

TO DEBAR OR NOT TO DEBAR: WHEN TO ENDORSE A
CONTRACTOR ON THE REGISTER FOR TENDER
DEFAULTERS

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INTRODUCTION

The Prevention and Combating of Corrupt Activities Act 12 of 2004 (the Corruption Act) provides in s 29 for the creation by the National Treasury of a Register for Tender Defaulters. A court convicting a contractor on charges under ss 12 or 13 of the Corruption Act (which relate to corruption offences in public procurement) may order the contractor to be endorsed on this register. Endorsed contractors will be denied access to public contracts (debarred) for a period of between five and ten years (s 28(3)(a)(ii) and (iii)).

In the almost four years since the creation of the register, no contractor has been endorsed and consequently debarred from government contracts under the Act. Part of the reason for this lack of endorsements is certainly that the Corruption Act does not operate retrospectively (see s 36), so that convictions under the Act and consequent endorsements on the register can be obtained only for misconduct following its enactment on 27 April 2004. While many of the current prosecutions involving corruption charges are being carried on under the Act's predecessor, the Corruption Act 94 of 1992, it is to be expected that the Corruption Act of 2004, and concomitantly the

Register for Tender Defaulters, will become more relevant over time. However, in our view, a second factor that may contribute to the empty register and that will continue to have an adverse impact on the use of the new debarment procedure under the Corruption Act is uncertainty about the precise rationale behind the debarment procedure and its proper place in South African public procurement regulation.

In this note we assess the rationale behind the debarment mechanism in the Corruption Act and thus the reason for the existence of the Register for Tender Defaulters. Postulating such a rationale is necessary as it enables us to map out the exact positioning of the Register for Tender Defaulters vis-à-vis other debarment mechanisms in South African law, and further, it enables us to identify a number of factors that are important for the courts to consider when deciding whether to order a particular contractor to be endorsed on the register.

THE CORRUPTION ACT AND REGISTER FOR TENDER DEFAULTERS

The Corruption Act forms the legislative centrepiece of the South African government's fight against corruption in both the private and public sectors. The Act creates three specific offences in relation to public procurement. Section 12 criminalizes bribery in obtaining a public contract as an 'offence of corrupt activities relating to contracts'. This offence is defined in the Act to include situations where a person accepts or agrees to accept, offers or agrees to offer, or gives any gratification, for his benefit or the benefit of another person, in order to influence in any way the promotion, execution or procurement of a contract with a public entity. Section 13 relates to situations where a person offers, agrees to offer or to accept, or accepts any gratification as an inducement to or in order to influence another person to award a tender, make a tender or withdraw a tender for a contract. This second offence is termed 'corrupt activities relating to procuring and withdrawal of tenders'. Section 17 criminalizes the holding of a personal interest by a public officer in a public contract. Under this section it is an offence for any public officer to acquire or hold 'a private interest in any contract, agreement or investment emanating from or connected with the public body in which he or she is employed or which is made on account of that public body', subject to a number of exclusions (s 17(2)).

Apart from the general penalties of imprisonment and fines (s 26), the Act creates the additional penalty of endorsement on the Register for Tender Defaulters for offences contemplated in ss 12 and 13. In addition to the endorsement of the convicted person on the register, s 28 also authorizes the convicting court to order the endorsement of a number of related persons and relevant information pertaining to the conviction (see Sope Williams & Geo Quinot 'Public procurement and corruption: The South African response' (2007) 124 *SALJ* 339; Phoebe Bolton 'The exclusion of contractors from government contract awards' (2006) 10 *Law, Democracy &*

Development 25). The effect of an endorsement is that no government contract may be offered to the endorsed contractor during the period of the endorsement (s 28(3)(a)(ii) and (iii)). While it is the convicting court that orders the endorsement of the convicted and related persons, it is the National Treasury that determines the length of the endorsement, which is required to be between five and ten years (s 28(3)(a)(ii)). The Register for Tender Defaulters is maintained by the National Treasury and is publicly available (at *www.treasury.gov.za*), and all organs of state are required to consult the register before awarding government contracts (s 28(3)(a)(iii) read with reg 16A9.1(c) of the Treasury Regulations under the Public Finance Management Act 1 of 1999 (GN R225 GG 27388 of 15 March 2005)).

Under the Corruption Act, debarment from government contracts by endorsement on the Register for Tender Defaulters is a severe penalty and there is no provision for public or contracting authorities to waive or derogate from the debarment by contracting with endorsed persons. Furthermore, endorsement may lead to the cancellation of ongoing contracts with the debarred contractor at the discretion of the National Treasury (s 28(3)(a)(i)) (see Williams & Quinot *op cit* at 357–60).

RATIONALE FOR DEBARMENT

Excluding contractors from government business is an internationally well-known legal mechanism (see Sue Arrowsmith, John Linarelli & Don Wallace, Jr *Regulating Public Procurement: National and International Perspectives* (2000) 41–3). For example, in the USA and in the European Community there is an established practice of using debarment to achieve particular objectives (see generally Christopher McCrudden *Buying Social Justice* (2007); John Cibinic & Ralph Nash *Formation of Government Contracts* (1998) ch 4). Debarment in these jurisdictions always includes disqualification from public contracts for corruption-related offences. In fact, the most recent revisions to the EC procurement directives *require* member states to utilize debarment where contractors have committed serious criminal offences, including corruption (see Sue Arrowsmith *The Law of Public and Utilities Procurement* 2 ed (2005) 747–61 and 1307–12; Sope Williams ‘The mandatory exclusions for corruption in the new EC Procurement Directives’ (2006) 31 *European LR* 711 at 716–18).

Two categories of rationale

Generally the motivations for debarment mechanisms can be divided into two categories. First, debarment can function as part of the qualification framework of the procurement system. Secondly, debarment can serve a function ‘external’ to the procurement system and promote secondary government policies such as environmental protection, maintaining fair labour practices or empowering previously disadvantaged groups. In some cases, as will be seen, debarment may serve both qualification and secondary purposes.

A prime example of the first category is the debarment mechanism found in the United States Federal Acquisition Regulation (48 CFR § 9.400 et seq). Federal Acquisition Regulation (FAR) 9.402(b) expressly states that the 'serious nature of debarment . . . requires that these sanctions be imposed only in the public interest for the government's protection and not for purposes of punishment'. Debarment under the FAR is thus directed at ensuring that the government is protected from dealing with dishonest contractors (Steven L Schooner 'The paper tiger stirs: Rethinking suspension and debarment' (2004) 13 *Public Procurement LR* 211 at 212–14; Brian D Shannon 'Debarment and suspension revisited: Fewer eggs in the basket?' (1995) 44 *Catholic University LR* 363 at 420; Steven D Gordon 'Suspension and debarment from federal programs' (1994) 23 *Public Contract LJ* 573 at 581; Ralph C Nash & John Cibinic 'Debarment of contractors: Punishment or protection?' (1987) 1 *Nash & Cibinic Report* 90). The aim of this mechanism is to disqualify contractors that cannot be trusted with government business. This type of debarment has its basis in the qualification framework of the procurement system itself (see Schooner op cit at 213; Gordon op cit at 581–2).

Examples of the second category of debarment rationales are commonly found in legislation dealing with specific economic and social policy. In the USA, for example, debarment is used as an enforcement mechanism in statutes implementing fair labour practices (eg the Contract Work Hours and Safety Standards Act, 40 USC § 3704 and the Service Contract Act of 1965 (McNamara-O'Hara Service Contract Act), 41 USC § 354); environmental protection (eg the Clean Air Act, 42 USC § 7606 and the Clean Water Act (Federal Water Pollution Control Act), 33 USC § 1368); and protection of domestic industry (eg the Buy American Act, 41 USC § 10) (see Horowitz op cit at 69; Arrowsmith, Linarelli & Wallace op cit at 238–86; Shannon op cit at 427–9; Andrew T Schutz 'Too little too late: An analysis of the General Service Administration's proposed debarment of Worldcom' (2004) 56 *Administrative LR* 1263 at 1273 and 1281–2; Project on Government Oversight *Federal Contractor Misconduct: Failures of the Suspension and Debarment System* (2002) (<http://www.pogo.org/p/contracts/co-020505-contractors.html>)).

As mentioned above, there may of course be overlap between the qualification debarments and debarments for external or secondary purposes. For example, it may be argued that a contractor that does not comply with specific legal regulation (on labour standards or environmental protection, for instance) is generally unreliable and cannot qualify as a responsible contractor. As a result, debarment of such a contractor based on the secondary rationale (promoting labour standards or environmental protection) at the same time performs a qualification function within the procurement framework (see Arrowsmith op cit at 748 and 753; Elisabetta Piselli 'The scope for excluding providers who have committed criminal offences under the EU procurement directives' (2000) 9 *Public Procurement LR* 267 at 267–9). However, it is important to bear in mind that the fulfilling of a qualification function by secondary policy debarments is incidental and

is not the primary aim of this particular mechanism. As we will argue below, this has important implications for the factors relevant to debarment decisions falling within the two categories.

One type of debarment that most evidently straddles the divide between the two categories outlined above is exclusion from public contracts based on corruption or fraud. On the one hand, such exclusions may serve to fight corruption as a free-standing purpose 'external' to any procurement qualification objectives. In this sense, debarment functions as a punishment for past wrongdoing and a deterrent of similar future conduct (for the particular contractor and similarly situated persons) (see Sope Williams 'The debarment of corrupt contractors from World Bank-financed contracts' (2007) 36 *Public Contract LJ* 277 at 285–6; Piselli op cit at 273–4; Arrowsmith op cit at 748; Peter Trepte *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (2004) 195 and 317). On the other hand, excluding evidently corrupt contractors from obtaining further government contracts may have an impact on the integrity of the procurement system and protect public funds from the risk that corrupt contractors pose to the government (Williams *European LR* op cit at 715).

It is important to establish under which of the above two categories of debarment a specific mechanism falls in order to determine whether debarment is appropriate in any given case. This can be illustrated with reference to the distinct debarment mechanisms found in the USA and noted above. For debarments that are used to qualify contractors for public contracts under the FAR (falling within the first category outlined above), the past misconduct of a contractor is certainly relevant, but far from dispositive (Edwin J Tomko & Kathy C Weinberg 'After the fall: Conviction, debarment, and double jeopardy' (1992) 21 *Public Contract LJ* 355 at 356; Gordon op cit at 582). Past corrupt activities may indeed be a good indication that a particular contractor cannot be trusted. However, if the focus of the debarment decision is on the present responsibility of the contractor and the present and future potential risk to government in contracting with that contractor, then a number of further factors should be taken into consideration in addition to past misconduct. Factors indicating that the contractor has successfully taken steps to eliminate the risk that resulted in the past misconduct, for example by dismissing the relevant personnel or implementing effective internal controls, would weigh heavily against debarment (Gordon loc cit; Schutz op cit at 1271).

A clear understanding of the rationale behind a particular debarment mechanism therefore becomes vital in deciding whether to debar a contractor in a given case.

Identifying the rationale for particular mechanisms

A number of factors can help to identify the rationale of a particular debarment mechanism. There are few jurisdictions like the US where the rationale is expressly stated in the empowering provision, such as in FAR

9.402(b) quoted above. Where this is not the case, it is necessary to look elsewhere for the rationale. In some cases a good indication of the mechanism's rationale may be found in the considerations listed in the legislation as having to be taken into account in making a debarment decision (see Gordon *op cit* at 583–4; Tomko & Weinberg *op cit* at 360). Other guidance may be found in the nature of the legislation providing for debarment. For instance, a debarment mechanism found in environmental protection legislation will most likely fall within the second category outlined above, and serve a purpose external to the procurement system. Where the nature of the empowering legislation does not provide a clear indication, as for instance where the legislation deals with matters both internal and external to the procurement system — such as protection of domestic industry and linked preferential local procurement — the immediate context of the empowering *provision* may provide guidance as to its rationale. If the debarment mechanism is found in the section of the legislation dealing with enforcement or penalties, its rationale is likely to fall within the second category; whereas if the mechanism is found in the section relating to qualification, its rationale is more likely to fall within the first category.

Another indicator is the possibility of lifting the debarment sanction following rehabilitation of the debarred contractor or other remedial action (Shannon *op cit* at 420; Horowitz *op cit* at 82). Debarment mechanisms that serve an enforcement or deterrent function, and accordingly fall in category two, may continue despite remedial action taken by the contractor (Horowitz *loc cit*). In contrast, mechanisms that serve a purpose within the procurement framework itself generally allow for derogations or waiver of the exclusion.

Rationale behind the Register for Tender Defaulters

The Corruption Act does not contain any express indication of the rationale behind the creation of the Register for Tender Defaulters or endorsements on the register. Nor does it provide any guidance on factors relevant to debarment decisions (either to the court in ordering debarment or to the National Treasury in determining the period of debarment) which may give an indication of the rationale.

However, the context within which the register is created provides important clues regarding its function. The Corruption Act embodies in legislative form the government's anti-corruption policy. Debarment in terms of this Act is therefore closely related to the anti-corruption project. Section 28, which mandates endorsements on the register, is furthermore found in chap 5 of the Act, which deals with 'Penalties and related matters'. The section itself describes an endorsement order as additional to any penalty imposed in terms of the general penalties provision of the Act (s 26). If one goes behind the Act, one finds the statement in the Public Service Anti-Corruption Strategy, which amongst others informed the Act, that 'businesses found criminally guilty of corruption' must be excluded from

public sector contracts for a period of five years as a ‘stepping stone of the anti-corruption strategy’ (Department of Public Service and Administration *Public Service Anti-Corruption Strategy* (2002) 12–16 (available at <http://www.dpsa.gov.za/macc/>)). It further states: ‘Such punishment must be included in legislation as mandatory provision upon sentence.’ The context of the Register for Tender Defaulters strongly suggests that the rationale for this debarment mechanism is one of punishment of corrupt activities and serves the twin purposes of retribution for past misconduct and deterrence of future wrongdoing.

Another consideration that supports this view is the absence of derogation from endorsements on the Register for Tender Defaulters. The Corruption Act does not allow for any derogation from debarments in terms of s 28. Once an endorsement order has been made, exclusion of that contractor is mandatory and absolute (Williams & Quinot *op cit* at 360–1). It is therefore irrelevant that the contractor took remedial steps subsequent to the endorsement or even completely eliminated the risk that originally caused the corrupt activities, for example by purging the enterprise of corrupt employees. This absence of derogation indicates that the focus of the mechanism is on past misconduct and sending out a message with respect to corruption, rather than serving any function in relation to qualifying a contractor for present or future procurement.

REGISTER FOR TENDER DEFAULTERS VIS-À-VIS OTHER DEBARMENT MECHANISMS IN SOUTH AFRICAN LAW

Exclusion under the Corruption Act is not the only debarment mechanism in South African law, and not even the only one under which corrupt activity can be a basis of exclusion (see Bolton *op cit* at 28–42; Sope Williams ‘The use of exclusions for corruption in developing country procurement: The case of South Africa’ (2007) 51 *Journal of African Law* 1). Debarment is also possible under other statutes, such as the Public Finance Management Act 1 of 1999 (PFMA), the Preferential Procurement Policy Framework Act 5 of 2000, the Local Government: Municipal Finance Management Act 56 of 2003 (MFMA) and the State Tender Board Act 86 of 1968.

Without analysing in detail the provisions of these alternative debarment mechanisms (see in this regard Bolton *op cit* and Williams *Journal of African Law op cit*), it is sufficient for our purposes to note that some of these alternative mechanisms fulfil a function more directly related to the procurement system itself. In other words, some of these mechanisms are in the first category of debarment rationales outlined above, in contrast to the mechanism of the Corruption Act.

In terms of debarments directed at the integrity of the procurement process, the government is protected against unscrupulous contractors by the debarment mechanisms in the regulations under the PFMA and MFMA. The Treasury Regulations under the PFMA (GN R225 GG 27388 15 March 2005) provide that procuring entities *may* disregard bids by contractors that

'have abused the institution's supply chain management system' (reg 16A9.2(i)), 'have committed fraud or any other improper conduct in relation to such system' (reg 16A9.2(ii)) or 'have failed to perform on any previous contract' (reg 16A9.2(iii)). There is clearly an overlap between corrupt activities that may trigger debarment in terms of these regulations and conduct that will constitute an offence under ss 12 or 13 of the Corruption Act, triggering a potential endorsement order under s 28 of that Act. This overlap does not, however, result in redundant legislative provisions because of the divergent rationales of these two types of debarment. Another important reason to keep these debarment mechanisms apart lies in the different institutional arrangements of these provisions. Debarment under the Corruption Act is within the discretion of the courts and once an endorsement on the Register for Tender Defaulters has been ordered, procuring entities have no discretion to contract with the endorsed contractor. In contrast, debarment under the PFMA is within the procuring entity's discretion and can be exercised on a case-by-case basis taking into account all relevant considerations, including the present reliability of the contractor. These different institutional roles again follow directly from the distinct rationales behind the respective mechanisms.

FACTORS TO CONSIDER IN ORDERING ENDORSEMENT ON THE REGISTER FOR TENDER DEFAULTERS

Based upon the corruption-specific function of the Register for Tender Defaulters and its relationship with other debarment mechanisms in South African law, one can identify a number of factors that may be relevant when a court considers an endorsement order. It is not our purpose here to provide an exhaustive list of all the factors that are generally relevant to criminal sentencing (in this regard see S S Terblanche *A Guide to Sentencing in South Africa* 2 ed (2007) chs 5 and 8). Below we simply outline the particular procurement dimension of a number of relevant factors.

The gravity of the offence

The offence is naturally the primary consideration when a convicting court exercises its sentencing discretion (Terblanche op cit 137 and 146–7). It is thus not surprising that the seriousness of the crime is viewed as the 'yardstick' for the determination of the sentence (Terblanche op cit 146). From this perspective it is important to recognize the severity of debarment as a penalty under the Corruption Act. First, debarment will always be an additional penalty to imprisonment or a fine imposed under s 26 of the Corruption Act. Secondly, the debarment will be for a relatively long period of time — at least five years, but potentially up to a maximum of ten years. Even the minimum five-year debarment is quite long when compared to the time limits for debarment in other jurisdictions. Under the FAR in the US, debarment is typically for a maximum period of three years, although longer periods are possible in exceptional circumstances (FAR 9.406–4(a); Shannon op cit at 364). Although the World Bank can debar a contractor indefinitely

under its procurement rules, most debarments by the World Bank are currently also for a three-year period (Williams *Public Contract LJ* op cit at 298). Thirdly, once debarment has been ordered it is mandatory and absolute for the set period. Given the severity of debarment as a penalty, it should be reserved for convictions of more serious forms of contract corruption. What exactly would qualify as such serious wrongdoing can only be worked out on a case-by-case basis. The important point to emphasize is that, in order to maintain an appropriate balance between the crime committed and the punishment, debarment should not be ordered too easily under the Corruption Act.

Previous convictions for corruption

Section 271 of the Criminal Procedure Act 51 of 1977 (CPA) allows prosecutors in all criminal matters to submit to the convicting court a record of previous convictions of the accused for the purposes of sentencing. If such convictions are admitted or proved, the court is under an obligation to take them into account when imposing a sentence (s 271(4)). When a court considers endorsement on the Register for Tender Defaulters, previous corruption convictions are thus particularly relevant. Since debarment is an additional penalty under the Corruption Act, it is submitted that endorsement should be ordered for repeat offenders and not, except in cases of particularly serious corruption charges, for first-time offenders. It should be kept in mind that government risk is not necessarily affected by a failure to endorse a first-time offender under the Corruption Act. Debarment of that contractor remains possible under the PFMA and MFMA debarment mechanisms based on the corruption conviction.

While the CPA refers only to previous convictions of the *accused* being put before the court, under the Corruption Act the court may also order endorsement of related parties following conviction of the accused. Debarment of a related party will be particularly apt where that related party has previous corruption convictions, even if the accused is a first-time offender. This will avoid the possibility of persons convicted of corruption using substitute entities to obtain government contracts. It is thus important for a court to consider the previous convictions not only of the accused, but also of relevant related parties.

Nature of the contractor and the impact of debarment on it

It is important to distinguish between enterprise contractors and natural-person contractors when considering a debarment order. In the case of enterprises, a large number of innocent employees may be adversely affected by endorsement, especially where the enterprise obtains most of its business from the public sector. Also, where the convicted contractor is a large enterprise with many divisions, a court should carefully consider the impact of exclusion on the enterprise as a whole where only one particular division transgressed and there is no evidence to suggest a culture of corruption in the broader enterprise. Whether the offence was an isolated incident within the firm will thus be relevant in such a case.

The nature of the enterprise's business is also a relevant factor. The impact of debarment will obviously be much greater on a firm that operates within a government monopoly market, such as defence procurement, than one able to obtain business from the private sector such as private auditing firms.

None of the above factors on the nature of the contractor and the potential impact of exclusion can be dispositive of the debarment question. However, they are important considerations in establishing the severity of the punishment in a particular case, which is crucial in weighing up debarment as a suitable punishment against the offence at issue.

Furthermore, where the contractor is an enterprise it is appropriate that the natural persons behind the persona of the enterprise involved in committing the offence also be endorsed. The effectiveness of debarment as punishment will be greatly undermined if the enterprise alone is excluded, since it will allow the real culprits to escape censure. Under s 28(1) of the Corruption Act it appears that where the convict is an enterprise and the court decides to order an endorsement, it must include 'the particulars of any partner, manager, director or other person, who wholly or partly exercises or may exercise control over that enterprise and who was involved in the offence concerned or who knows or ought reasonably to have known or suspected that the enterprise committed the offence concerned' (s 28(1)(b)(ii)). This would mean that such natural persons behind the enterprise are also debarred. Section 28(1) is not, however, entirely clear and may be open to alternative interpretations (see Williams & Quinot op cit at 349–50).

The potential impact of endorsement on the government and society

Finally, it is also important for a court to keep in mind the potential impact on government business of endorsing a particular contractor. While the exclusion of a contractor from government business may be an effective punishment for that contractor, it may also have far-reaching adverse consequences for government. This will be the case in markets with a small number of contractors. Thus, according to Schooner, '[w]ith fewer major, critical contractors available to compete for the Government's most sophisticated requirements, it seems disingenuous to bar a key player from future competition. Such behaviour might be described as cutting off one's nose to spite one's face' (Schooner op cit at 214). The adverse consequences of debarment to the government need to be balanced against the desire to combat and punish corruption. The question then becomes how much a society is willing to pay in support of its anti-corruption objectives. Whilst the fight against corruption is undoubtedly an important societal goal and one to which South African society must commit itself, this commitment needs to be justified on the balance of costs and benefits to the society. For instance, society may not and ought not to be willing to compromise its internal and external security by debarring critical defence contractors who have been proved to have engaged in corruption. Another example may occur in the case of corrupt housing contractors. Is society prepared to accept

much slower delivery of housing with resultant continuing homelessness of millions of South Africans when housing contractors are debarred and prices consequently increase in a less competitive market, all in the name of fighting corruption? These examples illustrate that a choice in favour of imposing the anti-corruption mechanism of debarment may have significant cost implications for society. It is accordingly only proper that courts openly engage in debate on whether the choice is justified in a given instance.

CONCLUSION

The view that the debarment mechanism created in the Corruption Act serves as punishment for past corrupt activities has important implications for its use by criminal courts. It implies that convicting courts should focus on debarment as an appropriate punishment in the given instance within the framework of the offence, the offender and societal aims. Courts should not necessarily attempt to use the debarment provisions to police government contracting as there are adequate alternative debarment mechanisms to maintain the integrity of the procurement system and protect the government against undue business risks in contracting with irresponsible contractors. The important differences between these various types of debarment in South African law accentuate the need to keep them apart. Chief amongst these differences is the divergent institutional arrangements. Whereas debarment in terms of the Corruption Act lies solely in the discretion of the courts, the alternative debarment mechanisms in statutes such as the PFMA and MFMA are within the administrative discretion of procurement officials, with significant flexibility in application. The latter arrangements are much better suited to serve the purposes of an effective procurement system than judicial involvement.

The difference in rationales underlying various debarment mechanisms also highlights the need to treat foreign case law and statutes on debarment with caution. Accordingly, the well-established US jurisprudence and FAR provisions on debarment are of less relevance when courts have to make debarment decisions under the Corruption Act, since the US regulations are premised on the objective of ensuring that the government contracts only with responsible contractors as a central aim of the procurement system. As we have argued above, this is not the primary aim of debarment under the Corruption Act.

Finally, when a court has to decide whether to order debarment and to what extent, the factors that are relevant call for close liaison between prosecutors and public procurement officials. The input of the latter group is particularly important to enable a court to appreciate the potential severity of an endorsement on the Register for Tender Defaulters.