

# **BUSINESSDAY**

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## **Are SA's corporate big fish too clever for the Scorpions to sting?**

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Cases reviewed by the law commission show 83% reported to police do not get to court, 5% result in guilty verdicts and 1% end up with not-guilty verdicts

IN AN impromptu address in a university lecture hall last week, former Corpcapital director Nic Frangos stunned many when he told the assembled academics, businessmen and whistle-blowing experts: "In business, the level of deception is of such a level of complexity and sophistication that it is beyond the ability of the Scorpions to get to the bottom of it."

Frangos has summed up the sentiment in SA's corporate world: corporate criminals will not be brought to book, Scorpions and police are ill-equipped to understand fraudulent financial engineering, and the prospect of these criminals ending up behind bars is extremely slim.

The Scorpions and the police, of course, dispute this. After all, take a look at a number of high-profile businessmen arrested, either by the Scorpions or the police, in the past few years.

While several business bosses were arrested years ago, they all remain innocent as they have not been tried. In a few cases, charge sheets detailing allegations against them have not even been put to them.

They include JCI mining boss Brett Keble for share manipulation; Tigon CEO Gary Porritt for tax fraud and Companies Act infringements; former Regal Bank CEO Jeff Levenstein for fraud; Krion pyramid scheme mastermind Marietjie Prinsloo; Specialised Outsourcing founder Dave King; Leisurenet joint CEOs Peter Gardener and Rod Mitchell; and liquidator Enver Motala.

This suggests the authorities are making progress in calling white-collar crooks to account. But putting them behind bars is a completely different matter.

There have been successful convictions. The complicated case of Masterbond in the '90s saw three directors Koos Jonker, Johan Brits and Johan Winckler jailed for 10 years for a crime in which 20000 investors lost nearly R600m. Broker Greg Blank was convicted in 1992 on 48 counts of defrauding Old Mutual out of R10m. Sentenced to eight years, Blank was paroled after serving 21 months.

Jack Milne, disgraced former investment guru, is also behind bars for fleecing investors in the PSC Guaranteed Growth (PSC GG) fund of millions, in what he admitted was a complicated scam cooked up with Porritt. Galahad accounting consultant Grant Ramsay is also behind bars, for illegal accounting practices.

Ramsay and Milne were both jailed as part of a plea agreement after they turned state witness against Porritt. The question lingers: would the police have been able to nail Milne and Ramsay had they not confessed?

Stefan Grobler, former head of the police anticorruption unit, says it is difficult to investigate complex fraud. "But this is not specific to SA. Many law enforcement agencies across the world have this problem."

Grobler says the authorities are also hampered by the "everpresent" fear that the high-profile businessman will act against them. So the police and Scorpions often take longer dotting every "i" and crossing every "t".

Scorpions head Leonard McCarthy says his crime fighters arrest someone only when there is a prima facie case. Leading up to the trial, any number of processes can delay things. "It's not like doing a shoplifting case. Financial fraud is complex, and in about 50% of cases it involves getting

permission to unravel trusts and structures set up in other jurisdictions like Guernsey," he says.

McCarthy says in cases the directorate handles, the time from arrest to conviction is usually between nine months and two years. Clearly, the authorities do not have it easy when it comes to nailing down complex frauds.

According to a sample of cases reviewed by the Law Commission, 83% of fraud cases reported to the police do not make it to court. Only 5% of the reported fraud cases result in guilty verdicts, and 1% of the cases end up with not-guilty verdicts. An alarmingly high 8% of cases are withdrawn at some stage (the remaining 3% are in ongoing trial).

The National Directorate of Public Prosecutions said in its annual report for last year it had a conviction record for commercial crimes prosecuted of 75% to 100% contributing to an overall conviction rate of 86%.

The police said that for the year to March 2003, there were 56232 reported cases of fraud. While high, this figure underlines a trend in which the number of reported commercial crimes dropped 11% since 1994.

However, a KPMG fraud awareness survey suggests intracompany crimes are reported to the police in only about 20% of cases. Official statistics on this are important but not definitive.

But some of the outstanding cases have lingered for years. The case against Kebble, for example, was first alluded to four years ago, and he was handed a charge sheet only last November.

Porritt was first arrested in December 2002. As he reiterated in an attack on the state in a recent insolvency hearing, he has not yet been handed a formal charge sheet despite the mounting evidence from Milne and Ramsay.

Levenstein was arrested in May last year after an inquiry in which advocate John Myburgh recommended he face criminal charges for fraud, reckless trading and share manipulation. Myburgh said Levenstein "confused corporate governance with thuggery" and breached the Banks Act and Companies Act.

Although Levenstein had an idea of the allegations against him, he was presented with a charge sheet only in July, 15 months after his arrest and despite many court appearances.

Motala, who admittedly was arrested only four months ago, also has had no charge sheet put to him and his case could drag out for many months. This is a grievance of many high-profile fraud suspects. Kebble says he believes his being presented with a flimsy charge sheet only late last year suggests he was arrested to fulfil a personal agenda of former national director of public prosecutions Bulelani Ngcuka.

"In the most charitable view, SA needs to take a very close look at the methodology used by Ngcuka in choosing who to prosecute. Why is it that in other cases, very serious matters were dealt with by the levying of fines, whereas in my case, technical breaches were assiduously elevated to fraud charges?" he asks.

McCarthy says the references to an alleged personal agenda are "completely ill-conceived. Kebble's lawyers approached us with representations in 2002. A few months later we could not reach an agreement, so we went our separate ways and the prosecution proceeded as normal. Any reference to any agenda is just bluster," he said.

Conspiracy theories aside, Kebble may have a point that in the past authorities did not tackle many instances of share manipulation and supposed fraud. But it may also be he was merely in the firing line when the Financial Services Board and others turned up the heat and decided to take a serious look at corporate crime.

And if the belief is that it is impossible to nail down a conviction, Kebble's name on a billboard was seen as sufficient proof of his guilt, even though he has not yet been to trial.

In an environment where there are still many doubters about the Scorpions' ability to jail fraudsters, the mere arrest is seen as enough vindication that all is not well. There is enough evidence to suggest that corporate SA immediately shies away from anyone who has been arrested.

Kebble says his arrest was "designed to damage my business, and it is quite clear that damage has been done". He says in any discussion with a funder or partner the issue of his arrest comes up repeatedly.

McCarthy says that a charge sheet was on the table in the Kebble case in December 2002.

Levenstein's reputation was probably irretrievably tarred as much by events that led to Regal's collapse as by Myburgh's report.

This underlines a refrain from all the suspects: that the time taken to bring a case to court, along with detailed charges, all but obliterates their reputations before they are found to be either innocent or guilty.

One alleged offender says the police jump immediately to arrest someone before building a proper case, and then use the arrest as a platform for "fishing expeditions" to see what they can find to substantiate a flimsy case.

The question is: why do the authorities find it so difficult to convert arrests into convictions? Surely it is in the best interests of all parties, including the Scorpions, to arrest someone and have them locked up with the minimum of fuss? Or free them if the charges cannot be sustained?

Charles Goredema, a senior researcher at the Institute for Security Studies, says the efficient carriage of justice requires that a fraud case should not take longer than a year from arrest to trial.

"Within the realm of white-collar crime I believe we are taking longer to bring complicated fraud cases to trial. Often this is because authorities discover more details after the arrest."

Goredema says delays in white-collar cases arise from factors such as the suspects being better resourced and able to fight the charges than others, the difficulty of tracking the proceeds and the challenge of marshalling enough evidence. Also, the delays can be attributed partly to the fact that the authorities have learnt some hard lessons about not being prepared for trial.

This is certainly true. Liquidator Oliver Powell was arrested in 1999 in a giant swoop intended to clean up the liquidations industry by the Scorpions' predecessor, the Investigating Directorate: Organised Crime and Public Safety. (similar to the current liquidations crackdown in which Motala was nabbed).

But in four years Powell was never handed a charge sheet. The case was dropped and Powell recently settled a civil claim against the Scorpions for proceeding with "malicious intent".

Jean Redpath, who wrote *The Scorpions: Analysing the Directorate of Special Operations*, referred to the Powell case as one where "damage to reputation and disruption of business can be severe, and the indignation of an innocent citizen on the receiving end of such invasive procedures quite understandable".

But Redpath says the Scorpions "changed how it applies its procedures considerably, and requires a wealth of information before a case will be investigated".

Powell has said the investigation destroyed his business, although those behind it could never produce proof of wrongdoing.

There is evidence to suggest that Motala, even if he is not jailed, will struggle to find liquidations work once a trial is over. Motala said recently that he should have been charged only when the state had actually built a proper case against him a view echoed by other parties.

Goredema has doubts whether the prosecutors have the skills to unravel high-level fraud. "The

Scorpions have developed the forensic skills quickly enough, and are clearly showing progress. But I'm still not sure that the police have the necessary understanding and skills," he says.

But police spokesman Capt Ronnie Naidoo disputes the contention that the authorities do not have what it takes to unravel helix-like corporate crimes. "We definitely have the capacity, I can assure that. In our serious economic offences department dealing with corporate crime, every investigator has a minimum of a university degree including some financial training," he says.

McCarthy is adamant that the Scorpions have the capacity to tackle complex frauds, including technical Companies Act violations, successfully.

"A few years ago, I might have agreed that we didn't have the capacity to prosecute these kinds of crimes. But that's not true today. We are better equipped and positioned than we were five years ago," he says.

McCarthy says that 30% of the Scorpions' cases involve commercial crime, and the unit has employed accountants and economists to assist in cracking the financial scams.

Naidoo says cases involving corporate crime can take up to three years to prosecute. "It may seem like a long time to get a conviction, but when it comes to commercial crime, there are a number of processes that must be followed."

For example, he cites the investigation into the Krion pyramid scheme, which sucked in more than 30000 investors, mainly from Gauteng's Vaal Triangle area.

"We are talking of crimes estimated at more than R1bn, involving auditors and 15000 complainants. We have to investigate every single complaint and prepare an exhaustive case detailing each complaint. And then we've got to take this to court where, with appeals and delays, it can take a long time," he says.

Kebble contends: "Do your investigations, and then arrest us once they are complete so we can fight this properly. But you can do nothing about a vague arrest that hangs over your head.

"The unfairness of the process induces shock in anyone who studies it. Often, it could be viewed as little more than a protection racket in which those who found favour with the authorities remained sacrosanct, while others become fair game," he says.

Those arrested clearly not likely the most objective about the state of the national prosecuting authority feel they have been felled in the interests of putting up a banner poster as an advertisement that the police are not twiddling their thumbs.

But McCarthy is having none of it. "That's complete crap. These guys are trying to blame the system, but they play the system in every single way possible. They were arrested based on prima facie evidence and much of the delay in moving toward prosecution is at their instance."

Clearly there is much carping, and one would expect to meet stiff criticism from high-profile alleged criminals with access to the media and an opening to complain. As Management Today magazine noted in 2000, quoting a number of criminologists, "the three most outstanding features of white-collar offenders (is that they are) intelligent, manipulative and they do not see themselves as criminals".

But the long time taken to successfully prosecute someone after an arrest gives space for these critics to breathe as well as unfairly tarnishing the reputation of someone who may be entirely innocent.

An arrest is no longer good enough. In most instances, a person continues to deal with the money of shareholders or estates until he or she is found guilty, a huge risk to shareholders that authorities should be far more sensitive about.

Vindication for the crime fighters and proof that they have the ability and the stomach to tackle high-profile corporate crimes, as they claim they do can come only by putting the offenders behind bars.

Rose is chief reporter.

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