

CHAPTER 1

THE INFRASTRUCTURE TO DETECT AND CONTROL MONEY LAUNDERING AND TERRORIST FUNDING IN NAMIBIA

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Long before the tragic events that shook the world on 11 September 2001, the international community foresaw that the growth of international terrorism would be underpinned by the development of organised networks supported by reliable and enduring funding structures. With the development of reliable communications, including easier means of travel and electronic communications and use of the internet, the movement of money within and without territorial boundaries now requires no more than a telephone call to a recorded message or the press of a key on the computer. In this scheme of business activity the financial services sector plays a very important part. It is important for the generation and storage of funds and assets generally in the usual and ordinary course of legitimate business. It is equally relevant and useful in the same sense for the legitimisation of ill-gotten wealth and its availability for use in attaining the goals of criminals and others with religious and political objectives not shared by a significant section of the human race.

The most important legal instrument passed by the United Nations to address this concern is the International Convention for the Suppression of the Financing of Terrorism, dated 9 December 1999. The United Nations (UN) Security Council Resolution 1373 of 28 September 2001 was passed in reaction to the tragic events of September 11 and with a view to giving increased impetus to realising the objectives of the 1999 Convention. The Republic of Namibia promptly became a signatory to the Convention after 11 September 2001, signing it on 10 November 2001.

This report examines the capacity of the Namibian financial services and other commercial services sectors to detect, interdict, prevent, investigate and ultimately assist in the prosecution of money laundering crimes generally, and money laundering as a facilitating factor in the funding of terrorism. The report is the result of interviews conducted with various people in the banking industry, in other financial services and business life generally, as well as relevant reports

gleaned from the media. The relevant Namibian legal position is also examined in light of the provisions of the UN instruments.

Existing institutional mechanisms

The banking services sector: The Bank of Namibia and banking institutions

The central bank, the Bank of Namibia was established in terms of the Bank of Namibia Act, 1997 (Act No. 15 of 1997). The Bank of Namibia has regulatory and supervisory functions over the operations of banking institutions established in terms of the Banking Institutions Act 1998 (Act 15 of 1998), which is a complementary piece of legislation. An important aspect of its supervisory role is the Governor's power to issue directives, termed 'determinations', on any matter of banking activity. It also has important functions with regard to the supervision and control of foreign currency dealings by banks and other authorised dealers, such as *bureaux de change*. In terms of Section 50 of the Banking Institutions Act, banking institutions are obligated to report suspicious transactions to the Central Bank. In order to implement this provision, the Governor issued a determination on money laundering and another on reporting suspicious transactions and transactions above a stipulated threshold.

The individual banks, in turn, developed bank policies to implement these determinations and have been complying with them. All the banks interviewed have in place identifiable personnel responsible for handling reports on money laundering. Although they were reluctant to disclose internal standing instructions to an outsider, it emerged from interviewing the respective officials that the banking institutions place heavy reliance on their branches, particularly the managers, to detect suspicious transactions. This is largely due to the fact that the branches are the first contact point with a bank through the clerks who receive applications to open accounts, check the information provided, scrutinise and vet potential customers. When an account is finally opened and thus a relationship established, it is the branch managers who have the responsibility to monitor the performance of accounts and to report suspicious activities on them. The branches are required and expected to know their customers and to ensure the adequacy of information provided by the prospective customer before a relationship is entered into. All banks have a Money Laundering Control Officer (MLCO). Although such officers are not necessarily referred to by such title, they are either senior legal or audit

personnel. They, in turn, have the responsibility to undertake further investigations to confirm that any suspicion has merit before reporting to the Bank of Namibia. They are not obliged to report to their superiors within the banks in the first instance, before reporting to the Bank of Namibia, but can do so after the event. This is important as it ensures that reports are made timeously and also helps to prevent possible interference. Thus the subjective opinion of the MLCO formed on the basis of facts available is sufficient for a report to the Bank of Namibia.

The Banking Institutions Act provides the regulatory framework within which banking institutions operate. Furthermore, the powers and authority of the Bank of Namibia in its relationship with retail and merchant banks are defined.

The Act makes provision for the authorisation of persons to conduct business as a banking institution, the control, supervision and regulation of banking institutions and the protection of the interests of depositors, among other things.

The powers of the Bank of Namibia in respect of its relationship with banking institutions, as set out in the Act, include powers to grant banking licences and to investigate instances of illegal banking activity.

In the exercise of such powers, the Bank of Namibia can question any person including auditors, directors, members and partners, compel the production of books and documents, examine such documents and books and call for explanations and order banking institutions to freeze accounts and retain money pending further instructions.

It also has the power to suspend operations or, in the event of conviction under the Act for illegal banking activity, to close down the business altogether.

The Bank of Namibia has power to call upon the police for assistance in the enforcement of its powers and wide powers to enter, search and seize evidence are provided for.

To protect the integrity of the banking sector, it has power to inquire into the integrity of any person seeking to acquire or control a banking institution. It will only approve if it is satisfied that the person is a fit and proper person.

The Bank of Namibia can, by written notice, prohibit a person from acquiring or exercising control if, in its opinion, the individual concerned is not a fit and proper person.

Furthermore, it has power to examine the financial affairs of any banking institution to ascertain its liquidity and viability.

The Bank of Namibia has power to require banking institutions to report to it or any person or authority specified by it, any money transaction indicating or giving rise to a suspicion that the person involved in the transaction may be engaged in illegal activity.

Concerning bank secrecy and confidentiality, while it is trite that the business of banking necessarily operates in an environment in which confidentiality and secrecy are very important, the Bank of Namibia is authorised to disclose information acquired by it, subject to the confidentiality of the information transmitted, to an authority in Namibia or in a foreign state which has supervisory responsibilities in respect of financial institutions. In this respect, the Bank of Namibia can assist foreign authorities in their investigations, in securing evidence and in intelligence-gathering initiatives.

Although directors or officers of banking institutions are in general bound to secrecy and confidentiality, an exception is recognised in respect of disclosure for the purpose of instituting criminal proceedings or in the course of such proceedings and if disclosure is otherwise permitted in terms of the provisions of the Act or by any other law.

Banking institutions are also authorised to disclose information to a police officer investigating an offence under a law. The disclosure of such information is limited to the affairs or account of the customer who is a suspect in the investigation.

It is clear that the Act has useful provisions which may be used to combat money laundering insofar as the Bank of Namibia has authority to carry out supervisory functions, co-operate with domestic and international agencies, disclose information etc. It also has powers to freeze accounts, compel disclosure, impose reporting obligations on banks etc.

The Bank of Namibia has the power under section 71(3)(b) of the Banking Institutions Act to issue general determinations on any matter for the proper regulation of the financial sector.

Acting under this authority the Governor of the Bank of Namibia issued a determination on fraud and other economic crime in January 1999 and wrote in the introductory overview:

Given the growing incidence of fraud and other forms of financial and economic crime in a global perspective, banking institutions should be continually vigilant against such undesirable activities. Apart from causing financial loss to the banking institutions the various forms of economic crime may have far reaching consequences, not only to the afflicted banking institution but can also undermine public confidence in the banking system. Banking institutions are therefore required to bolster their surveillance systems and institute adequate and appropriate internal controls in combating fraud.

While it is accepted that there are costs attached to stepping up anti-fraud efforts and in placing improved control mechanisms, banking institutions should bear in mind that their costs represent additional barriers and hence costs to the criminal also. The prevention of fraud and other forms of economic crime should be regarded as part of risk management.

Given the far-reaching consequences of fraud, the Bank of Namibia deems necessary the setting up of a reporting mechanism and a database on the perpetration of these activities in Namibia. It is envisaged that the reporting mechanism and the database will constitute an effective means to monitor and keep abreast of these undesirable activities and to co-ordinate measures and develop strategies in the war against economic crime.¹

In terms of this determination, banking institutions are obliged to report to the Bank of Namibia any fraudulent or criminal activity or attempted criminal activity perpetrated against and involving the banking institutions whether by insiders or outsiders.

Banking institutions must report:

- each individual case involving an amount of N\$10,000² or more within 14 days of detection of the fraud or attempted fraud;
- the amount estimated to be recovered including from any claim against a third party such as insurance; and
- immediately, by telephone or otherwise, any fraud perpetrated upon the institution involving an amount exceeding N\$500,000.

The Governor of the Bank of Namibia issued a determination in June 1998 which specifically addressed the issue of money laundering.³ In terms of this

determination the Bank of Namibia adopted the Statement of Principles enunciated by the Basle Committee on Banking Regulations and Supervisory Practices of December 1988 and instructed banking institutions to conduct their business in accordance with those principles.

After setting out in general terms the three stages of money laundering, the Bank of Namibia noted that the Basle statement recommended that financial institutions should implement specific procedures to ensure that all persons conducting business with them are properly identified, all transactions that do not appear legitimate are discouraged and co-operation with law enforcement agencies is achieved.

It further stated that it was “of the view that the adoption of the Statement of Principles on the Prevention of Criminal Use of the Banking System would be beneficial to the banking industry in Namibia.”⁴

The Bank of Namibia referred to the reporting requirement in respect of suspicious transactions provided for in Section 50 of the Banking Institutions Act and the prohibition of disclosure of information acquired in the course of banking business otherwise than in the course of duty or in terms of law as provided for by the Bank of Namibia Act 1997. It concluded that the question of breaching customer confidentiality is well provided for.

In light of these provisions the Bank of Namibia determined that the minimum safeguards for banking institutions to detect and combat money laundering are to include the development of a ‘know your customer’ policy incorporating procedures for identifying customers at the time of the establishment of a relationship, the keeping of records, ‘due diligence’ in the conduct of business with a specific customer in terms of acquiring sufficient knowledge of customer activities in order to recognise unusual business patterns which may raise suspicion, the reporting of suspicious transactions, internal control procedures, staff awareness and training. The Bank of Namibia further directed that with regard specifically to funds transfers, especially those involving international funds, these could be used for the layering or dissimulation of the identity of the original ordering customer or beneficiary. It then set out the minimum requirements and guidelines to achieve these objectives.

It reiterated the Basle Statement of Principles and gave general guidelines and examples of suspicious transactions in respect of money laundering involving cash transactions, bank accounts, investment-related transactions, offshore and

international transactions, financial institution employees and agents, secured and unsecured lending and the use of dummy companies or trusts.

Another important initiative of the Bank of Namibia is the determination on the appointment, duties and responsibilities of directors and principal officers of banking institutions.⁵ In an introductory overview the Governor, T K Alweendo, wrote:

Public confidence is the cornerstone of a stable banking system. As the custodian of public funds, the management of a banking institution must exhibit impeccable integrity and professionalism in their [sic] conduct so as to engender public confidence in the safety of their deposits. The board of directors of a banking institution must comprise technically competent persons of integrity with a strong sense of professionalism, fostering and practising the highest standards of banking and finance in the country. These determinations incorporate a coherent set of rules relating to the appointment, duties and responsibilities of directors and principal officers to ensure the interests of banking institutions are adequately safeguarded through prudent, efficient and professional management.⁶

A key requirement of these determinations in relation to all banking institutions is the establishment of an audit committee comprising non-executive directors. The audit committee has direct supervisory responsibilities over an internal audit department, staffed with audit personnel qualified to perform internal audit functions, covering the traditional function of financial as well as management auditing. The board of directors is required to ensure the independence of the internal audit function by giving internal auditors full access to all records and an appropriate standing in the organisation's hierarchy. Internal auditors are accountable to the audit committee, which evaluates their performance.

Determinations issued by the Governor are authoritative and have the force of law and any banking institution which does not comply can be penalised by the Bank of Namibia. In this respect its inspectorate division is mandated with the responsibility to ensure compliance with its determinations.

The internal audit department of any banking institution has a corresponding role to ensure compliance with sound banking principles. Thus all banking institutions have an independent internal audit department. Although policies formulated by individual banking institutions in order to give effect to the

determinations vary, internal audit units play a very important part in the investigation of any matter within their purview such as suspicious transactions. Some banks, such as the Commercial Bank of Namibia, also have compliance managers who perform legal advisory functions and are also MLCOs.

A common feature of Namibian banking institutions is that when a business relationship is established with a customer, assuming all the procedures of establishing such a relationship have been exhausted and the bank has accepted an application to open an account, the branch managers are required to strictly monitor the performance of the account for at least three months. Thereafter, information is routinely generated by the computer for analysis and evaluation. These procedures facilitate the detection of suspicious activity, which must be reported to the MLCO and/or internal auditors for further investigation. If any detected suspicious transactions are confirmed, a report is made to the Bank of Namibia.

At the beginning of 2003, the Bank of Namibia issued a notice to all authorised dealers in foreign currency, such as banks and *bureaux de change*, effective from 3 March 2003, to report electronically to it on a daily basis all extra-territorial foreign currency transactions pertaining to receipts and payments involving Namibian residents. Only authorised dealers can deal in foreign currency in terms of Namibian law. In the case of transactions over the counter, authorised dealers are required to obtain personal details including the names, addresses, passport details etc of their customers. Thus it is standard procedure to require production of a passport when foreign currency is purchased or sold to an individual, whether that person is a Namibian resident or foreign national. Again, any suspicious transaction must be reported. The notice that was issued did not say that it was for the consumption of authorised dealers only, although a confidentiality undertaking was made by the Bank of Namibia in respect of the handling of information given to it in terms of the notice. Some authorised dealers have displayed the notice publicly on their premises. As such Namibian residents have been made aware that any foreign currency transactions entered into by them will be reported. The Bank of Namibia gave as its reason for this measure the need for accurate formulation of policy and planning with regard to balance of payments. However, it is clear that it will be used to detect suspicious transactions, to identify individuals involved in such transactions and take appropriate remedial measures. It follows that this measure is useful in the detection of money laundering.

In the realm of detection, interdiction, prevention and ultimate prosecution of money laundering the powers vested in the Bank of Namibia described above

can be of valuable assistance in that where suspicious activity is detected or brought to its attention, it can take appropriate measures. It can launch an investigation, search and seize evidential material, including the proceeds of such activity. If tainted money is lodged with a bank in Namibia, it can instruct that the money be frozen pending investigations or further instructions from it. It can also render assistance to a foreign state or bank in its enquiries should questionable funds be found within Namibia or should such funds have been channeled through Namibia.

Enquiries with the Bank of Namibia in 2002 gave some interesting insight into its perception of the attitudes of banking institutions in relation to its superintendence.

It was felt that banking institutions routinely report to their principal offices in South Africa rather than to the Bank of Namibia. It was therefore not possible to establish whether banking institutions report all suspicious transactions to it or whether they do so selectively, although a number of reports were made to it. Interviews conducted with officials in selected banking institutions⁷ revealed that while reports were made, it was not known to them to what use the Bank of Namibia put the information given as it never reported back to them. On the other hand, the Bank of Namibia reported that the information was passed on to the police or to the Reserve Bank of South Africa. Bank officials appeared to assume that, in certain cases, some of the information was passed on to Interpol, although the Bank of Namibia officials interviewed could not be certain about this. They could also not say what happened with the information the Bank of Namibia passed on as it, too, did not receive feedback, did not follow up and hence could not say what the final outcome was. The method of reporting information is the completion of a form designed for that purpose. Officials in the Bank of Namibia, who by the nature of their position and responsibilities should have the requisite knowledge, could not say how it passed on the information, i.e. whether this was done in written form or telephonically to a contact institution or person outside Namibia.

Furthermore, it was apparent from earlier interviews that the Bank of Namibia seems to think that local banking institutions, which are invariably wholly-owned subsidiaries of South African banks, tend to prefer reporting to their parent banks than to the Bank of Namibia itself. It was felt that this attitude is engendered by a lack of confidence in the Bank of Namibia or has roots in pre-independence practices. It was pointed out that a probable contributor factor is that the Bank of Namibia is a relatively new institution with a short history of experience, quite apart from the obligations of banking institutions

to their parent banks in South Africa. The Bank of Namibia lacks the institutional capacity to follow up reports made to it rendering the attainment of the noble objectives espoused in its determinations nugatory.

Furthermore, the determinations are applicable only to banking institutions and not to non-bank financial sector institutions such as insurance companies, stockbrokers, insurers etc. They also do not apply to other sectors of commerce such as the consumer retail sector generally. As the provisions of the Act do not cover non-bank financial institutions, the statutory powers of the Bank of Namibia are thus limited in scope and application.

Accordingly, the institutional mechanisms to combat money laundering in terms of these powers are largely ineffective at present.

Furthermore, in the absence of clear procedures with regard to the handling and action taken in respect of reports made to the Bank of Namibia, the usefulness of its instructions is indeterminable. It is of no value to have instructions on paper that are not put to practical use or measurable benefit.

Legislation to address activities in the non-bank financial services sector has recently been promulgated and is discussed below.

The Namibia Financial Institutions Supervisory Authority

The Namibia Financial Institutions Supervisory Authority (Namfisa) was established by the Namibia Financial Institutions Supervisory Authority Act, (Act 3 of 2001).

The functions of Namfisa are:

to exercise supervision in terms of this Act or any other law over the business of financial institutions and over financial services; and to advise the Minister of Finance on matters related to financial institutions and financial services, whether of its own accord or at the request of the Minister.⁸

These functions are wide and broadly stated and can be read to include matters related to ethics, management practices and criminal activities in the financial services sector outside the parameters of banking institutions. Although Namfisa is a new institution, it would seem that it has power to issue sector-specific regulatory directives and general regulatory instructions and guidelines to

financial institutions falling under its mandate. In this regard it can issue guidelines and directives on how to detect and control money laundering in those sectors. It would appear that it might also be able to impose reporting obligations in the same manner, as the Bank of Namibia is able to do in respect of banking institutions.

Financial institutions which are subject to supervision by Namfisa include public accountants and auditors who are members of the Institute of Chartered Accountants of Namibia, pension and provident funds, friendly societies, money lenders, unit trust schemes, participation bond schemes, managers of participation bonds schemes, licensed stock exchanges and brokers, medical aid funds, persons registered as Lloyds intermediaries, insurers and re-insurers, insurance agents and insurance and re-insurance brokers, boards of executors or trust companies and any other person who renders financial services as a regular feature of his/her business even if that person may not be registered.⁹ An aspect of its supervisory functions is the power of investigation and evidence gathering. It does not, however, have prosecutorial powers as these are reposed in the Prosecutor-General.¹⁰

In investigating any matter falling within its mandate Namfisa has powers granted in terms of the provisions of the Commissions Act. Witnesses and their evidence are treated as if Namfisa was a Commission of Enquiry. Thus persons may be compelled to give evidence and may be held in contempt for refusing to testify, producing documents required by Namfisa for evidentiary purposes etc. Namfisa is empowered to enlist the assistance of any persons it considers necessary to assist in the performance of its functions. Thus it can call on the police to assist in obtaining search and seizure warrants, in effecting arrests etc.

Nanfisa has recently had occasion to do so in regard to the affairs of two un-registered money lending close corporations and a trust, in the case of *Cornelia Cartharina Lewies Familie Trust (Namibia)*, *Janeel Financial Services CC and Dupwies Financial Services CC T/A Lighthouse Financial Services*, High Court case no. (P) A 137/2003. Ms Lewies, a South African resident carrying on business in Namibia, set up three related close corporations, namely Janeel Financial Services and Lighthouse Financial Services (set up to undertake micro-funding business) and the Lewies Family Trust (set up to act as surety for the monies advanced). Ms Lewies did so ostensibly on the legal advice of her husband, a practising lawyer in South Africa. On his advice, which turned out to be erroneous, none of the institutions were ever registered as micro-lending businesses in Namibia after their incorporation.

The *modus operandi* of these entities is that Janeel and Lighthouse have branches in every major urban area in Namibia except Windhoek and cater for persons who find themselves in need of funds but would otherwise not be catered for by the usual banking institutions, i.e. those who are marginalised. In terms of the provisions of the Usury Act 1968 (Act No 73 of 1968) and regulations published by the Minister of Finance on 6 August 2002,¹¹ permitted interest rates which may be applied by micro-lenders are stipulated. The maximum interest that can be charged may not exceed 35% per annum or approximately 2.8% per month.

Ms Lewies co-founded a trust, which acts as surety for any loans advanced to individuals by Janeel and Lighthouse. Typically, a borrower signs two agreements, one with the lending entity, Janeel or Lighthouse, for the amount of money lent plus interest at 2%, and another with the Lewies Family Trust as surety in respect of interest payments at 28%. The amount charged to the borrower and entered in the computer is the capital amount plus 30% and this is the amount the borrower is obligated to pay per month. The borrower is required to cede his automatic teller machine (ATM) card and personal identification (PIN) number. In the event that the borrower pays in full, the Trust does not have to pay anything in terms of the suretyship arrangement. If the borrower does not repay his debt it also does not have to pay anything. In fact, Janeel and Lighthouse have sued all defaulting borrowers in court. In the opinion of Namfisa the whole scheme is fraudulent.

Acting on complaints received and information gathered during its routine inspections, Namfisa decided to search and seize records, documents and computers at 11 branches of these entities. With the assistance of the police it obtained search warrants from the district courts in which the branches are cited and seized files, documents, computers, ATM cards and files. It has established that over a period of three years the three entities made a profit in excess of N\$25 million (ZAR25million) through these practices. Namfisa sought to retain the information on the computer hard discs of the three entities, which it had seized, for evidentiary purposes. Following disagreement on how this information was to be copied and certified for evidentiary use, Namfisa refused to return the computers. It had initially returned some files and ATM cards. The three entities resorted to legal proceedings and filed motion proceedings on an urgent basis. They sought the return of the computers and other ancillary relief such as a *declarator* to the effect that the search warrants were invalid and setting them aside and also to the effect that the three entities were lawful even though they were not registered as micro-lending institutions in terms of the laws of Namibia.¹²

Namfisa believes that the three entities are involved in a fraudulent and money laundering scheme. Significantly, it has been able to detect and deal with this matter due to its inspectorate powers and information from the public. It has also been able to use its powers in terms of the Act to investigate and secure evidence for possible criminal proceedings.

This case serves as a good example of the extent of Namfisa's capacity to detect, investigate and deal with possible money laundering activity in the micro-lending sector. The matter is now pending in Court. The current Chief Executive of Namfisa is Mr Frans van Rensburg. He is also the chairman of the Namibian chapter of the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG). He is actively involved in the consultative and legislative process currently underway in regard to the adoption of anti-money laundering legislation and the establishment of a central financial intelligence body in Namibia. Namfisa's staff complement comprises individuals with academic qualifications and experience in finance, accounting, auditing and law. It also has investigators who have police experience. In this respect it is suitably equipped from a skills perspective to carry out its supervisory functions over the non-bank financial services sector. Namfisa personnel undergo training in financial matters through workshops and seminars including those relating to money laundering matters.

Namfisa is well funded through:

monies raised as fees, and interest from unpaid fees, in respect of services rendered by the Authority in the performance of its functions, levies imposed on financial institutions and interest upon unpaid levies, borrowings, donations or bequests ...¹³

The Namibian Police Force

The police force is an important and indispensable institution in the detection, interdiction, investigation, prosecution and ultimate prevention of crime generally. In this regard the police will have an important role to play in the field of money laundering and the suppression of terrorist funding. The Namibian Police Force has different units tasked with the detection and investigation of specialised matters. These are the Vehicle Theft Unit (VTU), the Protected Resources Unit (PRU) responsible for diamond, gold and crimes involving protected resources such as wild life products, the Drugs Unit and the Commercial Crimes Unit for serious frauds. In the diamond industry and pursuant to the provisions of the Diamond Act 1999, diamond companies are

required to establish internal security mechanisms to detect and control illicit diamond dealings and theft. The Diamond Act makes specific provision for the appointment of diamond inspectors who have very wide inspectorate and investigative powers and are employed by the state. Diamond inspectors are required to carry out their functions in co-operation with the PRU.

Diamond mining companies offer incentives for reporting thefts and illicit diamond dealings. This is an important measure in controlling a primary point in the money laundering chain that, with regard to the diamond industry, starts with the theft of diamonds at source, which are then sold illegally for cash with the proceeds being legitimised through normal banking channels. Notwithstanding huge amounts which are spent on security and paying informers, substantial quantities of diamonds still manage to disappear from the mining premises through the collusion of mining employees and security personnel.

Two cases reported illustrate the shortcomings of existing mechanisms of detection and control of illicit diamond activities.¹⁴ In one, a Namibian citizen employed by the Namibia-De Beers Mining Company (Namdeb) at the exclusive diamond-mining town of Oranjemund physically deposited R1 million in cash into his personal bank account in South Africa. He personally attended to the deposit and filled in the relevant deposit slip before returning to Namibia. The South African bank, acting in compliance with reporting requirements under South African legislation, reported the deposit to the Financial Intelligence Centre which, in turn, contacted the security department at Namdeb headquarters in Windhoek. They reported it to the PRU, which sought legal advice from the Prosecutor-General's office as to what action to take. Having regard to the nature of the suspect's employment (he worked in an area which gave him access to diamonds), and remuneration, the size of the deposit made by him and his possession of such an amount of money was considered wholly inconsistent with his status. Furthermore, the fact that he chose to deposit the money into an account held in South Africa raised even more suspicion. Namdeb and the PRU were convinced that the deposit was most probably the proceeds of an illicit diamond deal. However, proof was lacking and the mere fact of such a deposit did not constitute a crime. The Prosecutor-General's office could only advise Namdeb to monitor the employee's activities and try and build a case through surveillance and ultimately entrapment, as the employee could not be charged with any criminal offence on the available facts. At the same time the South African bank was requested to monitor the performance of the bank account with regard to transactions on the account and the identity of persons involved.

In another case two Namibian citizens, Immanuel Handjaba Kaukungua and Joseph Heinrich, both employed by Namdeb at Oranjemund as cleaners (sweepers), became implicated in a case of armed robbery in Windhoek. The armed robbery involved a cash-in-transit motor vehicle, which was waylaid on the Western Bypass highway at Brakwater, 10 km north of Windhoek. N\$5.3 million in fifty-dollar notes was stolen during the robbery and a security guard was injured. Over N\$4 million remains unaccounted for. Namibian and South African nationals were allegedly involved and are currently on trial in the High Court.¹⁵ The two Namibians were drawn into the case when thousands of dollars, all in new fifty-dollar notes, were paid into their bank accounts at Oranjemund in the first five months of 2001 immediately after the robbery.¹⁶ The police had information linking them to some of the accused and it was not clear why such payments were made to them. The amounts were deposited in batches of about N\$20,000 a day during that period and a total of N\$15,000 was involved. The two were acquitted after the prosecution failed to link the deposits to the money stolen during the robbery, despite very strong grounds for suspicion. Namdeb officials were unaware that their employees possessed such large sums of money. The amounts were not part of their regular income and did not accord with their remuneration. It is suspected that the two were involved in diamond thefts and illicit diamond deals and that the money was part of the proceeds of the robbery, which were laundered through illegal diamond sales in which they were involved. They had access to diamonds as they were responsible for the sweeping of diamond-sorting areas. Despite these strong suspicions they could not be charged with any other crime after their acquittal.

Despite the unusual deposits into their accounts, the bank's suspicions were not aroused. Consequently, the Oranjemund branch had not made any reports to its head office in Windhoek. This illustrates that the reporting obligations imposed on the banking sector, as discussed above, are not effective.

From this example it can be concluded that there is a possibility of the existence of other unreported cases of suspicious transactions.

Factors exposing financial/commercial sectors to money laundering

In this section the case of the Presidential Enquiry into the Affairs of the Social Security Commission (hereafter referred to as the SSC), will be used as a revealing illustrative and practical example. Witness testimony during the hearings, revealed startling shenanigans at the operations of the SSC. The events described

during the enquiry give some insight into the factors that expose the financial and commercial services sectors to criminal enterprise, including the laundering of proceeds of crime.

The SSC case

In order to give a clearer picture of what went on and of how it impacts upon the detection and control of money laundering activities in Namibia, a summary of some of the testimony is given in this report. The summary is based on what the reporter heard during some of the hearing sessions he attended and on media reports, which are duly acknowledged.

During 2002 the Ombudsman carried out an investigation into suspected corrupt activities at the SSC, a statutory body responsible for collecting subscriptions and investing money on behalf of the working people of Namibia for social security purposes. At the end of the investigation the Ombudsman submitted a report to Cabinet, which resulted in the setting up of a Presidential Commission of Enquiry.¹⁷ The Ombudsman is empowered in terms of the Namibian Constitution to investigate allegations of corruption and the misappropriation of public monies and to report to the Prosecutor-General and Auditor-General and to report annually to the National Assembly.¹⁸

The Commission of Enquiry was mandated to investigate and report on the operations of the SSC. Public hearings were conducted in the first half of 2003. At the end of the hearings a report was presented to the President. At the time of writing¹⁹ the report had not been made public. However, the print media widely reported the hearings. Some of the shenanigans revealed showed that high ranking and well-placed officials within the SSC, middlemen and insurance brokers received huge returns by way of commissions for business generated through investments made on behalf of the SSC through various insurance companies.

Top officials of the SSC executive connived to award themselves huge perks and harangued the Board to approve them. Nepotism in the hiring of employees was also rampant. The wife of the then-Chairman of the Board rose to become the SSC's Investment Administrator, allegedly without proper qualifications. For one to be given investment business by the SSC one had to have connections within the institution. Insurance brokers could not get business on merit; they had to go through other people, some of whom were not even employees of the SSC, with the SSC being the beneficiary. Kickbacks were paid to employees,

contacts who posed as brokers but who were not registered as such and insurance brokers, in return for investment business given by or on behalf of the SSC. Insurance contracts were also taken out for large sums of money on the lives of top employees of the SSC.²⁰ Employees of the SSC, acting in cahoots with some insurance brokers, engaged in fraudulent activities aimed at generating millions of dollars in commission. The acting investment accountant, Paul Kisting, allegedly tied the SSC to an N\$11 million a year investment for ten years without authorisation. During the hearings it came to light that he was not even qualified and had no training in, or knowledge about, investments. He surfed the Internet for information and applied concepts that he did not understand in making investment decisions. He allegedly signed for dozens of million-dollar investments with Fedsure Life, (an insurance firm now known as Channel Life) through Hendrik Sandmann, an independent broker carrying on business as Central Insurance Financial Services, and would-be broker Lazarus Kandara, who acted as a trainee unregistered 'broker' but was in reality only important in the chain because of connections he had in the SSC, such as with the Chairman of the Board (Gerson Hinda), who is his cousin, and Hinda's wife, Hansina. Sandmann received N\$3.5 million as commission for selling the life assurance product to the SSC. Kisting's life and that of another employee, Clarence Balie, were covered by the policy. Another broker, Pieter Bonanzier, received N\$12 million to invest on behalf of the SSC, earning himself commission to the tune of N\$1.8 million. In one instance Bonanzier paid N\$1.34 million from commissions totaling \$1.46 million to Maria Tsowases (now Lombardt), a former colleague of his at Old Mutual, for 'introducing' him to the responsible officials of the investment committee of the SSC. Lombardt was not registered to conclude any deals and thus made use of Bonanzier. Although Bonanzier retained only N\$117,500 from the commissions on this deal, he went on to conclude four other deals without Lombardt's knowledge, keeping all the commissions. Lombardt paid her receipts into her husband's company's bank account for new ventures, with his knowledge. In this way the proceeds were cleaned and their origin concealed.

The Commission heard evidence that the SSC had invested nearly N\$500 million since its establishment in 1995, with 24% (N\$119 million) of that going to insurance companies. On average the SSC collects contributions from Namibian workers and companies totaling N\$8 million per month of which about N\$6 million remains after paying for costs. Investments totaling N\$95 million made between May and December 2001 resulted in brokers and investment advisers raking in N\$14 million in commissions.²¹ Johan Deyssel, an investment advisor for Old Mutual, told the Commission that he received N\$1.5 million in commission and expected another N\$350,000 over a four-year period from

investments made on behalf of the SSC through him. An Old Mutual insurance agent, Keith Fransmann, admitted receiving a commission of N\$1.55 million for merely filling in an investment application form on behalf of Hendrik Sandmann, who could not do so himself because he had no authority to deal in Old Mutual policies. Fransmann paid Sandmann, who was his link to the SSC, a sum of N\$697,000.

The investments done on behalf of the SSC were approved by an internal investment committee that was not sanctioned by the Board and was, in fact, illegal. The suspended Chief Executive Officer of the SSC, Dessa Onesmus, admitted that she signed blank forms for huge investments. The details would be filled in by other officials or insurance brokers and she invariably did not have personal knowledge of the precise amounts and nature of investments made. It also emerged that Onesmus was a nurse by training and had little knowledge of financial investments. Some of the commitments made, in one instance to pay N\$75 million a year, were likely to result in cash flow problems for the SSC and, if stopped before maturity, would result in huge losses.

The Commission heard evidence from Sandmann that he paid Kandara N\$650,000 in cash from commission proceeds on one of the investments. Kandara was Sandmann's link to officials in the SSC and acted as Sandmann's pupil.²² Kandara testified that he received cheques worth more than N\$2 million made out in his mother's name, which he deposited into a trust account with Dammert and Hinda, a law firm in which his cousin, Gerson Hinda, mentioned earlier, is a co-partner. He claimed that he did so because he did not have a bank account of his own. The amount was part of N\$5 million in commissions from investments totaling N\$30 million channeled through Sandmann. He claimed that he negotiated the deals on behalf of Sandmann after the latter and his firm had failed in previous attempts to secure investment business from the SSC. He claimed that the cheques were made out in his mother's name for no apparent reason other than a 'business decision' and that the moneys were channeled through a trust account to avoid losing his wealth to creditors.²³

Another insurance agent, Peter Bonanzier, admitted paying N\$2 million, which was part of the commissions he received on investments made on behalf of the SSC, to one Manfred Namaseb, a businessman. Bonanzier claimed to have bought some shares in Namaseb's company, Clarion Investments. The shareholders of the company were Manfred and his brother Issy. At the time of the hearings, some two years after the alleged purchase, no shares had been transferred and there was no evidence showing him to be a shareholder. Clarion

Investments was existent only on paper with no bank account or balance sheet. Namaseb featured in a previous case which came up in the High Court of Namibia during which a Judge declared him a 'corrupt' person after he allegedly used inside information to win a government tender for a pensions distribution contract. His company, JMS, was subsequently blacklisted by the government. A senior government official was also accused of corruption in that matter for giving information to JMS.²⁴

Namaseb told the Commission that of the almost N\$2 million he received from Bonanzier he kept N\$1 million in cash at home in order to cover up his gains due to marital problems and to avoid paying creditors. It transpired that Issy Namaseb's wife was employed as an accountant at the SSC and Issy himself worked for Fedsure, the insurance company through which Bonanzier placed the SSC investments. Namaseb was not convincing on how he had spent the balance of the N\$1 million that remained after he paid N\$300,000 to his brother, claiming that that kind of money was "nothing" to maintain his standard of living.²⁵ He claimed that he had "a responsibility" to his brother. "I must support him," he said. He said that he is a black businessman in a capitalist society but has no capital. He also claimed that he installed a new up-grade of the water system at his farm and also bought bulldozer.

When aspiring insurance broker Lazarus Kandara was pressed to detail how he spent the N\$5 million he had received and split with Sandmann, he revealed that he bought just about everything money can buy through the trust account he opened in his mother's name with Dammert and Hinda Legal Practitioners. He bought a house in the prestigious Windhoek suburb of Hochland Park (Hinda also lives there!) for N\$715,000, a Land Rover Freelander vehicle for N\$228,000 plus another N\$10,000 on conversions to the vehicle. He also spent N\$43,000 on a television set, N\$144,000 on a Nissan bakkie, \$N9,000 on a Hi-Fi system, N\$35,000 on curtains, N\$30,000 on the services of an interior decorator, N\$184,000 on a Nissan V6 bakkie, N\$150,000 on repaying a loan from one Amunyela who had been patient enough to wait for the money owed him, as well as N\$60,000 to one Kandundu, who had helped him during hard times. He also took N\$200,000 in cash to South Africa to purchase furniture, including an Italian bedroom set for N\$58,000.²⁶

In an interesting contribution, Dammert and Hinda defended the use of the lawyers' trust account for non-legal transactions. "For us it was legit," Hinda was quoted as telling the Commission.²⁷ He said that if he had known that the firm was being requested to channel dirty money he would have turned it down. Hinda admitted that he allowed Kandara to use his personal bank account

on familial grounds, although he insisted that none of the SSC commissions were channeled through that account. "The relationship with Kandara is a familial one. I was born. I was not cloned," he is quoted as having said.²⁸ Hinda also stated that he was aware that many legal practitioners had trust accounts to help clients transfer money to foreign accounts. Hinda stated that at the time Kandara concluded deals with the SSC, he was no longer its Chairman and his wife was on maternity leave. He said that he did not benefit personally from Kandara's activities. Marlene Dammert, Hinda's partner, was quoted as telling the Commission that it is not unusual for trust accounts to be used in this manner, as lawyers often receive millions of dollars to put into trust accounts to conclude deals on clients' behalf.²⁹

Kandara also registered two close corporations, Trafalgar Investments and Dei-Yar Investments, in his mother's name. The trust accounts were operated in the names of the close corporations. The house was bought in the name of one of the close corporations. His mother had no knowledge of the use of her name in these transactions. Hinda stated that there was nothing sinister in the purchase of properties and their registration in the names of close corporations as many people use this practice.³⁰

Weaknesses in the SSC

The revelations during the Commission of Enquiry make it a classic case study to identify the factors which expose the financial and commercial sectors to the laundering of tainted money and property. It is also useful for analysing and assessing the strengths and weaknesses of these sectors to detect the laundering of tainted money and other illicit proceeds in Namibia generally. It needs to be pointed out that in terms of financial and commercial activity Namibia is a comparatively small but significant market.

The factors that facilitated the misappropriation of public funds at the SSC can be explained against the background of poor organisational and management structures. These include the appointment of unqualified and inexperienced personnel to make crucial investment decisions and to manage the operations of the SSC, the appointment of an ineffective Board that could be manipulated by the executives and the absence of effective management structures. Also important was corruption and nepotism that facilitated the growth of a syndicate within the institution, which undermined the SSC by colluding with external forces within the insurance sector to perpetrate fraudulent deals on the SSC's behalf for the benefit of its associates.

An Investments Committee set up within the SSC was not authorised by the Board. Only a select membership of the Board was privy to its existence and operations and those members in the know were probably some of the persons who were benefitting from the activities that were going on or were associated with the perpetrators.

Internal auditing structures were poor. There was lack of clarity as to whom the Auditing Unit reported to. If it reported to the Chief Executive Officer then it was almost inevitable that any improprieties found by it would not be brought to the attention of the Board. On the other hand, if it had an obligation to report to the Board directly, the risk existed that nothing would be done to force a powerful executive to take remedial action. Furthermore, if there was collusion between certain members of the Board and some of the management executives, no action could be expected to be taken to correct the situation. It would have been preferable for the audit function to reside in an independent committee that reported directly to the responsible minister, i.e. the Minister of Labour.

There were patently ineffective checks and balances built into the structures of the SSC. This facilitated the perpetration of the predicate fraudulent activities that generated the commissions and kickbacks that were subsequently laundered by the beneficiaries. From this it can be seen how crime—and for present purposes, especially money laundering—can be facilitated by the failure to put in place proper management structures, the hiring and appointment of unsuitable personnel and poor corporate governance. This situation can arise in any sphere of the financial and commercial sectors.

After the commissions had been generated, the beneficiaries were able to launder the money owing to a variety of factors and circumstances which operated in their favour. The first and most important factor is the absence of anti-money laundering legislation. The second is the absence of suitable anti-corruption provisions in the existing law. It is possible that some of the activities of the persons concerned can be prosecuted under the provisions of the current Anti-Corruption Ordinance. However, some of the activities that probably took place, such as the abuse of inside information, cannot be dealt with as such under the criminal law as it stands.

It is possible that some of the persons involved saw nothing wrong in what they were doing. For example, the Managing Director of Channel Life, Lennie Louw,

defended his company's dealings with the SSC. He was quoted as saying, "We believe that our house is and was 100% in order."³¹ He claimed that SSC executives understood what the investments involved. He argued that the commissions were high because of the amounts of investment monies involved and that they were determined by law. This was despite allegations that some brokers paid kickbacks to SSC officials to 'facilitate' the transactions and that Channel Life made changes to some policies unilaterally to maximise its benefit.³²

In the absence of such laws, reporting obligations do not exist in the non-banking financial and commercial services sectors. As a result Kandara was able to establish 'paper' close corporations which he used as the vehicles to launder his ill-gotten wealth through a trust account. He was able to purchase property in the name of a legally established close corporation, albeit one that existed on paper only, and to pay for the purchases through trust cheques without raising suspicion. The motor vehicle dealerships, the estate agents and retail furniture shops with which he dealt, as well as the law firm itself, were under no legal obligation to report the transactions. Furthermore, when the money was banked by the sellers of the movable and immovable property thus purchased, the banking institutions would have had no reason to peep behind the deposits to ascertain whether they were tainted or not. In this manner Kandara's ill-gotten gains were insinuated into the legitimate banking system through innocent parties. Whenever Kandara re-sold his immovable property, for example, the purchaser would legitimately obtain title from the close corporations while the money would be cash available to Kandara to use as he pleased. These transactions typify the kind of business transactions that are considered normal in the course of business in Namibia. One does not need to be a rocket scientist to prophesy the negative implications of such a state of affairs on the financial and commercial services sector and the limitless opportunities such situations offer to money launderers.

An additional important revelation made during the Commission of Enquiry was the abuse of corporate laws through the setting up of paper entities to conceal the identity of persons involved in the transactions. This was evinced by the use of close corporations by Kandara and the apparent attempt to conceal the use to which proceeds of illicit deals between Namaseb and Bonanzier had been put through a dubious share-purchase arrangement involving a paper company. This demonstrates that there are serious loopholes in the laws regarding the registration of corporate entities in terms of performance monitoring and the enforcement of proper corporate governance.

The role of corruption in money laundering

The SSC case also illustrates that corruption in the public sector can be a catalyst for corruption in the private sector and can be complemented by corruption in the latter. Thus money laundering can be the product of criminal activities simultaneously conducted in the private and public sectors. It is apparent that wherever opportunities arise to make money through criminal acts, whether in the public or private financial sectors, the laundering of the resultant proceeds is a logical consequence. Laundering becomes more a feature of the commercial business sector secondary to criminal activities perpetrated in the public sector. It is thus possible to conjure a situation where a public tender, albeit involving a government ministry or parastatal, is irregularly awarded through a corrupt process and the benefits of such tender are laundered through the financial and commercial business sectors. In this respect the existence of loopholes that encourage and fuel corruption is a factor, just as the corrupt act itself, which increases the exposure of financial, commercial and public sectors to the laundering of money and other illicit proceeds.

In the legal sector the Law Society of Namibia and the Society of Advocates, which regulate the practice of law by both attorneys and advocates, do not have any specific legal duty to look into the operations of law firms and legal practitioners to detect money-laundering practices. In the absence of specific money laundering obligations the two bodies have responsibility to supervise activities in the legal sector in terms of whether ethics and rules of practice are being observed and to investigate complaints brought against their members. Although one would expect lawyers not to collude with their clients or perform any acts on behalf of their clients which may be of a criminal or questionable nature, the old adage that what is not clearly prohibited by law is not unlawful tends to diminish the fine line between illegal and unethical conduct. Furthermore, the doctrine of legal professional privilege may also act as protective cover for unlawful acts by lawyers and clients. The fact that lawyers are not in agreement on the boundaries within which this principle ought to apply further compounds the issue. As is apparent from the comments made by Dammert and Hinda Legal Practitioners, it is possible for lawyers to act innocently for clients without knowledge of the clients' prior criminal conduct. It is also possible for an unscrupulous lawyer to assist his client in furthering a money laundering operation with actual or constructive knowledge of the criminal enterprise or through negligence. In the absence of a clear law imposing reporting obligations, the legal sector is exposed to money laundering activities.

In the SSC case, the commissions paid to middlemen and brokers were paid in cash. One of the alleged central figures in the scam, Kandara, received over

N\$3 million on separate occasions. Kandara testified that he did not own or operate a bank account because he had had previous problems with creditors. It was because of this that he placed all the proceeds of the deals through the trust account of his cousin's law firm, from which he withdrew the funds to purchase movable and immovable property amounting to more than N\$1.5 million. Trust cheques in the name of the law firm would have been used to do so and in the process to conceal his identity to the sellers and banks. If the legal practitioner's firm was aware that the funds were proceeds of criminal conduct, facilitating the use of such funds through its trust account was tantamount to money laundering. Although the firm issued a statement to the effect that receiving and processing large sums of money is a normal function of a law firm in Namibia, it is clear that the law firm's conduct may invite adverse comment. Kandara chose to divulge his dealings through his cousin's law firm. He did not raise the defence of legal professional privilege and it is open to speculation what the effect would have been if the law firm had relied on this privilege and if Kandara had refused to testify.

With regard to the Namaseb share-purchase arrangement, it is most probable that the payment made to Namaseb was in fact to disguise the origin of the funds, since Namaseb is a well-known businessman. Namaseb revealed that some of the proceeds were used to pay for his farm and to purchase a new tractor in cash, which would have resulted in the further 'washing' of the proceeds from the SSC commissions.

These facts provide additional proof that tainted money can be laundered and legitimised through normal banking channels by the use of the bank accounts of third parties, such as those held by respectable individuals, corporate entities and lawyers, without raising suspicion. Furthermore, because of a legal vacuum, a motor vehicle dealer, for example, is under no obligation to place himself on enquiry where a luxury motor vehicle is purchased using cash. The same applies to an estate agent or a furniture shop. Payments made to such commercial entities can easily be insinuated into the legitimate banking sector. It would be unreasonable to expect a banker to investigate a reputable commercial concern to determine whether the money deposited into its account is clean, unless a basis to do so exists. A banking institution would not have the capacity to do so. In this respect the fact that cash transactions are a normal occurrence is a factor which contributes to the exposure of the financial and commercial services sectors to money laundering activities and compounds the problems of detection and control.

The SSC case reveals some of the factors which breed fertile ground for money laundering activities. In summary these can be listed as follows:

1. *An absence of comprehensive legislation to combat corruption.* As previously stated the legislation, a pre-independence colonial statute, does no more than codify the common law crime of bribery. Its coverage is limited and it does not cater for the new realities of practices occurring within the public and commercial sectors. It does not address issues related to insider trading and the abuse of price-sensitive information for financial gain. This is particularly important in view of the fact that Namibia has a registered stock exchange and stockbrokers. Money laundering could conceivably be carried out through these institutions.
2. *The authority of the Bank of Namibia is limited in scope to banking institutions.* Furthermore, its effectiveness in handling reports of suspicious transactions is limited. Its capacity to analyse and evaluate data generated by these reports is not measurable. Cases reported to it have not resulted in any investigations that ended up in court or resulted in convictions.
3. *There is no anti-money laundering legislation in Namibia yet.* Thus money laundering as such is not a crime in Namibia. Such conduct falls to be dealt with under the common law and is investigated under the recognised common law crimes such as theft, fraud, bribery etc. Bills on the Prevention of Organised Crime, the establishment of a Financial Services Centre, Anti-Terrorism Activities and Corruption are in various stages of development. Save for the Anti-Corruption Bill, which has been passed by the House of Assembly but which has now been referred to the second house of Parliament—the National Council—for approval, all the others are still on the drawing board and in circulation by the responsible ministries. They are still drafts in circulation for comment and input by the various stakeholders. With government's attention focused on other priorities, such as domestic violence, it is not known when these papers will be ripe for parliamentary presentation.
4. *The level of awareness of the nature, form and content of conduct constituting money laundering at important levels is limited.* For example, in the banking sector most clerks who are the first point of contact with customers have little or no such knowledge. However, bank managers do have the training needed to identify suspicious activities on an account although this does not mean that they can identify it as money laundering activity. This has a direct and adverse bearing on their ability to evaluate information churned out regularly by computer in respect of customer accounts. Thus it militates against or reduces their detection capacity insofar as suspicious activity and hence money laundering are concerned. All the banking institutions place heavy reliance on the branches to know their customers, keep complete

and reliable records and to detect and report suspicious activity. An enhanced capacity through training will go a long way in justifying this reliance, otherwise the number of suspicious transactions which go undetected will be incalculable.

5. *Where money laundering control officers are in place, it is difficult to ascertain their skills level in terms of analysing reports made to them and their decision-making in regard to whether an investigation should ensue or not in order to confirm the merits of the suspicion from below.* However, as most of these officers are either legal officers or auditing personnel it can be reasonable to assume that they have the requisite capacity. As the reporting of suspicious transactions and detection of money laundering is not a legislative requirement, due to the absence of such legislation, and is a feature of the statutory functions and powers of the Governor of the Bank of Namibia, it is not possible to measure the commitment of banking institutions to combat money laundering in their operations. After all, banks are more interested in attracting and making money rather than discouraging business and combating crime. It is true, though, that all Namibian banks have an interest in the protection of the integrity of the banking sector.
6. *The absence of anti-money laundering legislation also affects activities in the non-bank financial services sector supervised by Namfisa.* This is a wider financial services sector and requires greater regulation. Namfisa is a newly-established institution. It is yet to test and apply its powers to the fullest extent possible under its parent statute. It has so far not issued any directives or guidelines relating to money laundering. As previously stated it would appear to have powers in that regard. However, the extent to which it can apply those powers is yet to be tested. For example, section 1(n) is a general catch-all provision that includes under the definition of ‘financial institution’:

any other person who renders a financial service as a regular feature of the business of that person, but who is not registered as a financial institution or authorised to render a financial service under a law referred to in paragraph (a) to (l) of this definition.

‘Financial service’ is defined thus:

...any financial service rendered by a financial institution to the public or to juristic person, and includes any service rendered by any other person and corresponding to a service normally rendered by a financial institution.

Lawyers do provide financial services to their clients through their trust accounts. For instance, it occurs in the ordinary and usual course of the business of a legal firm that large sums are received on behalf of a client and held in trust, usually in a bank account of the firm. Can it be said that a legal firm renders a financial service under these circumstances and thus becomes a financial institution to which the provisions of the Namfisa Act apply? Could Namfisa have power to regulate and supervise such financial transactions?

In the retail, real estate, stock exchange, insurance, trusts and securities sectors, cash transactions are perceived as normal as they are a common way of conducting business. This is a factor which exposes these sectors to money laundering. There is no legal obligation to report suspicious transactions or to report any transactions above a predetermined threshold. Accordingly, transactions which may be associated with money laundering are not detected in those sectors. No one is out there looking for money laundering activities. It is just not their responsibility.

Interviews with major property developers, motor vehicle dealers and insurers revealed that there is little knowledge of what constitutes money laundering in these sectors.³³ There is a general acceptance that monies used to purchase movable or immovable property may be the proceeds of criminal enterprise such as fraud or theft. However, it was apparent from the interviews that even then, the only time they would become aware of any link to a crime in a transaction carried out through them was when there was a police investigation, which would have commenced as a result of the detection of a crime through other means available to the police, presumably through a complaint or information received. There is little capacity, if any at all, in such a commercial environment to detect money-laundering activities.

The micro-lending sector is a very important segment of the non-bank financial services sector. Operations in the sector are regulated by the Usury Act 1968 (Act 73 of 1968) and the regulations issued thereunder.³⁴ Furthermore the provisions of the Namfisa Act apply to micro-lenders and hence Namfisa has supervisory authority in the sector. The Janeel Lighthouse Financial Services case is an illustrative example of an area in which Namfisa has used its powers to probe alleged shady dealings. Through the micro-lending sector large sums of illicit money can be brought into the legitimate sector and laundered through lendings to needy borrowers who would otherwise fall outside those catered for by banking institutions. Through charging usurious interest more income can be generated from illicit

proceeds and further laundered until the audit trail to the original predicate crime, which was the source of the initial funds, is either blurred or obliterated. The fact that Namfisa has regulatory and supervisory powers in this sector is therefore important in the detection, interdiction and control of money laundering.

Capacity of institutions to detect the laundering of tainted money and other illicit proceeds

Implications for the control of terrorist funding

The only institutions that are ideally situated to detect money laundering are the banking institutions, the Bank of Namibia and Namfisa. None of these institutions are required under present law to detect money laundering. In fact, the detection, control and prevention of money laundering is not a statutory requirement of their functions since there is at present no legislation to deal with this question. Whatever capacity these institutions have, flows from the appreciation by the Bank of Namibia and the banking institutions themselves of the risks and threat posed by money laundering to the financial integrity of the Namibian banking sector. They are alive to the risk of loss of confidence in the Namibian banking industry on the part of international financiers and investors if they do not comply with internationally recognised standards and banking practices. Thus the requirement to report suspicious transactions in terms of section 50 of the Banking Institutions Act was intended to be part and parcel of a diligent banking regime. Furthermore, the determinations issued by the Governor of the Bank of Namibia are intended to bolster this regime. As part of this ethos the banking sector has adopted the Basle Principles and the Financial Action Task Force (FATF) recommendations as amended because of the realisation that the banking sector needs to be proactive in regulating activities within the sector and thus must keep abreast with developments in the international banking sector. The Namibian banking sector is therefore able to render assistance in international enquiries and investigations in terms of existing law and guidelines issued by the Bank of Namibia, notwithstanding the fact that a specific anti-money laundering law is still being formulated.

With regard to international investigations, the banks can assist in the provision of evidentiary material through the Bank of Namibia and the police. Furthermore, law enforcement authorities of a foreign state can obtain the required assistance through the appropriate authorities in Namibia in terms of the provisions of the Criminal Matters (Mutual Assistance) Act.

Thus it can be said that even as matters stand at present, the banking sector does have the capacity to detect money laundering within the framework of existing legislation and the statutory powers of the Bank of Namibia. The issue that then arises relates to the competence of banking officials, i.e. the individual staff members, to detect money laundering within the existing legal and institutional framework. There appears to be sufficient reason to conclude that in this respect capacity is limited. Bank clerks and managers are not sufficiently schooled in this area and there is a need to sensitise the banking institutions to the importance of giving appropriate training to personnel at the primary money laundering control points, including branch managers, money laundering control/compliance officers and those responsible for the audit function. Such training should canvas such issues as the nature and form of money laundering, the harmful effects of such activities, the importance of implementing effective 'know your customer' policies and procedures and the importance of creating an audit trail through appropriate record-keeping. The training must also include knowledge of extradition and mutual legal assistance procedures provided for under existing legislation. Such training can be effected through holding workshops and seminars within individual banks or jointly between banks locally. It can also be effected through the provision of opportunities for the high-ranking bank officials such as bank managers and compliance officers to attend international workshops and seminars.

With regard to the supervisory function of Namfisa in the non-bank financial services sector, it would seem that in terms of its general powers and functions, Namfisa can issue guidelines for financial institutions to follow. These guidelines would be sector-specific and similar to those issued by the Bank of Namibia. Namfisa could also adopt and adapt the Basle Principles and some of the FATF recommendations to suit the needs of the financial services sector under its mandate. Thus appropriate reporting obligations, 'know your customer' policies and procedures and record keeping policies similar to the ones applied in the banking institutions sector could also be imposed within this sector under the wide powers of Namfisa. As things stand at present, there are no such guidelines operating within that sector and as has been demonstrated by the SSC example, money laundering is not being detected and controlled within that sector. Namfisa can resort to its general supervisory powers in the interim period pending the promulgation of anti-money laundering legislation and the establishment of a central financial intelligence institution to receive reports, evaluate information and intelligence and to take appropriate corrective measures. As it is not clear whether Namibia will decide there is a need to set up a financial intelligence centre (FIC), by issuing such guidelines or instructions Namfisa will have made a useful head-start in this field. Its parent Act could be

revamped to incorporate a specific financial intelligence and anti-money laundering function in the sectors for which it has supervisory and regulatory responsibility. In this respect it would complement the functions of the Bank of Namibia. The two bodies could remain seized with responsibility to supervise and regulate the banking institutions and non-bank financial services sectors independently of each other, while at the same time creating a co-operative relationship in the discharge of their functions.

Concerning the commercial sector outside that which is catered for by the above, such as the retail and the informal sectors, in the absence of anti-money laundering legislation no regulation or control exists in Namibia. There are no reporting requirements, whether suspicion- or threshold-based. Thus detection of money laundering or laundering of illicit proceeds is virtually absent. This sector does not have the capacity at all to detect and control money laundering. Furthermore, there is no institutional framework to deal with this problem. This is a major weakness as experience shows that money launderers tend to have an insatiable appetite for worldly material possessions. The ease with which movable or immovable property can be acquired and disposed of is an important facilitative factor for money laundering. It is through this sector that money or proceeds can be washed and cleaned and introduced into the legitimate banking and non-banking sector. The SSC's experience is a case in point. In the retail and informal sectors one can buy or sell for cash with no questions asked and without raising any suspicion at all. Even if the seller or purchaser had suspicions, it is not his business to enquire any further. He is under no legal obligation to enquire anyway.

While the police are not required to prevent and control money laundering, they have a statutory duty to investigate criminal complaints. In doing so, they rely on the general powers given to them in terms of the Police Act. They also rely on the various provisions in the Criminal Procedure Act regarding the gathering of evidence and securing the attendance of witnesses at court. They can also rely on the provisions of the mutual assistance legislation to obtain evidence from abroad and to provide assistance to foreign authorities when called upon to do so. As disclosure of information by banking institutions to police officials is authorised in terms of relevant legislation, as mentioned earlier, it follows that banking institutions as well as the Bank of Namibia have the capacity to enforce civil/administrative measures relating to mutual legal assistance, including the freezing of assets pending forfeiture in due course of law such as consequent to a conviction and sentence by a competent court in Namibia. As Namibian law makes provision for reciprocal enforcement of judgments, it is possible to have a foreign judgment enforced in Namibia and

the banks would be duty bound to comply with any order issued by a Namibian court pursuant to a foreign request. These measures can be used to freeze and confiscate terrorist property.

Existing formal and informal arrangements, even in the absence of a specific anti-money laundering and anti-terrorist funding legislation, make it possible for the banking sector to co-operate with law enforcement agencies in tracing the proceeds of crime that may be directed to terrorist funding, if such proceeds are brought to the attention of the banking institutions. Such arrangements also make it possible for financial institutions within the banking sector to comply with any request for information or evidentiary material and for the freezing of questionable funds and assets of individuals suspected of involvement with terrorist groups.

The non-bank financial services sector would also be in a position to co-operate when called upon to do so because it has an interest in protecting the integrity and reputation of the sector, as to do otherwise would discourage the attraction of investment in an increasingly competitive global village.

However, it is conceded that the current situation is not ideal as it entails reliance on the goodwill of the financial services sector in the absence of clearly laid down statutory provisions.

International obligations

Namibia is a member of the Community of Nations. Article 144 of the Namibian Constitution reads:

Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.

Namibia is a signatory to the International Convention for the Suppression of the Financing of Terrorism (1999), having signed it on 10 November 2001.

It is bound by the provisions of Security Council Resolution 1373 of 28 September 2001. It is significant to note that Namibia signed the Convention shortly after the tragic events of September 11, 2001. This is in itself an indication that the country fully appreciates and accepts its international obligations. In keeping with these obligations Namibia is in the process of preparing domestic

legislation in this area. A draft of the proposed law is still with the Ministry of Justice, which is sponsoring it. It is still being circulated among all stakeholders for comment and input. It has been considered by the Attorney-General who has made her comments and observations. It is not known when it will be ready for publication as a Bill and when it will be tabled in parliament. Accordingly, no discussion of its specific provisions will be attempted as its final form and content are a matter of conjecture. Suffice it to say that it is intended to give effect to the spirit of the Convention and the Resolution. Even though specific legislation dealing with the suppression of the financing of terrorism is still on the drawing board, Namibia is in a position to render assistance to foreign authorities in this area by virtue of the fact that it is a signatory to the Convention and also the fact that its Constitution incorporates international law. Thus the absence of specific legislation does not prevent Namibia from playing a co-operative role.

Recommendations

Namibia is already in the process of drafting various pieces of legislation to deal with money laundering problems. Proposed legislation to combat organised criminal activity and money laundering, to establish an FIC, to suppress both domestic and international terrorism and their financing, are being circulated for discussion and comment by the Ministry of Justice. What is required at present is to speed up the process to have the proposed legislation tabled in parliament. The proposed Anti-Terrorism Activities Bill is much wider in scope than is envisaged under Resolution 1373. This is because there is at present no legislation in Namibia dealing with issues of public safety, law and order and acts of terrorism which may occur within the country. This was one of the reasons why the state had to rely on a Presidential Declaration of a State of Emergency in terms of Article 26 of the Constitution, when on 2 August 1999, a revolt occurred by persons who aspire to the secession of the Caprivi Strip. The government was caught by surprise by those developments, as it did not have appropriate law and order legislation in place. Some old apartheid regulations had to be retrieved from the archives, cobbled into some emergency powers regulations applicable to Namibia and promulgated by a proclamation issued in a hurry by the State President. The state of emergency lapsed on 23 August 1999, leaving the state to deal with the alleged secessionists, over 128 of them, in terms of the common law and the provisions of the Criminal Procedure Act. Part of the reason why the state of emergency was allowed to lapse was the fact that most people felt that it had no place in a democratic dispensation and served more to remind the people of an era which they

wished to forget. The alleged secessionists have been in custody without trial since 1999 and have now been charged with treason and other statutory offences in terms of existing firearms legislation. This situation is considered unsatisfactory, hence the need to address domestic terrorism in the proposed Bill as well as international terrorism as required under the UN Convention and Resolution 1373.

The absence of such legislation also presented serious law enforcement problems at the height of União Nacional para a Independência Total de Angola (Unita) incursions into Namibia during the period from 1999 to March 2002, after the death of Jonas Savimbi. Law enforcement agents and the defence forces often found themselves without adequate legislative powers to deal with suspected Unita sympathisers. Where an arrest was made, the suspect had to be brought before a court within 48 hours in terms of Article 11 of the Constitution. A criminal charge had to be formulated. It was impossible in many cases to formulate an appropriate charge and to comply with the Constitution. Many suspects were thus detained for long periods unlawfully, a situation which has in the post-conflict period given rise to numerous law suits for unlawful arrest and detention and claims of torture etc. Thus it is considered important to address these domestic concerns together with international concerns regarding terrorism.

Because of the broad objectives of the proposed legislation it is expected that it will take some time before the Bill is tabled in parliament. Fierce resistance and debate is expected. However, insofar as the mandatory directives contained in the resolution are concerned, it is expected that these will be fulfilled.

It has been stated above that the Anti-Corruption Bill finally sailed through the two houses of parliament, the National Assembly and the National Council, on 10 June 2003.³⁵ It is now awaiting Presidential assent. Its scope is wider than the common law crimes of bribery. It seeks to criminalise certain acts committed both in the private and public sectors which are categorised as acts of corruption. It also seeks to establish an independent anti-corruption commission reporting to the Prime Minister. This is despite heated and protracted opposition to the creation of such an independent body, the major argument being that it was not necessary as it could be placed in the Office of the Ombudsman, since the Ombudsman has constitutional powers to investigate corruption. The further argument was that if it was to be truly independent it had to be accountable directly to parliament.

In terms of mutual assistance in criminal matters, the International Co-operation in Criminal Matters Act, 2000 (Act 9 of 2000), is already in force. The object of

the Act is to facilitate the provision of evidence and the execution of sentences in criminal matters and the confiscation and transfer of the proceeds of crime between Namibia and foreign states. The states to which the provisions of the Act apply are those specified in the Schedule to the Act as amended from time to time or a state which is a party to an agreement with Namibia. At present the only states covered are those within the SADC block. This may, at present, limit the ambit of co-operation. Recourse would have to be had to the provisions of Article 144 of the Namibian Constitution and the fact that Namibia is a signatory to the Convention. Requests for assistance would have to be premised on the basis of its Constitution and the binding force of its membership of the Convention.

However, these constraints should disappear once the proposed legislation is promulgated. That necessary legislation is in the pipeline and will be promulgated is not in doubt. The unknown factor is the role bureaucracy will play in the determination of time.

In terms of the rendition of fugitive criminal offenders, the Extradition Act 1996 (Act No 11 of 1996) is already in force. The principle of dual criminality is recognised under this statute. Extradition is authorised only in respect of what is termed “an extraditable offence”. This is an offence committed within the jurisdiction of a country which has an extradition treaty with Namibia or is a specified country and which constitutes an offence under the laws of that country, punishable by a imprisonment of 12 months or more, and which, had it occurred in Namibia, would have constituted an offence punishable by imprisonment of 12 months or more. Differences in terminological description, categorisation or the constituent elements of the offence between Namibia and the requesting country are immaterial to whether Namibia would grant extradition requests. However, as this may not cover some—if not many—of the acts committed by money launderers, effective assistance may not be possible in some cases.

It is recommended finally that a central institution will need to be established to:

- receive reports;
- analyse and evaluate information and intelligence gathered;
- disseminate such information to appropriate law enforcement agencies and affected financial and commercial institutions;
- enforce monitoring and surveillance orders;
- interface and co-operate with other international law enforcement agencies and financial institutions; and

- maintain a data base.

In the present framework in terms of which the Bank of Namibia and Namfisa have distinct spheres of supervisory influence, the task of regulation and control of money laundering activities may become unco-ordinated, breed attitudes of professional protectionism and exclusion and stifle co-operation. The mandate of such a central institution should also be extended to other sectors of commerce not at present under the jurisdiction of the Bank of Namibia or Namfisa.

Notes

- 1 General determinations on fraud and other economic crime, Government Notice no. 16 of 1999, *Government Gazette*, 15 January 1999.
- 2 N\$1.00 = ZAR 1.00.
- 3 Determinations on money laundering and 'know your customer' policy, General Notice no. 121, *Government Gazette* no. 1899, 29 June 1998.
- 4 *Ibid.*
- 5 Determination on the appointment, duties and responsibilities of directors and principal officers of banking institutions, General Notice no. 119, *Government Gazette* no. 1899, 29 June 1998.
- 6 *Ibid.*
- 7 First National Bank, Bank Windhoek and Commercial Bank of Namibia
- 8 Namibia Financial Institutions Supervisory Authority Act (Act 3 of 2001), Section 3.
- 9 *Ibid.* Section 1.
- 10 Article 88 of the Constitution of Namibia, which came into force on 21 March 1990.
- 11 Republic of Namibia, *Government Gazette* no 2782, 6 August 2002.
- 12 *Cornelia Cartharina Lewies Familie Trust (Namibia) and Two Others v Chief Executive Officer (Namfisa) and Twelve Others*, High Court of Namibia (*supra*)
- 13 Namibia Financial Institutions Supervisory Authority Act (Act 3 of 2001), Section 9.
- 14 Interview with Daniel Frank Small, Deputy Prosecutor-General, 18 March 2003.

- 15 *State v James Hyacinth Nangisi & Others*, High Court Case No. CC 4/2002, a.k.a. the Brakwater Heist Case.
- 16 *The Namibian*, 16 January 2003 and 12 February 2003.
- 17 The Commission of Enquiry into the Activities, Management and Operations of the Social Security Commission.
- 18 Article 91 (f) and (g) of the Namibian Constitution.
- 19 The report has not yet been made public.
- 20 *The Namibian*, 14-17 January 2003 and 4-6 February 2003.
- 21 *Ibid*, 7 February 2003.
- 22 *Ibid*, 20 February 2003.
- 23 *Ibid*, 24 February 2003.
- 24 *Ibid*, 26 February 2003.
- 25 *Ibid*, 19 March 2003.
- 26 *Ibid*, 4 March 2003.
- 27 *Ibid*.
- 28 *Ibid*.
- 29 *Ibid*.
- 30 *Ibid*, 3 March 2003.
- 31 *Ibid*, 15 April 2003.
- 32 *Ibid*.
- 33 Individuals interviewed requested the author not to disclose identities.
- 34 Notice in terms of section 15A of the Usury Act, 1968 and the Inspection of Financial Institutions Act No 38 of 1984, Government Notice no. 136 of 2002, *Government Gazette* no. 2782, 6 August 2002.
- 35 *The Namibian*, 11 June 2003.