

CHAPTER 4

LEGISLATIVE AND INSTITUTIONAL SHORTCOMINGS AND NEEDS OF FINANCIAL INSTITUTIONS AND THE BUSINESS SECTOR IN ZIMBABWE

Bothwell Fundira

Introduction

Accountable institutions can be used as conduits for money laundering activities. These institutions are especially important in the third stage of the laundering process where proceeds need to be re-introduced into the financial system in such a way that they are disguised from law enforcement authorities.

It is important that accountable institutions be equipped with the skills to detect suspicious money laundering transactions and that they report them to the relevant authorities.

At an Institute for Security Studies (ISS) workshop held in Cape Town on 8 March 2003, it was agreed that the South African Financial Intelligence Centre Act (Act 31 of 2001, also known as FICA) be used as a guide on the breadth of the range of accountable institutions. A total of 22 institutions are listed in the Act. In Zimbabwe, the following list mirrors the specifications of the South African Act:

- the legal profession;
- banks of all types;
- estate agents;
- unit trusts and asset managers;
- insurance companies;
- casinos/gambling houses;
- travel agents;
- the People's Own Savings Bank (POSB);

- accountants; and
- the stock exchange.

Their significance in money laundering is assessed below.

The legal profession

Lawyers act on behalf of clients and defend them in criminal cases, some of which may involve money laundering. There is a relationship of utmost good faith, *uberima fides*, between lawyer and client and this situation obtains the world over. A client needs assurance that the information that is provided to the lawyer will not be divulged to his disadvantage. The livelihood of some lawyers depends on defending their clients in criminal cases, some of which involve money laundering activities.

The importance of lawyer/client relationships was well articulated by Wigmore, who ascribes to it the following four cornerstones:

1. that the communication originates with the confidence that it will not be disclosed;
2. that the element of confidentiality is essential to the full and satisfactory maintenance of the relationship between the parties;
3. that the relationship is one which in the opinion of the community ought to be sedulously fostered; and
4. that the injury that will endure to the relationship by the disclosure of the communication is greater than the benefit thereby gained for the correct disposal of the litigation.²

It is the lawyer that advises his client what to say or not to say. He can even advise his client to plead guilty in order to achieve a light sentence. However, where a client confesses to being guilty, the lawyer is confronted with an ethical dilemma. According to the party autonomy principle, and the fact that there is a presumption of innocence until proven otherwise, the lawyer is likely to withhold information that can otherwise be adverse to his client's interests.

Where a lawyer knows that there is an underlying criminal activity, he has the responsibility of disclosure to the police. However, this responsibility is not greater than that of any other citizen.

In 1999, a lawyer was charged under the Serious Offences (Confiscation of Profits) Act for receiving and concealing a sum of money that was suspected to be the proceeds of fraud.³ He contended that the money was handed over to him as a deposit to cover legal fees. Even though the Court found that he had not made any attempt to establish that the money was not linked to the alleged crime, he was acquitted. As far as could be established, there has been no other similar prosecution.

Case studies

Trust accounts have proven to be safe havens for laundered funds, as the following case studies show.

Case study 1: Roger Boka

The Roger Boka case in the mid-1990s shows how trust accounts can be used in money laundering matters and reinforces the reasons why lawyers are part of the group of accountable institutions that should detect and report suspicious transactions.

Roger Boka obtained a merchant banking licence, which gave him access to deposits from clients. A trust account was opened with Boka's lawyer, Gregory Slatter. Such trust accounts are normally treated as sacred cows, given the confidential relationship between lawyer and client.

Boka used depositors' funds for personal gain by purchasing personal property and externalised the bulk of the money by buying foreign currency on the market and depositing it in various accounts abroad. Slatter, his lawyer, was a signatory to these accounts. Had Boka not had the trust account with his lawyer, he could probably not have been able to perpetrate the fraud. A lawyer's trust account makes it easier, as lawyers are more aware of loopholes in the law and can exploit them to advantage. Law enforcement agents are generally scared to investigate cases where lawyers are involved. A lawyer is more aware of his rights and is more likely to sue if he is implicated without basis.

Case study 2: Aitken

Aitken was a prominent lawyer based in Harare. He opened a trust account into which he deposited funds from his clients. He obtained

foreign currency from individuals and companies abroad and used it to buy luxury items like cars and Automated Teller Machines for banks. It is illegal in Zimbabwe for non-registered operators, such as Aitken, to deal in foreign currency. Aitken was able to launder money because he could use the camouflage of a lawyer's trust account.

A survey was carried out among lawyers in Harare in order to ascertain their obligations in detecting and reporting money laundering cases. The lawyers spoken to indicated that there is no specific requirement for them to report cases of money laundering.

Lawyers can detect money laundering because they are the chief interpreters of the law and clients tend to confide in them in criminal activities, which encompass money laundering. They may even be at the very centre of the activity as the Boka and Aitken cases show. To combat money laundering effectively, it is important to give lawyers specific responsibilities outside the common law to detect and report cases of money laundering.

Lawyers in Zimbabwe act as investment advisors and register and administer trusts. Lawyers are more likely to come across laundered funds compared to other professionals and therefore are well placed to detect the menace.

Banks

Banks play a pivotal role in money laundering matters, even if only inadvertently. The laundering process involves a predicate criminal offence that is followed by concealment and then re-introduction *into the banking system*. Laundered funds end up in banks. The act of banking introduces ill-gotten funds into the formal system and with it a semblance of legitimacy. This is very important to money launderers because they would like to avoid detection. The capacity of banks to detect money laundering is important so that the menace can be eliminated.

Because of competition and globalisation, banks have had to create sophisticated products in order to meet customer expectations. Bankers know the products that can be used in money laundering, and are hence well placed to detect such practices.

Findings

The research on banks in Zimbabwe was conducted in two phases. Firstly, account-opening forms were obtained from five commercial banks and two building societies in order to ascertain whether the information that the banks collect is adequate for them to act as effective accountable institutions. Standard Bank is an international bank that has operated in Zimbabwe for more than a hundred years. Trust Banking Corporation (hereafter Trust), National Merchant Bank (NMB) and Kingdom Bank have come into existence in the past decade. As their names indicate, Central Africa Building Society (CABS) and Beverley Building Society are building societies. The diversity in the sample is a good cross section of the Zimbabwean financial landscape.

The forms obtained do not cover all products offered by the banks and so this area was covered by face-to-face interviews with bank officials in the second phase of the survey.

The findings are tabulated on the next page

Comment

Table 1 shows the amount of information that is collected by banks at the account opening stage.

Individuals

Marital status: Those banks that do not collect the marital status of people wishing to open accounts, and therefore the details of their spouses, expose their systems to money laundering. It is easy in such circumstances for individuals to use spouses to hide ill-gotten gains. In circumstances where the bank is aware of the spouse's banking details, it would be easy to link suspicious transactions to those of the spouse

Next of kin: Collection of this information is important because money launderers may use their next of kin to perpetrate their offences and ensure that proceeds are hidden from the law.

Declaration by applicant: This declaration is important because it puts the client on the spot. In circumstances where the client provides falsehoods, it would be possible to take them to task if they have sworn that the information provided by them is correct.

Table 1: Research findings: Information required on financial institutions' account opening forms							
	Financial institution						
Information required:	Trust	NMB	Standard	Kingdom	Century	CABS	Beverley
Individuals							
First name	√	√	√	√	√	√	√
Surname	√	√	√	√	√	√	√
Date of birth	√	√	√	√	√		√
Country of birth	√	√	√		√	√	√
Marital status	√	√	√		√		
Details of spouse	√	√			√		
National identity no.	√	√	√	√	√	√	√
Residence status	√	√	√		√	√	√
Residential address	√	√	√		√	√	√
Period at address	√				√		
Telephone no.	√	√	√	√	√		√
Mobile phone no.	√	√	√	√	√		√
Mailing address	√	√	√	√	√		
Residential status: type and ownership	√	√	√				
Employer	√	√	√	√	√		√
Earnings	√	√	√	√	√		√
Occupation	√	√		√	√		√
Details of other bank accounts	√	√	√	√	√		√
Bank	√	√	√		√		√
Branch	√	√					√
Type of account	√	√					√
When opened	√	√					√

	Financial institution						
Information required: Individuals	Trust	NMB	Standard	Kingdom	Century	CABS	Beverley
Next of kin	√	√	√	√	√	√	√
Full names	√	√					√
Relationship	√	√					√
Address	√	√					√
Declaration that details provided are correct	√	√	√	√	√		
Companies							
Company name	√	√	√	√	√	√	√
Physical address	√	√	√	√	√	√	√
Postal address	√	√	√	√	√	√	√
Registration number	√	√	√	√	√	√	√
Registration date	√	√	√	√	√	√	√
Date of incorporation	√	√	√	√	√	√	√
Nature of business	√	√	√	√	√	√	√
Accounts with other banks	√	√	√	√	√	√	√
Documents attached							
Copy of Memo and Articles of Association	√	√	√	√	√	√	√
Copy of rules, constitutions, regulations (incorporated entities)	√	√	√	√	√	√	√
Partnership agreement	√	√	√	√	√	√	√
Trading licence (sole partnership)	√	√	√	√	√	√	√
Originals of identity documents – directors/signatories	√	√	√	√	√	√	√
Directors/officials							
Full names	√	√	√	√	√	√	√
Place of birth	√			√	√		
Date of birth					√		

	Financial institution						
Information required	Trust	NMB	Standard	Kingdom	Century	CABS	Beverley
Company directors/officials (continued)							
Designation	√	√	√	√	√	√	√
Nationality	√	√	√	√	√	√	√
Residential address	√	√	√	√	√	√	√
Contact details	√	√	√	√	√	√	√
Identity particulars	√	√	√	√	√	√	√
Personal bankers				√	√	√	√
Other directorships				√	√	√	√
Authorised signatories							
Full names	√	√	√	√	√		
Place of birth					√		
Date of birth					√		
Designation	√	√	√	√	√	√	√
Nationality	√	√	√	√	√	√	√
Residential addresses	√	√	√	√	√	√	√
Identity particulars	√	√	√	√	√	√	√
Personal bankers				√	√	√	√
Specimen signature	√	√	√	√	√		
Declaration by applicant that information provided is correct	√	√	√	√			
Directors' resolution authorising opening of account	√	√	√	√	√	√	√

Companies

It is important to collect sufficient information on directors of companies so that suspicious transactions can be traced to them. This is likely to lead to more conclusive investigations because directors may mingle transactions in their personal accounts with those in company accounts.

Deposits

Discussions with bank officials revealed that limited diligence is exercised when banks receive money on deposit from clients. The deposits include fixed deposits, negotiable certificates of deposit and bankers' acceptances. The latter two are vulnerable to laundering because they are bearer instruments: monies due are payable to the bearer. This is obviously an effective way of cleaning tainted money. Most of the banks interviewed indicated that they were only too happy to receive deposits in an environment where this sector has become highly competitive and did not consider it their business to check the source of funds.

Case study 3: Ruturi and Musoma

The liberalisation of the Zimbabwean economy has seen the formation of new banks. Some of the promoters have seen a window of opportunity to launder depositors' funds. In the last quarter of 2002, NMB was placed under curatorship. The managing director, Samson Ruturi, and the finance director, Nicholas Musoma, are being charged with diverting depositors' funds to pay private bills. The two promoters and senior officials invested in luxury cars and immovable property. One such investment in immovable property was made in Cape Town, South Africa. The curator has indicated that he requires Z\$4 billion in order to return the society to solvency. It is interesting to note that the two accused are not being charged with laundering. This reflects that this phenomenon is not generally understood and even if laundering charges were to be preferred, they would be too low compared to the offence perpetrated (see the legislation review). The case of Roger Boka referred to above is also relevant to circumstances where bank promoters or managers launder depositors' funds.

The above example illustrates the fact that bank supervision is weak. As pointed out elsewhere in this report, the Governor of the Central Bank is on record as saying that he does not have enough powers to discipline errant banks because authority is shared with the Ministry of Finance, which unfortunately tends to have a predominantly political approach to issues.

Banks in Zimbabwe are trying to be innovative in order to gain or maintain market share. Various derivative instruments, including interest and exchange

rate swaps, have been introduced into the market. The net effect of this is that the audit trail is often obliterated in money laundering situations.

Case study 4: *Motsi v Attorney-General and ORS 1995 (2) ZLR 278 (H)*

Mr. Davis Tendai Midzi, then-Chief Executive of Zimbabwe Newspapers, used his influence to remove money from companies and externalise it to the United Kingdom and other places. Part of the money was used to purchase spare parts, which were brought into the country through Mr. Midzi's nominee companies.

This case shows the inability of banks to detect and stop money laundering. Through proper reporting of suspicious transactions, these transgressions would have been nipped in the bud.

Banking regulations review

This section explores the Central Bank of Zimbabwe's guidelines aimed at eliminating or curtailing money laundering.

To its credit, the Central Bank has recognised the extent of money laundering that occurs and how banks are used as conduits. In order to curb the menace, it produced guidelines on money laundering for banking institutions and circulated them to the banks. In the guidelines, the Central Bank defines the phenomenon of money laundering, how it occurs and why banks are prone to be used as vehicles in its perpetration.

The guidelines deal with the following major items:

- the money laundering process;
- links between money laundering and terrorist financing;
- internal policies and controls required of banks;
- characteristics of suspicious transactions/activities; and
- the 'know your customer' programme and the need for internal policies and procedures to combat money laundering.

The guidelines deal at length with the information required from persons, both natural and legal, before accounts can be opened. In the case of individuals, the following information should be obtained (section 5.1):

- True name or names used. The name should be verified by reference to a document that bears a photograph, for example a national registration certificate, drivers' licence or passport. Where young people are involved, thorough checks of guardians' identities should be carried out.
- Permanent address. This can be verified by utility bills, local authority bills or bank statements. The bank may also make personal checks in the telephone directory where it is deemed necessary.

In the case of corporate customers, the following information is required:

- The original or certified copy of the certificate of incorporation.
- The memorandum and articles of association.
- The resolution of the board of directors to open an account and confer authority on individuals to operate the account.

A search at the company's office should be carried out in order to verify the information and authenticity of the documents supplied.

Clubs, societies and charities

According to section 5.3 of the regulations, the banking institution should satisfy itself of the purpose for which the organisation exists. One such recommended way of ascertaining the information is by having sight of the Constitution.

Partnerships

Where a partnership exists, the partnership agreement should be produced and verified and a mandate should be produced by the partnership authorising the opening of the account.

The details of at least two partners should be obtained in the same manner as those of personal customers.

Trusts and similar accounts

Where an account is opened on behalf of a third party, the full details of the third party should be obtained.

The source of funds in the case of a trust should be clearly established and verified on an on-going basis.

Internet banking

Banking institutions are not allowed to open accounts via the internet or through the post. Internet banking should only be extended to a customer who already has a banking relationship with the banking institution and whose full details have been recorded and verified.

Correspondent banking

The guidelines require banking institutions to satisfy themselves that bank regulations in the jurisdiction of domicile of the correspondent bank is thorough. However, in practice, this amounts to an expression of intent on the part of the Central Bank. The prevailing economic and political situation is such that foreign banks are reluctant to deal with Zimbabwean banks. Personnel in local banks confirmed that there is virtually no supervision on the part of the Central Bank regarding correspondent banks, understandably so because they are a good source of scarce foreign currency. In particular, regard should be had to the calibre of management at the correspondent banks. Before a correspondent bank account is opened, its purpose should be established and, above all, the identity of third parties that will use the facility should be ascertained.

Professional intermediaries

Section 6.4 of the regulations deals with instances where professional intermediaries open accounts on behalf of principals.

Where funds are pooled, the banking institution should establish details of all the beneficiaries to the account. The same due diligence that is carried out in the case of personal accounts should be observed in respect of individuals who co-own accounts.

Reporting obligations

The regulations state that Zimbabwean authorities are working to establish a Financial Intelligence Unit (FIU) but until this occurs, banking institutions should report suspicious transactions to the Banking Supervision Department (BSD) in the Reserve Bank of Zimbabwe.

Banks have an obligation to report:

- all accounts that potentially involve money laundering or terrorist financing, regardless of the amount involved;

- all cash transactions amounting to Z\$500,000 or more per transaction; and
- situations in which a banking institution is entering into a business relationship that might involve money laundering or the financing of terrorism.

Reporting frequency

The regulations call for banking institutions to report immediately to the BSD and to law enforcement agencies in circumstances where immediate action is required.

Apart from this, every banking institution should forward a summary of all suspicious transactions to the BSD on a monthly basis. Reports should reach the BSD by the fifth of each month.

Compliance responsibilities

Every banking institution is required to have a money laundering reporting officer and a deputy to act in his/her absence. The officer should be fairly senior so that they are effective in dealing with law enforcement agencies and other regulatory authorities.

The banking institutions should not inform their clients that they are making reports to the law enforcement agencies or the BSD.

Duties of the money-laundering officer

The money-laundering officer has the responsibility to ensure compliance by the banking institution on a day-to-day basis. The compliance officer determines whether information that has been received on a transaction report should be the subject of further investigation or reporting to law enforcement agencies or banking supervision. He/she makes a *prima facie* determination of whether or not a client is involved in money laundering activities or the financing of terrorism.

Education and training programmes

Every banking institution is required to ensure that its staff undergoes training in how to detect money laundering occurrences or the financing of terrorism.

All new employees need to be trained in what money laundering means and the need to report money laundering and financing of terrorism indicators and situations.

Training should especially be extended to employees that interface with clients. These employees include, but are not limited to, cashiers, foreign exchange officers, account opening and new customer personnel and advisory staff.

Administration personnel, internal auditing staff, operations supervisors and managers should also receive training in issues related to money laundering and the financing of terrorism.

The above regulations became effective from 1 November 2002.

Banks: Conclusion

In general banks in Zimbabwe have elaborate forms to collect basic client information, sufficient for the banking institution to know the client reasonably well. The guidelines on detecting and reporting money laundering and terrorist financing are fairly elaborate. Banking institutions have considerable discretion to report suspicious transactions. It is, however, only those transactions that are reported that come to the fore, which means that a lot of transactions can go undetected.

Commercial and merchant banks are licensed foreign currency dealers. The Government has pegged foreign currency exchange rates at unrealistically low levels. Transactions are being carried out at the banks at rates that are at least three times more than the official rate, in contravention of the law. A lot of laundering occurs in Zimbabwe, for which foreign currency shortages continue to provide the backdrop and pretext.

A shortage of Zimbabwe bank notes has been experienced since November 2002. Though official inflation to 30 April 2003 was about 270% (with the unofficial rate considered to be at least double this), the Central Bank has not been able to print sufficient money to satisfy the demand because of the shortage of foreign currency required to finance the printing of bank notes. Local currency shortages have had a ripple effect: the shortage of bank notes at the banks themselves has meant that individuals and organisations are not depositing cash. The banks have, in turn, been compelled to solicit cash from individuals and organisations such as commuter transport operators, supermarkets and petrol filling stations and are prepared to pay a premium to get them.⁴ It is not realistic to expect banks that are involved in these sorts of activities to be at the centre of controlling money laundering. It is illegal in itself for banks to obtain bank notes at a premium and such transactions have to be concealed from the authorities. This becomes a predicate offence, especially in cases where the

banks have to use the money in order to obtain scarce foreign currency on the illegal parallel market.

Local travellers' cheques were introduced in Zimbabwe at the beginning of July 2003 in order to deal with the shortage of foreign currency. Most retailers were reluctant to accept the cheques as a form of payment. As a result, the cheques were withdrawn on 26 September 2003 and replaced with bearer cheques, which have the same effect as cash for the purpose of transactions. What is significant is that these cheques, due to expire at the end of January 2004, have insufficient security features. Because of lack of foreign currency to print bank notes, the life of bearer cheques has been extended and they are still in use as of the beginning of September 2004. It is not surprising that a handful of forgery cases has been prosecuted. It is not possible to account for those forged bearer cheques that are never detected. Bearer cheques can be easily forged, as a good colour copy can look genuine. To avoid social unrest arising from the lack of local currency, the authorities encouraged the use of bearer cheques. Bearer cheques provide money launderers with ample scope to clean ill-gotten gains.

Estate agents

Experience the world over has demonstrated that money launderers often purchase immovable property. This is the reason that, in most jurisdictions, estate agents who are at the centre of property transfer issues are considered to be accountable institutions.

Property sellers in Zimbabwe understandably prefer payment in cash.

Numerous Zimbabweans have left the country to work in the diaspora. Because of the skewed exchange rates, which are the result of the current challenges in the agricultural sector, many can afford to buy property, particularly houses. Because of foreign currency shortages, the authorities have seen fit to control the rate of exchange of the Zimbabwe dollar against other currencies. As of 31 March 2003, the official exchange rate of the Zimbabwe dollar to the US dollar was Z\$800 for exporters and Z\$55 for non-exporters. The US dollar has been trading at a rate of about \$5,600 on the controlled auction floor and Z\$7,400 on the parallel market as at the beginning of September 2004. This led to sellers of property preferring payment in foreign currency, which is illegal. As a result, transactions have been concluded in foreign currency through estate agents. The latter invariably have not established or tried to ascertain the source

of the hard currency, perhaps so as not to jeopardise prospective sales. A survey of several estate agents revealed that they preferred settlement in 'hard' currency. To cover up the transgression, the recorded transaction would purport to be in Zimbabwe dollars.

Face-to-face interviews with three registered estate agents confirmed that they did not believe it to be their responsibility to report suspicious transactions and that they would prefer to be paid in cash as cheques have a lengthy clearing period.

Unit trusts

Unit trusts are, in essence, collective investment schemes. It is important for laundered funds/property to be re-introduced into the formal system and be given the semblance of legitimacy. One way is to pool laundered funds in collective investment vehicles such as unit trusts or other asset management portfolios.

Legislation exists to regulate the activities of unit trust companies and their responsibilities towards the unit holders. There is no effort made to impose a responsibility on unit trust companies to detect and report situations involving money laundering.

Insurance companies

Insurance companies play a significant role in money laundering. The simplest scenario is one in which a criminal purchases an annuity with an insurance company and surrenders the policy for encashment soon thereafter. When a cheque is received from the insurance company it appears to represent untainted money. It is important that insurance companies are alerted to the phenomenon of money laundering so that they can assist in its reduction or elimination.

There are no money laundering reporting requirements for insurance companies. The existing legislation, as enshrined in the Insurance Act Chapter 24:07, deals mainly with the responsibilities of the insurance companies towards their clients.

The only serious existing legislation on money laundering, the Serious Offences (Confiscation of Profits) Act, does not make reference to insurance companies.

Casinos and gambling houses

A study carried out by the writer revealed that gamblers use cash to purchase casino chips of considerable value. After a few bets, they encash the chips and are paid out in 'clean' cash.

The legislation on casinos and gambling establishments is aimed at ensuring that the practice of gambling is carried out equitably. As a result, there is no reference to money laundering in the available legislation, namely the Lotteries and Gaming Act.

Travel agents

Travel agents have been used to clean 'dirty' money. A client buys tickets to travel abroad, which then enables him to obtain foreign currency. The tickets are cancelled and a refund received in whole or in part. Once foreign currency is obtained, it can be taken out of the country and banked in external accounts in contravention of the law.

There is no specific legislation that deals with travel agents. As a result, the operations of travel agents are covered under the common law. They are thus not required to account for suspicious transactions that can involve money laundering or the financing of terrorism.

The People's Own Savings Bank

Significance in money laundering

The POSB is a bank in the true sense, with the notable difference that it is government-owned and offers tax-free interest on deposits in order to raise money for the fiscus. The comments in the section above on banks, on why they are an important component of accountable institutions, are relevant for the POSB, too. However, it is difficult to launder money using the POSB because it does not offer cheque accounts or bearer instruments.

The Peoples Own Savings Bank Act 18 of 1999 is mainly concerned with setting out how it mobilises deposits. It also deals with the fact that interest on deposits from the bank is tax exempt. The main purpose of the Act is to demonstrate that funds raised are for the fiscus. By and large the staff in the POSB are not aware of the phenomenon of money laundering.

Accountants

Significance in money laundering

Accountants produce financial statements for individuals and corporations. During the course of their duties, they may come across money laundering transactions.

Legislation relating to accountants is contained in the Accountants Act and the Public Accountants and Auditors Act. These pieces of legislation are concerned with ethical guidelines for accountants and do not refer to money laundering at all.

The Stock Exchange

Clients purchase shares on the bourse and are paid by cheque by stockbrokers when they eventually sell the shares. A cheque from a stockbroker gives legitimacy to 'dirty' money. In Zimbabwe, shares with dual listings, such as Old Mutual, have been used to externalise foreign currency in contravention of the law. The shares are purchased on the local bourse using Zimbabwe dollars and offloaded in international markets for hard currency, which is externalised. These transactions ensure that laundered funds are cleaned.

Case study 5: NMB

The Central Bank had a blitz on banks in mid-2003, investigating their illegally dealings on the parallel foreign exchange market. Errant banks were fined and NMB was stripped of its foreign currency-dealing licence in August 2003. NMB has argued, though, that it is being used as a scapegoat because government departments and the Central Bank itself have been known to purchase foreign currency on the parallel market, in the case of the government to finance the importation of basic commodities such as electricity and fuel.

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

Review of legislation

The following legislation has a bearing on, or tries to combat, money laundering:

- the Serious Offences (Confiscation of Profits) Act;
- the Prevention of Corruption Act;
- the Companies Act;
- the Banking Act;
- the Customs and Excise Act;
- the Income Tax Act;
- the Accountants Act;
- the Insurance Act;
- the Estate Agents Act; and
- the Zimbabwe Investment Act.

The Serious Offences (Confiscation of Profits) Act

This piece of legislation (hereafter the Serious Offences Act) empowers the police to investigate matters of money laundering. It goes further to provide for confiscation and forfeiture in money laundering cases.

Section 63 deals with money laundering. A person or body corporate is deemed to have perpetrated the offence of money laundering in circumstances where he:

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

Penalties

A person who is found guilty of money laundering will be liable to a fine not exceeding Z\$200,000—about US\$36 at the official bank rate or about US\$ 27

at the parallel market rate—or twice the value of the property, whichever is greater, or to imprisonment for a period not exceeding 15 years or to both such fine and imprisonment. (The exchange rates used are as at the beginning of September 2004.)

A body corporate is liable to a fine not exceeding Z\$600,000 or three times the value of the property, whichever is greater.

Corporate veil

Directors, officers, employees and agents of companies will be held personally liable in circumstances where a reasonable person would be deemed to have known that they were dealing in tainted money.

Under section 17, the courts may lift the corporate veil in order to look at the real perpetrators of the offence.

Foreign proceeds

Tainted money that relates to a specified foreign offence is liable to be forfeited to the state by order of the High Court or on application by the Attorney General.

Conviction

The act gives the police powers to investigate matters relating to tainted property and obtain search warrants where appropriate, in order to enable them to carry out their tasks expeditiously.

Under section 57, a police officer can apply to a judge for an order directing a financial institution to give information to the Commissioner of Police about financial transactions relating to account(s) held by a particular person with the financial institution. This occurs in situations where an individual is under investigation.

Rights to property under investigation

Where a forfeiture order has been made against property, the property will vest in the state and where the property is the subject of registration at the Deeds Registry, any rights to the property will lie with the state until registration is effected.

Rights and obligations of third parties

Third parties who receive tainted property may forfeit it to the state especially in cases where there was reasonable suspicion at the time of acquisition that the property was tainted.

Provision is made for pecuniary orders in respect of persons who derive benefits from tainted property. The penalty is generally equal to the value of the benefits derived.

Where tax has been paid in regard to benefits obtained from tainted property, such tax is deductible in arriving at a fine.

Conclusion

This piece of legislation does not place much obligation on individuals to record, report and keep auditable systems in place.

Section 63 is too general to adequately cover money laundering. It does not confine itself to money laundering but instead covers petty issues as well. As a result, a meaningful prosecution under this Act is difficult to achieve:

The first mode of activity does not fit into the conventional definition of money-laundering [sic] at all. It seems to target conduct that may or may not constitute the aspect of illegally obtained assets. Section 63 (1) of the Act is worded in such a broad manner as to include non-monetary assets, such as a motor vehicle or a firearm. If a motor vehicle is stolen in Zimbabwe and driven across the border into Botswana, the section would describe this conduct as money-laundering [sic].

Section 63(b) is drafted in similarly wide terms, so wide as to render a person who receives a motor vehicle stolen from a foreign country knowing the manner of its acquisition, guilty of money laundering. As the court pointed out in *S v Mambo* (1995), a pickpocket could be charged under the section for holding onto the proceeds of his theft.⁵

Section 63 defines money laundering on the basis of an unlawful acquisition of assets on which a monetary value can be placed. If a person is involved in the possession, concealment, or disposal of such assets they will be deemed to have perpetrated money laundering. Such a definition ignores the predicate offence and clouds the concept of money laundering.

The Act is derelict insofar as it does not provide a deterrent to money laundering. The predicate offence is not catered for and there is no provision for reporting suspicious transactions, nor are the penalties sufficient to offer a deterrent.

The Prevention of Corruption Act

The Prevention of Corruption Act indirectly deals with money laundering matters. Section 3 points out that a criminal offence is committed:

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

Corruption is usually predicate to money laundering.

Section 4 imposes a fine on public officers of companies convicted in terms of the Act of up to Z\$3,000 or imprisonment for up to three years, or both such fine and imprisonment.

According to Section 6, the Minister may specify individuals who are involved in corrupt activities. A specified person is one who is prohibited from transacting in a business or commercial capacity on their own behalf.

Where it is reasonably believed that a corrupt activity has taken place, an investigator can be appointed with the right to examine books and records pertaining to individuals and companies.

A banker is obliged to produce documents, including cheques or record books, that relate to corrupt activities and is required to answer questions relating to bank accounts that can shed light on corrupt activities. In practice this precludes trust accounts administered by lawyers because once an account is registered as a lawyer's trust account, bankers tend to ignore transactions that might otherwise raise suspicions.

Section 15 covers situations where complex company structures are used to disguise the true nature of a transaction. The law allows the lifting of the corporate veil in order to identify the real perpetrator of a crime in complex group situations.

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

It is noteworthy that there have been transgressions to this legislation, which include the Zimbabwe Electricity Supply Authority (ZESA)/YTL Corporation Berhad (Kuala Lumpur, Malaysia) deal and the new airport tender. According to Zimbabwean law, all projects that are undertaken by the Government or Government-related institutions have to go to tender. In the case of these two projects relating to the construction of a power station and construction of a new airport respectively, awards were made without reference to tender. Political considerations appear to have prevailed as no prosecutions were instigated.

Corruption often leads to money laundering or encompasses it. The low salaries earned by civil servants make them particularly vulnerable to corruption, including money laundering. Other legislation inhibits the collection of information and the successful prosecution of money laundering matters: in terms of Section 10(4) of the Defence Procurement Act, for example, the Minister is empowered to withhold information relating to defence procurement. An officer in the army who exposes corruption in defence procurement does not have protection, contrary to the provisions of Section 14(2).

The constitutionality of the Prevention of Corruption Act was challenged in *Motsi v Attorney General & Others* 1995 (2) ZLR 278 (H). In arriving at a decision that the provisions were deemed to be constitutional, the judge considered the intention of the legislature in drafting the legislation.

Though corruption is usually predicate to the money laundering offence, the Act does not deal with money laundering.

The Companies Act

Companies have limited liability and this is the position the world over. Zimbabwean company law is based on Roman Dutch law and this law has provision for lifting the veil to ascertain who is behind a company's transactions

should it be necessary. However, the fact that limited liability exists makes criminals feel comfortable to use companies as fronts in their dealings. It is difficult to attribute culpability in such transactions.

The use of nominee companies to transact business is legal in Zimbabwe. Dividends, for instance, can be paid to nominee companies, thereby providing a camouflage for the real owner of the 'investment' (see *Motsi v Attorney-General & Others* 1995 (2) 278 (H)).

The Act predominantly deals with common law crimes and therefore is derelict when it comes to money laundering issues.

The Banking Act

The Banking Act confines itself to monitoring the operations of banks and financial institutions. To this end it prescribes the minimum capital requirements for the operation of banking institutions. It lays down the qualities that are required of the top officers of banking institutions, especially relating to the Chief Operating Officer and the Chief Accounting Officer. In theory, if these people are of high integrity, as required by the Banking Act, they are unlikely to be a conduit for money laundering activities.

The Reserve Bank Governor has complained that he does not have the authority to issue licences, despite being responsible for the supervision of banks, as this power lies with the Ministry of Finance. The Boka case illustrates this matter. Section 4 (2) of the Banking Act states that:

The Registrar shall be responsible for registering banking institutions and canceling their registration, and performing such other functions as are conferred or imposed upon him by or in terms of this Act or any other enactment.

The Customs and Excise Act

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

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

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

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

The Income Tax Act

The Income Tax Act is mainly concerned with collection of taxes for the fiscus. It is noteworthy that departmental practices make ill-gotten profits taxable.

The Act is concerned with collection of taxes and is not intended to deal with money laundering matters.

The Accountants Act

This piece of legislation sets strict ethical operating standards for accountants. They are required to observe these standards and cannot be involved in criminal activities. However, there is no specific mention of money laundering in the Act.

Auditors have specialist knowledge and are more likely to detect money laundering ahead of law enforcement agents. An audit is carried out in order to ascertain the truth and fairness of transactions and of the financial position of an individual or organisation. By its nature an audit is an opinion. Transactions below a certain threshold are ignored. Depending on the scale of operation, this threshold can be quite significant. For some operations, a materiality level can, for instance, be set at US\$100,000. The launderer can therefore make individual transactions below this level and avoid the attention of the auditors.

An audit involves checking a sample of, say, 5% of the total transactions. This means that the majority of the transactions are not checked.

The auditor can look at unusual items in the accounts because he doubts their authenticity, not because he is necessarily checking whether funds have been laundered.

The scope of the auditor in carrying out his duties does not encompass checking for money laundering. This was confirmed by respondents in a survey carried out by the ISS on audit firms based in South Africa, Botswana, Zambia, Swaziland, Tanzania, Mauritius and Malawi.

There were six main reasons why auditors felt unconfident in their country's ability to combat money laundering. These were: the relative importance of an informal economy that too easily accommodates dirty cash; the complexity of certain forms of money laundering, especially due to international transactions; the role of corruption; the prevalence of poor business culture; the requirements of an environment conducive to business which may contradict anti-money laundering policies, especially surrounding issues of banking and confidentiality; and finally the weakness of the criminal justice system.⁶

The Insurance Act

The Insurance Act does not place obligations on insurance companies to ascertain the source of funds prior to investment. Launderers can therefore use this avenue to clean their money.

The Estate Agents Act

Like the other pieces of legislation discussed, the Estate Agents Act does not specifically deal with money laundering but instead expects users to use their discretion under common law to curb such activities.

Immovable property is sometimes purchased using hard currency, in contravention of the law. Despite the control of the exchange rate, fixed property values have moved up in line with the fortunes of the parallel market. The property market is thus being used to clean hard currency that is changed at an illegal rate.

The Zimbabwe Investment Act

Due to foreign currency shortages and the need to create employment, the quest for foreign investment is desperate. Individuals are granted permanent residence permits on proving that they are bringing funds into the country. Proof of possession of US\$1 million will lead to the granting of permanent

residence, while US\$300,000 and US\$100,000 will entitle operators of sole businesses and individuals with special technical skills, respectively, to three-year residence permits. Such monies could well be tainted but there are no screening structures. Individuals can bring money into the country ostensibly in order to set up businesses. Once tainted money is invested in a business venture, it becomes very difficult to track. The money can be used as payment for exports, among other things.

Transfer pricing involves under- or over-invoicing of goods and services in order to settle transactions at an incorrect value and thereby depriving the state of hard currency, or taxes that are payable on goods and services in the case of imports and exports. In the case of transactions that are confined to the country's borders, the practice has the effect of disguising the true value of transactions. This provides money launderers with the opportunity to clean 'dirty' money.

Review of proposed legislation

A Bill on money laundering has been produced and is to be considered in parliament before becoming law. Unfortunately this legislation has been pending for at least eighteen months. There does not appear to be any urgency to push it through. A senior official at the National Economic Conduct Inspectorate has confirmed that the Bill's content is essentially the same as contained in a paper written by the former Chief Justice, Antony Gubbay, in 1998,⁷ the year after legislation to deal with money laundering was proposed. As a result, the merits and demerits of this proposed legislation are considered below.

Sections 2(a) and (b) of the Bill provides the proposed definition of money laundering, which is similar to that in the Serious Offences Act. The definition is too general to include petty transactions undertaken with the proceeds of crime. It thus has the same shortcomings as Section 63 of the Serious Offences Act, as dealt with above. Money laundering is defined as:

... any activity, whether inside or outside Zimbabwe, which directly or indirectly:

- (a) involves or facilitates the transfer into or from Zimbabwe of the proceeds of crime, committed inside or outside Zimbabwe; or
- (b) involves or facilitates the possession or concealment inside or outside Zimbabwe of the proceeds of crime committed inside or outside Zimbabwe.

A lot of money laundering activities in Zimbabwe is linked to politics. The proposed legislation gives the Minister of Finance the power to delete organisations or individuals from the list of designated institutions. Further, the Minister has the power to establish a Central Intelligence Unit and to appoint a director and deputy director to it. It is advisable that these powers are vested in an independent board so that there is no political influence. The board should ideally have representatives from accountable institutions, the police, the Attorney General and from government itself.

According to the proposed legislation, the Minister of Finance can grant exemptions from the requirements of the Act. The possession of such powers is likely to lead to favouritism and corruption and under such circumstances, it will be difficult to eliminate or reduce money laundering.

The proposed Act will be called the Money Laundering (Supervision) Act. This title in itself appears restrictive. It would appear that the Act sets itself to deal with matters of supervision and not the broad scope of money laundering. A better title would be the Money Laundering Control Act.

UN Security Council Resolution 1373

This section looks at the implications of the UN Security Council Resolution 1373 (2001) (hereafter the Resolution) and the response thereto by the government of Zimbabwe, and contrasts this with the situation on the ground.

The Resolution was borne of the September 11 2001 terrorist attacks on the United States of America. In essence, it requires that no country turn a blind eye to the scourge of terrorism. To this end, all member states are to ensure that there is legislation to criminalise terrorism, such that the assets of organisations and individuals who directly or indirectly benefit from terrorist activities are frozen. In short, conditions in the member states should be such that individuals and organisations that are involved in terrorist activities do not reap the fruits thereof. All states are to provide information to other countries on terrorist activities, without reservation.

The Resolution requires that states become part of international conventions and protocols aimed at the suppression of terrorism, such as the Convention for the Suppression of Terrorism and Security Council Resolutions 1269 (1999) and 1368 (2001).

The Resolution requires that states should have regulations in place to ensure that refugees are thoroughly screened in order to avoid the harbouring of terrorists.

The following is a summary of the Zimbabwean government's response to the requirements of the Resolution, contrasted with the situation as it exists.

In the first paragraph of its response, Zimbabwe laments that it is not yet a state party to the International Convention on Terrorism, but that it would like to be a state party to it and to the Organisation for African Unity (OAU) Convention on the Prevention and Combating of Terrorism. To date, however, very little has been done by Zimbabwe to become a state party to these conventions. A Bill on money laundering has been in draft form for at least 18 months and there appears to be no hurry to bring this to parliament.

Zimbabwe also pointed out that in the absence of specific legislation on money laundering, it has other legislation that deals with terrorist activities though in an indirect way. Acts cited to this end are the Law and Order Maintenance Act, Serious Offences (Confiscation of Profits) Act, Criminal Matters (Mutual Assistance) Act, Fire Arms Act, Public Order Act and the Security and Explosives Act. However, all this legislation is derelict when it comes to dealing with money laundering, let alone terrorism.

Conclusion

The institutions that are vulnerable to money laundering in Zimbabwe do not have the ability to record and report suspicious money laundering cases. Apart from banks, there is no obligation on the other accountable institutions to report cases of money laundering to the relevant authorities.

The survey on which this chapter is based revealed that the majority of personnel in accountable institutions are not aware of how money laundering occurs. To expect them to monitor and report such cases is to expect too much. The banks confirmed that they are aware of money laundering. They confirmed that it is impossible to follow the guidelines to the book because of the economic situation in the country. Virtually all banks are facilitating the exchange of foreign currency at above the controlled rates in contravention of the law. The shortage of banks notes in the market is leading to financial dis-intermediation whereby parties exchange cash and avoid the inter-mediatory role of the banks.

The Central Bank, to its credit, has set up elaborate guidelines that go a long way in defining and putting the onus on banks to detect and report suspicious money laundering transactions. All the other accountable institutions do not have similar guidelines. In any event, the banks are not playing the desired role as spelt out in the guidelines because they facilitate money laundering through foreign currency dealing.

In Zimbabwe, money laundering has become part of everyday life. Economic mismanagement has led to distortions in the market which include a skewed exchange rate. The government has tried to put in place measures that defy logic. These measures include price controls on basic commodities. The distortions have meant great opportunity to some who are in authority who would naturally be opposed to the idea of ensuring that there is tight money laundering legislation.

The Star newspaper of 8 October 2003, in an article titled “Zimbabwe slips into Zairisation,” summarises the situation in the country. The fact that foreign currency and fuel are controlled means that those few who have access to these commodities can offload the proceeds onto the illegal parallel market. The article points out that those in power would like to legitimise ill-gotten gains while they still can, or at least hang on for as long as possible.⁸

Zimbabwe is now ranked 106 out of 133 countries on the Corruption Perception Index scale. According to Transparency International in the report that gave Zimbabwe this ranking, matters relating to political and civil participation, the media’s operating environment, access to information and judicial independence all play a major role in forming perceptions about the state of fair play or lack of it in the country.⁹

In conclusion, accountable institutions do not have the capacity to control money laundering because of the political and economic environment, which has led to a weak legislative environment.

Notes

1. C Goredema, Criminal justice and the truth in Zimbabwe: A necessary introspection, *South African Journal of Criminal Justice* 12(155) 1999.
- 3 An unreported decision in the Regional Court case of *State v. T Hove*, 2000.
- 4 See *Daily News*, 28 May 2003.

- 5 C Goredema (ed), *Organised crime in Southern Africa: Assessing legislation*, Institute for Security Studies (ISS), Pretoria, 2001.
- 6 A Standing and H van Vuuren, *The role of auditors: Research into organised crime and money laundering*, ISS, Pretoria, 2003.
- 7 Chief Justice Antony Gubbay, Money Laundering Supervision Act 1997, in *Journal on Money Laundering Control*, 3, January 1998, pp 277–286.
- 8 *The Star*, 8 October 2003.
- 9 *Financial Gazette*, 10 October 2003.