CURRENT SITUATION AND COUNTERMEASURES AGAINST MONEY LAUNDERING IN SOUTH AFRICA

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I. INTRODUCTION

South Africa moved into an entirely new dispensation with a new democratically elected government that came into power on 27 April 1994. The return of South Africa to the international arena, the deregulation of financial markets and advances in communications technology have brought a dramatic increase in organized crime in the Republic. With a growing awareness of the threat presented by dirty money, South Africa has introduced certain measures to protect itself. Certain objectives have been reached and a comprehensive legislative framework to combat money laundering was developed in a fairly short period of time.

II. DEFINITION

Various definitions can be given for money laundering, each designed to fit a specific set of circumstances in which money laundering is taking place. In its simplest form money laundering can be defined as the manipulation of money or property in order to misrepresent its true source or nature.

III. THE FINANCIAL ACTION TASK FORCE (FATF)

South Africa is not a member of the Financial Action Task Force. However, the major financial centre countries of Europe, North America and Asia are members and have adopted the forty recommendations as a standard for an effective money laundering control strategy. These countries will therefore measure South Africa's money laundering control strategy against the forty recommendations. Furthermore, the FATF has already embarked on projects involving South Africa and there is distinct possibility that South Africa will become involved in the FATF.

IV. DEVELOPMENT OF LEGISLATION IN SOUTH AFRICA

A. The Drugs and Drug Trafficking Act, 1992 (Act No 140 of 1992)

The first set of money laundering legislation in South Africa came into operation on 30 April 1993. Money laundering was originally criminalized in the Drugs and Drug Trafficking Act, 1992 (Act No 140 of 1992). The Act criminalized *inter alia* the laundering of proceeds of specific drug-related offences and required the reporting of suspicious transactions involving the proceeds of drug-related offences. It also provided mechanisms for restraining and confiscation orders in respect of such proceeds and for international assistance regarding the enforcement of foreign confiscation orders in respect of the proceeds of drug-related offence.

B. The Proceeds of Crime Act, 1996 (Act No 76 of 1996)

The general offence of money laundering was later included in the Proceeds of Crime Act, 1996 (Act No 76 of 1996). The Proceeds of Crime Act criminalized the laundering of the proceeds of any type of offence. The

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Act came into effect on 16 May 1997 and provided, *inter alia*, for the confiscation of the proceeds of crime in general. It created a general reporting obligation for businesses coming into possession of suspicious property and also made provision for the freezing and confiscation of the proceeds of crime. The misuse of information, the failure to comply with an order of court in terms of the Act and hindering a person in the performance of his or her functions under the Act was also criminalized.

C. The Prevention of Organized Crime Act, 1998 (Act No 121 of 1998)

Money laundering has been declared a criminal offence in South Africa in terms of the Prevention of Organized Crime Act, 1998 (Act No 121 of 1998)(POCA) which came into operation on 21 January 1999.

The Prevention on Organized Crime Act:

- Criminalises racketeering and creates offences relating to activities of criminal gangs.
- Criminalises money laundering in general and also creates a number of serious offences in respect of the laundering of the proceeds of a pattern of racketeering activity;
- Contains the general reporting obligation for businesses acquiring suspicious property;
- Contains mechanisms for criminal confiscation of proceeds of crime and for civil forfeiture of proceeds and instrumentalities of offences;
- Allows the National Director of Public Prosecutions to obtain information for purposes of an investigation under the Act from any statutory body, and creates
- mechanisms for co-operation between the investors and the Commissioner of the South African Revenue Services.

Amendments to address certain flaws in the Act were effected by the Prevention of Organized Crime Amendment Act, 1999 (Act No 24 of 1999) and the Prevention of Organized Crime Second Amendment Act, 1999 (Act No 38 of 1999).

Section 2 of the Prevention of Organized Crime Act makes provision for seven (7) offences relating to racketeering activities. This section is largely based on the RICO (Racketeering Influenced and Corruption Organisations) legislation of the United States. The purpose of declaring these activities to be offences is to prevent the infiltration and contamination of legitimate enterprises by organized criminals and to prevent them from acquiring any interest in the establishment, operation or activities of such enterprises.

Section 4 of the Act addresses the offence of money laundering. This section applies to any act committed in connection with proceeds of crime by a person who appreciated or should have appreciated the illicit nature of the property, if it assists or is likely to assist the criminal to avoid prosecution or to hide, remove or diminish the proceeds.

Section 5 of the Act prohibits any conduct facilitating the retention or control of the proceeds of crime by another person, or benefiting person. In terms of section 6 no one may acquire, use or possess the proceeds of crime unless he has reported his suspicion to the reporting body.

The offence of money laundering, and related offences in terms of section 5 and section 6 were previously dealt with by the Proceeds of Crime Act, 1996 (Act No 76 of 1996), except for the fact that is now clear that the offences can be committed intentionally or through negligence. This

was done by substituting the phrase "knowing or having reasonable grounds to believe" in the Proceeds of Crime Act with the phrase "knows or ought reasonably to have known" in the Prevention of Organized Crime Act.

Section 7 of the Act imposes a reporting duty on all persons conducting a business or who are in charge of a business undertaking and who suspect or ought reasonably to have suspected (intention or negligence) that:

(i) any property which comes into his or her possession or the possession of the business undertaking, is or forms part of the proceeds of unlawful activities;
(ii) a transaction to which he or she or the business undertaking is a party will facilitate the transfer of the proceeds of unlawful activities; or
(iii) a transaction to which he or she or the business undertaking is a party and which is discontinued:

  (a) may have brought the proceeds of unlawful activities into possession of the person or business undertaking: or
  (b) may have facilitated the transfer of the proceeds of unlawful activity, had that transaction been concluded

The Act stipulates that the suspicion, as well as all available information concerning the grounds on which it rests, must be reported within a reasonable time to a person designated by the Minister of Justice. The designated person is the Commander of the subcomponent: Commercial Crime Investigations, Head Office of the South African Police Service.

The Proceeds of Crime Act was problematic in the sense that business undertakings that reported suspicious transactions were refusing investigating officers access to documents or records listed in their report. These documents or records had to be obtained by means of an order issued in terms of section 205 of the Criminal Procedure Act, 1977 (Act No 51 of 1977), which, in many instances, seriously hampered and delayed money-laundering investigations.

Section 7 of the Prevention of Organized Crime Act, largely negates section 205 orders as a prerequisite for access to bank records. The Commander: Commercial Branch can henceforth, in writing, require the person/business making the report to provide him with particulars "of any matter concerning the suspicion to which the report relates and the grounds on which it rests". The Commander may also instruct the person or the business making the report, to provide him with copies of all available documents concerning particulars or further particulars. Persons conducting a business or who are in charge of businesses are rendered criminally liable for failure to report their suspicions or to comply with any other obligation contemplated in section 7.

A person who knows or ought reasonably to have known that a report has been made, commits an offence in terms of section 75(1) if he or she brings information to the attention of another person, which is likely to prejudice an investigation.

No restriction on the disclosure of information, whether imposed by any statutory law, the common law or any agreement, relieves the person of this obligation, unless it can be classified under the narrow heading of attorney-client privilege.

Failure to comply with the reporting obligation constitutes an offence for which a person is liable to a fine or to imprisonment for a period not exceeding 15 years. A person who is convicted of a money laundering offence under section 4,5 or 6 of the Act is liable to a maximum fine of R100 million ($13 192 612) or to imprisonment for a period not exceeding 30 years. Although the Proceeds of Crime Act was repealed by the Prevention of Organized Crime Act, some of its provisions may still be enforced.

D. A Proposed Financial Intelligence Centre (FIC) Bill

A Financial Intelligence Centre Bill will be tabled before the Parliament of South Africa, probably in 2001. The object of the Bill is to complement the Prevention of Organized Crime Act, 1998 ("POCA") by introducing mechanisms and measures aimed at preventing and combating money laundering activities. The essence of the new legislation is that it places the responsibility for detecting potentially illegal activities on accountable institutions.

The proposed Bill will *inter alia* provides for the establishment of a Financial Intelligence Centre (FIC) that will, among other things, act as a centralised repository and analyst of certain cash and suspicious transactions. It will be an independent statutory body, outside the Public Service but within the public administration, as envisaged by section 195 of the Constitution of South Africa, accountable to the Minister of Finance. It will create a framework of laws and regulations to control the way in which accountable institutions conduct their business as far as record keeping, reporting, staff, training and compliance requirements are concerned. The Bill will also impose certain duties, such as the duty to identify clients, the duty to keep records of transactions and the duty to report certain transaction to the FIC, on institutions that may be used for money laundering purposes. The FIC will not be an investigative body. The structure of the Centre has not been decided on.

E. Other Legislation

Legislation which will help in the fight against money laundering, includes the International Co-operation in Criminal Matters Act, 1996 (Act No 75 of 1996) and the Extradition Amendment Act, 1996 (Act No 77 of 1996). These Acts deal with matters relating to the obtaining of evidence from foreign states, supplying evidence to foreign states, transferring the proceeds of crime, the carrying out of foreign penal orders and sentences and extradition.

Apart from statutory measures, our common law and existing law contain crimes and other provisions that may still be employed by investigators and prosecutors in money laundering cases, eg:

(i) Fraud
(ii) Conspiracy in contravention of section 18(2) of the Riotous Assemblies Act, 1956 (Act No 17 of 1956).
(iii) Complicity (either as an accomplice or accessory after the fact); and
(iv) Defeating, or attempting to defeat the ends of justice.

V. TYPES OF MONEY LAUNDERING SCHEMES IN OPERATION

Much research is still required on money laundering in South Africa. Statistics on the magnitude of money laundering are not readily available. Information on the main methods employed by money launderers at present is also mainly anecdotal. However,

the following tentative observations can be made about money laundering methods in South Africa:

(i) It appears that the informal business sector is often abused for money laundering. Front businesses that are often conducted include shabeens, taxi operations and micro-lending businesses.
(ii) Casinos were used extensively in the past and some instances of laundering still occur in the gambling industry.
(iii) Gold, jewellery, real estate, luxury vehicles and furniture are often bought to wash money.
(iv) Professionals are sometimes involved in money laundering schemes. An investigation which was conducted by an appointed commission, showed an increase in the use of attorneys' trust accounts for money laundering purposes.
(v) Cases are still often encountered where hot money was deposited in bank accounts or washed by buying insurance or other financial instruments.
(vi) Electronic wire transfers to and from South Africa.

VI. NUMBER OF MONEY LAUNDERING CASES IN SOUTH AFRICA (EXCLUDING CASES REGISTERED AS ENQUIRIES)

A. Cases In Terms Of The Drugs And Drug Trafficking Act

Although cases were investigated in terms of this Act there has been no convictions for money laundering.

B. Cases in terms of the Proceeds of Crime Act

Four (4) cases were registered in terms of this Act. Three cases are still under investigation.

C. Cases in Terms of the Prevention of Organized Crime Act

Three (3) cases were registered in terms of this Act. One case is still under investigation. In two cases that are before the court at present the suspects are charged with fraud and with contraventions of section 4 of the Prevention of Organized Crime Act, 1998 (Act No 121 of 1998). There has, however, not been any conviction for money laundering in terms of the Prevention of Organized Crime Act.

VII. TRANSNATIONAL ORGANIZED CRIMINAL GROUPS AND THEIR ACTIVITIES

Gangsters have identified South Africa as a fresh innocent market for money laundering and international crime. The opening of South African borders has spurred dramatic growth in crime. With globalisation, launders now have the ability to manipulate financial systems to move large sums of money across the world. It is estimated that R200bn ($26 billion) in drug money finds its way into the financial system annually.

VIII. ASSETS CONFISCATION

Chapter 5 of the Prevention of Organized Crime Act, 1998 (Act No 121 of 1998) deals with the confiscation procedures that have to be followed to confiscate the proceeds of unlawful activities. Apart from the criminal confiscation procedure, the Prevention of Organized Crime Act also introduced a civil forfeiture procedure. Important differences between the criminal confiscation procedure and the civil forfeiture procedure include the following:

(i) The criminal confiscation procedure focuses on the criminal benefit that a person obtained

through unlawful activities. The civil forfeiture procedure can also be used to forfeit such criminal benefit, but, in addition, allows the forfeiture of property that aided the commission of an offence.

(ii) The criminal confiscation procedure follows upon the conviction of a person for an offence that gave rise to criminal benefit. No conviction or even prosecution of any person is required for tainted property to be forfeited.

(iii) A successful criminal confiscation procedure results in a court order requiring the defendant to pay a specific amount to the State, while a successful civil forfeiture procedure results in an order forfeiting the specific property to the State.

In terms of civil forfeiture the State may seize and forfeit property merely by showing that there are reasonable grounds to believe that the properties concerned is an instrumentality of an offence referred to in Schedule 1 or is the proceeds of unlawful activities. Proceeds or the instrumentality of an offence can, therefore, be confiscated and forfeited without a conviction being a prerequisite. Civil recovery of property does, however, not imply that the State can seize and forfeit property at will. The National Director of Public Prosecution may apply to a High Court for an order forfeiting to the State.

The Act provides for two mechanisms to deprive the criminal of his ill-begotten gains. These mechanisms are the so-called "restraint order" and the "confiscation order". A restraint order is a proactive measure to conserve property, thereby prohibiting a person from dealing in any manner with any property to which the order relates. A restraining order can only be made by the High Court of South Africa. Only the National Director of Public Prosecutions may apply to the High Court to have a restraining order imposed.

Property which was instrumental in the commission of a Schedule 1 offence or which are the proceeds of unlawful activities may only be seized by a police official if the High Court has made a specific order authorising the seizure of the property concerned by a police official. Such an order may only be made once the High Court has made a preservation of property order which is a freezing order, prohibiting any person from dealing in any manner with such property. The order can only be granted following an application of the National Director of Public Prosecutions to the High Court.

If the court finds that the defendant benefited from crime, the value of the proceeds of the defendant's unlawful activities is determined. Section 9 of the Act provides that the value of a defendant's proceeds of unlawful activities is the sum of the values of the payments or other rewards received by him or her at any time, whether before or after the commencement of the Act. Section 15 of the Act prescribes how the value of specific property, other than money, must be determined. Chapter 7 of the Prevention of Organized Crime Act makes provision for the establishment of a Criminal Assets Recovery Account to which all moneys derived from the execution of confiscation and forfeiture orders will be paid.

Civil recovery is undertaken by the Asset Forfeiture Unit. The Unit was created in terms of the National Prosecuting Authority Act, 1998 (Act No 32 of 1998). This Unit is headed by a Special Director and is located in the Office of the National Director of Public Prosecutions. The mandate of the Unit is to:

(i) develop detail policy guidelines for forfeiture proceedings;
(ii) institute forfeiture proceedings; and
(iii) co-ordinate the management of assets subjected to restraining orders.

Assets that have been confiscated thus far in terms of the Act include, among other, several houses, luxury vehicles and furniture that amounts to millions of rand. Criminal investigations are pending against the persons from whom these assets were confiscated.

IX. THE REPORTING OF SUSPICIOUS TRANSACTIONS

The Prevention of Organized Crime Act creates a general reporting obligation in respect of suspicious transactions. A suspicious transaction will often be one, which is inconsistent with a customer's known legitimate business or personal activities or with the usual business for that type of account. Whether that suspicion is reasonable will depend on the particular context and circumstances and the client's profile.

A. Prescribed Form of the Report

The report must be in writing and must correspond substantially with the form prescribed in the Prevention of Organized Crime Regulations, 1999. The report must contain the full particulars of:

(i) the person making the report;
(ii) the person against whom the suspicion has been formed, in so far as such particulars are available;
(iii) the transaction or other action whereby the property concerned has come into the possession of the person making the report; and
(iv) the property concerned.

It must also set out the grounds on which the suspicion rests and indicate what documentary proof is available in respect of the transaction or action and in respect of the grounds for the suspicion. The report must be accompanied by copies of documentation that are directly relevant to that suspicion and the grounds on which it rests. The report must be handed or faxed to the designated person or any official of the subcomponent.

The Commander of the Commercial Crime Investigations may, in writing, require the reporter to provide him with particulars or further particulars on any matter concerning the suspicion and the grounds on which it rests, as well as copies of all available documentation concerning such particulars. If the person has the required information or documentation, he must comply with the request within a reasonable time.

B. Analysis of the Reports

Analysis of the reported transactions is the responsibility of the South African Police Service. Reports made to Head Office are analysed by designated personnel. A reference number is allocated to a report and an acknowledgement of receipt is sent to the reporting institution. If the report meets the requirements in terms of the Act and the regulations, the report is sent to the Commercial Crime Units of the Commercial Branch of the South African Police Service for investigation. The units concerned are requested to provide Head Office with a reference number and the particulars of the investigating officer within ten days after the report has been received at their units respectively. The outcome of the investigation must be reported to Head Office after completion.

C. A Case Involving the Cooperation of a Financial Institution in Providing Information on Suspicious Financial Transactions

1. The State versus Jumnalalall Bantho and Parshan Bantho

In 1997, a bank in South Africa reported a suspicious transaction in terms of the then Proceeds of Crime Act to the South African Police Service. Further investigations revealed that a person was regularly depositing large sums of cash into his private banking account and that another person was depositing some considerably smaller amounts into the trading bank account of a close corporation. One of the suspects was requested to give an explanation of the deposits. He informed the investigating officer that he had a secondhand clothing business. He said that he bought clothing stock from a company in Swaziland and that he sold his stock to hawkers and persons from the Transkei, a former homeland. He stated that his turnover did not exceed R40 000,00 ($5 333) a month and did not have any other source of income. He admitted that he did not have an import permit from Swaziland.

When the bank documents were perused, it transpired that the accused had deposited a sum of R 580 930,00 ($77 457) in cash into his own bank account in August 1997. The suspect could not give an explanation, as this amount had not been deposited into his business account which was held at another branch. It was further established that the accused had a second private account held at another bank in which he held R 901 000 ($120 133). He withdrew money and transferred the money to other accounts.

It was further established that Parshan Bantho also had a number of vehicles and a house, of which the market value is R380 000 ($50 666). There was a bond on the house to the value of about R220 000,00 ($29 333). Parshan Bantho only had the business for about two years, and it would not have been possible to accumulate the above assets in a legitimate way. It was believed that the assets were the proceeds of crime. Although the case was also investigated in terms of the then Proceeds of Crime Act, the accused was found guilty on charges of contraventions of the Import and Export Control Act, 1963 (Act No 45 of 1963).

X. COOPERATION BY BANKS AND OTHER FINANCIAL INSTITUTIONS

Reporting institutions have identified a single reference point within their organisation to which their staff must report suspected money laundering transactions promptly. These reports are evaluated by a qualified person within the institution and suspicious activities are reported to the South African Police Service. The banks in South Africa have acknowledged the fact that they have to develop their own defence mechanisms against money laundering activities. This involves knowing the customer and his or her business, refusing to act for customers in suspicious transactions and determining of the true ownership of all their accounts and safe-custody facilities. The staff of institutions are encouraged to co-operate fully with the law enforcement agencies and provide prompt information on suspicious transactions.

In 1996 the Money Laundering Forum of South Africa was set up to create channels of communication between organisations in the private sector and the police. Matters of mutual importance concerning money laundering are discussed during meetings.

XI. OTHER ANTI-MONEY LAUNDERING SYSTEMS/ STRATEGIES

A. Intelligence Gathering and the Capturing of Information on Database

Information on suspicious activities and persons is fed to a database of the South African Police Service. The Individual Structuring Information System (ISIS) is a database on which records and stores information in respect of suspect gangs, syndicates, organisations and activities of persons for enquiry purposes and the combating of organized crime. Information on persons against whom suspicions have been formed and their activities, in so far as particulars are available, is fed to this database.

B. Establishment of an Investigating Unit to Combat Financial Crimes

It is envisaged that an Investigating Unit that will be responsible for the investigation of reported suspicious transactions and all money laundering cases, which may flow from the information received will be established in 2001. The Investigating Unit will be included under the structures of the Commercial Branch of the South African Police Service. This team will gather information on suspicious transactions and proceed with further investigations in this regard.

C. Sharing of Information

Section 73 of the Prevention of Organized Crime Act provides that the Commissioner of the South African Revenue Service must be notified of any investigations in terms of the Act, notwithstanding secrecy provisions in income tax legislation, with a view to mutual cooperation and the sharing of information regarding possible money laundering activities.

XII. INVESTIGATION OF MONEY LAUNDERING IN SOUTH AFRICA (METHODS OF CONTROLLED DELIVERY AND UNDERCOVER OPERATIONS)

In the investigations which have thus far been conducted in South Africa in terms of money laundering methods of controlled delivery and undercover methods have not been used.

XIII. CONCLUSION

The most dangerous consequence of money laundering schemes is that it places vast amounts of money in the hands of criminals and enables them to put such amounts to further illegal use. Regulatory measures must be introduced to combat money laundering by means of proactive and preventive action. However, the key to effective money laundering prevention is recognition. It is important for financial institutions to recognise those situations in which money laundering might actually be occurring. It is further a truism to say that legislation is only effective as its enforcement.