Article

An Evaluation of Strategies to Improve Awareness of Remuneration Clawback in South Africa

Naseeha Mahomed
https://orcid.org/0000-0001-6346-7431
University of South Africa
mahomn@unisa.ac.za

Danie Schutte
https://orcid.org/0000-0001-7283-247X
North-West University, South Africa
danie.schutte@nwu.ac.za

Abstract

Purpose: The regulatory governance regime in South Africa does not comprehensively address the issue of remuneration clawback, leading to ambiguity in implementation and enforcement. Despite this, JSE-listed companies are increasingly adopting the use of clawback. To address the uncertainty present in the corporate environment, this study aims to provide practical strategies for improving awareness and understanding of clawback.

Methodology: A qualitative exploratory study was conducted with participants from JSE-listed companies to gauge the current level of understanding of the concept of clawback provisions and the practical ramifications. Data were gathered through a semi-structured interview process from ten participants involved in the design or implementation of remuneration.

Findings: This study found that the understanding and awareness of the concept of clawback differed across various levels of the corporate hierarchy. This understanding was hampered by implementation challenges, inadequate statutory guidelines, legal complexities, the costs of recovery, and other factors. In addressing this issue, the article provides practical strategies to enhance exposure to clawback, thereby improving its efficacy as a risk mitigation tool on remuneration.

Originality: This study is the first to integrate the level of awareness and understanding of the concept of clawback into the enhancement of the governance structure related to remuneration.

Keywords: accountability; awareness; clawback; ethical compliance; governance; malus; remuneration policy; repayment; risk mitigation; variable

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Introduction

Clawback is used as a risk mitigation tool to strengthen the governance of remuneration (Stark 2021). Babenko et al. (2017) explain that various corporate governance failures have been the catalyst for the increased adoption of clawback in recent years. According to the Institute of Directors South Africa (2016), responsible governance of remuneration requires senior management to implement measures that appropriately mitigate risk exposure. Through the use of clawback, management is given the opportunity to evaluate the adequacy of variable remuneration and, where necessary, make adjustments and recoveries upon the occurrence of certain events (Moolman and Giliam 2019).

According to Prescott and Vann (2018), clawback provisions are clauses in employment contracts that require the reimbursement of funds upon the occurrence of specified trigger events. Through clawback, funds are recovered from employees subsequent to payment or vesting (Cha et al. 2023). The clawback amount usually represents an erroneous overpayment and, therefore, clawback is a control mechanism used to remedy these adverse financial effects (Gillan and Nguyen 2018). In addition, Cha et al. (2023) explain that the purpose of clawback is to deter executives from misconduct by linking incentive payouts to underlying performance.

Clawback is a means through which the asymmetry between incentive-based compensation and financial misrepresentation may be addressed, whereby responsibility is assigned to risk-taking (Liu et al. 2020). The recovery of excess pay through clawback facilitates arm's-length contracting at the senior executive level by diminishing the influence held by these executives (Bebchuk and Fried 2005). In a study conducted by Addy et al. (2014), it was found that a greater propensity to adopt clawback was found in companies with a stronger focus on robust remuneration governance. More broadly, improved remuneration governance has been associated with better financial performance and more controlled risk-taking behaviour (Reddy et al. 2010).

The effective management of remuneration includes aligning remuneration outcomes with performance (Van Wyk and Wesson 2021). While various risk mitigation tools can be used to achieve this objective, Velte (2020) explains that including a clawback clause within the remuneration policy results in better alignment between executive responsibility and stakeholder interests. In promoting the fair and responsible governance of remuneration, clawback is a means by which outcomes can be correlated to expectations (Institute of Directors South Africa 2025). It is also a mechanism for establishing accountability in decision-making, resulting in more robust reasoning and justification processes within the business (Hirsch et al. 2017).

In studies conducted by the Organisation for Economic Co-operation and Development (OECD), it was found that the use of clawback has increased in various jurisdictions globally, particularly among listed companies (Cormann 2021). Van Zyl and Mans-Kemp (2021) explain that the use of clawback by listed companies in South Africa has increased, yet the link between pay and performance remains absent. In a study conducted by Van Zyl and Mans-Kemp (2021), various inconsistencies were found in the application of clawback policies to remuneration.

In light of this, Mahomed and Schutte (2023) conducted a study to evaluate the adequacy of South African legislation and governance frameworks pertaining to the clawback of remuneration, and found that the current regulatory regime does not address the issue of remuneration clawback sufficiently. While the King IV Report (Institute of Directors South Africa 2016) advocates good governance on remuneration, explicit statutory guidelines for the enforcement of clawback are not currently available in South Africa. Companies are exercising discretion in the application of clawback policies, as the absence of clear directives creates uncertainty regarding their implementation and enforcement.

To address the uncertainty in the corporate environment, this study seeks to propose strategies to improve awareness and understanding of clawback. Although clawback is intended to achieve a particular purpose, deficiencies within the current regulatory regime are acknowledged as impeding its effective implementation. An adequate understanding of the clawback process forms the cornerstone for informing regulatory development in this field.

This study, therefore, seeks to determine whether an appropriate conceptual understanding of clawback exists among employees of JSE-listed companies. Given the increased use of clawback by these companies and the deficient regulatory guidance that currently exists, the purpose is to gauge the current level of exposure to clawback and to understand the interpretations of the principle that are presently applied in practice.

Secondly, this study will determine the extent to which employees are currently aware of the consequences posed by the enforcement of clawback. As the concept of clawback is fairly new in South Africa, it has rarely been enforced in practice. Considering its inclusion in the remuneration policies, this study seeks to evaluate how mindful employees are of the potential ramifications that arise from the enforcement of clawback. As clawback has financial implications, a thorough understanding will assist with the recoupment process.

Thirdly, this study will highlight the factors that companies should consider when including clawback as part of remuneration. The advantages and disadvantages of clawback will be explored so that the efficacy of clawback as a risk mitigation tool in remuneration can be appropriately understood.

Lastly, suggestions will be collected on practical ways to improve the level of understanding and awareness of clawback. A greater level of awareness and understanding of clawback would not only facilitate a seamless enforcement process but also assist in enhancing the governance structure of remuneration. In this way, the use of clawback would be more effective.

This article will gather feedback from listed companies and address the issues in four parts. The first part provides the background and explains the purpose of the study. The second part explains the methodology, followed by the third part, which provides a detailed discussion and analysis of the findings. The fourth part provides concluding remarks.

Methodology

In achieving the objectives stated above, an exploratory study was conducted with participants from the corporate sector to better understand whether employees are sufficiently aware of the clawback of remuneration and its ramifications. Through engagement with participants, the factors to consider in the adoption of clawback were highlighted, along with strategies to cultivate better awareness of clawback.

Various studies on remuneration have used interviews as the instrument for data gathering. This process allows for sharing insights and experiences in a descriptive and detailed manner (Mey 2022). The interview process enables the researcher to derive meaning from the perspectives and opinions obtained so that inferences may be drawn (Muzari et al. 2022). Semi-structured interviews were conducted, as this allowed flexibility for both the researcher and the participants (Mey 2022). The interviews facilitated interaction between the researcher and the participants, enabling an in-depth understanding of the subject matter under investigation (Hignett and McDermott 2015).

The interviewees in this study comprised personnel from various JSE-listed companies directly involved in the design or implementation of remuneration. The criteria used for selecting participants were influenced by the researcher’s perceptions and experiences and were tailored to suit the research question (Parker et al. 2019). The individuals targeted for participation included those involved in defining remuneration policies or authorising their enforcement, and were presumed to have a better understanding of the legal, financial, and reputational consequences of remuneration clawback. Interviews were conducted with individuals meeting these criteria.

In identifying potential participants for the interview process, the remuneration reports of the top 50 JSE-listed companies that included clawback provisions in their remuneration policies were reviewed. Telephonic contact was then made through the companies’ switchboards for further engagement with individuals involved in remuneration. Verbal discussions were followed by email communications in which an invitation to participate in the study was extended. In total, ten interviews were conducted. The participants interviewed were purposefully selected and possessed a wide range of expertise. Once the researcher was satisfied that the feedback had become repetitive, the point of saturation was reached. A summary of the key biographic details of each participant is presented in Table 1.

Table 1: Summary of the key biographic details of participants

List of participants	Role	Industry sector	Location	Expertise
Participant 1	Partner	Legal advisory	Gauteng	Employment law, remuneration, and rewards
Participant 2	Head	Banking	Gauteng	Remuneration design, governance, and advisory
Participant 3	Head	Banking	Gauteng	Remuneration and rewards
Participant 4	Head	Banking	Gauteng	Rewards and governance
Participant 5	Head, president, board member	Remuneration consulting	Gauteng	Remuneration design, strategy, governance, and advisory
Participant 6	Head	Mining	Gauteng	HR, remuneration, and rewards
Participant 7	Head	Petrochemical	Gauteng	Reward architecture and governance
Participant 8	Head	Retail	Gauteng	Remuneration and rewards
Participant 9	Director, author, board member	Remuneration consulting	Gauteng	HR, remuneration design, strategy, governance, and advisory
Participant 10	Director, board member, chairperson	Fast-moving consumer goods, property, and banking	Gauteng	IT, remuneration design, strategy, governance, and advisory

Source: Author's own compilation

The information gathered through the interview process is discussed in more detail below.

Discussion and Analysis

Data were analysed using an inductive coding process. According to Bihu (2024), this process involves repeated reading of the data to identify common themes or ideas. The themes that emerged through the process of coding and categorisation of the data revealed patterns and shared experiences among participants. The themes identified are presented in Figure 1 below and reflect the core issues and complexities surrounding the clawback of remuneration.

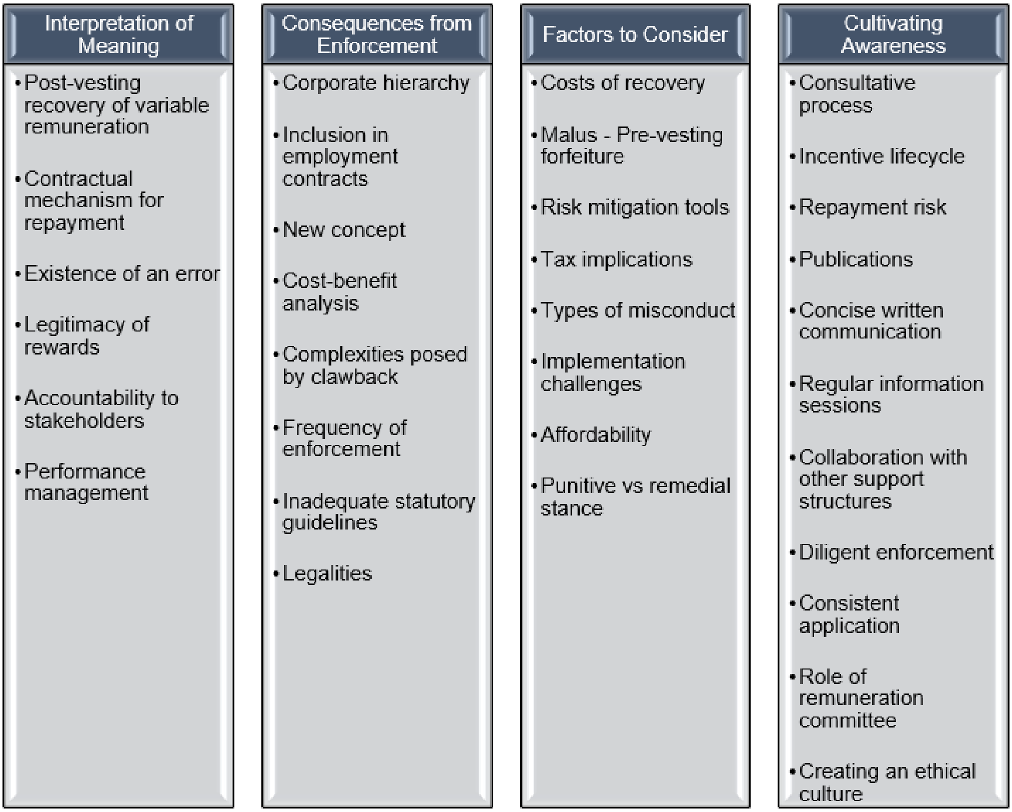

Figure 1: Diagrammatic representation of the key strategies to improve the awareness of clawback

Source: Author's own compilation

This section begins with a discussion of the interpretations of the meaning of clawback currently in practice, followed by an assessment of the potential ramifications perceived to occur upon enforcement. The factors to consider in the adoption of clawback as a risk mitigation tool are then examined, followed by an exploration of strategies to cultivate better awareness of clawback.

Interpretations of the Meaning of Clawback

Participants were asked to elaborate on their understanding of the concept of remuneration clawback. There was a general consensus regarding the understanding of the meaning of clawback in the context of remuneration.

Post-Vesting Recovery of Variable Remuneration

Participants unanimously agreed that clawback relates to the post-vesting recovery of variable remuneration and could apply to both cash and equity awards. Participant 1 explained the meaning of clawback as follows, and participants 2, 4, and 6 concurred with this view.

> My understanding is that it predominantly and exclusively relates to variable remuneration. So, you're not looking at fixed pay, but you are looking at your short-term incentives and long-term incentives and it can be applied regardless of whether its equity settled or cash settled. It applies to the post-vesting recovery of remuneration.

Participant 5 emphasised that the vested remuneration to which clawback applies is unrestricted and already accrues to the employee.

> Clawback refers to when an element of remuneration, usually variable remuneration, has already been settled to an employee, which means it's either been paid if it's cash, and if it's a share-based payment it's been delivered. It's unencumbered and is freely disposable.

Participants 4 and 5 explained that if recoveries are made prior to the vesting date of an award, a malus or forfeiture provision would apply. Once the vesting date has passed, only then would clawback apply. According to Participant 5:

> Clawback is a forfeiture of remuneration and a payback of remuneration after it has been settled, as differentiated from malus, which is an adjustment made to forfeit remuneration before it is settled to you.

Contractual Mechanism for Repayment

Participant 1 explained that clawback tends to be quite severe in nature, as employees are expected to repay amounts previously received. Clawback also creates a contractual mechanism through which recoveries may be made after the vesting date, provided that a pre-agreed trigger event has occurred. Participants 3 and 5 concurred with the view shared by Participant 1:

> I think it definitely acts as a hard mechanism because they stand to lose what they might have gained. It is such a draconian measure. So, once it has vested and been paid or settled to an employee, clawback creates a contractual mechanism by which to enforce a claim for repayment in the event of a clawback trigger event occurring.

Existence of an Error

Participant 7 highlighted the importance of the existence of an error to warrant the enforcement of clawback.

> For me, it's about having the means to recover any payments that have been made when you find out later that there have been errors made at the time of the calculation of a remuneration payment.

Legitimacy of Rewards

Participant 10 introduced the concept of unjustified awards and explained that clawback can be used to recover awards that were not adequately substantiated.

> We use clawback if we have given an award to an employee and we find that the award in the future is unjustified; at that time, we thought you delivered X but you actually delivered Y, so we use clawback in that context mostly.

The mere inclusion of a clawback provision in a remuneration policy draws attention to the legitimacy of rewards, as remuneration outcomes should fairly reflect underlying performance. Participant 10 explained that while clawback creates a means through which this alignment may be achieved, its implementation may be challenging.

> It sounds so easy, but it's not an easy thing to do because it takes you into all the things around performance management. It takes you into the legitimacy of rewards and benchmarking. It's an easy thing to talk about, but it's not an easy thing to deliver on.

Accountability to Stakeholders

Participant 8 added that clawback also plays an important role in fulfilling the responsibility of accountability to stakeholders:

> Clawback is typically designed to get some money back. I would think that satisfying shareholders also plays a part, as you have measurements in place in the company to recover funds. It's an accountability issue.

Performance Management

Participant 10 explained that, in practice, clawback is mainly used for bad leavers as opposed to good leavers. Particularly when dealing with senior executives, companies prefer gentle exit procedures to prevent reputational harm or legal challenges.

> You would use it for bad-leaver provisions. Normally, at senior levels, it's about a discussion, and a negotiation, and a gentle exit. If you're [a] good leaver, we would waive our rights to doing full clawback because we don't want to seem to be prejudiced, and we also don't want to give them a stick to take to the CCMA [Commission for Conciliation, Mediation and Arbitration] against us. And then, for a bad leaver, or [a] nonperforming employee who isn't leaving, we would use clawback in those situations.

Potential Consequences Arising from the Enforcement of Clawback

Regarding the existing level of awareness of the consequences posed by the enforcement of clawback, feedback from participants was found to vary.

Corporate Hierarchy

As the remuneration structure at top levels usually includes both cash and equity-type incentives, this category of staff would be directly impacted by the enforcement of clawback. As such, participants 1, 7, 8, 9, and 10 felt that an appropriate level of awareness of clawback exists only at higher levels within a company, as this group represents the affected individuals. Participant 10 explained it comprehensively:

> Employees at the level at which we would apply clawback normally sit at the top of the pyramid. It's normally those employees that participate in both cash and share incentives. Most of those employees are aware of it in theory and so they understand the concept of clawback.

Inclusion in Employment Contracts

Participant 2 felt that all employees are sufficiently aware of the existence of clawback provisions, as these are included in employment contracts.

> All employees are required to accept the clawback terms before they receive an incentive, and it's also included in the award letter. They accept the terms, so I think they're very much aware. It's also in the employment contracts of individuals.

New Concept

On the contrary, participants 3, 4, and 6 felt that there is an insufficient level of awareness about clawback, as the concept is fairly new. While companies may have included the provision in their remuneration policies, the need to implement the policy has not arisen thus far. According to Participant 6:

> I don't think most people are aware of it. I don't think there is a general understanding of clawback, but I know a lot of companies have implemented malus and clawback policies.

Cost-Benefit Analysis

Participant 1 noted that clawback is seldom applied to all employees, as the cost of making recoveries needs to be balanced with the value of potential recoveries. Consequently, awareness of clawback at lower levels within a company is minimal.

> We have seen some employers who apply clawback, you know, globally to the whole group, but obviously there's a cost element that comes with that and then enforcement, and then the balance between the costs of pursuing that versus the cost of the money that needs to be recovered. There is a very broad adoption of malus and clawback

> policies, but what we find is most employers aren't really extending to your lower-level employees.

Complexities Posed by Clawback

Participants 3, 7, and 8 felt that the complexities imposed by clawback impede the level of awareness that exists. While employees may read the policies on clawback, their understanding of the content is deficient. Participant 3 explained:

> I think that employees have access to things like policies that talk about it, but like many policies, employees don't typically know policies until they're on the verge of applying them.

Frequency of Enforcement

Participants 3, 9, and 10 added that, to date, clawback has rarely been enforced. Therefore, the practical implications resulting from enforcement are not widely known, and this hampers the level of understanding and awareness of clawback. According to Participant 3:

> Do employees understand that? I'm not sure they do because clawback is very seldom used. It's very difficult to actually execute on clawback. You also don't want a situation in an organisation where people are constantly worried that the money you paid them will be recovered for relatively minor reasons. I think that creates some fractures in the trust relationship with employees.

Inadequate Statutory Guidelines

In terms of understanding the implications resulting from the enforcement of clawback, participants suggested that a lack of understanding exists due to insufficient statutory guidelines. At present, clawback provisions pose a legal challenge due to the complexity of their application. There is a general lack of understanding of what needs to be done and how to implement it. According to Participant 1:

> I'd say the biggest challenge is a lack of understanding on how it works, legally. It's just because it is quite nuanced; it's hard for employers to get their heads around it. It's the understanding of how it works and how to implement it.

Legalities

Participant 4 supported this view and added that the absence of clarity regarding how to implement clawback results in companies using legal jargon when drafting the necessary policies. While this creates a safety net for the employer, it hinders the employee's ability to understand the implications that result from the enforcement of clawback.

> I think there's a general lack of communication to employees in a way that they understand. The malus and clawback guidelines are a legal document with many terms

> and conditions, and it's so long that nobody will read that. I think the problem is communication is lacking in terms of breaking things down for people.

Factors to Consider in the Adoption of Clawback as a Risk Mitigation Tool

Various suggestions were made by participants regarding the factors to consider when adopting clawback as a risk mitigation tool for remuneration. These factors are explained in greater detail below.

Costs of Recovery

Participants 2 and 5 suggested that the cost element be appropriately considered. At times, the costs of recovery may exceed its value. Participant 5 suggested that, despite this, it is important for companies to implement principles consistently, irrespective of the monetary implications, as this sets the tone regarding the consequences associated with certain actions.

> In terms of the principle, you need to follow through the process and sometimes smaller companies would struggle because it would cost them more to get that money back than the money is worth. But it's important to establish the principle of fairness, or it could weaken your position if you didn't do that.

Malus: Pre-Vesting Forfeiture

Participants unanimously agreed that in South Africa, malus is more widely applied, as forfeiture is easier to implement than clawback. Participant 8 explained:

> The easier one is actually just to forfeit things in-flight as opposed to clawback. It's far easier just to cancel all in-flight compensation than to enforce a clawback.

According to participants 1 and 2, no crystallised rights to remuneration exist prior to the vesting of an incentive award. While employees may expect to receive the awards, the company retains control and ownership rights during this period. The company is, therefore, afforded the opportunity to make an informed decision in light of the prevailing circumstances prior to the vesting of the incentive awards. According to Participant 1:

> I think forfeitures is also a big one because there's no crystallised rights to that remuneration as yet. With malus, all employees have is a hope or expectation to receive that remuneration.

Participant 2 added:

> I think that the preference is definitely anything that is still within the control of the company in its relationship with the individual, not something that the individual now owns in their own right.

Participants 4 and 6 added that the very nature of malus allows the employer to exercise discretion more easily. Prior to the vesting of awards, risk exposure can be managed through an appropriate evaluation of the surrounding circumstances. In this way, adjustments can be made to the awards prior to vesting. According to Participant 4:

> The remuneration committee will apply discretion and say there are also these circumstantial matters that need to be considered in determining what percentage of the shares should vest. In this way, financial risk is controlled, but I would say it's done more with forfeiture through malus as opposed to clawback. The Remco's [remuneration committee's] discretion can override as they have the final decision to adjust the value of awards.

Risk Mitigation Tools

Participants 3 and 7 agreed with the sentiments detailed above but also pointed out that both malus and clawback are required for an effective risk mitigation framework. The reason for this is the timing. Malus governs the ability to make recoveries prior to vesting, while clawback facilitates recovery after vesting. According to Participant 7:

> I think it's really important to have both, because if something is brought out into the open prior to something actually happening, then you can handle it with a malus provision. But clawback is really important because it could be a couple of years in the future when suddenly something comes up and you realise something was incorrect, then you have the ability to get that money back.

Participant 1 added that because clawback deals with the vested rights of employees, it cannot be applied to everything. Therefore, it is important to include clawback, together with malus and other risk mitigation strategies, when creating a comprehensive control system for remuneration.

> In South Africa, employers don't have carte blanche to enforce clawback for anything that's occurred, and the reason for that is that you're dealing with vested rights that have accrued to someone. With malus, it's much wider because all they have is a hope or expectation to receive that remuneration.

Tax Implications

Participant 5 suggested that the tax implications of the transaction should also be considered. With malus, there are no tax implications since the money has not been paid. The enforcement of clawback, however, will incur tax consequences, which can become fairly complex, particularly if recoveries are made years after vesting. The decision to apply malus or clawback is, however, solely dependent on the timing of the trigger event. The tax implications arise consequently.

> It's always easier to apply malus because you haven't actually paid anything, and there isn't any tax that needs to be recovered, but unfortunately, whether you apply malus or clawback is a matter of timing. So once the money's been paid or the shares have been

> delivered, then you have to apply clawback. You will have to go through proper legal action or get orders to make a recovery, which is why you would rather go for malus rather than clawback.

Types of Misconduct

Participant 1 explained that a wider range of conduct can fall within the malus category, as the incentives have not vested. It is also a means by which the company can emphasise that certain types of conduct are unacceptable. Furthermore, malus allows the employee to retain their employment if found guilty of a specific act of misconduct; therefore, the employee only stands to lose the incentive award.

> There's a much wider range of conduct that can fall within that as well because there's no rights to that remuneration. Malus would be a mechanism short of termination or dismissal, but you still want to indicate that this is unacceptable conduct.

Participant 2 added that most transgressions are not very severe, particularly in companies with robust internal control structures. Consequently, forfeiture is a more effective mechanism than clawback. Clawback is, by its very nature, a more arduous mechanism used in response to serious misdemeanours.

> Most transgressions are not that severe, so forfeiture is more effective than clawback, in my opinion.

Implementation Challenges

Participant 3 highlighted the difficulties currently faced by companies when enforcing clawback. Not only is the concept new in South Africa, but the application process is also quite lengthy, expensive, and complex. This has resulted in minimal application of clawback thus far.

> Clawback is very seldom used; it's very difficult to actually execute on clawback. And because it's so hard to actually implement, I'm not sure that it is that effective. There's a very complicated, long-winded, and quite expensive process that needs to be followed.

Affordability

Participant 7 also drew attention to the practicality of making recoveries through clawback. As clawback requires the reimbursement of funds, affordability is an issue, particularly for lower-level earners. Therefore, it is more feasible to retain incentives for a longer period through the use of malus rather than attempting to recover payments from employees afterward via clawback.

> From a practicality and application point of view, how do you know that in a year or two years that you would be able to get money back from the really low-level earners?

Punitive Versus Remedial Stance

According to Participant 1, South African law does not allow a punitive stance to be adopted when enforcing clawback. Clawback can only be remedial in nature. Therefore, it is imperative to establish a clawback window, which represents a period after vesting during which clawback will be effected if a contractually agreed trigger event occurs.

> Clawback in South African law is required to be remedial in nature. There would need to have been a trigger event that had occurred at the time of making the award or during the vesting period. It can't be applied after the vesting period, because then it's punitive in nature, and our position in law is that it can't be punitive.

Participant 5 reaffirmed the view that clawback is a corrective measure. Malus, on the other hand, can serve as both a punitive and a remedial measure, as employees stand to lose future incentives if found guilty of certain actions.

> Most clawback is corrective. Malus can be corrective and punitive. It's quite difficult to make clawback punitive. If it's corrective, then there's no degree of wrongdoing which is alleged, or that needs to be proved. It's just that a mistake was made and you must pay back the results of a mistake.

Cultivating an Awareness of Clawback

The discussion below documents various suggestions made by participants on ways to improve awareness and understanding of clawback.

Consultative Process

Participant 1 suggested that companies follow a consultative process with employees when drafting policies on remuneration clawback. This will ensure that affected employees agree to the implementation of the clawback from the onset.

> Generally, when it is implemented, the companies follow a consultative process. So, it would be implemented by way of a policy, but management would be engaged on the implementation. Our best practice recommends that you get employees to agree to the implementation of clawback at the outset so they are well aware of the implications as and when they are made the awards.

Incentive Lifecycle

Participant 5 proposed that the clawback terms be included in the letters of award issued to employees on the grant date to create explicit awareness of the provision and its potential consequences. In addition, reference should be made to the existence of clawback when incentives are paid out to remind employees of the possibility of reimbursement. The clawback of incentives also has tax implications; therefore, employees should be aware of the potential cash flow issues that may arise.

> We always advise our clients that clawback must be made very explicit to the participants. Reference should be made to it in award letters of long-term incentives. I think this should be done for bonus payments when they are actually paid and for share awards both when they're ordered and settled because the consequences of clawback are significant and can have a huge impact on people. There should be something that draws the employees' attention. There are significant tax issues that arise as well and getting your money back on assessments can also create quite severe cash low issues.

Repayment Risk

Participant 2 recommended that a reference to clawback be included in the employment contracts of affected employees. Employees should also provide written consent acknowledging the risk that incentives may need to be repaid. In this way, employees are made aware of the potential financial impact of enforcing clawback.

> I think you have to have it in the employment contract. You need to make the terms clear at the beginning, when you employ an individual, as it relates to their remuneration. The employee must agree in writing that I accept the risks of clawback in you paying me the incentive.

Publications

Participant 3 added that awareness of clawback may be improved in the company through well-publicised policies. The circulation of these policies within the company would create better awareness of the concept of clawback and its ramifications.

> I think making policy documents available to people are important. It should be known and visible.

Concise Written Communication

In enhancing awareness, participants 1 and 5 suggested that clear and concise communication about incentives should occur throughout the process, from the grant date to the vesting date. Employees should expressly agree in writing that they have read the policies and are aware of their implications. Participant 1 explained:

> To improve awareness—it would be communicating the adoption and implementation of the policy clearly. We ordinarily include malus and clawback provisions in the actual scheme rules or as a standalone policy. We would then make the employees it's applicable to aware of the implementation by way of communicating. And we would get them to expressly acknowledge that they have read the policy or are aware of the policy, and sign in receipt of the policy.

According to participants 1, 4, and 7, information should be relayed in a clear, unambiguous manner that is easy to understand. As official policy documents contain technical legal jargon, disseminating information outside of these documents would ensure broader coverage within the company. It would also promote better awareness, as the concept of clawback is fairly new in South Africa. Participant 4 explained:

> I think there's a general lack of communication to employees in a way that they understand. The malus and clawback guidelines are a legal document with many terms and conditions. I think the problem is communication is lacking in terms of breaking things down for people. At least make it a bit more concise for people to understand.

Regular Information Sessions

In ensuring effective communication, Participant 5 added that information sessions are helpful when implementing a new policy or making changes to an existing policy. In this way, attention is drawn to the policy and its implications. These information sessions should be repeated regularly to share insights on new developments while also serving as a reminder about the clawback policy and the potential consequences that could result.

> We encourage the use of information sessions when a new policy is being implemented or is being changed. Also, if there are precedents that have come to light in the public domain, people should be reminded of it. So, awareness sessions both *ab initio* when these things are first implemented and every so often, maybe on an annual basis. There should also be a reminder session on what the trigger events are, giving practical examples of what they are.

According to Participant 8, one-on-one sessions with affected individuals may also facilitate awareness and understanding of clawback:

> It's purely communication and change management. Perhaps having one-on-one sessions with them could also help.

Collaboration with Other Support Structures

Participant 7 highlighted the importance of collaboration between different support services or committees in enhancing communication with employees. In particular, HR is familiar with drafting policies and should ideally take the lead in relaying the necessary information to employees in a concise and understandable way. Appropriate channelling of information within the company helps enhance awareness and understanding of clawback.

> I think we need to communicate specifically to the HR team so that they can assist with the communication. It would be your HR fraternity that would be involved in reading those policies or trying to check for changes.

Diligent Enforcement

According to Participant 9, the diligent enforcement of the clawback policy is imperative. If companies demonstrate a serious attitude regarding the implementation of clawback, employees will appreciate its significance. This will facilitate the understanding of clawback and also inspire changes in individual behaviour.

> I don't think they take it seriously, or they don't fully appreciate what it might mean. We just need to do it once and make it public, then folk would quickly realise that the company is serious and will actually do something about it.

Consistent Application

Participants 6 and 9 added that companies also need to apply clawback consistently whenever a trigger event occurs. When clawback is applied, it should be announced so employees are aware that action will be taken for certain offences. This publicity will, in turn, inspire a change in the ethical culture within the organisation. Participant 6 explained:

> I think that awareness is a big thing. People need to see action being taken. If we have the first clawback event, and we do nothing about it, you can be sure that people are going take more chances. But if we claim the money back and inform people that this is what has happened, then there'll be a better understanding and a better alignment with the culture of the organisation and behaving appropriately under those circumstances.

Role of Remuneration Committee

Participant 10 highlighted the importance of the remuneration committee's role in enhancing awareness of clawback. The remuneration committee should deliberate on the enforcement process and issue clear directives within the company so that the policies are unambiguous, the categories of infringement are clearly defined, and the manner of implementation is understood.

> As a Remco, you worry that you've documented the rules of your share schemes clearly, what are your policies, what are the kinds of categories of infringement, when will you implement it, and how will you implement it.

Creating an Ethical Culture

Participant 6 drew attention to the culture of impunity that exists within South Africa. Effective law enforcement on a timely basis is necessary for creating a culture of compliance with rules and regulations. If laws are applied as they should be, and their implications are publicised, a greater level of awareness is created about the consequences of certain actions. In this way, a culture of ethical compliance is encouraged.

> I think until we have effective law enforcement, where we see the results of people being found guilty and being forced to pay back money, and that being made public, this will make people understand what the impact of clawback is. We don't often hear about what's happened if that person has been found guilty and they've been forced to pay back money or assets have been attached and things like that. So, I think the communication around that, and the publication of that needs to be a bit more widespread.

Participant 3 narrowed down this concept and highlighted the importance of maintaining a sound ethical culture within the company. The ethical standards of the company should be consistently enforced, and clawback policies should be used to support this.

> The company needs to have a well-publicised policy, and the company has to have a no-tolerance policy for fraud, corruption, and unethical behaviour. If there are certain principles that the company applies, we need to drive it quite hard in the company, so people know that you don't step out of line.

Summary of Key Findings

Clawback creates a contractual means through which the recovery of variable remuneration can occur after vesting, provided that an error is found to exist. It is a severe sanction, as it creates adverse monetary consequences for the employee. Clawback is a mechanism through which remuneration can be aligned with performance, as it enables the recovery of unjustified awards. In this way, an attitude of accountability is inspired within the business.

Considering the increased use of clawback by JSE-listed companies, this study found that executives closely involved in designing remuneration policies have an adequate understanding of the concept of clawback. Executives in senior roles are more likely to be affected by clawback, as a substantial component of the remuneration packages at this level is incentive-based. Clawback poses various complexities, firstly because there is a lack of appropriate guidelines at a statutory level, and secondly, because the provision has rarely been enforced in South Africa. This hampers the understanding of the practical implications that could potentially arise.

This study found that the level of understanding and awareness of clawback differed across various levels within a company. As the concept of clawback is relatively new in South Africa, some participants felt that the level of awareness is inadequate both at a company-wide level and among employees in more junior roles. While employees in senior roles may have a greater level of exposure to clawback, a comprehensive understanding of its implications was found to be lacking. Oftentimes, the use of legal jargon within remuneration policies obscures the understanding of the true meaning of clawback and the consequences resulting from its enforcement.

Participants unanimously agreed that malus is currently easier to enforce in South Africa than clawback. This is because the company retains control of the incentives prior to vesting and has the opportunity to forfeit unvested awards if necessary. The category of infringements for malus may be much broader, as the sanction is far less serious. The application of malus may be punitive and remedial, while that of clawback is solely remedial. Both provisions are, however, important for a robust policy on remuneration, as malus refers to pre-vesting forfeiture, while clawback applies to post-vesting recovery.

Through engagement with participants, various recommendations have been made to enhance awareness and understanding of clawback. These recommendations, together with their practical implications, are summarised in Table 2.

Table 2: Summary of recommendations and practical implications

	Recommendations	Practical implications
1.	Adoption of a consultative process	Involve different stakeholders, business units, and employees when drafting clawback policies.
2.	Provision of access to policies	Ensure policies are available and easy to read, with supplementary explanatory guidelines.
3.	Inclusion in employment contracts and awards	Include clawback and its implications in employment contracts and, subsequently, in incentive awards.
4.	Provision of concise and regular communication	Communicate frequently and concisely at grant date, vesting date, and intermittently on a periodic basis.
5.	Obtaining written consent from employees	Obtain written consent from affected employees to facilitate the enforcement process.
6.	Issuance of clear directives	Issue directives in an unequivocal manner, with adequate explanations of complex matters in an easily understandable form.
7.	Consistent application of policies	Ensure consistent application to demonstrate its significance and relevance as a risk mitigation measure.
8.	Publicity of enforcement incidents	Publicise instances of enforcement to demonstrate management's commitment to accountability for certain actions, thereby fostering an attitude of ethical conduct within the organisation.

Source: Author's own compilation

Limitations and Areas for Further Research

The findings are based on a sample of ten participants, and while saturation was reached and the participants possessed substantial expertise, the perspectives shared may not capture the full diversity of views across the broader South African corporate environment. The findings are limited to the South African regulatory context and may not be directly transferable to other jurisdictions.

A broader sample from multiple regions would strengthen the generalisability of the findings. Comparative jurisdictional research involving regimes such as the United States, United Kingdom, and Europe could highlight gaps within the South African context.

Conclusion

This study has shown that the efficacy of clawback on remuneration is undermined by several factors. These include a lack of understanding of the terms of the provision and its implications, inconsistent application among companies, and a disconnect between the adoption, implementation, and enforcement of clawback policies.

While a theoretical understanding of clawback may exist among senior executives, a deeper understanding of its legal, practical, and financial implications is necessary. At present, the legal complexities and costs related to clawback have reduced management's willingness to enforce the provision. The use of legal jargon and ambiguity in policies further exacerbates the lack of clarity among employees. Consequently, forfeiture provisions such as malus tend to be more favourable, as they are simpler, more practical, and easier to implement.

In demonstrating a resolute stance on the enforcement of clawback, companies are encouraged to transition from merely drafting policies to actually implementing them. Clear, concise communication about clawback and its ramifications is required from the commencement of employment and periodically throughout the incentive lifecycle. The publication of instances of clawback and the actions taken would portray clawback as genuine deterrents. Through this awareness, a shift in ethical culture is inspired, enhancing the integrity of remuneration governance in South Africa.

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