Stretching solidarity too far: The impact of fraud and corruption on social security in South Africa

KITTY MALHERBE[1]
Senior lecturer, University of the Western Cape

1 INTRODUCTION

> "A true democracy only exists if the fundamental rights provided for in a Bill of Rights exist in practice and can be exercised by the population. This applies in particular to the poor people for example people depending on housing, pensions, childcare and health care. If these services do not exist because of the misappropriation of State funds through corruption and fraud, then a democracy has no meaning to the population." (Heath 1999c)

The focus of this article will be the negative impact of crimes such as corruption and fraud on the state's capacity to deliver adequate social security.

An attempt will firstly be made to explain briefly what is generally understood by terms such as social security, corruption and social security fraud, followed by a brief discussion of the right to access to social security. Next, the incidence of fraud and corruption on three levels, namely by state employees, employers and beneficiaries will be examined. This will be followed by an analysis of the impact of the penalties imposed by social security law on the levels of fraud and corruption in the social security system. Finally, some suggestions will be made on measures to combat social security fraud and corruption in South Africa.

2 CORRUPTION, FRAUD AND SOCIAL SECURITY

> ". . . (C)orruption adversely affects all sectors in society and impacts most directly on the poor, and is corroding the national culture and ethos of democracy. Both government and civil society are being depleted of scarce resources that are needed to ensure economic prosperity, equality and a better life for all. Corruption is also viewed as a blight on society caused by the worship of self, which gives the pursuit of personal affluence priority above the pursuit of economic justice for all. Government and civil society together share a commitment to stamp out corruption at every level in society and develop a culture of zero tolerance of corruption." (Public Service Commission 1999)

The crime of corruption is a statutory crime in terms of the Corruption Act 94 of 1992. It can be divided into active and passive corruption, with

1 The author wishes to thank Gerhard Kemp for his assistance and helpful comments.

active corruption being the unlawful and intentional offering of a reward to someone in return for future or past action or inaction in his or her official capacity, or with the intention of influencing the latter to act in a specific manner in his or her official capacity. Of more importance for this article is passive corruption, as it involves the unlawful actions of the official receiving the reward. This crime is committed when someone in his or her official capacity unlawfully and intentionally receives any type of reward in return for future or a past action or inaction in his or her official capacity. The crime therefore lies in the (corrupt) receipt of the reward as inducement to act in a particular manner or for past actions.[2] Examples in the sphere of social security which would fit the description of corruption, are: in return for money, to influence the allocation of government contracts with private sector providers of services, for example, outsourcing of payment of state grants; assisting persons who are not entitled to benefits to amend or falsify information required on application for assistance, so as to ostensibly meet the requirements for the benefit.

The common meaning of corrupt is "rotten; depraved; wicked; influence by or using bribery" (Pocket Oxford Dictionary). According to Prof Kader Asmal (1999) in his address to the National Anti-Corruption Summit, the defining characteristics of corruption are the misuse of public or private office, roles or resources, for private benefits (material or otherwise). He feels strongly that corruption should not be confused with other activities such as abuse of power and nepotism.

Fraud is defined as the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another (Snyman 1999:539). The misrepresentation that forms the basis for the fraud usually takes the form of one person representing to another that a certain set of facts exists which in truth does not exist. Fraud can also be committed by omission, that is, by failing to disclose information, which, if the other party were aware of the information, would have induced him or her to act differently. The requirement that prejudice must be suffered is sufficiently met where the prejudiced party is the state or the community in general.[3] The prejudice suffered could be non-proprietary in nature, as for example, the obtaining of a benefit or permit which the person requesting it is not entitled to, but endeavours to obtain by fraudulent means, would be regarded as fraud.[4]

This paper deals with fraudulent acts committed in a specific context, namely social security fraud. One has to distinguish between mere improper use of social security and social security fraud. The most common form of social security fraud is knowingly making or causing a statement to be made which is materially false or which results in an incorrect payment of benefit in an application for benefits; or, wilfully making any false entry on any book, record or document relating to a claim for benefits.

2 See Snyman 1999:392–404.
3 *S v Myeza* 1984 4 SA 30 (T) at 32.
4 See Snyman 1999:540–541.

The problem with fraud and corruption is that these are crimes that are difficult to detect, and once disclosed, are notoriously difficult to prove in a court of law. A belief exists that "white-collar crimes cannot be solved and nothing ever comes of reporting white-collar crime to the police – a notion that is not entirely true in all cases" (Heath 2000). In 1998, only 8.5 per cent of the total reported cases of commercial crimes such as fraud, misappropriations and embezzlements were followed up by convictions.[5]

Social security is a concept which is difficult to define and is interpreted differently in different countries. Pieters (1993:2) defines social security as "the body of arrangements shaping the solidarity[6] with people facing the threat of a lack of earnings (that is, income from paid labour) or particular costs".[7]

Social security is traditionally divided into two branches:

- Social insurance, which is administered by the state and is intended to provide protection to wage earners when their earnings cease through conditions beyond their control, that is, old age, unemployment, workplace injuries.
- Social assistance, which is the means-tested, non-contributory benefits provided by the state to persons who cannot provide for their own minimum needs.

3 RIGHT OF ACCESS TO SOCIAL SECURITY

Section 27 of the Constitution of the Republic of South Africa Act 108 of 1996 provides that everyone has the right to access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. The state is required to take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of these rights.[8]

The preamble to the Constitution states that it aims to establish a society based on democratic values and to improve the quality of life of all citizens and free the potential of each person. This cannot be achieved without the state creating a comprehensive and integrated social security system (De Wet 1995:36; White Paper for Social Welfare 1997:par 45).

When interpreting any of the fundamental rights in the Constitution, and therefore the right to access to social security, the courts must promote the values that underlie an open and democratic society based on

5 These statistics can be broken down as follows: of the 62 086 cases of commercial crimes that were reported, only 12 779 cases went to court. In the same year there were 5 289 convictions for commercial crimes – the outcome of the rest of the cases being 1 052 acquittals and 4 740 cases being withdrawn (Heath 2000).

6 The importance of the terms "solidarity" in this definition will be explained below.

7 For other definitions, see Olivier *et al* 1999:9–11.

8 For the purposes of this paper it is not necessary to join in the debate on the enforceability in general of socio-economic (second generation) rights such as the right to social security. See in this regard Olivier *et al* 1999:587–90.

human dignity, equality and freedom (s 39(1)(a)). The values of human dignity and equality are of special importance to the right to access to social security and the recognition of the state as a welfare state (Olivier *et al* 1999: 592).

Section 7(2) of the Constitution places a duty on the state to respect, protect, promote and fulfil the fundamental rights. The duty on the state to respect, protect, promote and fulfil the right to access to social security is, however, qualified by the wording of section 27(2). These qualifications include that the state is required [my emphasis]:

- to take *reasonable* legislative and other measures
- within its *available resources*
- to achieve the *progressive realisation* of this right.

The qualifying terms of "available resources" and "progressive realisation" mean that the state is not required to fulfil its social security obligations immediately and completely and that it has a certain measure of discretion to decide how and to what extent this right can be realised. It is exactly here that the impact of fraud and corruption on the realisation of social security rights becomes obvious. The resources available to the state to fulfil its social security obligations are already limited, due to fiscal constraints (see Olivier *et al* 1999:275). If these already insufficient resources are wasted on persons they were never intended for as a result of corruption and fraudulent claims, this impacts on the state's ability to comply with even the minimum social security standards.

The onus rests on the state to show that it does not have enough available resources. It will, however, be inexcusable if the state were to partly blame the lack of resources on current levels of corruption and fraud, without taking reasonable legislative and other measures to combat these crimes.

There are qualifications attached to the right to social assistance as well: it is to be means tested (". . . if they are unable to support themselves and their dependants"); and only "appropriate" social assistance is guaranteed, which means that an applicant has to meet the requirements imposed at the state's discretion. Only those who meet these requirements can lay claim to social assistance. Many instances of social assistance fraud (welfare fraud) are cases of persons fraudulently providing false information regarding their income and assets, so as to meet the requirements of the means test, or about their personal circumstances, to meet the requirements for a specific grant.

4 FRAUD AND CORRUPTION IN SOUTH AFRICAN SOCIAL SECURITY

The perpetrators of social security fraud and corruption can generally be found on three levels: corruption by the officials administering the various schemes, employers defrauding the social insurance schemes, and fraudulent claims by those who are not in fact entitled to benefits.

4.1 Corrupt officials

> "Corruption has always been part of human experience. It is not a new phenomenon and will certainly not disappear tomorrow. Despite its pervasive nature, corruption can be contained and its pernicious effects on social and economic development significantly curtailed" (Maduna 1999).

Corruption is not a new phenomenon in South Africa, even though it has only started falling in the media spotlight over the past three to four years. The fact that the press was suppressed during the apartheid years, and that little was known about the extent of fraud and corruption during that time, has led to the perception that corruption, fraud and maladministration are creations of the current dispensation (Heath 1999b).

According to a statement released by the Minister of Welfare on 10 March 2000,[9] an official from the Department of Welfare was arrested and charged in December 1999 with fraud and theft of R200 000 from the poverty relief funds. The Minister also admitted that "there are serious shortcomings in the financial management of the Poverty Relief Programme by the Department of Welfare".

Other examples of irregularities that have been identified are pensions being paid to deceased persons and individuals receiving more than one pension under various names (Heath 1999b).

The case of former Minister of Welfare Abe Williams exposed high-level corruption in the department responsible for social assistance and welfare delivery. Williams was charged under section 1(1)(b) of the Corruption Act for allegedly receiving R100 112 to use his position as Minister to promote the chances of Nisec, a private company, being granted the tender to pay out grants and pensions in the Eastern Cape. (Nisec already held the tender in respect of the Western Cape.) He was found guilty on 20 June 2000 on four counts of corruption and 36 counts of theft (*S v Williams* SS 31/2000 CPD unreported) and sentenced to three years' imprisonment. It is highly ironic that one of the highest profile cases of corruption and fraud in connection with welfare service delivery was linked to the privatisation of pension payment systems – a measure initially intended to *combat* the problems with fraud and corruption regarding pension payments.

The fact that money that is intended for poverty relief and social assistance is being stolen, misspent and wasted as a result of the fraudulent and corrupt deeds of officials in charge of running the various schemes means that there is less money available for government to spend on social assistance and welfare services. Corruption distorts sectoral priorities and undermines government's ability to raise revenue, affecting government's ability to provide essential public services (Maduna 1999). Where does that leave those who theoretically have a right of access to social security? The state is only required to take the measures to realise the right to social security *within its available resources*.

---

9 Press release at www.polity.org.za/govdocs/pr/2000/pr0310a.html.

Some causes for the high levels of corruption in South Africa are:

- the breakdown of ethical social values of society
- greed on the part of officials entrusted with public responsibility
- a lack of strong institutional controls
- a lack of enforcement measures
- the lack of the requisite political will to take exemplary punitive action against corrupt officials and agencies (Maduna 1999).

It is submitted that as privatisation of service delivery in the social security sector is stepped up, state officials will have increased opportunities to deal with the private sector – a situation that will not do much to stem the tide of corruption.

4.2 Fraud by employers

All of the social insurance schemes have some employer involvement in their administration. This, of course, opens the door for the commission of serious social insurance fraud.

In terms of the current Unemployment Insurance Fund[10] legislation,[11] the employer is required to pay a monthly contribution of 2 per cent of the salaries paid to employees in the previous calendar month. Employers are entitled to deduct the employee's contribution (1 per cent of earnings) from employees' earnings. The most common form of fraud committed by employers in this context is the intentional evasion of payment of contributions, even though the employees' part of the contribution has been deducted from their earnings. The employer is therefore fraudulently taking employee contributions. The UIF, on the other hand, is faced with claims for unemployment benefits for which many contributions were never paid over, leading to a deficit.

An employer could also attempt to cover his or her tracks by giving incorrect statements of the employees' earnings. By not declaring all the employees and their earnings, the employer could therefore potentially get away with paying a smaller contribution towards the fund. This is because no individual record of each contributor is currently held and the fund has to take the word of employers for how many contributors they employ.

4.3 Fraud by beneficiaries

One of the most important obligations of a potential beneficiary of a social security scheme is to provide the relevant social security administrative body with complete and truthful pertinent information about his or her situation. This duty extends past merely providing information as and when requested, it implies voluntarily keeping the relevant administrations informed of changes in the beneficiary's circumstances (Pieters 1993:108).

10 UIF.
11 Unemployment Insurance Act 30 of 1966.

The main type of social security "fraud" perpetrated by "beneficiaries" is steps taken to conceal the fact that applicants are not entitled to the relevant benefit. It has to be understood that many of the perpetrators of this type of fraud would be shocked to hear that their actions could be regarded as criminal. To many, defrauding the "system" is acceptable and they find it very hard to see social security administrations as victims of crime.

Why is it that social security fraud is regarded as perfectly acceptable and corrupt state officials can expect crowds of support at their trials? Tager (1996:26) attributes the erosion of South Africa's value systems to the lack of legitimacy of laws during the apartheid era. As people found ways to circumvent laws that did not serve their needs, a culture of sidestepping the law was established, which remains intact even in democratic South Africa.

It is here that the principle of solidarity comes in, as it is only when people realise that social security structures are not just faceless systems, but are there to provide benefits to real people, that their attitudes might change.

Most social security programmes are based on the principle of solidarity, meaning the shared responsibility of those who contribute towards each other and towards those who benefit (Olivier *et al* 1999:50). Solidarity can be likened to the *ubuntu* principle,[12] in that the principle of caring for each other's well-being is promoted and a spirit of mutual support fostered. Like the principle of solidarity, *ubuntu* acknowledges both the rights and responsibilities of every person in promoting individual and societal well-being (White Paper for Social Welfare 1997:17).

Intergenerational solidarity is the solidarity at work between different generations and is of particular importance for old age pensions. This type of solidarity implies that members of the younger, active population are prepared to meet the social security needs of the older generation. The other type of solidarity is intra-generational solidarity, which is the solidarity at work within members of the same generation, for example between the employed and unemployed of the working age population (Pieters 1993:28–29).

Solidarity is one of the basic principles of social security and should be actively promoted. The reality for social assistance in particular is that system operates on the tenuous "solidarity" of taxpayers with social assistance beneficiaries. Should the current impression continue that this money is wasted, taxpayers will become increasingly reluctant to contribute towards social security. The same concern can be raised in the context of social insurance. Many employees who see amounts deducted from their earnings would prefer to have the cash in hand now, rather than the promise of benefits at a later stage. The knowledge that their contributions might be filling the employer's pockets or be used to pay benefits to people who are not entitled to such benefits, will only increase their resistance to contributing. This further weakens solidarity.

---

12 Which says that people are only people through other people.

Some examples of fraud in the social assistance sector will be discussed briefly. The state pays out a number of means tested grants, namely:

- social grants for the aged, disabled and war veterans;
- grants-in-aid for elderly people who need full-time care;
- child support grants paid to primary caregivers of children under the age of seven;
- care-dependency grants paid to the parents of disabled children who receive permanent home care;
- foster child grants payable to persons in whose custody foster children are placed.

These grants are clearly intended only for those with no alternative income. It is for this reason that, according to the Social Assistance Act,[13] any person furnishing information that to his or her knowledge is untrue or misleading in any material respect or makes a false representation, in order that he or she or another person:

- may obtain social assistance to which they are not entitled;
- may obtain more social assistance than to which they are entitled;

is guilty of an offence (s 12). The same goes for receiving social assistance knowing that you are not entitled to it.

A beneficiary is required to inform the Director-General of Welfare without delay of any changes in his or her circumstances which may have a bearing on the continuation or the amount of the grant, for example, when the beneficiary marries, receives an inheritance or accepts an offer of employment. Often the beneficiary is reluctant to make this information available, as the grant would be discontinued once the Director-General is informed that the person does not qualify for the benefit any more. Not making this information available can be regarded as fraud by omission. Similarly, intentionally furnishing the Director-General with false or misleading information is an offence (s 17).

The Social Assistance Act itself creates an opportunity for fraud by allowing a beneficiary who is unable to collect his or her grant money, due to illness or other reasons beyond his or her control, to appoint and authorise another person to draw the grant on his or her behalf. Particularly in the case of social grants for the elderly, fraudsters take advantage of the elderly and claim the grants on behalf of them. The system has also been confronted with a multitude of claims that later turn out to have been made on behalf of deceased beneficiaries. One of the measures to combat fraud that will be discussed below is the planned new identification system which will, it is hoped, halt the payment of grants to these "ghost" beneficiaries, as it will create a link between the records of the departments of Home Affairs and Welfare.

13 Act 59 of 1992.

5 PENALTIES

5.1 Reclaiming undue benefits

When a person who does not meet the requirements for a benefit has nonetheless been granted a benefit, the undue benefits can be reclaimed at a later stage when the mistake is revealed.

Various cases where overpayments or payments to beneficiaries who are not entitled to social assistance benefits were made by the Department of Welfare have been documented. The Social Assistance Act provides that, should the Department of Welfare pay a social grant to a person under the belief that that person is entitled to the grant while he or she is not, that amount has to be repaid to the state (s 9(1)). The National Treasury may in its discretion write off the amount owed to the state by an overpaid beneficiary if it is satisfied that to sue for that amount would be uneconomical or cause undue hardship to the debtor concerned or his or her dependants, because they would be deprived of the minimum essential means of livelihood (s 9(5)). It is submitted that this exception would in most cases prove the rule, as the amounts are usually so small that it would be uneconomical for the state to sue.

5.2 Administrative sanctions

In cases where a person wilfully provides incorrect information to obtain social security payments or refuses to co-operate with the relevant authority, the relative administrative body can impose "administrative sanctions", such as suspension of, or cuts in benefits

As was seen above, one of the most prevalent forms of social security fraud is the failure by employers to pay over contributions to the Unemployment Insurance Fund. It is submitted that the financial woes of the UIF are largely due to the fact that the administrative sanction available is ridiculously inadequate and this type of fraud is so common.

Any employer who fails to pay the contributions at the time when it becomes payable, faces the "threat" of the Director-General of Labour, in his or her discretion, imposing and recovering a penalty from the defaulting employer. This might seem like an appropriate administrative sanction, except that section 31(1) of the Unemployment Insurance Act[14] limits the penalty to the amount of 10 per cent of the unpaid amount, or the princely sum of R20, whichever is the greater.[15] It is only when the employer has been convicted by a court of the offence of failing to pay contributions that he or she would be ordered to pay the whole unpaid amount (s 31(2)).

To ensure that the new, improved unemployment insurance system does not let contributors down, section 12 of the Unemployment Insurance Contribution Bill of 2000 provides for improved penalties to be used against defaulting employers:

14 UIA.

15 And even then the possibility exists that the Director-General could waive such a penalty in whole or in part.

Where the employer fails to pay contributions or does not pay the full amount payable, with the result that the employee is not entitled to a benefit or is entitled to less than the benefit he or she would have been entitled to had the full contribution been paid, the employer will automatically be liable:

- for a penalty of twice (200 per cent of) the unpaid amount;
- to pay the difference between the amount to which the employee would have been entitled had the full amount been paid by the employer, and the amount to which the employee is in fact entitled to as a result of the non- or underpayment.

Should this legislation be passed in this form, the abovementioned penalties may well reduce the incidence of fraudulent employers defaulting on paying over contributions already deducted from employees' wages.

5.3 Penal sanctions in terms of particular social security schemes

Social security legislation in many cases lists particular offences linked to those particular schemes, together with the penalties attached to such offences. Intentionally providing false information is usually dealt with under these penal sanctions.

An employer who is convicted of one of the offences listed in section 61(1)(j) of the UIA, namely failing to pay over contributions or not providing information regarding employee earnings timeously, will be liable to a fine not exceeding R500 or to imprisonment for a period not exceeding one year, or to both such fine and such imprisonment. It is submitted that this penalty is inadequate to avert any employer from defrauding the fund, as the fine of R500 does not weigh up the potential financial gains for an employer in hoarding employee contributions.

The Unemployment Insurance Bill definitely shows improvement as far as penalties are concerned. Apart from the built-in administrative sanctions listed above, any employer found guilty of committing an offence in terms of the new legislation will be liable to imprisonment for a maximum of two years (s 64). The same goes for the Unemployment Insurance Contributions Bill of 2000, which makes an offence under the Bill punishable by a fine[16] or imprisonment for a maximum of two years. This means that a defaulting employer now faces the threat of a massive fine or up to two years' imprisonment, which in many cases would outweigh the potential benefits of defrauding the system.

Anyone convicted of the offence of defrauding the social assistance system to receive benefits that he or she was not entitled to faces a fine, imprisonment of a maximum of 12 months, or both.

The success of these sanctions will depend on the combination in which they are applied. This can be seen in the current unemployment system, where some form of all of the above penalties is provided for to some extent, but as a whole it is still not deterring employers from defaulting.

16 No maximum is set.

5.4 Criminal prosecution

Unfortunately, the perception exists that the criminal justice system is not equipped to stem the tide of corruption in South Africa. According to the Heath Special Investigating Unit,[17] the police and the courts have not been able to hinder the growth of the problem of corruption and maladministration of public funds and assets, partly because of the difficult onus of proof in criminal cases. The mechanisms to manage corruption utilised in other countries, for example, harsh sentencing, strict control measures and effective policing, are not yet in place in South Africa (Heath 1999b).

6 MEASURES TO DETECT FRAUD AND CORRUPTION

There are some cases where the threat of punishment will do little to deter those who defraud social security:

- in some cases the applicable punishment does not exert pressure on culprits to cease cheating the system, for example, the case of unemployment insurance;
- in many cases penalties such as fines have no effect, as the culprit would not have the financial means to pay the fines and the penalty would be remitted;
- suspending a grant which has been providing the means necessary for a family to have a decent existence might not be appropriate, particularly where there are children involved;
- employers facing financial difficulties could gamble on not being caught out failing to comply with their obligations to the social security system. They would therefore risk having to pay fines and be faced with forced collection of contributions, rather than face the regular expense of paying over contributions (Pieters 1993:112–113).

It therefore seems that the effectiveness of particular penalties lies in the risk-reward balance. While the risk of being caught and convicted and effectively punished is still outweighed by the illicit gains from fraudulent and corrupt behaviour, the offences discussed above will still be committed.

The fight against fraud and corruption will therefore depend on measures to ensure that these crimes do not go undetected. A number of measures are in place or being contemplated.

6.1 New identity cards

The Department of Home Affairs (1996) expects that the new identification system, consisting of an identity card to replace the old identity book, coupled with the implementation of the Automated Fingerprint Identification System[18] will make it possible for various government departments and institutions to easily verify a person's identity. It is hoped that this

17 See www.heathsiu.co.za for more information.
18 AFIS.

new identification system would assist the Department of Welfare to combat further fraud, particularly to ensure that pensions are only paid out to South African citizens and to pensioners entitled to grants.

6.2 A database of UIF contributors and employers

The Unemployment Insurance Bill of 2000 makes provision for the creation of a database of contributors and employers. The benefits payable to a contributor will be linked to the information available to the Unemployment Commissioner from the database (s 56),[19] leaving less scope for employers to defraud the fund.

In the case of grants payable out of the social assistance system, the Department of Welfare needs to have access to relevant information to ensure the efficient operation of the system. To ensure that this information is readily available, the Social Assistance Act provides that, notwithstanding anything to the contrary contained in any law, the Director-General of Home Affairs or any Registrar of Deeds or other civil servant must, at the request of the Director-General of Welfare, furnish the information relating to an applicant which he or she may require (s 15). This information may of course only be used for the official purposes for which it is requested.

The need for access to the information required for an efficient social security system has to be balanced with the right to privacy.

The Constitution guarantees the right of access to any information held by the state, and any information that is held by another person and that is required for the exercise or protection of any rights (s 32).

The Promotion of Access to Information Act[20] has been enacted to foster greater transparency and accountability in the public administration. It therefore meets the requirement in section 195 of the Constitution that national legislation should promote an accountable public administration, public participation, transparency, provision of timeous, accessible and accurate information to the public.

Chapter 4 of the Act contains the grounds for refusal of access to public records:

- if the disclosure of information would involve the unreasonable disclosure of personal information about an individual, unless (among other things);
  - the individual has consented to the disclosure,
  - the information was given to the public body by the individual to whom it relates and the individual was informed, before it was given, that the information belongs to a class of information that would or might be made available to the public,

19 In terms of s 62, the Bill forbids the disclosure of any information obtained by any unemployment insurance official, except – to the extent to which it may be necessary for the proper administration of a provision of this legislation for the purposes of the administration of justice at the request of the Minister of Labour, Director-General of Labour or any other person entitled to the information.

20 Act 2 of 2000.

  - the information is already publicly available,
  - it is information about an official of a public body which relates to the position or functions of the individual (s 34).
- protection of certain records of the South African Revenue Service;
- protection of commercial information of third party;
- access to information *may* be refused if the information was supplied in confidence by a third party and the disclosure could reasonably be expected to prejudice the future supply of similar information and if it is in the public interest that similar information should continue to be supplied (s 37; my emphasis);
- protection of safety of individuals.

Overriding these grounds for refusal of access is section 46, which states that a request for access to public records must be granted if:

- the disclosure of the record would reveal evidence of;
  - a substantial contravention of the law,
  - an imminent and serious public safety or environmental risk, and
- the public interest in the disclosure of the record clearly outweighs the harm contemplated.

Section 14 of the Constitution guarantees the right to privacy. Any action that violates the right to privacy must meet two requirements:

- it must be authorised;
- it is only permissible in order to achieve compelling public interest objectives.

How far may the measures to acquire the requisite information encroach upon the right to privacy? Like any other fundamental right, the right to privacy may only be limited to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Factors that are taken into account are: the nature of the right; the importance of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; as well as the possibility of less restrictive means to achieve the purpose.

A restriction on the right to privacy would accordingly not be justifiable unless there is reason to believe that the restriction would achieve the purpose it is designed to achieve and there is no other reasonable way in which the purpose may be achieved without restricting the right.

The purpose of the Promotion of Access to Information Act is to promote transparency, accountability and effective governance of all public and private bodies (s 9), in an attempt to root out corruption. Combating corruption can clearly be regarded as a "compelling public interest objective" which justifies a restriction on the right to privacy.

A central database for social security is required for reasons of efficiency. The argument used most often to justify infringing on the right to privacy in order to root out social security fraud is that no one is compelled to allow the intrusion into his or her privacy, as the choice to waive the social security benefit in order to keep his or her personal freedom is

still available. Should one, however, choose to utilise the social security benefit, a restriction on personal privacy should be endured. This argument assumes, however, that there is a real possibility of choice, which is usually not the case for those who are in fact dependent upon the benefits (Pieters 1993:109).

6.3 Protection for whistleblowers

The Protected Disclosures Act 26 of 2000 protects whistleblowers from victimisation where they disclose information about corrupt or irregular behaviour by their employers or fellow employees.

6.4 Anti-corruption hotlines

Anti-corruption hotlines have been established nationally and provincially. The Public Service Commission has been investigating their effectiveness, as well as an auditing system to monitor the progress made on investigations arising out of information gathered through the hotlines.

6.5 The Public Protector

The Public Protector can play an important role in the fight against corruption. Section 182(1) of the Constitution empowers the Public Protector to investigate "any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice". This section therefore empowers the Public Protector to investigate complaints of corruption and to report to Parliament. The Public Protector cannot however investigate individuals and private institutions.

6.6 The Heath Special Investigating Unit

The Heath Special Investigating Unit[21] was created to investigate fraud, corruption and maladministration. After investigating such crimes, the HSIU can attempt to recover the state assets lost through litigation before the Special Tribunal created for these purposes.

The grounds for recovery of state assets by the HSIU are:[22]

- serious maladministration in connection with the affairs of any state institution;
- improper or unlawful conduct by employees of any state institution;
- unlawful appropriation or expenditure of public money or property;
- unlawful, irregular or unapproved acquisitive act, transaction, measure or practice having a bearing upon state property;
- intentional or negligent loss of public money or damage to public property;

21 HSIU.
22 S 2(2) Special Investigating Units and Special Tribunals Act 74 of 1996.

- corruption in connection with the affairs of any state institution;
- unlawful or improper conduct by any person which has caused or may cause serious harm to the interests of the public or any category thereof.

6.7 The Auditor-General

The office of the Auditor-General was created to use independent audits and examinations to promote clean and transparent administration, the effective utilisation of resources, and good governance.[23]

7 CONCLUSION

South Africa was rated as 34th out of 90 countries in the Transparency International Corruption Perception Index of 2000 with a CPI score of 5 (a score of 10 being highly clean and 0 highly corrupt). According to this rating South Africa does not fall in the group of the most corrupt countries, but there is definitely scope for improvement.

To root out corruption among the state officials dealing with social security, and particularly low to middle-level employees, senior officials should tighten up on supervision and control to remove the possibility of opportunistic crimes. Senior officials should also lead by example, creating a culture of honesty. They should also communicate the seriousness of fraudulent behaviour to state employees (see Robinson 1996:20–21). Tager (1996:28) puts it so well:

> "The role of the government is to create an appropriate legal environment, a policy and legal framework to eliminate as far as possible the opportunity for fraud and corruption. The responsibility of government does not, however, end there. As the leaders of the country it is the duty of Government to ensure that the Ministers and all officials from top to bottom are themselves free of corruption and are subject to the strictest censure for any contravention. Furthermore this must be seen to be done. But this must be judged by our courts. We must not try people through the press. Without clear messages from the leaders, it is unlikely that effective changes can ever be achieved. If the leaders do not set the standards those standards will not be attainable."

The Minister of Welfare, Zola Skweyiya has promised that the department will ensure that national and provincial departments of welfare have the requisite procedures and systems of effective financial control, management, monitoring and accountability in place, as part of a strategy to ensure that payments reach those they are intended for.[24]

The answer lies in preventative measures, either by minimising opportunities to commit these crimes, or by providing punishments that would provide adequate deterrence.

---

23 Mission statement of the Office of the Auditor-General www.agsa.co.za/home_right.htm.
24 Speech on Budget Vote 35, National Council of Provinces, 6 June 2000.

As part of the national anti-corruption strategy, businesses, organisations and individuals who are proven to be involved in corruption and unethical conduct are to be blacklisted.[25]

De Koker (1996:68) warns against creating too many statutory offences without in fact enforcing the law.

> ". . . [W]e cannot afford to clutter our regulatory systems with unnecessary offences. Criminal sanctions are employed too often by law-makers to ensure compliance with their laws . . . Many offences are simply created to ensure compliance with administrative detail. We cannot afford the luxury of this approach any more. Our law-makers must be more creative, must decriminalise existing acts to rid the system of offences which were created unnecessarily and ought to follow a policy of minimal criminalisation. We ought to free our system to enable it to deal with real crimes."

Creating various statutory offences regarding fraudulent and corrupt behaviour is not the answer if criminals know that the chances that they will be successfully prosecuted are slim. Many corrupt individuals realise that the financial gains from their illegal actions would outweigh any fine they would have to pay and might even compensate for any period of imprisonment they would have to endure. Were they, however, aware that they would, together with imprisonment and fines, be forced to return the illegal gains to the relevant social security authority, the reward from their misdeeds would no longer outweigh the risk. The answer, therefore, lies in enforcement of the relevant laws in such a manner that the rumours of persons who have successfully gained illicit rewards from defrauding social security are replaced by warnings against following in the footsteps of those who were foolish enough to do so and are suffering the consequences.

Ensuring that prospective transgressors are warned off defrauding social security will require co-operation between government, the welfare sector and communities themselves. This is to be done by way of continued public education demonstrating the damage done by social security fraud, so as ensure that these deeds are no longer regarded as acceptable. The public should be educated about their rights and complaints procedures, as well as encouraged to expose corrupt officials.

It is submitted that the final and only lasting answer to the financial difficulties experienced by the social security system in South Africa, is a full-scale endeavour to rebuild solidarity amongst South Africans. Whether one calls it solidarity or *ubuntu*, it envisages a social contract between the "haves" and "have-nots". Once again, it has, however, to be said that solidarity also entails those at the receiving end not abusing the system through fraudulent claims. To ensure continued public support for the social security system, the number of fraudulent claims must be kept to the minimum and a culture of zero tolerance towards corruption promoted.

---

25 Resolutions of the National Anti-Corruption Summit April 1999 www.polity.org.za/govdocs/summit/corruptresolutions.htm.

Sources

Asmal K Address to National Anti-Corruption Summit 1999 www.polity.org.za/govdocs/speeches/1999/sp0414a.html

De Koker L The prevention of economic crime in Southern Africa *Tran CBL* 67–69 1996

De Wet E Can the social state principle in Germany guide state action in South Africa in the field of social and economic rights? *SAJHR* 30–49 1995

Department of Home Affairs Launching a new identification system Press release 1996 www.polity.org.za/govdocs/pr/1996/pr0729.html

Heath W Corruption and community development Address at the official opening of the ArtSA '99 conference 1999a www.heathsiu.co.za Recent speeches

Heath W Corruption and development – A South African perspective Address to the Foreign Correspondents' Association 11 March 1999 www.heathsiu.co.za Recent speeches 1999b

Heath W The fight against corruption, fraud, money laundering and maladministration of state institutions assets and public money. Address at the Integrity Round Table Conference: The state of corruption in Zambia Lusaka 1–3 July 1999 www.heathsiu.co.za Recent speeches 1999c

Heath W White collar crime in South Africa Address to the Munich Reinsurance Crime and Fraud Seminar 14 March 2000 www.heathsiu.co.za Recent speeches

Heath W No date Corruption in Africa: A South African perspective www.heathsiu.co.za Recent speeches

Heath Special Investigating Unit No date www.heathsiu.co.za Home page

Maduna P Address to the 9th International Anti-Corruption Conference (October 1999) www.polity.org.za/govdocs/speeches/1999/sp1010c.html

Office of the Public Protector *South Africa's Public Protector: an introduction* Pretoria 2000

Olivier M *et al* (eds) *Social security law – general principles* Durban: Butterworths 1999

Pieters D *Introduction into the basic principles of social security* Deventer Boston: Kluwer 1993

Public Service Commission Report to Parliament on progress on the National Anti-Corruption Initiative 1999 www.polity.org.za/govdocs/pr/1999/pr1116d.html

Regulation R418 in *Government Gazette* 18771 of 31 March 1998

Robinson R Profile of economic crime in Southern Africa: mining industry *Tran CBL* 16–21 1996

Snyman J *Strafreg* 4ed Durban: Butterworths 1999

Tager L The regulation of economic activity in Southern Africa *Tran CBL* 25–32 1996

Transparency International Year 2000 Corruption Perceptions Index www.transparency.de/documents/cpi/2000/cpi2000.html

White Paper for Social Welfare Government notice 1108 in *Government Gazette* 18166 of 8 August 1997