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THE INSIDE JOB: WHEN CORPORATE ADR EXPOSES THE BOARD

Just like Al Capone, today's directors can be undone by their own house

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History has a way of repeating itself. In the 1930s, Al Capone terrorised the inhabitants of Chicago. Yet he was ultimately brought down not by rival criminals or daring law enforcement raids, but by an "inside job" - meticulous examination of his own records, tax filings, and internal financial missteps. Today, the corporate world faces a similar reckoning. Through **Corporate Alternative Dispute Resolution (C-ADR)**, organisations may survive scandal, but directors and executives are increasingly exposed to scrutiny, prosecution, and reputational damage. The modern "inside job" may come from within the company itself.

Corporate ADR: A game-changer

South Africa's **Corporate ADR policy** allows companies to self-report corruption, cooperate with authorities, and remediate wrongdoing in exchange for non-prosecution. Inspired by international best practices such as Deferred Prosecution Agreements in the US and non-prosecution agreements in the UK, this mechanism represents a pivotal shift in how corporate misconduct is addressed.

Corporate ADR, however, **does not protect** individuals. Employees, executives, and directors involved in wrongdoing remain fully liable, and the company's cooperation may provide authorities with the very evidence needed to prosecute them.

As Adv. Chuma Mtengwane, Special Director of Public Prosecutions highlighted at the recent **Frontiers of Asset Recovery Conference in Cape Town**:

> *"We have a very good legislative framework in South Africa, but it's difficult to enforce and monitor. If we don't encourage collaboration between regulatory authorities including the public sector, we won't conquer corruption - the pace is very slow, and frustrating for law enforcement authorities."*

Judge Dennis Davis further emphasised the operational challenges, saying:

> *"We have developed Rolls-Royce legislation in South Africa, but we are clueless of how to implement and police it."*

And Justice Raylene Keightley of the Supreme Court of Appeal South Africa framed it in constitutional terms, saying:

> *"It's a constitutional imperative to deal with corruption - not dealing with it poses a serious threat to our state."*

These insights underline the persistent enforcement gap: strong laws exist, but a lack of evidence, coordination, and transversal governance data slows justice. Corporate ADR addresses this gap by encouraging companies to come clean, providing authorities with actionable evidence while giving organisations a chance to survive.

The director exposure problem

Corporate ADR flips traditional assumptions of protection on their head. Directors have often relied on the belief that the company and D&O insurance would shield them. Today, these assumptions are increasingly dangerous. When a company cooperates under Corporate ADR, the evidence it provides can directly implicate directors, executives and the Company Secretary, exposing them to criminal liability even if the company itself avoids prosecution.

D&O insurance rarely covers deliberate misconduct or criminal activity, leaving boards vulnerable. Even non-executive directors, previously thought to be insulated, are now exposed if they fail to exercise reasonable care, skill, and diligence in their oversight duties.

Much like Al Capone, the threat is often from inside the house. Directors cannot rely on ignorance, delegation, or incomplete governance records to protect themselves. Robust, time-stamped governance documentation is required to demonstrate due diligence and conscientious oversight.

Digitised governance framework: The modern shield

This is where a **Digitised Governance Framework (DGF)** becomes indispensable. By capturing all board and management governance activities in a verified, auditable, and shared format, a DGF safeguards the organisation by enabling swift, credible cooperation under Corporate ADR. At the same time, it protects directors by verifying of how well they have fulfilled their fiduciary duties and oversight responsibilities.

Governance becomes more than a tick-box exercise, it becomes **real-time evidence**, shielding boards from the modern “inside job” threat.

PRECCA: Legal duties and the end of excuses

South Africa’s **Prevention and Combating of Corrupt Activities Act (PRECCA)** reinforces this imperative.

- **Section 34**: Any person in a position of authority -- including directors, the Company Secretary, prescribed officers, and senior managers -- has a legal duty to report certain offences (such as corruption, fraud, or theft over R100,000) to the South African Police Services (SAPS). Failure to do so is in itself a criminal offence.
- **Section 34A**: Introduces a “failure to prevent corruption” offence. If a person associated with the organisation (e.g. third-party contractor) engages in corrupt activities to obtain or retain business, the organisation can be held liable unless it can prove it had **“reasonable measures”** in place to prevent such conduct.

While the term “reasonable measures” has not yet been defined in South African law, a DGF directly supports proactive risk mitigation by enabling boards and executives to:

- demonstrate top-level commitment to setting up and leveraging systems to drive and monitor good governance
- critically analyse data to identify governance weaknesses, including problematic patterns or outliers, more swiftly
- expand necessary communication and enhance transparency of governance data to strengthen the internal control environment and promote robust due diligence
- assemble auditable evidence of oversight to support PRECCA investigations.

Once this level of awareness and visibility exists, excuses cannot withstand scrutiny. In the context of Sections 34 and 34A, such evidence may well be the difference between **organisational compliance** and **personal liability**.

Global and local case studies

South Africa has seen Corporate ADR in action, but individual accountability remains crucial. In the ABB/Kusile case (2022) the company paid around **ZAR 4 billion** in multi-jurisdictional fines, while senior executives faced criminal charges and plea agreements. The SAP case in 2024 involved multiple state-owned enterprises, with restitution of approximately **ZAR 200 million**, while certain employees and executives remained exposed to prosecution for fraud and corruption.

Globally, similar patterns emerge:

- Airbus (2020) settled for $3.9 billion across multiple jurisdictions; several executives were dismissed and banned from management for bribery allegations.
- Petrobras (2018) paid $2.95 billion; senior managers faced criminal charges over bribery allegations.
- Glencore (2022) agreed to settlements exceeding $1 billion; key trading executives were investigated for corruption.

These cases show that while organisations may survive financially, individuals pay a personal price, reinforcing the principle that wrongdoing carries massive consequences.

While the number of Corporate ADR cases in South Africa remains relatively small, those which have been initiated are **landmark in scale and impact**. Some directors may be tempted to dismiss these early settlements as exceptional or irrelevant. Believing this would be a grave mistake.

These cases signal a momentous shift in which the **juristic person -- the company itself -- can effectively “speak” against those who were entrusted to protect it**, including directors, executives, Company Secretaries and prescribed officers. Mechanisms are now in place to hold individuals accountable, often faster and more effectively than through traditional criminal trials. Regulatory authorities, both local and international, are increasingly **coordinating their efforts**, sharing data, and pursuing cross-border settlements. In this environment, those who

continue to operate as if governance failures will remain hidden are taking a reckless gamble. The 'snakes in suits' will not slither away for long.

Conclusion

The modern corporate landscape has changed. Just as Capone's tax records betrayed him, today's directors may face exposure from the very companies they govern. Corporate ADR may ensure organisational survival, but only transparent, auditable governance records protect boards and executives in their individual capacities.

The message is clear: ignore governance diligence at your peril.

Call to action: Boards and executives must act now: implement robust, auditable governance systems, ensure transversal oversight, and embed real-time governance monitoring. In an era where Corporate ADR can be leveraged to reveal weaknesses from within, only evidence-backed diligence will protect your organisation -- and you personally -- from being the next victim of an "inside job."

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