

## CHAPTER 2

# BOTSWANA'S LEGISLATIVE CAPACITY TO CURB MONEY LAUNDERING

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### Introduction

The concept of money laundering, though familiar to many legal and financial systems in the First World, is relatively new in the Third World. Botswana is viewed as a shining example of democracy, a country that emerged from rags to riches. This has led people, both locally and internationally, to believe that there is no serious financial crime in Botswana. To most citizens of Botswana, money laundering is not such a common occurrence as to warrant legislative attention. The Criminal Code of Botswana (Cap. 08:01) does not address money laundering or its related offences. It cannot therefore be easy for financial institutions to take measures to deal with money laundering without clear policy or legislation.

Provisions that have a bearing on money laundering are found in seven pieces of legislation, namely:

- the Banking Act (Cap.46:04);
- the Bank of Botswana Act (Cap. 55:01);
- the Proceeds of Serious Crime Act (PSCA) (Cap. 08:03);
- the Corruption and Economic Crime Act (Cap. 08:05) (CECA);
- the Extradition Act (Cap. 09:03);
- the Banking (Anti-Money Laundering) Regulations (S.I. No. 17 of 2003); and
- the Mutual Assistance in Criminal Matters Act (MACMA) (Cap. 08:04).

## Existing institutional mechanisms to detect and control money laundering

### *Definition of money laundering*

In order for financial institutions to be able to curb money laundering, the law must provide an unambiguous definition of the concept. Sections 14 and 17 of the Proceeds of Serious Crime Act (PSCA) deal with money laundering. Section 14 stipulates that 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 realized from an *unlawful activity*.

The Act does not, however, specify what constitutes an unlawful activity.

Section 15 of the PSCA is concerned with the concealment of money or property. Subsection (2) defines concealment of money or property to include concealment or disguise of the nature, source, location, disposition, movement, ownership or any rights with respect to such money or property.

It may be argued that a person can only conceal or disguise the nature, source, location, disposition movement, ownership or any rights with respect to such money or property if he or she knows that the money or property in question is tainted, dirty or somewhat related to an unlawful activity.

The definition of money laundering may be weak, but it is fortified by the subsection dealing with concealing or disguising the origin of laundered money or property.

Even though banks, building societies, insurance institutions and professional intermediaries in Botswana are vulnerable to money laundering, they are guided on how to identify tainted money or property.

Institutions regulated by Financial Services Centres (FSCs) include banks, insurance companies and building societies. Section 17 of the PSCA lumps them together as 'designated bodies'.

Section 17 does not define 'designated bodies' but it states that the section applies to:

A person or body of persons whose business consists of or includes the provision of services involving the acceptance or holding of money or property for or on behalf of other persons or whose business appears to the Minister to be liable to be used for the purpose of committing a crime.

In short, a designated body is any business that, it appears to the Minister, is liable to being used for the purposes of committing a serious offence. It is not clear how the Minister reaches that conclusion. Designated bodies include, among others, any bank licensed under the Banking Act, savings banks or post offices, registered stockbrokers, long-term insurance business specified under the Insurance Industry Act (Cap. 46:01), foreign exchange businesses licensed under the Bank of Botswana Act or any other person or body as the Minister may prescribe by order.

The Schedule to the PSCA further lists business relationships, transactions and services under section 17(3). Therefore, any person or business that is involved in such business relationships, transactions and services, is a designated body. These include, *inter alia*, lending, financial leasing, money transmission services, participation in share issues and the provision of services related to such issues, safekeeping and administration of securities, all types of direct life assurance, etc. It must be noted that the section does not seem to directly provide for law firms, which may hold money for clients in their trust accounts.

### *Proof of identity*

In terms of section 17(6) of the PSCA, a designated body is obliged to take reasonable measures to obtain the required proof of identity of a person with whom it proposes to enter into a business relationship or to provide services of a kind specified in the Schedule. However, subsection 6 only applies where the services are in respect of a single transaction or a series of transactions which are, or appear to be, linked to an amount in the aggregate prescribed in the regulation.

Further, section 44 of the Banking Act obliges a bank to open accounts and accept security deposits or rent out safe deposit boxes only when the bank has established the identity of the person in whose name the funds or securities

are to be credited or deposited or the identity of the lessee of a safe deposit box. Where a bank is not satisfied with the true identity of a customer in terms of the Act, it is required to close the account or security deposit or terminate the lease of the safe deposit box and report the matter to the Central Bank.

The true identity of the customer will assist the financial institution in detecting whether or not the money is from an unlawful activity.

Regulations 5-9 of the Banking (Anti-Money Laundering) Regulations also deal with customer identification. They oblige a bank, when establishing business relations, to request from a customer certain documents to prove their identity. This requirement is to ensure that banks are not used to launder tainted money. Where a bank fails to establish the identity of a customer, it is required to close the account or deny the facilities in question. One method by which the bank may verify the names and addresses of its customer is by obtaining a reference from a well-known professional, an employer of the customer, a known customer of the bank or a customary authority that knows the applicant.

### Reporting of excess amount of cash or property

Section 17(14) of the PSCA requires a designated body that is a party to a transaction involving an amount of money that exceeds an amount prescribed, from time to time, to report the details of the transaction to the Directorate on Corruption and Economic Crime (DCEC) and to the Regulatory Authority. No regulations prescribing such amounts have been made yet.

At a practical level, however, where a customer deposits an amount exceeding BP10,000 (approximately US\$2500) most banks will inquire from the client how the money was acquired. This practice should not be waived, regardless of the type of customer or his identity. There are occasional reported deviations, such as the reported case of a BP50,000 (US\$12,500) deposit by a Government Minister into a personal bank account that appears not to have been brought to the attention of the DCEC. In consequence, it was never investigated.

Barclays Bank of Botswana has indicated that some of its money laundering control practices are based on instructions from its British-based head office. As far as the bank is concerned, its practices would not be affected by the absence of anti-money laundering laws in the country: if the parent bank provided international guidelines to be followed, it would comply.

Regulation 12(2) of the Banking (Anti-Money Laundering) Regulations requires a financial institution to complete such forms as the Bank of Botswana may prescribe to record an outward transfer or a foreign currency payment for any foreign currency receipts or funds from external sources. Where the transaction involves an amount of BP10,000 or more, the customer must produce full details of the transaction including the name, identity number, purpose, address and other details of the transaction. Whatever records are obtained from the client shall be kept as originals, stored on microfilm or a computerised form for a period of five years so that they may be used during an investigation if the need arises.

### *Anonymous accounts and suspicious activities*

The Banking (Anti-Money Laundering) Regulations prohibit financial institutions from opening anonymous accounts or accounts in obviously fictitious names. Further, a financial institution is to report to the Bank of Botswana (BoB) and the Financial Intelligence Agency (FIA) any transactions by their customers involving large amounts of money or suspicious activities. The Third Schedule to the Regulations lists certain activities that are referred to as '*suspicious activities*'. These include the following:

- suspicious customer behaviour, e.g., if a customer has an unusual or excessively nervous demeanour or behaves abnormally;
- if a customer's permanent address is outside Botswana;
- if a customer makes a large cash deposit without counting the cash;
- a wire transfer that moves large sums to secrecy havens such as the Cayman Islands, Hong Kong, Luxembourg, Panama or Switzerland;
- if an employee lives a lavish lifestyle that could not be supported by his or her remuneration; or
- if an employee avoids taking vacations.

A financial institution is further required to designate one employee as a money laundering reporting officer who serves as a contact person on money laundering matters between the financial institution and the BoB, the FIA and the Botswana Police. A further requirement of the Regulations is for the financial institution to train its staff, irrespective of the level of seniority, on the importance of

reporting any suspicious transactions to the money laundering reporting officer. The Regulations further set out programmes for staff training.

### ***Anti-Money laundering measures and practices***

The Banking (Anti-Money Laundering) Regulations oblige financial institutions to put in place anti-money laundering measures and adopt such practices as are necessary for the prevention of money laundering.

#### Factors that create exposure to money laundering

Even though the relevant pieces of legislation seem to be addressing money laundering, a major weakness is that there does not seem to be any connection between the laws and what actually happens on the ground. A survey of stakeholders revealed ignorance of the concept of money laundering and the relevant laws.

Anecdotal evidence suggests that there is a high level of economic crime and corruption in the country. It is evident that there is a significant number of individuals in positions of power that live beyond their means, with multiple ownership of costly residential properties being common. The source of their income cannot be established. Some are known to have established charitable organisations that donate huge amounts of money without identifiable sources. Other lavish acquisitions noted include aeroplanes. All these have raised a major challenge to the police and the DCEC.

Two of the well-publicised cases involving high-ranking officials were both connected to public works in Botswana. The *State v. Kemokgatla*, involved a construction company, Zakem, that bribed Kemokgatla, the then-Director of Roads, to award it a multimillion Pula contract. Kemokgatla accepted the bribe and built himself a massive double storey house in Gaborone with the proceeds. Construction of the house raised the suspicion of bribery. The Managing Director of Zakem turned a state witness during the trial. Kemokgatla lost his appeal to the High Court in 2003 but the house in question is still registered under his name at the Deeds Office.

The other corruption case led to litigation, in *State v. Rabana*. Rabana was an Assistant Managing Director of the Botswana Housing Corporation when he was charged with corruption. What led to his arrest was the lavish lifestyle he led. His family spent holidays in Disneyland and he built a massive structure at his home village, Shoshong. His house was later termed '*Shoshong Sun City*'.

This case is still continuing after more than eight years of investigations; meanwhile, Rabana is employed in South Africa and his family continues to enjoy the benefits of living at Shoshong.

Cases such as these indicate that corruption is rampant and that there are indeed proceeds available for laundering.

The magnitude of capital flight that is linked to corruption is not fully understood in Botswana, especially as no survey has been conducted to reveal whether such an activity takes place in the country.

### **Capacity of authorities to detect money laundering**

The CECA empowers the DCEC to investigate any person where there are reasonable grounds to suspect that the person maintains a standard of living higher than is commensurate with his means. This requirement, though it appears to empower the DCEC, is somewhat limiting in the sense that where a person such as the businessman referred to above, claims that his lavish lifestyle is from a loan-sharking business, the investigation may not yield anything. The DCEC does not seem to have enjoyed much success in investigating those in higher positions of power.

Further, the use of criminal law to punish money laundering has limitations. In other jurisdictions, such as South Africa, civil law is used to take away the proceeds of crime from launderers. It is more difficult to prove beyond reasonable doubt, as the criminal law requires, that the money in question comes from illicit activities, than it is to establish a claim sufficient for a civil forfeiture.

It must, however, be noted that CECA empowers the DCEC to investigate any alleged suspected offence under the Act, or any other offence disclosed during such an investigation. Therefore, even though the CECA mainly provides for public bodies, or the Act confines the powers of the DCEC to the investigation of allegations of corruption in public bodies, an offence of money laundering may be investigated even if it does not involve a public body. A plausible interpretation of the Act is that a money laundering offence may be investigated if, during an investigation of complaints alleging corruption in a public body, there is evidence that the offence of money laundering is being committed.

Further, the Act provides that if during the investigation of an offence under the Act, another offence is disclosed, the officer is empowered to arrest without

a warrant, any person the officer reasonably suspects to be guilty of other offence. It may be argued that money laundering is included in the words 'any other offence'.

It must be noted that the Act does not empower the DCEC to investigate money laundering if it does not take place within public bodies. This is an unfortunate situation because, the DCEC, being an independent body with its own budget, can attract the cream of the crop to fight corruption and money laundering.

The possibility of conflicts over turf between the police and the DCEC cannot be ignored. An effective campaign against money laundering will require that the responsibility of dealing with money laundering be streamlined, so that technical capacity can be provided to the appropriate agency.

Section 8(1) of the PSCA empowers the Attorney-General to apply to a court, *ex parte*, for a restraining order where a person is charged with, or is about to be charged with, a serious offence. The investigating officer must state that he reasonably believed that the defendant received or derived proceeds from the commission of an offence and he must identify the property that he reasonably believes to represent the proceeds received or derived by the defendant from the offence. However, the use of restraining orders has proved difficult in practice.

Section 2 of the PSCA defines the term 'serious offence' as an offence for which the maximum penalty is death or imprisonment for less than two years. This definition is not helpful to financial institutions in that most offences fall within it. It can be argued that the legislature, when enacting the law, did not have all offences with imprisonment for less than two years in mind. Therefore the legislature must narrow it to financial crimes including money laundering and terrorism offences.

In so far as cross-border issues are concerned, section 20 of the PSCA provides for mutual assistance by countries in relation to confiscation and restraining orders regarding offences equivalent to a serious offence in Botswana, as defined in the Act.

Section 3 of the MACMA empowers the Minister to make regulations for mutual assistance in criminal matters to any country with which Botswana has made arrangements. The objectives of the Act are to facilitate the provision to, and offer by, Botswana of international assistance in criminal matters, including obtaining evidence, documents' location and identification of witnesses or

suspects or property that may be confiscated, freezing of assets and execution of requests for search and seizures. Section 30 (a) provides for a request by a foreign country for search and seizure of tainted properties situated in Botswana. The Act does not define 'tainted property'.

Prosecutors have identified practical difficulties in implementing the provisions of section 3.

### **Capacity of financial and related institutions to discharge their responsibilities effectively**

The PSCA and the Banking (Anti-Money Laundering) Regulations provide for capacity building by the financial institutions and for them to designate an officer as a money laundering officer and to train members of staff on money laundering issues. However, research revealed that some employees of financial institutions were not aware that there was such a designated money-laundering officer, or the requirement to appoint such an officer.

Compliance with the minimal statutory requirement may also not be good enough. The legislative requirement to have one person designated as a money laundering officer means that if that person, who is likely to be a senior bank official, is away from the bank, there will be no-one to deal with money laundering related issues. It is advisable to designate two persons so that one is always available. Failure to do so may be interpreted as banks not taking money laundering seriously.

At the time of writing, there were still banks without training programmes on money laundering, or with training programmes of which employees were not aware. e no designated money laundering. In the insurance industry, as in the commercial sector, there were no designated money-laundering officers and employees did not seem to know what money laundering is all about.

Though the DCEC's independent budget makes it likely to attract qualified staff such as forensic financial investigators, financial lawyers, economists, etc., it cannot offer the salaries demanded by professionals in these areas. As with other public sector employees, the DCEC staff salary scales are set by Central Government.

It is therefore suggested that according the DCEC the kind of independence enjoyed by institutions such as the Serious Fraud Office (SFO) in England would

go a long way to ensure that it is able to develop the capacity and the technical skills to effectively discharge its added responsibilities.

Further, even though the Banking Act refers to the DCEC as the Financial Investigating Authority, the Act in terms of which the DCEC was established does not conceive of it in this way. This raises the possibility of the DCEC's powers as the FIA being called into question. There is a need to rectify this anomaly.

The capacity of the police force to discharge its responsibilities is also limited. Money laundering, especially in its layering and integration phases, can take sophisticated forms. To untangle some of the conceivable schemes requires police officers who are specially trained in the investigation of financial crime. Insofar as the police do have the technical capacity to prosecute money laundering cases, such cases may be referred to the Attorney General's Chambers. However, only a few members of Chambers have been exposed to money laundering.

Money laundering is an offence that is linked to terrorism. Terrorists launder money by, for example, buying and selling properties and using the funds derived from such sales to finance terrorist attacks. However, currently there are no legislative provisions linking money laundering and terrorism. It is common cause that terrorists may launder money by establishing schools, charitable organisations or non-governmental organisations (NGOs), churches as well as mining consortiums. But the law in Botswana is silent on terrorism despite the fact that Botswana has ratified all terrorism-related conventions.

Ordinary citizens do not seem to think that terrorist attacks could occur in Botswana or that locals might be used during such attacks. The terrorist attack on 7 August 1998 in Tanzania bears witness to the fact that terrorism has no respect for borders, religious affiliation, ethnic origin or political affiliation. The public in Botswana, however, seems unaware of this.

Further, there seems to be no exchange of information in Botswana society relating to money laundering and terrorism in the domestic and international context. Anecdotal evidence suggests that sham marriages by potential terrorists may be an emerging phenomenon in Botswana, but the implications of such marriages are not fully understood by locals.

In relation to the UN Security Council Resolution 1373 of 28 September 2001, no legislation has been drafted to incorporate the mandatory decisions taken

in the Resolution into law. In a report dated 22 December 2001 to the UN Security Council, pursuant to paragraph 6 of Resolution 1373 concerning counter terrorism, Botswana reported that it had taken steps to implement the Resolution. However, the report revealed steps taken before 2001 and no legislation on counter-terrorism measures has been enacted post-September 2001. Botswana committed itself to fully and effectively implementing the Security Council resolutions on terrorism, as evidenced by the establishment of the National Anti-Terrorism Committee (hereafter the Committee). However, Committee members revealed a lack of serious commitment and direction by the government. For example, no ministry is designated a focal point in the event of a terrorist attack.

The Committee comprises officials from:

1. the Ministry of Foreign Affairs, which chairs the Committee;
2. the Office of the President;
3. the Attorney-General's Chambers;
4. the Department of Civil Aviation;
5. the Botswana Defence Force;
6. the Botswana Police;
7. the Department of Customs and Excise;
8. the Department of Immigration and Citizenship; and
9. the Bank of Botswana.

Botswana reported that the Committee's mandate was to enforce financial laws and regulations, immigration control, aviation security, asylum control and other law enforcement measures. It was not explained how the Committee works with law enforcement organs and the Committee is not empowered by any law.

Botswana further said that it had instituted strict measures to ensure that funds owned by Botswana nationals or funds in the territory of Botswana are not used to support terrorist activities. This was done through a circular issued by the Bank of Botswana to all financial institutions, instructing them to take all measures necessary to ensure that they do not provide "safe harbour for terrorist actions or activities and to freeze without delay funds and other financial assets

of persons who may be suspected of participating in terrorist activities". The government further reported that no activities had been detected to suggest that Botswana's financial institutions could have been used to make funds, financial assets or financial services available, directly or indirectly, for the benefit of persons involved in terrorist activities. This, it was said, was largely due to the country's strict laws on money laundering.

However, the existing money laundering laws have loopholes that need to be tightened to ensure that they are indeed strict. No country is immune to money laundering and terrorism. Saying that no money laundering activities has been detected does not necessarily mean that financial institutions in Botswana cannot be used to launder dirty money.

### **Recommendations for legislative and institutional measures**

To meet the requirements of Resolution 1373 and the 12 UN counter-terrorism conventions, the following legislative and institutional measures should be taken:

1. members of the public should be encouraged to be vigilant and aware of money laundering and terrorism;
2. multi-disciplinary task forces should be established and empowered to investigate money laundering and terrorism;
3. capacity of law enforcement agencies should be developed to enable them to investigate and enforce money laundering as well as the adoption of counter-terrorism measures;
4. Botswana's long and porous borders should be patrolled;
5. a cross-border exchange of information relating to money laundering and terrorism should be encouraged;
6. money laundering should be clearly defined and linked to terrorism;
7. money laundering and counter terrorism measures should be incorporated into domestic laws;
8. money laundering regulations should be made applicable to all financial institutions, not just banks. This would require all anti-money laundering legislation to be brought together into one piece of legislation rather than being scattered in different pieces of legislation.

9. anti-money laundering measures must be put in place by all financial institutions; and
10. banking institutions must, as a matter of urgency, have anti-money laundering training programmes in line with the Banking (Anti-Money-Laundering) Regulations.