

Money laundering and the impact thereof on selected African Countries: A comparative study

by

Chinelle van der Westhuizen
(26066442)

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Under supervision of Mr Monray Marsellus Botha
(University of Johannesburg)

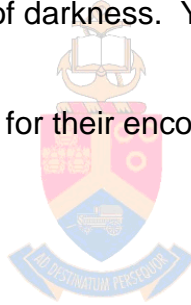
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Last but not least to my family for their encouragement, love and support.



“The Lord grants wisdom!

From His mouth comes knowledge and understanding.”

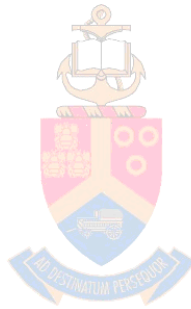
Proverbs 2:6

DECLARATION

I declare that “Money laundering and the impact thereof on selected African Countries: A comparative study” is my own work, that it has not been submitted before for any degree or examination in any other University, and that all sources I have used or quoted have been indicated and acknowledged as complete references.

Chinelle van der Westhuizen

January 2011



ABSTRACT

The variations that exist in the definitions or interpretations of money laundering is not relevant to the actual meaning of the term money laundering, but rather to the transactions that could be indicative of money laundering. Therefore money laundering becomes easier when poorly legislation creates loopholes that can be demoralised by criminal syndicates and terrorist financing.

Since 1996, the South African Reserve Bank has been in negotiations with the International Monetary Fund (IMF), the United States Federal Reserve Bank and many European financial institutions to ensure that South Africa can compete in the International sphere. To comply with International banking standards, South Africa has promulgated a number of laws, for example The Prevention of Organised Crime Act of 1996, The Proceeds of Crime Act of 1997, The Money Laundering Control Act of 2000 and The Financial Intelligence Centre Act of 2003.

Money laundering attracted increasing interest since the late 1980's. To control the increase in money laundering, a number of initiatives were adopted, for example the Financial Action Task Force on money laundering in 1989. The Eastern and Southern African countries also formed the Eastern and Southern Africa Anti-Money laundering Group (ESAAMLG) in 1999.

The advances in technology and particularly electronic funds transfers brought a dramatic increase in organised crime. In respect hereof, South Africa received attention in terms of The Prevention of Organised Crime Act 121 of 1998 as well as the Financial Intelligence Centre Act 38 of 2001 to prevent the increase of money laundering. With South Africa returning into the International sphere, South Africa is becoming increasingly attractive to the practical dilemmas of money laundering.

Certain challenges on money laundering have an impact on legislators, both in South Africa and Africa. These challenges include criminal syndicates profiting from criminal activities to financing of terrorism such as 11 September 2001. By using South Africa as an example against the selected African countries, it is indicated how the certain implications of money laundering undermine the legitimate private sector. One way to address the challenges of money laundering is that legislators must understand how these criminal syndicates operate as well as the terrorist financing thereof.

This mini-dissertation gives an historical overview of what money laundering entails in South Africa as well as the selected African countries, the typologies thereof as well as the legislation dealing with money laundering in South Africa. It also provides the practical implications of implementing the money laundering measures in South Africa as well as the selected African countries against the background of the challenges and realities thereof. Money laundering is difficult to measure, but a preliminary attempt was made to give recommendations on this global predicament.

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CHAPTER 1

INTRODUCTION

OVERVIEW OF THE STUDY

Money not associated with criminal activity can be freely spent without any fear of incriminating the spender or the recipient as being party to any criminal misdeeds.¹

With the possible exception of minor crimes where criminals steal for sustenance or instances when collectors of rarities purchase stolen antiquities for their private collections, it remains inherent in any criminal undertaking that the proceeds of the criminal activity will have to be carefully disguised. The process of meticulously applying this disguise forms the basis of money laundering.²

Because these money launderers deal with other people's money, financial institutions rely on a reputation for probity and integrity. The predicaments of money laundering and underlying criminal activities, including the financing of terrorism, are real, as they affect our day-to-day socio-economics and political lives across the whole region.³

In recent years, the international community has become more aware of the dangers that money laundering poses and many governments has committed them to taking action against these dangers. The application of intelligence and investigating techniques is one way of disrupting the activities of terrorists and terrorist organisations. Developing countries that attract so called "dirty money" as a short terms platform of growth, can find it difficult to attract long-term investment which is based on good governance and which helps sustain development of a country.⁴

¹ United Nations office on Drugs and Crime "Background on money laundering" (2010) <www.unodc.org/unodc/en/moneylaundering> (accessed on 25 February 2010).

² *Ibid.*

³ Sithole "Taking action against Money laundering" (2003) unpublished LLD-thesis, University of South Africa.

⁴ *Supra* note 1.

Money laundering activities can occur in any country, but they may have a more significant impact on developing countries with small or fragile financial systems or weak economies that are susceptible to disruption as a result of illicit activities.⁵

PROBLEM IN THIS STUDY

A critical challenge to understanding the impact of money laundering is that its clandestine nature makes it difficult to observe.⁶ In certain instances, this distinctive feature of money laundering requires that the casual relationship or consequences thereof be identified by means of inference.⁷ Based on these inferences, it is possible to identify the extent and the security implications of money laundering in South Africa.

PURPOSE OF THE STUDY

To provide an overview of the history and impact of money laundering on developing countries and also to compare Southern African regulations with other African developing countries, that has been incorporated to fight and prevent this economic problem and the spread thereof.

DIVISION OF THE STUDY

Chapter 1 – Introduction

Chapter 2 – History, Definitions and Typologies of money laundering

- Introduction and Historical overview
- Defining money laundering
- Methods of money laundering

⁵ Moshi “Fighting Money laundering – The challenges in Africa” (2007) 3, ISS Paper 152. Retrieved 14 March 2010 from SABINET online databases.

⁶ Moodley & Maiendra “The extent and security implications of money laundering in South Africa” (2008) <<http://www.highbeam.com/doc/1G1-193140719.html>> (accessed on 16 September 2010).

⁷ *Ibid.*

- Typologies of money laundering
- Conclusion

Chapter 3 – Money laundering and the impact thereof on the South African economy

- Introduction
- Money laundering concept under South African law
- Money laundering offences
- Defences and penalties
- Money laundering and typologies
- Prosecutions under South African law
- Money laundering control and legislation
- Money laundering obligations
- Conclusion

Chapter 4 – Money laundering and the impact thereof: The case of Botswana, Kenya, Tanzania, Malawi and Zimbabwe

- Introduction
- Botswana
- Kenya
- Tanzania
- Malawi
- Zimbabwe
- Conclusion

Chapter 5 – Prevention of money laundering in South Africa

- Introduction
- The key challenges for money laundering control
- South Africa as a destination of laundered funds
- The prognosis for medium-term money laundering control in Southern Africa
- Conclusion

Chapter 6 – Conclusion and Recommendations

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2.1 Introduction and Historical overview

The term “money laundering” does not derive, as is often said, from Al Capone having used Laundromats to hide ill-gotten gains.⁸ It is more likely to mean that dirty money is made clean.⁹ No one can be really sure when money laundering first began, but we can be confident that it has been going on for thousand of years.

Merchants in China, some two thousand years before Christ, would hide their wealth from rulers who would take it away from them. The Merchants would move their money and assets and invest it in businesses in remote provinces or outside China. The principles of money laundering have not changed at all, except for the mechanisms which are being used. It was several thousand years ago that money and value were separated and value became

⁸ The National Archives “Anti-Terrorism, Crime and Security Act of 2000, contained in art 24. <<http://www.opsi.gov.uk/Acts/acts2001/ukpga>> (accessed on 12 April 2010).

⁹ *Ibid.*

represented by assets, often assets with no intrinsic worth, but increasingly by assets that were recognisable and convertible.¹⁰ For example, gold coins were literally worth their weight in gold and it was immaterial what country issued them – the only thing that mattered was the quality and quantity of the gold.¹¹

Whatever the origins of the term money laundering, criminals moved into businesses where they formed law firms, accountancy practices and bought banks. In the Post-World War II era, legislators found themselves in a quandary as they were confronted with a growing list of commercial, fiscal and environmental offences that did not actually cause direct harm to any identifiable victim.¹² Money laundering has been named the “Achilles heel of organised crime”, for it compels mobsters and other criminals to seek out established businessmen and woman with highly technical know-how and access to legal institutions like banks to launder their plunder.¹³ It is important to remember that money obtained by an illegal action is not itself laundered money, but the attempt to “conceal” its source, is an offence and not the transaction itself, which is a different offence.

In 1988, the United Nations Convention against Drug Trafficking¹⁴ was held. At this Convention it was decided amongst others, that governments should criminalise drug trafficking and the associated laundering of the proceeds to provide for confiscation of the proceeds of drug trafficking and for the amending of the bank secrecy legislation and approaches.¹⁵

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² Komisar "Tracking Terrorist Money - 'Too Hot for US to handle?'" (2001) Pacific News Service. <<http://www.webcom.com/hrin/magazine/money.html>> (accessed on 12 May 2010).

¹³ Granville “Dot.Con: The Dangers of Cyber Crime and a Call for Proactive Solutions” (2003) *Australian Journal of Politics and History*, vol 49, 102-109.

¹⁴ Also referred to as the 1988 Vienna Convention.

¹⁵ Humphrey “Challenges of fighting money laundering in Africa” (2007) ISS Paper 152, 4. Retrieved 10 April 2010 from SABINET online databases.

The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime which was approved in 1990, has achieved recognition as one of the main International instruments in this area.¹⁶ In June 2003, the Council of Europe was instructed to expand the 1990 Convention to prevent financing of terrorism in accordance with the relevant International standards.¹⁷ After this, a new Convention, The Council of Europe new Convention on laundering, search, seizure and confiscation of the proceeds from crime and on the financing of terrorism, was drafted. This new Convention was the first step against terrorism, by attacking its financing on a broader scale. A disconnection clause has been inserted in Article 52(4) of the Convention, allowing parties that are members of the European Union to apply corresponding Community and European Union rules rather than the rules contained in the Convention.¹⁸

In 1989, the Financial Action Task Force¹⁹ was established by the G7 members of the OECD²⁰ to develop a coordinated international response to money laundering.²¹ The FATF is regarded as the international watchdog on money laundering and terrorist financing.²² It assesses and monitors compliance with the FATF standards, conducts typology studies on money laundering and terrorist financing and responds to new threats such as proliferation financing.²³ As from 2007, the FATF consisted of 34 members and South Africa became a member in 2003. The FATF provides guidance

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ The Council of Europe new Convention on laundering, search, seizure and confiscation of the proceeds from crime and on the financing of terrorism (2005) <www.europa.eu/rapid=MEMO/05/331> (accessed 30 August 2010).

¹⁹ Hereafter referred to as the FATF.

²⁰ Hereafter referred to as the Organisation for Economic Co-operation and Development.

²¹ *Supra* note 15 at 3.

²² *Ibid.*

²³ Financial Action Task Force – *Groupe d'action financière* “An introduction to the FATF and its works” (2010)<www.fatf-gafi.org> (accessed 10 April 2010).

for governments and other institutions regarding money laundering and terrorist financing.²⁴

The control of money laundering is the subject of increased interest as a result of the events in the United States (US) on 11 September 2001.²⁵ It is recognised that terrorism would be checked by controlling terrorists' financial capacity to organise. This requires detecting the movement of money that would be used in assembling the accessories of terrorism. Money laundering control is, therefore, important for the purpose of controlling terrorism.²⁶

In modern days, money laundering is the subject of several television episodes, films as well as video games. The following are examples:

- Several episodes on "The Sopranos".
- Episode 12 of "The Simpsons".
- In "The Shield", Vic and his strike team steal millions of dollars from a money laundering operation run by the Armenian mob.
- In "Scarface", drug kingpin Tony Montana launders money through a series of shell businesses.
- A literal interpretation of money laundering is shown in the film "To live and die in L.A".
- In "License to kill" a drug dealer creates an alternative religious group to launder drug money.
- In "Lethal Weapon 2" one of the characters were saved after stealing money as part of a money laundering scheme.
- In "Scarface: The world is yours" players must launder money in order to keep it when they die.

²⁴ *Ibid.*

²⁵ Kegoro "The control of money laundering and terrorist financing in Kenya" (2003) 38 <www.iss.co.za/pubs/monographs/no90/pdf.html> (accessed on 20 April 2010).

²⁶ *Ibid.*

2.2 Defining money laundering

The money laundering definition is designed to fit a specific set of circumstances. For the purpose of this discussion, a broad working definition has been adopted as follows:²⁷

“Money laundering consists of the concealment of assets generated by crime or to be used in committing or facilitating the commission of crime.”

The Financial Intelligence Centre Act 38 of 2001 defines money laundering as an activity which lies or is likely to have the effect of concealing or disguising the nature, source, location, disposition or movement of the proceeds of unlawful activities or any interest which anyone has in such proceeds and includes any activity which constitutes an offence in terms of s64 of the Act.

The term “money laundering” in South African law²⁸ refers to a number of different offences that can be committed in terms of the Prevention of Organised Crime Act 121 of 1998 (POCA)²⁹.

2.3 Methods of money laundering

A starting point in identifying money laundering trends is to locate the predicate activity areas from which proceeds for laundering are derived. Potentially, there are as many activities relevant to the inquiry as there are varieties of economic crime. Practical reasons make prioritisation necessary.³⁰ A discussion of the various methods of money laundering will be discussed below.

²⁷ G Kegoro “Money laundering patterns in Kenya” (2002) *Monograph Series* 135 <www.iss.co.za/pubs/Monographs/no90/chap5.html> (accessed 10 June 2010).

²⁸ De Koker “KPMG Money laundering Control Service” (1999) Butterworths, Durban.

²⁹ POCA defines money laundering as an activity which lies or is likely to have the effect of concealing or disguising the nature, source, location, disposition or movement of the proceeds of unlawful activities or any interest which anyone has in such proceeds and includes any activity which constitutes an offence in terms of s64 of the Act.

³⁰ Goredema “Money laundering in Southern Africa – Incidence, magnitude and prospects for its control” (2004) ISS Paper 92. Retrieved 20 April 2010 from SABINET online databases.

2.3.1 Transfer pricing:

Transfer pricing works as follows: an organisation charges for goods or services at prices that are not market related with the aim of moving funds out of or into a chosen jurisdiction.³¹ Exporters use this method to ensure that funds earned from exports are externalised.³² One of the key aspects of global financial centres is that there is a high degree of secrecy with which transactions are undertaken. These conditions are ideal for effective transfer pricing.³³

2.3.2 Shell and nominee companies:

Shell companies typically do not carry out activities on a day-to-day basis and are often formed in order to fulfil particular transactions. Money launderers open accounts in the name of such companies, deposit ill-gotten gains and subsequently introduce the proceeds into the formal system, thereby completing the laundering process.³⁴ Shell and nominee companies are normally used in money laundering in order to disguise the identity of the perpetrator of the predicate offence. The fact that there is a high degree of secrecy in the financial centres provides the perpetrator with suitable camouflage.³⁵

2.3.3 Banking institutions:

Financial institutions have a remarkable ability to move substantial sums of money all over the world with no questions asked.³⁶ Amounts can be transferred at the speed of a telephone call to a desired destination. The following methods are ideal for the money launderer, because transactions can be carried out repeatedly and speedily:³⁷

³¹ Fundira "Implications of Foreign Banking and Offshore Financial Centres for Money laundering in the region" (2000) 166. <www.iss.co.za/pubs/monographs/no90/ExecSum.html> (accessed 10 April 2010).

³² *Ibid.*

³³ *Ibid.*

³⁴ *Supra* note 19 at 167.

³⁵ *Idem* at 168.

³⁶ *Ibid.*

³⁷ *Ibid.*

- **SWIFT:** Society for Worldwide Interbank Financial Telecommunications System.
- **CHIPS:** CHIPS is a privately operated, real-time, multilateral payments system typically used for large-dollar payments. CHIPS are owned by banks, and any banking organization with a regulated U.S. presence may become a participant in the system. Banks use CHIPS for the settlement of both Interbank and customer transactions, including, for example, payments associated with commercial transactions, bank loans, and securities transactions. CHIPS also plays a large role in the settlement of United States Dollar payments related to international transactions, such as foreign exchange, international commercial transactions, and offshore investments.³⁸
- **FEDWIRE:** Federal Reserve: Fedwire is operated by the Federal Reserve Banks and allows a participant to transfer funds from its master account at the Federal Reserve Banks to the master account of any other bank. Payment over Fedwire is final and irrevocable when the Federal Reserve Bank either credits the amount of the payment order to the receiving bank's Federal Reserve Bank master account or sends notice to the receiving bank, whichever is earlier. Although there is no settlement risk to Fedwire participants, they may be exposed to other risks, such as errors, omissions, and fraud.³⁹

2.3.4 Lawyers' trust funds:

In many parts of the world, lawyers have been used by individuals whose intention is to conceal their illegal activities.⁴⁰ In the case of *Aitken and Another v Attorney General*,⁴¹ Aitken, a Harare lawyer, deposited funds into his practice's trust account and used them to carry out illegal activities. The

³⁸ Federal Financial Institutions Examination Council "Bank Secrecy Act/Anti-money laundering infobase" (2010)
<http://www.ffiec.gov/bsa_aml_infobase/pages_manual/OLM_057.htm> (accessed on 20 September 2010).

³⁹ *Ibid.*

⁴⁰ *Supra* note 22 at 171.

⁴¹ 1992 (1) ZLR 249 (S).

predicate offence in this case was the dealing in foreign currency in a manner that was not allowed under Zimbabwean Law. In order to finance the transactions, money was paid into the lawyer's trust account. The trust account was used to clean the ill-gotten gains as and when the providers of the foreign currency were paid their dues and the lawyer got his commission. In this case, it appears that a global financial centre, Lloyds Bank, was used in order to carry out laundering activities. Section 63 of the Serious Offences Act 14 of 2004 deals with money laundering.⁴²

In the recent case of *The Law Society of the Cape of Good Hope v Petrus Johannes Roodt*,⁴³ the respondent caused the sum of R22 500,00 being a debt collection payment made by a debtor of his client, to be deposited into his business bank account. This was a contravention of Section 78(4) of the Attorneys Act 53 of 1979 and numerous rules of the Society, which stipulates that: "Any practicing attorney shall keep proper accounting records containing particulars and information of any money received, held or paid by him for or on account of any person, of any money invested by him in a trust savings or other interest-bearing account referred to in subsection (2) or (2A) and of any interest on money so invested which is paid over or credited to him".⁴⁴

Attorneys are officers of the court and a high standard of honesty and integrity is expected of them because they are the people in whom the public ought to have sufficient confidence to trust them with their affairs and with their funds.⁴⁵

⁴² A person or body corporate is deemed to have committed money laundering in circumstances where he:

"engages directly or indirectly, in a transaction, whether in or outside Zimbabwe, which involves the removal into or from Zimbabwe, of money or other property which is the proceeds of a crime: or receives, possesses, concedes, disposes of brings into or removes from Zimbabwe, any money or other property which is the proceeds of crime: and knows or ought to have reasonably known that the money or other property was derived or realised, directly or indirectly from the commission of an offence".

⁴³ (18621/2009) [2010] ZAWCHC 102 (28 May 2010).

⁴⁴ *Supra* note 30 at par 9.

⁴⁵ *Idem* at par 11.

2.3.5 Bureaux de Change and money transfer companies:

Bureaux de Change and money transfer companies are probably the foremost perpetrators of money laundering. Bureaux de Change was formally abolished in November 2002 by government decree, but they have continued to exist, albeit as informal structures often disguised as money laundering institutions.⁴⁶ Global financial centres make it possible to transfer or manually deposit or withdraw funds in many jurisdictions.⁴⁷ The key function of the domestic financial community is not to service the domestic economy's needs domestically; rather it's to service the domestic economy's needs wherever and however they are best serviced. Thus, a key measure for financial centres is how effective they are at providing choice and access to global financial services.⁴⁸

2.4 Typologies of money laundering

Money laundering consists of different types, but it is convenient to consider the patterns of money laundering as it consists out of three dimensions. These are:⁴⁹

- *Internal money laundering*: characterised by the laundering of proceeds of crime within a given country or assets to be used in committing crime there.
- *Incoming money laundering*: in which the assets laundered are derived from crime committed outside the country and thereafter introduced into the country.
- *Outgoing money laundering*: in which the proceeds of crimes committed within the country are exported to one or more countries for laundering.

⁴⁶ *Supra* note 22 at 173.

⁴⁷ *Ibid.*

⁴⁸ Frino "The handbook of World stock derivatives commodity exchanges" (2008) Published by Mondo Visione, University of Sydney <<http://www.exchangehandbook.co.uk/index.cfm?section=articles&action=detail&id=78439>> (accessed on 20 August 2010).

⁴⁹ Goredema "Money laundering in East and Southern Africa: An overview of the threat" Institute for Security Studies (2003) ISS Paper 69, 3 <www.iss.co.za/pub/monograph/no69.html> (accessed on 10 April 2010).

- In 2002, the Rand Afrikaans University's Centre for the Study of Economic Crime (currently known as University of Johannesburg), released a report on laundering trends.⁵⁰

2.4.1 Purchase of goods and properties:

Criminals often display their money by spending it on expensive clothes, personal effects, vehicles, property and furniture. In coastal areas boats, jet skis and yachts are purchased by criminals and in rural areas livestock and farm implements are bought.⁵¹ In the majority of cases, criminals want to enjoy the proceeds of their crimes and improve their lifestyle.

Real estate transactions are also abused in another way to launder money: proceeds of crime are paid into the trust account of an attorney or an estate agent by a new client who instructs the attorney or agent to assist him in acquiring a property. A few days later the client cancels the instructions and request the repayment of the money and thus in these cases the criminal uses the transaction to launder a sizeable amount of money through the trust account of the attorney or estate agent.⁵²

2.4.2 Abuse of businesses and business entities:

Criminals often use business activities and business enterprise to launder money.⁵³ These business enterprises can be unincorporated (for instance business trusts and partnerships) or incorporated (for instance close corporations and companies).⁵⁴ Business entities do not trade itself, because this entity will be a corporate cloak where the criminal can hide the laundered money.

⁵⁰ De Koker "Money laundering Trends in South Africa" (2002) *Criminal Reports* 80 <http://general.uj.ac.za/law/English/CenSec_2.htm> (accessed on 3 March 2010).

⁵¹ *Supra* note 37 at 89.

⁵² *Idem* at 90.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

The corporations can be registered personally or through an agent and it is interesting that front businesses often feature in laundering schemes.⁵⁵ These front businesses are actively trading and the proceeds are being used to fund the business activities. Examples of such businesses include bars, restaurants, “shebeens” and cell phone shops.⁵⁶

2.4.3 Use of cash and currency:

Criminals can spend their cash proceeds without using formal financial systems. Cash can be transferred physically in many ways, but during the RAU workshop⁵⁷, specific examples were given where cash was strapped to bodies of passengers in motor vehicles and aircraft or hidden in their luggage.⁵⁸ The methods being used to transfer cash across South African borders are the same.

Trust account of professionals such as attorneys and estate agents are sometimes used to place the cash amounts in the financial system.⁵⁹ In the case of gambling institutions, criminals or their assistants would buy gambling chips or credit in cash and after a short period of gambling, the gambler returns and exchange the chips for a cheque issued by the gaming institution.⁶⁰

2.4.4 Abuse of financial institutions:

South Africa has a well-developed financial system.⁶¹ Claasen provides the following perspectives on the South African banking industry.⁶²

⁵⁵ *Idem* at 91.

⁵⁶ *Ibid.*

⁵⁷ South African Money laundering Workshop, RAU (UJ), 5 December 2001.

⁵⁸ During a 10 week period in 2001, flights that left Cape Town for other South African destinations were monitored.

⁵⁹ Davids “Examples of typical Money laundering trends in DSO matters” (2001) unpublished paper. Presented at the South African money laundering typologies Workshop, 5 December 2001.

⁶⁰ Casinos have been changing their practices. They will now refuse to issue a cheque when the chips were bought for cash and will repay the gambler in cash.

⁶¹ *Supra* note 37 at 92.

“Total banking assets grew by 5.7% to R790 billion in the third quarter of 2000... The banking sector remains dominated by the big six banks whose combined assets account for approximately 86% of the market. However, this shows that South African banks do not have large foreign currency exposures.”

Exchange controls have deterred the large-scale abuse of the financial system by international launderers. According to the report, a sizable amount of dirty money is still deposited into bank accounts.⁶³ An arrangement is made with a family member who allows the criminal to deposit and withdraw money from his or her account. The first two convictions for statutory money laundering in South Africa were based on the abovementioned agreements.⁶⁴ These two unreported cases will be thoroughly discussed in Chapter 3.

2.4.5 Abuse of informal sector of the economy:

The prevalence of informal business enterprises in South Africa, coupled with the general absence of formal financial and other business records, allow for the abuse of such enterprises by launderers.⁶⁵ De Koker and Henning stipulate that:⁶⁶

“It is submitted that multi-disciplinary research in respect of all aspects of money laundering is urgently required in South Africa to assist the development of effective money laundering laws. Little is known about the extent of the problem and about the main methods employed by money launderers. Money laundering legislation may induce money launderers to divert criminal profits from the regulated formal business sector to the less regulated informal business sector.”

⁶² Claasen “Industry salient points” in KPMG, KPMG banking survey-Africa (2001) Johannesburg, 20-21.

⁶³ *Supra* note 37 at 92.

⁶⁴ *S v Dustigar* (Case no CC6/2000, Durban and Coastal Local Division unreported) and *S v Van Zyl* (Case no 27/180/98, Regional Court, CT unreported).

⁶⁵ Concerns has been expressed before about the lack of research about laundering and the informal sector.

⁶⁶ *Supra* note 37 at 93.

Sizeable amounts of cash are also deposited into community-based rotating credit schemes that operate general saving schemes (for instance “stokvels”) or dedicated savings schemes (for instance burial societies).⁶⁷ Although the majority of schemes cannot be penetrated by a launderer⁶⁸, a launderer could operate a sham stokvel as a front to launder money.⁶⁹ The abuse of the informal sector by launderers is a cause for concern, because laundering laws regulate the formal sector of the economy.⁷⁰ Proceeds can be integrated in the informal sector without entering the formal sector of the economy: if a launderer requires the proceeds to enter the formal sector, he can ensure that they do so at a stage when they have been laundered sufficiently and cannot be linked to any unlawful activity.⁷¹

2.4.6 Professional assistance:

There is clear evidence that knowledgeable persons do assist criminals to launder money. For example, in *S v Dustigar*⁷², an attorney and a police officer played key roles in planning and operating different laundering schemes.

2.5 Conclusion

The most dangerous consequence of money laundering schemes is that it places large amounts of money in the hands of criminals through all the money laundering trends and to put it to illegal use. Regulatory measures must be introduced to combat money laundering on a national as well as international standard. Thus, the most important way of preventing money laundering is that the financial institutions must recognise the situation.

Being suitable for a single phase of money laundering, a combination of different payment systems would enhance their suitability for the whole money

⁶⁷ Schulze “Legal aspects of the insurance premium” (1996) unpublished LLD thesis, University of South Africa.

⁶⁸ Schulze “Stokvels and the proposed Money laundering Control Bill” (1997), THRHR, 509.

⁶⁹ *Idem* at 516.

⁷⁰ *Supra* note 37 at 93.

⁷¹ *Idem* at 94.

⁷² Unreported Case no CC6/2000, Durban and Coastal Local Division.

laundering process – prepaid cards for the placement phase, mobile payment systems for the layering phase and virtual gold currencies for the integration phase.⁷³ Hence, money laundering is a complex and continuously changing process; however, the dimension of illegal money activities can be limited by suitable measures and approached or detected by early warning and supervision systems.



⁷³ Woda “Money laundering techniques with electric payment systems” (2006) *Information and Security: An International Journal* vol 18, 45.

CHAPTER 3

MONEY LAUNDERING AND THE IMPACT THEREOF ON SOUTH AFRICA

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3.1 Introduction

South Africa enacted various laws which is aimed at combating money laundering. In South Africa the primary legislation dealing with money laundering and terrorist financing are the Prevention of Organised Crime Act of 1998,⁷⁴ Financial Intelligence Act of 2004⁷⁵ and the Protection of Constitutional Democracy against Terrorists and Related Activities Act of 2004.⁷⁶ However, the financial aspects of POCDTAA have been incorporated in FICA.

⁷⁴ Hereafter referred to as POCA.

⁷⁵ Hereafter referred to as FICA.

⁷⁶ Hereafter referred to as POCDTAA.

3.2 Money laundering concept in South African Law

Money laundering in South African criminal law refers to a number of offences committed in terms of Prevention of Organised Crime Act of 1998.⁷⁷ This concept also overlaps with the common law (for instance, fraud and forgery) as well as statutory offences such as corruption.⁷⁸

POCA regulates the following:⁷⁹

- Criminalises racketeering and creates offences relating to activities of criminal gangs;
- Criminalises money laundering in general and also creates a number of serious offences in respect of laundering and racketeering;
- Contains a general reporting obligation for business coming into possession of suspicious property; and
- Contains mechanism for criminal confiscation of the proceeds of crime and or civil forfeiture of the proceeds and instrumentalities of offences.

POCA also creates two sets of money laundering offences:⁸⁰

- Offences involving proceeds of all forms of crime; and
- Offences involving proceeds of a pattern of racketeering.

3.3 Money laundering offences

POCA creates three main general money laundering offences:⁸¹

- Firstly, a person who knows or ought to know that property forms part of the proceeds of unlawful activities, commits an offence in terms of

⁷⁷ POCA defines money laundering as an activity which lies or is likely to have the effect of concealing or disguising the nature, source, location, disposition or movement of the proceeds of unlawful activities or any interest which anyone has in such proceeds and includes any activity which constitutes an offence in terms of s64 of the Act.

⁷⁸ *Supra* note 37 at 83.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ *Idem* at 84-85.

Section 4 if he enters into any agreement, arrangement or transaction in connection with the property;

- Secondly, a person commits an offence in terms of Section 5 if he knows or ought to know that another person has obtained the proceeds of unlawful activities and enters into any agreement, arrangement or transaction;
- Thirdly, a person who acquires uses or possesses property and who knows or ought to have known that it is of the proceeds of unlawful activities of another person, commits an offence under Section 6.

For purposes of POCA, a person had knowledge of a fact if he actually knew that fact, or if the court is satisfied that he believed there was a reasonable possibility of the existence of that fact and then failed to obtain information to confirm or disprove the fact.⁸²

3.4 Defences and penalties

A person who is charged with negligently committing an offence under Section 2(1)(a) or (b) or Section 4, 5 or 6, may raise that he reported a suspicion under Section 7 of POCA as defence.⁸³ The maximum fine is R100 million or imprisonment for a period not exceeding 30 years.⁸⁴

3.4.1 Money laundering and racketeering:

Racketeering is contained in Chapter 2 of POCA and creates a number of offences in connection with the receipt, use or investment of proceeds of a pattern of racketeering activity.⁸⁵ This phrase refers to any offence in Schedule 1 of POCA such as murder, rape, corruption, fraud, perjury, theft and robbery.⁸⁶

⁸² S 1(2) of POCA.

⁸³ *Supra* note 37 at 85.

⁸⁴ De Koker & Henning "Money laundering control in South Africa" (1998) Transactions of the Centre for Business Law, University of the Free State, 24.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

The following acts in connection with property constitute offences if the person knows or ought to know that the property is derived, directly or indirectly from a pattern of racketeering activity:⁸⁷

- Firstly an offence is committed in terms of Section 2(1)(a) if such property is received or retained and any part of it is used or invested, directly or indirectly, to acquire any interest in an enterprise, to establish or operate an enterprise or to fund any activities of an enterprise;
- Secondly, an offence is committed in terms of Section 2(1)(b) if a person receives or retains any such property, directly or indirectly, on behalf of an enterprise;
- Thirdly, an offence is committed under Section 2(1)(c) if a person uses or invests any such property, directly or indirectly, on behalf of any enterprise, to acquire an interest in an enterprise, to establish or operate an enterprise or to fund the activities of an enterprise.

A person convicted of a racketeering offence in terms of Section 2(1) is liable to a fine not exceeding R1000 million or imprisonment for a maximum term of life imprisonment.

3.4.2 Reporting of suspicious transactions:

In general, no obligation as to secrecy or any other restriction on the disclosure of information in respect of the affairs or business of another, whether imposed by any law, the common law or any agreement, affects this duty to report or to permit access to any register, record or other document.⁸⁸

The reporter is explicitly exonerated from liability for any breach of secrecy that occurs as a result of the disclosure of information with this reporting obligation.⁸⁹

Section 7 of POCA recognises only one exemption from the general reporting obligation, namely the attorney-client privilege in a criminal defence context.⁹⁰

⁸⁷ *Ibid.*

⁸⁸ S 7(5)(a) of POCA.

⁸⁹ S 7(5)(b) of POCA.

⁹⁰ This exemption is clearly limited to a criminal defence context. Information gleaned while undertaking ordinary civil work does not fall within the ambit of the exemption.

Once a report has been made under Section 7, care should be taken that information prejudicial to an investigation does not leak.

3.5 Money laundering and typologies

The following trends and typologies were discussed in Chapter 2 regarding money laundering in South Africa:

- Purchase of goods and properties.
- Abuse of businesses and business entities.
- Use of cash and currency.
- Abuse of financial institutions.
- Abuse of the informal sector of the economy.
- Use of professional assistance.

3.6 Prosecutions in South Africa

S v Dustigar

In *S v Dustigar*⁹¹ 19 persons were convicted for their involvement in the biggest armed robbery in South Africa's history. Seven of the accused were convicted as accessories after the fact on the strength of their involvement in the laundering of the proceeds and an eighth accused (Neethie Naidoo) were convicted on a count of statutory laundering under the Proceeds of Crime Act 76 of 1996.⁹²

Many of the accused were family members or third parties who allowed the abuse of their bank accounts to launder the money. In some cases, they also allowed new accounts to be opened and fixed deposits to be made in their names to launder the money. Accused No. 9 (Nugalen Gopal Pillay) was a practicing attorney. A robber who turned state witness testified that the accused approached him at the court. After confirming confidentially that the witness participated in the robbery, the accused said that he "must (then) have a lot of money". Some time later he approached the witness and offered

⁹¹ Unreported Case no. CC6/2000, Durban and Coast Local Division.

⁹² Supra note 35 at 94.

him an investment opportunity in a nightclub. The attorney then brokered the deal between the sellers and the witness.⁹³

He drafted a sales agreement in which the name of the purchaser was left blank. He handed R500 000 in cash to the sellers at his office as a deposit in terms of the agreement. He drafted another sham agreement in the name of another purchaser and also manipulated his trust account records to hide the identity of the purchaser and the actual amounts that were paid. Accused No. 9 was sentenced to five years imprisonment. The sentence can be converted into community service after at least one sixth has been served. Accused No. 13 (Balasoorain Naidoo) was a police captain who had served for 18 years in the SAPS. He created the laundering scheme that involved seven of the other accused. In the judgment the judge described him as a highly intelligent person with business acumen.⁹⁴

Of all the accused who have been convicted as accessories, accused No. 13's role was undoubtedly by far the most serious. He took upon himself the task of organising the so-called money laundering. He did so spontaneously and apparently with considerable vigour. He did so, furthermore, in enormous proportions. His ingenuity was limitless. In doing what he did he over-reached and manipulated not only police colleagues but also the women in his life who were under his influence, being accused Nos 15, 16 and 19. Accused No. 13 was sentenced to 15 years' imprisonment.⁹⁵

S v Van Zyl

In *S v Van Zyl*⁹⁶ the accused pleaded guilty to a charge of negligent laundering under section 28 of the Proceeds of Crime Act 76 of 1996. Van Zyl's sister-in-law stole R8.9 million from her employer.

Van Zyl allowed her to make 79 transfers of money totaling R7.6 million from the account of her employer into his personal bank account. Money was

⁹³ *Ibid.*

⁹⁴ *Idem* at 95.

⁹⁵ *Ibid.*

⁹⁶ Unreported Case no 27/180/98, Regional Court, Cape Town.



channeled, on instructions by his sister-in-law, to her by means of cheques made out either to her or to people nominated by her. Some withdrawals were also made at ATMs. According to the accused, he was led to believe that the money was the result of successful business ventures of, and investments by, his sister-in-law.

He acknowledged that his beliefs were unreasonable. He was sentenced to a fine of R10 000 and to imprisonment for ten years, suspended for five years.⁹⁷

S v Gayadin

The accused in *S v Gayadin*⁹⁸ operated several illegal casinos. He admitted to laundering the proceeds of his illegal gambling businesses by entering into arrangements with certain people to hide the money in offshore bank accounts on the Isle of Man and Jersey. More than R11 million was transferred to accounts in these jurisdictions. He was convicted of money laundering under POCA on 12 April 2002.⁹⁹

S v Selebi

In the *S v Selebi*¹⁰⁰ case, the accused was the former National Commissioner of the South African Police Services ("SAPS"). The accused was charged with two main counts. The first count was that the accused is guilty of the crime of corruption in contravention of s 4 (1) (a) of the Prevention and Combating of Corrupt Activities Act, No 12 of 2004 ("PCCA").

The first alternative count was that the accused is guilty of the crime of corruption in contravention of s 1 (1) (b) read with s 3 of the Corruption Act, No 94 of 1992 ("CA"). This count is in respect of the period 1 January 2000 to 26 April 2004.¹⁰¹

⁹⁷ *Supra* note 35 at 95.

⁹⁸ Unreported Case no 41/900/01, Regional Court, Durban.

⁹⁹ *Supra* note 35 at 96.

¹⁰⁰ 25/2009[2010] ZAGPJHC 53 (5 July 2010).

¹⁰¹ *Idem* at par 22.

The second alternative count was that the accused is guilty of the crime of corruption in terms of s 3 (a) and or 4 (1) (a) of the PCCA. This count is in respect of the period 27 April 2004 to 16 November 2005. The reason for the two alternative counts is to be found in the repeal of the CA by the PCCA. The PCCA came into effect on 27 April 2004.¹⁰²

The accused is a public officer in terms of the PCCA. A relationship developed between a Mr Glen Norbert Agliotti ("Agliotti") and the accused. This relationship became a generally corrupt relationship. The accused received sums of money and clothing for himself and on one occasion for the accuser's sons from Agliotti. The accused received the aforementioned gratification in order to act in a manner proscribed in s 4 (1) (a) (i) to (iv) of the PCCA and the accused did so act. The accused so acted by sharing with Agliotti secret information about an investigation against Agliotti conducted by United Kingdom law enforcement authorities; protecting Agliotti from criminal investigation; sharing with Agliotti information about SAPS investigations; sharing secret and or confidential information with Agliotti.¹⁰³

It is stated that the NPA and the DSO approached a number of people with a history of criminal activities, and offered them indemnities against prosecution on serious crimes ranging from murder, attempted murder, drug trafficking, money laundering, fraud, theft, intimidation, defeating the ends of justice and other crimes in exchange for false statements implicating the accused.¹⁰⁴

The accused is found guilty of corruption in contravening s 4(1) (a) of the Prevention and Combating of Corrupt Activities Act, 12 of 2004 and sentenced to 15 years imprisonment.¹⁰⁵

¹⁰² *Ibid.*

¹⁰³ *Idem* at par 80.

¹⁰⁴ *Idem* at par 100.

¹⁰⁵ *Idem* at par 428.

3.7 Money laundering control and legislation

3.7.1 The Financial Intelligence Centre Act 38 of 2001

The origins of FICA can be traced back to 1996 when the South African Law Commission published a money laundering control bill as part of a report entitled “Money laundering and related matters”.¹⁰⁶ The Department of Finance produced a new financial intelligence centre bill.¹⁰⁷ The provisions regarding the FIC and Money Laundering Advisory Council (MLAC) came into effect on 1 February 2002.

Apart from the establishment and operation of the FIC and the MLAC, FICA creates money laundering control obligations and regulates access to information.¹⁰⁸ Only two reporting institutions are listed in FICA, namely persons dealing in money laundering as well as persons dealing in Kruger Rands.¹⁰⁹

The money laundering control obligations include:¹¹⁰

- A duty to identify clients;
- A duty to keep records of business relationships and single transactions;
- A duty to report suspicious transactions; and
- Compliance obligations.

¹⁰⁶ South African Law Commission “Money Laundering and related Matters”, Projects 104, 1996.

¹⁰⁷ Smit “Clean Money, suspect source – turning organised crime against itself” (2001) *Monograph Series*, Pretoria, 59 <www.iss.co.za/pubs/monograph/no90/chap8.html> (accessed on 10 September 2010).

¹⁰⁸ Itzikowitz “Financial Institutions – 2002 RAU Annual Banking Law Update” (2002) *Criminal Reports* 22-28.

¹⁰⁹ S 1 read with Schedule 3 of FICA.

¹¹⁰ <www.investec.com/en_na/home/.../fica/fica_information.html> (accessed on 20 August 2010).

3.7.2 The Financial Intelligence Centre

The principal objective of the Financial Intelligence Centre¹¹¹ is to assist in the identification of the proceeds of unlawful activities and the combating of money laundering activities.¹¹²

The Financial Intelligence Centre will collect, retain, compile and analyse all information disclosed to it and obtained by it in the Act. It will not investigate criminal activity, but will provide info to advise and co-operate with intelligence services, investigating authorities and the SARS who will carry out such investigations.¹¹³ FICA creates a special relationship between the Financial Intelligence Centre and SARS. Section 29 explicitly requires all businesses to report any transactions that may be relevant to the investigation of any evasion or attempted evasion of a duty to pay a tax, levy or duty under any legislation that is administered by SARS.¹¹⁴

However, Section 36(2) of FICA allows the SARS to make reasonable procedural arrangements and to impose reasonable safeguards to maintain the confidentiality of the information that is disclosed in terms of FICA.¹¹⁵

3.7.3 The Money Laundering Advisory Council (MLAC)

The Money Laundering Advisory Council will advise the Minister of Finance on policies and the best practices regarding the combating of money laundering activities as well as the exercise by the Minister of his powers under FICA.¹¹⁶

The Money Laundering Advisory Council is one of the partners that must be consulted before the Minister of Finance may make, repeal or amend regulations under FICA, amend the list of accountable institutions, supervisory bodies or reporting institutions or exempt anyone from compliance with

¹¹¹ Hereafter referred to as FIC.

¹¹² S 3 of FICA.

¹¹³ S 44 of FICA.

¹¹⁴ *Supra* note 37 at 100.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

provisions of FICA.¹¹⁷ The Money Laundering Advisory Council consists of various government representatives and representatives of categories of accountable institutions and supervisory bodies.¹¹⁸

3.8 Money laundering control obligations

FICA imposes money laundering control obligations on primarily accountable institutions. These obligations include a duty to identify clients; a duty to keep records of business relationships and single transactions; a duty to report certain transactions; a duty to appoint a compliance officer; and a duty to train employees in their money laundering control obligations.

These obligations are primarily imposed on accountable institutions although some reporting obligations also extend to reporting institutions, persons involved in businesses and international travellers in general.

3.8.1 Duty to identify clients and to keep records:

Section 21(1) of FICA requires an accountable institution to establish and verify the identity of a prospective client before establishing a business relationship or concluding a single transaction with that client.

Accountable institutions are also required to establish similar facts in relation to clients that are parties to business relationships that were established before

FICA took effect. In addition, the institution must trace all accounts at the institution that are involved in transactions concluded in the course of that relationship.¹¹⁹ In terms of section 82(2)(1) this duty in respect of existing clients will only take effect one year after the general identification duty in section 21(1) takes effect. Accountable institutions are therefore allowed a year to identify their existing clients who still have active business relationships with the institution.¹²⁰

¹¹⁷ *Ibid.*

¹¹⁸ S 19 of FICA.

¹¹⁹ S 21(2) of FICA.

¹²⁰ S 46 read with S 68 of FICA.

It seems that the large banks and insurance companies will find it very difficult to comply with this obligation in such a relatively short period of time. Calls have therefore been made for an amendment to the legislation that will provide the larger accountable institutions with a more realistic timeframe within which this obligation could be met or, alternatively, for their complete or partial exemption from this obligation in the regulations.¹²¹

3.8.2 Cash transactions:

Prescribed particulars of every transaction to which an accountable institution or a reporting institution is party and which involves the payment or receipt by the institution of an amount of cash exceeding a prescribed amount, must be furnished to the FIC within a prescribed period.¹²²

'Cash' is defined in section 1 of FICA as coin and paper money of South Africa (or of another country if it is designated as legal tender, circulates as, and is customarily used and accepted as a medium of exchange in that country) and travellers' cheques.

A transaction is defined in section 1 of FICA as "a transaction concluded between a client and an accountable institution in accordance with the type of business carried on by that institution". A transaction with a reporting institution does not constitute a transaction as defined in section 1 of FICA because the definition limits the meaning of 'transaction' to transactions with accountable institutions. If 'transaction' in section 28 of FICA is defined in terms of the definition in section 1, reporting institutions will not have any reporting obligations in terms of that section. The same argument applies in respect of non-accountable institutions and the obligation to report suspicious transactions under section 29 of FICA.

3.8.3 Conveyance of cash to and from South Africa:

A person intending to convey an amount of cash in excess of a prescribed amount to or from South Africa must report prescribed particulars concerning that conveyance to a person designated by the Minister, before the cash is

¹²¹ *Supra* note 37 at 100.

¹²² S 28 of FICA.

conveyed. The designated person is then required to send a copy of the report to the Financial Intelligence Centre without delay.¹²³

3.8.4 Electronic transfer of money from and to South Africa:

If an accountable institution sends money in excess of a prescribed amount through electronic transfer across the borders of South Africa, or receives such a sum from abroad, on behalf of or on the instructions of another person, it must report prescribed particulars of that transfer to the Financial Intelligence Centre within a prescribed period after the transfer.¹²⁴

3.8.5 Suspicious and unusual transactions:

The Financial Intelligence Centre Act 38 of 2001 compels certain persons and institutions to identify and verify the identity of a new client before any transaction may be concluded or any business relationship is established.¹²⁵

In April 2004, the FIC issued its first guidance note relating to the approach that should be followed. This guidance note advocates a risk-based approach in respect of the verifications of certain clients.¹²⁶

The Money Laundering Control Regulations require accountable institutions to verify the address particulars supplied by a client. Many clients are unable to provide any information or documentation which can reasonably serve to verify their residential particulars.¹²⁷ This problem is not confined to those who live in informal housing, but formal residential addresses can not be

¹²³ S 30(2). Any person who willfully fails to report the conveyance of cash into or out of South Africa in accordance with S 30(1) commits an offence (S 54). It is important to note that this offence can only be committed by a person who willfully fails to report the conveyance. This offence carries a penalty of imprisonment for a period not exceeding 15 years or a fine not exceeding R10 million (S 68). If the person referred to in S 30(2) fails to send a report regarding the conveyance of cash to the FIC in accordance with that section, he commits an offence under S 55. This offence carries a penalty of imprisonment for a period not exceeding five years or a fine not exceeding R1 million (S 68(2)).

¹²⁴ S 31 of FICA.

¹²⁵ De Koker "Client Identification and Money Laundering Control: Perspectives on the Financial Intelligence Centre Act 38 of 2001" (2004) *TSAR* 715.

¹²⁶ *Ibid.*

¹²⁷ *Idem* at 727.

verified. The difficulties regarding verification created predicaments for financial institutions, because the Financial Institutions made a commitment in the Financial Sector Charter to purposefully and substantially increase access to financial services.¹²⁸ FICA is explicit about the need to re-identify current clients, thus the re-identification scheme clearly poses financial and practical challenges to banks.¹²⁹ It is therefore relevant to consider the motivation behind, and the benefits of the scheme. The two main motivations that are often cited is required by International Anti-Money Laundering and Combating of the Financing of Terrorism standards and that it is crucial to enable accountable institutions to identify suspicious transactions by their clients.¹³⁰

FICA creates a very broad category of suspicious or unusual transactions that must be reported and also applies this duty to a broad spectrum of persons. Any person who carries on a business, who manages or is in charge of a business or who is employed by a business and who knows or suspects certain facts must report the grounds for the knowledge or suspicion and prescribed particulars regarding the transaction to the FIC within a prescribed period after he acquired the knowledge or formed the suspicion.¹³¹

3.8.6 Access to information:

A number of provisions of FICA regulate the access to information held by the Financial Intelligence Centre as well as the Financial Intelligence Centre's access to information. Important provisions allowing the FIC access to information include the following:

- An authorised representative of the FIC may, by virtue of a warrant issued in chambers by a magistrate, judge or regional magistrate, examine and make extracts from or copies of records kept under section 22.¹³² These records contain details regarding the identification of the clients, business relationships and single transactions. The warrant is

¹²⁸ CI 8 fo the Financial Sector Charter.

¹²⁹ *Supra* note 125 at 733.

¹³⁰ *Ibid.*

¹³¹ S 29(1) of FICA.

¹³² *Supra* note 37 at 104.

only required if the records are not public records. It may only be issued if there are reasonable grounds to believe that the records may assist the FIC to identify the proceeds of unlawful activities or to combat money laundering activities;

- The FIC may require an accountable institution to advise whether a particular person is or was a client, represented a client or was represented by a client;¹³³
- Reporters of transactions may be required to furnish the FIC with additional information regarding the report and the grounds for the report;¹³⁴
- The FIC may apply to a judge for a monitoring order requiring an accountable institution to furnish information to the FIC regarding transactions concluded with the institution by a specified person or transactions conducted in respect of a specified account or facility at the institution. No notice of the application or hearing is given to the person involved in the suspected money laundering activity.¹³⁵ The order may be issued if there are reasonable grounds to believe that the person has engaged or may engage in an unusual or suspicious transaction or that the account has been or may be used for such purposes. The order will lapse after three months unless it is extended;¹³⁶
- If a supervisory body or the SARS knows or suspects that an accountable institution is wittingly or unwittingly involved in an unusual or suspicious transaction, it must inform the FIC and furnish the FIC with any records regarding that knowledge or suspicion which the Centre may reasonably require to achieve its objectives.¹³⁷ If the FIC believes that a supervisory body or the SARS has such information, it may request the body or SARS to confirm or rebut that belief. If the belief is

¹³³ S 27. Failure to furnish this information to the FIC constitutes an offence (s 50) that carries a penalty of imprisonment for a period not exceeding 15 years or a fine not exceeding R10 million (s 68).

¹³⁴ S 32 of FICA.

¹³⁵ See S 35(4) of FICA.

¹³⁶ S 35(2) of FICA.

¹³⁷ S 36(1) of FICA.

confirmed, certain information must be provided to the FIC.¹³⁸ These bodies may make reasonable procedural arrangements and impose reasonable safeguards to maintain the confidentiality of any information.¹³⁹

3.8.7 Search, seizure and forfeiture:

Although POCA regulates general criminal confiscation of proceeds of crime as well as civil forfeiture of such proceeds and instrumentalities, cash that is transported across South Africa's borders may be forfeited under FICA if the necessary report has not been filed.

FICA provides for the seizure of any cash which is transported or is about to be transported across the borders of South Africa if the cash exceeds the prescribed limit and there are reasonable grounds to suspect that an offence under section 54 has been or is about to be committed. If a person is convicted of the offence, the court must, in addition to any punishment that may be imposed, declare the cash amount that should have been reported, to be forfeited to the state.¹⁴⁰ A similar duty is imposed on the court if a person is convicted under section 64 (conducting transactions to avoid giving rise to a reporting duty under FICA).

The forfeiture may not affect any innocent party's interests in the cash or property. To qualify for this protection, a person must prove:¹⁴¹

- that he or she acquired the interest in that cash or property in good faith; and
- that he or she did not know that the cash or property in question was:
 - conveyed as contemplated in section 30(1) or that he or she could not prevent such cash from being so conveyed; or
 - used in the transactions contemplated in section 64 or that he or she could not prevent the property from being so used, as the case may be.

¹³⁸ S 36(2) of FICA.

¹³⁹ *Ibid.*

¹⁴⁰ S 70(4). This provision obviously raises excessive fines and proportionality concerns.

¹⁴¹ See S 70(6) of FICA.

FICA also provides that innocent parties who meet the above criteria may approach the court within three years of the forfeiture order in order to retrieve their property or interests or to receive compensation. Although FICA provides protection for the rights and interests of innocent third parties, it is important to note that the protection does not extend to interested parties who were merely unaware of the intention to commit an offence.¹⁴² It is limited to parties who can prove that they did not know that the cash or property was to be conveyed across the borders of South Africa or used in transactions contemplated in section 64.¹⁴³

3.8.8 Funding of terrorism:

The new democratic South Africa inherited a comprehensive set of anti-terrorism legislation from the previous regime. Schönreich identifies more than 30 different laws that were enacted in the past to combat terrorism and related acts.¹⁴⁴ However, many provisions of these laws are unconstitutional and outdated. They reflect the apartheid regime's pre-occupation with its own safety and security and are inadequate to meet the current international standards.

This brief discussion focuses on one aspect only, namely the ability of the current South African law to address the funding of terrorism in terms of international standards laid down in instruments such as the 1999 United Nations International Convention on the Suppression of the Financing of Terrorism or in the United Nations Security Council Resolution 1373 and the Eight Special Recommendations on Terrorist Financing of the Financial Action Task Force.¹⁴⁵

The latter requires, for instance, that:

¹⁴² *Supra* note 37 at 110.

¹⁴³ *Ibid.*

¹⁴⁴ Chapter 5 of the South African Law Commission, "Review of security legislation (terrorism: section 54 of the Internal Security Act, 1982 (Act no 74 of 1982)", Part 1, Discussion Paper 92, Project 105, July 2000.

¹⁴⁵ Norton & Shams, "Money laundering law and terrorist financing: Post-September 11 responses. Let's step back and take a breath", *2002 RAU Annual Banking Law Update*, Lexis Nexis <www.litigation-essentials.lexisnexis.com> (accessed on 20 April 2010).

- countries should take immediate steps to ratify and implement the relevant Convention and the relevant United Nations resolutions;
- countries should criminalise¹⁴⁶ the financing of terrorism and associated money laundering;
- countries should implement measures to freeze funds and other assets of terrorists;
- financial institutions should be required to promptly report transactions if they have reasonable grounds to suspect that they are linked to terrorism;
- countries should render mutual legal assistance to one another in this respect;
- countries should regulate alternative remittance systems;
- financial institutions should identify the originators of transfers, should ensure that the information remains with the transfer and should scrutinize transfers which do not contain complete originator information; and
- countries should review the adequacy of their laws and regulations that relate to entities that can be abused for the financing of terrorism, in particular non-profit organisations.

Two South African organisations, Qibla and People against Gangsterism and Drugs (Pagad),¹⁴⁷ have been classified by the US State Department as terrorist groups. Despite the fact that criminal prosecutions have been instituted against many members of these organisations, the organisations are not banned in South Africa. Although not much is generally known about their funding it seems as if they rely heavily upon their members and supporters for contributions. Pagad, for instance, obtains its funds through fundraising projects. Money is also often collected at Pagad meetings and rallies.¹⁴⁸ The South African Law Commission is currently drafting an anti-

¹⁴⁶ *Ibid.*

¹⁴⁷ Boshoff, Botha and Schönreich, "Fear in the City-Urban terrorism in South Africa", ISS Paper, SAGE publications, Pretoria, 2001 <www.eai.sagepub.com/content/16/2/165.refs> (accessed on 10 August 2010).

¹⁴⁸ *Supra* note 120.

terrorism bill. A draft was published for comment in July 2000. Comment was received and the work is continuing.¹⁴⁹

3.9 Conclusion

South Africa has a comprehensive framework for money laundering control. The challenge that it now faces is to implement the system. If done correctly, the system could contribute to the development of the South African economy as well as the combating of crime in the country. It is clear that South Africa will be able to rely on the available international expertise in money laundering control in this process.¹⁵⁰

However, South Africa faces many challenges that are foreign to developed economies, for instance those in respect of the abuse of its informal economy by launderers. South Africa will have to formulate its own answers and strategies in this regard.¹⁵¹ Greater cooperation between the countries in the sub-region will enable South Africa and the other countries to pool their expertise and resources and to develop systems that will effectively address money laundering as it is manifested in their economies.

Measures must be put in place to train the various officials who will be expected to work with the new legislation such as the police, prosecutors and magistrates. Such measures would include joint training programs for these officials. It may well be that the government might not have the resources. If so, consideration should be given to seeking donor funding and the necessary resource persons.

Only when the law-enforcement authorities are adequately trained regarding the substance of the legislation, will the legislation be living documents. For example, the police will be enabled to investigate money laundering as a

¹⁴⁹ *Ibid.*

¹⁵⁰ *Supra* note 37 at 121.

¹⁵¹ *Ibid.*

crime and not only as a by-product of other predicate offences.¹⁵² They would also be able to investigate the assets of suspects, follow up the paper trail in order to account for ill-gotten property, seize the property and ultimately have it confiscated. This would give credence to the goal of taxing the criminal in his pocket, heighten the risk factor in relation to criminal conduct and ensure that crime in the ultimate analysis does not pay.¹⁵³



¹⁵² Goba “Profiling Money laundering in Eastern and Southern Africa” (2003) International Centre for Criminal Reform and Criminal Justice 48 <www.ICCLR.law.ubc.ca> (accessed on 10 August 2010).

¹⁵³ *Ibid.*

CHAPTER 4

MONEY LAUNDERING AND THE IMPACT THEREOF: THE CASE OF BOTSWANA, KENYA, TANZANIA, MALAWI AND ZIMBABWE

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4.1 Introduction

Organised criminal activities of which money laundering and the financing of terrorism form part, have been on the increase in Botswana, Kenya, Tanzania, Malawi and Zimbabwe. The incidence of smuggling, poaching, trading in illicit drugs, corruption, fraud, embezzlement, misappropriation and theft of public funds, racketeering, illegal arms dealing and most recently terrorism, have been on the rise.¹⁵⁴ This chapter does not seek to highlight or explain the perceptions of the financial sector; it rather explores some of the key issues at the heart of contemporary concerns about money laundering and considers them as they relate to Southern Africa.

¹⁵⁴ Mwema (2002) "Current situation and countermeasures against money laundering: Tanzania's experience" paper presented at the SA Regional Conference on Money laundering, Johannesburg, 26-28.

The increase of these criminal activities has been facilitated by several factors including globalisation, liberalisation of the economy and advances in technology. Taking into account the abovementioned, the impact of money laundering on these five countries will be discussed.

4.2 Botswana

The concept of money laundering is very familiar to First World (Developed Countries) than to Third World (Developing Countries) countries. Botswana is a country that went from rags to riches and has led people to believe that there is no serious financial crime in this country. In order for the financial institutions to curb money laundering, the law must provide a broadband definition of money laundering.

Sections 14 of the Proceeds of Serious Crime Act (PSCA) deals with money laundering.¹⁵⁵ Botswana is classified as a middle income country and indices on leadership and governance and enjoys a reputation for low levels of corruption and crime.¹⁵⁶ The impact of these characteristics is that it consistently boosts socio-economic development.¹⁵⁷ Although these characteristics are a high point, criminals (money launderers) will take advantage thereof. As stated earlier, Botswana never conducted an assessment on risk for money laundering or financing of terrorism. Although there have been very few prosecutions for money laundering, however, in 2009 suspected Al Qaeda terrorists were being detained for money

¹⁵⁵ A person commits money laundering if he:

“-engages directly or indirectly in:

-a transaction that involves money; or

-any other property that is the proceeds of a serious offence;

-receives, possesses, conceals or brings into Botswana, any money or property that is the proceeds of a serious crime and the person knows or ought to reasonably know that such money or property is derived or realised from an unlawful activity”.

¹⁵⁶ Transparency International Corruption Perception Index, 2007 <www.transparency.org> (accessed on 15 April 2010).

¹⁵⁷ Chepete, Bank of Botswana, “Press Release: Standards and Poor’s, Botswana Sovereign Credit Rating” (2008) <www.bankofbotswana.bw/files/attachments/t102387288.pdf> (accessed on 15 April 2010).

laundering and attempting to establish various forms of terrorist structures in Botswana.

Further, money laundering issues include that:¹⁵⁸

- Al Qaeda agents rarely use banks in their business transactions.
- Botswana is believed to be a soft target because of its relatively weak finance and company regulating regimes.

The existence of organised crime in Botswana was observed in the report to the UN Congress on Crime Prevention and Criminal Justice and was said that:¹⁵⁹

“Transnational organised crime continues to threaten the safety and wellbeing of the people of Botswana and hampers social and economic development. Not only has this type of crime increased in scope, but it has also increased in intensity and sophistication. It is evident from the latest Police Statistics that Transnational crime and criminal syndicates have expanded their range of activities from robbery, motor vehicle theft, drugs and arms trafficking to which colour crime.”

Over the past few years there are non-designated institutions dealing in value-based commodities, such as lawyers, notaries and other independent legal professionals. Up till date, there have been two lawyers convicted of money laundering in Botswana. Like members of the legal profession, estate agents have been known to accept large payments in cash and since the purchase of property is assured to be a key money laundering technique, this area might constitute a source of vulnerability in Botswana.¹⁶⁰ While this industry gives the impression of a heavy local presence, it is believed that the really big money goes to the principals located outside the country.¹⁶¹

¹⁵⁸ Madzima “Money laundering and Terrorism Financing risks in Botswana” (2009) ISS Paper 184 4 <www.iss.co.za/uploads/Paper184/pdf> (accessed 20 September 2010).

¹⁵⁹ The 11th UN Congressional Crime Prevention held in Bangkok, Thailand from 18 April to 25 April 2005 <www.un.org/webcast/crime2005/statements/24bot_eng.pdf> (accessed on 20 April 2010).

¹⁶⁰ *Supra* note 132 at 6.

¹⁶¹ *Ibid.*

There are a number of foreign communities resident in Botswana, but because of restricted access to resources that are easily accessible to citizens, some members of these communities are tempted to engage in corrupt practices, such as bribing government officials and run companies using locals as fronts.¹⁶² Botswana is one of countries that is not under threat of terrorism, but the country still has an international obligation to prevent abuse of its systems for the purpose of both money laundering and the financing of terrorism. While there have been great strides in fighting money laundering in general and in Botswana itself, the initiatives are not without critics nor have they escaped politics.¹⁶³ Confronting “anti-money laundering”¹⁶⁴ and “combating the financing of terrorism”¹⁶⁵ will be discussed in context of the challenges in Botswana:

- There is constant debate on the efficacy of the AML/CFT generic standards. Political perceptions in the region appear to subscribe to the view that the Bratton Hood institutions assume a critical role in pressurising developing countries to toe the line. These institutions will not do business in jurisdictions that fail to implement international AML/CFT standards.¹⁶⁶
- There are challenges of a practical nature, for example, even though banks keep records of transactions, tracing them is still problematic in several developing countries. The issue of banks not being able to maintain proper records is a curious one, because most banks in the region are either subsidiaries of, or partly owned by, overseas banks.¹⁶⁷
- At the operational level, a contributory factor to lethargy in the fight against money laundering, especially on the part of the government

¹⁶² *Idem* at 9.

¹⁶³ *Idem* at 12.

¹⁶⁴ Hereafter referred to as AML.

¹⁶⁵ Hereafter referred to as CFT.

¹⁶⁶ Hubschle “Terrorists financing in Southern Africa: Are we making a mountain out of a mole hill?” (2007) Institute for Security Studies: ISS Paper 132 Pretoria <www.eisa.org.za/EISA/Libraryacc20070330.html> (accessed on 20 September 2010).

¹⁶⁷ *Supra* note 132 at 15.

agencies, is that salaries are relatively low and there is a high attrition rate.¹⁶⁸

- A key issue is that the manner in which statistics are generated is different for different jurisdictions and agencies. In Botswana, such statistics are not structured to inform the strategy against organised crime, money laundering and the financing of terrorism. While crime is under control, the Botswana Police Service has consistently warned of an increasing component of organised crime.¹⁶⁹
- There is a legal debate on criminal law in addressing money laundering in Botswana. There is no law on civil forfeiture of assets. From a legal point of view, the disadvantage of criminal forfeiture is that criminal case law requires proof beyond reasonable doubt, thus making the standard of proof very high and difficult to enforce.¹⁷⁰
- It has been observed in various situations that there is a dilemma in developing countries: effectively enforcing money laundering laws comes with the inherent risk of scaring investors away and negatively impacting on the much sought after Foreign Direct Investment (FDI). Some authorities subscribe to the view that the absence of political will emanate from the fact that the politicians are most likely to gain from the status quo.¹⁷¹

The implementation of effective solutions becomes problematic as mentioned earlier, but this has not stopped international institutions from agreeing on generic international standards on AML/CFT.

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

¹⁷⁰ Charles Goredema “Tracking money laundering in East and Southern Africa: An overview of Capacity” (2004) Pretoria: Institute for Security Studies, 1 <www.iss.co.za/pubs/monograph/no107/chap2.html> (accessed 20 September 2010).

¹⁷¹ Johnson “Is the global financial system AML/CFT prepared?” (2008) *Journal of Financial Crime*, vol 15:1, 7-21.

4.3 Kenya

The poor record of law enforcement in Kenya and the poor keeping of public records on registered businesses, make it difficult to detect instances of money laundering.¹⁷² The Corruption Perception Index ranked Kenya third from the bottom as the most corrupt country in the world in 1996. Since then, Kenya ranked 84th out of 91 countries.¹⁷³

In 2002, a panel of judges from Tanzania, Uganda, South Africa and Canada was invited to review the state of the administration of justice and advice on how to bolster public confidence in the institutions responsible for justice. In their view, Kenya's judiciary was in need of "a short sharp shock".¹⁷⁴ Professor Yash Ghai, head of the Constitution of Kenya Review Commission, is said to have described Kenya's judiciary as incompetent and lethargic, noting that it has never delivered a landmark decision.¹⁷⁵ The level of crime in Kenya is high and the police can scarcely cope and in respect thereof, the crimes often go un-investigated. There is, however, no strong motive to launder money in Kenya, because law enforcement is very weak. It is not possible to discuss all the forms of money laundering in Kenya; therefore the types will be limited in discussion.

4.3.1 Proceeds of Corruption:

Corruption in Kenya takes many forms which results in the loss of public funds or other resources.¹⁷⁶ During the 1990's, a scandal involving the alleged

¹⁷² *Supra* note 14 at 137.

¹⁷³ Mati and Githago "Judicial decisions and the fight against corruption in Kenya" (2001) unpublished paper contributed to the International Commission of Jurists State of the rule of law report, Nairobi.

¹⁷⁴ See the Constitution of Kenya Review Commission's "Main Report of the Constitution of Kenya Review Commission" 2002, 163.

¹⁷⁵ Abdullahi "The judiciary in Kenya: Who is to reform it?" (2002) *The Advocate*, Law Society of Kenya, 2 <www.iss.co.za/pubs/monographs/no90/chap5.html> (accessed on 20 April 2010).

¹⁷⁶ *Supra* note 14 at 141.

export of non-existent gold and diamonds occurred in Kenya. It had a profound negative effect on the economy. The Goldenberg scandal¹⁷⁷, as it is called and known for, will be discussed below.

The Goldenberg scandal is a series of financial scams involving high-ranking state officials which together led to an estimated loss of US\$500 million by the Government of Kenya. The Goldenberg scandal follows:¹⁷⁸

Some time in 1987, Pattni made a proposal to the government to grant him exclusive rights to export gold from Kenya, where it only exists in small, uneconomic quantities. Its mining and sale have never interested the government. As an incentive, Pattni proposed that the government should pay him 'export compensation' to give him sufficient profit margins to fight the black market trade. The government did not act on his proposal immediately.¹⁷⁹

In 1990, the government accepted a renewed proposal from Pattni, whose proposals now included diamonds as an item for export. Pattni also requested that he be allowed to set up his own commercial bank to handle the trade transactions. Three irregularities had occurred up to this stage:¹⁸⁰

- Firstly, the export compensation level of 35% was in excess of the allowed legal limit of 20%.
- Secondly, giving Goldenberg exclusive rights to export gold, contravened anti-monopolies legislation.
- Thirdly, Kenya has no known deposits of diamonds that could be the subject of export trade.

From 1991, Pattni went to work. He started sending invoices to the government for compensation, as agreed. His bankers, the First American Bank, produced records in evidence of payments that Pattni had received

¹⁷⁷ The discussion on the Goldenberg Scandal is based on research done by Warigi "Fool's Gold: Goldenberg and the worst criminal financial scam in Kenya's history" (2001) Transparency International, unpublished.

¹⁷⁸ *Supra* note 14 at 142-147.

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

from the exporters. These were at variance with existing invoices. Oddly, the invoices and payments made to Pattni were in Kenyan shillings yet they purported to emanate from overseas transactions. The Central Bank of Kenya queried the invoices. Through the direct intervention of the governor, Eric Kotut, the invoices were paid without these discrepancies being resolved. More invoices came, leading to more queries. More queries were raised: why was a single consignee remitting payment in so many different currencies?

Other than receiving money for non-existent exports, Pattni's Goldenberg was involved in more scandals. They would pay back the government once their overseas partners paid them. Goldenberg, naturally, claimed to be an exporter, and was paid Sh185, 816,800 as pre-shipment finance for the gold and diamonds to be traded.¹⁸¹

This money was to be refunded through Delphis Bank (formerly the Nairobi branch of the Bank of Credit and Commerce International—BCCI). Pattni invoiced his overseas consignees in Kenyan currency but claimed compensation from the government in foreign currency. Using the pre-shipment finances, Goldenberg amassed forex certificates, which it then redeemed at a premium. The last instrument of which Pattni took advantage during this period was the export retention scheme. Introduced in 1992, this scheme allowed exporters to retain a portion of their foreign exchange earnings in special accounts. This would be available to them conveniently in subsequent transactions that needed foreign exchange.¹⁸²

The case against them has never been decided, and has been the subject of endless interlocutory applications. Ten years on, the case is still in court. The then-Vice President, George Saitoti, who was Minister for Finance when the scandal happened, was never charged despite much public pressure for him to be made accountable. Also, Kanyotu, the security intelligence boss, was never charged in court. The Central Bank of Kenya, which lost the US\$210 million through the spot contracts and the further US\$69 through an overdraft

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

given to Pan African Bank, sued Pattni and his companies for the recovery of the money. To further complicate the litigation Pattni has sued, together with the Central Bank of Kenya, the companies through which he acted in the Goldenberg scandal, and which he still controls.¹⁸³

4.3.2 Violent Crime:

It is difficult to give a precise definition of crime. But crime can be roughly divided into two broad categories. The first is covert, less visible crime, which often comes under the rubric of corruption. This includes criminal activities such as embezzling public funds, filing false information, etc. Such crimes are mainly committed by the elite in society – the economically well-to-do and the politically powerful.¹⁸⁴

The second category is overt crime, which is easily identifiable. It involves the physical or psychological injury to other people. Physical criminal violence or physical assault includes homicide, armed robbery, car-jacking, attempted murder, manslaughter, rape, etc. Psychological violence includes lies, threats, brainwashing, etc. These serve to diminish mental potentialities. In addition, there is also violent crime against property - car-jacking, house breaking, etc.¹⁸⁵

This kind of crime, which is rightly called violent crime, causes direct harm. It is a big contributory factor that disturbs security in society. Violent crimes are committed mainly by members of the lower social strata, whose lives are characterised by poverty.¹⁸⁶

Cairo, Lagos and Johannesburg are the cities that feature most prominently in literature on violent crime in Africa. There are other cities, however, whose

¹⁸³ *Ibid.*

¹⁸⁴ Gimode “An anatomy of Violent Crime and Insecurity in Kenya: The Case of Nairobi (1985 – 1999)” (2001) 235, *Africa Development*, vol XXVI, 1&2 <www.unpan1.un.org/intradoc/groups/public/.../UNPAN011852.pdf> (accessed 10 September 2010).

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*

violent crime rate is equally or relatively high or is fast becoming so. Nairobi, the capital of Kenya, is one of those cities.¹⁸⁷

In the last five years, Nairobi and other major Kenyan cities have witnessed significant increases in property prices, against the backdrop of a global and national economic downturn, and increased unemployment. As property prices and rental rates in Kenya skyrocket way above industry projections, speculation is rife that some of the unexplained capital being injected into real estate is laundered money. Media reports have suggested that the sudden hike in property prices, even beyond the reach of the middle class, is being caused by 'piracy money'.¹⁸⁸

According to the Central Bank of Kenya's February 2010 monthly report, the figure for 'errors and omissions' in the balance of payment statistics increased from \$1.1 billion in January 2009 to \$2.1 billion in January 2010.¹⁸⁹

There are two forms of "violent crime" in Kenya:¹⁹⁰

- Cattle rustling; and
- Violent robbery.

The second form of violent crime is "cattle rustling", where cattle rustled in Kenya is converted into meat for sale in the domestic and international market. The cattle are driven for hundreds of miles from the point of theft to where they are slaughtered.¹⁹¹ How is cattle rustling a form of money laundering? Cattle rustling are now a commercial rather than cultural practice. According to Human Rights Watch:¹⁹²

¹⁸⁷ *Idem* at 2.

¹⁸⁸ Mukundi "Money laundering control in Kenya – New Dawn or False promise" (2010) <<http://www.the-african.org/blog/?p=268>> (accessed 20 September 2010).

¹⁸⁹ *Ibid.*

¹⁹⁰ *Supra* note 14 at 149.

¹⁹¹ *Ibid.*

¹⁹² Human Rights Watch (2002) "Playing with fire" p24.

“Stolen livestock have been sold, often across international borders, rather than being kept in communities. Non-pastoralist riders and youths, in addition to herders themselves, have been drawn into cattle rustling.”

In traditional society, cattle stolen from other communities were usually kept by the raiding community. In the commercialised form of cattle rustling, the cattle are sold in the Kenyan market.¹⁹³ Commercial cattle rustlers usually act in complicity with law enforcement officials who, instead of arresting them, provide them with security.¹⁹⁴

The last form of violent crime is “violent robbery”. Fuelled by the increasing number of guns in Kenya, armed robbers have greatly increased in its cities, many of them targeting banks.¹⁹⁵ Although many of these robberies do not lead to large financial losses, they are of concern because of the serious injury, death and personal trauma associated with robbery.¹⁹⁶

4.3.3 Invasion of small arms:

During the Cold War, the arms were brought in by the United States and the Soviet Union, in competition with each other, but since then, other sources of arms have been developed.¹⁹⁷ Kenya has developed its own capacity to manufacture bullets, but the manufacture of these bullets is of complete secrecy.¹⁹⁸ Studies show that the movement of small arms in Kenya is wholly informal and difficult to detect or control. Prices vary greatly, but Kenya is a preferred market, because the prices are relatively high compared with other neighbouring countries.¹⁹⁹ The effect of the ready availability of small arms is that the security situation has worsened considerably. Small arms have given criminal enterprise a higher priority as an economic activity.

¹⁹³ *Supra* note 14 at 152.

¹⁹⁴ *Idem* at 153.

¹⁹⁵ Ngunyi “Liberalising a bandit economy” (2000) *Daily Nation* 8.

¹⁹⁶ *Supra* note 14 at 153.


¹⁹⁷ *Idem* at 159.

¹⁹⁸ Human Rights Watch, p24.

¹⁹⁹ *Ibid.*

Often conflicts in which small arms are used assume an international dimension involving communities in different countries.²⁰⁰ According to the Human Right Watch report, wealthy people import and sell guns to criminal networks in Kenya.²⁰¹ Furthermore, arms dealers who broker arms to other parts of Africa live in Kenya and may also be supplying the country as well.²⁰² Some arms in transit to other parts of Africa in fact end up in the local market because of the complicity of corrupt officials. Measures to tackle money laundering would, it follows, have to address the way politics is conducted in Kenya. A large part of the Kenyan economy is informal or is in the process of becoming so.

4.4 Tanzania



Money laundering is a domestic and transnational problem that is endangered by organised crime and illegal acts.²⁰³ The SADC sub-region consists mainly of Southern and Central African states, with Tanzania located in both Eastern and Southern Africa. Except for South Africa and Namibia, the states in the sub-region obtained their independence in the 1960's and 1970's.²⁰⁴ An estimate US\$7 billion infiltrated the sub-region from other regions, including East Asia, North America and Europe.²⁰⁵ No one can tell how much money is laundered in or through Tanzania, because detection methods are poor or entirely lacking.

Tanzania is one of the least developed countries in the sub-region with weak political, economic, communication and financial sectors. The US State Department Report goes on to say that:²⁰⁶

²⁰⁰ *Ibid.*

²⁰¹ *Supra* note 14 at 160.

²⁰² *Idem* at 161.

²⁰³ Bagenda "Combating money laundering in the SADC Sub-region: The case of Tanzania" (2003), 50 <www.iss.co.za/pubs/monographs/no90/chap3.html> (accessed 20 April 2010).

²⁰⁴ *Idem* at 51.

²⁰⁵ Xiang "US-Financial war on terrorism vs International financial system" (2002) *Journal of Contemporary Chinese International Relations*, China Institute of Contemporary International Studies: Beijing, 21.

²⁰⁶ *Supra* note 179 at 51.

“Money laundering happens in Tanzania, but a very weak financial sector, under-trained and under-funded law enforcement makes it difficult to tackle and persecute.”

In Tanzania anyone can introduce into the country any amount of money in cash without any questions being asked. Proceeds from illicit activities form the backbone of internal and external money laundering. Money laundering in Tanzania has two dimensions:

- Domestic dimension; and
- Transnational dimension.

In the domestic scene, the proceeds of illegal activities are first laundered by injecting them into legal economic activity or transferring them to another country.²⁰⁷ The following are major areas from which domestic money laundering profits are derived:²⁰⁸

- Tax evasion;²⁰⁹
- Abuse of religious charities;²¹⁰
- Bureaux de change;
- Stock theft, car theft, arms and gem smuggling; and
- Exchange control violations.²¹¹

The following are major areas from which proceeds are derived for external money laundering:²¹²

²⁰⁷ *Idem* at 52.

²⁰⁸ *Ibid.*

²⁰⁹ One important area where tax evasion has been reported to be a severe problem is customs duties.

²¹⁰ The abuse of charities occurs when the sanctioned government status of a charitable organisation is abused either by the charitable organisation, by taxpayers and donors, or third parties, such as fraudsters who pose as charitable organisations or tax return preparers who falsify tax returns to defraud the government. The abuse has serious and increasing risks to governments and the wider community.

²¹¹ With only six percent of the population engaged in the formal financial sector, money laundering is more likely to occur in the informal non-bank sectors. Criminals have been known to use front companies, including bureaux de change, to launder funds. Real estate and used car businesses also appear to be particularly vulnerable.

²¹² *Idem* at 53.

- Tax evasion;
- Debt conversion;
- Public debt payment; and
- Fraud from the private company.

Policy makers need to have knowledge of the ways in which money laundering is carried out and the extent to which it occurs. There are two types of money laundering:²¹³

- Money laundering in the internal environment; and
- Money laundering in the external environment.

In terms of the first type, a particular country is the base for money laundering activities. The main actors include government officials and their allies outside the state system. Their prominence in money laundering stems from the fact that they control the major means of production in the state sector, which also includes the parastatal sector.²¹⁴

In the second type, the actors are externally based and use the receiving country as an investment location or a transit location. Transnational crimes, which give rise to most transnational money laundering, are drug trafficking and international corruption.²¹⁵ International trading companies and multinationals bribe government officials to award them contracts, especially for projects in developing areas. A news correspondent, Peter Reeves, states the following:

“Bribery and corruption lead to a society where economic and political decisions become twisted. They show social progress, hamper economic developments and drive up prices for products and services.”²¹⁶ The following create an inductive environment for laundering:

²¹³ *Idem* at 55.

²¹⁴ *Idem* at 56.

²¹⁵ *Idem* at 57.

²¹⁶ Reeves “Tougher laws to tackle international corruption” (2002) Bank of Tanzania, *Quarterly Report*, 32 <www.iss.co.za/pubs/monographs/no90/chap3.html> (accessed 20 September 2010).

4.4.1 Corruption:

The Tanzanian state sector was singled out as the most corrupt sector, with law enforcement agencies, especially the police, judiciary, Revenue Authority and Public Procurement, topping the list of the most corrupt departments in the state system.²¹⁷

The Chairman of the Presidential Commission of inquiry into corruption of Tanzania, Judge Joseph Sindi Wariobe, has stated that some Ministers, members of Parliament and top officials of the government are involved in corrupt practices and that corruption is rampant in the executive, the legislature as well as the judiciary.²¹⁸ The former European Commission delegate, Peter Beck Christiansen, is reported to have remarked that corruption was “by far the biggest challenge” facing the government.²¹⁹

4.4.2 Embezzlement, misappropriation and theft of public funds:

Senior government officials have been implicated in diversion of billions of shillings from the medical funds at the country’s diplomatic missions abroad. In one incident the wife of a former Minister of State in the President’s Office fraudulently obtained US\$63, 450 from Tanzania’s High Commission in Ottawa, Canada in 1997, supposedly for her medical treatment at the University Of Washington School Of Medicine in the United States. However, the hospital disowned the receipts, saying that it had not treated the Minister’s wife.²²⁰

4.4.3 Smuggling of minerals, arms and dangerous materials:

It is reported that between 1995 and 2002 Tanzania lost more than US\$300 million through the smuggling of tanzanite from the country.²²¹ Another media report indicated that the country was losing over US\$25 million worth of gold

²¹⁷ *Supra* note 14 at 58.

²¹⁸ *Ibid.*

²¹⁹ Mniwasa “Detection and Suppression of money laundering in Tanzania” (2004) The Sunday Observer: Tanzania, <www.iss.co.za/pubs/monographs/no108.html> (accessed on 1 August 2010).

²²⁰ *Ibid.*

²²¹ *Supra* note 195.



and gemstones annually, depriving the country of revenue.²²² Both international and local criminals in Tanzania have generated huge sums from the illicit trade in arms and the supply of military logistics to warring factions in war-torn Burundi, the DRC and Rwanda.²²³ It is said that Tanzania has become a major route for legal and illegal arms trafficking to warring factions in the above-named countries as the wars in the Great Lakes region continue.²²⁴

The Minister of Finance observed in parliament that:²²⁵

“Money laundering creates instability and impedes the government’s ability to make appropriate economic and fiscal decisions. Failure to prevent money laundering allows organisations to accumulate considerable political, economic and financial power, which can ultimately undermine national peace and democratic systems. Money laundering generally harms society by circling the wheels of financial crime, which has no boundaries. Laundered funds provide financial support for illicit drug dealers, terrorists, arms dealers and other criminals to operate and expand their criminal empire.”

The government has acknowledged that the laws against money laundering have several loopholes. The Minister of Finance has stated that the government is identifying legal and administrative loopholes and that new legislation will conform to the standards of international legal instrument.²²⁶

4.5 Malawi

Launderers are continuously looking for new routes for laundering their funds. Economies like that of Malawi, with growing or developing financial centres

²²² *Ibid.*

²²³ Anonymous “The Nairobi declaration of the proliferation of illicit small arms and light weapons in the great lakes region and the horn of Africa” (2000) *The East African (Kenya)* <www.recsasec.org/pdf/Nairobi%20declaration.pdf> (accessed on 15 August 2010).

²²⁴ *Ibid.*

²²⁵ Regional Centre on Small Arms “Tanzania arms destruction” (2010) <www.dse.de/ef/arms/maupri.htm> (accessed on 16 August 2010).

²²⁶ The Minister was addressing parliament on money laundering and capitalisation of the informal sector at Dodoma, Tanzania on 8 February 2003.

but inadequate controls, are particularly vulnerable. To fight money laundering in Malawi, a comprehensive anti-money laundering regime must be established as well as acting in liaison with all the institutions susceptible to money laundering.²²⁷

The formal retail and mercantile commercial sector in Malawi continues to deal mainly in cash transactions.²²⁸ The growing trend of refusing payment by cheque has raised concern among industry captains, who says the practice frustrates the country's efforts to move towards a cash-free financial system if left unattended.²²⁹ Foreign exchange bureaux are highly exposed to money laundering. In some instances, no record of transaction is entered in any books and it is at the discretion of the customer whether the transaction should be recorded or whether his passport should be stamped.²³⁰ The Fiscal Police is the police unit that deals with economic crimes. It is not clear what measures, if any, it has put in place to detect and control money laundering.²³¹

The Reserve Bank of Malawi is established under the Reserve Bank Act 1964, where Section 48(i) stipulates that:²³²

“The Bank shall supervise banks and other financial institutions to safeguard the liquidity and solvency of such transactions and ensure their compliance with the monetary regulations under the Act.”

The Reserve Bank has the power to call upon commercial banks and other financial institutions to submit financial and other statements regarding their business and any additional info the Bank may require.²³³

²²⁷ *Supra* note 195 at chapter 2.

²²⁸ *Supra* note 14 at 100.

²²⁹ Goredema “Observations on typologies of money laundering in the SADC” (2002) *Nations Newspaper*, 1.

²³⁰ *Ibid.*

²³¹ *Ibid.*

²³² Reserve Bank Act, section 48(i) of 1964.

²³³ *Supra* note 14 at 104.

Malawi has registered remarkable progress in the fight against money laundering, Dr. Wilson Banda, General Manager of Reserve Bank of Malawi, said in February this year. Dr. Banda said this during training on Capacity Enhancement in Financial Institutions on anti-money laundering and combating financing of terrorism which he officially opened as guest of honor at the Capital Hotel.²³⁴

Dr. Banda said the presence of the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act of 2006 that led to the establishment of the Financial Intelligence Unit is one of the factors that attest to this fact. He added that a landmark milestone came about when the country's Financial Intelligence Unit was accepted to become a member of EGMONT²³⁵:

“Within southern Africa, there are only three countries that have been accepted by specialized EGMONT group. Only 6 African countries are members of EGMONT,” said Dr. Banda. The six countries are Malawi, South Africa, Senegal, Mauritius, Nigeria and Egypt.²³⁶

The FIU has also managed to train some financial institutions in AML like banks, forex bureaus, banks, stock brokers and insurance companies. “We have also developed the National Anti-Money Laundering and Combating of Financing Terrorism Strategy which will be launched soon,” he said.²³⁷

Formal, structured co-operation is clearly lacking between financial institutions and government departments. If money laundering is to be detected, then a multi-disciplined approach between government agencies and financial institutions is desirable, but the capacity to carry out this approach is hindered because.²³⁸

²³⁴ Financial Intelligence Unit “Profiling money laundering and Financing of Terrorism” vol 1 (2010) <www.fiumalawi.gov.mw/newsletter> (accessed on 30 June 2010).

²³⁵ The EGMONT group of Financial Intelligence Units. This is an informal group for the stimulation of international co-operation.

²³⁶ *Ibid.*

²³⁷ *Ibid.*

²³⁸ *Idem* at 111-112.

- An unwillingness to share information is common government agencies and is usually the result of lack of mutual trust which gives rise to fear of possible leakage material to unauthorised persons.
- There are differences in the levels of technology being applied by the relevant institutions and in the skills level of their personnel. This often acts as a barrier to effective and efficient info exchange.

The Security Council, acting under Chapter VIII of the Charter of the United Nations, took some mandatory decisions in respect of all nations and decided that all nations shall:²³⁹

- Criminalise the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;
- Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the directions of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;
- Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities action on behalf of or at the direction of such person;

²³⁹ Adopted by the Security Council at its 4385th meeting on 28 September 2001 <www.unodc.org/pdf/crime/terrorism/res_1373_english.pdf p2> (accessed on 20 August 2010).

- Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;
- Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information;
- Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;
- Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other states or their citizens;
- Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflect the seriousness of such terrorist acts;
- Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings.

In addition, states are also called upon to:²⁴⁰

- Find ways of intensifying and accelerating the exchange of operational information, especially regarding actions or movements of terrorist persons or networks; forged or falsified travel documents; traffic in arms, explosives or sensitive materials; use of communications technologies by terrorist groups; and the threat posed by the possession of weapons of mass destruction by terrorist groups;

²⁴⁰ *Idem* at 3.

- Exchange information in accordance with international and domestic law and co-operate on administrative and judicial matters to prevent the commission of terrorist acts;
- Co-operate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such acts;
- Become parties as soon as possible to the relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism of 9th December 1999;²⁴¹
- Increase co-operation and fully implement the relevant international conventions and protocols relating to terrorism and Security Council resolutions 1269 (1999) and 1368 (2001);
- Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts;
- Ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organisers or facilitators of terrorist acts, and that claims of political motivation are not recognised as grounds for refusing requests for the extradition of alleged terrorists.²⁴²

4.6 Zimbabwe

Accountable institutions are very important in the third stage of the laundering process where proceeds need to be re-introduced into the financial system.²⁴³

In Zimbabwe, the following list mirrors the specifications of the South African Act.²⁴⁴

²⁴¹ *Ibid.*

²⁴² *Ibid.*

²⁴³ Goredema "Criminal Justice and the truth in Zimbabwe: A necessary introspection" (1999) *South African Journal of Criminal Justice*, 155.

²⁴⁴ *Ibid.*

- The legal profession;
- Banks of all types;
- Estate agents;
- Insurance companies;
- Casinos or gambling houses;
- Accountants; and
- Stock exchange.

Their significance in money laundering will be discussed below.

4.6.1 The Legal profession:

There exist a relationship of utmost good faith between lawyer and client. The importance of lawyer and client relationship was well articulated by Wigmore, who ascribes to it the following four cornerstones:²⁴⁵

- That the communication originates with the confidence that it will not be disclosed;
- That the element of confidentiality is essential to the full and satisfactory maintenance of the relationship between the parties;
- That the relationship is one which in the opinion of the community ought to be sedulously fostered; and
- That the injury that will endure to the relationship by the disclosure of the communication is greater than the benefit thereby gained for the correct disposal of the litigation.

Where a lawyer knows that there is an underlying criminal activity, he has the responsibility of disclosure to the police. Lawyers can detect money laundering, because they are the chief interpreters of the law and clients tend to confide in them in criminal activity, which encompass money laundering. Lawyers in Zimbabwe act as investment advisors and register or administer trusts. Lawyers are more likely to come across laundered funds compared to other professionals and therefore are well placed to detect the menace.²⁴⁶

²⁴⁵ *Supra* note 19 at 125.

²⁴⁶ *Idem* at 127.

4.6.2 Banks:

Because of competition and globalisation, banks have had to create sophisticated products in order to meet customer expectations.²⁴⁷ The following examples show that the Bank's supervision of funds is very weak:²⁴⁸

*Motsi v Attorney-General and ORS*²⁴⁹ - Mr. Davis Tendai Midzi, then-Chief Executive of Zimbabwe Newspapers, used his influence to remove money from companies and externalise it to the United Kingdom and other places. Part of the money was used to purchase spare parts, which were brought into the country through Mr. Midzi's nominee companies. This case shows the inability of banks to detect and stop money laundering. Through proper reporting of suspicious transactions, these transgressions would have been nipped in the bud.

4.6.3 Estate agents:

As previously shown, money launderers often purchase immovable property. This is the reason, in most jurisdictions, estate agents who are at the centre of property transfer issues, are considered to be accountable institutions. Property sellers in Zimbabwe understandably prefer payment in cash, but because of the US Dollar trading at a high rate, transactions have been concluded in foreign currency through estate agents.²⁵⁰

4.6.4 Casinos and Gambling houses:

Gamblers use cash to purchase casino chips of considerable value, after a few bets, they encash the chips and are paid out in "clean cash". The legislation on casinos and gambling establishments is aimed at ensuring that the practice of gambling is carried out equitably and there is no reference to money laundering available in the Lotteries and Gaming Act.²⁵¹

²⁴⁷ *Idem* at 139.

²⁴⁸ *Idem* at 140.

²⁴⁹ 1995 (2) ZLR 278 (H).

²⁵⁰ *Ibid.*

²⁵¹ *Ibid.*

4.6.5 Stock Exchange:

In Zimbabwe, shares with dual listings, such as Old Mutual, have been used to externalise foreign currency in contravention of the law. The shares are purchased on the local bourse using Zimbabwean Dollars and offload it in international markets for hard currency, which is externalised.²⁵²

All transactions on the listed equities market have to be registered on the stock exchange. Existing legislation to regulate activities on the exchange does not deal with laundering matters.

4.7 Conclusion

It is very difficult at present to apprehend and prosecute money launderers due to inadequacies in the legislation and in the relevant institutions. Money laundering detection requires special skills and knowledge of how this offence is committed. With the development of technology, the largest and highest standards of action can be obtained through regional co-operation with developed countries or international agencies. The challenges facing Africa in implementing AML/CFT measures are enormous. They range from the structure of countries' economies to law human and institutional capacity and the scarcity of resources.²⁵³ Undertaken at both national and regional level, it is clear that political will is not lacking. What is lacking however is a systematic means or comprehensive strategy for enhancing the capacity of African countries so that they are able to implement AML/CFT measures effectively.²⁵⁴

The international community is yet to reach consensus on the definition of organised crime and terrorism. The result of this absence of consensus is that discussions on the subjects of money laundering (which is a direct offshoot or organised crime) and financing of terrorism (which logically relies on what

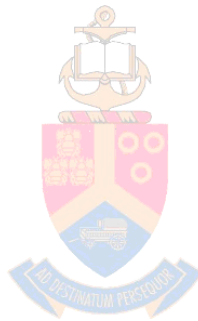
²⁵² Gubbay "Money laundering Supervision Act" (1998) *Journal on Money laundering Control* 277-286.

²⁵³ Humphrey "Fighting money laundering: the challenges in Africa" (2007) ISS Paper 152 11. <www.iss.co.za/uploads/paper152.pdf.html> (accessed 20 September 2010).

²⁵⁴ Humphrey "Money laundering: the case of Eastern Africa, Past and Present Perspectives" (2002) 8-11. <www.iss.co.za/uploads/paper152.pdf.html> (accessed 20 September 2010).

constitutes terrorism) remains shrouded with contradictions. The implementation of effective solutions therefore becomes problematic. However, this has not stopped international institutions from agreeing on generic international standards on AML/CFT.²⁵⁵

Competent authorities must not only have the necessary legal tools to complement the international standards, but they must have sufficient human resources retention programmes. More importantly, there is a need to review the risks of money laundering and the financing of terrorism on a regular and ongoing basis so that interventions remain relevant.²⁵⁶



²⁵⁵ *Supra* note 129.

²⁵⁶ *Ibid.*

CHAPTER 5 PREVENTION OF MONEY LAUNDERING IN SOUTH AFRICA

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5.1 Introduction

In today's open and global financial world characterised by rapid mobility of funds and the introduction of new payment technologies, the fight against money laundering needs to be globally coordinated in a comprehensive manner. Money launderers seek the weak links in the chain, and the consequences for developing economies like ours can be extremely detrimental. Confronting the menace of money laundering becomes even more challenging in our sub-region, with its largely cash-based economies, its less developed and loosely regulated financial, business and intermediary sectors, its underground banking or money-remitting services, and the gaps in its legal and law enforcement infrastructures and operational capacities.²⁵⁷

Money laundering can only be fully addressed on an international scale. Criminals operating without regard to national boundaries will always try to exploit the weaker links in the anti-money laundering chain.²⁵⁸ Thus, countries and institutions which have not yet put into place the necessary protective measures may find themselves attracting the sort of businesses that prudentially regulated financial centres have turned away. Seriously

²⁵⁷ Goredema "Money Laundering Control in Eastern and Southern Africa" (2000) *Criminal Reports*, 182.

²⁵⁸ *Ibid.*

addressing these gaps to contain the adverse impact of money laundering is no longer an option for us, but a real necessity. We cannot afford to ignore or sideline these daunting issues without suffering the resultant consequences.²⁵⁹

5.2 The key challenges for money laundering control

The most basic measure in combating money laundering is criminalisation. Developments in the international sphere, and in the sub-regional economic fabric, have rendered it almost obligatory to impose criminal sanctions on money laundering as a primary and not just a derivative offence.²⁶⁰ It is, however, one thing to proscribe the activity, but quite another to create a viable enforcement system to give practical effect to such a measure. At the outset of establishing a regulatory regime, it is important to identify the core institutions on which to impose the onerous responsibility of detecting and combating money laundering. Recently adopted legislation in South Africa, for instance has tabulated 19 kinds of institutions.²⁶¹ It is anticipated that each institution will experience its own compliance challenges.

The money laundering most often takes place in several different states at the same time, sometimes even in different areas of the world.²⁶² This is why the international cooperation through the judicial institutions such as the extradition, the rogatory commission, foreign definitive decisions' enforcement, distraint and confiscation of objects resulted from criminal acts

²⁵⁹ The Minister's remarks were made in a keynote speech at an ISS seminar on money laundering in East and Southern Africa, held at the Leriba Lodge, Centurion, South Africa, on 21 and 22 November 2002.

²⁶⁰ The two most prominent international instruments are the 1988 Vienna Convention (on illicit drugs and psychotropic substances) and the 2000 Palermo Convention (against transnational organised crime). In the wake of the terrorist atrocities of 11 September 2001, the United Nations Security Council followed up with a resolution targeting the funding of terrorist activities, numbered 1373/2001.

²⁶¹ See the Financial Intelligence Centre Act, 38 of 2001.

²⁶² Lutescu and Bucur "Money laundering – an international phenomenon" (2008) *International Journal of Juridical Sciences*, 154.

done in other states, as well as new methods of cooperation between the national agencies from different states.²⁶³

Only the existence of a common body of laws can help the institutions from different states in their effort to efficiently cooperate in this matter.

This chapter traverses developments in the Southern African member states of the ESAAMLG, namely Botswana, Lesotho, Malawi, Mauritius, Mozambique, Namibia, the Seychelles, South Africa, Swaziland, Zambia and Zimbabwe.

5.3 Southern Africa as a destination of laundered funds

Insofar as the discussion above shows that laundered funds have tended to flow in certain directions, it raises two issues: firstly, what makes a country attractive to such funds, and secondly, does the sub-region attract laundered funds? In a study prepared by Blum, Levi, Naylor and Williams, offshore financial systems were identified as being amenable to manipulation by money launderers.²⁶⁴ Various components were found to be both characteristic and predisposing.

The authors highlighted many factors, nine of which seem to be of particular importance. They are not necessarily listed in order of precedence:²⁶⁵

- an environment in which banking institutions can easily be established, with the predominant focus being on basic capitalisation requirements at the expense of minimal due diligence investigations;
- availability of instruments and mechanisms to facilitate anonymous conduct of investment business, while allowing the creator to retain a beneficial interest—examples are trusts, bearer shares and international business corporations;

²⁶³ *Ibid.*

²⁶⁴ Blum, Levi, Naylor and Williams “Financial havens, banking secrecy and money Laundering” (1998) A study commissioned by the United Nations Office for Drug Control and Crime Prevention, 1998, accessible at <www.knab.gov.lv/uploads/eng/dnicola_offshore.pdf> (accessed 20 April 2010).

²⁶⁵ *Ibid.*

- prevalence of bank-like institutions with the capacity to transfer funds rapidly, such as brokerages and bureaux *de change*;
- banking secrecy laws, or laws that create formidable impediments to the discovery of beneficial holders of bank accounts;
- availability of mobile or walking accounts, these being accounts opened on the understanding that any funds above a certain amount credited to the account should be immediately transferred to another location. Funds can be transferred thereafter to one or more other accounts;
- proliferation of loosely regulated casinos;
- availability of free trade zones;
- facilitation by intermediaries in establishing corporate entities, opening accounts, dishonestly or without any kind of due diligence;
- permissibility of shell companies.

In recent times, many government officials have been caught in the process of trafficking money into and outside the country. Often times, such officials are politicians, a status they leverage on to circumspect justice.²⁶⁶

5.3.1 The Prevention of Organised Crime Act:

The Prevention of Organised Crime Act²⁶⁷ indirectly deals with money laundering matters. Section 3 points out that a criminal offence is committed:²⁶⁸

- if any agent corruptly solicits or accepts or obtains, or agrees to accept or attempts to obtain, from any person a gift or consideration for himself or any other person as an inducement or reward:
- for doing or not doing, or for having done or not done any act in relation to his principal's affairs or business: or
- for showing or not showing, or for having shown, favour or disfavour to any person or thing in relation to his principal's affairs or business.

²⁶⁶ Shehu "Promoting financial sector stability through effective AML/CFT regime" (2010) *Journal of Money Laundering Control*, 139.

²⁶⁷ Act 121 of 1998.

²⁶⁸ *Supra* note 19 at 145.

Corruption is usually predicate to money laundering. The Act deals with circumstances of specification, gives obligations to banks to produce documents and deals with corrupt activities that are the major predicate offences in money laundering.

5.3.2 The Companies Act:

Companies have limited liability in terms of the Companies Act²⁶⁹ and this is the position the world over. However, the fact that limited liability exists makes criminals feel comfortable to use companies as fronts in their dealings. It is difficult to attribute culpability in such transactions. The Act predominantly deals with common law crimes and therefore is derelict when it comes to money laundering issues.²⁷⁰

Section 216 of the new Companies Act, which is not in operation yet, regarding any penalties, will apply and reads as follows:

Any person convicted of an offence in terms of this Act, is liable—

- (a) in the case of a contravention of section 213(1) or 214(1), to a fine or to imprisonment for a period not exceeding 10 years, or to both a fine and imprisonment; or
- (b) in any other case, to a fine or to imprisonment for a period not exceeding 12 months, or to both a fine and imprisonment.

5.3.3 The Banking Act:

The Banking Act²⁷¹ confines itself to monitoring the operations of banks and financial institutions. To this end it prescribes the minimum capital requirements for the operation of banking institutions. It lays down the qualities that are required of the top officers of banking institutions, especially relating to the Chief Operating Officer and the Chief Accounting Officer. In

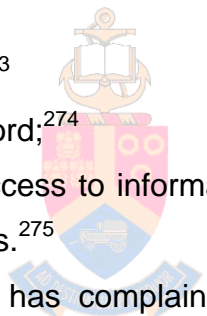
²⁶⁹ Act 71 of 2008.

²⁷⁰ *Ibid.*

²⁷¹ Act 94 of 1990.

theory, if these people are of high integrity, as required by the Banking Act, they are unlikely to be a conduit for money laundering activities.²⁷²

The Financial Intelligence Centre Act 38 of 2001 was established to combat money laundering and financing of terrorism and to impose duties on institutions and other persons who might be used for money laundering purposes. Chapter 3 of the Financial Intelligence Centre Act provides for control measures for money laundering and financing of terrorist and related activities. The following measures are relevant to the Banking Act 94 of 1990 to control money laundering and to achieve the requirements of the Financial Intelligence Centre Act:

- 
1. Duty to identify clients;²⁷³
 2. Duty to keep proper record;²⁷⁴
 3. Reporting duties and access to information, especially with suspicious and unusual transactions.²⁷⁵

The Reserve Bank Governor has complained that he does not have the authority to issue licenses, despite being responsible for the supervision of banks, as this power lies with the Ministry of Finance.²⁷⁶

5.3.4 The Customs and Excise Act:

The main objective of the Customs and Excise Act²⁷⁷ is to create a mechanism for charging companies and individuals in respect of imported goods. Where invoices are not produced for imported goods, the officials will use a deemed value for the determination of duty payable. Launderers are quite happy to pay duty for goods that are not properly valued, which destroys the audit trail.²⁷⁸

²⁷² *Idem* at 147.

²⁷³ S 21 of the Financial Intelligence Centre Act 38 of 2001.

²⁷⁴ S 22-26 of Act 38 of 2001.

²⁷⁵ S 27-41 of Act 38 of 2001.

²⁷⁶ *Ibid.*

²⁷⁷ Act 19 of 1994.

²⁷⁸ Goredema "Organised crime in Southern Africa: Assessing legislation", Institute for Security Studies (ISS), Pretoria, 2001.

Forfeiture of goods can occur in circumstances where there has been a false declaration of goods. The forfeiture clauses are not linked to money laundering.

However, individuals may feel obliged to report criminal activities when they come across them to avoid being treated as accomplices.

The Act is not designed to deal with money laundering. Any linkage to the phenomenon is incidental.²⁷⁹

The structure of the current Act is not suitable to serve as a vehicle for implementing a modern system of control in accordance with current international trends and best practice.²⁸⁰ What is required is a fundamental restructuring of our customs and excise legislation not only to give effect to Kyoto and other binding international instruments but also to establish a sound, clear and logical legislative framework that would enhance and “speak to” the many other legislative instruments that rely for their implementation on customs control.²⁸¹

5.4 The prognosis for medium-term money laundering control in Southern Africa

For efforts against money laundering to be sustainable, all countries in the region must:²⁸²

- develop a comprehensive appreciation of the structure of their economies and the relative proportions of the formal and informal sectors;
- ratify the Palermo Convention and implement its prescriptions in respect of predicate money laundering activities and anti-money laundering strategies;

²⁷⁹ *Ibid.*

²⁸⁰ Anonymous “Introduction to the Draft Customs Control Bill and Draft Customs Duty Bill” (2010) Workshop at Price Waterhouse Cooper <www.pwc-customs-client-workshop.pdf> (accessed 30 June 2010).

²⁸¹ *Ibid.*

²⁸² *Supra* note 18.

- have a clear strategy that defines the roles and responsibilities of each component in its delivery. It is clear that the public sector (law enforcement and revenue collection) and private institutions have to jointly combat money laundering.²⁸³ The factors that discourage the use of the formal sector should be identified and ameliorated to create a broad business sector;
- determine the best manner of integrating roles and responsibilities and allocating resources to key components to enable them to discharge their responsibilities;²⁸⁴
- regularly monitor the incidence of money laundering on a sector-by-sector basis, using objectively verifiable indicators, with a view to identifying and reviewing high risk spheres and improving the targeted efforts of reporting institutions;
- ratify and implement the international instruments that target predicate transnational criminal activities which have been linked to money laundering, such as corruption;
- ensure that there is uniformity in the integration and functioning of corresponding law enforcement institutions and structures in different countries; and
- complement the mutual legal assistance arrangements to which international instruments commit them by entering into memoranda of understanding relating to the exchange of information and mutual technical and financial assistance. Information exchange should embrace the full range of what is relevant to profiling high risk individuals and corporate entities and agreement to facilitate it should be flexible enough to allow modification in the light of new developments.

International strategy regarding money laundering and the finance of terrorism involves a number of actions. These include criminalising money laundering and ensuring that there are legislative measures that allow such as

²⁸³ Adapted from suggestions in a report by Philip Robinson, Sector Leader, Financial Crime, Financial Services Authority, entitled Anti-money laundering regulation - next generation developments, given at the City & Financial Conference, London, 21 April 2004.

²⁸⁴ *Ibid.*

investigation and seizure of the proceeds of crime to be taken.²⁸⁵ The strategy also co-opts the private sector by requiring it to take certain action such as customer identification and the reporting of suspicious transactions.²⁸⁶

5.5 Conclusion

The commitment of governments in Southern Africa to combat money laundering implies the existence of political will. The challenges facing Africa in implementing AML/CFT measures are enormous. They range from the structure of countries' economies to low human and institutional capacity and the scarcity of resources.²⁸⁷ All these underscore the fact that Africa is different from other continents, so a one-size-fits-all approach is bound to fail. This being so, it is important for the global and regional AML institutions not to put undue pressure on the African continent to implement AML/CFT measures without designing, in parallel, a solution framework to the challenges facing the continent.²⁸⁸

Financial institutions have made some progress towards implementing legislative and administrative controls on money laundering but much more still has to be done to ensure full compliance and enforcement of laws.²⁸⁹ Even if the banking industry is effective in detecting money laundering, the second leg of that process has to be enforcement of civil and/or criminal sanctions as deterrents to would-be launderers and as a punishment to launderers.²⁹⁰

²⁸⁵ Charene Nortier "The role of the South African Regulatory Authorities in combating money laundering and terrorist financing perpetrated through alternative remittance systems" (2006) unpublished thesis.

²⁸⁶ *Idem* at 77

²⁸⁷ *Supra* note 18.

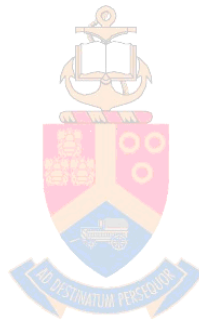
²⁸⁸ *Ibid.*

²⁸⁹ *Supra* note 19 at 145.

²⁹⁰ *Ibid.*

The police must prioritise economic crime in order to fight money laundering, without being hampered by political pressure. The need for training to equip them to deal with complex money laundering schemes cannot be overemphasised. Training has to be extended to other institutions and government departments.

Money laundering is connected regardless of technological point of view that is our interest with organized crime, drugs, corruption and financing of terrorism. The United Nations General Assembly Special Session on the World Drug Problem which took place in New York in June 1998 aims to increase international cooperation to combat money laundering.²⁹¹ According to the expected political declaration was to enact laws, run programmes and promote cooperation among judicial and law enforcement authorities to prevent, detect, investigate and prosecute the crime of money laundering by the year 2003.²⁹²



²⁹¹ Poremska “Money laundering as a cybercrime of white collars” (2009) Masaryk University, *Journal of Law and Technology* 139.

²⁹² *Ibid.*

CHAPTER 6

Conclusion and Recommendations

The limitations of this study is to address the money laundering problem not just at a national level, but also international. South Africa enacted various laws to deal with money laundering, but it is difficult to implement it when dealing with one of the selected African countries who do not deal with these laws or legislation. An attempt must be made to collude the African legislation with South Africa's legislation, therefore to combat money laundering globally. All the information is secondary sources to explain the legal framework of money laundering and the combating thereof. The emerging strategy is to have specialised agencies focus on specific areas such as economic crime, anti-narcotics and laundering. South Africa faces challenges that are foreign to developed countries and especially these selected African countries, but South Africa will have to formulate its own answers and strategies. To co-operate with these selected African countries, South Africa will develop an effective system to address money laundering.

There is consensus that laundering is occurring in the region on a significant scale. The statistics often cited are based on the results of the Australian developed Walker model. According to the model, a total of US\$22 billion was laundered through the financial systems of southern Africa in 1998. Of this US\$15 billion was generated within the region. It was estimated that US\$7 billion was infused from outside the region, with East Asia accounting for US\$1 billion North America for US\$5 billion and Europe US\$1 billion.²⁹³

Forensic auditors, Price Waterhouse-Cooper, found that, in terms of susceptibility to money laundering, 50% of ESAAMLG²⁹⁴ countries are

²⁹³ Smit "Clean money, suspect source: Turning organised crime against itself", ISS Monograph Series, 2001, 51, 9.

²⁹⁴ East and Southern African Anti-Money Laundering Group.

regarded as high-risk, 35.7% fall into the medium-risk category and only 14.3% are regarded as low-risk jurisdictions.²⁹⁵

Financial institutions have made some progress towards implementing legislative and administrative controls on money laundering but much more still has to be done to ensure full compliance and enforcement of laws. Even if the banking industry is effective in detecting money laundering, the second leg of that process has to be enforcement of civil and/or criminal sanctions as deterrents to would-be launderers and as a punishment to launderers.²⁹⁶

It is imperative that the Money Laundering and Proceeds of Crime Bill be passed into law to enable the Anti-Money Laundering Authority to become functional. The Fraud Unit lacks the capacity and resources to effectively combat money laundering. There is already an appreciation of the fact that the intricacies of criminal activities like money laundering require specialised skills from institutions that are mandated to deal with the problem.²⁹⁷

While government has shown its political commitment to addressing issues of corruption and economic offences through the establishment of the Directorate, it is hoped that this commitment will be carried further by providing the necessary financial and human resources to equip the Directorate with the capacity to carry out its duties. As the Directorate is designated by law as the country's Anti-Money Laundering Authority, this requires that it be augmented with a variety of skills such as specialised investigative techniques, forensic auditing, banking practices and prosecution.²⁹⁸

It is imperative that government moves with due haste to complete the outstanding process of passing anti-money laundering and related legislation.

²⁹⁵ The high-risk countries are Kenya, Malawi, Seychelles, Tanzania, Uganda, Zambia and Zimbabwe. Medium-risk countries are Botswana, Lesotho, Mauritius, Mozambique and South Africa.

²⁹⁶ *Supra* note 19 at 188.

²⁹⁷ *Ibid.*

²⁹⁸ *Ibid.*

It is also recommended that measures be put in place to train the various officials who will be expected to work with the new legislation such as the police, prosecutors and magistrates. Such measures would include joint training programs for these officials. It may well be that the government might not have the resources. If so, consideration should be given to seeking donor funding and the necessary resource persons.²⁹⁹

Only when the law-enforcement authorities are adequately trained regarding the substance of the legislation will the legislation be living documents.

For example, the police will be enabled to investigate money laundering as a crime and not only as a by-product of other predicate offences. They would also be able to investigate the assets of suspects, follow up the paper trail in order to account for ill-gotten property, seize the property and ultimately have it confiscated. This would give credence to the goal of taxing the criminal in his pocket, heighten the risk factor in relation to criminal conduct and ensure that crime in the ultimate analysis does not pay.³⁰⁰

The logical starting point is to educate the populace on the menace of money laundering. After the education exercise, it will be necessary to formulate appropriate legislation. In coming up with appropriate legislation, it will be important to take into account the views of all key stakeholders.³⁰¹

Observations made about the way illicit funds behave raise another salutary lesson, namely that speed is essential. Reporting institutions should be able to quickly determine suspicious fund activity and report it.³⁰² Thereafter, the authorities have to act speedily to freeze activity on suspect accounts, or stop suspect transactions, such as sales of real estate, pending investigation. Because of the potential for wrong decisions to be made with serious consequences for innocent parties, the capacity to investigate should be

²⁹⁹ *Supra* note 139 at 104.

³⁰⁰ *Ibid.*

³⁰¹ *Ibid.*

³⁰² Goredema "Confronting money laundering in South Africa: An overview of challenges and milestones" (2002) *Criminal Reports* <<http://www.iss.co.za/uploads/M132CHAP4.PDF>> (accessed on 30 August 2010).

good. Inevitably, there will be legal challenges to freezing directives. The relevant authorities need the support of competent lawyers, and the funds to pay or hire them.³⁰³

After taking abovementioned into account, the following are recommended regarding the possible prevention of money laundering and terrorist financing:

1. successfully investigate and criminalise money laundering and terrorist financing;³⁰⁴
2. properly train law enforcement and prosecutorial authorities;
3. deprive criminals of their criminal proceeds, thus implementing effective mechanisms to freeze, seize and confiscate criminal assets;
4. require financial institutions and other businesses and professions to implement effective measures to detect and prevent money laundering and terrorist financing by ensuring the following:³⁰⁵
 - customer due diligence;
 - proper record keeping; and
 - suspicious transaction reporting.
5. implement mechanisms to facilitate cooperation and co-ordination of Anti-money laundering and Combating of Financing of Terrorism efforts at the international and domestic level;³⁰⁶
6. securing a more stable financial system that is more attractive to foreign investors; and
7. meet binding international obligations and avoid the risk of sanctions or other action by the International community, through numerous International treaties and United Nations Security Council Resolutions.³⁰⁷

³⁰³ *Ibid.*

³⁰⁴ *Supra* note 23 at 3.

³⁰⁵ *Ibid.*

³⁰⁶ *Idem* at 4.

³⁰⁷ *Ibid.*

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Abbreviations

- AML = Anti-money laundering.
- CFT = Combating the Financing of Terrorism.
- EGMONT = EGMONT group of Financial Intelligence Unit.
- ESAAMLG = Eastern and Southern African Anti-money laundering Group.
- FATF = Financial Action Task Force.
- FEDWIRE = Federal Reserve.
- FIC = Financial Intelligence Centre.
- FIU = Financial Intelligence Unit.
- MLAC = Money laundering Advisory Council.
- OECD = Organisation for Economic Co-operation and Development.
- SADC = Southern African Developing Countries.
- SWIFT = Society for Worldwide Interbank Financial Telecommunications System.

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