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## FORUM:

# Tackling fraud and corruption in Africa

FW moderates a discussion on tackling fraud and corruption in Africa between Benjamin Haley at Covington & Burling (Pty) Ltd, Muhammed Essop at GE Power, and Bernice Asuquo at Nepal Oil & Gas.



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## THE PANELLISTS



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Based in Covington & Burling LLP's Johannesburg office, Benjamin Haley leads the firm's compliance and investigations practice in Africa. He is a seasoned compliance lawyer with deep experience handling matters on the ground in Africa, including investigations, risk assessments, pre-acquisition diligence and post-acquisition integration, and developing tailored policies and controls to address compliance risks in interactions with police, tax, customs and other government and parastatal officials.



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Muhammed Essop is the senior compliance officer at GE Power in Sub-saharan Africa and is based in Johannesburg, South Africa. He is a South African qualified lawyer and experienced compliance professional who has a deep understanding of the compliance risks and challenges of doing business across Africa. Mr Essop has been a speaker on Africa at a number of international compliance conferences.



**Bernice Asuquo**  
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Bernice Asuquo is an astute professional with robust experience spanning accounting, consulting, audit, internal controls and fraud investigations. She is skilled in outlining risk assessments and discussing potential compliance and corporate governance related issues with management, while also providing valuable solutions that address lapses and promote optimal company practices. She is based in Lagos, Nigeria.

**FW:** How would you describe the level of fraud and corruption across Africa? How has the prevalence of these activities developed in recent years?

**Haley:** One must be careful about generalising when considering fraud and corruption risk across Africa, because these risks vary greatly by country – and by region within a country, by sector, and by other factors, such as the current political environment. It is also hard to say whether there is more or less fraud and corruption in Africa today compared to several years ago. In recent years we have seen more high-profile corruption investigations and scandals, but does that mean that fraud and corruption are more prevalent, or that anti-fraud and anti-corruption enforcement is on the rise? Regardless, for virtually any entity operating in Africa, fraud and corruption risk should be top of mind, and there should be a focus on understanding and mitigating the specific risks that your business faces. This starts with a thorough and thoughtful risk assessment, and appropriately tailored compliance measures.

**Asuquo:** Fraud and corruption across Africa is widespread, despite the activities of governments and other regulatory bodies to stem it. It has become prevalent in recent years mainly because the deterrents to such activities are not fully applied. At other times, deterrents are not forthcoming as most of the perpetrators are connected to people in positions of power and therefore are shielded from prosecution. The socio-cultural factor must also be considered, where corrupt persons are praised and no questions are asked as to the source of their wealth. Furthermore, anyone who dares to raise a comment on the sudden wealth attained by these individuals is vilified. They are also reminded of some of the charitable acts done by these fraudulent individuals and are advised to mind their own business. There is nothing wrong with being wealthy, but when that status is attained through underhanded practices, we need to start tasking the regulatory authorities responsible for tackling fraud and corruption.



**Essop:** It is unfair to attempt to describe the level of fraud and corruption across Africa as if it was a single country, rather than a melting pot of 54 diverse countries with unique cultures, ideologies, languages and differing levels of risks of fraud and corruption. Nevertheless, generally, the prevalence of fraud and corruption across Africa has gradually decreased in recent years. This gradual decrease is evident from how the scoring of countries in Africa has incrementally improved, on average, on Transparency International's Corruption Perceptions Index (CPI). Furthermore, the decrease in the prevalence of fraud and corruption could also be attributable to the strong external pressure placed on African governments by multilateral development banks (MDBs) – especially the World Bank and the African Development Bank, foreign governments directly as part of aid packages, for example USAID, and foreign companies looking to do business in Africa, to ensure greater transparency and certainty in public procurement decisions and consistently implement and enforce international standard anti-corruption laws nationally. However, it is trite to believe that fraud and corruption across public and private sectors

remains a significant stumbling block for Africa, the second most populous continent in the world, and can only be cleared through strong political will and leadership.

**FW:** Have any recent, high-profile cases of fraud or corruption caught your attention? What made these cases noteworthy and what do they tell us about the potential risks of conducting business in Africa?

**Asuquo:** The recent case of the alleged bribery scandal involving a state governor in the northern part of Nigeria is rather worrisome. The case is noteworthy because it involved a kickback scheme for projects awarded in the state. When contractors are required to offer kickbacks as a precursor to a contract award, the quality of the job done may be questionable because part of the funding allocated for the project will have found its way to private pockets. This has led to bloated project costs as contractors are required to factor bribe money into the cost of the project and may not even bother to execute the contract at all. The risk of continuing in this way is that foreign companies with genuine interest in conducting business in the country are

prevented from doing so if they do not comply with corrupt officials whose only interest is siphoning off money meant for projects that they ought to steward. The irony of the situation is that corrupt persons continue to enjoy the support of some citizens, despite the weight of their alleged offences.

**Essop:** Recently, a number of high-profile cases which were resolved with regulators in the US and UK have directly or indirectly had a bearing on trends to watch out for in Africa, from a fraud or corruption perspective. The most noteworthy case for Africa was the Odebrecht case, not only due to the magnitude of the corruption perpetrated but also because it highlighted the potential risks of manipulation of public procurement processes, which is a rising trend in African countries, and the risks of using third parties as company representatives. From 2001 to 2016, Odebrecht, a Brazilian construction giant which also had a large footprint in Angola and Mozambique, paid approximately \$788m in bribes in association with 100 projects in 12 countries, including Brazil, Argentina, Colombia, Mexico, Venezuela, Angola and Mozambique. In December 2016, Odebrecht, together with its petrochemical subsidiary Braskem, agreed in plea agreements with the US Department of Justice (DOJ) to a record fine of \$3.5bn

to be allocated among US, Brazilian and Swiss authorities. Furthermore, in April 2018, Panasonic Corporation and its US-based subsidiary, Panasonic Avionics Corporation (PAC), agreed to pay more than \$280m in combined fines, disgorgement and interest to resolve Foreign Corrupt Practices Act (FCPA) charges with the DOJ and SEC, while in separate settlements in May and July 2018 Credit Suisse agreed to pay over \$75m to the DOJ and SEC. In both of these cases the risks of hiring either former public officials as representatives or employees of the company or the relatives of such public officials – commonly known as the ‘Sons and Daughters’ programme in China and some parts of Asia – were highlighted. Although these cases did not specifically refer to Africa, they serve as a stark reminder when conducting business in Africa of the potential risks associated with hiring relatives or associates of foreign government officials as representatives or employees without conducting robust due diligence. Finally, interaction with state-owned companies in Africa must be conducted with caution as reflected by the arrest on 4 January 2019 of three former Credit Suisse Group AG bankers in London on conspiracy to violate US anti-bribery laws and to commit money laundering and securities fraud involving US\$2bn in loans to state-owned companies in Mozambique. In addition, the former minister of finance

of Mozambique was also arrested in connection with the alleged wrongdoing.

**Haley:** The ‘State Capture’ matter in South Africa, involving allegations of widespread corruption and conflicts of interest in the government of former president Jacob Zuma, is noteworthy in several respects. It is a sprawling investigation that goes to the highest levels of government and it has drawn in a number of multinationals, similar to the *Lava Jato* affair in Brazil. The question remains whether the State Capture matter will be a turning point for anti-corruption enforcement in South Africa, or the continent more broadly, though it certainly has that potential. In terms of what it tells us about the risks of doing business in Africa, there are parallels to *Lava Jato* as well, as the matters both involve large, highly bureaucratic parastatals and problematic intermediaries. This highlights the need for robust controls around public tenders and the engagement and monitoring of third parties, both of which should be core components of the compliance programme of any company operating in Africa that deals with parastatals or public tenders.

**FW:** To what extent are you seeing increased regulation and stronger enforcement across Africa, in an effort to fight fraud and corruption?

**Haley:** We do see increased regulation here and there. Kenya’s anti-corruption law, which came into force in 2017, and includes provisions mandating certain measures to prevent bribery, as well as reporting obligations, is particularly noteworthy. But, with some exceptions, the question across the continent has been, and will continue to be, whether the political will and resources are there to support principled and sustained enforcement efforts. I say ‘principled’ because we have to be mindful that anti-corruption laws can be weaponised in a corrupt manner to punish political rivals or outgoing regimes. There is the potential for a sea-change in enforcement with matters like the State Capture investigation, but, by and large, we have yet to see the types of enforcement actions by

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African law enforcement authorities that have the potential to have a major deterrent effect.

**Essop:** Foreign direct investment (FDI) into Africa in recent years has prompted African countries to adopt Organisation for Economic Co-operation and Development (OECD) and UN Global Compact-based local laws and regulations to combat fraud and corruption. However, in most countries across Africa a lack of strong, consistent enforcement has led to the fight against fraud and corruption being handicapped in some instances. Nevertheless, some African countries such as South Africa have active and mobilised civil organisations which help expose fraud and corruption and compel the government to take action against those involved in such misconduct.

**Asuquo:** To date, the efforts of regulatory agencies in fighting crime have yielded little gains as much more is still required of them. Blatant cases of fraud and corruption must be investigated swiftly in order to curb the trend of corrupt practices within the continent. However, with increasing regulation across Africa, it is expected that policies will be implemented in order to further sanitise the economy.

**FW: How are companies responding? Are concerted efforts being made to adapt policies and procedures to drive greater awareness, heighten internal controls, encourage whistleblowing and generally improve prevention of fraud and corruption?**

**Essop:** From a corporate perspective, there are an increasing number of medium to large size organisations operating in Africa which have business relationships or dual listings in the US and Europe and which also play a pivotal role in raising awareness among African governments of the importance of the fight against fraud and corruption and how its success is non-negotiable. Internally, such corporates are investing in codes of conduct and awareness training for their employees. Increased investment in technology and analytics has also resulted in stronger internal controls

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GE Power

which has led to an increase in the number of whistleblower programmes active across Africa, which has encouraged employees to come forward to raise their concerns without fear of retaliation. According to the PwC ‘Global Economic Crime and Fraud Survey 2018’, 64 percent of South African respondents monitor whistleblower lines as a means of ensuring the effectiveness of their compliance and governance programmes compared to 51 percent across the rest of Africa – a 9 percent increase since 2016. In addition, the ‘tone from the top’ has substantially contributed to the increased prevention and detection of fraud and corruption.

**Asuquo:** Some companies are putting measures in place to proactively respond to fraud and corruption, including increasing the perception of detection and incorporating stricter internal controls over areas where it may become prevalent, such as financial reporting. Some companies have embraced ethical corporate governance policies that reduce incidences of management override of controls, and require due diligence to be carried out on any prospective business venture. Increasing the perception of detection creates a greater awareness for the consequences of fraud and corrupt practices and encourages whistleblowers to volunteer helpful information anonymously.

**Haley:** On the whole, we see increasing attention being paid to compliance in businesses operating in Africa. For those businesses that have significant exposure to the FCPA, particularly issuers of US securities, or the UK Bribery Act, the reasons for investing in their compliance programmes are not new. For those that have less exposure under US or UK law, increased enforcement activity in other countries, such as France, which introduced a sweeping new anti-corruption law in 2016 and has signalled intent to aggressively enforce the law against companies operating in Africa, and ‘local’ enforcement efforts like the State Capture investigations, should lead to increased focus on compliance. Regardless, the reality is that expectations for what an effective compliance programme looks like have evolved a great deal from what they were five to 10 years ago. This evolution is driven by the issuance of detailed guidance by enforcement authorities, such as the FCPA Resource Guide and UK Ministry of Justice Bribery Act Guidance, as well as emerging best practices in corporates. You cannot expect sophisticated enforcement authorities and external stakeholders, for example auditors, lenders and multinational business partners, to be satisfied with a paper policy that prevents bribery but has no functioning controls behind it. You need to be ready to answer not only the question ‘do you have a compliance programme?’ but also, ‘how do

you know your compliance programme is working?’ It is also essential for compliance professionals to get on the ground in the operations they are supporting, so they can better understand the challenges that their businesses face.

**FW: In your opinion, do senior executives need to be more proactive when it comes to addressing the fraud and corruption risks their company faces? What more needs to be done?**

**Asuquo:** Senior executives must be proactive in addressing the fraud and corruption related risks faced by their companies as it costs less in time, effort and resources to prevent rather than detect fraud. The risks faced must be articulated clearly and a counter strategy against fraud and corruption should be developed. Sometimes, companies develop a strategy to counter fraud and corruption but fail to fully implement it or provide the resources required for its implementation. The lack of willpower is detrimental to the actualisation of zero tolerance for fraud and corrupt practices in the workplace. Senior executives must constantly remind themselves that the responsibility for mitigating the risks of fraud and corruption lies with them, therefore corporate governance policies need to be fully implemented and reviewed periodically to determine if they

are addressing the needs of a constantly evolving business environment. This is critical as executives may become personally liable if their diligence in ensuring that the workplace is an anti-fraud and anti-corrupt environment is ever in doubt.

**Haley:** Many senior executives exhibit terrific leadership on the compliance front, but many do not. Effective leadership on compliance is not just about ‘tone at the top’, which many incorrectly interpret to be saying the right things about a company’s commitment to compliance. It is about exercising appropriate oversight over your company’s compliance programme in the same way that you exercise oversight over important commercial, financial and operational matters. That means investing adequate resources in your compliance programme, considering and addressing compliance risks in key transactions or business decisions, such as acquisitions or market entry, and integrating the compliance function into corporate decision making and ensuring that compliance professionals have a ‘seat at the table’. It also means empowering employees to say ‘no’ and walk away from transactions where the perceived risks are too great. Finally, it means asking questions about whether your compliance programme is effective, and, when you see things like the State Capture matter in the papers, asking whether your company has

similar risks, and what steps are being taken to mitigate those risks.

**Essop:** Senior executive leadership needs to be more proactive, and demonstrate through their actions zero tolerance of fraud and corruption in the company. The tone from the top is critical to changing the organisational culture of the company. Policies must be more than just words on a piece of paper; they must be living corporate values and beliefs shared by all employees. Senior executive leadership in companies need to do more to craft a narrative where regulatory compliance and ethical behaviour by employees are not the cost of doing business but can provide a competitive advantage.

**FW: If a report of suspected fraud or corruption surfaces, what steps should a company take? What advice can you offer on responding to a red flag and carrying out an internal investigation where necessary?**

**Essop:** Once any report of a suspicion of fraud or corruption arises, a company should promptly initiate an independent internal investigation. All reports should be investigated without any presumptions of the veracity or accuracy of the report received. The internal investigation should adequately and appropriately examine allegations or evidence of misconduct. Red flags should not be ignored. In the circumstances where the red flag necessitates an internal investigation it should be completed independently and expeditiously. Identification by internal or external auditors of red flags or suspicious conduct has been used by enforcement agencies as evidence of companies’ knowledge of and failure to stop improper practices. For example, in Panasonic’s 2018 settlement with the DOJ, the DOJ noted that as early as September 2010 Panasonic’s internal audit department issued a report identifying a number of compliance risks associated with Panasonic’s use of one service provider to engage other third-party consultants and stated clearly that the consultant payments should be “carefully reviewed in light of FCPA regulation due to lack of clarity in deliverables”. However,

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nothing was done and, by December 2010, an abbreviated version of the report began to circulate with that critical conclusion removed.

**Asuquo:** When companies suspect fraud or corruption has taken place, they should adopt the following steps. First, they should get as much information as possible on the case. Learn as much as possible and determine the fraud type. Second, carry out preliminary analysis. Evaluate the suspicion and take steps if required at this stage. Companies should speculate on different hypotheses by proving or disproving the ‘facts’ of the incident. Third, develop an investigative plan of action. Companies should establish the investigative hypothesis, timeframes and so on. Fourth, execute the plan and engage with or interview key individuals and secure evidence. Fifth, companies must analyse the evidence and prepare a final report. Lastly, companies should follow up on the report. Is regulatory reporting required? Are there disciplinary measures to be taken? When responding to a red flag, the fraud response team should decide the most appropriate plan of action, which includes evaluating the subject of the allegation, as well as the credibility of the allegation and any potentially negative impact. When carrying out an internal investigation, the suspected ‘red flag’ should be matched to the potential scheme, and then other red flags should be identified. Thereafter, companies should determine if the red flags justify an investigation.

**Haley:** First, preserve the relevant evidence. Nothing undermines the credibility of your investigation like a failure to preserve relevant documents. This does not mean that you need to march in and take forensic images of everyone’s computers and mobile phones when you receive a hotline report, but rather that you should take considered, risk-based, proportionate data-preservation steps.

Second, proceed incrementally. Start with the specific allegations, issues or third-party relationships at hand, and expand the scope only as new issues arise or you identify broader control issues. If you can draw a box around the problematic conduct, actors and transactions, you have conducted a defensible investigation. Third, remediate as you go rather than waiting until the end of the investigation to take corrective actions. There is often a relationship between the remedial steps you take and the scope of the investigation, meaning that you can narrow the scope of the investigation by taking immediate remedial action to mitigate the identified risks. If you have real concerns that an employee may have engaged in unethical or unlawful conduct, consider immediate personnel action, such as adjustment of responsibilities or ‘garden leave’, in order to minimise the risk of recurrence. Similarly, with third parties, consider freezing outstanding payments, or terminating the relationship altogether. Investment in your compliance programme on the front end can make it easier to move quickly to implement these types of remedial measures.

**FW: What are your predictions for fraud and corruption in Africa in the years ahead? Do you expect to see continued efforts to stamp out such practices, with growing success?**

**Asuquo:** We expect to see increased prosecution of fraud and corruption related cases as many citizens harness social media in order to increase pressure on relevant agencies to increase the pressure on investigations of corrupt practices, both in government and the corporate world. It will no longer be acceptable for allegations to be swept under the table. Going forward, a series of smaller strides will likely gather enough momentum to increase the number of prosecutions being pursued. This is the

only measure that will serve as a deterrent to others.

**Haley:** Companies operating in Africa must continue to be vigilant about fraud and corruption risk, but there is cause for optimism. There are remarkable civil society movements and government initiatives afoot in Africa to reduce corruption. We also see increased focus on compliance at many corporates, and significant technological advancements, such as data analytics, which will enable companies to better understand and mitigate their risks. These trends will only continue with the drive for increased international investment in Africa. But while the importation of best practices from multinationals can help drive change, it will be key for compliance efforts to be ‘localised’, allowing parties to be responsive to the unique risks and conditions present in the relevant geography and sector.

**Essop:** In the coming years, we believe that African governments will be pressured externally by the advance of globalisation to take strong action against fraud and corruption in order to realise economic growth as a continent. However, we believe that it will be societal and civil mobilisation, especially with the threat of public exposure through social media, and increased demands for transparency and accountability from governments, that will turn the tide against fraud and corruption. Perhaps naively, we do believe that this will lead to a cultural change across Africa as a continent where ethical behaviours are revered by society. Furthermore, coupled with the closer collaboration between global enforcement agencies and the implementation of automation technologies in the next few years, it will become easier to detect, prevent and respond to any fraud or corruption in the future and will possibly lead to fewer opportunities and incentives for fraud and corruption, both for the public and private sectors of society. ■

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