

## CHAPTER 4

# THE CAPACITY OF FINANCIAL INSTITUTIONS AND THE BUSINESS SECTOR IN LESOTHO TO DETECT AND CONTROL MONEY LAUNDERING

Mokhibo Nomzi Gwintsa

---

### Introduction and international framework

In this Chapter money laundering is defined as encompassing:

all activities to disguise or conceal the nature or source of, or entitlement to money or property, or rights to either, being money or property or rights acquired from serious economic crime or corruption, as well as all activities to disguise or conceal money or property that is intended to be used in committing, or to facilitate the commission of, serious crime.<sup>1</sup>

The primary objective of money laundering is to convert 'dirty' money into some other legitimate asset, to conceal the illegal source or origin of income from such activities as drug trafficking, arms smuggling and financial crime. Globalisation, communication and technology serve to facilitate easy and speedy movement of money all over the world, thus making the detection of money laundering more difficult.<sup>2</sup>

The quest to combat money laundering stems from increasing recognition of the link between money laundering and serious crime. Successful money laundering activities not only enrich criminals but also assist in funding more serious criminal activity. Money laundering is closely linked to economic crimes such as fraud, bribery, corruption, exchange control violations, tax evasion and, more seriously, to international terrorism.

In recent years, Lesotho has been under the international spotlight over a variety of criminal and civil cases arising from the corruption and bribery of a top official by a number of international companies. Some major international banks were used to facilitate the laundering of the proceeds. The revelations brought into question the integrity of these institutions and had a potentially damaging effect on their reputation.

Lesotho has now been placed in a position where it has to keep up the momentum to portray a genuine and sustained commitment to fight corruption. This, of necessity, requires a commitment to put in place institutional mechanisms to fight not only corruption, but also money laundering, which has been shown to facilitate other crimes.

The international community has become increasingly aware of the dangers posed by money laundering. The United Nations (UN) and other international organisations have committed themselves to playing a more effective role in fighting money laundering.

The twelve major multilateral conventions on terrorism that have been adopted in the last three decades set out states' responsibilities in combating terrorism. Lesotho signed the 1999 International Convention for the Suppression of the Financing of Terrorism. The Convention applies to the offence of direct involvement or complicity in the intentional and unlawful provision or collection of funds, with the intention or knowledge that any part of the funds may be used to carry out an offence. State parties are required to take appropriate measures, in accordance with domestic legal principles, for the detection and freezing, seizure or forfeiture of funds used or allocated for purposes of committing the offences. State parties also have an obligation to establish their jurisdiction over offences described, make the offences punishable by appropriate penalties, take alleged offenders into custody, prosecute or extradite alleged offenders, co-operate in preventive measures and exchange information and evidence needed in related criminal proceedings.<sup>3</sup>

Lesotho also signed and ratified the United Nations Convention Against Transnational Organized Crime in 2000, thus assuming an obligation to combat money laundering and to criminalise the laundering of proceeds of crime. Another important obligation is that of instituting a comprehensive regulatory and supervisory regime for banking and non-banking financial institutions which are susceptible to money laundering.<sup>4</sup>

The United Nations Security Council unanimously adopted Resolution 1373 of 28<sup>th</sup> September 2001. Under the Resolution, all states are obliged to prevent and suppress the financing of terrorism as well as to criminalise the willful provision or collection of funds for such acts. Provision is also made for freezing the funds, financial assets and economic resources of both those who commit or attempt to commit terrorist acts, or participate in or facilitate the commission of terrorist acts, and those persons and entities acting on behalf of terrorists.

States are also expected to afford one another the greatest measure of assistance in criminal investigations or proceedings relating to the financing or support of terrorist acts. Note has been taken of the close connection between international terrorism and transnational organised crime, illicit drugs, money laundering and the illegal movement of nuclear, chemical, biological and other deadly materials.<sup>5</sup>

Lesotho has not only shown commitment by signing the various international instruments but is also putting in place measures to implement them through domestication. Consultations are currently ongoing among all relevant stakeholders on the process and modalities of domestication. A committee has been formed to spearhead this process.<sup>6</sup> Information is also being compiled by the different stakeholders, specifically towards implementing Resolution 1373, on individual sector needs as well as programmes in place to address money laundering.

## Methodology

An audit was undertaken of all laws which have potential implications for money laundering. This process facilitated the development of data collection tools, as the dearth of legislation on money laundering showed that structured questions would work better for the commercial and business sector, while questionnaires would work well for the banking institutions. Group and individual interviews were used for both the questionnaires and the structured questions.

What emerged early in the research process was that quite a number of the relevant institutions, with the exception of the banks, initially did not understand the concept of money laundering, particularly at the micro level where it is likely to affect most of them. The few that did understand it believed that their operations were not exposed to money laundering, as it is a phenomenon often associated with international transactions in large amounts of money.

## Supervisory/regulatory regime: The Central Bank of Lesotho

### *Central Bank of Lesotho Act, 2000*

The purpose of the Act is to continue the existence of the Central Bank of Lesotho (the Central Bank), to enable it to ensure price stability and to provide for its administration and control.

The functions of the Central Bank, as set out in section 6, are:

- a) To foster the liquidity, solvency and proper functioning of a stable market-based financial system;
- b) To issue, manage and redeem the currency of Lesotho;
- c) To formulate, adopt and execute the monetary policy of Lesotho;
- d) To formulate, adopt and execute the foreign exchange policy of Lesotho;
- e) To license or register and supervise institutions pursuant to the Financial Institutions Act 1999, the Money Lenders Act 1989, the Building Finance Institutions Act 1976 and the Insurance Act 1976;
- f) To own, hold and manage its official international reserves;
- g) To act as banker and adviser to, and fiscal agent, of the government of Lesotho;
- h) To promote the efficient operation of the payments system;
- i) To promote the safe and sound development of the financial system; and
- j) To monitor and regulate the capital market.

Section 47 designates the Central Bank as:

- the Commissioner of Financial Institutions in terms of the Financial Institutions Act 1999 and the Money Lenders Act 1989;
- the Commissioner of Building Finance Institutions in terms of the Building Finance Institutions Act 1976; and
- the Commissioner of Insurance in terms of the Insurance Act 1976.

### *Financial Institutions Act, 1999*

This Act provides for the authorisation, supervision and regulation of financial institutions, agents of financial institutions and ancillary financial service providers. The Act defines a financial institution as “an institution which performs banking business or credit business”.<sup>7</sup> In terms of the Act, the Central Bank serves as Commissioner of financial institutions. In the exercise of this function, the Central Bank licenses financial institutions, agents of financial institutions and ancillary financial service providers such as foreign exchange dealing services, electronic fund transfer services etc. In terms of Section 49, the Central Bank is also responsible for the supervision of financial institutions and other licensed institutions.

Section 26 provides for secrecy of information of a non-public nature relating to a licensed institution or any customer of such an institution.

### ***Financial Institutions (Anti-Money Laundering) Guidelines, 2000***

In pursuance of its function as Commissioner of financial institutions, the Central Bank of Lesotho prescribed the Financial Institutions (Anti-Money Laundering) Guidelines, 2000 (hereafter the Guidelines).

The objectives of the Guidelines are:

- to require financial institutions to establish and maintain specific policies and procedures to guard against the use of the financial system for the purpose of money laundering;
- to enable financial institutions to recognise suspicious transactions and to provide an audit trail of transactions with customers who come under investigation; and
- to require financial institutions to submit reports and to disclose information on large cash transactions and suspicious transactions.

The Guidelines define money laundering as:

Any act or attempted act to conceal or disguise the identity of illegally obtained proceeds so that they appear to have originated from legitimate sources.

#### *Anti-money laundering programmes*

Sub-guideline 5 provides that financial institutions shall develop programmes against money laundering. These programmes are to include, inter alia, internal controls, policies and procedures including the designation of compliance officers at management level. The programmes furthermore have to provide for customer identification procedures, record keeping, recognition and reporting of suspicious transactions and education and training of relevant employees.

There are two commercial banks in Lesotho: the Standard Bank Group and Nedbank Lesotho. Interviews were held with compliance officers of both these banks and with senior officers of the Central Bank in the policy and exchange control division. The information provided was that Nedbank Lesotho acts in

conformity with the 2000 Guidelines and that, as part of the Nedcor Group (RSA), implements the Nedcor Group policy of 2001 on money laundering. The Standard Bank Group similarly implements the Guidelines as well as an anti-money laundering control policy for the Standard Bank Group in the whole of Africa. Both banks' policies are said to have more or less similar components to the Guidelines.

The compliance officers interviewed showed that Nedbank Lesotho exercises self-regulation on money laundering by ensuring compliance with legislation, internal controls, policies and procedures. These processes are rolled out to all staff members, including those at branches in Maseru and other districts. The officers concerned state that they also conduct training for all staff members in the appreciation of the background to money laundering, the primary purpose of which is to raise awareness of money laundering. The content of the training includes defining what constitutes money laundering, the most common forms of money laundering, achieving comprehensive knowledge of the client, the detection of suspicious transactions, dealing with large cash transactions, the possible link between investment-related transactions and international activity to money laundering.

#### *Customer identification and record keeping*

Sub-guideline 6 prohibits financial institutions from keeping anonymous accounts or accounts in fictitious names. The Guidelines further enjoin financial institutions to identify their customers when establishing business relations or conducting transactions. This identification has to be based on official or other reliable identifying documentation and records. Specific reference is made under this sub-guideline to the following transactions:

- the opening of accounts or passbooks;
- fiduciary transactions;
- the renting of safety-deposit boxes;
- the use of safe custody facilities;
- large cash transactions.

Sub-guidelines 8 and 9 require financial institutions to maintain a record on customer identification, such as copies of official identification documents, account files and business correspondence, for at least ten years after an account is closed. Records which can enable financial institutions to comply with

information requests from competent authorities are also to be kept for a minimum period of ten years. Such records are to be kept in such a form as to enable reconstruction of individual transactions as evidence in criminal proceedings.

A further requirement under sub-guideline 10 is for financial institutions to review and properly document the background and purpose of all complex, unusually large transactions and all unusual transactions which have no apparent economic or visible lawful purpose.

The Guidelines have been enacted in terms of Section 71 of the Financial Institutions Act and are by their very nature subsidiary to the main Act. The Central Bank of Lesotho has enacted the Guidelines pursuant to its mandate in terms of the Act, to make, among others, such guidelines as are necessary for the better or more convenient implementation of the Act. Section 26 of the Act provides for non-disclosure of information of a non-public nature relating to bank customers. Sub-guideline 6 prohibits banks from keeping anonymous accounts or accounts in fictitious names.

Banks have to balance customer secrecy against their banking reputation where such secrecy renders them vulnerable to misuse. It is in the interest of banks to be seen to be attracting honest customers and investors and to be dealing in legitimate funds. The draft Money Laundering and Proceeds of Crime Bill has a clause which specifically overrides secrecy obligations and other restrictions on disclosure of information.

In terms of sub-guideline 7, where a customer or client conducts a transaction on behalf of another person, the Bank is obliged to require that the true identity of the person on whose behalf the account is opened or transaction conducted be disclosed. This requirement extends, for example, to attorneys in respect of trust funds.

#### *Reporting requirements*

Sub-guideline 11 requires financial institutions to report to law enforcement authorities and to the Central Bank any transaction that the institution suspects may form part of a criminal activity or that otherwise constitutes a suspicious transaction. Under sub-guideline 18, reports are also immediately to be made to the Central Bank pertaining to any knowledge or suspicion of money laundering related to a specific customer or transaction.

Financial institutions are also required to report to the Central Bank any transaction above M100,000 within 30 days of month-end. These are transactions which involve cash or 'near cash', for example, travellers' cheques, bearer bonds and other easily negotiable monetary instruments.

In the quest to protect themselves from misuse by potential launderers and in order to preserve the bank's reputation, the Standard Bank Group policy requires that suspicious transactions are reported to the Bank's head office in Johannesburg. The reports are handled by the Group's anti-money laundering officer, who in turn reports to the South African Reserve Bank. A person who conducts suspicious transactions could be declared a *persona non grata* within the Group. It was also stated that branches of the Standard Bank have established their own internal controls over and above those required, to deal with what they term "unusual transactions". These are transactions with an unusual pattern from that expected by bank officials and which are therefore checked.

The Guidelines make provision for a bank to apply to the Central Bank for exemption from reporting some clients in terms of the large cash transaction sub-guideline. These would be clients who frequently deal in large amounts of money. This provision renders banks vulnerable to money laundering as all that a money launderer has to do is establish a pattern in his/her transactions which automatically protects him from scrutiny. It would also seem to open the banks up to the risk of employees being too lax about such customers to even pay attention when the customer begins to transact in an unusual manner. In practice, however, bank officials say they have not sought this exemption. It was further revealed that the issue is being mooted with a view towards removing the exemption.

Another potentially problematic area seems to be the reporting of suspicious transactions. It would seem that large cash transactions are routinely reported, while the same diligence cannot be said of suspicious transactions, especially when it comes to reporting to law enforcement agencies. The perception is that bank officials do not report suspicious transactions as they are enjoined to do for fear of reprisals as there is a lack of faith in the police to deal with reports in confidence and to protect the identities of the officials who report. Members of the Fraud Unit of the Lesotho Police Service conceded that reports of suspicious transactions were very few in number.

The Guidelines do not empower law enforcement officials to compel bank officials to report suspicious transactions. It is only the Central Bank that has powers to impose penalties where a bank fails to observe the Guidelines in a

flagrant manner. The Anti Money-Laundering and Proceeds of Crime Bill establishes the Anti Money-Laundering Authority which will serve as the country's financial intelligence unit (FIU). The fact that the Bill still has to be passed into law has led to an arrangement whereby some members of the Fraud Unit have been designated as contact points for reports of suspicious transactions. These officers are not specially trained to deal with issues of money laundering and they are also supposed to deal with suspicious reports as well as other duties pertaining to fraud. The Fraud Unit also has no mechanisms for initiating investigations unless a report of a suspicious transaction has been made to it.

Interviews were conducted with bank customers to verify controls that the financial institutions purport to have put in place and to also determine the extent to which the public is aware of the concept of money laundering. A random selection of customers was made among individuals and business people. From information provided, it seems that the banks are consistent in the documents they require for purposes of opening bank accounts in order to verify customers' identities. In the case of businesses, the banks are said to require documents such as a certificate of incorporation of a company as well as the memorandum of the company and articles of association.

Some business people who usually transacted in large amounts of money complained of a lack of consistency within the banking industry in terms of requirements for bank transfers and banks cheques. It emerged that bank tellers often made different requirements for similar transactions. According to information provided by bank officials, all bank employees are trained in compliance procedures. The aim is to standardise the way work is carried out and to implement new requirements pertaining to issues such as detection and control of money laundering. This means that minimum requirements have to be met, regardless of which teller or bank official a customer deals with. Consistency and uniformity in implementation are necessary to ensure the effectiveness of control measures.

A major complaint by customers was that banks do not provide them with sufficient information when introducing changes. Customers say they often discover only when they try to undertake a transaction that they can no longer do so. A majority of customers were surprised that some transactions they routinely undertook could constitute suspicious transactions. A common understanding of money laundering also turned out to be that it was associated with huge amounts of money and serious international crimes, such as drug trafficking, and that it therefore did not affect the ordinary person.

Banks have traditionally operated on the basic premise of ensuring customer confidentiality. It stands to reason, therefore, that it poses a challenge to them to balance the interests of their clients to confidentiality with the requirement to report what may look like an unusual or suspicious transaction, particularly as it may turn out to be a false alarm. A lot of effort is required to emphasise the advantages for banks to keep a clean image and to protect themselves from misuse by criminal elements.

### ***Central Bank of Lesotho (Collective Investment Schemes) Regulations, 2001***

The objective of these Regulations is to introduce, for the first time, a framework for regulating collective investment schemes with a view to encouraging the growth of such capital instruments without compromising investor protection. The Regulations are aimed primarily at regulating such as unit trusts, which were set up in Lesotho only a few years ago.

A 'collective investment scheme' is defined as a scheme, in whatever form, in pursuance of which members of the public are invited or permitted to invest money or other assets in a portfolio, and which scheme has the following characteristics:

- two or more investors contribute money or other assets to hold a participatory interest in a portfolio of the scheme through shares, units or any other form of participatory interest; and
- the investors share the risk and the benefit of investment in proportion to their participatory interest in a portfolio of a scheme or on any other basis determined in the deed.

The Central Bank of Lesotho is the Registrar and has supervisory authority over collective investment schemes. The Registrar's powers include appointing examiners to investigate and examine books, documents, accounts and transactions of collective investment schemes, with a view to ensuring compliance with the Regulations and to safeguard the interests of investors. The Central Bank only embarked on programmes to implement these Regulations in 2003.<sup>8</sup>

### ***Insurance Act, 1976 and Insurance Regulations, 1985***

The main aim of the Insurance Act, 1976 is to provide for the regulation and supervision of insurance business in Lesotho. It therefore focuses on setting out conditions and requirements of conducting insurance business.

Insurers and insurance intermediaries can become susceptible to money laundering through the purchase of life policies, personal investment products and general insurance.<sup>9</sup> Insurance business usually involves large amounts of money, which renders the industry vulnerable to misuse by money launderers. In spite of this vulnerability, legislation regulating insurance business is silent on money laundering.

Information provided by insurers for this research shows that the primary concern of insurers is not how a client obtained his/her money, but whether a client can pay and continues to pay for cover. Client companies owned by the Chinese, in particular, are said to transact mostly in cash. Most short-term insurers concede that they have no mechanisms in place for screening clients. The only requirement for companies is that they produce papers of registration or a trading licence.

The Central Bank has regulatory powers over the insurance industry. This function is carried out by the Central Bank's Financial Institutions Supervisory Division, through on-site auditing of insurers and off-site analysis of returns submitted by insurers in terms of the Act. According to the bank's officials, they take cognisance of their obligation to detect and control money laundering in undertaking this analysis. The Central Bank is also said to be looking into revising the Insurance Act and the Regulations, in order to address current challenges such as that of money laundering.

The insurance industry falls under the definition of 'cash dealer' under the Money Laundering and Proceeds of Crime Bill. The vulnerability of this industry to money laundering illustrates the need for enactment of the Bill into law so that the industry can discharge its obligations towards the Anti-Money Laundering Authority.

### ***Money Lenders Order, 1989 (as amended by the Money Lenders Act, 1993)***

Prior to 1989, money lenders operated freely in Lesotho and often charged their clients exorbitant interest rates. In 1989, the government enacted the Money Lenders Order to require the licensing of money lenders and to regulate money lending operations.

In 1993, the Order was amended to introduce a clause on the revocation of money lenders' licences. It empowers the Commissioner of Financial Institutions (the Central Bank), to revoke a licence if the holder:

- fails to commence operations within a period of one year;
- fails to comply with the conditions of the licence;
- is in breach of any provision of this Act; or
- ceases to carry on the money lending business.

The Amendment also requires that quarterly returns show the assets and liabilities of the holder. Every money lender must produce records and information relating to the business for examination. These include any books, minutes, accounts, cash, securities documents and vouchers. Furthermore, every licensed money lender has to appoint an auditor, approved by the Commissioner, to audit the accounts and report upon on an annual basis the annual balance sheet and profit and loss account. The Central Bank analyses these audited financial reports in order to pick up any irregularities.

In interviews with some of the licensed money lenders, they stated that most of their clients are government employees as well as employees of private organisations. The reason for this is to minimise the risk of non-payment as the money lenders arrange stop-order facilities with the employers for regular withdrawals from the salaries of their employees to pay off their loans.

A common perception is that money laundering does not really feature in this industry as it commonly deals with relatively small amounts of money, for example, maximum amounts of about M10,000.00). The most frequent users of money lending activities are lower-income employees, while other clients use the facility once in a while as a temporary stop-gap measure while awaiting some funds.

Money lenders could themselves engage in money laundering by using tainted funds which they would then get back as clean funds, plus interest. This, however, would require diligence on the part of the regulating authority in issuing licences.

### **Institutional mechanisms**

#### ***Anti-money laundering authority***

##### *Money Laundering and Proceeds of Crime Draft Bill, 2001*

Lesotho's Money Laundering and Proceeds of Crime Draft Bill has been in existence since 2001. The Central Bank of Lesotho is the custodian of the draft Bill. It has taken an inordinately long time to be processed. Initially the

explanation for the delay was that consultations were being held, including with the International Monetary Fund.<sup>10</sup> At the time of writing this report, in mid-2003, the Bill was still at a stage where comments were being incorporated, after which it was going to be forwarded to the office of Parliamentary Counsel. The office of Parliamentary Counsel was at the time already in consultations with the Central Bank on the draft Bill. The next step would be to seek cabinet approval, after which the Bill could then be placed before parliament. In spite of international pressure being brought to bear on Lesotho to enact this Bill into law and contrary to indications that it would have been placed before parliament and passed before the end of 2003, the Bill had still not been placed before Parliament by mid-2004.

The Money Laundering and Proceeds of Crime draft Bill attempts to legislate on money laundering in a comprehensive manner. The preamble sets out the purpose of the Bill as being to enable the unlawful proceeds of all serious crime to be identified, traced, frozen, seized and eventually confiscated.

Money laundering is defined as:

any act or attempted act to conceal or disguise the identity of illegally obtained proceeds so that they appear to have originated from a legitimate source.

The draft Bill furthermore brings financial institutions and cash dealers within the ambit of its operation. Cash dealers are defined as insurers, insurance intermediaries, securities dealers, futures brokers, operators of gambling houses, casinos or lotteries, persons who carry on a business of issuing, selling or redeeming travellers' cheques, money orders or similar instruments, of dealing in bullion or of collecting, holding and delivering cash as part of a business of providing payroll services, and trustees or managers of unit trusts.

The obligations currently imposed on financial institutions by the Financial Institutions (Anti-Money Laundering) Guidelines, 2000, are also extended to cash dealers under the draft Bill. These obligations include verifying the identity of a customer, establishing and maintaining customer records, reporting suspicious transactions, establishing and maintaining internal reporting procedures and providing training to employees in the recognition and handling of money laundering transactions. Enforcement of legislation on money laundering will, in terms of the draft Bill, now lie with the Anti-Money Laundering Authority. Financial institutions still retain the obligation to adopt prudent measures to combat money laundering, as well obligations to report to the

Central Bank by virtue of the Central Bank's supervisory role over financial institutions.

The Bill also makes provision for seizure of suspicious imports or exports of currency, has overriding effect over secrecy laws or other restrictions on disclosure of information and provides immunity for action taken in good faith by financial institutions and cash dealers and their employees or representatives. Provision is also made for confiscation of tainted property and for pecuniary penalty orders.

Part II of the draft Bill sets up an Anti-Money Laundering Authority (hereafter, the Authority). This Authority is the Directorate on Corruption and Economic Offences established pursuant to the Prevention of Corruption and Economic Offences Act, 1999.

In terms of Section 11(2) of the draft bill, the Authority:

- shall receive reports of suspicious transactions issued by financial institutions and cash dealers pursuant to section 14(1);
- shall send any such report to the appropriate law enforcement authorities, if, having considered the report, the Directorate also has reasonable grounds to suspect that the transaction is suspicious;
- may enter the premises of any financial institution or cash dealer during ordinary business hours to inspect any record kept pursuant to section 14(1), and ask any question relating to such record, make notes and take copies of whole or part of the record;
- shall send to the appropriate law enforcement authorities, any information derived from an inspection carried out pursuant to paragraph (c), if it gives the Directorate reasonable grounds to suspect that a transaction involves proceeds of crime;
- may instruct any financial institution or cash dealer to take such steps as may be appropriate to facilitate any investigation anticipated by the Directorate;
- may compile statistics and records, disseminate information within Lesotho or elsewhere, make recommendations arising out of any information received, issue guidelines to financial institutions and advise the Minister accordingly;

- shall create training requirements and provide such training for any financial institution in respect of transaction record-keeping and reporting obligations provided for in section 13(1) and 14(1);
- may consult with any relevant person, institution or organisation for the purpose of exercising its powers or duties under paragraph (e), (f) or (g); and
- shall not conduct any investigation into money laundering other than for the purpose of ensuring compliance by a financial institution with the provisions of this part.

One of the major weaknesses of this section is that, by using the word 'may', it does not always impose an obligation on the directorate to enforce its responsibilities. The fact that the Authority can only conduct investigations for purposes of ensuring compliance by a financial institution is a weakness as it does not make provision for investigations to lead to enforcement, which may be a necessary follow-up.

#### *Prevention of Corruption and Economic Offences Act, 1999*

The Prevention of Corruption and Economic Offences Act, 1999 establishes the Directorate on Corruption and Economic Offences which will serve as Lesotho's Anti-Money Laundering Authority. The Act further makes provision for the prevention of corruption and confers power on the Directorate to investigate suspected cases of corruption and economic crime.

The functions of the Directorate are, among others, to:

- receive and investigate any complaints alleging corruption in any public body;
- investigate any alleged or suspected offences under this Act, or any other offence disclosed during such an investigation;
- investigate any alleged or suspected contravention of any of the provisions of the fiscal and revenue laws of Lesotho; and
- undertake any other measures for the prevention of corruption and economic offences.

Section 2 of the Act defines a 'serious economic offence' as any offence that, in the opinion of the Director of Prevention of Corruption and Economic

Offences, calls for different treatment in relation to investigation and prosecution because of the amount of money involved or the complexity and nature of the transaction. Section 8 of the Act empowers the Director to obtain information to assist or expedite investigations into offences of corruption or economic offences. Such information shall be furnished by suspected persons, persons whom the Director believes that the suspected person has any financial or business dealings with and the manager of any bank. Persons served with a notice under this section shall comply with the requirements of the notice notwithstanding any oath of secrecy that they may have in place.

In terms of Section 36 of the Act, the Director may hold an inquiry if he has reason to suspect that a serious economic offence has been or is being committed or that an attempt has been or is being made to commit such an offence. The Director shall also hold an inquiry referred by the Attorney-General in relation to the alleged commission or attempted commission of a serious economic offence.

Section 37 entitles the Attorney-General, upon the request of the Director and upon obtaining a court order to that effect, to seize or freeze bank accounts or assets of any person the Director reasonably suspects to have committed an offence under the Act.

Section 49 makes it an offence for any person to disclose without lawful authority or reasonable excuse, to any person who is the subject of an investigation in respect of an offence alleged or suspected to have been committed by him under the Act, the fact that he is subject to such an investigation or any details of such investigation, or to publish or disclose to any other person the identity of any person who is the subject of such an investigation.

All indications are that there are no immediate plans to establish a separate unit from the Directorate to serve as the Anti Money-Laundering Authority. In discussions held with the Director of the Directorate on Corruption and Economic Offences, the importance of having the draft Bill passed into law was emphasised, so as to enable the Directorate to discharge its functions as the Anti-Money Laundering Authority. Among others there are plans for a unit that will deal specifically with money laundering. It was pointed out that the Directorate had already submitted some comments on the draft Bill to the Central Bank and that plans were already in place for recruitment of relevant staff as well as identification of training needs in order to enhance capacity to undertake the Directorate's statutory functions.

The Directorate, which has only been functional since April 2003, has been established as a public office, pursuant to Section 3(1) of the Act. The Directorate and its staff are regulated by the Public Service Act, 1995 with necessary modifications or as set out in the establishing Act. The Minister of Justice, Human Rights and Rehabilitation is responsible for the Directorate and receives annual reports from it.

The fact that the Directorate is a public office renders it accountable to government, even though it can be argued that it is functionally independent in the discharge of its functions. While the Directorate has been functional for a relatively short period, one can, however, posit that it will not be immune from challenges such as undue influence. Factors that can contribute to this vulnerability include the fact that members of staff of the Directorate are public officers who may have to take unpopular action over persons in authority over them. The Directorate is empowered to investigate allegations of corruption of public officers, and under the Act, these include Cabinet Ministers, holders of statutory public office and members of Parliament.

The Directorate has to go through normal government budget systems and allocations. This can be a hindrance as the public service is renowned for its bureaucracy and inefficiency, which will not necessarily take into account the exigencies of the Directorate's operations. The fact that the public service is not usually a great remunerator may also hamper the Directorate's efforts or desire to attract high calibre staff as they will naturally demand remuneration that is commensurate with their qualifications and experience as well as the demands of their work. Conducive working conditions also serve to minimise internal corruption as well as to act as an incentive to attain a high degree of performance.

The Directorate has taken cognisance of the need for confidence building between itself and the different stakeholders. This includes, but is not limited to, financial institutions, law enforcement agencies, the Central Bank, the Lesotho Revenue Authority and the general public. This confidence building is crucial in order to enhance mutual co-operation which is so necessary in dealing with money laundering. The Directorate also needs confidence building from Government in order for it to have the clout necessary to discharge its functions without fear of favour or prejudice. So far Government has portrayed its political will to address issues of corruption through enactment of legislation and the Directorate's establishment. This has to go hand in hand with the provision of adequate resources and non-interference in the discharge of the Directorate's functions.

### *Commentary on the Sole case*

On 3 December 1999, Masupha Sole, a former chief executive of the Lesotho Highlands Development Authority (LHDA) was indicted, together with 18 other accused, on charges of bribery, fraud and perjury. The charges arose out of allegations of bribery of the chief executive by various international firms, partnerships and joint ventures involved in the multi-million dollar Lesotho Highlands Water Project (LHWP).

Evidence led in the case before the High Court showed that between 1991 and 1999 there was already dissatisfaction among some of Mr. Sole's colleagues regarding the awarding of some contracts under the project and favouritism displayed towards contractors' staff over Basotho nationals. It is also common cause that at the material time, the activities of LHDA and the LHWP were of national interest as it was the first project of its magnitude in the country and one of the biggest projects in Africa.

The Prevention of Corruption and Economic Offences Act came into force in 1999. However, the Directorate only became functional in April 2003. If the Directorate had already been functional, the case would have fallen squarely within its ambit as its functions include, among others, to receive and investigate any complaints alleging corruption in any public body and to investigate the conduct of any person which in its opinion may be connected with or conducive to corruption. The Directorate also, importantly, has the function of advising heads of public bodies of changes in practices and procedures which are necessary to reduce the likelihood of corrupt practices. An early investigation would perhaps have detected irregularities in the chief executive's execution of his duties or could at least have deterred further transgression.

The magnitude of the LHWP should have awakened the government of the country to the need to guard against corruption. Numerous public authorities whose activities could render their employees susceptible to corruption are putting in place policies which require employees to declare their assets and keep track of any signs of unexplained wealth or changes in lifestyle. The government needs to consider putting legislation in place or, at least, seeking amendments to legislation that sets up public and private bodies, to require all employees and holders of public office to declare their assets. This would go a long way as a preventive measure and would be preferable to waiting until there are signs of corrupt practices before taking action..

### ***Lesotho Revenue Authority***

The Lesotho Revenue Authority (LRA) was established by the Lesotho Revenue Authority Act, 2001. It is the main body responsible for the assessment and collection of specified revenue on behalf of government and for the administration and enforcement of laws relating to such revenue.

One of the functions of the LRA is to take necessary measures to counteract tax fraud and other forms of fiscal evasion. The LRA also has to provide for the establishment, maintenance and application of systems for identification of taxpayers. The Directorate on Corruption and Economic Offences has the duty, among others, to investigate allegations or suspected contravention of the fiscal and revenue laws of Lesotho. The two bodies have to co-operate in their respective duties, which will increase the likelihood of identifying money laundering activities.

As already mentioned, there is often a close link between money laundering and other economic offences. In a number of cases, money laundering is detected in the process of investigating offences like tax evasion and vice versa. Money laundering is also facilitated through the use of shell companies. Lesotho lacks a system of keeping track of companies once they are registered, so that it is easy for a company to exist on paper only or to be engaged in activities totally different from those stipulated on paper. If the LRA functions properly, it should be able to ensure that such companies and individuals do not escape scrutiny for contravention of revenue laws or money laundering activities.

## **The commercial sector**

### ***Investment promotion***

The bulk of investment in Lesotho consists of export-oriented manufacturing industries. These industries, which are largely textile and apparel industries are dominated by Chinese nationals. Most of the Chinese traders who do business in Lesotho reside in the neighbouring South African town of Ladybrand. They generally receive their capital through banks in Lesotho, which they withdraw and move to South Africa. They therefore become responsible for most of the cross-border movement of money from Lesotho into South Africa, which in turn increases the risk of money laundering in the country.

Banks generally acknowledge that they are aware of the way in which Chinese traders do their transactions but this seems to have been accepted as normal. As such, it is not unreasonable to assume that a lot of what would constitute suspicious transactions is not really followed up due to this aura of normality.

### ***Travel agents***

Although the exchanging of cash for travel tickets is a common method of moving money from one country to another, the travel agents interviewed indicated that this is not a common practice in their industry. The information provided is that there is no limit to the number of tickets one can purchase and that travel tickets can be cancelled before the departure date. However, there are penalties involved, depending on the price of the ticket and the airline involved. Where a refund is due, it is not issued by the agent but by the airline itself and takes several weeks to process.

In theory nothing stops a launderer from purchasing travel tickets worldwide and for extended periods and then either using the tickets or canceling them before the date of departure and then obtaining a refund from the airline.

### ***Estate agents***

Estate agents have no regulatory body in Lesotho. All that is required is that one should hold the relevant licence.

Dealing in property can be a way for money launderers to invest illicit funds or as a vehicle for laundering activities. Such property dealings can be undertaken through estate agents using a variety of means. An example is the use of shell companies which are registered in such a way that there is no apparent connection with the launderer, even though, in reality, the launderer will actually own the company or have an interest in it. The end result is that it becomes difficult to link the launderer with either the company or the property, which makes confiscation difficult.

The cost of property is normally high enough to discourage dealing in cash. Estate agents can minimise their being used by launderers by insisting on payment by cheque or at least on the cash being deposited by the buyer into a bank account. This would then render the transaction reportable in most cases, or would at least facilitate an audit trail.

## Other relevant legal measures

### *Companies Act 25, 1967*

The Companies Act makes provision for the constitution, incorporation, registration, management, administration and winding up of companies and other associations.

In the past, accountants and lawyers could register companies on behalf of clients. A recent directive from the Office of the Registrar-General has removed these powers.

The Companies Act stipulates that foreigners are only able to register companies if they have a local counterpart. In the process of facilitating registration of such companies, lawyers sometimes end up being shareholders. This can result in lawyers unwittingly being shareholders in shell companies that are set up merely to facilitate illicit activities, such as money laundering. This situation is made easy by the fact the once a company is registered, there is no follow-up from the registering authority on whether the company is actually functioning or whether it is undertaking the activities it was registered to undertake. Many of these companies are used internationally to make fictitious payments and move money that is, in most cases, tainted.

Accountants can be involved in money laundering, sometimes without their knowledge, in the provision of their professional advice on investments and services. Accountants may be used to assist in converting illicit funds into legitimate ventures such as purchase of property, goods and investment products.

### *Privatisation Act, 1995*

The Privatisation Act was established to provide for the privatisation of parastatals and for the establishment of the privatisation unit. Under this Act, after the approval of the privatisation scheme, the privatisation unit must identify a potential purchaser. A 'purchaser' is defined as an individual, a lessee, an investor or a contractor who acquires an interest in a parastatal or any asset which is owned by parastatal or in which a parastatal has an interest.

This means that anybody can be a purchaser, especially as the Act does not have a screening process for the potential purchaser.

### *Casino Order, 1989*

The purpose of this legislation is to provide for the management, control and licensing of casinos. It contains no screening requirements. It merely states that citizens of Lesotho can operate only on a cash basis (section 26), which includes travellers' cheques but excludes personal cheques, credit cards and other forms of credit. What this means is that foreigners can use any currency and there is no limit on the amount of cash that can be used in the hotels.

The fact that anyone can walk into a casino and gamble using an unlimited amount of cash renders the industry susceptible to money laundering. A launderer can purchase casino chips for a large amount of money and cash them back, thus enabling him to exchange tainted money for clean money. Casinos state that, in practice, they exchange casino chips for the currency which a person used to purchase the chips. However, this does not minimise money laundering as the purpose is not necessarily to acquire a different currency.

### *Lotteries Act, 1975*

The purpose of the Lotteries Act is to provide for the establishment, promotion and conduct of state and other lotteries. Lesotho has not had any lotteries in recent years. Money launderers can use the guise of lottery winnings to explain illegally acquired funds. In terms of the Money Laundering and Proceeds of Crime Draft Bill, a person who operates a lottery falls under the definition of a cash dealer. This means that such an operator would be obliged to adopt measures as stipulated in the Bill to help combat money laundering.

### *Legal Practitioners Act, 1983*

In terms of the Legal Practitioners Act, lawyers are empowered to set up trust accounts into which clients' moneys are deposited. The definitions of financial institution and cash dealer as accountable institutions in the draft Money Laundering and Proceeds of Crime Bill seem to have excluded lawyers. The rationale for this exclusion is not quite clear, as lawyers can unwittingly be involved in money laundering activities in their various professional roles. The Central Bank is of the opinion that they have tried to use broad terminology which seeks to include all possible accountable institutions. However, the fact that the Bill does not include a comprehensive list of accountable institutions is a weakness as a number of institutions that are susceptible to money laundering are left out.

As a means of giving effect to the Financial Institutions (Anti-Money Laundering) Guidelines, banks now require lawyers to transact in their own names in respect of trust accounts and to disclose the true identity of a person on whose behalf they undertake a transaction, unlike previously when they could transact fully in clients' names in respect of trust accounts.

In the absence of a specific provision rendering them an accountable institution, lawyers can only come under scrutiny in respect of reportable large cash or suspicious transactions. Lawyers' clients, however, enjoy less scrutiny, while also having a route into a bank account. Clients can also pay a retainer to their lawyers, which can be done in lump sum or through regular or periodic payments. These payments may be in genuine anticipation of future incurring of legal expenses, but they may also be used by launderers to hide illicit money.

## Conclusion and recommendations

The process of domestication of international obligations to which Lesotho is signatory is not as fast as may be desirable. However, as already pointed out, efforts are being made to implement these obligations. The Draft Money Laundering and Proceeds of Crime Bill is an attempt to meet international standards on money laundering. It is however, a weakness that the Bill is still in draft form, almost three years since its inception. That the Bill is crucial in enhancing legislative and institutional capacity to detect and control money laundering is a factor acknowledged by all relevant respondents. It is also a positive step towards implementing the mandatory obligations of United Nations Security Council Resolution 1373, 2001 as well as other international instruments on money laundering and the financing of terrorism.

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.

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. 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.

## Notes

- 1 Definition agreed on at a workshop held for researchers commissioned by the Institute for Security Studies (ISS), Cape Town, 8 March 2003.
- 2 Global Programme Against Money Laundering, <[www.unodc.org/unodc/money\\_laundering.html](http://www.unodc.org/unodc/money_laundering.html)>.
- 3 United Nations Treaty Collection, accessible at <[www.untreaty.un.org/English/tersumen.html](http://www.untreaty.un.org/English/tersumen.html)>.
- 4 SP Sakoane, Research project on money laundering in Southern Africa: Final report on Lesotho, unpublished paper prepared for the ISS, 2002.
- 5 UN Security Council Resolution 1373, 2001, accessible at <[www.un.org/news/press/docs/2001/sc7158.doc.htm](http://www.un.org/news/press/docs/2001/sc7158.doc.htm)>.
- 6 According to information provided by the Legal Services Section of the Ministry of Foreign Affairs.
- 7 Financial Institutions Act, 1999, Section 2(b)(iii).
- 8 According to information provided by the Bank's Supervisory Section.
- 9 S Thornhill and M Hyland (MHA Consulting), *Combating money laundering: A model of best practice for the financial sector*, Commonwealth Secretariat, UK, 2000.
- 10 Interview with the Head and a senior officer of Policy and Exchange Control.