

**IS THE REPORTING OBLIGATION OF ATTORNEYS
IN TERMS OF SECTION 29
OF THE FINANCIAL INTELLIGENCE CENTRE ACT 38 OF 2001
A MYTH OR A REALITY?**

by

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I declare herewith that the research paper titled “Is the reporting obligation of attorneys in terms of section 29 of the Financial Intelligence Centre Act 38 of 2001 a myth or a reality?”, is my own work and that all sources used and referred to were acknowledged in full.

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SUMMARY

This research examines an attorney's reporting obligation in terms of section 29 of the Financial Intelligence Centre Act 38 of 2001 (FICA) to report suspicious and unusual transactions, which are not subject to legal professional privilege.

In order to contextualise this reporting obligation and to understand its application, terminology such as the proceeds of crime and money laundering is explained. Global best practice anti-money laundering guidelines, as manifested in the Financial Action Task Force (FATF) recommendations, are evaluated as well as typologies related to attorneys as targets for money laundering purposes.

The establishment and development of the domestic regulatory and legislative frameworks to address the challenges around the proceeds of crime and money laundering are discussed, with specific reference to the Prevention of Organised Crime Act 121 of 1998, which *inter alia* criminalised money laundering, and the FICA. Special focus is placed on section 29 of FICA and terminology such as "transaction" and "suspicion" is evaluated as well as section 37 of the FICA, which acknowledges the legal professional privilege.

The research explains the principles around the legal professional privilege and the requirements for the privilege to sustain and also indicates that there are clear limitations to the application of the legal professional privilege, as mere confidential information is not privileged and the right to confidentiality can be limited by legislation.

The research also evaluates contradictory views around the section 29 FICA reporting obligation by attorneys and addresses possible reasons for low reporting. As attorneys have a definite reporting obligation in terms of section 29 of FICA, ramifications of non-reporting may include an attorney being the subject of a criminal investigation for possible association with predicate offences, offences under POCA as well as FICA non-reporting offences. Relevant role players will therefore need to partner towards assisting the profession in understanding and discharging this reporting obligation. Recommendations addressing the role of the provincial law societies as well as the

Financial Intelligence Centre in assisting towards maturing the regulatory regime are also discussed.

The research concludes with an ethical and positivistic approach towards discharging the reporting obligation and suggestions regarding the way forward in order to protect the reputation of an elite profession.



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CHAPTER 1: INTRODUCTION

The phenomena around the proceeds of crime and subsequent money laundering are well known. From an international point of view, the Financial Action Task Force¹ put in major effort in developing global best practice guidelines to assist in combatting money laundering and terrorist financing. In this regard the 40 plus 9 recommendations of the FATF have set the basis to address the problem. With the signing of international instruments such as the Vienna² and Palermo Conventions³ by the South African government, our country confirmed its commitment towards the combatting of crime and money laundering.

In line with international best practice, South Africa established its own regulatory and legislative framework to address the problem. Domestic legislation⁴ to deal with the proceeds of crime and which criminalised money laundering was enacted. Obligations related to the reporting of suspicions regarding the proceeds of crime were also put into effect.⁵

¹ Also referred to as the FATF. This is an inter-governmental “policy making body” established in 1989 in Paris France by the G7 summit. The FATF’s purpose is to develop and promote national and international policies to combat money laundering and terrorist financing. Refer <http://www.fatf-gafi.org>.

² Refer http://www.unodc.org/pdf/convention_1988_en.pdf. The Vienna Convention refers to the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. South Africa acceded to this Convention on 14 December 1998. According to De Koker “KPMG money laundering control service” (2005) com 1-8, this was the first set of United Nations Conventions that created obligations regarding money laundering control.

³ Also known as the “United Nations Convention against Transnational Organized Crime”. South Africa ratified this convention on 20 February 2004 which *inter alia* focuses on the combatting and close international cooperation regarding transnational organised crime such as money laundering.

⁴ De Koker *supra* com 2-3, explains that the Drug and Drug Trafficking Act 140 of 1992 created the first set of provisions which dealt explicitly with money laundering and required the reporting of suspicious transactions involving the proceeds of drug related offences. The scope of money laundering was widened beyond mere drug related offences via the Proceeds of Crime Act 76 of 1996, which was subsequently repealed by the Prevention of Organised Crime Act 121 of 1998. The latter *inter alia* criminalised money laundering.

⁵ Sec 31 of Act 76 of 1996 provided for the reporting of a suspicion regarding the proceeds of crime, where after sec 7 of Act 121 of 1998 provided for the reporting of a suspicion regarding the proceeds of unlawful activities to a person designated by the Minister of Justice. In practice these reports were routed to the South African Police Service.

Shortly hereafter the Financial Intelligence Centre Act⁶ came into operation to support the local regulatory regime. This resulted in the historic reporting obligation in terms of the Prevention of Organised Crime Act⁷ to be repealed and to be replaced by a general reporting obligation associated with unusual and suspicious transactions as per section 29 of the FICA.⁸

This reporting obligation directly impacts on attorneys as it places a reporting obligation on them to report suspicious and unusual transactions, which are not subject to legal professional privilege.⁹ The attorney's relationship with a client is however always understood and practised in the context of client confidentiality or the legal professional privilege, which result in discomfort regarding this reporting obligation.

Various opinions have been voiced in relation to this reporting obligation as it is reasoned that it places the profession in a peculiar situation.¹⁰ Non-reporting on the other hand may have serious legal ramifications. It may result in an attorney being the subject of an investigation or even prosecution due to statutory contraventions.¹¹ The attorney's profession is therefore in need for guidance regarding this reporting obligation.

⁶ Act 38 of 2001, also referred to as the FICA, which commenced 1 February 2002.

⁷ Also referred to as POCA and later amended by the Prevention of Organised Crime Amendment Act 24 of 1999 and the Prevention of Organised Crime Second Amendment Act 38 of 1999. Also see footnote 5 *supra*.

⁸ The duty to report suspicions regarding proceeds of unlawful activities was replaced and is now regulated by a duty to report suspicious and unusual transactions as per sec 29 of FICA. Sec 27 of the Protection of Democracy Against Terrorist and Related Activities Act 33 of 2004 substituted sec 29 of FICA.

⁹ Refer sec 37 of FICA.

¹⁰ Refer De Koker *supra* com 3-13 to 3-17; Bester "An 'assault' on the attorney-client relationship and the independence of the profession?" money laundering legislation part 2 July 2002 *De Rebus* 26; van der Westhuizen "Attorneys, privilege and confidentiality" June 2004 *De Rebus* 37; Dendy "Watching your back a guide to FICA and POCA" March 2006 *De Rebus* 33; Avery "Global assault on attorney-client privilege: the law" *Without Prejudice* October 2005 (vol 5.9) 35.

¹¹ Sec 52 of FICA criminalises the non-reporting of suspicious and unusual transactions. Also refer statutory contraventions as per sec 2, 4 and 5 of POCA.

The writer adopted a legal positivistic methodology¹² towards this research and advocates an ethical approach¹³ in complying with the legislative framework. International best practice anti-money laundering recommendations, relevant domestic legislation, the context of the legal professional privilege as well as case law and its application will form the theoretical and conceptual framework of the research paper. The main objective of the research is to understand the attorney's role in the statutory reporting obligation in terms of section 29 of the FICA, also considering the concepts of client confidentiality and legal professional privilege. In this regard common law principles, legislation, case law and views of different authors and institutions will be examined. The secondary objective of the research is to examine the exposure the attorney might face in terms of possible statutory contraventions and criminal exposure in case of non-reporting. After consideration of the best practice guidelines, analysis and application of the law and an evaluation of criticism against the current legal framework, the research will conclude with an ethical approach towards discharging the reporting obligation and suggestions regarding the way forward.

The first part of this research intends to address a basic understanding of what is understood by terminology such as “the proceeds of crime” and “money laundering”. International best practice guidelines will also be discussed in order to understand the global regulatory framework and expectations regarding the combatting of the unwelcome result associated with proceeds of crime. An overview of the gatekeeper's role, with specific reference to the attorney's exposure in money laundering challenges will also be discussed.

The second part of the research will explain the domestic legislative framework in order to deal with the combatting of the proceeds of crime and money laundering. Specific focus will be placed on important definitions and the criminalisation of money laundering

¹² Legal positivism is the thesis that the existence and content of law depends on social facts and not on its merits which was formulated by the English jurist John Austin (1790-1859). Refer <http://plato.stanford.edu/entries/legal-positivism/>.

¹³ “Ethics” (also known as moral philosophy) is a branch of philosophy that involves systematising, defending and recommending concepts such as right and wrong, good and bad and justice. Refer <http://www.iep.utm.edu/ethics/>.

as per the POCA.¹⁴ The establishment of the Financial Intelligence Centre¹⁵, its objectives and mandate in terms of the FICA¹⁶ as well as the section 29 reporting obligation regarding suspicious and unusual transactions associated with businesses, will be addressed in detail. More specifically the focus will be on section 37 of the FICA¹⁷ and the ramifications in case of non-reporting.¹⁸

The third part of the research will concentrate on the common law legal professional privilege as between an attorney and the attorney's client, with specific reference to case law and secondary authoritative sources regarding the topic.

The fourth part of the research will address different views regarding the attorney's reporting obligation as per section 29 of the FICA and will include a reality check, followed by discussions of the responsibilities of the Law Society of South Africa¹⁹ via their provincial structures in order to support the legislative regime and suggestions regarding the way forward and conclusions in part five and six.

The research will not focus on areas associated with the combatting of terrorist financing, although the guidelines and practices associated with the combatting of money laundering and terrorist financing are often used in conjunction. Only certain sections of the POCA will be discussed as will be the case with the FICA. Limited focus will be placed on amendments to the latter.²⁰ This dissertation will also not deal with the scope of POCDATARA²¹ or PRECCA.²²

¹⁴ Refer footnotes 4 and 7 *supra*.

¹⁵ Also referred to as the FIC or the Centre.

¹⁶ Refer footnote 6 and sec 2-4 of FICA.

¹⁷ Sec 37 of FICA acknowledges the legal professional privilege.

¹⁸ Sec 52 of FICA criminalises the non-reporting of suspicious and unusual transactions in accordance with sec 29(1) and (2) of the FICA and sec 68 of FICA provides for penalties in this regard.

¹⁹ Also referred to as LSSA, which is listed as a supervisory body in schedule 2 of the FICA. Also see footnotes 202-204 *infra* regarding the amendments to the FICA legislation and responsibilities of the provincial footprint of the LSSA.

²⁰ Financial Intelligence Centre Amendment Act 11 of 2008.

²¹ Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004.

CHAPTER 2: THE PROCEEDS OF CRIME, MONEY LAUNDERING AND INTERNATIONAL BEST PRACTICE GUIDELINES AS PER THE FATF

2.1 WHAT ARE THE PROCEEDS OF CRIME AND MONEY LAUNDERING?

In laymen's terms, proceeds of crime are exactly what it says it is. It is the proceeds or "fruits" of unlawful activity – thus something that is being regarded as unlawful either in terms of common law or statutory law. Money laundering should therefore not be viewed in isolation, as it is interlinked to a crime, sometimes referred to as a predicate offence, to ensure some sort of benefit.²³ The underlying criminal activity or predicate offence is therefore a prerequisite for money laundering. It is obvious that the proceeds of crime can take many forms which are not restricted to money in the form of cash, but any type of asset or benefit.²⁴ Therefore the terminology "money laundering" can be regarded as a misnomer. Terminology such as "property laundering" is probably a more accurate description of what was intended.

Criminals need to find a way to enjoy the benefits of crime in an undetected manner. They therefore need to find a method to transform the proceeds of crime to create a basis of legitimacy, and this process is referred to as laundering. Money laundering is criminalised and as such described in section 4 of the POCA.²⁵ In the following chapter this statutory crime will be addressed in more detail. At this stage it's suffice to say that in basic terms, laundering can be understood as an act that is directed towards obscuring the existence and true origin of the fruits of ill-gotten gains.²⁶ From an

²² Prevention and Combatting of Corrupt Activities Act 12 of 2004.

²³ Kruger "*Organised Crime and Proceeds of Crime in South Africa*" (2008) 38 explains that the state must prove that the property involved was the proceeds of unlawful activity. A person can be charged with both a predicate offence as well as money laundering as different elements need to be proven, but for sentence purposes the charges may be combined.

²⁴ Refer Smit "Clean money, suspect source, turning organised crime against itself" ISS monograph series 51 (2001) chapter 1 and 2.

²⁵ Refer footnote 4 *supra*.

²⁶ Money laundering may involve various stages to manipulate and obscure the criminal origin of the proceeds but the typical placement, layering and integration stages are common occurrences.

investigative perspective Adv J A Swanepoel SC²⁷ explained that it requires a backwards trace regarding the source.²⁸

Some countries limit the scope of their money laundering legislation to certain predicate offences.²⁹ South Africa however applies an all crime approach and the proceeds of crime can therefore relate to any type of crime.³⁰

2.2 THE FATF RECOMMENDATIONS

As addressed *supra*³¹, the FATF is a “global policy making body” established in 1989 with the purpose to develop and promote national and international policies to assist in the combatting of money laundering and terrorist financing. The FATF has developed 40 plus 9 recommendations in order to meet this objective. The FATF also collaborates with the IMF³² and World bank to *inter alia* assess the anti-money laundering systems of countries worldwide.³³ Of recent the FATF also collaborates with the G20 to fight the global economic crisis.³⁴ South Africa became a member of the FATF during 2003, whereby it declared its commitment and political will towards implementing the recommendations. Regional styled FATF bodies were established to support the purpose of the FATF, with South Africa forming part of the ESAAMLG.³⁵ In addition the

²⁷ Former director of the Office for Serious Economic Offences.

²⁸ Refer De Koker and Henning “*Money laundering control in South Africa*” 30 Tran CBL (1998) 28.

²⁹ Also refer recommendation 1 of the FATF.

³⁰ Refer definitions of “proceeds of unlawful activity” and “unlawful activity” as per POCA.

³¹ Refer footnote 1 *supra*.

³² International Monetary Fund.

³³ Refer De Koker (2005) *supra* com 1-15.

³⁴ Refer the opening remarks by the FATF President during the FATF consultative forum meeting with the banking, insurance and security sector on 30 September 2009 - <http://www.fatf-gafi.org/>.

³⁵ Eastern and Southern African Anti-Money Laundering Group. ESAAMLG is a FATF-styled regional body subscribing to global anti-money laundering and anti-terrorist financing standards. It consists of 14 member states: Botswana, Kenya, Lesotho, Malawi, Mozambique, Mauritius, Namibia, South Africa, Seychelles, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe. Also refer <http://www.esaamlg.org>.

South African Financial Intelligence Centre, which was established by the FICA, is a member of the Egmont Group.³⁶

The FATF methodology and recommendations are exceptionally broad, but for purposes of this study, only recommendations 12(d), 13 and 16 applicable to DNFBP³⁷ as well as recommendation 15 will be addressed.

Recommendation 12(d) deals with customer due diligence and record-keeping requirements applicable to lawyers, notaries and other independent legal professionals and accountants when they prepare for or carry out certain transactions.³⁸

Recommendation 13 provides for the reporting to the financial intelligence unit,³⁹ of suspicious transactions by financial institutions and DNFBP in case of them having reasonable grounds to suspect that funds are proceeds of criminal activity.

Recommendation 16 also refers to reporting requirements of DNFBP with specific reference to suspicious transactions associated with activities described in recommendation 12(d). The interpretative note to recommendation 16 however acknowledges the legal professional privilege and states:

“ 1. It is for each jurisdiction to determine the matters that would fall under legal professional privilege or professional secrecy. This would normally cover information lawyers, notaries or other independent legal professionals receive from or obtain through one of their clients: (a) in the course of ascertaining the legal position of their client, or (b) in performing their task of defending or representing

³⁶ The Egmont is an informal group, consisting of Financial Intelligence Units, which was established with the aim of enhancing the sharing of information cross border and international cooperation. Also refer <http://www.egmontgroup.org/>.

³⁷ An abbreviation used for Designated Non-Financial Businesses and Professions, which include attorneys. Refer the glossary to the 40 plus 9 FATF recommendations.

³⁸ The following list of transactions are noted as per recommendation 12(d): “the buying and selling of real estate; managing of client money, securities or other assets; management of bank, savings or securities accounts; organisation of contributions for the creation, operation or management of companies; creation, operation or management of legal persons or arrangements, and buying and selling of business entities”.

³⁹ A financial intelligence unit is also referred to as a FIU. South Africa’s FIU is the financial intelligence centre, or in abbreviated form referred to as the FIC or the Centre.

that client in, or concerning judicial, administrative, arbitration or mediation proceedings. Where accountants are subject to the same obligations of secrecy or privilege, then they are also not required to report suspicious transactions.

2. Countries may allow lawyers, notaries, other independent legal professionals and accountants to send their STR⁴⁰ to their appropriate self-regulatory organisations, provided that there are appropriate forms of co-operation between these organisations and the FIU.”

Recommendation 15 *inter alia* provides for measures to be taken by DNFBP to prevent money laundering and suggests the development of programmes against money laundering for example: the development of internal controls including appropriate compliance management arrangements, adequate hiring of employees, ongoing employee training and an audit function to test the system.

Member countries of the FATF agreed to be evaluated against the implementation and effective application of the 40 plus 9 recommendations. South Africa underwent its first mutual evaluation in 2004 and second mutual evaluation in 2008. Although South Africa received very favourable ratings during the last evaluation, certain shortcomings and areas of improvement were also highlighted.

With regard to certain portions of recommendations 13 to 15, 16 and 21 relevant to DNFBP, South Africa received a partially compliant rating for various reasons. More specifically the FATF evaluation report questioned the effectiveness of reporting in applying recommendation 13 and stated that the implementation of the reporting obligation is negatively affected due to attorneys’ lack of clarity on how to interpret legal privilege in the context of meeting the reporting obligations pursuant to the FICA.⁴¹ With regards to recommendation 15, it was found that other than for banks, there is no requirement for accountable institutions⁴² to maintain an adequately resourced and

⁴⁰ An abbreviation used for suspicious transaction reporting and sometimes also referred to as suspicious activity reporting.

⁴¹ Refer <http://www.fatf-gafi.org/dataoecd/56/35/42390354.pdf> - mutual evaluation report – executive summary, South Africa 26 February 2009.

⁴² Refer list of accountable institutions as per schedule 1 of the FICA.

independent audit function to test compliance (including sample testing) with the AML/CTF⁴³ procedures, policies and control.

Considering these ratings, it is obvious that South Africa will need to improve its understanding of complying with the relevant recommendations.

2.3 FATF TYPOLOGIES RELATING TO ATTORNEYS AS TARGETS TO FACILITATE MONEY LAUNDERING

The FATF also has the responsibility of examining money laundering techniques and trends and setting and developing measures to be taken to combat money laundering and terrorist financing.⁴⁴ To ensure awareness of emerging trends and typologies the FATF publishes a variety of trend and typology reports. Early FATF reports on money laundering typologies identified as a prevailing trend, the use of accounts in the name of persons or interests operating on behalf of beneficiaries, and it was emphatically stated that agents such as solicitors, attorneys and accountants fall within a class of targeted money laundering agents. Criminals are seeking professional intermediaries to launder money and therefore targets in the DNFBP were highlighted and attorneys and solicitors, amongst others, were being identified as a targeted class of professional money laundering facilitators.⁴⁵ Subsequent typology reports focused on the role of specialised professions as gatekeepers, such as lawyers, and how these professionals may be abused for money laundering purposes via various methods.⁴⁶ These reports alert the gatekeeper against the risk of money laundering abuse.

During 2008, the FATF issued a report on guidance for legal professions where a risk based approach towards combatting money laundering was addressed.⁴⁷ It was argued that each country needs to identify the most appropriate regime which is tailored in

⁴³ These abbreviations mean anti-money laundering and contra-terrorist financing.

⁴⁴ Refer footnote 1 *supra*.

⁴⁵ Refer the June 1996 FATF-VII report on money laundering typologies at 4-5 as well as the FATF 1997-1998 report on money laundering typologies par 40.

⁴⁶ Refer the FATF 2003–2004 report on money laundering typologies at 24-26 and the June 2007 report on money laundering & terrorist financing through the real estate sector at 9-10.

⁴⁷ Refer FATF RBA guidance for legal professions 23 October 2008.

terms of its own country risks in applying AML/CTF measures. Although the report acknowledged the legal professional privilege, it was also highlighted that legal professionals may be more or less vulnerable to the onslaughts of criminals to move illicit funds depending on the effectiveness of risk measures. The attorney's role as gatekeeper is therefore crucial as the report states that if a lawyer provides legal advice to a client that helps the client to commit an offence, the lawyer may be, depending on this state of knowledge, become an accomplice to the offence.

Jurisdictions share different views regarding the attorney as gatekeeper coupled with reporting obligations.⁴⁸ Both American and English courts have found attorneys guilty of money laundering crimes.⁴⁹ Interesting to note is the actions by the American Securities and Exchange Commission (SEC), namely to hold lawyers accountable for not performing their gatekeeper role in preventing fraud and other violations of the federal security laws.⁵⁰

What appears to be unfortunate is that dishonest lawyers hide behind codes of ethics and the constitutional right of legal professional privilege, allowing crimes to be committed.⁵¹ Unethical lawyers may prefer to turn a blind eye to questionable transactions and may become comfortable practicing in a grey area.

⁴⁸ Refer directive 91/308/EEU and second directive 2001/97/EC, regarding the legal profession in the prevention of money laundering. The reporting obligation is described as the most controversial element of the second directive and despite the acknowledgement of the legal professional privilege, lawyers believe the obligation is disproportionate and contrary to the essence of the profession. Also refer http://europa.eu/legislation_summaries/other/l24016_en.htm and http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=32001L0097&lg=EN.

⁴⁹ Refer Bell "The prosecution of lawyers for money laundering offences" 2002 *Journal of Money Laundering Control* (vol 6.1) 17. This publication also addresses various services lawyers offer which may be abused for money laundering purposes.

⁵⁰ Refer Lowenfels, Bromberg, and Sullivan, "Attorneys as gatekeepers: SEC Actions against lawyers in the age of Sarbanes-Oxley" (2006). *Bepress Legal Series*. working paper 991 - <http://law.bepress.com/expresso/eps/991>. However, also note the comments of Krauland *et al* (May 2005) to the American Bar Association regarding the gatekeeper responsibilities associated with lawyers - <http://www.abanet.org/crimjust/taskforce/actions.html>.

⁵¹ Refer course paper by Canadian Clayton Wilbern for North Central University titled "Lawyers as gatekeepers for money laundering". <http://michaelguth.com/economist/moneylaundering.htm>; "According to case law (*Law Society of British Columbia v Canada Attorney General*, 2003) while remaining sensitive to the social and political context of the impugned law and allowing for difficulties of proof inherent in that context, the courts must nevertheless insist that before the state can override constitutional rights, there be a reasoned demonstration of the good which the law may achieve in relation to the seriousness of the

CHAPTER 3: THE DOMESTIC LEGISLATIVE FRAMEWORK DEALING WITH PROCEEDS OF CRIME

As explained earlier, the FATF has set international guidelines to support the fight against money laundering and in line with international best practice, South Africa established its own regulatory and legislative framework to address the problem.⁵²

The Drug and Drug Trafficking Act 140 of 1992 created the first set of provisions which dealt explicitly with money laundering and required the reporting of suspicious transactions involving the proceeds of drug related offences.⁵³ The scope of money laundering was however widened beyond mere drug related offences via the Proceeds of Crime Act⁵⁴, which was subsequently repealed by the POCA.⁵⁵ The latter is a remarkable piece of legislation and therefore scrutiny of this act is required. For purposes of the research only theme specific sections in the act will be addressed.

3.1 THE PREVENTION OF ORGANISED CRIME ACT 121 OF 1998 AS AMENDED

The act commenced on 21 January 1999 and *inter alia* introduced measures to combat crime and money laundering. It criminalised racketeering and money laundering and also provided for an obligation to report certain information as well as the recovery of the proceeds of unlawful activity.⁵⁶

infringement. In Canada, legislation has been developed to force lawyers to report suspicious currency transactions, however, the law society had this quashed arguing the law to violate constitutional rights.” According to the International Bar Association’s feedback on the UK money laundering forum, an English court in the case of *R v Griffiths* [2006] All ER (D) 19 (Sep) convicted a lawyer of failing to disclose a suspicious real estate transaction where he should have known that the subject property was associated with the proceeds of crime as it was grossly undervalued - http://www.anti-moneylaundering.org/europe/united_kingdom.aspx.

⁵² Refer De Koker and Bernard “Money laundering: of watchdogs, bloodhounds and guide dogs”, September 2003 *Accountancy SA* (AC 116) 2.

⁵³ Refer footnote 4 as well as De Koker and Henning *supra* at 38.

⁵⁴ Act 76 of 1996.

⁵⁵ Act of 121 of 1998.

⁵⁶ Some perceive the powers of the POCA to be draconian with specific reference to non-conviction based remedies as per chapter 6 and the attachment of “instrumentalities of an offence”. It is obvious that the constitutional principle of proportionality will always need to be applied. POCA also applies to non-

“Property” is defined very widely in the act and “means money or any other movable, immovable, corporeal or incorporeal thing and includes any rights, privileges, claims and securities and any interest therein and all proceeds thereof”. Therefore the previous comment relating to the misnomer of the term “money laundering”.⁵⁷

The definition of “proceeds of unlawful activity” covers “any property or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly in the Republic or elsewhere, at any time before or after the commencement of this act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived”. There must however be a direct link between the unlawful activity and the proceeds associated therewith.⁵⁸

“Unlawful activity” is explained as “any conduct which constitutes a crime or which contravenes any law whether such conduct occurred before or after the commencement of this act and whether such conduct occurred in the Republic or elsewhere”.

With regards to the test of guilt it is clear that the act covers both intention and negligence.⁵⁹ Regarding knowledge, the act not only defines actual knowledge but also willful blindness and regarding negligence the act addresses the general knowledge, skill, training and experience that may reasonably be expected of a person in his/her position as well as the general knowledge, skill, training and experience he/she in fact has. It is however pertinent to mention that the FATF test for guilt associated with the money laundering offence, is intention.⁶⁰

organised crimes and individual wrongdoing - refer Kruger *supra* at 7 and 11, also with reference to *NDPP v Geyser* [2008] ZASCA 15 (25 March 2008) and *NDPP v Vermaak* 2008 (1) SACR 157 (SCA).

⁵⁷ Refer chapter 2 and footnote 24 *supra*.

⁵⁸ With regards to tax evasion for example, only the portion that would be subject to income tax would logically be regarded as the “proceeds of unlawful activity”. Refer *NDPP v Seevnarayan* [2003] 1 All SA 240 (C) as explained by De Koker (2005) *supra* com 2-15 and 2-16.

⁵⁹ Refer definitions (2) and (3) in chapter 1 of POCA regarding “knowledge” and “ought to have known or suspected”.

⁶⁰ Refer FATF recommendation 2: “The intent and knowledge required to prove the offence of money laundering is consistent with the standards set forth in the Vienna and Palermo Conventions, including

Considering that the reporting obligation in terms of FATF recommendation 13 refers to situations where *reasonable grounds* exist to suspect that funds are the proceeds of a criminal activity and therefore requires these suspicions to be reported to the financial intelligence unit (FIU), the reference to reasonable grounds in the context of recommendation 13, undoubtedly refers to the test of negligence.⁶¹

Section 2 of the act refers to offences associated with racketeering.⁶² Section 4 of the act addresses the money laundering offence, section 5 covers persons who assist another to benefit from the proceeds of unlawful activity and section 6 covers the acquisition, possession or use of the proceeds of unlawful activities, which is normally applicable to family members and close associates. Section 5 and 6 are therefore applicable to third parties and not to the main perpetrator. Section 8 of the act addresses the penalties upon conviction of offences in terms of sections 4, 5 and 6.⁶³

Money laundering in section 4 is described and criminalised in the following manner:

“Any person who knows or ought reasonably to have known that property is or forms part of the proceeds of unlawful activities and -

- a) enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether such agreement, arrangement or transaction is legally enforceable or not; or
- b) performs any other act in connection with such property, whether it is performed independently or in concert with any other person,

which has or is likely to have the effect -

- i) of concealing or disguising the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof; or
- ii) of enabling or assisting any person who has committed or commits an offence, whether in the Republic or elsewhere-

the concept that such mental state may be inferred from objective factual circumstances”. Art 3(1)(b) and 3(1)(c) of the Vienna convention specifically refer for example to the possession, acquisition, conversion, transfer, concealment or disguising of property *knowing* that the property is derived from an offence. Art 5 and 6(1) of the Palermo convention refer to *intention* combined with *knowledge*.

⁶¹ My cursive.

⁶² Refer full text of section 2 of POCA, as well as the definition of a “pattern of racketeering activity” and sec 3 regarding associated penalties.

⁶³ Providing for a fine not exceeding R 100 million or imprisonment for a period not exceeding 30 years.

aa) to avoid prosecution; or
bb) to remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence,
shall be guilty of an offence”.⁶⁴

Perhaps more applicable to the attorney-client situation is section 5 which reads as follows:⁶⁵

“Assisting another to benefit from the proceeds of unlawful activities.- Any person who knows or ought reasonably to have known that another person has obtained the proceeds of unlawful activities, and who enters into any agreement with anyone or engages in any arrangement or transaction whereby-

- a) the retention or the control by or on behalf of the said other person of the proceeds of unlawful activities is facilitated; or
- b) the said proceeds of unlawful activities are used to make funds available to the said other person or to acquire property on his or her behalf or to benefit him or her in any other way,

shall be guilty of an offence.”

Section 7 of the POCA placed a reporting obligation on any person who carried on a business, or managed or was employed by a business to have reported suspicions regarding the proceeds of unlawful activities linked to the business, to a person designated by the Minister of Justice. In practice these reports were routed to the SAPS.⁶⁶ Section 7A of the POCA provided for defences related to certain contraventions if a suspicion was reported or if a situation as addressed in section 7A(2) found application.⁶⁷ Section 7 of POCA was repealed and section 7A of POCA was

⁶⁴ The agreement referred to in sec 4 does not need to be legally enforceable, neither does the consequence need to materialise, as long as it is likely that the agreement or arrangement could have resulted in the consequence. The word “likely” refers to a remote possibility. Refer Smit *supra* chapter 3.

⁶⁵ This section for example may find application, depending on the circumstances, in the event of a suspicious or unusual deposit to an attorney’s trust account.

⁶⁶ South African Police Service.

⁶⁷ The sec 7A defence clause was flawed as it only provided for certain contraventions as per the wording in sec 7A(1) and the wording in sec 7A(2) was inconsistent with the wording of sec 69 of the FICA. Also refer De Koker (2005) *supra* com 2–7, advising that the sec 7A defence found application in instances where persons *negligently* committed certain money laundering offences. My cursive. However refer footnote 103 *infra* regarding a more detailed explanation by the learned author.

substituted by FICA.⁶⁸ The historic reporting obligation as per section 7 of the POCA was replaced by the section 29 reporting obligation in terms of the FICA, which came into effect on 3 February 2003.

3.2 THE FINANCIAL INTELLIGENCE CENTRE ACT 38 OF 2001

3.2.1 THE ESTABLISHMENT OF THE CENTRE AND THE SECTION 29 REPORTING OBLIGATION

The FICA commenced 1 February 2002 and *inter alia* provides for the establishment of the Centre.⁶⁹ The objectives of the Centre are to assist with the identification of the proceeds of unlawful activities and the combatting of money laundering and terrorist financing and related activities.⁷⁰ Functions of the Centre include the processing, analysis and interpretation of information received, cooperation with investigating authorities, supervisory bodies, the South African Revenue Service and intelligence services and the monitoring and giving of guidance to accountable institutions and supervisory bodies and others regarding compliance with the provisions of the act.⁷¹ The act must be read in conjunction with the regulations and exemptions. The Centre also issues guidance notes regarding compliance to the FICA legislation.⁷²

As already mentioned, the reporting obligation in terms of section 29 of the FICA replaced the reporting obligation under the POCA.⁷³ Both sets of legislation

⁶⁸ Refer sec 79 read together with schedule 4 of FICA as well as sec 69 of FICA regarding defences.

⁶⁹ See footnote 15 and 16 *supra*.

⁷⁰ Refer sec 2-3 of FICA and <https://www.fic.gov.za>.

⁷¹ Refer sec 4 of FICA.

⁷² Refer guidance note 4 published on 14 March 2008 in Government Gazette 30873, regarding the reporting obligation in terms of sec 29.

⁷³ Reporting in terms of sec 29 needs to be made as soon as possible, but within a period not exceeding 15 days after having become aware of a fact concerning a transaction on the basis of which knowledge or a suspicion concerning the transaction must be reported. The Centre can give an extension for the period within which a report must be filed if such a request is properly motivated. Also refer full text of reg 24(3) of FICA. Note in terms of general interpretation, the reference to days refer to working days, excluding Saturdays and Sundays as well as public holidays.

consistently apply the test for guilt, providing for both intention and negligence.⁷⁴

Section 29 of FICA is very widely worded and reads as follows:

“ Suspicious and unusual transactions. - (1) A person who carries on a business or is in charge of or manages a business or who is employed by a business and who knows or ought reasonably to have known or suspected that -

(a) the business has received or is about to receive the proceeds of unlawful activities or property which is connected to an offence relating to the financing of terrorist and related activities;

(b) a transaction or series of transactions to which the business is a party-

(i) facilitated or is likely to facilitate the transfer of the proceeds of unlawful activities or property which is connected to an offence relating to the financing of terrorist and related activities;

(ii) has no apparent business or lawful purpose;

(iii) is conducted for the purpose of avoiding giving rise to a reporting duty under this Act;⁷⁵

(iv) may be relevant to the investigation of an evasion or attempted evasion of a duty to pay any tax, duty or levy imposed by legislation administered by the Commissioner for the South African Revenue Service;⁷⁶ or

(v) relates to an offence relating to the financing of terrorist and related activities; or

(c) the business has been used or is about to be used in any way for money laundering purposes or to facilitate the commission of an offence relating to the financing of terrorist and related activities,⁷⁷

must, within the prescribed period after the knowledge was acquired or the suspicion arose, report to the Centre the grounds for the knowledge or suspicion and the prescribed particulars concerning the transaction or series of transactions.

(2) A person who carries on a business or is in charge of or manages a business or who is employed by a business and who knows or suspects that a transaction or a series of transactions about which enquiries are made, may, if that transaction or those transactions had been concluded, have caused any of the consequences referred to in subsection (1) (a), (b) or (c), must, within the prescribed period after the knowledge was acquired or the suspicion arose, report to the Centre the grounds for the knowledge or

⁷⁴ Refer footnote 59 *supra* and definitions (2) and (3) of FICA.

⁷⁵ Refer sec 64 of FICA. This type of transacting is sometimes also referred to as “smurfing”, where transacting is structured via more than one transaction of smaller amounts in an attempt to avoid detection.

⁷⁶ This subsection refers to transacting to avoid paying tax on legitimate income. The reference to “the investigation” creates the impression that it should relate to a specific investigation. It is however obvious that general tax evasion is intended.

⁷⁷ A type of “catch-all” provision.

suspicion and the prescribed particulars concerning the transaction or series of transactions.

(3) No person who made or must make a report in terms of this section may disclose that fact or any information regarding the contents of any such report to any other person, including the person in respect of whom the report is or must be made, otherwise than-

- (a) within the scope of the powers and duties of that person in terms of any legislation;
- (b) for the purpose of carrying out the provisions of this Act;
- (c) for the purpose of legal proceedings, including any proceedings before a judge in chambers; or
- (d) in terms of an order of court.⁷⁸

(4) No person who knows or suspects that a report has been or is to be made in terms of this section may disclose that knowledge or suspicion or any information regarding the contents or suspected contents of any such report to any other person, including the person in respect of whom the report is or is to be made, otherwise than-

- (a) within the scope of that person's powers and duties in terms of any legislation;
- (b) for the purpose of carrying out the provisions of this Act;
- (c) for the purpose of legal proceedings, including any proceedings before a judge in chambers; or
- (d) in terms of an order of court."

A business is logically understood as anything that dedicates time, attention and manpower for the purpose of making profit.⁷⁹ There must also be a link between the business of the person reporting and the offending act or transaction.⁸⁰ With reference to an attorney, the latter's involvement must involve the latter's business, therefore dinner table conversations or informal gossip does not impose a reporting obligation.⁸¹

The definitions of both "knowledge" and "ought reasonably to have known" are consistent in both POCA and FICA. De Koker⁸² explains that if a suspicion is strong enough to call for enquiries to be made, a person should be careful to proceed without

⁷⁸ This subsection prevents "tipping-off", as information obviously should not be shared with criminals as to allow them to evade the course of justice.

⁷⁹ Refer *Standard General Insurance Company v Hennop* 1954 (4) SA 560 (A) at 565.

⁸⁰ Refer van der Westhuizen "Interpreting s 29 and the obligation to report" part 1 April 2004 *De Rebus* 37.

⁸¹ Van der Westhuizen: "Some rules of thumb" July 2004 *De Rebus* 34.

⁸² Refer De Koker "South African money laundering and terror financing law" (2010) com 3-21 also with reference to *Frankel Pollak Vinderine Inc v Stanton NO* [1996] 2 All SA 582 (W).

making reasonable enquiries, as a court may regard deliberate failure to make such enquiries as “willful blindness”. Under those circumstances it cannot be said that there is absence of knowledge and knowledge will be attributed to such a person.

“Transaction” is defined to mean “a transaction concluded between a client and an accountable institution in accordance with the type of business carried on by that institution”.⁸³ Section 29 also provides for a transaction or series of transactions that did not materialise and also stipulates that the business must be a party to the transaction or be used or attempted to be used for *inter alia* money laundering purposes. Considering the definition of transaction, it creates the impression that a transaction not concluded with an accountable institution will not be covered in terms of section 29 of the act, which will render the reporting obligation of section 29 meaningless.⁸⁴ Guidance note 2 issued by the Centre, explains that any instruction or request by a client to an accountable institution to perform some act to give effect to the business relationship between them can be regarded as a transaction.⁸⁵ Therefore the term “transaction” is not to be understood to include activities which happen automatically without instructions from the client. This explanation however does not clarify the confusion and therefore it is reasoned that the section 1 definition of “transaction” should not apply to section 29 and that the term “transaction” should be given its ordinary, grammatical meaning.⁸⁶ The writer is of the opinion that there may be a need to review the definition of “transaction” as addressed in FICA in order to provide for a more robust application.

The term “suspicion” is not defined in FICA. The term “suspicion” was evaluated in *Powell NO and Others v Van der Merwe and Others*⁸⁷, where the supreme court of appeal confirmed that South African courts have endorsed the interpretation used by

⁸³ Refer definitions in FICA.

⁸⁴ Refer de Koker (2005) *supra* com 3-9.

⁸⁵ Guidance note 2 was published in the Government Gazette 26469 on 18 June 2004.

⁸⁶ Refer van der Westhuizen “Interpreting section 29 and the obligation to report” part 2 May 2004 *De Rebus* 37.

⁸⁷ [2005] 1 All SA 149 (SCA) where the court also followed the same *dictum* regarding a reasonable suspicion as in *Minister of Law and Order v Kader* 1991 (1) SA 41 (A) and *Investigating Directorate Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others* 2001 (1) SA 545 (CC).

Lord Develin in the English case of *Shabaan Bin Hussien and Others v Chong Fook Kam and Another*.⁸⁸ In the latter the learned judge held that “*Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; ‘I suspect but I cannot prove’*”. It is however obvious that a suspicion can be subjective. What is suspicious for one person may not be suspicious for another.

In *Nkambule v Minister of Law and Order*,⁸⁹ the court referred to the cases of *Duncan v Minister of Law and Order*,⁹⁰ *Minister of Law and Order and Others v Hurley and Another*⁹¹ and *Mabona and Another v Minister of Law and Order and Others*⁹² and found, with reference to the basis for an arrest, that one can not merely act on wild suspicions but on suspicions that have an objective reasonable basis. For logical reasons it is argued that “suspicion” within the meaning of FICA must have some reasonable basis before an obligation to report a transaction will arise.⁹³ Reference to “ought *reasonably* to have known or suspected” and the wording of section 29(2) relating to reporting the *grounds for the knowledge or suspicion*, support the inference that a reasonable basis needs to exist for the suspicion.⁹⁴

Section 32(1) provides that a report in terms of section 29 to the Centre must be made in the prescribed format.

Accountable institutions are those institutions as per schedule 1 of the act, which include an attorney as defined in the Attorneys Act.⁹⁵ Other reporting obligations associated with an accountable institution are addressed in sections 28, 28A and 31 of

⁸⁸ [1970] AC 942 ([1969] 3 All ER 1627 (PC)).

⁸⁹ [1993] 3 All SA 847 (T) at 152E.

⁹⁰ 1986 (2) SA 805 (A) at 814E and 819I.

⁹¹ 1986 (3) SA 568 (A) at 579F-I.

⁹² 1988 (2) SA 654 (SE) at 658F-H.

⁹³ Refer wording of sec 29 of FICA as well as guidance note 4 as per footnote 72 *supra*.

⁹⁴ My cursive. In *Commissioner for the SARS & Another v ABSA Bank Ltd & Another* [2003] JOL 11072 (W) par 55 it was held that unreasonable suspicions need not be reported even if they are subjectively harboured.

⁹⁵ Act 53 of 1979.

the act, some of which are not yet operative, which will not be discussed due to the limited scope of the research.

Section 33 of the FICA enables an accountable institution to continue with a transaction in respect of which a report is required unless directed otherwise by the Centre in terms of section 34. Section 35 provides for a judge, on application by the Centre, to order an accountable institution to monitor transactions.⁹⁶

Section 37⁹⁷ of FICA acknowledges the common law legal professional privilege and provides as follow:

“ Reporting duty and obligations to provide information not affected by confidentiality rules.-

(1) Subject to subsection (2), no duty of secrecy or confidentiality or any other restriction on the disclosure of information, whether imposed by legislation or arising from the common law or agreement, affects compliance by an accountable institution, supervisory body, reporting institution, the South African Revenue Service or any other person with a provision of this Part.

(2) Subsection (1) does not apply to the common law right to legal professional privilege as between an attorney and the attorney's client in respect of communications made in confidence between-

(a) the attorney and the attorney's client for the purposes of legal advice or litigation which is pending or contemplated or which has commenced; or

(b) a third party and an attorney for the purposes of litigation which is pending or contemplated or has commenced.”

Section 38 provides for the protection of persons who made *bona fide* reports and classify them as competent but not compellable witnesses to give evidence in criminal proceedings arising from the report.⁹⁸ Logic dictates that the anonymity of reporters needs to be guaranteed. Information held by the Centre can be disseminated as dictated by section 40, which also provides for the sharing of information with supervisory bodies.⁹⁹

⁹⁶ Refer full text of sec 35. This may also be imposed on attorneys as accountable institutions.

⁹⁷ De Koker (2005) com 3-14, explains that sec 37 of FICA summarises the two forms of attorney client privilege, namely advice privilege and litigation privilege.

⁹⁸ Refer full text of sec 38 of act 38 of 2001

⁹⁹ Refer full text of sec 40 of Act 38 of 2001.

3.2.2 RAMIFICATIONS OF NON-REPORTING

The failure to report suspicious and unusual transactions in terms of section 29(1) or (2) has been criminalised in section 52 of the FICA.¹⁰⁰ Not only is non timely reporting and reporting not containing the prescribed information criminalised, but also the negligent omission of the reporting of prescribed information in respect of a suspicious and or unusual transaction, or series of transactions or enquiry. The inference that a person negligently failed to report will be drawn if a vigilant person would have filed a report having had the general knowledge, skill, training and experience that may reasonably be expected of a person in the position of the particular person; and the general knowledge, skill, training and experience that he/she in fact has.¹⁰¹

A person convicted of a section 52 offence is liable to imprisonment for a period not exceeding 15 years or to a fine not exceeding R 10 million.¹⁰² Defences for non-reporting are addressed in section 69 of the FICA.¹⁰³

Attorneys therefore need to detect reportable transactions or proposed transactions, in order to protect themselves against reputational exposure and or criminal prosecutions.¹⁰⁴ In addition it is also important that attorneys should not lose sight of the contraventions of sections 2 and 4 to 6 of the POCA.¹⁰⁵

¹⁰⁰ Refer full text of sec 52 of FICA.

¹⁰¹ Refer de Koker (2005) *supra* com 3-12 and Smit *supra* chapter 3.

¹⁰² Refer full text of sec 68(1) of FICA. Also refer amendments to FICA which increased the monetary penalty to a fine not exceeding R 100 million.

¹⁰³ Refer full text of sec 69 of FICA. Note this defence is only applicable to certain people within accountable institutions. De Koker (2010) *supra* com 7-37 submits that a person who knowingly involves himself in a laundering transaction also enjoys the reporting defence if he subsequently reports that transaction in terms of sec 29 of FICA. The learned author explains that initially sec 7 of POCA referred to a person charged with negligently committing an offence under sections 2(1)(a) or (b), 4, 5 or 6, who might have raised as defence the fact that he reported a suspicion in terms of sec 7. FICA however amended POCA and replaced the text of sec 7A and it dispensed with the reference to negligent commission of an offence and specifically uses the word “reported a knowledge or suspicion”. These amendments therefore broaden the scope of the defence to a person who knowingly involves himself in a reportable transaction.

¹⁰⁴ Refer reference to Dendy as per footnote 10 *supra*.

¹⁰⁵ Refer Bester “Negotiating the Financial Intelligence Centre Act (part 1)” June 2002 *De Rebus* 22.

If the Centre has reasonable grounds to suspect that an attorney is not complying with legislative requirements, it may report the matter to an investigating authority as well as to the relevant supervisory body,¹⁰⁶ namely the Law Society of South Africa,¹⁰⁷ where after the matter must be investigated and actions within the scope of the LSSA powers may follow to remedy the matter.¹⁰⁸

3.2.3 OTHER OBLIGATIONS FOR ACCOUNTABLE INSTITUTIONS AND POWERS OF THE CENTRE

On top of reporting obligations, the act also addresses numerous administrative measures associated with accountable institutions for example the identification of clients, record keeping, formulation and implementation of internal rules, the appointment of a compliance officer and appropriate training regarding the combatting of money laundering and terrorist financing.¹⁰⁹

Section 26 of the FICA makes provision for an authorised representative of the Centre to have access during ordinary working hours to any records kept by or on behalf of an accountable institution in terms of section 22 or section 24, and to examine and make copies of such records. The authorised representative however needs a warrant issued by a magistrate or judge before such action can be taken and a warrant may only be issued if reasonable grounds exist to believe that the records may assist the Centre in identifying the proceeds of crime.

Section 36 of FICA *inter alia* provides that if a supervisory body knows or suspects that an accountable institution, as a result of a transaction concluded by or with the accountable institution, has been or may be used for money laundering purposes or for the purpose of a transaction contemplated in section 29(1)(b), it must advise the Centre of that fact.¹¹⁰ The Centre may also request information from a supervisory body as well

¹⁰⁶ Refer full text of sec 44 of FICA.

¹⁰⁷ Also referred to as LSSA.

¹⁰⁸ Refer full text of sec 45 of FICA as well as new amendments to the section.

¹⁰⁹ Refer sec 21, 22, 42 and 43 of FICA. Under the Banks Act 94 of 1990, banks for example are required to establish independent compliance functions as part of risk management to guard *inter alia* against the bank being used for money laundering purposes. Also refer sec 64A of the Banks Act and reg 46 and 47.

¹¹⁰ Refer full text of sec 36 of act 38 of 2001.

as the SARS,¹¹¹ if the Centre believes that these institutions have information indicating that an accountable institution, as a result of a transaction concluded by that accountable institution, received or is about to receive the proceeds of unlawful activities or it has been used or may be used to commit money laundering or for the purpose of any transaction contemplated in section 29(1)(b).

Due to the limited scope of the research the additional obligations of accountable institutions and powers of the Centre will not be addressed in detail.

¹¹¹ South African Revenue Service.

CHAPTER 4: THE LEGAL PROFESSIONAL PRIVILEGE

4.1 GENERAL PRINCIPLES APPLICABLE TO LEGAL PROFESSIONAL PRIVILEGE

Wigmore,¹¹² with reference to established case law, confirms that the first duty of an attorney is to keep the secrets of clients. This was historically based on the honor of the profession but the privileged developed to be understood as providing subjectively for the client's freedom of apprehension in consulting the legal adviser. In general terms professional privilege protects from disclosure communications between a legal adviser and a client, which are made in confidence for the purpose of enabling the client to obtain legal advice.¹¹³ If the advice is required in connection with some contemplated litigation,¹¹⁴ the privilege will also extend to statements which the client or adviser has obtained from third parties for the same purpose.¹¹⁵ De Koker¹¹⁶ *supra* explains that in general, advisers are compelled by law to keep confidential information of their clients and not to disclose the information without the permission of the client unless they have just cause to disclose the information or are compelled to disclose it by law.

The Law of South Africa¹¹⁷ addresses the legal professional privilege as a right necessary for the proper functioning of the adversarial system. It is considered to be in the best interest of the administration of justice that there should be full and frank disclosures between clients and their legal advisers which support a relationship of

¹¹² Refer Wigmore "Evidence" (1961) Mc Naughton Revision par 2290.

¹¹³ The so-called "advice privilege". See Hoffman and Zeffertt "The South African Law of Evidence" (1988) 248.

¹¹⁴ The so-called "litigation privilege". Zeffertt and Paizes "The South African Law of Evidence" (2009) 674 however explain that although the litigation privilege was regarded as a manifestation or extension of the legal professional privilege, a distinction should be drawn between the two classes of privileges. The learned authors therefore explain, with regard to the litigation privilege, that the information obtained should be for the purpose of submission to a legal advisor for legal advice and secondly, litigation has to be pending or contemplated.

¹¹⁵ See Hoffman and Zeffertt *supra* 248.

¹¹⁶ Refer De Koker (2005) com 3-13 also with reference to *Jansen van Vuuren v Kruger* 1993 (4) SA 842 (A). Also refer *Bowman v Fels* [2005] 4 All ER 609.

¹¹⁷ Also referred to as LAWSA. See LAWSA (ed Joubert) 2nd ed vol 9 (2005) par 754 at 503. Zeffertt and Paizes *supra* 642 explain that the right to consult a legal advisor privately and confidentially was also confirmed in *Euroshipping Corporation of Monrovia v Minister of Agricultural Economics and Marketing and Others* 1979 (1) SA 637 (C) / [1979] 3 All SA 505 (C).

open communication.¹¹⁸ The rationale behind the privilege is therefore not to be seen as keeping communications confidential, but rather to be understood in the context of aiding to litigation which is in public interest.¹¹⁹

Professional privilege is regarded as a substantive rule of law and not merely a rule of evidence¹²⁰ and any limitation of these rights must therefore be reasonable and justifiable.¹²¹ The appeal court in *Safatsa*¹²² concluded that the legal professional privilege extends beyond mere communications made for the purpose of litigation to all communications made for the purpose of receiving advice and that any claim to the relaxation of the privilege must be approached with great circumspection.

It can be reasoned that an accused's legal professional privilege is by implication also acknowledged in the Constitution¹²³ with reference to the right to effective legal presentation as well as the right to a fair trial coupled with substantive fairness.¹²⁴ The legal professional privilege is therefore a just and fair limitation of the right to

¹¹⁸ Refer van der Merwe, Morkel, Paizes and Skeen "Evidence" (1983) Legal Guide Series 133.

¹¹⁹ Refer Schmidt and Rademeyer "Bewysreg" (2000) 554.

¹²⁰ Hoffman and Zeffert *supra* 247–248, explain that the legal professional privilege was historically treated as an evidentiary rule as per *Mandela v Minister of Prisons* 1983 (1) SA 938 (A), but that the court in *S v Safatsa and Others* 1988 (1) 868 (A) acknowledged it as a fundamental common law right and approved the "fundamental principle" with reference to *Baker v Campbell* (1983) 49 ALR 385. Also refer *Bogoshi v Van Vuuren NO and Others; Bogoshi and Another v Director: Office for Serious Economic Offences and Others* 1993 (3) SA 953 (T) and *Mahomed v National Director of Public Prosecutions and Others* 2006 (1) SACR 495 (W). Also see Zeffert and Paizes *supra* 641 with reference to *Bennett and Others v Minister of Safety and Security and Others* 2006 (1) SACR 523 (T) and the English case of *Three Rivers District Council and Others v Governor and Company of the Bank of England* (No 5) [2005] 4 All ER 948 (HL). Also see *R (Morgan Grenfell & Co Ltd) v Special Commissioner* [2002] 1 All ER 776 at 783 and 787 and *Re McE Re M Re C and Another* [2009] 4 All ER 335 at 352.

¹²¹ Zeffert and Paizes *supra* 644, with reference to *Safatsa supra*, explain that the court can exercise a discretion regarding the relaxation of the privilege, but conclude that the court is under an obligation to balance the interests of the public in the due administration of justice against rights of the accused and that this is a legal rule and not a mere discretion.

¹²² [1988] 4 All SA 239 [AD] at 259-260.

¹²³ Refer the Constitution of the Republic of South Africa Act 108 of 1996 and full text of sec 35(3) with specific reference to the right to a fair trial and sec 35(3)(f) and (g) with regard to the right to legal advice.

¹²⁴ Schmidt and Rademeyer *supra* 558 submit that the privilege will also be applicable in *quasi* judicial matters.

information¹²⁵ and to compel either a lawyer or a client to disclose what has been passed between them would be tantamount to involuntary self-incrimination.¹²⁶ Zeffertt and Paizes *supra*¹²⁷ however explain that the Constitutional court in the case of *Thint*¹²⁸ accepted that the right to privilege was not an absolute one and that it could be outweighed, in appropriate cases, by countervailing considerations. Some authorities are therefore of the view that the fair administration of justice can be impaired as a result of the privilege and therefore the ambit of the privilege needs to be limited.¹²⁹ The privilege is limited to the lawyer-client relationship.¹³⁰ Therefore no privileges exist regarding communications that have been made for example to a doctor,¹³¹ accountant,¹³² journalist,¹³³ minister of religion¹³⁴ and an insurer¹³⁵ and limited privilege exists regarding a banker.¹³⁶

¹²⁵ Refer full text of sec 32 of the Constitution regarding access to information as well as sec 36 regarding limitations of rights as per the bill of rights. Also refer *Jeeva and Others v Receiver of Revenue, Port Elizabeth and Others* 1995 (2) SA 433 (SE) where the court held that the Receiver of Revenue should give the applicant access to all requested information except those covered by legal professional privilege.

¹²⁶ Refer Schwikkard and van der Merwe “*Principles of Evidence*” (2002) 134.

¹²⁷ At 646.

¹²⁸ *Thint (Pty) Ltd v NDPP & Others; Zuma & Another v NDPP & Others* 2008 (2) SACR 421 (CC) at par 185. Also see *Key v Attorney-General, Cape of Good Hope Provincial Division and Another* 1996 (6) BCLR 788 (CC).

¹²⁹ Refer Schmidt and Rademeyer *supra* 551, who are of the view that Wigmore par 2192 is taking the argument related to the limitation of the privilege too far, by reasoning that “When the course of justice requires the investigation of the truth, no man has any knowledge that is rightly private” - also with reference to *S v Heyman* 1966 (4) SA 598 (A) 610 F.

¹³⁰ Refer Zeffertt: “Confidentiality and the Courts” 1974 *SALJ* 435 and 449, where the learned author reasons that there is scope to expand the privilege to a new privilege that relates to confidential communications whose secrecy may be regarded as serving the public interest and that anyone who made a confidential communication to any adviser should be able to claim it. The court should therefore determine, on social balance, whether society is best served by disclosure or non disclosure. Zeffertt explains that this will leave room for expansion of the privilege to other professions.

¹³¹ Refer *S v Forbes* 1970 (2) SA 594 (C) where the evidence from the doctor was excluded because the court held that it had a discretion to excluded admissible evidence where fairness and considerations of public policy demands its exclusion. Also refer *S v Webb* (1) 1971 (2) SA 340 (T) and *Botha v Botha* 1972 (2) SA 559 (N) as well as the full text of sec 79(7) of the Criminal Procedure Act 51 of 1977.

¹³² Refer *Chantrey Martin & Co v Martin* [1953] 2 All ER 691 (CA).

¹³³ Refer *R v Parker* 1965 (4) SA 47 (SRA) and *S v Cornelissen* 1994 (2) SACR 41 (W).

The privilege is that of the client¹³⁷ and it has to be claimed either by the client, the client's agent or the legal representative on behalf of the client.¹³⁸ The privilege can be waived, either explicitly or impliedly by the client and consent can be given to disclose privileged information.¹³⁹ The scope of the privilege extends to all material that is integral to the communication.¹⁴⁰ Communications that are privileged remain privileged, irrespective of the nature of subsequent proceedings¹⁴¹ and it may also pertain to the client's successor in title.¹⁴² The privilege also extends to communications between third parties and lawyers. In these instances the requirements are stricter in that the communications must have been made in confidence after litigation is actually taking

¹³⁴ Refer *Smit v Van Niekerk NO en 'n Ander* 1976 (4) SA 293 (A).

¹³⁵ Refer *Howe v Mabuya* 1961 (2) SA 635 (D).

¹³⁶ Sec 236(4) of the Criminal Procedure Act 51 of 1977 provides that no bank may be compelled to produce any accounting records in terms of sec 236(1) at criminal proceedings unless the court concerned orders that such record be produced.

¹³⁷ See *S v Van Vreden* 1969 (2) SA 524 (N); *S v Moseli* 1969 (1) SA 650 (O); *Bowes v Friedlander NO* 1982 (2) SA 504 (C), *Bogoshi v Van Vuuren NO and Others; Bogoshi and Another v Director: Office for Serious Economic Offences* 1996 (1) SA 785 (A) and *Kommissaris van Binnelandse Inkomste v Van der Heever* [1999] 3 All SA 115 (A).

¹³⁸ In *Schlosberg v Attorney-General Transvaal* 1936 WLD 59 it was found that an attorney is entitled and in fact under a duty to claim privilege on behalf of his client, when asked to disclose privileged communication. In *Bogoshi* (1996) *supra* it was held that the privilege does not automatically arise, it must be claimed. Also refer *Euroshipping supra* where the court held that the person claiming the privilege must set out the facts showing entitlement to the privilege.

¹³⁹ Refer Hoffman and Zeffert *supra* 255, where it is explained that if there is no expressed waiver or an inference that privilege has been waived, there can be no question of a waiver of privilege. The learned authors also refer to the case of *Msimang v Durban City Council* 1972 (4) SA 333 (D), where it was pointed out that two elements are predicated in every tacit waiver, namely fairness and consistence and where a litigant has disclosed privileged material, the question whether fairness requires additional disclosure is one of fact to be decided in the circumstances of each case. Also refer Wigmore *supra* par 2327 and Schwikkard van der Merwe *supra* 140 with reference to the case of *Boesman* 1990 (2) SACR 389 (E).

¹⁴⁰ See Hoffman and Zeffertt *supra* 256 also with reference to *International Tobacco Co SA Ltd v United Tobacco Companies (South) Ltd* (3) 1953 (4) SA 251 (W) at 255-256, where it was held that investigation of the matters that went to make up the communication would much deny the principle behind the privilege.

¹⁴¹ See *Euroshipping supra* at 511 and *Jonas v Minister of Law and Order* [1993] 1 All SA 49 (E) at 52.

¹⁴² See *LAWSA supra* par 754 at 503 with reference to *Calcraft v Guest* 1898 (1) QB 759.

place or is contemplated,¹⁴³ irrespective whether or not there are other purposes, litigation need not be the sole dominant purpose.¹⁴⁴ In these instances litigation must have been foreseen as a mere possibility of litigation is not being enough.¹⁴⁵

Privileged documentation may not be seized in terms of a search warrant.¹⁴⁶ Schmidt and Rademeyer *supra* however reason that the court may still exercise a “judicial peep”, in order to establish if a seized document is indeed privileged.¹⁴⁷ Schwikkard and van der Merwe *supra* explain that although a court has an inherent power to examine any document in respect of which privilege is claimed, it should not inspect privileged documentation as a matter of course, as such an inspection is only called for in special circumstances for example “where it is necessary and desirable for a just decision or

¹⁴³ Refer Schmidt and Rademeyer *supra* 560 and Cross and Tapper “*Evidence*” (1990) 428. Also see Hoffman and Zeffert *supra* 259–261, where the learned authors criticise the decision of the court in *United Tobacco Co (South) Ltd v International Tobacco Co (SA) Ltd* 1953 (1) SA 66 (T) which supported the English judgment of *Anderson v Bank of British Columbia* (1876) 2 Ch D 644.

¹⁴⁴ Refer *A Sweiden & King (Pty) Ltd v Zim Israel Navigation Co Ltd* 1986 (1) SA 515 (D).

¹⁴⁵ Refer *Bagwadeen v City of Pietermaritzburg* 1977 (3) SA 727 (N).

¹⁴⁶ Schmidt and Rademeyer *supra* 552-553 explain that the decision of the court in *Anderson v Minister of Justice* 1954 (2) SA 473 (W) to the effect that the existence of the privilege does not prohibit authorised seizure of privileged documentation, was seriously questioned in *Cheadle, Thompson & Haysom v Minister of Law and Order* 1986 (2) SA 279 (W) and *Sasol III (Edms) Bpk V Minister van Wet en Orde* 1991 (3) SA 766 (T). With reference to *Safatsa supra*, the legal professional privileged was found to be a substantive right and therefore logic dictates that documentation subject to the legal professional privilege, must not be seized. In *Bogoshi* 1996 *supra* the court however held that if the privilege was not claimed in a *bona fide* manner, it should be disregarded. Kriegler & Kruger “*Hiemstra Suid-Afrikaanse Strafproses*” (2002) 32-33, explain that *Bogoshi* 1996 *supra* made it clear that seizure was limited from the outset to documents to which the attorney-client privilege does not apply. Kruger “*Hiemstra Criminal Procedure*” (May 2010 *Lexis Nexus* – electronic version) under the commentary to sec 20 of the Criminal Procedure Act, explains that in case of a search under Act 32 of 1998, the person executing the warrant has a duty to inform the persons in question of their rights in terms of sec 29(11) of the same act, that the documents are to be sealed for handing over to the registrar of the court for safe keeping. Kruger (2008) *supra* 43 also explains that in *Minister of Safety and Security and Others v Bennett* [2008] 1 All SA 26 (SCA), the high court declared the execution of search warrants having been performed in an unconstitutional and unlawful fashion because of breach of professional privilege, but on appeal the court found that the privilege had not been claimed and upheld the appeal. Setting aside of the privilege is for a court to decide on the unique set of facts of each case. A possible solution in order to vet seized documentation may be the appointment of an independent counsel to review seized material and to determine whether the material is privileged or not. Also note that sec 21 of the Criminal Procedure Act 55 of 1977 is silent on the aspect of seizure of documentation subject to legal professional privilege.

¹⁴⁷ At 553.

where there are some reason to cast doubt on the claim of privilege”.¹⁴⁸ The legal professional privilege can therefore be claimed not only in actual litigation but also to prevent seizure by warrant as the provisions of the POCA¹⁴⁹ and also the FICA¹⁵⁰ do not override such privilege. The privilege also extends to enquiries and examination or investigations under the Income Tax Act.¹⁵¹

The legal professional privilege is restricted in criminal matters. With reference to the Criminal Procedure Act, the law of professional privilege reflects the English law as it was on 30 May 1961.¹⁵² A legal practitioner is competent and compellable to give evidence to any fact, matter or thing related to the commission of an offence with which his/her client is charged if such a fact, matter or thing came to the practitioner’s knowledge before he/she had been professionally employed or consulted with reference

¹⁴⁸ At 138-139 with reference to *South African Rugby Football Union v President of the Republic of South Africa* 1998 (4) SA 296 (T).

¹⁴⁹ Act 121 of 1998 as addressed in *LAWSA supra* par 754. Zeffertt and Paizes *supra* at 623-625 however explain that the provisions of sec 39 and 48 of POCA were not regarded unconstitutional in *Mohamed NO and Others v National Director of Public Prosecutions and Another* 2003 (1) SACR 286 (W) with reference to sec 35(5) of the Constitution. The authors also refer to *National Director of Public Prosecutions v Mohamed and Others* 2003 (2) SACR 258 (C), where the court held that the applicant’s right to remain silent was not infringed should he be obliged to make disclosures regarding realisable property, as he still had a legitimate choice to exercise the right to remain silent and the court still had a judicial discretion to exclude derivative evidence if the reception of such evidence would compromise the right to a fair trial. In addition it was also held that the disclosure in terms of POCA was aimed at securing sufficient property against which an ultimate confiscation order might operate and not aimed at obtaining self-incriminatory testimony for purposes of securing a conviction against an arrested or accused person.

¹⁵⁰ Refer sec 37.

¹⁵¹ Act 58 of 1962. Refer *LAWSA* (ed Joubert) 2nd ed vol 14 part 2 (2007) par 306 at 265 where it is explained, with reference to *H Heiman, Maasdorp & Barker v Secretary for Inland Revenue and Another* 1968 (4) SA 160 (W), that the attorney cannot refuse to hand over a document, which in the hands of the client, the latter would be obliged to hand to the secretary for inland revenue. Lewis “*Legal Ethics*” (1982) 296 therefore explains that it is important to understand that the claim of privilege respecting documents must not be lightly and casually made, but only when there is at the very least some colour of right to the protection.

¹⁵² The Criminal Procedure Act is also referred to as the CPA. Refer full text of sec 201 of the CPA which provides that a legal adviser is incompetent to give evidence against his/her client if he/she could not have done so on 30 May 1961 in English law. Schmidt and Rademeyer *supra* 553-554 point out that this privilege is limited to possible testimony against the client by the legal adviser, whereas the common law legal professional privilege is also applicable to non-litigation situations and therefore it should however be accepted that sec 201 *supra* does not affect the common law position.

to the defence of the person concerned.¹⁵³ The State is however allowed to ask an accused if the latter's version was shared with the accused's legal adviser, but not allowed to ask what was shared with the legal adviser.¹⁵⁴ There is no similar express provision in the Civil Proceedings Evidence Act,¹⁵⁵ but the common law privilege principles will apply.

4.2 REQUIREMENTS FOR THE PRIVILEGE TO SUSTAIN

Before legal professional privilege can be claimed the communication in question must have been made in confidence to a legal adviser, acting in a professional capacity, for the purpose of pending litigation or for the purpose of obtaining professional advice and not so as to facilitate the commission of a crime.¹⁵⁶ The prerequisites for this privilege to be successful should therefore be evaluated.

4.2.1 To obtain privilege, the legal adviser must have been acting in a professional capacity. This remains a question of fact.¹⁵⁷ The mere fact that a person is an advocate or an attorney does not give rise to the conclusion that everything that such person might say, or that might be said to him/her for the purpose of obtaining his/her advice

¹⁵³ Hoffman and Zeffertt *supra* 259 explain that as it can be reasoned that a legal adviser is being consulted "with reference to the defence of the client", an attorney who has been advising a client generally in connection with his affairs over a period of time, can be required to disclose all communications which may be relevant to the commission of the offence by the client if they were made before the client reasonably foresaw being prosecuted as an impending certainty.

¹⁵⁴ Refer Kriegler and Kruger *supra* commentary to sec 201 at 500. Also see *R v Davies* 1956 (3) SA 52 (A) and *S v Green* 1962 (3) SA 899 (D).

¹⁵⁵ Act 25 of 1965, refer sec 42.

¹⁵⁶ See Schwikkard and van der Merwe *supra* 135 and Zeffertt and Paizes *supra* 625. On page 671 the latter also explains that the legal professional privilege is different to the so-called "litigation privilege", which is a privilege attaching to materials obtained in anticipation of litigation, which serves to protect from disclosure communications between the client or the legal adviser and third parties, if those communications were made for the legal adviser's information for the purposes of pending or contemplated litigation.

¹⁵⁷ In *R v Fouche* 1953 (1) SA 440 (W) it was held that the charging of a fee is a strong indication that the relationship is a professional one, but failure to charge a fee on the other hand in itself is not indicative that the relationship was not a professional one. In *Danfuzz v Additional Magistrate Bloemfontein* 1981 (1) SA 115 (O) the court held that if the applicant had not acted as legal adviser, communication was not privileged.

will be privileged.¹⁵⁸ A relationship of legal adviser and client must exist for communication to be regarded privileged and advice should not be given on a friendly basis only, as mere friendly conversation is not covered in terms of the privilege. Whether a qualified lawyer who is employed on a full time basis can also fall back on the privilege is an open question.¹⁵⁹

4.2.2 The communication has to be made in confidence. In *Bank of Lisbon and South Africa Limited v Tandrien Beleggings (Pty) Ltd and Others*¹⁶⁰ the court held that the basis of privilege is confidentiality and if the latter ceases, confidentiality ceases.¹⁶¹ The mere relation of attorney and client does not raise a presumption of confidentiality and circumstances should indicate that communication was of a sort intended to be confidential.¹⁶² Confidentiality will usually be inferred if it is proved that a legal adviser was consulted in a professional capacity for the purpose of obtaining legal advice. This also remains a question of fact.¹⁶³ A mere instruction to an attorney to act on behalf of a

¹⁵⁸ Refer *LAWSA (2005) supra* par 754 at 503-504 with reference to *Minter v Priest* 1930 All ER 431 434.

¹⁵⁹ Lord Denning in *Alfred Crompton Amusement Machines Ltd v Commissioners of Customs and Excise (no2)* [1972] 2 All ER 353 (QB) was of the view that a salaried legal adviser, whether a barrister or solicitor, who is employed by a government department or a commercial concern has the same duties as a lawyer in private practice and professional privilege, within defined limits, attaches to confidential communications between the salaried adviser and his/her client. In *Van Heerden v Die Meester* 1997 (3) SA 93 (T) it was held that legal advisers which do not operate in private practice should also be afforded the privilege. The rationale for adopting such an approach was also addressed in *Mohammed v President of the RSA* 2001 (2) 1145 (C) where the court held that to limit the scope of legal professional privilege to clients and lawyers in private practice is not justified in law. Kruger (2010) *supra* under the commentary to sec 201 of the CPA submits that the finding in *Van Heerden supra*, which was followed in *South African Rugby Football Union supra*, is wrong as the relationship to which sec 201 of the CPA refers, is that between a lay client and a legal practitioner who acts as an independent officer of the court, which relationship differs materially from that between an employee who has received legal training and that employee's employer.

¹⁶⁰ 1983 (2) SA 626 (W).

¹⁶¹ Hoffman and Zeffert *supra* 252 therefore submit, *contra* the finding in the case of *Euroshipping supra*, that where a client's agent, the legal adviser, allows someone to listen to, or to read, privilege matter, that the client cannot complain if the person tells the court what he heard or read. Also note that Lewis *supra* 291 explains that confidentiality is wider than the concept of privilege and the affairs of the client, though not essentially privileged, must be kept confidential.

¹⁶² See Wigmore *supra* par 2311.

¹⁶³ Refer Schwikkard and van der Merwe *supra* 136. Also see *Giovagnoli v Di Meo* 1960 (3) SA 393 (D); *Euroshipping* and *Danzfuss supra*.

client and to obtain a specific settlement is not privileged, as it lacks the element of confidentiality because it was intended to be disclosed.¹⁶⁴

4.2.3 Communications must be made either for the purpose of obtaining legal advice or at least must have been connected with this purpose.¹⁶⁵ Therefore any statement made when the obtaining of legal advice was not contemplated or was unconnected with the giving of legal advice, will not be privileged merely because it was made in confidence.¹⁶⁶

4.2.4 The advice must not facilitate the commission of a crime or fraud even if the legal adviser is unaware of this intention.¹⁶⁷ The privilege is confined to the obtaining of proper legal advice and a request for advice on how to commit a crime is therefore not protected.¹⁶⁸ According to van der Merwe *supra* with reference to *Butler v Board of Trade*,¹⁶⁹ this rule will however not apply to a letter from a legal adviser to a client informing or advising the latter that certain conduct might lead to prosecution.¹⁷⁰ A legal adviser who wittingly participates in his/her client's offence, as well as an adviser conspiring to mislead the court, is not only acting unprofessional and criminal, but these

¹⁶⁴ Refer *Giovagnoli supra*.

¹⁶⁵ Refer Hoffman and Zeffert *supra* 252-253 with reference to *Minter supra* at 434. Also see *Lane NO and Another v Magistrate, Wynberg* [1997] 2 All SA 557 (C) and *Euroshipping supra*.

¹⁶⁶ Refer *Davies supra* and *S v Kearney* 1964 (2) SA 495 (A).

¹⁶⁷ Refer *Waste Products Utilisation (Pty) Ltd v Wilkes and Another* 2003 (2) SA 515 (W). Also refer *R v Central Criminal Court, ex parte Francis & Francis (a firm)* [1988] 1 All ER 677 at 678.

¹⁶⁸ Refer van der Merwe, Morkel, Paizes and Skeen *supra* 134. Also see *Botes v Daily* 1976 (2) SA 215 (N), *Waste Products supra*, *Harksen v Attorney-General Cape and Others* 1999 (1) SA 718 (C) and *Wigmore supra* par 2299. Also refer Fisher "Legal privilege in criminal cases generally, and money-laundering cases in particular" 2000 *Journal of Money Laundering Control* (vol 4.1) 26.

¹⁶⁹ 1974 3 All ER 593.

¹⁷⁰ However also see Duncan "Hidden Assets" July 2004 *De Rebus* 32. In this publication an example of a would-be testator is explained, who did not apply for tax amnesty with regards to un-legalised foreign assets, disclosed this fact to his attorney, and it is submitted that the offence would not be privileged and must be reported under FICA, only the advice will be privileged and under the circumstances the only advice can be to disclose the assets to the fiscal authorities. Also refer the position in the UK with reference to sec 333D of the *Proceeds of Crime Act 2002 (c. 29)* whereby an offence will not be committed where a lawyer makes a disclosure to a client with the intention of dissuading the client from engaging in conduct amounting to an offence - http://www.anti-moneylaundering.org/europe/united_kingdom.aspx.

actions are not subject to any privilege.¹⁷¹ In this regard an attorney also has an ethical duty and must acknowledge his/her vital role in the administration of justice. Although the attorney must serve his/her client faithfully, if a transaction is tainted with fraud, the attorney should not be a party to it, nor encourage it.¹⁷² A legal adviser can also not rely on the privilege to protect own interests, but not that of the client. In such instances reliance on the privilege will not be successful.¹⁷³

In summary, it is important to note that confidentiality is a primary right and duty of a lawyer, as without the certainty of confidentiality, there can not be trust. Confidentiality is however not privilege¹⁷⁴ and the right to confidentiality can be limited by legislation,¹⁷⁵ also with specific reference to money laundering legislation and the reporting obligations in terms of the FICA. The FICA overrides secrecy and confidentiality obligations in South African Law.¹⁷⁶ Domestic anti-money laundering legislation however still acknowledges the common law right to legal professional privilege.

¹⁷¹ See Kriegler and Kruger *supra* 500 with reference to *Schlosberg supra*.

¹⁷² Refer *LAWSA* (2007) par 306 at 265-266. Also see *Law Society Tvl v Matthews* 1989 (4) SA 389 (T).

¹⁷³ See *Bogoshi* 1996 *supra*.

¹⁷⁴ Also refer Bester (July 2002) *supra* with reference to the case of *Lavallee, Rackel & Heintz v Canada (A.G.)* 1998 ABQB 436. Also refer van der Westhuizen "Obligations to report" FICA series December 2003 *De Rebus* 33 and Van der Westhuizen as per footnote 10 *supra*.

¹⁷⁵ Refer *Commissioner for SARS v ABSA Bank Ltd supra*.

¹⁷⁶ Refer De Koker (2010) *supra* com 7-19.

CHAPTER 5: OPINIONS ABOUT THE REPORTING OBLIGATION, A REALITY CHECK AND REPORTING BY ATTORNEYS

5.1 OPINIONS ABOUT THE REPORTING OBLIGATION

Notwithstanding the obvious necessity to combat money laundering, some lawyers are of the view that attorneys are rather harshly treated by the extraordinary demands in terms of the FICA which, according to them, intended only to promote compliance but were not designed to protect the interests of attorneys and their clients.¹⁷⁷ Bester *supra* explains that the section 29 reporting obligation makes an attorney a ‘secret informer’ for the government and that section 35(1) of the FICA forces the attorney to trap his own unsuspecting client, which state of affairs is ethically and morally unacceptable.¹⁷⁸ In a follow-up article,¹⁷⁹ the same author argues that the danger of erroneous reporting by an attorney can not be ignored and once the wrong has been done to the client, it could hardly be reversed. With reference to a finding by the supreme court of Canada,¹⁸⁰ Bester *supra* concludes that the FICA obligations can be regarded as an assault on the attorney-client relationship and the independence of the profession. The learned author is also of the view that the cost of compliance with the legislation will dramatically add to the already overburdened practice overheads and therefore submits that the constitutionality of the FICA legislation will be challenged.¹⁸¹

Van der Westhuizen *supra* submits that attorneys faced with a reporting obligation will find themselves in a dilemma, as the profession’s inherent conviction dictates that communications between a legal adviser and a client must be kept confidential unless the client or a competent judicial order directs otherwise. Against this background the

¹⁷⁷ Refer Bester *supra* June 2002 *De Rebus* 22.

¹⁷⁸ *Ibid.*

¹⁷⁹ Refer footnote 10 with reference to Bester *supra*.

¹⁸⁰ *The Law Society of British Columbia v Attorney General Canada; Federation of Law Societies v Attorney General Canada* 2001 BCSC 1593. Bester *supra* also refers to *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 where the supreme court of Canada stressed the importance of the independence of the legal profession to ensure proper administration of justice. Also refer footnote 51 *supra*.

¹⁸¹ Also refer Klaff “Fica is unconstitutional” Letters July 2004 *De Rebus* 5.

author expresses that it is inconceivable that an attorney should be compelled to issue a report to the Centre, arising out of information so disclosed and it is even more difficult to accept that the attorney is not entitled to advise the client that such a report has been submitted.¹⁸²

Dendy *supra* is of the view that an attorney, in order to protect himself/herself against possible criminal prosecution, must become the eyes and ears of the Centre in relation to suspicious moneys, and attorneys who disregard the FICA and POCA legislation will run the risk of becoming a criminal themselves.¹⁸³

Avery *supra* explains that it is apparent that legal professional privilege is the linchpin to the legal system and therefore some may consider anti-money laundering legislation to be the single biggest threat to attorney-client privilege globally.¹⁸⁴ The author however also concedes that the attorney has a gate-keeping role in identifying sophisticated money laundering techniques and that although the attorney-client privilege is exempt from the compulsory reporting standards, it is recognised that attorneys can, through their own self imposed professional codes of conduct, report suspicious transactions or refuse to represent a client.¹⁸⁵

Lawyers may find themselves in a dilemma as it is their legal duty to keep the affairs of their clients confidential, but a client may abuse a lawyer and this loyalty may not always be returned.¹⁸⁶

¹⁸² Refer reference to van der Westhuizen as per footnote 10 *supra*.

¹⁸³ Refer reference to Dendy as per footnote 10 *supra*.

¹⁸⁴ Refer reference to Avery as per footnote 10 *supra*.

¹⁸⁵ *Ibid*.

¹⁸⁶ Refer de Koker (2010) *supra* com 7-20 to 7-23 and com 3-31 also with reference to *Van Hulsteyns Attorneys v Government of South Africa* 2002 (2) SA 295 SCA, where a stolen cheque was deposited into an attorney trust account and the unreported case of *National Director of Public Prosecutions v Botha* case no 21005/2003 (T) where a restraint order was obtained which also covered funds that were held in trust by a firm of attorneys on behalf of a client. Also refer however *Price and Another v S* [2003] 4 All SA 26 (SCA) where stolen cheques were deposited in the trust accounts of attorneys with their full knowledge and where severe sanctions were imposed.

5.2 A REALITY CHECK

Although lawyers would like to deny it, there is no doubt that they assist criminals and money launderers, sometimes with full knowledge of what they are doing and sometimes unwittingly.¹⁸⁷ Other authorities also reason that there is no rational basis for believing that lawyers are exempt from the moral failings which afflict other members of society, and neither are lawyers more ethical and moral than the remainder of society and could therefore not possibly commit money laundering offences.¹⁸⁸ Criminals also need to buy houses, obtain legal advice and may use attorneys' accounts to launder proceeds. Other services may include the use of corporate vehicles and trusts, issuance of guarantees and false legal documentation to create legitimacy behind certain transactions as well as investment scams.¹⁸⁹ A classic local example of a massive investment-fraud scam where attorneys were apparently used to receive and route funds, is the recent *Tannenbaum* matter.¹⁹⁰

Lawyers are considered soft targets to money launderers as they lend legitimacy and respectability to illegal transactions.¹⁹¹ In addition, fewer questions are being asked when lawyers are involved and clients also enjoy anonymity via the sacrosanct legal professional privilege. Therefore Campbell *supra* submits that by getting a lawyer to take a client's money the most difficult part of the laundering process, namely placement, has been done.¹⁹²

¹⁸⁷ Refer Middleton "Lawyers and client accounts: sand through a colander" 2008 *Journal of Money Laundering Control London* (vol 11.1) 34.

¹⁸⁸ Refer Bell *supra* 17.

¹⁸⁹ Refer Bell *supra* 19-21.

¹⁹⁰ Refer <http://www.mg.co.za/article/2009-06-12-sa-businessman-tannenbaum-denies-12bn-fraud>; <http://www.timeslive.co.za/sundaytimes/article602035.ece/Tannenbaum-victims-sue-attorneys>; <http://www.mg.co.za/article/2009-10-27-arrest-warrant-issued-for-barry-tannenbaum>. Also refer a typology example in the FIC annual report 2009/10 at 52.

¹⁹¹ Refer Campbell "Solicitors and the prevention of money laundering" 1999 *Journal of Money Laundering Control* (vol 3.2) 135-136.

¹⁹² *Ibid.*

Middleton *supra* explains that money passes through lawyers' accounts like sand through colander and if coupled with proceeds of crime, the seriousness of this problem needs to be recognised and addressed.¹⁹³ Reality therefore dictates that the legal professional privilege is capable of being manipulated by dishonest clients or lawyers as a cloak and so as to keep investigating authorities in a state of ignorance about the nature and extent of fraudulent activities.¹⁹⁴ Close attention and remedial action are therefore needed.

5.3 REPORTING BY ATTORNEYS

The current level of reporting in terms of section 29 of the FICA by attorneys is very low. Without mentioning specific statistics the author, by virtue of being in the Centre's employment, can authoritatively state that very few reports are being received from attorneys. Various reasons may exist for low reporting by lawyers which may justify further analysis.

Firstly, it seems that the levels of anti-money laundering awareness in the legal profession have not reached the maturity levels which exist in the banking sector. Banks have been involved from inception of the FICA legislation to ensure a solid foundation in support of the anti-money laundering regime. With the main focus being on banks, the legal profession may find them in a situation where they need to play "catch-up".

Secondly, a culture of non-suspicion may also exist in the legal profession, as attorneys are conditioned to believe their clients.¹⁹⁵ Some lawyers may also feel flattered when famous and powerful people use their services, without considering that they may be a target for money laundering purposes by all levels of society. Other contributing factors

¹⁹³ At 44. In the remainder of the article the author also refers to several cases where lawyers committed money laundering offences.

¹⁹⁴ Refer Fisher *supra*.

¹⁹⁵ The same applies to other jurisdictions, refer Bell *supra* 21-22. The learned author refers to various reasons for non-disclosures by lawyers, which were considered and addressed by the writer as it is equally applicable domestically.

may be that attorneys in the recent credit crunch may also prefer to turn a blind eye to questionable transactions, with greed being a possible motivating factor.

An obvious obstacle to the reporting challenges is lawyers' duty of confidentiality towards their clients and the view that compliance with anti-money laundering requirements is in conflict with the right to confidentiality in lawyer-client communications. These views are clearly expressed in paragraph 5.1 *supra*. The reporting obligations are therefore experienced as a culture shock, as instinct and tradition dictate otherwise.¹⁹⁶

From a law enforcement perspective, investigators and prosecutors felt comfortable in applying the *status quo* by investigating and prosecuting mere predicate offences, with little focus on following the proceeds of crime. Historic reluctance was experienced in order to give effect to the anti-money laundering legislation, as it demanded a different mindset in addition to concentrating on predicate offences. Therefore very little prosecutions involving POCA and FICA offences materialised. This could have sent a message of comfort to launderers in that they were prosecuted for predicate offences, but the benefit was not taken out of the crime. As a result, upon serving their sentence, they could still enjoy the fruits of their misconduct. It is however time for a wake-up call, as various role-players including the investigating and prosecutorial authorities are starting to get to grips with the anti-money laundering legislation and more POCA and FICA related investigations and prosecutions, involving all money laundering role-players and facilitators, are sure to follow.¹⁹⁷ Various members of the NPA,¹⁹⁸ AFU¹⁹⁹ and SAPS are now having a solid understanding of the anti-money laundering regime and with the operations of the newly established Directorate for Priority Crime

¹⁹⁶ *Ibid.*

¹⁹⁷ Refer FIC annual report 2008 at 27 for information on a successful prosecution for a FICA non-reporting offence linked to the Fidentia debacle and also see <http://www.npa.gov.za/UploadedFiles/FIDENTIA'S%20STEVEN%20GOODWIN%20SENTENCED%20TO%20FIFTY%20YEARS.pdf>.

¹⁹⁸ National Prosecuting Authority and also refer National Prosecuting Authority Act 32 of 1998.

¹⁹⁹ The Asset Forfeiture Unit which was established in May 1999 in the office of the National Director of Public Prosecutions. Also see <http://www.npa.gov.za/ReadContent387.aspx>.

Investigations,²⁰⁰ interesting developments will unfold and the number of money laundering investigations and prosecutions will certainly increase dramatically.

Attorneys' own supervising authority, also need to understand that it has a significant role to play in assisting with awareness, education and guidance related to the anti-money laundering regime and associated reporting obligations. Considering the new amendments to the FICA legislation,²⁰¹ the respective provincial structures of the LSSA will most probably need to take the lead in fulfilling this role.

Although various factors might have contributed towards low levels of awareness and reporting by attorneys, reality dictates that a major paradigm shift is needed in order to give effect to our country's commitment towards combatting the proceeds of crime.

²⁰⁰ Also referred to as DPCI. See section 17D(1) of the SAPS Amendment Act 57 of 2008. The directorate will focus on serious organised crime, commercial crime and corruption – see <http://www.pmg.org.za/briefing/20090521-directorate-priority-crime-investigation-dpci-head-announcement>.

²⁰¹ Refer the FIC Amendment Act 11 of 2008. Also refer representations by van der Westhuizen to the portfolio committee on finance “LSSA urges parliament to respect professional legal confidentiality, independence of the profession and the rule of law in amending FICA” June 2008 *De Rebus* 18. Van der Westhuizen submitted that anti-money laundering control measures should not impose on attorneys' unreasonable onerous and impractical obligations which may adversely impact on the attorneys' ability and right to conduct their profession in a businesslike and effective way. It was argued that practical difficulties may arise in distinguishing confidential information from privileged information which presents a significant burden on the attorney and that certain amendments to the legislation may be in conflict to the rule of law.

CHAPTER 6: THE ROLE OF THE PROVINCIAL STRUCTURES OF THE LAW SOCIETY OF SOUTH AFRICA AND THE WAY FORWARD

The LSSA is listed as a supervisory body as per schedule 2 of the FICA. Amendments to the latter²⁰² were assented to on 27 August 2008 and will come into operation on a date to be determined. Proposed amendments will probably include the removal of the LSSA from the schedule of supervisory bodies,²⁰³ as it has no legislative mandate to ensure compliance with and supervision of accountable institutions as required in terms of the FICA, and the inclusion of a “law society” as contemplated in section 56 of the Attorneys Act.²⁰⁴

The amendments to the FICA address various issues, but of importance to the research is the power to issue directives by the Centre as well as a supervisory body, the registration of all accountable institutions and the clarification of the roles and responsibilities of supervisory bodies. This includes enforcing of compliance by accountable institutions regulated and supervised by it, authorising supervisory bodies to conduct inspections and to provide for administrative sanctions to be imposed by the Centre and supervisory bodies in relation to breaches of compliance with the act.²⁰⁵ Considering the amendments to the FICA legislation, the respective provincial structures of the LSSA are most likely to become responsible for supervising and enforcing compliance with the FICA by practicing attorneys.

From a practical point of view, it seems logical to assume that the LSSA, or at least its provincial structures, are best suited to understand the practice and transacting patterns associated with different attorneys’ practices. It is therefore respectfully submitted that the respective provincial law societies should therefore fulfill its role as lead regulator of attorneys, as they are best suited to understand the “business of attorneys”.

²⁰² Refer full text of sec 43A, 43B and 45 of the FIC Amendment Act.

²⁰³ Refer FIC annual report 2008/09 at 28.

²⁰⁴ Act 53 of 1979. Sec 60 of the aforementioned act provides that the affairs of a society will be managed and controlled by a council with powers as per sec 69-72. Also refer FIC annual report 2009/10 at 36.

²⁰⁵ Refer full text of sec 45 of FIC Amendment Act.

In order to fulfill this mandate, the respective provincial structures of the LSSA will need to ensure that proper awareness is created and that appropriate training is conducted in order to educate attorneys regarding the anti-money laundering regime and associated challenges and obligations.²⁰⁶ Basic training material can also be provided in electronic format and for lawyers that do not have access to electronic means, a free booklet can be provided with guidelines. It is also important to enforce a paradigm shift towards fulfilling these compliance obligations and therefore attorneys should be warned about their attractiveness to launderers as well as the ramifications of non-reporting.

The provincial law societies' commitment towards supporting the anti-money laundering compliance regime can also be enforced via the standard yearly audits, which are undertaken at the request of the councils of the provincial law societies, in order to ensure that compliance is being appropriately audited. Special attention should therefore be given to anti-money laundering compliance during these annual examinations of the accounting books of attorneys by independent accountants, which is necessary in order for the annual certificate required by the law society rules, to be given.²⁰⁷ Furthermore it is of utmost importance that *independent* auditors are being used to conduct these audits.

Attorneys should ensure that advice offered to clients conforms to the law and clients should be advised about illegalities.²⁰⁸ Clients should also be advised upfront of the difference between confidential and privileged information and that information disclosed in confidence may be subject to disclosure in terms of reporting obligations.²⁰⁹

From a practical perspective of running an attorney's business, it is obvious that an attorney must be able to explain the purpose of a transaction and must not merely

²⁰⁶ Also refer footnote 177 with reference to Bester *supra*.

²⁰⁷ Refer Lewis *supra* 298.

²⁰⁸ Refer Van der Westhuizen (July 2004) *supra*. The author also advises that provisions of FICA do not impact on an attorney's ethical right and duty not to accept an unlawful mandate from a client or to withdraw from a matter, neither is there a requirement in FICA that an attorney must cease working for a client where a report has been made to the FIC. Considering risks and depending on individual circumstances, it may be preferable to withdraw.

²⁰⁹ *Ibid.* Also refer Campbell *supra* 141.

follow a client's instructions, which may result in the offering of mere banking services and the channeling of proceeds of crime. Attorneys should therefore refuse to follow instructions, unless satisfied that transactions have a genuine honest purpose and solid underlying basis upon which they are giving legal advice.²¹⁰ Middleton *supra* therefore submits that an experienced professional will apply an independent mind to every transaction and will not provide dishonest assistance and will not conspire with a launderer. Attorneys should ensure that appropriate policies and procedures are in place so that money-laundering transactions are prevented.²¹¹ Campbell *supra* also submits that clients should be advised of the lawyer's policy on money laundering control and can be requested to sign documentation to the effect.

In terms of global best practice, the FATF RBA guidance for legal professionals offer valuable guidance and explains that an effective risk-based approach towards AML/CTF will ensure that resources should be directed in accordance with priorities, so that the greatest risks receive the highest attention. Avery *supra* explains that the FATF consultation paper recommended increased regulation and supervision of the profession, increased due diligence and internal controls, internal compliance training, appropriate record keeping and ensuring STR reporting and no tipping off.²¹²

²¹⁰ Refer Middleton *supra* 40-43.

²¹¹ Refer Campbell *supra* 141.

²¹² At 37. Also refer footnote 47 *supra* with specific reference to section three of the RBA guidance.

CHAPTER 7: RECOMMENDATIONS AND CONCLUSIONS

7.1 BACKGROUND TO THE RESEARCH AND RESEARCH QUESTION

This research examined an attorney's reporting obligation in terms of section 29 of the FICA to report suspicious and unusual transactions, which are not subject to legal professional privilege.

In order to contextualise this reporting obligation and to understand its application, terminology such as the proceeds of crime and money laundering was explained. Global best practice anti-money laundering guidelines, as manifested in the FATF recommendations, were evaluated as well as typologies related to attorneys as targets for money laundering purposes.

The domestic regulatory and legislative frameworks to address the challenges around the proceeds of crime and money laundering were discussed, with specific reference to the POCA legislation, which *inter alia* criminalised money laundering, and the FICA. Special focus was placed on section 29 of the FICA and terminology such as "transaction" and "suspicion" was evaluated as well as section 37 of the FICA, which acknowledges the legal professional privilege. The research also explained the principles around the legal professional privilege, the requirements for the privilege to sustain and its limitations.

The main objective of the research is to understand the attorney's role in the statutory reporting obligation under the FICA, also considering client confidentiality and legal professional privilege. For these purposes, common law principles, legislation, case law and views of different authors and institutions were examined. The secondary objective of the research is to examine the exposure the attorney might face in terms of possible statutory contraventions in case of non-reporting, in order to conclude with an ethical and positivistic approach towards discharging the reporting obligation and suggestions regarding the way forward in order to protect the reputation of an elite profession.

7.2 MAIN FINDINGS

The phenomena around proceeds of crime and money laundering are well known. From a global perspective the FATF has developed sophisticated guidelines and typologies to assist in the fight against money laundering. South Africa confirmed its commitment towards combatting crime and money laundering by signing international conventions and by becoming a member of the FAFT. It has also developed its own regulatory and legislative framework, *inter alia* through the POCA and FICA, to deal with these challenges. In this regard the criminalisation of money laundering and reporting obligation associated with suspicious and unusual transactions play a significant role. During South Africa's last FATF mutual evaluation it was however found that the effectiveness of reporting suspicious transactions is negatively affected due to attorneys' lack of clarity on how to interpret legal privilege in the context of meeting the reporting obligations pursuant to the FICA. This may also explain why the current level of reporting in terms of section 29 of the FICA by attorneys is very low.

The FATF also issued reports addressing various methods and typologies related to attorneys as targets for money laundering purposes and numerous institutions and authoritative writers have warned about the abuse of attorneys for money laundering purposes. The reality is that attorneys wittingly or unwittingly assist in laundering the proceeds of crime for their clients, but they experience discomfort in reporting unusual and suspicious transactions in the context of confidentiality associated with the attorney-client relationship.

The research indicated that there are clear limitations to the legal professional privilege and that specific requirements need to be met for the privilege to sustain. Moreover, any legal advice should never facilitate a crime and a legal adviser can never rely on the privilege to protect own interest. Mere confidential information is not privileged and the right to confidentiality can be limited by legislation, with specific reference to money laundering legislation and the section 29 reporting obligation in terms of the FICA.

An attorney therefore has a definite reporting obligation in terms of section 29 of the FICA and the ramifications of non-reporting may include an attorney being the subject of a criminal investigation for possible association with predicate offences, offences under

POCA as well as FICA non-reporting offences. Relevant role-players will therefore need to partner towards assisting the profession in understanding and discharging this reporting obligation.

7.3 RECOMMENDATIONS AND CONCLUSIONS

7.3.1 GENERAL RECOMMENDATIONS

Our entire surroundings are threatened by crime. We normally concentrate on violent crime as it touches the heart and soul of all around us. Laundering proceeds from illegal rhino killing, blood diamonds, drugs, human trafficking or taking a person's life earnings under fraudulent pretences of solid investment, never to return it due to pure greed, can however be just as devastating. In order to assist in the fight against combatting the proceeds of crime and subsequent money laundering, various role-players including the legal profession will need to demonstrate firm commitment.

Attorneys are often used, either wittingly or unwittingly, to facilitate money laundering as their involvement tends to create a basis of legitimacy around proceeds of crime. Attorneys will therefore need to take their compliance obligations seriously and they should have a proper understanding of the POCA legislation and the section 29 FICA reporting obligation, as well as limitations associated with the legal professional privilege. Attorneys will also need to ensure that transactions are evaluated against a justifiable basis and that clients are informed about the practical implications around the FICA regulatory and reporting regime.

In order to support attorneys and considering the FICA amendments, the provincial structures of the LSSA will need to play a leading role in creating awareness, delivering training initiatives and providing guidance, in order for attorneys to understand their compliance obligations and to ensure that they discharge their FICA reporting obligation. It is also important that the provincial law societies should ensure proper and independent auditing of anti-money laundering policies, procedures and practices during standard yearly audits, and that appropriate action is taken in the event of unsatisfactory audit findings.

7.3.2 RECOMMENDATIONS APPLICABLE TO THE CENTRE

Reality dictates that the Centre has a very important task to fulfill in contributing towards maturing the regulatory regime applicable to attorneys and FICA compliance. Considering the FATF mutual evaluation findings about the uncertainty of attorneys in complying with the FICA reporting obligation, and also considering the FICA amendments, the Centre must develop a solid partnership with the provincial law societies to assist in ensuring effective understanding and implementation of the regulatory regime. Frequent interaction will create opportunities and is needed to facilitate mutual understanding of the respective role-players' mandates and challenges. The Centre is in a position to explain the legislation, but the practical implementation thereof and the appropriate understanding of the attorney's business, is best understood by attorneys themselves and the provincial law societies, which necessitates reciprocation.

The Centre also has a role to play in awareness initiatives in order to advise attorneys about their reporting obligations and to share typologies around the abuse of the profession for money laundering purposes. The Centre should also share these typologies with other role players, such as banks, to assist them in detecting similar abuse associated with attorneys' bank accounts.

From an operational perspective, the Centre should ensure that STRs on attorneys' accounts are properly evaluated and that information related to possible abuse of attorneys' accounts or deviations from section 78 of the Attorneys Act, are being referred to the relevant supervisory authority for proper consideration. Referrals with merit should be taken seriously, and once legislative amendments are operative and the provincial structures of the LSSA will have supervisory status, the provincial councils of the law societies will need to consider inspections or alternative action, subsequent to receipt of a worthy referral.

Important however is that the Centre, as an intelligence organisation, has an obligation to ensure confidentiality of its sources and therefore information shared should be dealt with discreetly. Information disseminated by the Centre may normally be used for information purposes only and should not be shared without the prior written consent of

the Centre. If the/a law society insists on sharing information with an attorney whose transacting has been reported, it will mean by default that the Centre will merely convey hearsay which is also tantamount to tipping off. In the process the identity of *bona fide* reporters will be compromised, which is contradictory to the spirit of the FICA legislation. It is therefore suggested that the provincial law societies should consider appropriate action, as if they received a reliable tip-off, without relying on the presentation of documentation by the Centre to the attorney under scrutiny, to justify such action.

The Centre may also consider ensuring amendments to the FICA, with reference to redefining “transaction” in order to ensure a more robust application and interpretation and to eliminate possible confusion.

7.3.3 CONCLUSIONS

The FICA legislation and specifically the section 29 reporting obligation causes challenges to attorneys, as it seems superfluous and to be taking away some of the professional independence that has been jealously guarded. Considering the legislation as it stands, the answer can however be relatively simple as a lawyer’s practice can effectively operate as historically, with the exception of making certain adaptations in support of a good goal, thereby contributing towards ethical and moral obligations that suit the reputation of an elite profession.

The law is clear, as the legal professional privilege between attorney and client is being acknowledged and legal advice or assistance can never support an illegal purpose. The reality is that attorneys are being abused by launderers and globally jurisdictions have followed a ruthless approach towards lawyers who committed money laundering offences. Logic dictates that the same approach will be followed domestically.

Attorneys, assisted by their supervisory body, will need to take their compliance and reporting tasks seriously, as the reputation of the profession is at stake.

Despite various frustrations and threats, the constitutionality of the section 29 FICA reporting obligation relevant to attorneys, has not been challenged. This reporting

obligation is certainly not going to disappear; neither will law enforcement agencies apply a sympathetic approach towards blatant disregard of the law.

8. BIBLIOGRAPHY

8.1 PRIMARY SOURCES

8.1.1 LEGISLATION AND REGULATIONS

- Attorneys Act, 53 of 1979
- Banks Act, 94 of 1990 and Regulations
- Constitution of the RSA Act, 108 of 1996
- Civil Proceedings Evidence Act, 25 of 1965
- Criminal Procedure Act, 51 of 1977
- Drug and Drug Trafficking Act, 140 of 1992
- Financial Intelligence Centre Act, 38 of 2001 and Regulations
- Financial Intelligence Centre Amendment Act, 11 of 2008
- Income Tax Act, 58 of 1962
- National Prosecuting Authority Act, 32 of 1998
- Prevention of Organised Crime Act, 121 of 1998 and Regulations
- Prevention of Organised Crime Amendment Act, 24 of 1999
- Prevention of Organised Crime Second Amendment Act, 38 of 1999
- Prevention and Combatting of Corrupt Activities Act, 12 of 2004
- Proceeds of Crime Act, 76 of 1996
- Protection of Constitutional Democracy Against Terrorist and Related Activities Act, 33 of 2004 and Regulations
- South African Police Service Amendment Act, No 57 of 2008
- United Kingdom: Proceeds of Crime Act, 2002 (c. 29)

8.1.2 CASE LAW

- *Alfred Crompton Amusement Machines Ltd v Commissioners of Customs and Excise* (no2) [1979] 2 All ER 353 (QB)
- *Anderson v Bank of British Columbia* (1876) 2 Ch D 644
- *Anderson v Minister of Justice* 1954 (2) SA 473 (W)
- *Andrews v Law Society of British Columbia* [1989] 1 SCR 143
- *A Sweiden & King (Pty) Ltd v Zim Israel Navigation Co Ltd* 1986 (1) SA 515 (D)
- *Bagwadeen v City of Pietermaritzburg* 1977 (3) SA 727 (N)
- *Baker v Campbell* (1983) 49 ALR 385
- *Bank of Lisbon and South Africa Ltd v Tandrien Beleggings (Pty) Ltd and Others* 1983 (2) SA 626 (W)
- *Bennett and Others v Minister of Safety and Security and Others* 2006 (1) SACR 523 (T)
- *Boesman* 1990 (2) SACR 389 (E)
- *Bogoshi v Van Vuuren NO and Others; Bogoshi and Another v Director: Office for Serious Economic Offences and Others* 1993 (3) SA 953 (T)
- *Bogoshi v Van Vuuren NO and Others; Bogoshi and Another v Director: Office for Serious Economic Offences* 1996 (1) SA 785 (A)
- *Botes v Daily* 1976 (2) SA 215 (N)
- *Botha v Botha* 1972 (2) SA 559 (N)
- *Bowes v Friedlander NO* 1982 (2) SA 504 (C)
- *Bowman v Fels* [2005] 4 All ER 609
- *Butler v Board of Trade* 1974 3 All ER 593
- *Calcraft v Guest* 1898 (1) QB 759
- *Chantrey Martin & Co v Martin* [1953] 2 All ER 691 (CA)
- *Cheadle, Thompson & Haysom and Others v Minister of Law and Order and Others* 1986 (2) SA 279 (W)
- *Commissioner for the South Africa Revenue Service and Another v ABSA Bank Ltd and Another* [2003] JOL 11072 (W)
- *Danzfuss v Additional Magistrate, Bloemfontein* 1981 (1) SA 115 (O)

- *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A)
- *Euroshipping Corporation of Monrovia v Minister of Agricultural Economics & Marketing and Others* [1979] 3 All SA 505 (C)
- *Frankel Pollak Vinderine Inc v Stanton NO* [1996] 2 All SA 582 (W)
- *Giovagnoli v Di Meo* 1960 (3) SA 393 (D)
- *Harksen v Attorney-General Cape and Others* 1999 (1) SA 718 (C)
- *H Heiman, Maasdorp & Barker v Secretary for Inland Revenue and Another* 1968 (4) SA 160 (W)
- *Howe v Mabuya* 1961 (2) SA 635 (D)
- *International Tobacco Co (SA) Ltd v United Tobacco Companies (South) Ltd* (3) 1953 (4) SA 251 (W)
- *Investigating Directorate Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others* 2001 (1) SA 545 (CC)
- *Jansen van Vuuren v Kruger* 1993 (4) SA 842 (A)
- *Jeeva and Others v Receiver of Revenue, Port Elizabeth and Others* 1995 (2) SA 433 (SE)
- *Jonas v Minister of Law and Order* [1993] 1 All SA 49 (E)
- *Key v Attorney-General Cape of Good Hope Provincial Division and Another* 1996 (6) BCLR 788 (CC)
- *Kommissaris van Binnelandse Inkomste v Van der Heever* [1999] 3 All SA 115 (A)
- *Lane NO and Another v Magistrate, Wynberg and Others* [1997] 2 All SA 557 (C)
- *Lavallee, Rackel & Heintz v Canada (A.G.)* 1998 ABQB 436
- *Law Society of British Columbia v Canada Attorney General*, 2003
- *Law Society Tvl v Matthews* 1989 (4) SA 389 (T)
- *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 (SE)
- *Mandela v Minister of Prisons* 1983 (1) SA 938 (A)
- *Mahomed v National Director of Public Prosecutions and Others* 2006 (1) SACR 495 (W)
- *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (A)

- *Minister of Law and Order v Kader* 1991 (1) SA 41(A) / [1991] 1 All SA 256 (A)
- *Minister of Safety and Security v Bennett and Others* [2008] 1 All SA 26 (SCA)
- *Minter v Priest* 1930 All ER 431 434
- *Mohammed v President of the RSA* 2001 (2) 1145
- *Mohamed NO and Others v National Director of Public Prosecutions and Another* 2003 (1) SACR 286 (W)
- *Msimang v Durban City Council* 1972 (4) SA 333 (D)
- *National Director of Public Prosecutions v Botha* Case no 21005/2003 (T)
- *National Director of Public Prosecutions v Geyser* [2008] ZASCA 15
- *National Director of Public Prosecutions v Mohamed and Others* 2003 (2) SACR 258 (C)
- *National Director of Public Prosecutions v Seevnarayan* [2003] 1 All SA 240 (C)
- *National Director of Public Prosecutions v Vermaak* 2008 (1) SACR 157 (SCA)
- *Nkambule v Minister of Law and Order* [1993] 3 All SA 847 (T)
- *Powel NO and Others v Van der Merwe and Others* [2005] 1 All SA 149 (SCA)
- *Price v S* [2003] 4 All SA 26 (SCA)
- *R v Central Criminal Court, ex parte Francis & Francis (a firm)* [1988] 1 All ER 677
- *R v Davies* 1956 (3) SA 52 (A)
- *R v Fouche* 1953 (1) SA 440 (W)
- *R v Griffiths* [2006] All ER (D) 19 (Sep)
- *R (Morgan Grenfell & Co Ltd) v Special Commissioner* [2002] 1 All ER 776
- *Re McE Re M Re C and Another* [2009] 4 All ER 335
- *R v Parker* 1965 (4) SA 47 (SRA)
- *S v Boesman and Others* 1990 (2) SACR 389 (EC)
- *S v Cornelissen* 1994 (2) SACR 41 (W)
- *S v Forbes* 1970 (2) SA 594 (C)
- *S v Green* 1962 (3) SA 899
- *S v Heyman* 1966 (4) SA 598 (A)
- *S v Kearney* 1964 (2) SA 495 (A)
- *S v Moseli* 1969 (1) SA 650 (O)

- *S v Safatsa and Others* 1988 (1) 868 (A) / [1988] 4 All SA 239 [AD]
- *S v Van Vreden* 1969 (2) SA 524 (N)
- *S v Webb* (1) 1971 (2) SA 340 (T)
- *Sasol III (Edms) Bpk V Minister van Wet en Orde* 1991 (3) SA 766 (T)
- *Schlosberg v Attorney General* 1936 WLD 56
- *Shabaan Bin Hussien and Others v Chong Fook Kam and Another* [1970] AC 942 ([1969] 3 All ER 1627 (PC))
- *Smit v Van Niekerk NO en 'n Ander* 1976 (4) SA 293 (A)
- *South African Rugby Football Union v President of the Republic of SA* 1998 (4) SA 296 (T)
- *Standard General Insurance Company v Hennop* 1954 (4) SA 560 (A)
- *The Law Society of British Columbia v Attorney General Canada; Federation of Law Societies v Attorney General Canada* 2001 BCSC 1593
- *Three Rivers District Council and Others v Governor and Company of the Bank of England* (No 5) [2005] 4 All ER 948 (HL)
- *Thint (Pty) Ltd v National Director of Public Prosecutions & Others; Zuma & Another v NDPP & Others* 2008 (2) SACR 421 (CC)
- *United Tobacco Co (South) Ltd v International Tobacco Co (SA) Ltd* 1953 (1) SA 66 (T)
- *Van Heerden v die Meester* 1997 (3) SA 93 (T)
- *Van Hulsteyns Attorneys v Government of South Africa* 2002 (2) SA 295 SCA
- *Waste Products Utilisation (Pty) Ltd v Wilkes and Another* 2003 (2) SA 515 (W)

8.2 SECONDARY SOURCES

- Avery: "Global assault on attorney-client privilege: the law" *Without prejudice* October 2005 (vol 5.9)
- Bester "Negotiating the Financial Intelligence Centre Act (part 1)" June 2002 *De Rebus*
- Bester "An 'assault' on the attorney-client relationship and on the independence of the profession?" July 2002 *De Rebus*
- Bell "The prosecution of lawyers for money laundering offences" 2002 *Journal of Money Laundering Control* (vol 6.1)
- Campbell "Solicitors and the prevention of money laundering" 1999 *Journal of Money Laundering Control* (vol 3.2)
- Commission of the European Communities: directive 91/308/EEU and second directive 2001/97/EC - http://europa.eu/legislation_summaries/other/l24016_en.htm and http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=32001L0097&lg=EN
- Cross and Tapper "*Evidence*" (1990)
- De Koker and Bernard "Money laundering: of watchdogs, bloodhounds and guide dogs" September 2003 *Accountancy SA* (AC 116)
- De Koker "*KPMG money laundering control service*" (2005) *Lexus Nexus*
- De Koker "*South African money laundering and terror financing law*" (2010) *Lexus Nexus*
- De Koker and Henning "*Money laundering control in South Africa*" 30 *Transactions of the Centre for Business Law* (1998)
- Dendy: "Watching your back a guide to FICA and POCA" March 2006 *De Rebus*
- Duncan "Hidden assets" July 2004 *De Rebus*
- FATF mutual evaluation report of South Africa February 2009 - <http://www.fatf-gafi.org/dataoecd/56/35/42390354.pdf>
- FATF 40 recommendations plus 9 special recommendations, methodology, interpretative notes and glossary - <http://www.fatf-gafi.org>

- FATF VII report on money laundering typologies June 1996
- FATF report on money laundering typologies 1997/98
- FATF report on money laundering typologies 2003/2004
- FATF report on money laundering and terrorist financing through the real estate sector 2007
- FATF RBA guidance for legal professions 23 October 2008
- Financial Intelligence Centre annual report 2008
- Financial Intelligence Centre annual report 2008/09
- Financial Intelligence Centre annual report 2009/10
- Financial Intelligence Centre Guidance note 2 - Government Gazette 26469
- Financial Intelligence Centre Guidance note 4 - Government Gazette 30873
- Fisher "Legal privilege in criminal cases generally, and money laundering cases in particular" 2000 *Journal of Money Laundering Control* (vol 4.1)
- Hoffman and Zeffertt "*The South African Law of Evidence*" (1988) Butterworths
- Klaff "Fica is unconstitutional" letters July 2004 *De Rebus*
- Krauland, Roselle and Mullerat "Comments to the ABA Task Force on Attorney-Client Privilege" May 2005 - <http://www.abanet.org/crimjust/taskforce/actions.html>
- Kriegler and Kruger "*Hiemstra Suid-Afrikaanse Strafproses*" (2002) *Lexis Nexis*
- Kruger "*Hiemstra Criminal Procedure*" (May 2010) *Lexis Nexis* – electronic version
- Kruger "*Organised crime and proceeds of crime in South Africa*" (2008) *Lexis Nexis*
- Lewis "*Legal Ethics*" (1982) *Juta*
- Law of South Africa (ed Joubert) 2nd ed vol 9 (2005)
- Law of South Africa (ed Joubert) 2nd ed vol 14 part 2 (2007)
- Lowenfels, Bromberg, and Sullivan, "Attorneys as gatekeepers: SEC actions against lawyers in the age of Sarbanes-Oxley" (2006). *Bepress Legal Series* working paper 991 - <http://law.bepress.com/expresso/eps/991>
- Middleton "Lawyers and client accounts: sand through a colander" 2008 *Journal of Money Laundering Control* (vol 11.1)

- Schmidt en Rademeyer “*Bewysreg*” (2000) Butterworths
- Schwikkardt and van der Merwe “*Principles of Evidence*” (2002)
- Smit “Clean money, suspect source, turning organised crime against itself”. *Institute for Security Studies (South Africa) ISS monograph 51* (2001)
- United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances
- United Nations Convention against Transnational Organized Crime
- Van der Merwe, Morkel, Paizes and Skeen “*Evidence*” (1983) Legal Guide Series
- Van der Westhuizen “Obligations to report” FICA series December 2003 *De Rebus*
- Van der Westhuizen “Interpreting section 29 and the obligation to report” part 1 April 2004 *De Rebus*
- Van der Westhuizen “Interpreting section 29 and the obligation to report” part 2 May 2004 *De Rebus*
- Van der Westhuizen “Attorneys, privilege and confidentiality” June 2004 *De Rebus*
- Van der Westhuizen “Some rules of thumb” July 2004 *De Rebus*
- Van der Westhuizen “LSSA urges parliament to respect professional legal confidentiality, independence of the profession and the rule of law in amending FICA” June 2008 *De Rebus*
- Wilbern “Lawyers as gatekeepers for money laundering” - <http://michaelguth.com/economist/moneylaundering.htm>
- Wigmore “*Evidence*” (1961) McNaughton revision
- Zeffertt “Confidentiality and the Courts” 1974 *South African Law Journal* 432
- Zeffertt and Paizes “*The South African Law of Evidence*” (2009) Lexis Nexus

Website information and links:

- <http://www.abanet.org/crimjust/taskforce/actions.html>
- http://www.anti-moneylaundering.org/europe/united_kingdom.aspx
- <http://www.egmontgroup.org/>
- <http://www.esaamlg.org>
- http://ec.europa.eu/internal_market/company/official/index_en.htm#tcl
- http://europa.eu/legislation_summaries/other/l24016_en.htm
- http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=32001L0097&lg=EN
- <http://www.fatf-gafi.org>
- <http://www.fatf-gafi.org/dataoecd/56/35/42390354.pdf>
- <https://www.fic.gov.za>
- <http://www.iep.utm.edu/ethics/>
- <http://law.bepress.com/expresso/eps/991>
- <http://michaelguth.com/economist/moneylaundering.htm>
- <http://www.mg.co.za/article/2009-06-12-sa-businessman-tannenbaum-denies-12bn-fraud>
- <http://www.mg.co.za/article/2009-10-27-arrest-warrant-issued-for-barry-tannenbaum>
- <http://www.npa.gov.za/ReadContent387.aspx>
- <http://www.npa.gov.za/UploadedFiles/FIDENTIA'S%20STEVEN%20GOODWIN%20SENTENCED%20TO%20FIFTY%20YEARS.pdf>
- <http://plato.stanford.edu/entries/legal-positivism/>
- <http://www.pmg.org.za/briefing/20090521-directorate-priority-crime-investigation-dpci-head-announcement>



- <http://www.timeslive.co.za/sundaytimes/article602035.ece/Tannenbaum-victims-sue-attorneys>
- http://www.unodc.org/pdf/convention_1988_en.pdf