambule (16 January 2011).

¹⁹¹ Nkambule (16 January 2011).

Commissioner of the ACC that it is difficult to pursue cases against top officials due to their relation to the King is plausible,¹⁹² or that the legislature is protecting its members from being held accountable. Either of these possibilities illustrates the culture of impunity in cases involving top officials.

3.4.6 Procurement system

The current procurement system of Swaziland is still young. An effective procurement system is one which is transparent, fair, impartial, economical and efficient, all things which the erstwhile procurement system was not. Only in 2011 was the Procurement Act enacted to remedy the weaknesses of the system after severe criticisms and recommendations by the African Development Bank (AfDB). The AfDB had observed that the procurement system was not transparent and was regulated by out-dated laws.¹⁹³ Owing to the deficiencies in the system, it was not economical since the suppliers of government overcharged it. In some instances, prices were increased by 100 per cent¹⁹⁴ and impartiality was not guaranteed as the companies awarded tenders were owned by politicians.¹⁹⁵ Hence, funds that would have been allocated for sustainable development were lost through an inefficient system and corruption.

The Minister of Finance was confident that with the enactment of the Procurement Act government would minimise corruption. The Act establishes the Public Procurement Regulatory Agency which is an independent body with duties to oversee and manage public procurement in liaison with internal government procurement departments.¹⁹⁶ A Procurement Manual was introduced in 2010.

The effectiveness of the system devised is yet to be seen. A significant improvement is the disqualification, by Section 60(2) of the Act, of politicians as candidates eligible to tender for government contracts.

¹⁹² Bearack (7 September 2008).

¹⁹³ African Development Bank Report (2005: 30).

¹⁹⁴ Sukati (23 August 2011). The article reported how one MP expressed his shock at a fellow MP who charged government E220 for a piece of wood that is normally sold at E16.95 in local hardware shops.

¹⁹⁵ See 2.3.3 above.

¹⁹⁶ Section 9 of the Procurement Act.

3.4.7 The Judiciary

The effectiveness of the judiciary depends on its independence, impartiality and non-interference from the other arms of government. Judicial independence speaks to security of tenure and assurance that judicial officers will not be removed arbitrarily from office by the other arms of government.¹⁹⁷ Thus, their term of office may be limited only by age¹⁹⁸ and removal from office before end of term is justified only in cases of gross misconduct.¹⁹⁹ While the Constitution guarantees independence of the judiciary in Swaziland, the practicability of this principle is questionable, and history suggests that it is elusive.

In 2002, the government was determined not to follow any court rulings against the executive.²⁰⁰ The government adopted extreme measures of raiding the premises of the then DPP and confiscated his files because he had refused to withdraw charges of contempt of court against the Attorney-General.²⁰¹ The Attorney-General, together with the police, had instructed the High Court judges to stop hearing a civil case against the King.²⁰² The ensuing crisis resulted in the demotion of a High Court judge, the resignation of the four Court of Appeal judges and the DPP, and a strike by members of the legal profession.²⁰³ With the advent of the Constitution, it was expected that such violation of the rule of law would be a thing of the past. The government spokesperson, Percy Simelane, optimistically declared that the Constitution brought an end to the rule-of-law crisis.²⁰⁴

However, recent events defy the ambitions of the spokesperson. Impartiality of the judiciary entails that judicial officers apply the law and take decisions without fear, favour or prejudice.²⁰⁵ Their administrative functions should not be influenced by the other arms of government and they should

¹⁹⁷ Rautenbach & Marlherbe (2009: 236).

¹⁹⁸ Section 156 of the Constitution places the retirement age of a judge in Swaziland at 75 years.

¹⁹⁹ Rautenbach & Malherbe (2009: 236). The Constitution, at section 158, stipulates that such removal of a judge is to be executed by the King acting on the advice of the Judicial Service Commission.

²⁰⁰ Joubert *et al* (2008: 42).

²⁰¹ Maroleng (26 June 2003: 5).

²⁰² Maroleng (26 June 2003: 5).

²⁰³ Joubert *et al* (2008: 42).

²⁰⁴ Fombad (2007: 106).

²⁰⁵ Rautenbach & Malherbe (2009: 239).

be insulated from civil actions for improper conduct undertaken during judicial activities.²⁰⁶ In 2011, a High Court judge, Justice Masuku, was removed from office arbitrarily for saying in a judgment that the King had a 'forked tongue'.²⁰⁷ A sham case was brought against him as the Chief Justice was complainant and judge in the matter.²⁰⁸ When the recusal of the Chief Justice was sought, he claimed that the hearing was an investigative process on the allegations and further refused to have it conducted in public.²⁰⁹ The judge was found guilty and was dismissed. The Minister of Justice, who refused to endorse the dismissal of the judge, was also dismissed after a cabinet reshuffle.²¹⁰ In response to the judicial crisis, members of the law profession embarked on a strike.²¹¹

The Attorney-General, as a legal advisor to the Cabinet and Parliament and also custodian of public interests through the institution of cases, should strike a balance in the execution of his functions.²¹² When the Prime Minister hosted a party for the Attorney-General for ensuring that appeals cases were decided in favour of the government, it raised a suspicion as to the independence of the judiciary with regard to influence from the executive.²¹³ It cast a doubt on the interests the Attorney General was furthering. Were they for the public or the executive? His functions may be influenced by the other arms of government but he should not fear to pursue cases against politicians or the head of state. The prevention of corruption is also dependent on the advice he will give to Parliament that will inform the formulation of policy and legislation.

3.4.8 The Swaziland National Anti-Corruption Strategy (SNACS)

In 2007, the country developed an anti-corruption strategy which consisted of a multi-sector participatory approach involving government, civil society, the media and the private sector in the

²⁰⁶ Pope (2000: 68). An aggrieved person only has a remedy against the state not the judge. A judge may be removed from office due to incapacity or behaviour making him unfit to hold office.

²⁰⁷ Jele (2 July 2011). The Judge effectively meant that the King had a tendency of saying one thing and later authorising his officers to do the opposite.

²⁰⁸ Amnesty International Public Statement (18 August 2011).

²⁰⁹ Amnesty International Public Statement (18 August 2011).

²¹⁰ Amnesty International Public Statement (18 August 2011).

²¹¹ Ndlela (1 September 2011).

²¹² Langseth *et al* (1997: 517)

²¹³ National Corruption Survey (2010: 25).

fight against corruption. The strategy had three broad objectives, namely, 'ethics awareness and prevention, combating corruption, and oversight transparency and accountability', which objectives were based on a set of principles including the rule of law, good governance and efficiency.²¹⁴

The strategy was a positive initiative in the fight against corruption. It would have assisted in easing the burden of the ACC, thus strengthening the anti-corruption system. However, it was not implemented. Four years later, no mention of it has been made by all concerned parties. It has not been mentioned even in the annual SMART partnership dialogues that the country has hosted since 2003 in a bid to find a solution to the economic crisis and development of the country.²¹⁵

3.4.9 The media

The role of the media in the fight against corruption cannot be overestimated. The media have played a major role in sensitising society to corruption and exposing it by acting as a whistle blower. In a corruption perception research exercise in the country, the media were voted number one in the top ten tools to fight corruption by 25 per cent of the respondents.²¹⁶

Generally, government should not interfere in the role of the media as an appraisal mechanism of the legislature and executive.²¹⁷ However, where the government owns a majority of the media, as is the case in Swaziland, the independence and freedom of the press will not be guaranteed. Government will censor the media to avoid criticism.

While the Constitution guarantees freedom of the press,²¹⁸ the media are censored from reporting on news criticising government. The 2010 US Country Report on Human Rights in Swaziland reported that in 2008, 'the Attorney General warned journalists against criticising government as they would be viewed as terrorists and arrested under Section 2(b) of the Suppression of Terrorism

²¹⁴ National Anti-corruption Strategy and Action Plan (2007: 3).

²¹⁵ The SMART Partnership is an annual national dialogue encouraging networking amongst citizens involving the media to engage the nation in the development of the country. SMART is an acronym reaffirming the objectives of government in service delivery – Specific, Measurable, Attainable, Realistic, Time-bound.

²¹⁶ National Corruption Survey (2010: 38).

²¹⁷ Langseth *et al* (1997: 519).

²¹⁸ Section 25 of the Constitution.

Act, 2008'.²¹⁹ Such threats have not affected the print media for they have reported steadfastly on corruption. Rose-Ackerman argues that reporting on corruption scandals is a sign of political maturity; the citizens recognise the difference between public and private spheres and are willing to complain when the boarder is crossed.²²⁰ Thus the media should be engaged in the fight against corruption as a check on the government.

Rose-Ackerman argues, further, that instead of censorship, libel laws will be used to insulate politicians or heads of state from public criticism by the media.²²¹ The case of Bheki Makhubu confirmed that media are banned from reporting negatively on the monarchy.²²² Hence, the media cannot act as a critic of the wasteful monarchy.

3.5 Conclusion

The failure of Swaziland in combating the escalating rate of corruption cannot be attributed to the lack of an anti-corruption system. The anti-corruption system of Swaziland is comprehensive and covers a wide variety of the bodies necessary to reinforce the fight against corruption. However, the weaknesses and challenges faced by these agencies undermine the efforts made by the state. Worth noting is that these weaknesses are recurrent since they are observed from the first anti-corruption attempts. Despite the ombudsman of Swaziland being used as an example of 'how not to run an anti-corruption body' by scholars, Swaziland does not learnt from its history. Strong as the anti-corruption bodies look on paper, they are undermined primarily by the lack of independence and resources. Consequently, it weakens the anti-corruption system.

The succeeding chapter is a critical analysis of the strategy adopted by the state with a view to understanding the persistently high rate of corruption in Swaziland.

²¹⁹ Human rights report on Swaziland (2010: 12).

²²⁰ Rose-Ackerman (1999: 225).

²²¹ Rose-Ackerman (1999: 166).

²²² Freedom of Expression Institute Press Release, (27 September 1999). Bheki Makhubu, journalist, was arrested on criminal defamatory charges against the monarchy for alleging that the King had taken a school drop-out for a wife without HIV/AIDS screening at a period when the country had a high rate of the disease and, risking contracting the virus. The allegations were not refuted but his conduct was viewed as defamatory.

CHAPTER 4

THE ADEQUACY OF THE ANTI-CORRUPTION COMMISSION: AN ANALYSIS

*'Failure to combat corruption is more to do with institution failings than institution absence.'*²²³

4.1 Introduction

Corruption in Swaziland has reached abysmal levels. Monthly losses of E80 million are destructive to the economy and to sustainable development. The system adopted in curbing corruption has to be one that increases the accountability of the senior officials in the exercise of the discretionary powers bestowed upon them. As already noted, the system is a comprehensive one, albeit inadequate as the levels of corruption have been on the rise. The government has attested to this inadequacy by conceding that its efforts in combating corruption are not effective.²²⁴

The crux of the anti-corruption system is the ACC. The other agencies in the system identify corruption and report it to the ACC for investigations. Therefore, as the success of the anti-corruption system rests on the ACC, it will be the subject of the critical analysis that follows. While the international instruments against corruption advocate the establishment of anti-corruption bodies, they never provide implementation details.²²⁵ It is left to each state to tailor the bodies to best fit its domestic setting.²²⁶ Swaziland has adopted the international agenda and created an ACC in line with international objectives. However, the system has proven to be inadequate as the levels of corruption are on the rise.

²²³ Doig & McIvor (2003: 321).

²²⁴ Swaziland National Corruption Perception Survey (2010: 4).

²²⁵ Khemani (2009: 11).

²²⁶ Khemani (2009: 12).

4.2 Measuring the adequacy of the ACC

The system adopted should be a strong one that is interwoven amongst the different pillars to act as a check on the monopoly powers of the senior officials.²²⁷ The success of the interdependence will depend on the strength of the individual pillars that make up the system. Langseth *et al* argue that any weak link will overwhelm the system and tilt it towards corruption and abuse.²²⁸ By analogy, the success of an ACC will be determined by the inter-relations it maintains with the other bodies. An ACC is usually measured against 'seven deadly sins' from which most suffer, namely:

- Political
- Economic
- Governance
- Legal
- Organisational
- Performance
- Public confidence.²²⁹



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Scholars have analysed the different reasons for the failures of most African ACCs and unanimously conclude that they suffer from the above sins which evidently hamper their success. The ACC of Swaziland will be measured also against these sins to establish the reasons for its failures in preventing and curbing corruption.

4.2.1 Political sins

Political sins are lack of 'genuine political commitment' from the leadership.²³⁰ U4 argues that it is difficult to measure political sins due to their diversity of form.²³¹ However, academics agree that

²²⁷ Khemani (2009: 5)

²²⁸ Langseth *et al* (1997: 500).

²²⁹ Klemenčič & Stusek (2007: 23-24).

²³⁰ Klemenčič & Stusek (2004: 23).

²³¹ U4 'Why ACCs fail'.

they are primarily identified as lack of honest intention in the creation of the ACC.²³² The ACC will be hastily established due to pressure from international donors.²³³

Mbaku argues that an ACC which is established to appease international donors will be designed not to affect high ranking officials, despite overwhelming evidence of their involvement in corruption.²³⁴ A deficiency of the approach taken by POCA, which has affected the Swazi ACC, is that it has limited the scope of 'politicians' with regard to the offences relating to politicians.²³⁵ The list of politicians exclude the executive (Ministers) or the Prime Minister.²³⁶ Analogically, express mention of one, excludes the other. Hence, the question that arises is which agency has the authority to initiate investigations into malfeasance by the executive.

The tendency is that the PAC or a parliamentary Commission of Inquiry will initiate investigations into corruption by the executive and where it decides that a matter is final, the ACC will not pursue it. As already noted, such conduct contradicts the mandate of the PAC which cannot pronounce on the criminal liability of a person. In effect, it inhibits the ACC from pursuing the matter further and perpetuates the culture of impunity. Illustrations include the E31 million land sale and the land scam cases. In the former case, the parliamentary Commission of Inquiry had sentenced the Minister involved to community service for abuse of power, thereby trivialising the severity of the case.²³⁷ The matter was closed and no further investigations were conducted. In the land scam case, the King would not have issued a directive to stop any proceedings had the ACC taken the initiative instead of leaving it to the PAC to refer it.²³⁸

The argument is further buttressed by the non-ratification of the international instruments to which Swaziland is signatory. The ACC has been campaigning and lobbying the state to ratify these

²³² U4 'Why ACCs fail'.

²³³ Khemani (2009: 20).

²³⁴ Mbaku (2007: 145).

²³⁵ Worth noting is that, with regard to illicit enrichment, POCA, in Section 34(1), has cast the net wide and acknowledges that any person may be liable for such a crime. The ACC, therefore, may investigate malfeasance of the executive only in cases of illicit enrichment.

²³⁶ See fn. 40 above

²³⁷ See 3.4.5 above.

²³⁸ See 2.3.4 above.

instruments to enhance the provisions of POCA, but in vain.²³⁹ No positive response or commitment is forthcoming from the state. Hence, the will from the state is not genuine but it is aimed at appeasing international donors so that they may release funds which will seep through the cracks of the system and not reach their intended recipients.

Lack of political will is regarded as the most deadly of all the sins since it influences the functioning of the system. Camerer argues that ACCs need high levels of political support and democratic conditions under which they can operate.²⁴⁰ The determination to tackle corruption may be present but meaningless if an ACC is not supported by a favourable political climate, good governance and a functioning and credible rule of law and legal system.²⁴¹ Where political will is deficient or absent, it is unlikely that the ACC will succeed and produce the results expected by the citizens. The legitimacy of the system will be undermined. Thus, lack of political commitment guarantees the failure of the ACC.

4.2.2 Economic sins

Economic sins are influenced by a number of factors in the micro- and macro-economic environment.²⁴² Klemenčič & Stusek argue that an ACC is 'likely to fail if it is operating in an environment of endemic corruption and a highly state-controlled economy'.²⁴³ Contributing to the economic sins will be insufficient funding. Indeed, as already noted, the ACC in Swaziland is challenged by stark financial resource constraints. It complained that its budget could not sustain its operations; hence, it could not deliver services satisfactorily.²⁴⁴ The prevalence of grand corruption in Swaziland cannot be overemphasised. The budgetary constraints coupled with the high levels of corruption overwhelm the ACC.

²³⁹ ACC Strategic Plan (2009-2012: 17).

²⁴⁰ Camerer (2001: 4).

²⁴¹ Camerer (2001: 4).

²⁴² U4 'Why ACCs fail'.

²⁴³ Klemenčič & Stusek (2007:23).

²⁴⁴ See 3.4.1 above.

4.2.3 Governance sins

The stability of an ACC will be dependent on the overall performance of the different pillars in the anti-corruption system and the governance structure of government in general.²⁴⁵ Governance sins are a lack of effective institutional co-ordination amongst an ACC, the other pillars in the anti-corruption system and other government departments.²⁴⁶ The different pillars normally want to guard their territory and handle a case without the interference of the other pillars. In Swaziland, coordinated efforts are only present between the ACC, police and Anti-Money Laundering Supervisory Authority.²⁴⁷ There was no coordination involving the erstwhile procurement department, which was a completely corrupt institution. The process linking the financial pillars (Auditor-General and procurement department) with the enforcement authorities (ACC, police and DPP) is unnecessarily bureaucratic and smothers accountability, as some cases are dealt with administratively by the PAC which has limited powers in relation to criminal culpability. A Mutual Evaluation Report on Swaziland (2011) by ESAAMLG also noted that there was a 'lack of defined coordinated process amongst the institutions of government'.²⁴⁸

Udombana succinctly captures the relationship between good governance and corruption in the proposition that 'good governance curbs corruption and the disappearance of corruption enhances good governance'.²⁴⁹ He further argues that good governance is a 'basket of many practices' including accountability, transparency and participatory governance which sustain economic development.²⁵⁰ Where some of the pillars in the system shield the senior politicians from accountability for their actions it affects the good governance of the country. Some cases have been filtered through the criminal justice such as the case of the E31 million land sale.²⁵¹ A blatant case of grand corruption was summarily dealt with by parliamentary Commission of Inquiry, further

²⁴⁵ U4 'Why ACCs fail'.

²⁴⁶ Khemani (2009: 20)

²⁴⁷ ACC Annual Report (2009/2010: 4).

²⁴⁸ ESAAMLG Mutual Evaluation Report on Swaziland (2011: 24).

²⁴⁹ Udombana (2003: 479).

²⁵⁰ Udombana (2003: 487).

²⁵¹ See 3.4.5 above.

encouraging the culture of impunity.²⁵² Consequently, it affects the effectiveness of the ACC. Klemenčič & Stusek argue that the ACC becomes an 'island of integrity surrounded by a sea of corruption' which increases the burden it is carrying.²⁵³ The governance sin has continually obstructed the effective fight against corruption.

4.2.4 Legal sins

Legal sins are attributed to a weak legal framework and a weak state of rule of law under which an ACC operates.²⁵⁴ U4 argues that where there is no rule of law or it has broken down and decisions are taken arbitrarily, the failure of an ACC is inevitable.²⁵⁵ Respect for the rule of law has always been minimal in Swaziland. The rule of law crises of 2002-2004 and 2011 are clear indications of the executive and head of state arbitrarily interfering in the work of the judiciary.²⁵⁶ The judicial crises have halted the functioning of the courts, occasioning a backlog of cases.²⁵⁷ The land scam, further, illustrates not only a breakdown in the rule of law but also the culture of impunity prevailing in grand corruption cases.

Where a weak legal foundation defines the functions, powers and responsibilities of an ACC, it will affect its effectiveness.²⁵⁸ The allocation of the prosecutorial mandate to the DPP instead of the ACC has created cooperation problems. Cases have been postponed for want of evidence. The cause of the delay is that the prosecution is not involved in the investigative process of the ACC to guide it on the material information necessary for establishing viable cases. Moreover, where the prosecution is based in the ACC it ensures capacity development and expertise in the field. In corruption cases of Swaziland, advocates from South Africa have had to be hired on an *ad hoc* basis to assist in the prosecution and adjudging of the cases.²⁵⁹ In this regard, the state loses funds which could have been invested in capacity building and training of local experts.

²⁵² See 3.4.5 above.

²⁵³ Klemenčič & Stusek (2007: 24)

²⁵⁴ Khemani (2009: 20).

²⁵⁵ U4 'Why ACCs fail'.

²⁵⁶ See 3.4.7 above.

²⁵⁷ Human rights report (2010: 18).

²⁵⁸ Klemenčič & Stusek (2007: 24).

²⁵⁹ Ndlela (10 August 2011).

POCA itself is drafted poorly. It is common knowledge that monies stolen through corruption are kept in offshore bank accounts which are out of reach of the local authorities. To reclaim them, an asset recovery system that is supported by mutual legal assistance is necessary. POCA does not establish any mechanism for asset recovery in extrajudicial matters. Apart from that fact, locally the ACC can seize assets only for purposes of investigations²⁶⁰ and the DPP is the only office authorised to confiscate assets in Swaziland, through the Serious Offence (Confiscation of Proceeds) Act of 2001, once a conviction has been secured.²⁶¹ Thus, the system allows for criminal forfeiture only, and not civil forfeiture.²⁶² Civil proceedings (against the thing itself) are an option in cases such as grand corruption for the person might be immune from litigation or a fugitive. While the ACC has called for the amendment of POCA, the gap in the law could be filled by UNCAC, as it provides for asset recovery via *in rem* proceedings, but it has not been ratified. As yet, the ACC has no legal basis for *in rem* proceedings.

4.2.5 Organisational sins

The international instruments on anti-corruption leave it to states to choose the type of ACC that will best suit their domestic settings. In establishing ACCs, countries tend to follow the examples of success, such as the Hong Kong model,²⁶³ which model Swaziland has assumed. However, Klemenčič & Stusek argue that no model may be applicable equally in different situations and its successes depend on the environment in which it is established.²⁶⁴ It is for that reason that a country should assess the context in which an ACC is established. The Hong Kong model was suitable in that environment because, as Camerer describes it, it was a 'small city state with distinctive culture and highly efficient administrative machine operating in a highly sustainable economic growth society'.²⁶⁵

²⁶⁰ Section 13 POCA of 2006.

²⁶¹ Section 50 POCA of 2006.

²⁶² Swaziland Note Verbal to the UN Security Council concerning Counter Terrorism (2003: 6).

²⁶³ Meagher (2004: 17).

²⁶⁴ Klemenčič & Stusek (2007: 24).

²⁶⁵ Camerer (2001: 2).

U4 argues that the African environment is quite different, economically, socially and politically, and transposing of the Hong Kong model may not suffice.²⁶⁶ Indeed, the political landscape of Swaziland is very different to that of Hong Kong, as it is an absolute monarchy based on a dual governance system – the *tinkhundla* and modern systems of governance. While the ethnic composition of the country ensures that there are no language barriers in the fight against corruption, the close-knit family ties have proven to be an obstacle. Since corruption is perpetrated in the guise of cultural practices, some do not see the significance of fighting corruption while others are ambivalent of the existence of the ACC.²⁶⁷ In response to the ignorance, the ACC has been conducting public awareness programmes on corruption and its own programmes.

However, the ACC focused primarily on bureaucratic corruption, neglecting graft. Hence, in dealing with graft cases it has focused on its investigative rather than the preventative function. Yet again, Klemenčič & Stusek accuse ACCs of focusing on one function, the investigative one, to the detriment of the preventative one and classify the approach as an organisational sin.²⁶⁸ The key cause of graft in Swaziland is lack of accountability. In preventing grand corruption, the ACC has to direct its educational awareness and training programmes in reinforcing the accountability structures in government as a long-term solution to preventing it. Concentrating on criminal investigations is treating the symptom only, not the cause. Pope argues that the strength of the Hong Kong Commission was in the coordination of the prevention and investigation roles which enabled it to develop a coherent and coordinated strategy in tackling corruption.²⁶⁹ Hence, he argues, further, that commissions that have copied the Hong Kong model have failed largely due to the lack of a coherent approach.²⁷⁰

²⁶⁶ U4 'Why ACCs fail'.

²⁶⁷ ACC Strategic Plan (2009-2011: 17).

²⁶⁸ Klemenčič & Stusek (2007: 24)

²⁶⁹ Pope (2000: 95).

²⁷⁰ Pope (200: 95).

Corruption in Swaziland is systemic. Systemic or entrenched corruption pervades the political and economic institutions, routinely becoming part of them, so that few honest people can be identified. It is encouraged by an inefficient or lax anti-corruption system.²⁷¹ Nicholls *et al* argue that:²⁷²

It thrives where institutions are weak or non-existent and it is closely related to poor governance; where there are inadequate legislative controls, no independent judiciary ...; and where independent media agencies are absent. ...what you really have is a kleptocracy, a Government that has institutionalised theft at its heart.

Ogonda, a UNDP public policy specialist, has noted that the current structure of the ACC was not equipped to curb corruption efficiently, particularly graft.²⁷³ He contends that, at present, the ACC would have to duplicate itself to monitor government accountability structures which would necessitate that about 10 000 officers are deployed amongst the 18 government ministries.²⁷⁴ According to him, the ACC would also have to be systemic to prevent grand corruption effectively.²⁷⁵ In this regard, he proposes that the ACC should adopt a 'sectoral approach to accountability'.²⁷⁶ In this approach, the ACC will delegate its preventative function to Principal Secretaries as the accounting officers of a ministry.²⁷⁷ Thus, the Principal Secretaries would scrutinise the legislation, identify the gaps in their accountability mechanisms and address them accordingly.²⁷⁸ This structure will enable the ACC to target fighting corruption at ministerial level, unlike the broader approach it uses currently. Hence, an organisational structure which is inappropriate for the domestic setting may weaken the organisation and result in an organisational sin.²⁷⁹

²⁷¹ Nicholls *et al* (2006: 4).

²⁷² Nicholls *et al* (2006: 4).

²⁷³ Dlamini (20 October 2011).

²⁷⁴ Dlamini (20 October 2011).

²⁷⁵ Dlamini (20 October 2011).

²⁷⁶ Dlamini (20 October 2011).

²⁷⁷ Dlamini (20 October 2011).

²⁷⁸ Dlamini (20 October 2011).

²⁷⁹ Khemani (2009: 20).

4.2.6 Performance sins

Performance sins are partially self-inflicted by ACCs who set higher standards than they can achieve. Khemani accuses them of setting 'unrealistic benchmarks that are unattainable creating an unreasonably high expectation in the public'.²⁸⁰ When they do not deliver as expected, the public loses confidence in them and they lose legitimacy. The Swazi ACC has developed a strategy that sets out its action plan. It proposes to root out all types of corruption by adopting a zero tolerance approach to combating it.²⁸¹ In this regard, it rightly has identified the civil service to be vulnerable to corruption and, *inter alia*, will promote ethical and integrity practices amongst the civil service.²⁸² Hence, it places great importance on an honest and clean civil service.

However, this approach is single-minded. The media, which play a role in exposing corruption, have been exposing graft cases endlessly. The focus of the public has been shifted to preventing and curbing corruption at the top. Academics argue that where the top is corrupt, it will be difficult to have a clean civil service. While the efforts of the ACC are well intentioned, the aims it has set, coupled with its approach, are not in line with the reasonable expectations of the public which wants to see an end to grand corruption. Thus, as the ACC Commissioner has noted, the public sees the strategy as ambitious instead of realistic.²⁸³

Contributing to performance sins is 'lack of staff with the relevant skills and expertise'.²⁸⁴ In the year 2009/2010, apart from inadequate human resources, the United Nations Office on Drugs and Crime (UNDOC) and the United Nations Development Programme (UNDP) identified that the Commission was in urgent need of trained and qualified staff equipped with modern techniques.²⁸⁵ Daily, economic criminals develop new techniques of hiding and laundering the proceeds they derive from their criminal activities. In grand corruption, vast amounts of money are involved which usually are hidden in foreign accounts. Lack of expertise and experience will result in investigations that are likely to have little evidential value to establish *prima facie* cases leading to

²⁸⁰ Khemani (2009: 20).

²⁸¹ ACC Strategic Plan (2009-2012: 9).

²⁸² ACC Strategic Plan (2009-2012: 26).

²⁸³ ACC Annual Report (2009/2010: 4).

²⁸⁴ Khemani (2009: 21).

²⁸⁵ ACC Annual Report (2009/2010: 10).

prosecutions.²⁸⁶ Thus, the ACC will need experts to trace and recover the assets lost through grand corruption.

4.2.7 Public confidence sins

The public confidence sin emerges when the public does not have trust and confidence in the ACC, due to a weak relationship between itself, civil society and the media.²⁸⁷ The Swazi ACC has taken efforts to build a rapport with civil society and the media. It has conducted public awareness programmes across all media houses and has worked with NGOs. In the corruption perception survey report, it was concluded, however, that there was still need to increase the education and awareness programmes to reach all sectors of civil society and that corruption studies should be incorporated in academic curricula.²⁸⁸

These awareness programmes not only should include information on corruption and anti-corruption mechanisms but also should include information on the mandate, functions and performance of the Commission.²⁸⁹ The ACC has been accused of being a 'toothless dog' because the public has not been kept abreast of its performance. It has been viewed as non-effective since the media reported cases of alleged grand corruption often but the ACC was seen not to be responding. Also, the ACC has not had success in the court system. It was only in 2011, four years after its inception, that the ACC recorded its first conviction.²⁹⁰

4.3 Successes

The failures of the ACC obviously will surpass any success it has achieved. Despite it being plagued by the seven deadly sins, it has managed to sustain its existence. Acting in collaboration with the UNDP, it conducted a national perception survey of corruption in 2010 which, *inter alia*, highlighted the extent of the understanding of the concept of corruption in the country and the weaknesses of the Commission. The Commission has also developed a strategic plan for the period 2009-2012 which maps its main objectives, key areas of focus and which will be used to

²⁸⁶ U4 'Why ACCs fail'.

²⁸⁷ Khemani (2009: 21).

²⁸⁸ National Perception Survey (2010: 62).

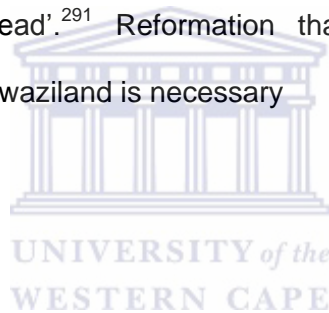
²⁸⁹ Klemenčič & Stusek (2007: 24).

²⁹⁰ *S v Koli Joel Ndlovu* unreported Pigg's Peak Magistrate Court case No. 428 of 2010.

gauge the strengths and weaknesses of the Commission. The one conviction it has secured in the midst of an epidemic of corruption and when the public had lost confidence in it has proven to the public the strengths of the investigation team.

4.4 Conclusion

The ACC is a well-intentioned body that looks good on paper but its objectives are difficult to implement. The combined effects of the seven deadly sins present it with a huge task with regard to curbing grand corruption. The efforts of the ACC in fighting against corruption under the present circumstances are meaningless and only portray it as an 'island of integrity' in a sea of corruption. Corruption is entrenched as part of the system of governance in Swaziland. Without political will to back it up, the anti-corruption system will continue be inadequate. Its efforts to ferret out corruption in the civil service will be futile if the top is not committed to help. Proverbially, it is said in Africa that 'fish starts rotting in the head'.²⁹¹ Reformation that will promote good governance, accountability and transparency in Swaziland is necessary



²⁹¹ Nsereko & Kebonang (2005: 92).

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

Corruption in Swaziland has affected the political and socio-economic spheres of life and has contributed partly to the economic crisis the country is facing. Most deleterious is grand corruption, which not only has depleted the national treasury but also has affected the formulation of policy and legislation. The state, concerned about the effects of malfeasance and in efforts to mitigate them, has adopted a holistic strategy to combat corruption, including 'watchdog' agencies, the media and civil society. Against the backdrop of the anti-corruption system, the levels of corruption should be low. However, they are on the rise.

State policy on corruption is to expose, combat and eradicate it. The media reports have exposed corruption and have provoked outrage in society over its rising levels. Society has looked to the ACC, which is the pivot of the anti-corruption system, to contribute in the endeavour to root out corruption, but in vain. Society has since concluded that it is toothless. The state, too, has acknowledged the ineffectiveness of the ACC and the system in the realisation of its goal. In such situations, reform is inevitable. Lambsdorff argues that for reformation efforts to be successful, a country must acknowledge first that the tools at its disposal are imperfect.²⁹²

This study has analysed the ACC, on whose strengths the system is dependent. Its failures, however, have contributed to the weaknesses of the system. The challenges facing the ACC are primarily based on lack of political will and good governance. Economic recovery can be achieved only by rectifying these administrative weaknesses.

Corruption is not a problem that can be attacked in isolation by the agencies tasked to curb it. While criminal sanctions are necessary, they are not sufficient. The state authority has to be involved, as its commitment shapes the strategy employed.

²⁹² Lambsdorff (2007: 28).

5.2 Political will

The leadership is seen to be involved in fighting corruption through the statements it issues, but such rhetoric is simply lip-service. Their spoken word is different from their actions. Tackling corruption in Swaziland will remain a problem if the relationship between the corrupt and the state is not differentiated.²⁹³ It hinders government from acting decisively and effectively on corruption issues as it shields the corrupt with impunity. The leadership should portray exemplary commitment by having zero tolerance for corruption.

However, U4 emphasises that political will does not necessarily emanate from the leadership only, but can also come from the citizenry and the media.²⁹⁴ The governance of the country should enable the society to hold government accountable. Society should be empowered and encouraged to question government policy and actions through civil education and literacy on how they can contribute to holding leaders accountable.

The international community can also assist the state in generating political will by withholding aid until effective reforms are implemented.²⁹⁵ The IMF has assisted in this regard by refusing to grant any loans to Swaziland until it manages its funds productively.²⁹⁶ The country has had a Fiscal Adjustment Roadmap for some time to help it recover from the economic crisis, but it has not been implemented. In such instance, outside pressure will not be adequate if the leadership is not ready to act decisively to remedy its problems. Without commitment from the leadership, the fight against corruption will not be won.

5.3 Good governance

Political will is dependent on good governance.²⁹⁷ Good governance is about reforming the institutional structures to enhance accountability, transparency and effectiveness to reduce corruption.²⁹⁸ The governance system of Swaziland is dual in nature as it encompasses both

²⁹³ Joubert (2007: 142).

²⁹⁴ U4 'Why ACCs fail'.

²⁹⁵ Rose-Ackerman (1999:180).

²⁹⁶ See 1.3 above.

²⁹⁷ U4 'Why ACCs fail'.

²⁹⁸ Udombana (2003: 479).

traditional and modern structures. Even so, the doctrine of separation of powers should be adhered to strictly.

The influence of the King in all arms of government should be decreased. The appointment of a majority of parliamentarians by the King has made them use the King as a shield against accountability. They have no sense responsibility to the citizenry. While the system does not accommodate political parties and bases eligibility for Parliament on individual merit, the individual has to be elected to power. The citizenry can decide at the polls whether an MP has served them well.²⁹⁹ However, in the *status quo*, the appointed politicians are not inclined to be accountable and have the best interest of the citizens at heart.

Also, judicial processes should be allowed to take their course and people be held accountable if the fight against corruption is to be successful. Cabinet reshuffles are not sufficient in preventing and curbing corruption nor will the directives from the King act as a deterrent in future misconduct. The independence of the judiciary should be guaranteed and the rule of law upheld.

Good governance also entails effective and efficient management of funds. Thus, priority should be given to projects that enhance social development rather than pleasing one person. Equitable allocation of resources for the welfare of society will decrease corruption thus decreasing poverty. The government must adopt fiscal discipline to improve the economic situation and ensure that no funds are lost through the cracks.

5.4 The legal framework

The laws of the country govern and empower the pillars of the anti-corruption system. When poorly drafted, they will take away the teeth of the agencies.

The ratification of the international instruments against corruption to which Swaziland is signatory could improve the quality of the domestic legislation. Being a mere signatory to them will not give the country a sense of obligation to implement their provisions. The instruments may also help cover the gaps in the existing legislation.

²⁹⁹ Rose-Ackerman (1999:127).

Successful investigation and prosecution of corruption cases is reliant on the speed and integrity of the ACC.³⁰⁰ Where its power is limited in some respects, it will hinder the effective implementation of anti-corruption efforts. The burden placed upon the investigators to establish a *prima facie* case before seizure of assets is limiting to their functions. The requirement should be reduced to establishing a reasonable suspicion as, at this stage, the investigations would still be ongoing.³⁰¹ Thus, there would not be sufficient evidence to establish a *prima facie* case. Also, POCA should be amended to increase the scope of asset recovery to include non-conviction based recovery.

It is noted that the Witness Protection Bill and the Leadership Code of Conduct are still pending in parliament. Their swift enactment would contribute to the fight against grand corruption.

5.5 The anti-corruption system

The lack of defined and co-ordinated processes amongst the different pillars of the system has weakened the system. Understandably, the ACC may want the other agencies to deal with a matter they are seized with before it intervenes. However, this has filtered out some cases worth investigating. Its role and powers have to be clearly defined in this regard, whether it may initiate investigations independently, regardless of the any other agency (PAC or Commission of Inquiry) investigating the matter. This will remove the bureaucratic structure that has been created in initiating investigations into malfeasance.

The independence of the different pillars is crucial to their operation. The judiciary should not be influenced either by the executive or the monarchy, and the office of the A-G must be given autonomy over its operations. Lack of resources implies poor institutional capacity. Thus, the pillars will always be ineffective in executing their functions. The budgets allocated to these bodies should be reviewed to ensure efficiency and effectiveness in fighting corruption. Retaining of experts in the each of the pillars should be made a priority. Special training must be given to the judiciary (prosecutors and judges), ACC investigators and auditors.

³⁰⁰ Diog & Riley (1998: 57).

³⁰¹ Swaziland Mutual Evaluation Report (2011: 59).

Government should consider strengthening its partnership with NGOs in the prevention of corruption.³⁰² The government could increase transparency by including them in discussions of accountability and anti-corruption procedures.³⁰³ In this regard, it should make available public policy information without any requirement placed on the requestor to show a cause of interest in the information.³⁰⁴ The speculations on the E2,4 billion loan from South Africa by the media resulting in their chastisement by the King would have been avoided if government had issued a statement on its progress.³⁰⁵ Society could rely only on South African reports for information on the progress of the negotiations as the Swazi government was silent. The society would want to be interested in policies in which they will be involved. When society has a sense of ownership in the strategy, its members participate in finding a solution. The government must not create conditions where one party is suspect of the others' motives and intentions. The relationship between government and the citizens has to be one of trust.

In its preventative measures, the ACC could raise awareness about grand corruption, its dangers and how it affects the society.³⁰⁶ It may also draw the relation between grand corruption and money laundering to highlight the magnitude of the effects it has, thus increasing awareness amongst the financial and non-financial institutions on the reporting of politically exposed persons. As such, the institutions will be vigilant in checking and reporting cases of grand corruption. Also such awareness should be extended to the government structures and the politicians themselves, especially persons entrusted with any discretionary power, inclusive of traditional structures. Moreover, the educational topics should also promote integrity and ethical conduct, particularly amongst the youth as it is the future generation of leaders.³⁰⁷

³⁰² Eser & Kubiciel (2005: 112).

³⁰³ Eser & Kubiciel (2005: 112).

³⁰⁴ Rose-Ackerman (1999: 225).

³⁰⁵ Dlamini (16 September 2011).

³⁰⁶ Eser & Kubiciel (2005: 127).

³⁰⁷ Udombana (2003: 487.)

5.6 Conclusion

The response of the state to the fight against corruption will remain a good policy on paper but difficult to implement if the state does not support it. To achieve sustainable development, political will and good governance are imperative. Without them, the pillars of the anti-corruption system will remain inadequate in curbing grand corruption. Instead, their inadequacy will weaken the anti-corruption system further, resulting in more funds losses and hindering the recovery of the country from the economic crisis.



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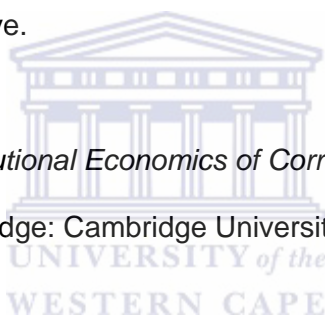
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