

CHAPTER 2

MONEY LAUNDERING CONTROL IN NAMIBIA

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This chapter reports on research carried out in Namibia on:

- the nature and extent of money laundering activities occurring in and originating from Namibia;
- the legislative mechanisms that could be used to prevent, detect and control money laundering in Namibia;
- the institutional mechanisms that could be used to prevent, detect and control money laundering in Namibia;
- the strengths and shortcomings of the legal and institutional frameworks in the control of money laundering;
- any current State initiatives; and
- the types of money laundering that occur in Namibia.

In addition, it will recommend legislative and institutional steps that Namibia might take to enhance its ability to combat internal and external money laundering.

At a workshop held in Pretoria on 19 January 2002, a guiding definition of money laundering was adopted for this project. The definition is somewhat broader than the universally accepted one, in that it extends the conceptual context within which money laundering is to be considered.

Money laundering is traditionally understood to be a criminal process of converting or “cleansing” property for the purpose of disguising its origin, knowing that the property is derived from serious crime. In other words, money laundering is more than just knowingly receiving stolen property, which is a common-law crime, or being found in possession of property believed to be stolen and being unable to give a satisfactory account of how it came into one’s possession, which is a statutory offence in Namibia. Those who engage in money laundering knowingly—in the sense of actual or legal intent—and those who engage in it when they ought reasonably to be aware that they are doing so, are ‘money launderers’.

Because money laundering is a new concept, it has to be defined by statute in order for it to be a recognisable criminal offence. Over the years it has become a feature of organised criminal activity. It became increasingly associated with illicit drug trafficking, and this led to its recognition in the United Nations Convention against Illicit Drug Trafficking of 1988, but developments since then have led to an international realisation that it is not confined to drug trafficking but is associated with other crimes, including common-law crimes of fraud, theft, murder, bribery etc. Practices that fit into the definition of money laundering have always been a feature of criminal activity although they have not been recognised as money laundering until recently.

Protocols adopted by the United Nations and other international bodies have recognised this and it is common to find that matters related to drug trafficking, organised crime, corruption and money laundering are addressed at the same time. The 1988 UN Convention mentioned above and the SADC Protocol on Combating Illicit Drug Trafficking are examples of this.

The United Nations Convention Against Transnational Organised Crime of 2000, (the Palermo Convention) is more thorough in its approach, and comprehensively deals with these issues and other issues relevant to the combating of organised crime.

Article 6 of the Palermo Convention requires states to criminalise, through legislation and other measures, the laundering of the proceeds of crime within the context of the fundamental principles of their domestic law. Conduct that must be criminalised when intentional (negligence is not referred to but seems to be contemplated) includes:

- the conversion or transfer of property, while knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his action;
- the concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights to property, while knowing that such property is the proceeds of crime
- the acquisition, possession or use of property, while knowing at the time of receipt that the property is the proceeds of crime; and

- participation in, association with or conspiracy to commit such offences, or aiding and abetting, facilitating, or counselling the commission of such offences.

The tragic events of 11 September 2001 have given new impetus to the broadening of the perception of the nature and scope of money laundering and its characterisation. It is now accepted that proceeds of criminal conduct may be laundered and channelled towards the implementation and realisation of other criminal goals, for example, terrorism.

It is because of this that a broader definition of the concept of money laundering may be adopted, namely, the concealment of assets generated by crime or to be used in committing, or facilitating the commission of crime. Put in another way, money laundering comprises all activities intended to disguise or conceal the nature or source of, or entitlement to money or property, or rights to either, being money or property or rights acquired from serious crime, as well as all activities to disguise or conceal money or property that is intended to be used in committing, or facilitating the commission of serious crime.

Types of money laundering in Namibia

Fraud and theft: Use of stolen cheques and identification documents

Money laundering is often associated with the concealment and disguising of the proceeds of fraud and theft. Stolen and forged identification documents may be used to open bank accounts. Cheques, which have also been stolen, are deposited into these accounts, and the funds withdrawn as soon as possible. Alternatively, stolen cheques are cashed in shops, supermarkets and banks. The money thus obtained is spent on clothes, luxury electronic goods like television sets, hi-fi equipment, DVDs, and VCRs, and vehicles. Sometimes the funds are invested in businesses such as driving schools, taxi companies or liquor outlets (*shebeens*), popularly known in Namibia as *cuca* shops. The taxi and *cuca* shop industries are the businesses of choice for many urban Namibians. They are easy to set up and it is fairly easy to obtain licenses to run them.

The taxi industry is predominantly in private hands and most taxis are individually owned. It is the only public transport system available in all the towns and cities. The taxis carry out most of their operations between Windhoek and

the Hosea Kutako International Airport, some 50 kilometres away. Like the *cuca* shops they are money-spinning machines and the owners routinely deposit large sums of notes and coins with the banks. It is relatively easy to mingle the proceeds of criminal activity with earnings from such businesses and introduce them into the legitimate business sector without rousing suspicions.

Cheque scams

In mid-2002, the police uncovered a big scam involving 30 cheques stolen from the Namibian Broadcasting Corporation (NBC) in Windhoek. The cheques were physically transported to centres 800 kilometres from Windhoek and deposited in the accounts of persons resident there. Three people were arrested for handling and negotiating some of the cheques, among them the owner of a well known driving school and a fleet of taxis. He allegedly took part in a transaction involving the receipt and processing of a cheque for N\$63,000 (US\$8 000).

Another suspect owns Limbandungula Lodge, near Ondangwa. She was arrested in April after bank officials thwarted her attempt to negotiate payment of a cheque for N\$163,570. Although many of the attempts to cash the cheques were thwarted some were successful because certain bank officials apparently colluded with the criminals.

As none of the persons arrested was employed by the NBC or associated with it, the conclusion is inescapable that those arrested were connected to the people who stole the cheques in the first instance, who are most probably NBC employees. This crime has all the characteristics of syndicated criminal activity.¹

The use of lodges to launder money is not an entirely new development. Three years ago, a case was brought before the Outjo magisterial district court involving government cheques stolen from Windhoek. These cheques had been laundered through tourist lodges that the government ran at the Etosha Game Park. Cheques made out to certain individuals had been stolen and endorsed to the accused, who used them to pay for staying at various lodges around the country. In each case they received change in cash, which was always substantial.²

In another case, which was pending at the time of writing, 'ghost soldiers' were created in the Ministry of Defence, using false identification particulars. Claims were later made on account of their purported deaths in action in the

Democratic Republic of Congo (DRC) and Angola, and the National Defence Force (NDF) paid out several hundred thousand dollars. A number of senior officers in the NDF have subsequently appeared in court on allegations of fraud.

The use of stolen and false identity documents to open bank accounts through which stolen cheques can be laundered is a common form of fraud, which often succeeds owing to collusion between the criminals and bank employees. Some cheques are simply cashed. The identification particulars and signatures on the back of these cheques turn out to be false. Sometimes a bank teller admits to having processed the cheque but pleads that he satisfied himself that the person who cashed the check was the person whose photograph appeared in the identity document. In some cases the teller claims a loss of memory. It is often difficult to prove that the bank employee has in fact colluded with a suspect.

In some cases the master copies of identity documents have been stolen from the Registrar's Office and used to create genuine-looking identification documents containing the particulars of actual deceased persons but with the photograph of some other person. These are used to open and operate bank accounts. Usually when the fraud is unearthed the perpetrators cannot be found, and the money is gone. Many an investigation has come to a dead end because of this.

The Commercial Crime Unit of the Namibian Police is responsible for investigating all commercial crimes in the country. If money laundering and related activities are criminalised this is the unit that will have to take on the additional responsibility.

Vehicle theft and related activities

Another kind of money laundering scheme mentioned by Chief Inspector Lloyd shows a different but interesting dimension to the use of false identification particulars. It involves vehicles stolen from South Africa and brought into Namibia. They are purportedly sold in Namibia, and payment is made to the criminals in South Africa by transferring funds from the bank accounts of innocent third parties in Namibia. The government has been the major victim in these cases. Payment is effected as follows: specimen signatures of authorised signatories to government accounts are stolen and letters are forged, instructing a banking institution to transfer funds to an account in South Africa. The funds are withdrawn and vanish without trace because the operators of the South African account will also have used forged identity documents. The ef-

fect of such schemes is that the criminals in Namibia receive the vehicles without paying a cent, while their South African counterparts receive payment for the stolen vehicles. Some of these fraudulent transactions go undetected even by the government authorities.

Vehicles stolen in South Africa are smuggled into Namibia and driven on Namibian roads with false or even original South African registration plates. South African-registered vehicles have always been a common sight on Namibian roads, because until 1990 Namibia was a territory of South Africa. The authorities tended to pay little attention to such vehicles. As a result a trend emerged for people to import such vehicles on temporary import permits without paying customs duties and tax and then use them in Namibia for years without changing the registration plates. This created fertile ground for criminal gangs to steal vehicles in South Africa, smuggle them into Namibia and sell them locally.

Some of the vehicles stolen in Botswana, South Africa and Namibia itself are smuggled to Angola through the Oshikango border post. The vehicles of choice are sports cars, luxury 4 x 4 station wagons, and double- and single-cab pickups. Some of these vehicles are exchanged for diamonds or are paid for in cash realised from the illicit sales of diamonds or hard currency like US dollars.

Sometimes owners who are experiencing repayment problems in South Africa bring vehicles into Namibia legally, paying the entry fee and receiving a temporary import permit. Then they sell the vehicles for cash or exchange them for diamonds. On returning to South Africa they falsely report a theft to the South African law-enforcement authorities and insurers in what are premeditated insurance frauds.

Cases have also been experienced where vehicles stolen in Namibia, or stolen in South Africa and smuggled into Namibia, have virtually 'disappeared', only to be found locked away in some garage in Windhoek, pending the opportunity to dispose of them. When cars are reported stolen, the police may set up roadblocks or embark on immediate but futile 'hot pursuit' operations; futile, because while they believe that the vehicle is being driven out of Namibia, it is simply taken to a safe house for storage. According to the police, this is increasingly becoming the preferred method of dealing with stolen vehicles.

Sometimes vehicles are substantially altered or tampered with to disguise their identity during this period before disposal.

Luxury vehicles from Japan

Besides the problem of vehicles stolen in Namibia and the SADC sub-region, vehicles stolen from Japan have surfaced in Namibia. The Namibian Police's Motor Vehicle Theft Unit (MVTU) has been investigating cases of luxury vehicles, notably Toyota Land Cruisers, Prados and Pajeros, imported into Namibia by affluent individuals or sold to them over the last three years.

Since September 2000, the Namibian Police have been aware through intelligence and information received that some second-hand luxury vehicles being imported into Namibia have been stolen in Japan.³ One such case, which prompted the police to undertake investigations, involved a Toyota Prado, which had been purchased by a high-ranking Namibian citizen. The vehicle had been bought from a motor dealer that carries on business at Oshikango in the Ohangwena district. The dealer specialises in importing second-hand vehicles from the Far East, mostly through Dubai. The company is owned and controlled by a Lebanese national who lives in South Africa. He also runs a motor dealership in South Africa. In Namibia, the dealership enjoys export-processing zone status, which means that it can import goods into Namibia at reduced tariffs and re-export them to other countries. Because of this, and because of its location on the border between Namibia and Angola, it imports vehicles in bond for resale in Namibia, subject to normal customs requirements, or for re-export.

The vehicle in question was seized by the Motor Vehicle Theft Unit and physically examined. Its identification particulars were checked with the ASF, or X400 system, an Interpol database system that confirmed that the vehicle had been reported stolen in Japan. As there were other vehicles in the warehouse, it was decided to check the status of these vehicles as well. In all, fifteen luxury vehicles, mostly Toyota Land Cruisers and Prados, were checked through the X400 system. It was confirmed that they had been reported stolen in Japan. All fifteen vehicles were seized by the VTU and kept at Ohangwena police station. The Japanese law-enforcement authorities were contacted through Interpol. However, investigations dragged out, with little progress being made, while the MVTU was put under pressure to return the vehicles to Jupiter Motors. Eventually, a decision was taken to return the vehicles with an indemnity and subject to the condition that they would not be sold

or in any manner removed from Namibia. All the vehicles remain in Namibia to this day.

In 2000 the Southern African Regional Police Chiefs' Organisation (SARPPCO), an umbrella grouping of all police forces within the Southern African Development Community (SADC), set up a special project dubbed 'Project Prado' in response to mounting concerns about the increasing number of vehicles reported stolen in Japan and imported into the sub-region. Intelligence reports indicated that there were criminal syndicates operating in Asia, between Japan and Dubai. These syndicates were involved in the smuggling of stolen vehicles. The 'Project Prado' Committee is composed of representatives from member states and has been engaged in negotiations with Japanese law-enforcement authorities for mutual assistance and cooperation in investigating these matters.

The MVTU has confirmed that many of the luxury Japanese-made vehicles in Namibia are stolen vehicles.

419 scams

The so-called 419 scams (advance fee frauds), which involve international syndicates, especially Nigerian ones, have also hit Namibia. From reports faxed and emailed to the Commercial Crime Unit it is apparent that some people have been conned but they are reluctant to identify themselves. The police also have information that some Namibians have acquired the expertise to generate and dispatch these letters, which was previously the domain of Nigerian syndicates.⁴

Because there is no anti-money laundering legislation, the Commercial Crime Unit can only investigate what would otherwise be money laundering under the traditional headings of fraud, theft etc. There is nothing more it can do. In any event, even when money laundering legislation is promulgated, it is doubtful that the unit will be able to cope, for the reasons given below.

Withholding and externalising foreign currency

Interpol has on occasion called upon the Commercial Crime Unit to carry out money laundering enquiries on behalf of German and South African law-en-

forcement authorities. This has entailed carrying out enquiries concerning banking transactions, property acquisitions etc., by persons under investigation in countries which have anti-money laundering legislation.⁵

One such case is that involving Hans-Juergen Kock, a fugitive German national, whose extradition is being sought by German authorities. It is alleged that he committed multi-million dollar frauds and tax evasion in Germany before moving the proceeds of his crimes and finding a home in Namibia in 1999.⁶

Namibia's strong historical links with Germany and South Africa are manifested by the dominance of the agricultural, commercial, tourism and industrial sector by persons of German descent. Most European visitors to Namibia come from Germany.

Like Kock, fugitives from justice often move their money to Namibia, which has an open investment policy. The money is used to purchase farms on which such commercial activities as game farming and lodging are carried out. It has been shown that in the process tainted money can be brought into Namibia and laundered. Most German tourists and hunters who visit Namibian game farms and lodges hardly bring any foreign currency to Namibia, having paid for their trips in Germany. Foreign currency that should have come into Namibia is withheld, and in this way 'nest eggs' are built up offshore.

Money laundering and diamonds

Namibia is one of the leading producers of gem-quality diamonds in the world. The diamond industry is the single largest contributor to the GDP. A number of diamond companies operate in Namibia. The market leaders are Namdeb Diamond Corporation (Pty) Ltd, a joint venture operation between the Namibian Government and De Beers of South Africa; Namibia Minerals Corporation (NAMCO), until a few weeks ago listed on the NASDAQ stock exchange, in which the Namibian government also holds shares; and NAMCOR. There are numerous other smaller operators holding mining claims and exclusive prospecting licences that authorise them to carry out mining operations.

The larger companies in particular mine a large proportion of diamonds from the Atlantic Ocean seabed. Namdeb mines at Oranjemund in the Orange River basin in Southern Namibia.

In spite of the onerous legislative requirements and harsh criminal penalties imposed on diamond operators, diamonds are still stolen from the mining areas on land and sea.

One of the major problems associated with the enforcement of the diamond law is that the geographical area covered by diamond prospecting and mining operations is huge, extending as it does from the Orange River Basin up to the Skeleton Coast in the north, towards Angola and into the Atlantic Ocean area. Thus the Diamond Act (1999) places a great deal of responsibility on the diamond industry itself, the very people who are supposed to be policed.

Although the Ministry of Mines and Energy employs a large number of diamond inspectors who are equipped with wide powers, they cannot police the whole of Namibia. Thus some of the players in the diamond industry, ranging from mining claim owners to exclusive prospecting-licence owners and employees, are the biggest offenders. Illegal diamond deals are also very difficult to detect because, like bribery and corruption, they are conducted in a very secretive manner by parties who all stand to benefit from non-compliance with the law. Therefore, in order to detect, interdict and prosecute offenders, the law-enforcement agencies have to rely on setting traps and mounting 'sting operations', which can be very dangerous, and have on a number of occasions led to the murder of some of Namibia's best diamond detectives.⁷ Law-enforcement agents invariably depend on informers to crack down on diamond smuggling and illicit diamond deals.

Some operatives in law enforcement believe that money laundering in Namibia is principally associated with illegal diamond deals, including deals involving fake diamonds, illicit drug trafficking, illicit dealings in protected natural resources like rhino horns and elephant tusks, and deals in weapons.

Front companies

A California based outfit with links to the Mafia attempted to establish a business relationship with a Namibian who would set up front companies to launder money through. The proposal was that 30 million US dollars would be shipped to Namibia to be invested in the companies. The Mafia were willing to write off a third of the capital investment; they simply required a guarantee that two thirds of it would be returned to the United States through legitimate business channels.

The reason for targeting Namibian financial channels was the country's open investment policy and its good international reputation. Its financial institutions are of high integrity and could be used to launder money without arousing the suspicion of the United States authorities. Using its own undercover agents, the PRU tried to offer the US syndicate diamonds in return for the cash but the syndicate would have none of this. Instead they proposed that a diamond-mining operation should be set up, through which the money received from them could be laundered back to the United States as the proceeds of legitimate business operations. They were even prepared to help establish several business operations in stable Southern African states for this purpose, but they did not want to buy diamonds.

It would appear that the money, which was to be brought into Namibia in cash, was the proceeds of drug trafficking.

This case demonstrates the methods that can be employed by international criminal syndicates to launder the proceeds of their criminal operations in one country through another country. It shows that money laundering operations can have an international dimension involving the unwitting abuse of the financial services sector of another country.

It is apparent that the Californian syndicate was holding a great amount of cash that it could not use in the legitimate business sector in the United States without attracting the attention of drug-law enforcement authorities and the FBI, owing to that country's stringent reporting requirements.⁸

Police intelligence reports indicate that money is also being laundered through the setting up of diamond cutting and polishing factories offshore. Rough and unpolished diamonds are raw materials. They have to be processed if they are to be marketed for jewellery and other needs. A cutting and polishing factory is therefore a necessity at the end of the line in all dealings involving diamonds. Until recently the only diamond cutting and polishing factory in Namibia was that of Namgem (De Beers), established in 1998. It is a joint venture between De Beers and the government of Namibia. In May 2002 some Russian investors commissioned a diamond cutting and polishing factory at Walvis Bay and at least one other such factory has recently come on stream.

Typically money is brought into Namibia to purchase rough and uncut diamonds on the black market. Because diamonds can be split into small packages and carried out of the country on one's person, a profit is guaranteed on any purchase made on the black market. The price of rough and uncut diamonds purchased on the legitimate market is marked up by 20%. The maximum mark-up which one can add on in order to realise a profit is another 20%. A purchase on the black market, however, is at 20% below the official market rate and one can add on a mark-up of a further 20%, realising a profit of 40% on what should be the original cost. It is therefore more profitable to purchase on the black market.

When it comes to the processing of illegal diamonds, however, it is the owners of the factories who provide the funds for the purchase of rough and uncut diamonds on the black market. They also own the cutting and polishing factories offshore, usually in Europe, South Africa and Middle Eastern countries like Israel. When the returns from their business are examined they appear reasonable, if the formal market prices are used as an indicator. The profits accord with those that would be expected to be realised if the rough and uncut diamonds had been purchased on the legal market. It will not be readily apparent that an additional 20% profit has been made by virtue of the raw material having been purchased on the black market.

The profits realised as a result of these activities are invested outside of Namibia, which is simply used as a tool in the laundering operation. Police intelligence officers indicated during the research that in all cases involving persons known to be engaged in illegal diamond deals and money laundering, even when the money launderers physically reside in Namibia, they do not establish the processing factories in Namibia but rather offshore. They establish nest eggs overseas in countries presumed to be safe investment destinations, with stable economies and currencies. Africa is not renowned for these things.

The cases that have come before the courts indicate that there is a network of illegal diamond activity covering Namibia, Angola, Belgium, South Africa and Israel. In a recent case some Iraqi and Lebanese nationals were arrested in a trap set by the PRU.

In Angola and Namibia the price of diamonds is quoted in United States dollars per carat. Diamonds are readily available in small quantities in Katutura Township and Northern Namibia. They are mostly obtained through thefts by syndicates involving people working in the diamond-mining areas. They are

also available on the Angolan side of the border from formerly UNITA-controlled areas. In cross-border deals diamonds are usually exchanged for United States dollars. Cross-border trading in Northern Namibia is generally conducted in US dollars, which are readily purchased by the banks, with no further questions asked if the seller produces a passport showing either that he or she was out of the country or that he or she is foreign.⁹

There is a sizeable population of Angolans living in Namibia, mostly in the northern towns of Oshikango. Oshakati, Ondangwa, Rundu and Windhoek. They have a reputation for ostentatious wealth and high living. They usually purchase immovable and movable property in cash. They still maintain contacts with their families in Angola, despite the conflict that has been raging for years. Because the vehicle and housing market is dominated by the banks, which normally lend money to companies and individuals with collateral and traceable references, it is difficult if not impossible for people who are not in well-paid formal employment, are foreign nationals or do not own or carry on successful businesses to secure mortgage finance or vehicle loans. Most Angolans are at a disadvantage in this regard. Hence they conduct most of their transactions in cash.¹⁰

It is difficult to explain the source of their wealth, except to assume that it is derived from illicit activities in both Namibia and Angola. The family ties between Oshiwambo-speaking peoples on either side of the border, the fact that the apartheid regime encouraged many Angolans to emigrate to Namibia at the height of its collaboration with UNITA against the ruling MPLA and the Cuban forces, and the conflict situation that has existed in Angola since 1975, which fled to the trafficking of diamonds acquired in UNITA-controlled provinces to boost the war effort against Angolan government forces, have all encouraged illicit diamond dealing and money laundering over the years.

Terrorist links

Some Angolans who have taken refuge in Namibia have been known to support the UNITA-led efforts to topple the Angolan government. In the case of *Ngeve Raphael Sikunda v the Government of the Republic of Namibia*,¹¹ the son of a permanent resident brought an urgent application to prohibit the Minister of Home Affairs from expelling his father, Domingos Sikunda, who had been resident in Namibia since 1976. On a number of occasions Sikunda had publicly held himself out to be the official representative of UNITA in Namibia.

For years Sikunda had been operating a thriving restaurant and lodge business at Rundu on the border with Angola and close to areas then controlled by UNITA.

It was believed that Sikunda, who claimed in newspapers and correspondence sent to the Office of the President that he was the official representative of UNITA in Namibia, was actively involved in the UNITA cause. He was using the proceeds of his business to fund UNITA war efforts, which the international community considered to be acts of terrorism. Sikunda's son had a previous conviction for illegal dealings in protected resources.

Other examples of businesses which were set up to support terrorist activities in Angola are two fuel service stations in the Caprivi, one at Divundu and the other at Kongola on the border with Angola, close to UNITA-controlled territory. These service stations are owned by Portuguese-speaking residents of Namibia, and appear to have been established to provide fuel to rebel UNITA forces.

Furthermore, the criminal investigations into the attempt by Mishake Muyongo's supporters to bring about the secession of the Caprivi Strip, which led to about 130 Namibians being indicted for treason, suggest that there was collaboration between the secessionists and UNITA. Some of the weapons used in the unsuccessful insurrection of 2 August 1999 were obtained from UNITA in exchange for fuel.¹² It appears that UNITA had always obtained its fuel supplies from Namibia, through Namibians residing in the Caprivi. In other words there had been long-standing collaboration in that region between Namibians and UNITA.

The funding for these activities could only have been obtained from illegal dealings.

Partly on account of government overtures Namibia has experienced a rise in the number of oriental businesses since independence. These tend to be small Chinese shops dealing in imported items and trinkets, and offering goods at cheaper prices than many of the more established shops. Some Chinese based companies have been awarded lucrative tenders, especially in public construction. However, it seems that organised criminal groups from Asia have followed Chinese business. Some small Chinese shops may be fronts for criminal operations. A Chinese grocery shop in Windhoek, owned by two brothers was engaged in buying United States dollars on the black market a few years ago. It offered better exchange rates than the banking institutions. Its operations were investigated, and the owners were subsequently prosecuted and convicted for

violating exchange-control regulations. They have subsequently been arrested at the coast for dealing in elephant tusks and rhino horn. The matter was still before the court at the time of writing, but one of the suspects has fled.¹³

The police believe that the Chinese shop, which has been receiving suspicious amounts of money from South Africa, has been receiving the money on behalf of other persons to purchase diamonds on the black market.

Illicit deals in arms and ammunition

Weapons are readily available, owing to the long-running Angolan conflict. They are also exchanged for United States dollars. The information available tends to suggest that this happens on a limited scale. Namibian criminal syndicates are less interested in weapons than in hard cash and diamonds. Weapons are only acquired for sale to those criminal groups that specialise in armed robberies. Weapons are more frequently used to intimidate than to kill during armed robberies, although there have been cases where the victims have been shot.

Registration of front companies and close corporations

Typically companies and close corporations are registered as fronts to facilitate the laundering of money, the registration of properties and the acquisition of government contracts. The preferred method is the registration of close corporations. The requirements for registering and operating such corporations are relatively simple and less onerous than with the requirements for companies. The banks report that, although they take the necessary steps to obtain all relevant information concerning potential customers who apply to open bank accounts, it sometimes happens that seemingly genuine requests are approved only for the accounts to be used to deposit stolen or fraudulently acquired cheques. When the cheques are cleared, and this usually takes place before the fraud is discovered, funds will already have been withdrawn. When false identification particulars have been used to open the accounts, or the bank employees have colluded with the perpetrators, it becomes extremely difficult to hold the perpetrators accountable.

Proceeds of common-law crimes

Apart from fraud the most prevalent common-law crimes are armed robbery, housebreaking and theft. Numerous serious robberies, involving large sums of

money, have been reported. These are usually inside jobs. Invariably cash-in-transit security vehicles are targeted. In two of the major armed heists dealt with by the Namibian Police,¹⁴ the Karibib and Brakwater heists, Namibian nationals teamed up with South Africans to execute the most daring armed robberies in the history of Namibia. In both cases the South African accomplices are known criminals in their home country

In the Brakwater case a cash-in-transit vehicle was ambushed a few kilometres outside Windhoek, in what was apparently an inside job involving one of the Security guards. One security guard was not privy to the scheme and during the ambush one of the robbers was shot and injured. However, N\$5 million was stolen. Some of the perpetrators were arrested in Cape Town in possession of large sums of Namibian dollars and foreign currency, which was later identified as part of the stolen loot. They appeared in court in Cape Town. The Namibians among them were deported to Namibia while formal extradition proceedings were instituted regarding the South African nationals. The extradition request was granted. One of those extradited, one Nangisi, temporarily escaped from custody but was recaptured.

Evidence led during the bail applications reveals that some of the money was laundered by being distributed to friends and relatives. Some of the cash was buried underground, while some was used for pleasure and to buy luxury items, like hi-fi equipment, televisions, VCRs and cell phones. A common feature of cases where large cash sums are stolen in Namibia is that criminals find it difficult to keep such large sums or to introduce them into the legitimate financial system.

Corruption

Although corruption is not the focus of this research it is important to make a few remarks about it. Corruption, like money laundering, is a known feature of organised criminal activity. Measures designed to tackle money laundering must of necessity address the problem of corruption. In order to demonstrate the high incidence of corruption in Namibia it is necessary only to refer to reports which have been dominating the media recently concerning scams involving the University of Namibia, the National Broadcasting Corporation, Air Namibia, the Roads Contractor Company, the Namibian Defence Force and other parastatal institutions.

Money laundering and banking institutions

There is presently no money laundering legislation in force in Namibia. A series of money laundering-related statutes have been drafted and are waiting to be introduced and debated in parliament. These draft statutes are discussed in some detail elsewhere in this chapter.

Notwithstanding this, enquiries have revealed that there is a high level of awareness of the problem of money laundering among law-enforcement agencies and banking institutions. However, in other commercial sectors where money laundering can and does occur, e.g. non-bank financial institutions, the vehicle industry and the property industry, the level of appreciation of what is involved in money laundering and how these sectors can be used in money laundering schemes is low, if not altogether non-existent. This is in large part due to the fact that there is no criminal offence known as money laundering in Namibia. It is generally accepted that there is always a possibility that when commercial transactions are carried out in cash, the cash might be the proceeds of a criminal offence. In the absence of any indication to this effect, business people are entitled to assume that the source of the cash is legitimate.

In Namibia, cash transactions are extremely common, especially among the indigenous people. In northern Namibia on the Angolan border, where according to the Population and Housing Census report published in March 2002, 75% of the country's population lives, commercial transactions are invariably conducted in cash. Furthermore, among the Herero people, who are traditionally cattle ranchers and who have large herds of cattle, commercial transactions are usually conducted on cash basis, even for large purchases, for example, when buying a vehicle.

Enquiries with the banks confirmed these cash practices. It is not unusual for large cash deposits to be made with commercial banks or for large withdrawals to be requested. Most importantly, cash transactions are conducted in the usual and normal course of business, with a deep sense of pride and without fear or suspicion. It transpired from interviews conducted with various banking officials that most customers are not aware of the fact that banks are obliged to report suspicious transactions and transactions involving amounts above certain prescribed limits to the Bank of Namibia. It was reported that this might be one reason why customers feel free to deposit and withdraw large cash amounts. Whether banking patterns would be affected if the public were more aware of the Bank of Namibia's reporting requirements could not be estab-

lished. However, it is possible that there would be changes, especially where money is the proceeds of a crime like armed robbery or theft.

Furthermore, because large cash transactions are not unusual the banks do not generally enquire into the origins of a customer's funds. Consequently, there have been few cases that have roused suspicions and warranted a report to the Central Bank.

In those instances where the bank's suspicions have been aroused, this has largely been due to the fact that a particular transaction or series of transactions during a given period have been noticeably at variance with the usual and known business of the customer and the previous conduct of account, to the extent that they cry out for an explanation or comment.

Banks do call customers in for an explanation if unusual transactions are observed. The customer is usually able to give a satisfactory explanation. However, on occasion a customer is not able to explain to the satisfaction of the bank, and this prompts the closure of the account.

In general, banking institutions in Namibia rely on their branches to obtain all relevant information, check the references of the prospective customer, and also check with the credit bureau before a business relationship is established. After that, account performance is strictly monitored and when any suspicious activity is noticed, as it should be since the branches deal with the customers directly and ought to know them, the bank reports it. All the banks have instituted centralised reporting procedures as a matter of policy to facilitate compliance with the reporting obligations provided for under section 50 of the Banking Institutions Act and the Determinations on Money Laundering and on Economic Crime issued by the governor of the Bank of Namibia.

The institutional response to money laundering

The Bank of Namibia and banking institutions

The Legal Advisor of the Commercial Bank of Namibia explained that at a meeting of the SADC Finance Ministers the ministers were tasked to create Anti-Money Laundering Task Force Groups in their individual countries.¹⁵ A task force drawn from the public and private sectors of Namibia was accordingly set up. The group identified the kind of legal machinery required to com-

bat money laundering. It would include a money laundering law, an anti-corruption law, and provisions for extradition, international cooperation, the prevention of organised crime, and the sharing of financial intelligence. The drafting of these statutes was then outsourced. When the draft Bills were ready the task force reviewed them, made further recommendations, and finally approved them. Only the Anti-Corruption Bill has yet been tabled in parliament.

Ms Gous did, however, point out that the banking industry is deeply aware of the problems of money laundering, and that it is under pressure from international donors and customers to ensure that banks operate in terms of internationally accepted norms. In particular the industry is worried about the prospects of losing international business if it allows itself to be used for money laundering in any manner.

Accordingly, notwithstanding the absence at this stage of comprehensive anti-money laundering legislation, all banks comply with the provisions of the Banking Institutions Act, in particular the requirement to report suspicious transactions in terms of section 50 and the determinations and guidelines issued by the governor of The Bank of Namibia, in particular the determination on money laundering and the “know your customer policy.”

The Commercial Bank also formulated a policy on the matter, following the issuing of that determination in 1998 and a further circular by the Central Bank. In terms of the policy a Money Laundering Control Officer (MLCO) was appointed. All members of staff are enjoined to follow the policy guidelines and to report all suspicious transactions to the MLCO.

The MLCO has a duty to conduct investigations in consultation with the internal audit unit of the bank to establish whether indeed a transaction is suspicious and warrants reporting to the Central Bank. The MLCO decides whether to report to the Central Bank’s banking supervision section. The managing director of the Bank simply ratifies the decision afterwards.

Concerns have been raised about the absence of enforcement mechanisms. There is no anti-money laundering law-enforcement agency in Namibia. The Central Bank’s enforcement capacity is limited. Even when legislation is passed by Parliament, unless an enforcement authority is established at the same time, it may not be possible to enforce the provisions of the legislation effectively.

The impact of the legislative provisions on these institutions and other accountable institutions and supervisory bodies is likely to be overwhelming,

especially the impact of the reporting obligations and the criminal and administrative penalties. It will significantly affect the manner in which they do business. The requirements to train staff, keep records, and identify customers will have far-reaching consequences. Large corporations like Edgars Stores and Pick 'n Pay, which have many customers and routinely receive and pay out large sums of money for goods and services, will find it extremely difficult to detect suspicious transactions involving their clients.

Subsidiary institutions

An important problem that has to be considered in the promulgation of anti-money laundering legislation was highlighted during an interview with Mr V Deitenbach of the Internal Audit and Loss Control Department of the Commercial Bank of Namibia.¹⁶ He is a member of the Financial Institutions Security and Fraud Committee (FISFC,) and its current chairperson.

The problem relates to the reporting obligations of a banking group when it operates in more than one jurisdiction that has reporting requirements. The Commercial Bank of Namibia is concerned about the implications of the reporting obligations, because it is part owned by Nedbank South Africa, which is the major shareholder. Nedbank in South Africa is required to report in terms of South African legislation. Lately, Nedbank has been requiring the Commercial Bank to report suspicious transactions involving Namibian customers. This is in order to enable Nedbank to comply with reporting obligations under South African law. In view of the fact that the Commercial Bank is required to report to the Bank of Namibia, it is a matter of concern that it may be saddled with a dual reporting obligation, although it could not report a Nedbank customer's activities to the Bank of Namibia. In a case in point, Nedbank reported transactions involving a Namibian customer of Commercial Bank to the Commercial Crime Unit in South Africa. It also reported the customer's activities to the Namibian Commercial Crime Unit without the knowledge of Commercial Bank.

One of the Bank of Namibia's functions is to supervise all the other banking institutions.¹⁷ The banking institutions have to comply with the reporting requirement of the Banking Institutions Act as well as the directives of the governor. The directives carry the force of law.

Other institutions, accountable and supervisory, over which the central bank has no supervisory powers and which are going to be affected by the new legislation are not involved at this stage. This means that there is a real possibility that they will not be able to cope once the legislation comes into force.

International legal instruments

The Republic of Namibia is a signatory to the SARPCCO Agreement in respect of Cooperation and Mutual Assistance in the Field of Crime Combating. It has also ratified the Protocol on Combating Illicit Drug Trafficking in the SADC sub-region (the SADC Protocol). However, it has not signed or ratified the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (the UN Convention).

These instruments are important. The SADC Protocol enjoins member states to promulgate and adopt domestic legislation to tackle drug trafficking, money laundering and related problems. It advocates the promulgation of legislation that provides effective measures for dealing with the proceeds of illicit drug trafficking including the tracing, freezing, seizure, confiscation and forfeiture of the proceeds and instrumentalities of drug crimes. It further advocates the adoption of laws to provide for mutual assistance regarding investigations into illicit drug trafficking, confiscations and prosecutions, the extradition of offenders, the prevention and detection of laundered proceeds of illicit drug dealings, and controlled delivery of drugs in order to identify the participants in criminal enterprise.

Finally, it obliges member States to curb corruption resulting from illicit drug trafficking, including the establishment of independent anti-corruption agencies, administrative and regulatory mechanisms for the prevention of corruption and abuse of power, the strengthening and harmonisation of criminal laws and anti-corruption procedures, the adoption of procedures for the detection, investigation, prosecution and conviction of corrupt persons and their accomplices and the protection of witnesses, the freezing, forfeiture and confiscation of property and money acquired through corruption, improved banking and financial regulations to prevent capital flight and tax and customs duty evasion, among other things.

The SADC Protocol adopts the objectives of the 1988 UN Convention.

At the level of international cooperation the Convention and the Protocol can be used by other signatory parties to obtain whatever assistance they may require of Namibia within the context of the provisions of the instruments. In other words, in the absence of specific domestic legislation dealing with an issue relevant to the spirit of the respective instruments, Namibia can follow the provisions of the Convention and the Protocol as if they were domestic legislative provisions. Namibia could not fail to comply with a request for assistance from a member state on the ground that there is no domestic statute dealing with a particular issue.

However, these two international instruments are only relevant to the problem of the laundering of funds arising from drug trafficking and not those that arise from other criminal activity. This is in itself a limitation on the extent to which money laundering can be addressed.

Namibia has signed and ratified the United Nations Convention against Transnational Organised Crime 2000, the Palermo Convention. In terms of the Convention, member states are required to criminalise participation in an organised criminal group and the laundering of the proceeds of crime, to institute comprehensive domestic regulatory and supervisory regimes for banks and non-bank financial institutions and other bodies particularly susceptible to money laundering in order to deter and detect all forms of money laundering (with emphasis placed on requirements for customer identification, record-keeping and the reporting of suspicious transactions), to criminalise corruption and to adopt measures to combat it, to freeze, confiscate and forfeit assets, to extradite offenders, to render mutual assistance in transnational criminal matters and to foster international cooperation in law enforcement.

Namibia is a signatory to the International Convention for the Suppression of the Financing of Terrorism (1999). It signed the Convention on 10 November 2001, but has not ratified it. Furthermore, it has not promulgated or adopted any domestic legislation providing for the criminal offences envisaged in articles 2, 4 and 5, or generally dealing with matters with which the Convention is concerned.

Broadly speaking, Article 2 of this Convention contemplates the commission of an offence under two headings:

- terrorist crimes stipulated in specified UN Conventions which, in substance, deal with various types of acts of terrorism and the spheres within which they tend to occur; and

- the killing and injuring of civilians not actively taking part in hostilities in situations of armed conflict when this is done in order to intimidate a population or to compel a government or an international organisation to abstain from carrying out its duties.

There is no legislative mechanism currently in place to address the question of the laundering of the proceeds of crime, whether related to illicit drug trafficking not, for the purpose of furthering the commission of terror crimes.

Domestic legislation

Namibia has not yet promulgated or adopted domestic legislation dealing with money laundering specifically. An examination of legislation currently in force reveals that money laundering is never specifically mentioned or defined. Either it is merely touched upon or some of its features are affected by certain provisions in the process of addressing other criminal matters.

However, the authorities are moving rapidly to address this concern. Practical steps that have been taken include the drafting of a number of Bills that are to be tabled in Parliament in the near future. These include the Prevention of Organised Crime Bill and the Financial Intelligence Centre Bill.

The Prevention of Organised Crime Bill

Modelled on similar lines to the South African Prevention of Organised Crime Act, the Bill seeks to introduce measures to combat organised crime, money laundering, the activities of criminal gangs, and racketeering; to criminalise money laundering and gang-related activities; and to provide for the recovery of the proceeds of criminal activities and the civil forfeiture of criminal assets, be they proceeds of crime or instrumentalities used to commit crimes. The Bill also seeks to establish a Criminal Assets Recovery Account.

The Financial Intelligence Centre Bill

The main aim and object of this Bill is to combat money laundering activities by establishing a Financial Intelligence Centre and a Money Laundering Advisory Council, and imposing certain duties on institutions and other persons who may be used for money laundering.

The measures to be adopted in the Bill complement and give effect to the measures to be adopted in terms of the Prevention of Organised Crime Bill.

THE FINANCIAL INTELLIGENCE CENTRE

The Financial Intelligence Centre, as its name implies, will be an intelligence-gathering and dissemination institution. It will be a juristic person with the capacity to sue and be sued. It will be headed by a director and have its own staff, bank accounts, budget etc.

In terms of combating money laundering its functions will be to:

- collect, receive, process, analyse and interpret information disclosed to it;
- inform, advise and cooperate with investigating authorities and the Namibian Intelligence Service;
- supervise compliance with the provisions of the Bill by accountable institutions;
- give guidance to accountable institutions to combat money laundering; and
- promote the appointment by accountable institutions and supervisory bodies of persons to specialise in measures to detect and counter money laundering.

THE MONEY LAUNDERING ADVISORY COUNCIL

The Bill seeks to establish a Money Laundering Advisory Council to advise the minister on policy matters, on measures to combat money laundering and on his exercise of the powers granted under the Bill, to supervise the operations of the Centre and to act as a consultation forum for stakeholders.

The Council members would be drawn from law-enforcement agencies, the prosecution, the central bank, banking and other financial institutions, trade officials, the Ministry of Finance, associations representing accountable institutions, etc.

APPLICATION OF PROVISIONS: ACCOUNTABLE INSTITUTIONS AND SUPERVISORY BODIES

Furthermore, once its provisions become law, the Bill seeks to make them applicable to accountable institutions and supervisory bodies. Schedule 1 of the Bill lists the accountable institutions contemplated. Legal practitioners are included among such institutions. Schedule 2 lists the supervisory bodies, which include the Bank of Namibia, the Registrar of Companies, the Law Society, the Estate Agents Board, the Public Accountants and Auditors Board, the Namibia Finance Institutions Supervisory Authority, and the Stock Exchange Board. The minister is empowered to add more accountable institutions and supervisory bodies to the lists.

MONEY LAUNDERING CONTROL MEASURES

1. The duty to identify clients

Accountable institutions are required to take reasonable steps to establish the identity of prospective clients, and, in the case of agents, their principals and authority to act. These steps must be taken at the inception of a business relationship or the conclusion of a single transaction.

With regard to established clients, that is, those already in a relationship with the bank at the time of promulgation of the act, an accountable institution is required to establish their identity within six months and in addition to trace all accounts involved in all transactions concluded with it.

If it is unable to achieve this, it may not conclude any further business and must inform the Centre. The Bill further stipulates what is to be done if identity is later established.

2. The duty to keep records

Accountable institutions will be required to keep records which identify who the real client is in every transaction, how his identity was established, the nature of the business relationship, all accounts held by the client, etc. The record must be kept in electronic form for up to five years. In cases where two or more institutions are part of the same business group, the records must be centralised.

The records kept in terms of these provisions are admissible in court as an exception to the hearsay rule; they merely have to be produced. This is advantageous in the event of a criminal trial because it would be cumbersome if the person who drew up the original document or the person who entered the data into the computer were to be required to testify orally in court. In this case admissibility of evidence would not be a problem. Furthermore, it would also be problematic if strict compliance were to be required with the best evidence rule. This provision is further justified by the fact that the authenticity of such records would hardly be disputable, the records having been originated and kept in the ordinary course of business.

The Centre will have the authority to access the records of accountable institutions and supervisory bodies during normal working hours, and to examine and make copies as necessary.

3. *Reporting duties*

The Bill envisages both a threshold-based and a suspicion-based reporting regime.

Firstly, it proposes that accountable institutions report payments and receipts above a prescribed limit.

Secondly, it proposes that accountable institutions report suspicious transactions involving actual or prospective receipts, or any money laundering activities, whether they have occurred or are about to occur. These reports must be made to the Centre within a period to be prescribed. They are to include the grounds for the suspicions and the particulars of the transactions.

Thirdly, it proposes that accountable institutions report suspicions about any receipts or imminent receipts of the proceeds of unlawful activities (i.e. offences as defined in the POCB), together with the grounds for the suspicions and the particulars of the transactions.

Accountable institutions are required to report when they objectively and subjectively suspect the above.

Furthermore, financial institutions, their employees and all other persons are prohibited from disclosing to any one the fact that a report has been made or is to be made, or the contents of any report, imminent or otherwise, except in certain permitted circumstances stipulated.

Accountable institutions are also required to report electronic receipts and transfers above a prescribed amount, together with the relevant particulars.

Likewise, supervisory institutions are obliged to report any discoveries they make concerning receipt of the proceeds of unlawful activities. They are also required to report it if they have been used wittingly or unwittingly in money laundering. They are expected to retain their own records for at least three months.

It is noteworthy that these provisions do not only apply to the offence of money laundering; they apply to the proceeds of any unlawful activities, e.g. theft and fraud.

It is also worth pointing out that these reporting obligations are likely to generate a considerable amount of work as a result of the routine reporting of suspi-

cions which turn out to be unfounded and the reporting of transactions which involve sums above the prescribed limit but are nevertheless innocent. It is feared that the institutions and supervisory bodies may not have either the staff or the funds to cope. The periods for which the records must be kept are also quite substantial.

When an accountable institution reports an imminent transaction to the Centre, it may proceed with the transaction unless the Centre directs otherwise. This is useful because, as with a controlled delivery when a drug consignment has been intercepted, continuing the activity may assist in the identification and apprehension of the real perpetrators of an offence.

The Centre may also acting on its own initiative intervene to prevent a transaction from being completed temporarily while investigations continue or the police or the prosecutor-general are informed.

Provision is also made allowing a judge in chambers to issue monitoring orders upon application, where a reasonable suspicion exists that a person is using an institution for money laundering or an account or facility is being used for this purpose. The order would direct an institution to report the matters stipulated in the order on any terms or conditions set out in it for up to three months; the period may be extended. This facilitates the monitoring and surveillance of the conduct of an individual or the conduct of an account for the purpose of making an evaluation and taking appropriate action.

This would presumably be done when law enforcement authorities require it. It follows that law enforcement authorities need to be well trained in these provisions. They also need to be trained in the preparation of the affidavits that would be needed to satisfy a judge before he issues such an order, which is necessarily intrusive and violate constitutional freedoms. Although, the provision does not state who will make such applications it seems that this is an investigative tool available to the police and like authorities.

The Bill further provides that no agreement, duty of secrecy or confidentiality, or statutory or common-law restriction on the disclosure of information affect these reporting obligations.

This provision appears to be in conflict with a provision under the Prevention of Organised Crime Bill (POCB) that protects legal professional privilege. It may be asked how a legal body such as a law society is to report if the lawyer

himself is protected and not obligated to report. Would a legal practitioner be able to report information conveyed to him in confidence for the purpose of criminal defence or give advice to the law society under these provisions and still be protected by the provisions of the POCB?

The Bill further seeks to protect persons, including the accountable institutions and supervisory bodies and their directors and employees, who make reports in good faith (whistle-blowers) from criminal or civil responsibility. The good faith requirement, though reasonable, may lead to problems in the event of an allegation of malice. However, it is a necessary check on possible abuses that may tarnish the reputation and dignity of others and which in addition may infringe on guaranteed constitutional rights.

The Bill also provides for restrictions on access to information held by the Centre.

ENFORCEMENT OF THE PROVISIONS

The Bill is progressive and takes cognisance of the matters of concern mentioned in the Palermo Convention, the forty Financial Action Task Force (FATF) recommendations, the Basle Convention Guidelines and the experience of jurisdictions which have a longer history of dealing with international and domestic organised crime. It is not surprising therefore that both administrative and criminal-justice-enforcement measures are provided for.

With regard to administrative measures, it is proposed that the Centre should have powers to impose administrative fines on accountable institutions for omissions or commissions that constitute offences. The offending institution would have to submit itself to an enquiry and to deposit a sum of money with the Centre as security. If the accountable institution submits to the enquiry and abides by any finding or order made against it, it will be exempted from criminal prosecution. However, if an accountable institution refuses to submit itself to an enquiry, the Centre may refer the matter to the prosecutor-general.

Before instituting the enquiry, the Centre must consult with the prosecutor-general, who may direct that a criminal prosecution should be conducted if it is in the interests of justice. In this event, no enquiry will be held.

Administrative fines are not a new phenomenon and have been in use in countries such as Germany or Italy. The advantage of this provision is that in order to protect their reputation and avoid the stigma associated with criminal convic-

tion, accountable institutions are likely to opt to be dealt with in terms of this procedure. The procedure appears to be straightforward and devoid of the complex rules of evidence and procedure which are a feature of criminal proceedings.

The Bill also creates a series of criminal offences applicable to all persons and accountable institutions, offences applicable to accountable institutions only, and offences applicable to supervisory bodies.

The offences applicable to supervisory bodies raise an intriguing question. It is open to speculation whether the Central Bank, or the Stock Exchanges Board would ever be prosecuted under these provisions in view of the fact that the Bill proposes to give the minister blanket powers to indemnify persons, institutions and supervisory bodies for anything done in good faith.

The Banking Institutions Act (Act No. 2 of 1988)

This Act and the Bank of Namibia Act 1997 complement each other. The latter establishes the Central Bank and makes provision for certain offences that might be committed within its purview, such as counterfeiting, forgery, etc.

The Banking Institutions Act provides the regulatory framework within which banking institutions operate. It also defines the powers and authority of the Central Bank in relationship to other banks.

The Act makes provision for the authorisation of persons to conduct business as banking institutions, 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 (the Bank) over other banking institutions are set out. These include powers to grant banking licences, and to investigate instances of illegal banking activity.

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

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

It has wide powers to enter, search and seize evidence, and may call upon the Police for assistance in the enforcement of its powers.

To protect the integrity of the financial sector the Bank has power to inquire into the integrity of any person seeking to acquire or control a banking institution. It will only approve an application if it is satisfied that the person is a fit and proper person. If in its opinion this is not the case, it can prohibit a person from acquiring or exercising control by written notice. Furthermore it has the power to examine the financial affairs of any banking institution to ascertain its liquidity and viability.

It can require banking institutions to report any money transactions that give rise to a suspicion that the person involved in the transaction may be engaged in illegal activity. The reports may be made to the Bank or to any person or authority specified by it.

Concerning bank secrecy and confidentiality, while the business of banking necessarily operates in an environment in which confidentiality and secrecy are very important; the Bank is authorised to disclose information it has acquired to an authority in Namibia or in a foreign State which has supervisory responsibilities over financial institutions. In this respect the bank can be of assistance in the sourcing of evidence.

Although directors or officers of banking institutions are in general bound to secrecy and confidentiality, an exception is recognised: disclosure is permitted for the purpose of instituting criminal proceedings, in the course of such proceedings, or if otherwise permitted in terms of the provisions of the Act or 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 accounts 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 in so far as the Bank has authority to carry out supervisory functions, cooperate with domestic and international agencies, disclose information etc. It also has powers to freeze accounts, compel disclosure, impose reporting obligations on banks, etc.

Under section 71(3)(b) of the Banking Institutions Act, the Bank has power to issue general directives on any matter for the proper regulation of the financial sector. Acting on this authority, the Governor of the Bank of Namibia issued a notice on fraud and other economic crimes.¹⁸

The Governor of the Central Bank also issued a determination that specifically addressed the issue of money laundering.¹⁹ 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.

The determination set out the three stages of money laundering in general terms. It 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 that there is cooperation with law-enforcement agencies.

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.”

The Bank referred to the requirement in the Banking Institutions Act that suspicious transactions should be reported,²⁰ and the Bank of Namibia Act’s prohibition of disclosure of information acquired in the course of banking business otherwise than in the course of duty or in terms of law,²¹ and concluded that the question of breaching customer confidentiality is well provided for.

In the light of these provisions the Bank determined that the minimum safety measures which banking institutions should adopt to detect and combat money laundering are:

- 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 the customer’s activities in order to recognise unusual business patterns which may raise suspicion;

- the reporting of suspicious transactions;
- internal control procedures; and
- staff awareness and training.

The Bank further directed that transfers of funds, especially international funds, could be used for the layering or concealment of the identity of the original ordering customer or beneficiary. It then set out the minimum requirements and guidelines to achieve the objectives listed above.

One noteworthy flaw in the Banking Institutions Act is the fact that it does not cover other financial institutions that are not banks. An Act to address activities in the non-banking sector has recently been promulgated. It is discussed later in this report.

CONFISCATION AND TRANSFER OF THE PROCEEDS OF CRIME

The Act provides that where a court makes a confiscation order in a criminal matter, it has a discretion, if an application is made to it, to issue a letter of request seeking the assistance of a foreign state in enforcing the order if insufficient money is available in Namibia to satisfy the order and the person against whom the order is made holds property in the foreign state. It is not required that there should be a criminal conviction before the provisions of this particular Act can be invoked. It is apparent from this provision and similar provisions mentioned earlier in regard to the enforcement of fines and compensatory orders that the state must not only investigate and obtain sufficient evidence to prove the crime charged but must also trace assets and proceeds of criminal activity in Namibia and abroad. Only if this were done would these provisions serve any useful purpose.

The provisions are particularly useful in dealing with economic crimes, particularly organised ones that transcend territorial borders, like money laundering, fraud and its kindred offences, and corruption. An important feature of these provisions is that there is no need to prove of a direct link between the crime and the money or property before the order becomes enforceable.

This is a good thing, because in many instances the laundering of money may have been so perfected that such a nexus is difficult to establish.

The provision dealing with this requires that a confiscation order would have been made in criminal proceedings dealing with some other matter, whether it

is a common-law or a statutory crime. Because Namibia has not yet criminalised money laundering, the provisions of such legislation would be useful for confiscating the proceeds of crimes like drug trafficking offences or vehicle theft.

Provision is also made for the clerk of court to receive, process and register foreign confiscation orders. Conviction for a criminal offence is not a necessary precondition.

Once again registration makes the foreign order a civil judgment of a local court, executable in the usual way.

The High Court of Namibia can issue restraining orders. It is also empowered to issue letters of request to foreign states seeking assistance in the enforcement of such orders if the person against whom the orders are issued holds property in the foreign state. Once again it does seem that the property does not have to be linked to a crime. Therefore such a restraint may have the beneficial effect of freezing the assets and thus help prevent them being stripped. This may be done with a view to attaching or confiscating the assets at a later stage. Once again, conviction for a criminal offence is not a necessary precondition.

This provision contemplates that the state to which the request is made would have the legal mechanisms to enforce the order or a bilateral agreement with Namibia; otherwise, Namibia, as the requesting state, would not be in a position to control the process in a foreign state.

Foreign restraint orders can also be accepted in Namibia provided the Permanent Secretary is satisfied that they are final orders not subject to review or appeal. They are forwarded to the Registrar of the High Court, where they are registered. The effect of which is to make them orders of the High Court of Namibia, enforceable in the usual way.

Foreign depositions, affidavits, certificates or records of conviction and orders of court, or copies or sworn translations of these, are admissible in criminal proceedings if they are properly authenticated in the foreign state in a manner in which foreign documents are authenticated for the purpose of production in a Namibian Court or in a manner provided for in an agreement entered into with the foreign state.

For the purposes of this act, the specified countries to which the provisions of the Act apply are listed in schedule 1 to the act. Currently, these are all members of SADC. It seems clear that for the Act to be effective, as with other laws concerned with combating transnational organised crime, complimentary legislation is required in these countries or any other state that enters into an agreement with Namibia.

Finally, although the Act empowers the minister to make regulations for its proper administration, none have so far been made. The Act has not yet come into force, and it is hoped that, at least in the short term, regulations of general application will be forthcoming. In the longer term, the minister may have to make regulations specific to different states, as provision exists to enable him to do so.

The Customs and Excise Act No. 20 of 1988

Money laundering may involve the movement of cash or assets physically from one place to another, and from state to state. It is in this respect that Customs legislation is relevant for combating money laundering activities. The Customs and Excise Act contains a number of provisions that can be used to combat transnational organised crime.

The movement of persons and goods across borders can be a feature of organised criminal activity. For this reason, provision is made in section 14 to deal with smuggling. Persons entering or leaving Namibia are required to "unreservedly declare" all goods in their possession which have been purchased or acquired outside Namibia, or have been remodelled or repaired outside Namibia or which are prohibited, restricted or controlled under any law. On leaving, they are required to do the same with all goods being exported. They are required to comply with any request or instruction from a customs officer, and, where necessary, to pay the relevant duty.

The Controller has power to detain persons suspected of violating the provisions of the Act until their appearance in court. Failure to comply with these provisions is a criminal offence. Severe penalties are stipulated. An offender may be liable to a fine of up to N\$8,000 or an amount three times the value of the goods, whichever is the greater or to imprisonment for up to two years, or both. The goods involved are liable to forfeiture.

In the recent past, a number of arrests have been made of foreign nationals attempting to export illicit drugs, notably methaqualone (mandrax), marijuana and cocaine from Namibia to South Africa. It is obvious that Namibia is not the source of the drugs; therefore they must have been imported into Namibia overland from neighbouring countries for transmission to South Africa, where there is a market for them. Namibian territory has tended to be used more as transit route rather than a final destination for hard drugs. Criminals have tended to take advantage of the fact that Namibia is a vast, sparsely populated country, with overland borders that are not well policed.

The Motor Vehicle Theft Act No. 12 of 1999

Undoubtedly vehicle theft has become one of the most serious crimes in the sub-region. It takes many different forms, ranging from the clandestine to the more bizarre form when people are accosted at gun point and forced to relinquish their vehicles or are killed in the process ('carjacking').

A significant number of stolen vehicles are smuggled across borders; others are broken up for spare parts, while others are simply altered to give them a difference appearance or identity.

The Namibian Legislature passed this law to combat this specific type of theft by creating statutory crimes that complement the common-law crimes of theft and the receipt of stolen property.

The Anti-Corruption Bill

This Bill has already been passed by one house of Parliament, the National Assembly, but has not been passed by the other house, the National Council, which has referred it back to the National Assembly with a string of objections, which include objections on principle and content.

From a money laundering perspective the Bill has provisions that can be used to obtain information on banking accounts, assets and gifts.

In the course of investigating an alleged corrupt practice the proposed Anti-Corruption Commission will be empowered to require by written notice:

- any suspected person to give a written statement enumerating all movable and immovable property owned or possessed by him in Namibia or

elsewhere or held in trust for him, specifying the date of acquisition, the manner of acquisition, any consideration paid and the monetary value of such consideration; and specifying any money or other property acquired within and without Namibia, or sent out on his behalf, etc.;

- any other person with whom the Director of the Commission believes the suspected person had any business or financial dealings to give a written statement as to immovable and immovable assets acquired by him in or outside Namibia;
- any person to furnish information relating to the suspected person's affairs and to produce documents or copies of them;
- the manager or any person in charge of a bank, building society or other financial institution to furnish information relating to the suspected person's affairs and to produce documents and statements of account.

Any person on whom such notice is served must comply, notwithstanding the provisions of any law relating to secrecy or confidentiality. Thus these provisions expressly exclude legal professional privilege. Severe criminal penalties are stipulated for non-compliance.

The Commission is also empowered to require access to and investigate bank accounts, share accounts, purchase accounts, expense accounts or any other accounts, and safety deposit boxes at any bank, building society or other financial institution. Persons in charge or control of such accounts are obliged to comply, subject to heavy penalties for failing to do so.

As corruption is a known feature of money laundering schemes these provisions will be very useful if the Bill is enacted with them intact. However, if the National Assembly decides to pass this Bill against the objections of the National Council it will have to do so by a two-thirds majority. Even if it passes the Bill, it is not clear whether the President will assent to it.

The Drugs Control Bill

A new Drugs Control Bill has also been prepared and is to be tabled before Parliament soon. It deals with the control of licit and illicit drugs, but contains no anti-money laundering provisions. This is because these issues are to be comprehensively and specifically covered in the Money Laundering Act.

Institutions to combat money laundering

The Commercial Crime Unit and the Financial Institutions Security and Fraud Committee

This is an ad hoc committee set up by the banking institutions and the Commercial Crime Unit. Every banking institution is represented on this committee, which meets once every month to discuss crime trends, syndicates, cooperation in police investigations and, in general, outstanding cases and ways to collectively address such issues in the banking sector. It has no legal foundation. However, it has proved to be a useful forum for mutual cooperation in dealing with crime in the banking sector. Only a few members of this Committee have ever undergone any training on money laundering issues.

The Namibia Financial Institutions Supervisory Authority (NAMFISA)

This body was established by the Namibia Financial Institutions Supervisory Authority Act, (Act 3 of 2001). It has a mandate to exercise supervision over the business of financial institutions and over financial services. 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, 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 reinsurance brokers, boards of executors or trust companies and any other persons who render financial services even if they are not registered. The authority does not have a mandate to supervise banks and banking institutions, since they fall under the Bank of Namibia.

In investigating any matter falling within its mandate, the authority has the powers granted by the provisions of the Commissions Act. Witnesses and their evidence are treated as if the authority were a Commission of Enquiry. The authority is empowered to enlist the assistance of any persons it considers necessary to assist in the performance of its functions.

The Commercial Crime Unit of the Namibian Police

The Criminal Investigations Department of the Namibian Police is composed of specialised units that deal with particular types of criminal activity. Thus there is a Serious Crime Unit that investigates murder, robbery, rape, serious assault cases, etc. The Drug Enforcement Unit is responsible for the investiga-

tion of drug-related cases, the Protected Resources Unit investigates crimes involving illegal dealings in diamonds, precious stones, gold, rhino horns, elephant tusks and game products generally, the Motor Vehicle Theft Unit is charged with the responsibility of investigating thefts of vehicles and vehicle parts, while the Commercial Crime Unit is mandated to investigate commercial crimes like fraud and theft. It is this unit that would have responsibility for money laundering offences if they were criminalised in Namibia. In the performance of their duties the different units cooperate with each other and coordinate their operations in so far some features of a particular case may be in the purview of the mandate of more than one unit. A case can be transferred for handling by another unit if the situation warrants it, or, by agreement, the investigation can be continued by the one Unit. Joint investigations are also possible by mutual arrangement on the part of the commanding officers.

The general findings of the research

The research carried out in this project has revealed that money laundering in different forms is definitely taking place in Namibia. However, money laundering per se is not a criminal offence under current laws. The fact that money laundering is not a crime in itself means that conduct which is a feature of money laundering can only be interdicted, investigated, prosecuted and controlled if at the same time it amounts to one of the recognised common-law crimes. In such a situation the predicate offence such as fraud or illegal dealing in drugs or diamonds is what is investigated and prosecuted. The concealment or disguising of the proceeds of the crime would not be separately prosecuted unless it also amounted to a recognised crime such as receiving stolen property while knowing it to be stolen in the case of crimes of dishonesty.

This limits the scope and ambit of conduct of a criminal nature that can be punished and of the participants who can be held accountable. This leads to a situation where persons involved in illegal activity benefit from conduct that would be viewed as criminal and warranting criminal sanction but for the absence of adequate laws to deal with it.

There is awareness within the banking sector of what money laundering entails. However, there is little awareness, if any at all, of the issue in other, non-banking, financial institutions.

There is an awareness of the problem among the law-enforcement agencies, but virtually none within the business sector generally. For example, enquiries

among people in the vehicle industry revealed that there is no real appreciation of the issue or of the implications of proposed legislation for the manner in which they conduct business.

The only available tool to deal with money laundering at the moment are the provisions of the Banking Institutions Act, the determinations issued by the Central Bank and the circulars issued in accordance with these determinations.

In the absence of a comprehensive anti-money laundering regime, these measures are wholly ineffective. In any event, they apply only to the banking sector and not to the entire financial sector. There is no legal mechanism to deal with money laundering in other trading and business activities in which it can occur.

Money laundering in Namibia includes the laundering of the proceeds of illicit deals in diamonds, foreign exchange, drugs, weapons and protected resources.

Furthermore, it occurs as a result of criminal activities involving general fraud, theft and armed robberies. Namibian residents, foreign nationals and foreign nationals and Namibians working in cahoots are involved in organised crime generally and money laundering in particular.

Because money laundering is not a specific crime, the authorities investigate such activities as common-law crimes. This is a limitation of their capacity to combat the activities of other persons who may have done something wrong but who would not have been involved in the predicate crime.

The Commercial Crimes Unit (CCU) is ill equipped to investigate money laundering offences if the relevant laws are enacted. It is too small for the number of cases it handles: if a detective devotes a day to a particular investigation it takes at least two months before he can return to the enquiry. As a result, investigations are delayed for a long time and the submission of dockets to the prosecution authorities is equally delayed. A single investigation can take up to two years to complete before the docket is ready for court.

Due to the complaints received by the CCU, especially those emanating from the banks, banking institutions and the CCC established the Financial Institutions Security and Fraud Committee. The banking institutions, including the central bank, are each represented by two persons on this committee. The committee meets once a month to discuss matters currently under investigation, review progress, determine what further assistance is required by the

investigation officers, and discuss trends in criminal conduct and other matters of mutual concern. These meetings have enhanced awareness that there is a money- laundering problem in Namibia.

Banking institutions have reported several suspicious transactions to the Central Bank. These reports have never been followed through by the Bank of Namibia, which has also never reported back to the banks on the outcomes of the reports. Not surprisingly, the banking institutions are frustrated and view the current set-up as useless.

Significant legislative developments have taken place and some legislation is already in force that would be useful to combat money laundering. Other legislative initiatives are in the pipeline.

However, there has not been enough preparation in terms of raising public awareness, training law-enforcement officers, prosecutors, magistrates, banking staff and employees of non-bank financial institutions. These issues need to be addressed in order to make the new statutes into living documents.

Recommendations

Namibia has made tremendous progress in adopting measures to combat crime since attaining independence from South Africa twelve years ago. This has largely been due to the fact that the government has the political will to institute and implement law-enforcement initiatives to combat criminal activity at the domestic level and, to the extent that it may be required to do so, at the international level. The government has been responsive to international initiatives to deal with organised criminal activity. It has readily acceded to, signed or ratified United Nations Conventions and SADC protocols. It has also moved rapidly where possible to introduce domestic legislation to give effect to those conventions or protocols.

Since ratifying the Palermo Convention the Namibian Government has commissioned work to draft new legislation on organised crime, corruption, mutual cooperation in criminal matters, vehicle theft, money laundering and the establishment of a financial intelligence centre. Some of this legislation, as highlighted elsewhere in this report, is already in force; some has been published and is still in the public discussion arena; while other legislation awaits tabling in Parliament.

In light of the findings of this report, it is imperative that government moves with due haste to complete the outstanding process of passing anti-money laundering and related legislation.

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

Furthermore, once the new legislation is in place and operational, banks and financial institutions should similarly implement training schemes for their employees through their respective supervisory authorities, that is the Bank of Namibia and the Namibia Financial Services Supervisory Authority.

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

Notes

- 1 *The Namibian*, 27 May 2002.
- 2 The author of the present report was the prosecutor assigned to peruse the criminal docket and make a decision regarding prosecution.
- 3 Interviews with Chief Inspector Sass of the Motor Vehicle Theft Unit, 6 June 2002.
- 4 Interview with Chief Inspector Lloyd.
- 5 Interview with Chief Inspector Lloyd.
- 6 *The Namibian*, 28 May 2002.
- 7 Interviews with officers of the PRU.
- 8 In the United States all transactions involving sums of over\$10,000 have to be reported. It would be difficult to break down several millions of dollars into packages below ten thousand in order to introduce them into the legal banking sector, without arousing the suspicion of the authorities.
- 9 Interviews with officials of the Drug Enforcement Unit as well as Clarky Mackay.
- 10 Interviews with car dealers and property agents.
- 11 *Sikunda v GRN*, Case No SA 5/2001.
- 12 *State v Mwilima and 128 Others* (pending).
- 13 *The Namibian*, 21 June 2002.
- 14 *State v Engelbrecht & Others*, *State v*
- 15 Interview
- 16 Telephone interview
- 17 Interview, 8 May 2002.
- 18 General determinations on fraud and other economic crime, Government Notice No 16 of 1999, *Government Gazette*, 15 January 1999.
- 19 This determination was gazetted and published as General Notice No 121, Determinations on Money Laundering and 'Know Your Customer' Policy, *Government Gazette*, 29 June 1998.
- 20 In section 50
- 21 Bank of Namibia Act, 1997.