1. General

1.1. Can a company be prosecuted in your jurisdiction in a similar way as an individual offender? Please explain the main differences, if any.

Yes. The general rule is that only a natural person can perform an act, but in certain circumstances a juristic person can be liable for a crime. Section 332 of the Criminal Procedure Act 51 of 1977 (“Criminal Procedure Act) provides for the prosecution of corporations and members of associations.

Main differences between the prosecution of individuals and companies:

- Summons served on the representative of the company as opposed to a warrant of arrest on an individual.
- Certain crimes cannot be committed by a company e.g. if the statutory prohibition is directed against an individual.
- A director or servant of the company in his/her representative capacity is cited as the offender and has to stand trial.
- A director or servant can only plead guilty on behalf of a company if the company authorizes him/her to do so (with the exception of minor offences where the payment of a fine is an admission of guilt).
The courts may only impose a fine on a company, even if the statute which created the crime does not make provision for a fine.

1.2. Can other types of sanctions under criminal law been imposed on companies? Describe the major types of sanctions and their legal prerequisites.

Yes, fines can be imposed on companies or the assets of the company may be forfeited. Even if a statute does not make provision for a fine, the courts may only impose a fine when prosecuting a company and here they would have discretion of what fine to impose. Asset forfeiture is usually used where the company has benefited financially or acquired property as a result of their unlawful activity. Items used in the furtherance of unlawful activities can also be confiscated, for example a credit card cloning machine.

1.3. Are there any other kinds of sanctions in other fields of law which can be imposed on companies following the commission of an offence by its directors, managers or employees (e.g. fines, dissolution of a company, etc.)? Please describe the relevant sanctions and summarize the legal prerequisites.

Yes. Companies can in certain circumstances also be liable for civil penalties over and above criminal penalties. An employer can be vicariously liable for a civil wrong committed by a servant during the course and scope of his/her employment. A company’s property can be attached and sold or a company can also be liquidated if it cannot pay an imposed fine. Additionally, s424 of the Companies Act 61 of 1973 provides that if the business of the company was being carried out recklessly or fraudulently the individuals involved may be personally liable for the debts and liabilities of the company.

2. Criminal Liability of Companies

2.1. What types of sanctions can be imposed on a company? What is the minimum/maximum punishment for each sanction? If the sanctions distinguish between certain types of offences please describe the sanctions for the most relevant offences or groups of offences.

Fines and asset forfeiture.

It is not possible to say exactly what the minimum or maximum sanction is for some offences as the courts have discretion, for example, in instances where no specific provision is made for a fine as a form of punishment. For certain statutory offences a minimum fine must be imposed and there the courts have no discretion. Maximum fines can be stipulated, for example, in terms s68(1) of the Financial Intelligence Centre Act 38 of 2001, a person convicted of certain offences specified in the act is liable for a fine not exceeding ZAR10, 000 000. The courts do have discretion not to impose the maximum fine though.
In CIR v Emary NO 1961 (2) SA 621 it was determined that the statutory concept of a “person” includes juristic persons i.e. companies. Accordingly, where legislation refers to a person, but the term is not defined or is not implied in the act, the presumption is that it includes a juristic person.

2.2. What are the legal requirements for each type of sanction?

Whatever the statute prescribes or whatever the common law requirements are. For example the elements of fraud are unlawfulness, intentional misrepresentation and actual or potential prejudice to another and where it involves amounts of ZAR500 000 or more the minimum sentence for a first offender is 15 years imprisonment. As discussed above, this will translate into a fine for a company.

2.3. Is the prosecution of a company confined to certain types of offences or to offences committed by certain hierarchy of company staff? If yes, please explain in more detail.

In theory a company can be prosecuted for any common law offences e.g. murder, culpable homicide, fraud etc. However, there are certain statutory crimes that are directed only towards individuals and a company cannot be liable for these offences. For the purposes of imposing criminal liability upon a company there is no requirement that the employee be of a specific seniority. The Criminal Procedure Act refers to any “director or servant of that corporate body.”

2.4. How will acts (or omissions) of individuals (directors, managers, employees) be attributed to a company? Can acts or omissions been attributed if the individual violated only internal (but not statutory) rules or regulations?

Section 332(1) of the Criminal Procedure Act makes provision for acts or omissions instructed by a director or servant of that corporate body during the performance of their duties to further the interests of the corporate body. The act or omission is deemed to be performed by the corporate body and no intent is required. How companies deal with the violation of internal regulations will depend on internal policies and procedures.

2.5. How will mens rea of the company be established?

Where mens rea is a requirement for an offence the criminal intent of the director or servant is attributed to the company.

2.6. Is there a strict liability of a company for certain kinds of offences for which mens rea is not required? Please describe for which kind of offences mens rea is necessary and for which not.

Yes, S 332(1) is broad enough to include crimes based on strict liability. Although fault is a requirement for the majority of crimes in South Africa, there are certain
statutory offences which are an exception to the rule, where fault is not a requirement. The majority of common law crimes (fraud, culpable homicide etc) and statutory crimes require mens rea.

2.7. **Is it necessary to identify and/or convict the individual offender in order to prosecute a company?**

No. The prosecutor can decide whether to prosecute only the director / servant of a company or only the company or both. Corporate liability often arises because it is very difficult to attribute the crime to a specific individual within the company. A representative of the company does have to stand trial though, where the prosecutor decides to prosecute the company.

2.8. **What additional defenses (except of lack of offence) can a company raise?**

Possible criminal defenses include necessity, consent, private defense and entrapment.

2.9. **Can a company avoid punishment if it is sufficiently organized, has duly instructed its directors, managers or employees and has taken reasonable care to exert control on its directors, managers or employees? What extent or organizational requirements and control are necessary to avoid conviction?**

To some extent companies can reduce the risk of being criminally liable especially where mens rea is an element of the crime. By creating an environment where the internal policies and procedures of a company are clearly defined, so that representatives of the company have a clear idea of what powers they have and what acts they can perform on behalf of the company. If an individual then acts beyond the scope of his employment it is more likely that he/she will be personally liable, as the act is then not within the course and scope of his/her employment. However, a company can commit a crime without even knowing that they have committed a crime (usually statutory offences) and in these instances there is little a company can do, other than ensure that all representatives are aware of all current legislation that may apply to the company. In the case of *Simon N.O. and others v Mutsui and Co Ltd and others 1997 (2) SA 475 (W)* Judge Wunsh says, “it is a question of construction in each case as to whether the particular rule requires that the knowledge that an act has been done, or the state of mind with which it was done, should be attributed to a company.”

2.10. **Can certain kinds of sanctions been executed during the investigative phase of a criminal proceedings (e.g. preliminary seizure of bank accounts, attachment of claims)?**

Assets can only be seized once a court order has been obtained. The seizure is done by the Asset Forfeiture Unit which is a division of the National Prosecuting Authority.
2.11. Can both the individual offender and the company been convicted for the same offence?

Yes, the individual and the company can be convicted for the same offence and both be punished separately.

2.12. Can a parent/group company been prosecuted for offences being committed within a subsidiary?

Possibly, where the parent/group company is aware of an offence in the subsidiary company and has a statutory duty to report such an offence, failing which they are also criminally liable.

3. Criminal Sanctions on a Company

3.1. What other types of sanctions but a criminal punishment can be imposed on a company? Please describe the types of sanctions and their legal requirements.

A company can also be punished with civil penalties or interdicted from acting wrongfully. Sometimes a crime and a delict will overlap although a specific act is not necessarily both a delict and a crime.

3.2. Is the imposition of these sanctions confined to certain types of offences? Describe the most relevant sanctions and types of offences?

Civil penalties are usually payable where private interests are protected as opposed to public interests. Civil penalties are more compensatory in nature as where criminal sanctions are more penal in nature.

3.3. What defenses can a company raise against these offences?

Possible civil defenses include private defense, necessity, consent and statutory authority.

3.4. Can such sanctions been executed during the investigative phase of a criminal proceedings?

Yes. A company can be found civilly liable while a criminal investigation is ongoing. The two matters are dealt with independently.
4. Procedural Issues in Cases of Corporate Liability

4.1. Does the prosecution have discretion to prosecute or not a company? Which aspects will the prosecution take into account?

Yes. The Prosecution has discretion and can decide whether to prosecute either the individual or the company or both. Furthermore section 6 of the Criminal Procedure Act provides the prosecuting authority with the power to withdraw a charge or to stop prosecution at any stage in proceedings, in regard to any offence. The prosecuting authority will consider the charges and available evidence when deciding whether to prosecute a company or not.

Section 7 of the Criminal Procedure Act provides that in instances where the prosecuting authority withdraws or declines to prosecute for an alleged offence, a private person can pursue private prosecution under certain circumstances where he has suffered harm as a result of the alleged conduct of the accused.

4.2. At what stage during an investigation/proceeding does a company have the status as a suspect or similar status?

Usually once an investigation into the actions of the company is initiated.

4.3. Does a company have the rights to remain silent (nemo tenetur se ipsum accusare), to refuse production of documents, to deny access to company site without search warrant, to refuse testimony, to answer questions or to any other suspects rights? Who exerts these rights if investigations are made against the company’s directors?

Section 332(2) of the Criminal Procedure Act provides that in the prosecution of a corporate body, a director or servant of that corporate body shall be cited as the representative of the corporate body. The representative steps into the shoes of the accused company and in these instances and the representative has the same rights in respect of the company as any other accused person would have. Section 332(3) of the Criminal Procedure Act provides that in criminal proceedings against a corporate body, any record which was made or kept by a director, servant or agent of the corporate body within his scope of activities and which was in his control or custody in his role as a director, agent or servant of the company shall be admissible as evidence against the accused. The representative of the company will exercise the rights of the company in respect of the investigations conducted.

4.4. When will a company be informed that it is or can become prosecuted?

When criminal charges against a company are pressed, a summons is served on the corporate body by serving it on a director or servant of the company, notifying the company of the impending proceedings.
4.5. Can the directors, managers or employees be witness in proceedings against a company? Does this also apply if the directors, managers or employees are suspects themselves?

Yes in both instances.

4.6. Will there be a joint proceeding against the company and the individual offender?

The director will either be jointly liable with the corporate body or apart from the corporate body and shall be personally liable. Section 332(6) of the Criminal Procedure Act further provides that any evidence that is admissible against the company will be admissible against the individual directors or servants of the company.

4.7. Does the proceeding against a company differ from that against an individual suspect? If yes, describe the elemental differences.

Only slight differences, for example a director or servant cannot plead guilty on behalf of a company without the authority to do so and the director or servant cannot be arrested or jailed on behalf of the company.

5. Procedural Issues on Other Criminal Sanctions

5.1. Does the prosecution have discretion to impose or not a sanction on a company? Which aspects will the prosecution or court take into consideration?

No, the court decides what the appropriate sanction is once the offender is found guilty of a crime, although s6 of the Criminal Procedure Act provides the prosecutor with the authority to withdraw a charge or stop a prosecution at any stage of the proceedings.

5.2. Does the company, have the status of a suspect or a similar status and at what stage in proceedings?

See 4.2 above.

5.3. When will the company been informed that the prosecution is considering to impose sanctions or have sanctions imposed?

See 4.4 above.
5.4. Which procedural rights does a company have when it is at risk that sanctions might be imposed?

Like an individual a company can also raise any relevant mitigating factors in relation to sentencing to the court, even though the court’s sentencing options are limited with companies.

5.5. Will there be joint proceedings against the company and the individual offender?

See 4.6 above.

5.6. Does the proceeding against a company differ from that against an individual suspect? If yes, describe the elemental differences.

See 4.7 above.

6. Criminal Liability of Directors or Managers

6.1. Can directors or managers be criminally held liable for offences committed by other individual directors, managers or employees? Which legal concepts apply in your jurisdiction?

In terms of section 332(5) of the Criminal Procedure Act, any directors or servants of the company will be liable to prosecution for any offences committed by the company while such persons were in fact servants or directors of the company, unless it is proved that such person did not take part in the offence and could not have prevented the offence. However, in the constitutional court case of *S v Coetzee* 1997 (1) SACR 379 (CC) this section was found to be unconstitutional as it effectively breaches the presumption of innocence. Therefore the director or servant must have been aware of the criminal conduct before they can be liable for prosecution.

6.2. What are the legal requirements for a criminal liability of directors and managers for offences committed by others?

For criminal liability the director or servant must have been aware of (or took part in) the criminal conduct and if he/she was aware then he/she must have been able to prevent the offence from occurring.

6.3. Does a criminal liability arise only from the fact that another director, manager or employee was not adequately selected, instructed, supervised or the company not adequately organized?

No, according to section 332(1) of the Criminal Procedure Act a company can be liable for any offence, whether under common law or in terms of a statutory provision. The section provides that any act or omission performed, with or without intent, by or on instructions or with permission, express or implied, given by a director or servant of
that company is punishable if it amounts to a common law or a statutory crime. A company can therefore be liable on a number of grounds.

6.4. **What recommendations do you have to exclude or minimize criminal liability risks of directors of a company?**

Recommendations:

- Where important decisions need to be made on behalf of the company which may expose the company, a resolution should be taken by the directors.
- Ongoing training regarding changes in legislation which affect companies, directors etc. is very important.
- Clear policies and procedures should be in place and conveyed to all employees of a company.
- A company should have a zero tolerance approach to any form of unlawfulness.
- A company should proactively take steps to ensure that its representatives act appropriately when furthering the interests of the company.