

Navigating Entrenched Corruption Risks in South Africa

The World Economic Forum on Africa, held in Cape Town last month, carried a familiar refrain: that corruption and bureaucracy are some of the most significant impediments to bringing foreign investment to Africa. Championing the resurgence of the African economy, South Africa's president Cyril Ramaphosa said that "this is Africa's century," but he also acknowledged that corruption is "a problem that has always beset the continent." As for Ramaphosa's home country, the events of his short tenure in office exemplify how South Africa's economic promise is vulnerable to highly entrenched bureaucracies with deeply rooted corruption. This article explores the corruption climate in South Africa and key compliance considerations for U.S. companies doing business there.

The decades that followed the end of apartheid brought hopes of an ascendant South African economy, and its promise was so strong that in 2011 the "BRIC" countries were rebranded as the "BRICS," to include South Africa. As with other BRIC countries, South Africa's growth was impaired by corruption, particularly during the administration of Jacob Zuma, who resigned in early 2018 in the face of a no confidence vote in Parliament. The May 2019 presidential election of Ramaphosa was widely viewed as a step in the right direction for undoing the systemic corruption that flourished under Zuma. However, the legacy bureaucracy of the dominant political party, the African National Congress, continues to present corruption risk for companies doing or seeking to do business in South Africa.

Ramaphosa, who first assumed the presidency in February 2018 following Zuma's resignation, ran on a campaign of cleaning up government and rebuilding the ANC's reputation. In the May 2019 election, the ANC maintained power despite many voters staying home, in part because of dissatisfaction with ANC corruption. The party received its lowest share of votes in a national election since gaining power in 1994. Ramaphosa, who remains more popular than his party, must now deal with the challenge of governing a divided party, with many in the ANC still loyal to Zuma. This rift was evident in Ramaphosa's recent cabinet selections. To appease party and Zuma loyalists, Ramaphosa named David Mabuza, who has been implicated in a number of corruption scandals, as his deputy president. Other Zuma-aligned appointees include Nkosazana Dlamini-Zuma, the former president's ex-wife, who was appointed Minister for Cooperative Governance and Traditional Affairs. Zuma, who remains close with Dlamini-Zuma, supported her in her unsuccessful campaign against Ramaphosa for president of the ANC in 2017. At the time, there was speculation that Dlamini-Zuma would shield Zuma from the corruption charges he faced if she had assumed the ANC leadership position.¹

Some actions of Ramaphosa's administration show potential for positive change: the majority of Ramaphosa's cabinet selections were viewed as merit-based, and he decreased the size of the cabinet, which numbered 73 members at the time Zuma left office, to 28.² Under Zuma, cabinet posts were often seen as products of patronage – a way to install loyalists through whom bribes could flow.

However, Ramaphosa has not been immune from corruption-related controversy. An inquiry into Bosasa – a company that provides services to the South African government – concerning allegations of corrupt payments

¹ Erin Conway-Smith, *South Africa's ANC, Divided over Tarnished President Zuma, Risks Losing Power as It Prepares to Choose a Successor*, LOS ANGELES TIMES (Dec. 15, 2017 3:31 PM), <https://www.latimes.com/world/africa/la-fg-south-africa-anc-20171215-story.html>.

² Crystal Orderson, *South Africa's Ramaphosa Faces Tough Cabinet Choices*, THE AFRICA REPORT (May 14, 2019 12:41 PM) <https://www.theafricareport.com/12908/south-africas-ramaphosa-faces-tough-cabinet-choices/>; Anthony Carroll, *Ramaphosa's Bold Pick for Public Works Minister of South Africa*, COUNCIL ON FOREIGN RELATIONS (June 4, 2019) <https://www.cfr.org/blog/ramaphosas-bold-pick-public-works-minister-south-africa>.

to the ANC revealed that Ramaphosa received a 500,000 rand contribution from Bosasa.³ Furthermore, Ramaphosa's son was paid approximately 2 million rand by Bosasa for "advisory services."⁴ Attention to Ramaphosa's Bosasa connections has been rekindled since August 26, 2019, when the CEO of Bosasa was killed in an automobile crash that is under investigation for potential foul play.

Even if Ramaphosa's efforts to combat corruption prove genuine, the entrenched ANC bureaucracy and its institutional bases of support may pose challenges to progress. For example, as part of a broader effort to rescue key state-owned institutions that were mismanaged under Zuma, Ramaphosa announced plans to restructure Eskom, the state-owned electricity provider. Eskom has been plagued by corruption⁵ and is over 440 billion rand in debt. This spring, the country suffered rolling blackouts after outdated Eskom power plants struggled to keep up with demand. Ramaphosa's restructuring plans have received criticism from labor unions, traditionally strong supporters of the ANC.

Given that some parts of the South African civil bureaucracy carry a record of corruption and remain heavily entrenched despite Ramaphosa's reforms, companies subject to U.S. anti-corruption laws that do business in South Africa or seek to enter the market should take a number of proactive steps, including, among others:

- Conduct a detailed anti-corruption risk assessment that considers industry-specific risks. Companies should ensure that their risk assessments are sufficiently granular to understand all relevant government counterparties and local conditions. It is essential that the risk assessment be tailored to the company's business, as anti-corruption risks and mitigation strategies for a company engaged in manufacturing and export, for example, may be markedly different from those of a company that bids on government contracts and infrastructure concessions.
- Develop a detailed mapping of all government agencies, by locale, with which the company will be interacting and which groups within the company are anticipated to interact with each agency. This mapping should feed into the anti-corruption risk assessment, and the relative risk presented by interactions with individual agencies should be considered. For example, the non-profit organization Corruption Watch recently reported that the South African Police Service is among the most corrupt public organizations in South Africa, based on a survey of whistleblower reports.⁶
- Identify all third party intermediaries who are, or are expected to, interact with government agencies on behalf of the company, and conduct appropriate due diligence on those third parties.

³ Alistair Smout and John Stonestreet, *South Africa's Ramaphosa Wins Latest Round of Legal Fight with Anti-Corruption Watchdog*, REUTERS (Aug. 12, 2019 6:05 AM) <https://www.reuters.com/article/us-safrica-politics/south-africas-ramaphosa-wins-latest-round-of-legal-fight-with-anti-corruption-watchdog-idUSKCN1V20UR>.

⁴ Krista Mahr, *Ramaphosa's Son Received Money from Corruption-Hit Company Bosasa*, THE TIMES (Mar. 28, 2019) <https://www.thetimes.co.uk/article/andile-ramaphosa-received-money-from-corruption-hit-company-bosasa-08cgjxb2l>.

⁵ Eskom and the ANC were at the center of the 2015 U.S. SEC enforcement action against the Japanese conglomerate Hitachi. Hitachi paid a USD \$19 million penalty to resolve violations of the Foreign Corrupt Practices Act involving improper payments it made to the ANC in exchange for the South African government awarding Eskom power station contracts to Hitachi. See <https://www.sec.gov/litigation/complaints/2015/comp-pr2015-212.pdf>.

⁶ *2019 Analysis of Corruption Trends Report*, CORRUPTION WATCH, available at <https://www.corruptionwatch.org.za/wp-content/uploads/2019/08/CORRUPTION-WATCH-ACT-REPORT-2019-OUT-DIGITAL-DBL-PAGE-AGENT-ORANGE-DESIGN-26082019-compressed1421.pdf>

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- Conduct specialized anti-corruption training for those employees who are expected to interact with government officials or oversee the work of third parties that may interact with government officials on the company's behalf.

The growing consumer market and maturing economy in South Africa – and in many other African countries – present clear opportunities for businesses across many industries, but those companies must tread carefully to avoid the compliance pitfalls and regulatory enforcement exposure that come with entrenched bureaucracies that may cling to corrupt practices.

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