



UNIVERSITY *of the*
WESTERN CAPE

Challenges Combating Money Laundering in the Real Estate Sector in South Africa.

FACULTY OF LAW

Research Paper Submitted in Partial Fulfilment of the Requirements

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LLM Degree

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DECLARATION

I declare that **Challenges Combating Money Laundering in the Real Estate Sector in South Africa** is my own work, that it has not been submitted before for any degree or examination in any other university, and that all sources I have used or quoted have been indicated and acknowledged as complete references.

Signed... 

Keiron Daniel Smith

Signed... 

Prof. A J Hamman



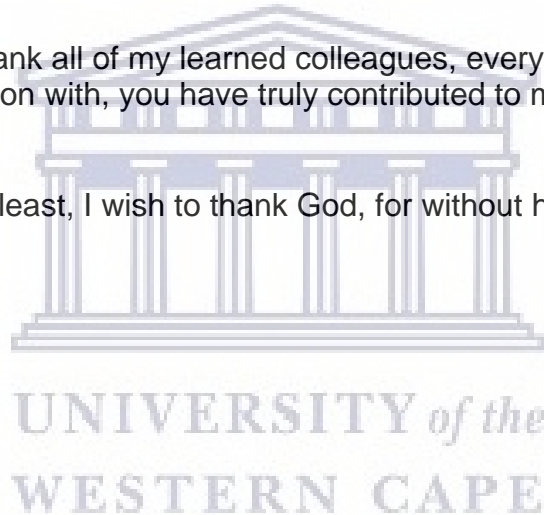
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Accountable Institutions

Assets

Conveyancers

Designated non-financial businesses and professions

Duty to Keep Records

Financial Action Task Force (FATF)

Financial Intelligence Centre Act 38 of 2001 (FICA)

Investigation

Money Laundering

Ongoing Due Diligence

Prevention of Organised Crime Act 121 of 1998 (POCA)

Prevention of Constitutional Democracy Against Terrorist Related Activities Act 33 of 2004 (POCDATARA)

Prosecution

Racketeering

Real Estate Sector

Reverse Flip Transaction

Asset Seizure

South Africa

The Estate Agency Affairs Board

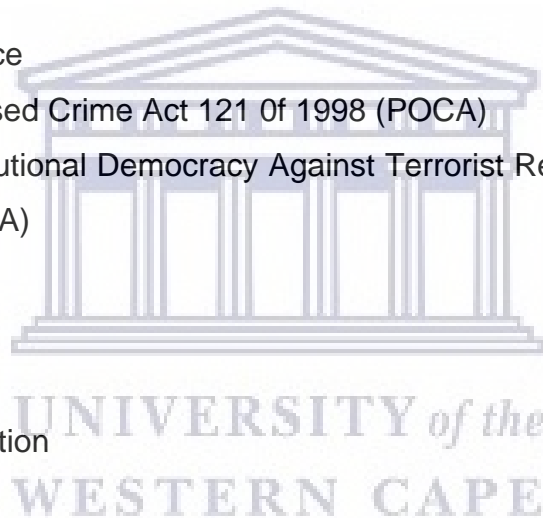


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CHAPTER ONE

1.1 Introduction

South Africa's main anti-money laundering legislation consists of 2 pieces of legislation, namely: The Financial Intelligence Centre Act (FICA)¹ and the Prevention of Organised Crime Act (POCA).² Money Laundering is often defined as the concealment of funds or property which has been obtained as the result of unlawful activity. It is also defined as giving the unlawfully obtained funds the appearance of legality when in actuality the funds or property is obtained unlawfully. POCA defines unlawful activity which includes any criminal offence in South African law, whether it has occurred in South Africa or elsewhere.³ Any person who has the knowledge of the aforementioned money laundering act or ought to have the knowledge may be guilty of an offence.

Money laundering is particularly prevalent in the real estate sector. It is an attractive avenue for criminals to launder money. Property prices remain relatively stable and purchased property can be rented out for an additional profit. Additionally, real estate often involves the exchange of large sums of money, allowing criminals to launder large amounts per transaction. The normality of such transactions leads one to believe that there could be various role players in the real estate laundering process. Some of those are criminals pretending to be legitimate buyers or sellers, real estate agents, conveyancing attorneys, deeds office personnel, bond originators and persons working at financial institutions. All persons involved in the process may, either implicitly or purposefully contribute to money laundering in the real estate sector.⁴

1.2 Background to Research

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- 1 Financial Intelligence Centre Act 38 of 2001.
 - 2 Prevention of Organised Crime Act 121 of 1998.
 - 3 S1(b) of POCA.
 - 4 Europarl 'Understanding Money Laundering through real Estate Transactions available at https://www.europarl.europa.eu/cmsdata/161094/7%20-%202001%20EPRS_Understanding%20money%20laundering%20through%20real%20estate%20transactions.pdf (Accessed 20 June 2020).

I found this particular focus, on the real estate sector, fairly interesting while doing research on the wider spectrum of Designated Non-financial Professions and Businesses (DNFBs). These include but are not limited to: banks, attorneys and real estate agents. These DNFB's are professions which are widely used by people in our economy and they make use of a large amount of cash flow in their daily operations. Whilst doing research I came across many obstacles facing these DNFB's with regards to their reporting requirements such as their client privilege as well as their lawful and moral obligations. I was tempted to shape my research paper towards combating money within the legal fraternity. However, the sheer amount of money which changes hands on the average transaction with regards to the real estate sector sparked my interest particularly.

FICA, as well as POCA, play an integral part in the process of combating money laundering in South Africa. FICA defines the crime of money laundering as any activity which has or is likely to have the effect of concealing or disguising the nature, source, location, disposition or movement of the proceeds of unlawful activities or any interest which anyone has in such proceeds.⁵ FICA also provides for the creation of a Financial Intelligence Centre (FIC). FIC is tasked with the responsibility of receiving, analysing and processing information in collaboration with law enforcement, the South African Revenue Service (SARS) as well as other investigating authorities.⁶ The Financial Intelligence Centre also tasks itself with the responsibility of surveying and supervising accountable institutions. Thus, ensuring accountability and compliance with the rules and regulations provided in FICA.⁷ An accountable institution is defined in FICA as a person or entity that carries out a particular business, examples of which can be found in Schedule 1 of

5 Vdma Corporate Commercial Attorneys 'Combating Money Laundering in South Africa' Available at <https://www.vdma.co.za/combating-money-laundering-south-africa-2/> (Accessed 2 July 2018).

6 Vdma Corporate Commercial Attorneys 'Combating Money Laundering in South Africa' Available at <https://www.vdma.co.za/combating-money-laundering-south-africa-2/> (Accessed 2 July 2018).

7 Vdma Corporate Commercial Attorneys 'Combating Money Laundering in South Africa' Available at <https://www.vdma.co.za/combating-money-laundering-south-africa-2/> (Accessed 2 July 2018).

FICA.⁸ Including. but not limited to estate agents as defined in the Estate Agency Affairs Act.⁹ FICA also applies to clients entering into a business relationship with accountable institutions, these include but are not limited to natural persons, close corporations and foreign companies.¹⁰

FICA provides that accountable institutions must be aware of who they transact with. This applies to new and existing clients and places the emphasis on identifying and verifying the identity of clients in order to manage potential money laundering risks.¹¹ Section 22 of FICA provides that accountable institutions have the duty to keep records; these include records of the client's identity, the business relationship as well as the source of the funds which the client intends to use in order to complete the various business transactions.¹²

Where FICA provides the definition of money laundering in South Africa, POCA describes the various money laundering offences in South African law. These offences can be found in Sections 4, 5 and 6 of Chapter 3.¹³ Section 4 of POCA provides the fundamental aspect of a money laundering offence by stating that any person who knows or ought to have reasonably known that property is or forms part of the proceeds of unlawful activities and then enters into an agreement with any person connected to that property, performs an act in connection with that property which has the effect of concealing or disguising the true nature of the property or the ownership thereof or assisting any person in committing a crime either in the Republic of South Africa or elsewhere, assisting persons in avoiding prosecution and/or removing any property

8 Act 38 of 2001.

9 Estate Agency Affairs Act 112 of 1988.

10 Sibisi Z 'Financial Intelligence Centre Act' Available at <http://www.puleinc.co.za/publications/example-publication/> (Accessed 13 July 2018).

11 Section 21 of FICA.

12 Section 22 of FICA.

13 Vdma Corporate Commercial Attorneys 'Combating Money Laundering in South Africa' Available at <https://www.vdma.co.za/combating-money-laundering-south-africa-2/> (Accessed 2 July 2018).

involved in or as a result of the commission of an offence, will be guilty of an offence in terms of money laundering.¹⁴

Section 5 of POCA provides for the assisting of another to launder money,¹⁵ by stating that a person has committed an offence if he knows or reasonably ought to have known that another person has attained the proceeds of unlawful activities and enters into an agreement or transaction with this person to control the proceeds of unlawful activities on behalf of this person or to use the funds in a manner to make the unlawful proceeds available to this person.¹⁶

Section 6 of POCA provides for the possession or use of the proceeds of unlawful activities, by stating that any person who intentionally is in the possession of, or makes use of the proceeds of unlawful activities or ought to have known that they are in possession of the proceeds of unlawful activities from another person has committed an offence.¹⁷

Section 38 of FICA,¹⁸ provides protection for those who have reported money laundering activities. If a person has reported a money laundering activity in good faith, no criminal or civil action can be brought against them.

There are three stages to money laundering: The placement stage, layering stage and the integration stage. These three stages are used by criminals in order to legitimise unlawfully obtained funds and give the appearance that the funds are obtained lawfully. The first stage in doing so is the placement stage. This is the stage where the proceeds enter into the financial system by physically smuggling the cash in and out of jurisdictions or depositing cash proceeds into the bank.¹⁹ The second

14 Section 4 of POCA.

15 Section 5 of POCA.

16 Section 5 of POCA.

17 Section 6 of POCA.

18 Section 38 of FICA.

19 Renner P 'What is Money Laundering? The Three Stages in Money Laundering' Available at <http://kycmap.com/what-is-money-laundering/> (Accessed 8 February 2021).

stage is the layering stage where the launderer attempts to distance the unlawfully obtained proceeds from its original source. This can be done by completing a series of complex transactions to offshore accounts in order to confuse banks as well as law enforcement.²⁰ The final stage being integration, allows the money launderer to reintroduce the unlawfully obtained proceeds back into the economy by giving the appearance that the proceeds were obtained lawfully, this can be done by purchasing property.²¹

It is clear that the real estate sector is vulnerable to exploitation by criminals. who could use their unlawfully obtained funds to sustain their lavish lifestyles by buying and selling property.²² The real estate sector is particular vulnerable due to the simple nature of the transactions allowing large sums to move from one party to another inconspicuously,²³ Using various methods such as loan-back schemes, mortgages and direct payments to name a few.²⁴

The Estate Agency Affairs Board (EAAB) supplements FICA to provide guidelines to estate agent members in order to be compliant with the reporting regulations in FICA. These guidelines will be critically analysed alongside the duties of estate agents which are also provided for in FICA. Section 27 of FICA provides for the Financial Intelligence Centre's access to information pertaining to clients which the accountable institution has acted on behalf of or transacted with. If the FIC requests particulars with regards to such information the act provides that the accountable institution should inform the Financial Intelligence Centre accordingly.²⁵

20 [Renner http://kycmap.com.](http://kycmap.com)

21 [Renner http://kycmap.com.](http://kycmap.com)

22 Eliseev A, Maughan K 'Druglords target SA for Money Laundering' Available at <https://www.iol.co.za/news/south-africa/druglords-target-sa-for-money-laundering-291405> (Accessed 8 February 2021).

23 Taimour A 'Money Laundering Schemes In Real Estate' Available at <http://www.corporatecomplianceinsights.com/money-laundering-schemes-in-real-estate/> (Accessed 8 February 2021).

24 Taimour A 'Money Laundering Schemes in Real Estate' Available at <http://www.corporatecomplianceinsights.com> (Accessed 8 February 2021).

25 Section 27 of FICA.

This provision is key to accountability as the centre may request information at any time in order ensure that operations are above board.

Section 28 of FICA provides for a cash threshold, an accountable institution must report transactions which are above the amount of R24 999.99. The amount includes composite transactions which in total exceed R24 999.99 and this report must be filed within a prescribed amount of time.²⁶ The threshold amount includes an amount paid by an accountable institution to a client. In addition to an amount paid by a client to an accountable institution, when acting for the client or acting on behalf of the client.²⁷ This amount is extremely low when considering the property prices in South Africa.

While section 28 provides for a cash threshold, FICA makes provision for suspicious transactions in section 29. Section 29 provides that an accountable institution shall report any suspicious transactions to the Financial Intelligence Centre. These transactions are reportable if there is a suspicion that funds used or received by a client are as a result of illegal/unlawful activities. If these transactions are reported, the reporter should not reveal the contents of the report or the fact that a report was made to a client unless ordered by the court. The contents can also be requested in judge's chambers or when acting within the scope of any applicable legislation.²⁸ If the reporter is convicted of tipping off he/she can be punished with imprisonment not exceeding 15 years or a fine not exceeding R10 million.²⁹ This imposes a duty on everyone in the real estate sector to report suspicious transactions.

1.3 Research Problem

26 Kruger P 'The Importance of Cash Threshold Reporting' Available at <https://www.moonstone.co.za/the-importance-of-cash-threshold-reporting/> (Accessed 8 February 2021).

27 Section 28 of FICA.

28 Section 29 of FICA.

29 Section 68 of FICA.

Money laundering has become prevalent in the real estate sector. This is due to the relative ease with which persons can enter into real estate transactions. These commercial and residential transactions allow the launderer to disguise and integrate large amounts into the economy.³⁰ This was evidenced in *S v Hattingh*,³¹ where an attorney was convicted on 32 counts of fraud. The Defendant worked as an attorney/conveyancer and had many clients including the top four banks. His main job was to register bonds on behalf of the bank's clients. When the defendant ran into financial trouble he decided to launder money through this process. He provided guarantees on behalf of the banks and when he received the full amounts he would pocket them for his personal use. In addition, as an agent he would convince his victims that bonds were registered, when in actual fact he was using the money to fund his other business dealings. Not only did he steal money from unsuspecting clients, but he also roped innocent people into his perverse schemes.

In a UK case,³² a prominent political person used the property market in order to launder illicit funds. In this case the launderer bought prime London property, shortly after the purchase went through the former owner re-purchased the property. This method can be used to "clean money". The owner leaves the transaction with a large sum of money and a legitimate source of the money, being the sale of the prime property.³³ In the case of *Auction Alliance v Estate Agency Affairs Board*,³⁴ the restrictions regarding an unwarranted search was debated. Although the court declared Section 32A of POCA and s45B of FICA³⁵ invalid, it illustrates how an estate agent took part in illegal activities in

30 Taimour A 'Money Laundering Schemes In Real Estate' Available at <http://www.corporatecomplianceinsights.com/money-laundering-schemes-in-real-estate/> (Accessed 8 February 2021).

31 *Hattingh v S* (20099/2014) [2015] ZASCA 84.

32 Jonathan Fisher QC 'Property Professionals and Unusual Money Laundering Cases' Available at <https://www.lexology.com/library/detail.aspx?g=b477af04-f6b2-4374-b6be-11befa444984> (Accessed 12 May 2018).

33 Fisher <https://www.lexology.com>.

34 *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others* (CCT 94/13) [2014] ZACC 3; 2014 (3) SA 106 (CC); 2014 (4) BCLR 373 (CC),

35 Section 32A of POCA and Section 45B of FICA.

the property sector. This paper will be an investigation into the many ways in which anti-money laundering is regulated in South Africa and how it pertains to the real estate sector.

Reverse flip transactions are also often used as a money laundering mechanism. A reverse flip transaction is for example where a buyer and seller may enter into a purchase agreement with regards to property where the purchase amount is less than the actual amount paid for the property. The surplus being paid secretly to the seller in order to disclose the true value of the purchase. This also allows for a larger profit when the launderer sells the property, meaning a larger amount is cleaned.³⁶

Another example prevalent in real estate is the buy-back scheme. An example of this scheme can be found in the case of *Tshatshu and Another v Standard Bank of SA Limited and Others*.³⁷ In this case a Company, AMS advertised to low-income or struggling families who cannot afford their bond repayments or are unable to obtain a mortgage bond. The victims of the scheme are coerced into signing over the property ownership to a subsidiary of AMS, called Dreamworld. The victim of the scam then leases the property from Dreamworld which is 100% owned by AMS 4 (Pty) Ltd.³⁸

At this point in the process, AMS registers the bond with the help of a creditworthy individual who serves as a security to the bank who provides the mortgage bond. The property is now owned by AMS 4 (Pty) Ltd, while the victim pays the bond repayments plus an added agent fee of R45 000.00, even though they provided no agency services whatsoever.³⁹ The guarantor receives 5% of the amount raised by the mortgage bond and in return the guarantor provides their clean record for AMS and AMS 3 (Pty) Ltd. The guarantor is also indemnified for any

36 European Parliament Briefing 'Understanding Money Laundering Through Real Estate Transactions' Available at https://www.europarl.europa.eu/cmsdata/161094/7%20-%2001%20EPRS_Understanding%20money%20laundering%20through%20real%20estate%20transactions.pdf (Accessed: 30 July 2020)

37 *Tshatshu and Another v Standard Bank of SA Limited and Others* [2016] ZAECGHC 43.

38 *Tshatshu and Another v Standard Bank of SA Limited and Others* [2016] ZAECGHC 43 Para 10.

39 *Tshatshu and Another v Standard Bank of SA Limited and Others* [2016] ZAECGHC 43 Para 16.

potential loss that may transpire from the scheme. In addition to the above the guarantor also signed undated registration forms. Should the victim be unable to pay the bond the guarantor resigns from his role and the shelf company is wound up.⁴⁰

The victim enters into a written lease agreement with the shelf company for the property which they previously owned. The agreement included an option clause to buy back the property for the same price for which it was sold to the shelf company. To secure the option the victim is required to pay 12.5% of the purchase price up front. Also, if at any time the victim defaults on the rental payments, the option to buy back is forfeited.

The court ruled in favour of the plaintiff that the sale of the property to Dreamworld be reversed and this severely impacted the banks' case for a remedy on the bond payments still outstanding. The court held that while the bank had remedy against Dreamworld for the fraudulent actions of the buy-back scheme, they did not hold a bond with the victim of the scheme and therefore could not recover the outstanding bond from them.

The Court held in passing that the bank was extremely negligent in their investigation of Dreamworld when approving funds for the bond.⁴¹ The bank should thoroughly investigate companies such as Dreamworld, and were wrong to treat the transaction as a regular one. The bank stated that if it were to thoroughly investigate each and every transaction it would prove extremely disruptive to its daily operations.⁴² The Court further held that the bank contributed to its own situation by granting the loan to a fraudulent company. If the bank entered into a thorough investigation into Dreamworld they would have discovered that one person was the sole director of 52 shelf companies under the AMS umbrella. That

40 *Tshatshu and Another v Standard Bank of SA Limited and Others* [2016] ZAECGHC 43 Para 11.

41 *Tshatshu and Another v Standard Bank of SA Limited and Others* [2016] ZAECGHC 43 Para 35.

42 *Tshatshu and Another v Standard Bank of SA Limited and Others* [2016] ZAECGHC 43 Para 46.

certainly points towards a transaction that does not occur during the natural course of business.

This case also points towards the various role players in a real estate transaction and the dangers of oversight in the fight against money laundering in real estate.

Criminals may seek assistance in buying property in order to facilitate their money laundering. Meaning many people may be involved in the purchasing of property on behalf of a launderer, these include real estate agents, banks and attorneys/conveyancers. The importance of reporting is highly stressed with regards to irregularities that may surface when these role players are involved.⁴³ The trail of money however moves through smaller role players such as notaries and registrars. Assuming that the larger role players are involved in the facilitation of money laundering it is of utmost importance that notaries, registrars and the Deeds Office are able to detect and report irregular or suspicious transactions. Examples of these irregular transactions include paying large amounts of the purchase price in cash or using different names throughout different stages of the transaction. Another example of a suspicious transaction is the purchasing of a residential property through a legal person and then re-classifying the property shortly after for commercial purposes. It is important for these role-players to remember the main aim of a launderer is to conceal the true source of funds and the ownership from which the illegal funds derive.⁴⁴

This FATF Typology contains a case study showing a clear example of how a notary can be used in order to facilitate a real estate transaction with illicit funds. In this scenario an East European through a company for which he was a director opened up a bank account with a Belgian bank.⁴⁵ This was done with the sole reasoning of creating a legitimate banking infrastructure for this company. The

43 FATF 'Money Laundering and Terrorist Financing Through the Real Estate Sector' Available at <https://www.fatf-gafi.org/media/fatf/documents/reports/ML%20and%20TF%20through%20the%20Real%20Estate%20Sector.pdf> (Accessed 25 June 2020).

44 FATF 'Money Laundering and Terrorist Financing Through the Real Estate Sector' 12 (Accessed 25 June 2020).

45 FATF 'Money Laundering and Terrorist Financing Through the Real Estate Sector' 12 (Accessed 25 June 2020).

banking account received many international transfers, the money in the banking account was used to pay a notary to purchase property on behalf of the company. The notary however became suspicious after the voluntary liquidation of the company shortly after purchase. Not only was the company liquidated, but the previous owner bought the property back for an amount exceeding the original price. It was clear that the company was a front set up with the sole intention of laundering money internationally through the purchase of property. If it were not for the Notary recognising the suspicious nature surrounding the transaction, the transactions may well have gone through unnoticed.⁴⁶

1.4 Research Question

The Real Estate Sector will be analysed as a whole against the background of International Instruments, South African legislation, academic opinion as well as foreign practices. It is possible that money laundering occurs on a daily basis in the real estate sector in South Africa. Questions could be asked whether there is sufficient protection to those in the sector and especially the honest role players in the real estate sector to combat this laundering.

The main question that this research attempts to answer is: How can the challenges and exposure to the laundering of money be curbed and combated in the real estate sector? To answer this question; a study was done to examine the Financial Action Task Force, primary legislation in the South African real estate landscape as well primary legislation pertaining to anti-money laundering efforts in South Africa.

1.5 Literature Review

The sources which will be referred to in the literature review is by no means an all-inclusive list of the sources on this particular topic, it merely serves as an overview of academic thoughts on the topic at hand.

46 FATF 'Money Laundering and Terrorist Financing Through the Real Estate Sector' 12 (Accessed 25 June 2020).

Reddington submits that in the developing world it is clear that on the surface much is being done to appease the developed world by creating anti-money laundering legislation which is on par with international standards.⁴⁷ He goes on to state that these regulations are not properly supervised and that general poor oversight is what has led to money laundering abuse in these countries.⁴⁸ There is a dearth of research on the chosen topic. There are a number of journal articles such as 'Client Identification and Money Laundering Control' by De Koker L, which raised issues that relate to this study, but it does not really focus on the central point namely; the challenges to combat money laundering in the real estate sector.⁴⁹

Kumar submits that real estate has become an important vessel for money laundering due to the difficulty of estimating the exact values of property, he also states that real estate is an efficient place to store large sums of money. He goes on to further state that following features make real estate an attractive avenue to store illicit gains. It is a relatively safe investment, with potential large returns involving property which cannot be objectively valued as easily as other assets.⁵⁰

Writers such as Hamman and Koen⁵¹ and Millard and Vergano⁵² did research about the laundering of money in the legal profession, but it did not focus on the central issue of this research. The unpublished theses on money laundering in South Africa; by Van Jaarsveld⁵³ and Hamman⁵⁴ do not deal specifically mention the real estate sector. The few masters' research papers by Burdette,⁵⁵ Van der

47 Reddington B Assessing the True Effectiveness of AML/CFT Controls in Developing Countries (Unpublished MA thesis, Georgetown University, 2011).

48 Reddington (2011).

49 De Koker L (2004), 715-746.

50 Vandana A 'Money Laundering: concept, significance and its impact' (2012) 4 European journal of business and Management.

51 Hamman & Koen (2) 'Cave Pecuniam: Lawyers as Launderers' (2012) 15 PELJ.

52 Millard D '& Vergano Hung out to dry? Attorney-client confidentiality and the reporting duties imposed by the Financial Intelligence Centre Act 38 of 2001 (2013) 34 *Obiter* 389-427.

53 Van Jaarsveld I (2011) Aspects of Money Laundering in South African Law (unpublished LLD thesis, University of South Africa).

54 Hamman AJ (3) (2015) The Impact of Anti-Money Laundering Legislation on the Legal Profession in South Africa (unpublished LLD thesis, University of the Western Cape).

55 Burdette M (2010) Is the Reporting Obligation of Attorneys in Terms of Section 29 of the Financial Intelligence Centre Act 38 of 2001 a Myth or a Reality? (Unpublished LLM thesis, University of Pretoria).

Westhuizen,⁵⁶ Moodaley⁵⁷ and others are also silent on this issue. At the time of research and writing there are very few academic writings on this particular topic, hence the decision to write on it.

1.6 Significance of the study

Money laundering is an on-going problem in society and the effects thereof are growing, as money laundering legislation is a relatively new concept with FICA only coming into effect in 2002. Criminals are constantly finding new ways of exploiting businesses for illegal gain and the real estate sector has become a recent target. Thus, making it important to review the laws regulating the sector but more importantly critically analyse the implementation of these laws. This study also looked at other jurisdictions in a comparative manner further enriching jurisprudence by suggesting alternative ways to improve legislation and compliance.

1.7 Limitations of this Study

This focus of this study will be on combatting anti-money laundering in the real estate sector, it will focus on South Africa, its legislation, the implementation thereof and the recommendations by the FATF.

1.8 Research Methodology

Given the nature of this study an analytical research methodology is fitting. The research was mainly desktop research. This study consists of primary and secondary sources. Primary sources being legislation and case law. The secondary sources being books, internet sources, textbooks and reports.

The foundations on which the anti-money laundering disposition is based are founded in legislation. The primary legal sources being, FICA, POCA

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- 56 Van der Westhuizen C (2011) Money Laundering and the Impact thereof on Selected African Countries: a Comparative Study (unpublished LLM thesis, University of Pretoria).
57 Moodley M (2008) Money Laundering and Countermeasures: A Comparative Security Analysis of Selected Case Studies with Specific Reference to South Africa (unpublished LLM thesis, University of Pretoria).

and EEAB. Journal articles, books and other sources will provide an alternative or supporting opinion when discussing the dangers of corruption in the real estate sector. While highlighting the weaknesses in legislation, articles may provide further insight in to aggravating factors contributing to the increased corruption in this sector.

The limitations of analytical research are that most of the information produced are from secondary sources which are often tailored to a specific point of view. With the information found an attempt was made to answer the research problem.

1.9 Chapter Outline

Chapter One introduces the reader to the background of the topic and to the reasons for embarking on this journey., the particular methodology employed as well as the research questions which were attempted to be addressed throughout the study.

Chapter Two: **The Regulations and duties for Accountable Institutions in FICA in line with the Risk-based Approach**, discusses the risk-based approach as found in the recommendations by the FATF. How South Africa has adopted this approach to combatting money laundering in the real estate sector is examined also.

Chapter Three: **Accountable institutions and the various contributors to Money Laundering in Real Estate**, deals with accountable institutions according to FICA and the many facilitators who contribute to the money laundering process. It includes inter alia; real estate agents, lawyers, accountants, financial advisers and bond originators to name a few. The chapter briefly refers how these industries are regulated in order to curb money laundering in the real estate sector.

Chapter Four: **Local introspection**, examines the South African legal framework in the context of the real estate sector. More specifically looking

at FICA, POCA and POCDATARA. Where Chapter two paid special attention to how the FATF and the risk-based approach has influenced South African legislature, this chapter is a critique on the main proponents of anti-money laundering legislature pertaining to the real estate sector.

Chapter Five: **Conclusion and Recommendations**, draws a conclusion by taking the critically analysed information and forming a final opinion on the state of South Africa with regards to anti-money laundering in the real estate sector. Inferences are drawn whether the laws and regulations are adequate and if not, what should be done to improve them. It further contains an evaluation whether the implementation and supervision of these statutes are up to adequate standards and recommends potential amendments to possibly improve it.



CHAPTER TWO

2.1 INTRODUCTION

This Chapter delves deeper into the FATF and the risk-based approach regarding the combating of money laundering in the real estate sector. The duties imposed on the participants in the real estate sector is analysed. To put these duties in perspective it is necessary to refer to the rules based and risk-based approaches.

2.2 THE FATF AND THE RISK-BASED APPROACH

Between 2008 and 2009 the FATF published a series of papers assisting authorities in the private and public sectors respectively, in implementing a risk-based approach. Keeping in line with FATF recommendations to be implemented in 2012.¹ The risk-based approach is the implementation of measures which are proportionate to the risks identified.² The main use of the risk-based approach is when real estate agents conduct activities which fall within the scope of the FATF recommendations.³

The need for a risk-based approach arose due to a rules-based system becoming especially expensive to implement in some states. This is particularly due to the fact that the rules-based approach does not focus on the appropriate use of resources. The FATF does however note that for some countries a rules-based approach will be more appropriate and therefore the risk-based approach is not compulsory to implement.

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- 1 FATF 'Topic: Risk-based Approach' Available at [http://www.fatf-gafi.org/documents/riskbasedapproach/?hf=10&b=0&s=desc\(fatf_releasedate\)](http://www.fatf-gafi.org/documents/riskbasedapproach/?hf=10&b=0&s=desc(fatf_releasedate)) (Accessed 1 October 2018).
 - 2 Financial Action Task Force 'RBA Guidance for Real Estate Agents' Available at <https://www.fatf-gafi.org/media/fatf/documents/reports/RBA%20Guidance%20for%20Real%20Estate%20Agents.pdf> (Accessed 1 October 2018).
 - 3 Financial Action Task Force 'RBA Guidance for Real Estate Agents' Available at <https://www.fatf-gafi.org/media/fatf/documents/reports/RBA%20Guidance%20for%20Real%20Estate%20Agents.pdf> (Accessed 1 October 2018).

If countries do however opt to implement the risk-based approach the FATF does provide extensive guidance on how to implement this approach in the real estate sector. The FATF describes the risk-based approach as using the measures to prevent money laundering in the most effective ways. In doing this, the areas with the highest risks will be afforded the most resources, thus the areas with the lower risk will be afforded less resources. With the main goal being efficiency., the FATF found that using a system of equal distribution among all areas of concern may lead to the goal of meeting requirements, but not actively combat money laundering.

The FATF prescribes that countries perform a risk analysis within their respective sectors. The analysis must include which areas are most susceptible to money laundering and terrorist financing risks.⁴ These risks will be different depending on many factors such as location, products and customers. The outcomes will forever be evolving as circumstances change.

The FATF provides for four types of risk. Higher risk, lower risk, risk arising from innovation and a risk assessment mechanism. Countries are required to provide more stringent measures including enhanced due diligence for higher risk clients. As recommendation six states, an example would be politically exposed persons. Lower risk clients are to be considered when implementing continuous due diligence measures. Real estate agents may simplify some of the requirements for clients falling into this category.⁵ Real estate agents must under recommendation eight, give attention to newer technologies used to aid anonymity. Additionally, the FATF recommends that a designated competent authority review procedure used to determine risk as well as whether the procedures are being used correctly.⁶

4 Financial Action Task Force 'RBA Guidance for Real Estate Agents' Available at <https://www.fatf-gafi.org/media/fatf/documents/reports/RBA%20Guidance%20for%20Real%20Estate%20Agents.pdf> (Accessed 1 October 2018).

5 Financial Action Task Force 'RBA Guidance for Real Estate Agents' Available at <https://www.fatf-gafi.org/media/fatf/documents/reports/RBA%20Guidance%20for%20Real%20Estate%20Agents.pdf> (Accessed 1 October 2018).

6 Financial Action Task Force 'RBA Guidance for Real Estate Agents' Available at <https://www.fatf-gafi.org/media/fatf/documents/reports/RBA%20Guidance%20for%20Real%20Estate%20Agents.pdf>

The FATF prescribes that states enable constant communication between the private and public sector. All the role players in the real estate sector should be competent to analyse various risks falling within the ambit of their industry. It is however necessary that privileged information should be made available to competent private authorities when such information may help combat money laundering. Public authorities should also interact with each other, assessing potential vulnerabilities before discussing these vulnerabilities with the applicable private authorities.⁷

2.3 SOUTH AFRICA'S POSITION

South Africa has elected to adopt the risk-based approach, evidenced by the amendment of the Financial Intelligence Act in 2017.⁸ The main purpose for the adoption being that it proves cost effective, compared to the previous approach. The main aim is taking the time spent on meeting many tedious compliance requirements by assessing clients and the risk they pose. Allowing more time to be spent on clients who pose a larger risk.⁹

The risk-based approach enhances transparency. All the role players in real estate should know who their client is. They should discontinue any interactions with them if the customer is involved in illegal business and take further reporting action.¹⁰ If the customer is deemed to be involved in a legal business the minimal risk allows for a smoother transaction.

FICA sets obligations for which all accountable institutions must adhere to. These obligations are found in Chapter 3 of FICA.¹¹ The obligations include: The duty to

gafi.org/media/fatf/documents/reports/RBA%20Guidance%20for%20Real%20Estate%20Agents.pdf (Accessed 1 October 2018).

7 <https://www.fatf-gafi.org/media/fatf/documents/reports/RBA%20Guidance%20for%20Real%20Estate%20Agents.pdf> Available at

gafi.org/media/fatf/documents/reports/RBA%20Guidance%20for%20Real%20Estate%20Agents.pdf (Accessed 1 October 2018).

8 FIC 'A New Approach to Combating Money Laundering and Terrorist Financing'.

9 FIC 'A New Approach to Combating Money Laundering and Terrorist Financing'.

10 FIC 'A New Approach to Combating Money Laundering and Terrorist Financing'

11 Chapter 3 of FICA.

identify clients, the duty to keep a record of transactions, reporting duties and access to information as well as measures in place to promote compliance by accountable institutions.

2.3.1 OBLIGATIONS OF ACCOUNTABLE INSTITUTIONS

As alluded to previously, FICA sets out the obligations in detail. Section 21 deals with the identification of clients and other interested parties. This section prohibits accountable institutions from conducting business or entering into relationships with clients regarding business transactions until they have established and verified the identity of such clients.¹² If the client is acting on behalf of another person the accountable institution must establish and verify the identity of the other party as well as the client's authority to act on behalf of the third party. If a third party is acting on behalf of the client the accountable institution must establish the identity of the third party and verify the third party's authority to act on behalf of the client.¹³

2.3.1.1 IDENTITY VERIFICATION

The accountable institution must obtain information about the business to determine whether potential dealings done with that client will be consistent with the current information obtained about that client.¹⁴ This information should include the nature of the business relationship, the purpose of the intended business relationship and the source of funds the client expects to use in order to conclude transactions during the course of business.¹⁵

In addition to the above measures FICA also provides for due diligence measures relating to legal persons, trusts and partnerships.¹⁶ This is also applicable when the client referred to in section 21 is a legal person or a person acting on behalf of

12 Financial Intelligence Centre *Public Compliance Communication No. 2 Period for Record Keeping of Matters Reported to the Financial Intelligence Centre (2017) 7.*

13 Section 21 of FICA.

14 Section 21 of FICA.

15 Section 21 of FICA.

16 Section 21B of FICA.

a partnership, trust or similar arrangement between natural persons. An accountable institution must establish the nature of the client's business and the ownership and control structure of the client.¹⁷

When verifying information pertaining to a client an institution should obtain information from a reliable independent third party. This could preferably be from a public sector department such as the Companies and Intellectual Property Commission,¹⁸ especially where it is unclear who the beneficial owner is. In the event of doubt whether a natural person is in control of the legal person, then the accountable institution must establish a person who otherwise controls the legal person through other means.¹⁹ After exhausting the above avenues the accountable institution must establish who exercises control over the management of the legal person. This could include a natural person in their capacity as an executive officer, director or manager.

Once the identity of the beneficial owner is established the accountable institution must take reasonable steps to verify the identity to the point where the institution is contented that the identity of the beneficial owner is true.²⁰

Where a natural person is acting on behalf of a partnership then in addition to section 21 and section 21A the accountable institution must also establish the name of the partnership, as well as the identity of each partner. The accountable institution must establish the identity of the individual who exercises executive power over the partnership. If any individual claims to have executive power to enter in to a transaction on behalf of the partnership the accountable institution must establish the identity of such persons. Once the identities of the relevant persons are established the accountable institution must verify that all the information obtained is correct.²¹

17 Section 21B (2) of FICA.

18 FIC Guidance Note 7 On The Implementation of Various Aspects of the Financial Intelligence Centre Act, 2001 (Act 38 of 2001) Available at https://www.fic.gov.za/Documents/171002_FIC%20Guidance%20Note%2007.pdf (Accessed 20 February 2019).

19 Section 21B(2)(ii) of FICA.

20 Section 21B of FICA.

21 Section 21(3) of FICA.

When a natural person enters into a transaction or business agreement as stated in section 21, in the fulfilment of a trust agreement between natural persons, additional information is required. The accountable institution must in addition to s21 and s21A establish the following: The name by which the trust is identified, if applicable, the address of the Master of the High Court where the trust is registered and the identity of the founder. The institution must establish the identity of each trustee and any person who claims executive power to enter into transactions on behalf of the trust. The accountable institution must verify that the aforementioned information is correct. The aforementioned natural persons must be verified to the satisfaction of the accountable institution. These provisions pertaining to beneficial ownership were added due to recommendations made by the FATF who are the global frontrunners in AML/FT.²² It enabled the accounting institutions to determine identity of their clients in order to prevent possible criminal activities.

FICA provides that the accountable institution must continue to monitor transactions throughout the course of a business relationship. The source of funds should be consistent with the risk profile compiled by the accountable institution in the beginning stages of the business relationship.²³ FICA has moved towards a position of understanding the customer's habits and usual operations within the business relationship. This method is a move away from simply establishing and verifying the identity of the client.²⁴ Therefore any unusually large transaction or strange pattern of transactions which have no lawful explanation should be monitored and investigated if necessary. All information gathered in the process of establishing and verifying client information in relation to section 21 must be kept up to date. In the event of the accountable institution doubting the authenticity of the information provided by a client subsequent to entering into a transaction, the procedure in sections 21 and 21B will be applicable.²⁵

22 Financial Action Task Force 'FATF Guidance: Transparency and Beneficial Ownership' Available at <http://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-transparency-beneficial-ownership.pdf> (Accessed 23 February 2018).

23 Section 21C(a) of FICA.

24 'Minister signs FIC Amendment into operation' Available at https://www.fic.gov.za/Documents/FIC_Act_Commencement_14June2017.pdf (Accessed 18 February 2019).

25 Section 29 of FICA.

Should the conduct of customer due diligence be hampered in any way, a transaction or a business relationship with the client should not be established. The institution may not perform any act which could result in a transaction. Should there be a transaction in effect, the accountable institution must terminate it in accordance with its Risk Management and Compliance Programme.

The process of verifying and establishing a client should be an easier process for a potentially low risk client, allowing more resources to investigate higher level clients. If the potential client is established to be a foreign prominent public official the institution should take additional measures to ensure the legitimacy of such a client.²⁶ The accountable institution must obtain senior management authorisation before establishing a business relationship. Reasonable steps should be taken to establish the source of the official's wealth and the particular source of funds used to complete the transaction and must engage in continuous due diligence throughout the ongoing relationship.²⁷ The same additional enhanced requirements must be applied for a client who is a domestic prominent official.²⁸

Immediate family members of foreign prominent officials and domestic prominent officials must be treated with the same care as in s21F and s21G. Immediate family members as stated in subsection (1) includes a spouse, civil partner or life partner, children, stepchildren and their spouses if applicable; parents and siblings including the spouses or life partners of those siblings. The Act provides for a wide array of protection to prevent prominent officials using family members as vehicles to money laundering in real estate.

2.3.1.2 RECORD KEEPING

FICA places a responsibility on all accountable institutions to keep customer due diligence records. When the institution is required to collect information as

26 'Minister signs FIC Amendment into operation' Available at https://www.fic.gov.za/Documents/FIC_Act_Commencement_14June2017.pdf (Accessed 18 February 2019).

27 Section 21F of FICA.

28 Section 21G of FICA.

described in sections 21 to 21H the institution must keep a record of the information. The reason for this provision being, the Financial Intelligence Centre must investigate all reports made and may need access to further records long after a report is made.

The records must include copies of the information obtained in order to establish and verify the person's identity.²⁹ This will include but is not limited to, the person's full name and surname, identity number and residential address.

If in the case of a business relationship the records kept should include the nature of the business relationship. This information should include the purpose of the relationship and the source of funds which the client proposes to use during the business relationship.

Once the institution enters into transactions with the client the institution must keep a record of every transaction.³⁰ These records must contain the following information. The amounts involved in the transaction as well as currency in which the money was dealt. The date on which the transaction occurred, including the parties to the transaction, the nature of the transaction and all business correspondence relating to the transaction.

Failure to keep records for the prescribed period may result in 15 years imprisonment and/or a fine not exceeding R10 million.³¹ The punishment for non-compliance is a strong one, suggesting the importance of compliance.

Transactional records are key in money laundering cases in order to determine the source of funds and the potential launderer behind it.

Section 23 of FICA states that all records referred to above,³² must be kept for a period of no less than five years from the date of the conclusion of business between the institution and client. And if the records stem from a section 29

29 Section 22(2)(a) of FICA.

30 Section 22A of FICA.

31 Section 47 of FICA.

32 Section 23 of FICA.

suspicious report,³³ the records must be kept for at least five years from the date on which the report was sent to the centre.

Sections 28 and 29 deal with reporting transactions with the amount above a threshold as well as transactions which are suspicious in nature.³⁴ Section 32 of FICA states that any report made to the centre or any authorised person must be made in the prescribed method.³⁵ An accountable institution may be requested to provide additional information relating to a report made under sections 28, 29 or 31.³⁶ Another reason why all records of transactions need to be kept for a period of five years.

2.3.2 A RISK-BASED SYSTEM

According to Melnick, the risk-based approach to customer due diligence will provide a simpler approach to managing customers.³⁷ The system only works if staff are trained and equipped with the necessary knowledge in order to meet the requirements which emanates from a risk-based approach.³⁸ FICA provides guidance on training and implementation in section 42.³⁹ The risk-based approach as adopted in the 2017 amendments of FICA require that all accountable institutions develop, preserve, record and implement a compliance programme to counter money laundering. The risk management and compliance programme should enable the staff to identify, assess, monitor, mitigate and manage risk. Risks associated with the exchange of products or services synonymous with the operations of the business that may facilitate money laundering activities.⁴⁰

33 Section 29 of FICA.

34 Financial Intelligence Centre *Public Compliance Communication No. 2 Period for Record Keeping of Matters Reported to the Financial Intelligence Centre (2017)* 7.

35 Section 32 of FICA.

36 Section 32(2) of FICA.

37 PwC South Africa 'Risk approach will strengthen fight against money laundering' Available at <https://www.pwc.co.za/en/press-room/money-laundering.html> (accessed 24 February 2018).

38 PwC South Africa 'Risk approach will strengthen fight against money laundering' Available at <https://www.pwc.co.za/en/press-room/money-laundering.html> (accessed 24 February 2018).

39 Section 42 of FICA.

40 Section 42 of FICA.

The programme must provide a manner in which the institution may determine whether a person is a prospective client looking to establish a business relationship or enter into a single transaction. Or whether the person is an existing client who has already established a relationship or entered into a single transaction on a previous occasion. The programme must establish a manner in which the institution deals with clients acting under false or fictitious names. The programme must enable employees with the tools to verify the identity of potential clients and determine consistency during the course of a business relationship with the client.⁴¹ Specific methods and tools should be provided for staff to assess clients in respect of legal persons,⁴² trusts and partnerships as well as processes regarding continuous due diligence.⁴³ Large transactions, transactions of a complex nature as well as transactions with unusual patterns should be given special attention.⁴⁴

An institution must also provide a manner in which staff may confirm information about a client whose information accuracy is in doubt. When the institution suspects that a transaction is suspicious as described in section 29, the institution must provide a manner in which the staff member/s perform customer due diligence.⁴⁵ And if proven necessary the institution must provide a means to terminate an existing business relationship with an existing client.⁴⁶

The ideals of a risk-based approach provide many advantages. However, allowing accountable institutions free reign with regards to the details of their risk and compliance programmes may lead to under-compliance with the Act. The main reason for allowing institutions to create their own compliance is due to the wide array of businesses falling under the definition of accountable institutions. Businesses are given the responsibility of creating a programme catered to their specific industry and risks.⁴⁷ The flexibility may unfortunately be coupled with gaps

41 Section 42(2)(e) of FICA.

42 Section 42(2)(f) of FICA.

43 Section 42(2)(g) of FICA.

44 Section 42(2)(h) of FICA.

45 Section 42(2)(j) of FICA.

46 Section 42(2)(k) of FICA.

47 Cliffe-Dekker Hofmeyr 'Bane or Boon? The Amendments to FICA' Available at <https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/news/publications/2018/Corporat>

which potential launderers can exploit. Each supervisory body should introduce a standardised method in which their accountable institutions create a compliance programme. The EAAB are in the process of compiling a draft risk management and compliance programme for all estate agents to use. Once drafted and circulated, estate agency enterprises should begin work on compliance with the risk-based approach.⁴⁸

2.4 CONCLUSION

It is clear that South Africa has complied with the recommendations of the FATF on implementing a risk-based approach in the real estate sector. The 2017 Amendments to FICA has provided for customer due diligence, new record-keeping requirements and various monitoring provisions with regards to transactions.⁴⁹ The reporting of suspicious transactions as found in section 29 of FICA also fulfils the reporting requirement.⁵⁰ The FATF are however highlights the challenges that the risk-based approach poses to those in the real estate sector. The main challenge being, assessing risk. Assessing risk requires a certain amount of expertise to gather and analyse information. The system must be effective for clients as well as simple enough to train personnel. Even so, there will be some uncertainty by clients and personnel as to the information which is to be collected and the information which should be provided.⁵¹ The training of staff will not come without any hurdles.

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- [e/Download/Corporate-and-Commercial-Alert-25-July-2018.pdf](#) (accessed 25 February 2019).
- 48 EAAB 'Implementation of the Financial Intelligence Centre Act, Act 38 of 2001 (The FIC Act), by the estate agency sector' available at https://www.eaab.org.za/article/implementation_of_the_financial_intelligence_centre_act_38_of_2001_the_fic_act_by_the_estate_agency_sector (accessed 26 February 2019).
- 49 Financial Action Task Force 'RBA Guidance for Real Estate Agents' Available at <http://www.fatf-gafi.org/media/fatf/documents/reports/RBA%20Guidance%20for%20Real%20Estate%20Agents.pdf> (Accessed 1 October 2018).
- 50 Section 29 of FICA.
- 51 Financial Action Task Force 'RBA Guidance for Real Estate Agents' Available at <http://www.fatf-gafi.org/media/fatf/documents/reports/RBA%20Guidance%20for%20Real%20Estate%20Agents.pdf> (Accessed 1 October 2018).

As the new approach is phased in it is important to train staff on a continuous basis, providing guidance and feedback when needed.⁵² The EAAB as well as management in the workplace are tasked with the responsibility of sharing information with each other. The FATF describe this as “learning by doing”.⁵³ The EAAB must be wary of ‘diversity of practice’. Diversity of practice occurs due to the nature of the risk-based approach, leading to small differences in how businesses adopt the practice of risk assessment. This highlights the need for good information and materials to be readily available for the EAAB to determine whether real estate agents are practicing comprehensive risk-based judgements.⁵⁴



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- 52 Financial Action Task Force ‘RBA Guidance for Real Estate Agents’ Available at <http://www.fatf-gafi.org/media/fatf/documents/reports/RBA%20Guidance%20for%20Real%20Estate%20Agents.pdf> (accessed 1 October 2018).
- 53 Financial Action Task Force ‘RBA Guidance for Real Estate Agents’ Available at <http://www.fatf-gafi.org/media/fatf/documents/reports/RBA%20Guidance%20for%20Real%20Estate%20Agents.pdf> (accessed 1 October 2018).
- 54 Financial Action Task Force ‘RBA Guidance for Real Estate Agents’ Available at <http://www.fatf-gafi.org/media/fatf/documents/reports/RBA%20Guidance%20for%20Real%20Estate%20Agents.pdf> (accessed 1 October 2018).

CHAPTER THREE

3.1 INTRODUCTION

This Chapter will investigate the numerous facilitators in the real estate sector who can contribute in the money laundering process. As mentioned previously a number of players can facilitate the laundering of money where the exchange of property take place. It could range from criminals pretending to be legitimate buyers or sellers, lawyers, real estate agents, financial institutions and bond originators. This part of the study consists of the duties of the various participants mentioned and contain a few examples where it is illustrated how they were involved in money laundering during the property transfer process.

In order for the sale of property to go ahead the criminal often has to convince a real estate agent and attorney (conveyancer) to facilitate the transaction. The criminal, whether acting alone or through a third party will do so using the following methods.

There are many methods in which criminals will use real estate as a tool to launder money. Criminals may use third parties to purchase property on their behalf by depositing illicit proceeds into their account.¹ This is done to create an appearance of a legitimate property purchase, while also keeping a safe distance from any transactions. Real estate agents and conveyancers may not even be aware that the potential buyer is not the

1 Miralis N 'How is Money Laundered through Real Estate' Available at <https://www.lexology.com/library/detail.aspx?g=4242839e-373c-4525-a853-3ad5cc84a17b> (Accessed 10 February 2021).

true controlling party of the property. Criminals may resell property soon after buying it in order to lose an audit trail.² They may even sell the property to a shelf company or trust controlled by the criminal and this once again keeps a safe distance between the property and the criminal whilst also maintaining an element of control of the property. An attorney may be asked to set up this trust or simply complete the transfer to the trust. Attorneys may be asked to communicate with financial institutions, receive and transfer large amounts of money all while providing a sense of legitimacy to transactions which may contain illicit funds.³

3.2 ATTORNEYS

In South Africa, in order to become the legal owner of a property, the property has to be registered and transferred into the buyer's name.⁴ A conveyancing attorney is a specialised type of attorney who facilitates this process, thus performing an integral role in the transferring of property.

According to the code of conduct for all legal practitioners, candidate legal practitioners and juristic entities all legal practitioners, candidate legal practitioners and juristic entities shall observe the law while maintaining standards of honesty and integrity while upholding the Constitution and laws of the land.⁵

Criminals are ready and waiting to test an attorney's integrity in an attempt to exploit an attorney for their specific position in the process of transferring property. Specifically, through use of an attorney's trust account and the powers of a conveyancer.

2 Miralis N 'How is Money Laundered through Real Estate' Available at <https://www.lexology.com/library/detail.aspx?g=4242839e-373c-4525-a853-3ad5cc84a17b> (Accessed 10 February 2021).

3 Miralis N 'How is Money Laundered through Real Estate' Available at <https://www.lexology.com/library/detail.aspx?g=4242839e-373c-4525-a853-3ad5cc84a17b> (Accessed 10 February 2021).

4 Mattheus N 'What is Conveyancing, what does a Conveyancing Attorney do and who pays the transfer costs?' Available at <http://www.coetzee-attorneys.co.za/conveyancing-conveyancing-attorney-pays-transfer-costs/> (Accessed 10 February 2021).

5 Code of Conduct for All Legal Practitioners, Candidate Legal Practitioners and Juristic Entities.

The attorney's trust account is a representation of confidence as a client seeking legal advice or legal work deposits money into such account in lieu of services rendered or services to be rendered. It is this very account which can become the main vehicle of money laundering in the attorney's profession.⁶ This pillar of confidence, when abused can be transformed into a money laundering device.

Attorneys are expected to be fit and proper, acting with a high level of integrity, upholding the law and its practices. There are however temptations for an attorney to use their position to further themselves illegally. There are many ways in which an attorney may become an instrument in money laundering. The attorney can use a trust account to clean the proceeds of his own criminal actions; The attorney may be used as an accomplice to a crime syndicate where he/she becomes a money laundering tool at their disposal; criminals may deposit funds into an attorney's trust account and claim a refund, thus cleaning the money; criminals may also use attorneys to store money in the same manner as a bank and then use the attorney to pay criminal proceeds to various third parties or shell companies.⁷

3.2.1 *PILLAY and OTHERS v S*

One example of an attorney using his trust account illegitimately is *Pillay and others v S*.⁸ In this case an attorney, Nugalen Gopal Pillay, ran a Money laundering scheme whereby he brokered and drafted sale agreements whereby the actual purchasers were untraceable.⁹ A convicted armed robber testified for the state against the attorney. He testified that he was approached by Pillay, who offered him an investment opportunity. Pillay then brokered and drafted the sale agreement between the sellers and the convicted robber – the name of the purchaser was omitted from the agreement. The attorney handed a R500 000.00 deposit in cash to the seller 'under the table'. The attorney committed various other acts of a similar nature using his trust account to hide the identity of the purchasers and to mask the amounts paid.

6 Hamman & Koen (2012) 69.

7 Hamman & Koen (2012) 70.

8 *Pillay and Others v S* 2004 (2) BCLR 158 (SCA).

9 *Pillay and Others v S* 2004 (2) BCLR 158 (SCA).

3.2.2 *S v PRICE*

In *S v Price*, attorneys created a scam trust, as money was deposited into the trust, attorney one stole a cheque worth R325 000.00 and deposited it into another attorneys' trust account. The second attorney deposited this amount into property under the guise of a refund. The first attorney created false entries stating a 'legitimate source' of the stolen cheque. On the surface the transaction is a cheque from a legitimate trust, which is deposited into the trust account of an attorney.¹⁰ The services are not needed and the trust asks that the refund be used as a deposit on a property. The attorneys' fee is subtracted which can also be the payoff fee for the attorney involved in the fraudulent money laundering scheme. Thus, funds extracted from a stolen cheque is given the disguise of being a legitimate real estate transaction after an attorney refund.

Another instance where an attorneys' integrity came into question is in the case of Anthony Broadway. According to the state Mr Broadway, an attorney of the High Court received various sums of cash from members and employees of an illegal poaching enterprise. It was also alleged that Mr Broadway was aware that the employees and associates of the enterprise had no legitimate source of income capable of justifying the large sums of money involved. It was further alleged that Mr Broadway set up trusts to buy property and that these deposits were from the proceeds of crime. Mr Broadway was acquitted as witnesses fearing for their safety, refused to testify.¹¹

In order to better understand the role of attorney's in the money laundering landscape, one must look at FICA. An attorney is included under accountable institutions under Schedule 1 of FICA. This list, which includes Banks and Real estate agents, creates a bubble of candidates who need to prescribe to certain

10 Cape Business News 'Lawyer Among Accused for Allegedly Operating an Illicit Abalone Enterprise' Available at <https://www.cbn.co.za/featured/lawyer-among-accused-for-allegedly-operating-an-illicit-abalone-enterprise/> (Accessed 9 November 2020).

11 Cape Business News 'Lawyer Among Accused for Allegedly Operating an Illicit Abalone Enterprise' Available at <https://www.cbn.co.za/featured/lawyer-among-accused-for-allegedly-operating-an-illicit-abalone-enterprise/> (Accessed 9 November 2020).

provisions of The Act.¹² These accountable institutions need to adhere to the duties of accountable institutions. These duties include, proper identification of a client, identity of a principal (if applicable), maintaining proper records of transactions for at least five years. FICA also provides the duty to report suspicious transactions as well as cash transactions over the threshold, set in The Act.¹³ The Act also prescribes that attorneys, along with other accountable institutions must formulate internal rules to guide its members on proper compliance with The Act, reporting requirements and the important information of which records should be kept.¹⁴

On the surface level the abovementioned duties are a necessary addition to South African law in order to curb money laundering and the funding of terrorism. A problem does however arise when an attorney during the course of his normal duties comes across a client who has potentially laundered money – A balancing act between legal professional privilege and duties under FICA occurs, leaving an attorney between a rock and a hard place.

According to the above provisions, all attorneys must act with the utmost integrity while furthering the interests of their clients acting in a lawful and ethical manner. According to Lewis's golden rule,¹⁵ an attorney must not act in any manner which would tarnish his/her reputation as an honourable attorney and honourable person. An attorney not only has a duty to his client, but the attorney also has a duty to the state,¹⁶ for it is the state's laws which the attorney is upholding.

Hamman states that the relationship between an attorney and client often goes beyond that which is protected under legal professional privilege.¹⁷ Because of the blurred line between privilege and confidentiality, the client and in some cases the attorney believe that all information shared shall be kept private between them.

12 FICA 38 of 2001.

13 Millard & Vergano (2013) 34 *Obiter* 389-427.

14 Millard & Vergano (2013) 34 *Obiter* 397.

15 Millard & Vergano (2013) 34 *Obiter* 397.

16 Millard & Vergano (2013) 34 *Obiter* 397.

17 Hamman & Koen (2012) 78.

3.3 REAL ESTATE AGENTS

An estate agent is described as any person who, acting in his capacity advertises that he/she is acting on behalf of a third party to sell immovable property.¹⁸ And that he or she is accepting monies in relation to the duties above. Estate agents must act with the utmost integrity when acting on behalf of a client.

Estate Agents are usually the first people who come into contact with the potential money launderer in the property transaction. Due to a slower housing market, estate agents are under high pressure to produce sales. The amounting pressure on real estate agents may provide reasoning for the low number of reports in the real estate sector. Estate agents may find their work poached by other estate agents who offer services without the full anti-money laundering checks. The poaching activity usually occurred when law-abiding estate agents insist on the full checks before they arrange home viewings.

It has become a massive task for estate agencies to monitor the activity of all of their branches. It is thus of great importance that businesses head to the requirements of their governing agency in order to ensure the greatest possible compliance.¹⁹

3.3.1 ESTATE AGENCY AFFAIRS BOARD v AUCTION ALLIANCE

In this case the Estate Agency Affairs Board,²⁰ attempted to conduct a warrantless search on Auction Alliance after an expose revealed a multi-corporation operation involving kickbacks to attorneys, bank managers, liquidators and auditors. The allegations began when billionaire Wendy Appelbaum disputed an auction she had won having found that she was the only legitimate bidder and that auction alliance used fake bidders to drive up the price. This revealed a web of illegal

18 Section 1, Estate Agency Affairs Act 112 of 1976.

19 Evans J 'UK Estate agents hit by crackdown on money laundering' Available at <https://www.ft.com/content/15ef0b06-40cd-11e9-b896-fe36ec32aece> (Accessed 12 September 2019).

20 *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others* (CCT 94/13) [2014] ZACC 3; 2014 (3) SA 106 (CC); 2014 (4) BCLR 373 (CC), para 3.

activity including money laundering covered up by people in the banking, legal and accounting fields respectively.²¹

3.4 BOND ORIGINATORS

There are various parties involved in the process of purchasing property, the estate agent, the seller and the purchaser. There are also parties involved in the facilitation of the purchase. The transferring attorney transfers the property into the purchaser's name. The bond attorney registers the bond, this attorney is usually appointed by the bank which grants the bond. And the cancellation attorney who attends to the cancelling of the existing bond.²²

The bond attorney role is usually outsourced to a bond originator. A bond originator serves as a department or person within a law firm or works independently.

The bond originator liaises with the bank on the purchaser's behalf. They fill in the necessary paperwork and may sometimes use their relationship with the service provider to secure competitive interests' rates for their clients. While this service provides great convenience to the purchaser this creates another layer in which banks have to sift through to ensure money laundering compliance.²³ When a bank deals with an appointed transferring attorney directly, the bank retains a tightened level of control. This level of control is loosened by the introduction of bond originator. The bond originator takes on a level of responsibility once held by the bank, a responsibility to act ethically to the advancement of the client's instructions. Naturally through this process there are opportunities for colluding with a criminal as the seller or the buyer. The process has to involve a

21 IOL 'Auction House Implicated in Kickback Scandal' Available at <https://www.iol.co.za/news/auction-house-implicated-in-kickback-scandal-1237281> (Accessed 8 November 2020)

22 Ooba Home Loans 'The Bond Registration Process: A first-time Home Buyer' Guide Available at <https://www.ooba.co.za/resources/bond-registration-process/> (Accessed: 23 August 2020).

23 Ooba Home Loans 'The Bond Registration Process: A first-time Home Buyer' Guide Available at <https://www.ooba.co.za/resources/bond-registration-process/> (Accessed: 23 August 2020).

conveyancer as he/she is the only legal person with the authority to prepare documents involved with the cancellation and registration of property at the Deeds Office.

As seen in the case of *Hattingh v S* where the launderer owned many companies complicit in his fraudulent scheme, one of them Quatro Home Loans, who serve as bond originators. In this scheme he fraudulently misrepresented to banks that he had registered property when actually using the funds to pay off his large debt. He used his good standing with the bank emanating from his interests in Quatro Home Loans as well as his position as an attorney.²⁴

It is thus important that bond originators are also subjected to the same KYC regulations as other at-risk industries. Most importantly banks need to guard against complacency when dealing with bond originators, especially those with which they have a good relationship with. Taking the risk-based approach into account, a certain level of caution must be taken by banks to ensure that the funds raised by bond originators are being used to register legitimate bonds. This requires a heightened level of continuous due diligence when assessing relationships with parties that may pose risk to the client as well as reputational risk to the bank.

3.5 CONCLUSION

In conclusion, there are numerous potential facilitators of money laundering in South Africa. The legislation in FICA and POCA sets forth strong requirements aimed towards curbing money laundering in the respective sectors. With the emergence and ease of bond originators a balance must be struck between convenience and continuous due diligence. Banks need to monitor their relationships with bond originators on a regular basis, this may form as part of a compliance function. And in turn bond originators must perform continuous due diligence, whether it be in-house or to outsourced conveyancers. This should be done regularly to ensure that innocent parties are protected from the potential

24 *Hattingh v S* [2015] ZASCA 84.

effects of money laundering and that potential launderers do not have an added vehicle to launder money through the purchase of property.

Real Estate Agents find themselves in a tough predicament, in a slow economy. They may have the propensity to turn a blind eye to suspicious funds, for commission on a sale. As an accountant may be the first line of defence in a company, the real estate agent should be the first reporter of suspicious activity during a residential sale. As seen in the Auction Alliance scenario, liquidators also have a large responsibility to act honestly when providing work to auction houses or real estate agents to ensure that money laundering does not take place.



CHAPTER FOUR

4.1 INTRODUCTION

In chapter two the legislation in South Africa in relation to the recommendations made by the FATF is discussed. This chapter contains an investigation into the successes and possible shortcomings in the legislation, the Investigation process and the prosecution of launderers. This chapter also discusses whether South Africa is competent, qualified and equipped to achieve successful prosecutions and convictions. Particularly, where the offences were committed in the real estate sector.

As mentioned previously, in South Africa, there are three main anti-money statutes; POCA, FICA and POCDATARA. This chapter considers the purpose of each statute and whether the main provisions applicable to the real estate sector are adequate.

4.2 THE PREVENTION OF ORGANISED CRIME ACT (POCA)

The Prevention of Organised Crime Act of 1998 was enacted to repeal and incorporate the Proceeds of Crime Act of 1996, to amend the International Co-operation in Criminal Matters Act of 1996; to amend the Drug and Drug Trafficking Act of 1992 and to provide for the establishment of a Criminal Assets Recovery Account. The purpose of POCA and all acts connected therewith was to combat organised crime, money laundering and related gang activities. It seeks to prohibit money laundering, racketeering activities and makes provision for reporting

requirements related thereto. It also makes provision for the recovery of assets instrumental to the abovementioned crimes.

POCA contains provisions relating to the definition and punishment of Racketeering and crimes relating to the proceeds of unlawful activities. POCA also provides for the preservation and confiscation of proceeds of unlawful activities. This will therefore be applicable to the possible confiscation of immovable property. The crime of racketeering is described in section 2 of POCA as follows:

An offence by any person who receives or retains any property derived, directly or indirectly from a pattern of racketeering activity and knows or ought to have reasonably known that such property is so derived and uses or invests, directly or indirectly, any part of such property in acquisition of any interest in, or the establishment or operation or activities of, any enterprise.¹

The definition not only provides for actual knowledge but also a scenario where the accused person ought to have knowledge from where such property is derived. This means that an accused person cannot present a position of ignorance or wilfully turn a blind eye in order to avoid prosecution. Section 2 also provides for property received from third parties.

Any person who receives or retains property, directly or indirectly, on behalf of any enterprise and knows or ought to have reasonably known that such property derived or is derived from or through a pattern of racketeering activity is guilty of an offence

This part of POCA enables the investigating and prosecuting authorities to charge offenders committing crimes in the property sector

Money laundering is defined in Section 4, 5 and 6 of POCA. Section 4 states:

Any person who knows or who ought reasonably to have known that property is or forms part of the proceeds of unlawful activities... shall be guilty of an offence' the provision mentions that any person who actively or passively enables the act of concealing these proceeds of unlawful activities, are guilty of an offence.²

1 Section 2 of POCA.
2 Section 4 of POCA.

Section 5 specifically deals with assisting a third party stating that:

any person who knows or ought reasonably to have known that another person has obtained the proceeds of unlawful activities, and who enters into any agreement with anyone or engage in any arrangement or transaction whereby... shall be guilty of an offence.³

Section 6 provides for a general overview of the provisions above stating that:

Any person who acquires; uses; or has possession of, property and who knows or ought reasonably to have known that it is or forms part of the proceeds of unlawful activities of another person, shall be guilty of an offence.⁴

Sections 4, 5 and 6 provide for a wide scope of money laundering. The actions of an individual or any third party which has aided in the concealment of proceeds of unlawful activities are criminalised. The punishment is equally varied. Sections 3 and 8 of POCA provide for the punishment when convicted of any of the money laundering offences under Sections 2, 4, 5, or 6.⁵ The punishment being, a maximum fine of R 100 million and a period of imprisonment of no longer than 30 years.⁶ By definition, any persons involved in the money laundering process, including lawyers, conveyancers and real estate agents can be found guilty of money laundering if they do not report it via the channels as pointed out in FICA.⁷

Accountable institutions may be subject to forfeiture of their fees if found that these fees were the proceeds of unlawful activities. Thus, if they acquired fees during an unlawful property transfer, such fees may be forfeited.

Chapter 6 of POCA deals with the civil recovery of property. The purpose of chapter 6 is derived from its preamble which states that no person should benefit from the proceeds of unlawful activities. Neither can these proceeds be used to

3 Section 5 of POCA.

4 Section 6 of POCA.

5 Frans (2017) 20.

6 Sections 3 and 8 of POCA.

7 Frans (2017) 20.

commit an offence.⁸ The true question lay however in the word 'use'. It constitutes the relationship between the proceeds of the unlawful activity and the crime for which it was allegedly used.⁹ The relationship must be of a rational nature to warrant a preservation or forfeiture order.

The Bill of Rights in the South African Constitution,¹⁰ provides that no one may be arbitrarily deprived of their property.¹¹ This may occur when the state does not provide sufficient reason for the deprivation order.¹² The court in *NDPP v RO Cook* found that the provision was remedial in nature, it is however inevitable that some of the provisions may have a punitive nature. The purpose of the provision may be remedial however the effect can come across as punitive. In *NDPP v Gillespie* the court held that the state of mind of the controlling or owning party is the defining point in whether the property can be preserved or forfeited. A 2-step process was introduced to determine whether an order could be granted. The first leg of the test asks whether the property was the instrumentality in the offence. The second leg of the test asks whether the owner knew or ought reasonably to have known that the property was an instrumentality of an offence. The owner's guilt, knowledge or lack thereof is put into focus. So once the property is established to be an instrumentality, only then can the court decide whether the owners' rights to the property can be forfeited or the property be preserved.

The interpretation above provides for an adequate process when establishing whether physical property should be preserved or forfeited. The interpretation does however provide difficulty when interpreting real estate agents which may fall victim to preservation orders based on fees received. Authorities may be hasty in recovering any funds from a party investigated in potential money laundering. The requirement however holds that the defending party must show that they had no knowledge or guilt in the respect of the fees. Because it is a civil

8 *NDPP v RO Cook Properties [2004] ZASCA 36 and NDPP v 37 Gillespie Street Durban (Pty) Ltd and Another [2004] ZASCA 37.*

9 *NDPP v RO Cook Properties* para 14.

10 The Constitution, 1996.

11 Section 25(1) of the Constitution of 1996.'

12 *NDPP v RO Cook Properties* para 15.

application the order is based on a balance of probabilities therefore putting the real estate agent and their fees at serious risk of preservation or forfeiture.

Section 52 is used to ensure that owners or persons controlling property or the general public act vigilantly in relation to the possessions they own. Generally, forfeitures which do not advance the purposes of Chapter 6 are unconstitutional. Therefore, forfeitures should not simply be an additional punishment to the crime. It must stem from the instrumentality between the property and the offence leading to a rational connection between forfeiture and the objective of the statute. It is thus safe to say that even though a forfeiture provides a reverse onus on the controlling property to prove their innocence, the law does not demand the impossible to prove the absence of guilt. Providing the agents have proven that they have done all that is reasonably possible to prevent the use of their property as an instrumentality.

In *Brooks v NDPP*,¹³ the court heard an appeal against a forfeiture order held against an illegal diamond seller. After an undercover operation in collaboration with police it was discovered that the applicant was using a property to sell diamonds in direct violation of The Diamonds Act.¹⁴ The property was purchased in 2012 as a vacant piece of land where eventually a house was built with an office where the applicant dealt in his illicit dealings. The wife of the applicant claimed that she only used the property as a house and had no knowledge of the illegal selling of diamonds and subsequent laundering that took place. The court excluded half of the property and half the proceeds of sale was paid to the wife by the *curator bonis*. The court dismissed the first applicant's appeal against the forfeiture order stating that the property was instrumental in the commission in the offence and was particularly chosen for this purpose, the applicant would often facilitate the meeting between sellers and buyers and was paid for this purpose.¹⁵ The court further held that by seizing the property, the court was

13 *Brooks v NDPP* (855/16) [2017] ZASCA 42 (30 March 2017).

14 The Diamonds Act 56 of 1986.

15 *Brooks v NDPP* (855/16) [2017] ZASCA 42 (30 March 2017) Para 22.

disabling the criminal enterprise from operating, or greatly inhibiting its ability to operate any further.¹⁶

It is evident that POCA provides the punitive legislation against money laundering. It provides adequately for the crimes of racketeering while also providing for asset preservation and asset forfeiture. Unfortunately, it does fall short in the protection of agents regarding fee forfeiture. Fee forfeiture is seen as an administrative function, but in practice it could become a punitive measure against an innocent reporting agent.¹⁷

4.3 THE FINANCIAL INTELLIGENCE CENTRE ACT (FICA)

As can be recalled, FICA¹⁸ was enacted due to the recommendations of the FATF. FICA provides for the various duties and responsibilities for which accountable institutions are to follow to report and combat money laundering in South Africa.¹⁹ FICA provides that all accountable institutions have a duty to adequately identify their clients, a duty to keep records, a duty to promote measures in the workplace to promote compliance with the act. The Act also provides measures relating to access of information and reporting duties.

A failure to report in terms of FICA will result in a fine or imprisonment as held in POCA. The two Acts work in tandem where FICA provides the framework for the prevention of Money laundering by providing administrative measures. POCA provides additional preventative measures. These are used in a punitive manner by providing the punishment for not following the provisions set out in FICA.

FICA provides the administrative legislation in relation to money laundering. It includes all the reporting and KYC requirements for employees working at accountable institutions. FICA is clear in its requirements, even detailing the formats in which reports should be made. Thus, the responsibilities of accountable

16 *Brooks v NDPP* (855/16) [2017] ZASCA 42 (30 March 2017) Para 42.

17 *NDPP v RO Cook Properties* para 14.

18 Act 38 of 2001.

19 As briefly introduced in Chapter two, page 5.

institutions are clear. FICA also provides detailed provisions regarding the keeping of records for a prescribed length and in specific prescribed formats. It is submitted that FICA contained adequate provisions to combat money laundering in the real estate sector.

4.4. PROTECTION OF CONSTITUTIONAL DEMOCRACY AGAINST TERRORIST AND RELATED ACTIVITIES ACT (POCDATARA)

POCDATARA,²⁰ specifically deals with money laundering in the sphere of terrorist funding. Section 4 provides specific convention offences surrounding the manipulation of property for illicit gain. These include acquiring, using, collecting possessing or owning property which benefits or furthers the commission of an offence.

POCDATARA was enacted mainly to prevent the manipulation of property to commit an offence during terrorism activities. The provisions specifically mention the funding of terrorism. The acquisition, collection or ownership of property for terrorist activities is the focus of this piece of legislation. The Act, albeit a short one, provides significant policing powers to prevent the funding of terrorism through money laundering.

After evaluating the provisions of the above-mentioned three pieces of legislation, the low conviction rate for money launderers,²¹ especially in the property sector, must be questioned. It is perhaps prudent at this stage to examine the role of certain professions.²²

4.5 THE ROLE OF LAWYERS AND ESTATE AGENTS

20 Act 33 of 2004.

21 De Lange J & Versluis JM 'Rising Crime, low prosecution rates: How law enforcement in SA has all but collapsed' Available at <https://www.news24.com/citypress/News/rising-crime-low-prosecution-rates-how-law-enforcement-in-sa-has-all-but-collapsed-20191021> (Accessed 01 August 2021).

22 This section only makes mention of lawyers and estate agents as they are the two key role players in the real estate sector in South Africa.

The ordinary man or woman in the street expects a certain level of competence, knowledge and experience when putting their trust in an agent. This knowledge and experience can be exploited by a person seeking to hide their ill-gotten gains under the guise of services rendered. These persons using their own guile can easily use the trust account of lawyers and real estate agents, to commit money laundering.

Attorneys provide confidence with their trust accounts. It is said that the attorney's trust account is the pillar of confidence when it comes to a client utilising the legal profession. Two main issues were discussed previously where this pillar's foundation is tested. The first is one where an attorney acts against his oath to be fit and proper, playing an active role in money laundering, acting with the launderer as an accomplice. The second issue is of a more complex nature. The second issue was a discussion on legal professional privilege and duties under FICA. Such as the acceptance of payment for legitimate representation with funds which may or may not be legitimate.

An attorney that acts whether in his personal or professional capacity, in an attempt to aid a money launderer should be punished to the full extent of the law. Auditors should be alive to these strange transactions when auditing the trust accounts of attorneys and should report these findings as provided for in FICA.²³ The firm itself also have a responsibility in terms of schedule 1 of FICA,²⁴ to report the money laundering and the responsible person may find themselves prosecuted if this report does not occur.

Another issue may be the when the attorney is unaware that he is transferring property for a criminal buyer or seller. He may even be dealing with an unscrupulous estate agent. That is why it is so important for attorneys as accountable institution to correctly identify and verify their client details and financial position. They should make sure that the client funds used in property

23 Gaetke & Welling S.N 'Money Laundering and Lawyers' (1992) 43 Syracuse L. Rev 1165.
24 Financial Intelligence Centre Act 38 of 2001.

transfers were not acquired unlawfully. Should the lawyer not be vigilant, he could also become an accomplice in the money laundering process.

Due to a slowing economy it can be difficult for real estate agents to report large sums of money from a suspicious buyer, when these very sums provide for their livelihood. The real estate agent is the first line of defence in the sale of property. The Importance of reporting suspicious transactions cannot be stressed enough, the potential for prosecution is not worth foregoing the report.

Real Estate Agents have large responsibilities to verify the legitimacy of their client, whether that client be the buyer or the seller. Launderers use many methods to conceal the true identity or true source of funds.²⁵ Thus it is not enough for real estate agents to assume that the source of funds is legitimate because the source is a mortgage bond. Real estate agents should complete comprehensive credit checks early into transactions, these should include whether the client has principal links to companies or trusts. If the client fits a profile that may be harmful to the estate agency or may purport money laundering the real estate agent should investigate this possibility further.²⁶ A real estate agent may do adverse media checks to establish whether the potential client has been involved in any documented illicit activity. If the estate agent discovers anything noteworthy they should report to the Financial Intelligence Centre.²⁷

According to FIC the accountable institution should develop risk profiles, these should be divided into groups or categories. When a client transacts with the real estate the agent should be able to ascertain which risk profile the particular client falls into. In order to build the client's profile, the estate agent should ascertain certain information about the client.²⁸ Will the client be purchasing the property as

25 Property 24 'How estate agents can combat fraud and money laundering risks' Available at <https://www.property24.com/articles/how-estate-agents-can-combat-fraud-and-money-laundering-risks/29615> (Accessed 12 February 2021).

26 Property 24 'How estate agents can combat fraud and money laundering risks' Available at <https://www.property24.com/articles/how-estate-agents-can-combat-fraud-and-money-laundering-risks/29615> (Accessed 12 February 2021).

27 Property 24 'How estate agents can combat fraud and money laundering risks' Available at <https://www.property24.com/articles/how-estate-agents-can-combat-fraud-and-money-laundering-risks/29615> (Accessed 12 February 2021).

28 FIC Guidance Note 7 On The Implementation of Various Aspects of the Financial Intelligence Centre Act, 2001 (Act 38 of 2001) Available at

a natural person or through a corporate vehicle? What is the client's main source of income? How does the client intend to pay, and does this payment involve complex layering of funds or foreign exchange? If the client intends to transact through a corporate vehicle who is the beneficial owner? These questions are important as it determines where the client is sourcing the funds from, who is going to benefit from the purchase of the property and for what reason the property is being purchased.²⁹

If the client already has a relationship with the estate agency, ongoing due diligence is required and the following information should be ascertained. How long has the agency been in a relationship with the client? Was the client previously vetted for compliance with AML measures?³⁰ Does the client have a pattern of behaviour in the time the client has been in a relationship with the institution? And has the client previously been under close scrutiny by the institution due to suspicious behaviour or unusual activities.³¹ If the client has previous suspicious conduct a higher level of restriction should be applied and real estate institutions should apply a higher level of care. This means being alert to repeat behaviour and reporting such behaviour where necessary, this may also require that the client relationship be terminated after repeat offences or repeat reports. Real estate agents must not only protect the state against money laundering but also themselves from prosecution by applying these measures with the utmost diligence.

4.6 PROSECUTIONS AND CONVICTIONS

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- https://www.fic.gov.za/Documents/171002_FIC%20Guidance%20Note%2007.pdf
(Accessed 20 February 2019).
- 29 FIC Guidance Note 7 On The Implementation of Various Aspects of the Financial Intelligence Centre Act, 2001 (Act 38 of 2001) Available at https://www.fic.gov.za/Documents/171002_FIC%20Guidance%20Note%2007.pdf
(Accessed 20 February 2019).
- 30 FIC Guidance Note 7 On The Implementation of Various Aspects of the Financial Intelligence Centre Act, 2001 (Act 38 of 2001) Available at https://www.fic.gov.za/Documents/171002_FIC%20Guidance%20Note%2007.pdf
(Accessed 20 February 2019).
- 31 FIC Guidance Note 7 On The Implementation of Various Aspects of the Financial Intelligence Centre Act, 2001 (Act 38 of 2001) Available at https://www.fic.gov.za/Documents/171002_FIC%20Guidance%20Note%2007.pdf
(Accessed 20 February 2019).

Legislation, as well as the evidence and assistance of certain role players in combating money laundering is however on its own, not sufficient. To achieve the successful prosecution and conviction of transgressors, the South African police and the Justice Department must also play a vital art.

A question that needs to be answered is. Are reports regarding suspicious transactions leading into investigations into predicate crimes only? Money laundering takes place when a criminal uses certain avenues to clean their ill-gotten gains, it is often easier to investigate and prosecute the predicate crime. The concern is that the reporting requirements in FICA may be used as a tool to identify persons with suspiciously obtained wealth. Another issue to be raised is the competency of Police officers to investigate money laundering crimes. The Hawks Directorate for Priority Crime Investigation was established as an independent directorate within the South African Police Service (SAPS). This branch of SAPS investigates priority crimes with links to organised crime and commercial crime. The Hawks however do not have the resources to fight all money laundering crime and it is therefore imperative that the main branch of SAPS be able to also deal with these investigations. The Hawks are currently understaffed and are dealing with over 4000 fraud cases. With a major backlog of cases investigations take longer than they should, allowing criminals to further launder their money back into society.³²

The issues in the implementation of proper investigations, prosecutions and convictions often lies in the disconnect between predicate crimes and the money laundering offence. Much can be done in order to improve the rate of money laundering convictions. Police officers need better training in order to upscale them for integration into the Hawks, as well as financial incentives to move into fighting financial crime. Fighting financial crime can be a dangerous job, persons who work in the field of anti-money laundering need better protection by police to enable them to do their job to the best of their ability.

32 Mattushek D 'Understaffed Hawks Deep Into State Capture Investigations ' Available at <https://www.sabreakingnews.co.za/2019/08/07/understaffed-hawks-deep-in-state-capture-investigations//>> (Accessed 29 September 2019).

The above-mentioned legislation and its proper application should be sufficient a to curb money laundering in South Africa. Many of the stumbling blocks occur during the implementation stage of proceedings against acts of money laundering. Impediments such as: the poor training of police to deal with high levels of crime, the poor protection of whistle-blowers and/or persons working in the money laundering field as well as the lack of incentives to work in the anti-money laundering field, in South Africa.

With regards to money laundering investigations in South Africa there seems to be a lack of enthusiasm to add money laundering charges onto an already long and burdensome charge sheet. And is further suggested that the low prosecution rate could possibly be linked to the lack of a separate money laundering branch of the NPA or the Hawks.³³

4.7 CONCLUSION

POCA provides adequate punitive legislation as a deterrent against committing money laundering. It makes provision for the crimes of racketeering and money laundering as well as asset preservation and asset forfeiture. The Act falls short in the manner in which it deals with the forfeiture of fees. There is a lack of adequate protection for estate agents when dealing with persons who have potentially committed money laundering. Asset forfeiture is not seen as an additional punishment to a crime but instead, an administrative measure with certain aspects being punitive in measure. The bar to which the proof is held, being the rational connection between the forfeiture and the objective of the state is sufficiently measured as to provide fairness to the affected parties. A collaborative effort is needed, between Law enforcement, the Financial Intelligence Centre and Prosecutors in order to fully utilize the Act and punish these money laundering crimes.

33 Institute for Security Studies ' Chapter 2: Money Laundering in the South African Real Estate Market Today' Available at <https://issafrica.org/chapter-2-money-laundering-in-the-south-african-real-estate-market-today> (Accessed 8 November 2020).

FICA provides adequate legislation as to the administration requirements of employees working for accountable institutions. FICA makes provision for stringent reporting requirements, in a specific format. FICA makes it clear who an accountable institution is and what their responsibilities are. It contains legislation requiring the adequate keeping of records and sets out the manner in which accountable institutions must identify their client.



CHAPTER 5

5.1 INTRODUCTION

The aim of the research paper was to analyse the effect of money laundering in the real estate sector in South Africa. It was important to ascertain why these recommendations were established worldwide and which parties are affected. Furthermore, my research made mention of the honest role players who are at risk of manipulation at the hands of launderers who seek to use real estate as a vehicle to conceal their illicit funds. Accountable institutions as well as the bodies who govern them play an integral role in curbing money laundering in this sector. Through their duties, they play an active part in the safeguarding of the real estate sector, not only protecting themselves from prosecution but also upholding the sanctity of the property market in South Africa.

5.2 RESEARCH OUTCOMES

The issues in this research paper was whether South Africa have implemented the recommendations of the FATF to a satisfactory level. The main question to be answered is, how can money laundering exposure be curbed and combated in the real estate sector? To tackle the research question, South African legislation, international instruments and regulators were scrutinized.

It seems that anti-money laundering regulation in the real estate sector has reached a plateau in South Africa. After the initial surge to create innovative regulations based on the recommendations of international instruments. From the research completed it is clear that there are still vulnerabilities for honest role players when dealing with potential launderers.

As long as launderers continue to invest their ill-gotten gains in real estate, the market will flourish. Estate agents, bond originators and conveyancers continue to handle large sums of money when facilitating property transfers. Once the funds get to an experienced conveyancer it is easier for him/her to facilitate one of the many laundering schemes that involve real estate. As mentioned before, the real

estate agent truly is on the front line of money laundering detection, often being the first person dealing with the prospective buyer or seller. Real estate agents are regulated well and are accountable to reporting standards as much as other industries.

South Africa have implemented the recommendations of the FATF well and continue to be involved in mutual evaluations as well as being a member of the Eastern and Southern African Anti-Money Laundering Group.¹⁶⁹ A large investment has been made into the drafting of legislation and as mentioned before, South African anti-money laundering legislation is particularly strong. The next investment must be made into education and detection on an individual level.

5.3 RECOMMENDATIONS

The combination of legislation in South Africa is fairly comprehensive. Implementation of these laws and regulations are gaining traction with a few hurdles. In order to better implement these laws, the training of reporting officials needs improving. These officials need to be equipped with the knowledge of when to report, how to report and more importantly what constitutes a suspicious transaction.

The primary legislation such as FICA, POCA and POCDATARA provides adequate information on reporting, combatting and punishing money launderers. All reporting institutions under the FICA umbrella are required to comply with the Act. There is however a disconnect between the Financial Intelligence Centre and the respective supervisory bodies such as The Law Society of South Africa, the Estate Agency Affairs Board and the Ombudsman for Banking Services South Africa (OBS).

When matters are reported, they are reported straight to FIC, where the matter is investigated and if necessary, passed on to the relevant law enforcement agency.

169 FATF 'South Africa' Available at <http://www.fatf-gafi.org/countries/#South%20Africa> (Accessed 11 February 2021).

The respective supervisory body was not made aware of these reports and not kept up to date with the developments. Due to this disconnect the supervisory body only finds out the extent of the problem when they do an annual audit of their members. FIC receives a large amount of reports a year which can lead to a backlog of cases some of which are not pursued.

Under the current system members under the LSSA and EAAB must have their trust accounts audited yearly, members may also find themselves subject to on-site checks to make sure they are compliant with anti-money laundering legislation. This wholesale approach is not an adequate use of resources compared to a risk-based approach. Liaising with the FIC these bodies can create a system of compliance comprising of all of their members. Based on the risk-based approach, this system will rate all members as compliant, deficient or under review. If a member has been found guilty of violating the provisions of the Act the supervisory body can follow-up annually to make sure that the organisation has addressed the issue related to its previous offence. By following-up with various organisations the supervisory body can share these findings with all members, in order to strengthen anti-money laundering procedures yearly. It is my recommendation that this approach be applied to the LSSA and EAAB. A secondary legislation must be created to provide supervisory bodies with the authority to receive reports and act upon them.

In addition to a more stringent risk assessment system, supervisory bodies must meet with their members regularly to keep up to date with the dangers of money laundering. These meetings should discuss new typologies, high risk areas and other trends within the money laundering landscape.

The legal profession necessitates a high level of protection in order to contribute to a fair functional legal system. A clear distinguishing line needs to be drawn between confidential information and information available for investigation of

money laundering.¹⁷⁰ It is thus important that protection is provided to attorneys, especially criminal law attorneys, when representing clients.

Accountants are to be provided with adequate training on what constitutes suspicious transactions. Checks and balances are a necessity within inhouse finance departments, multi-level transactions should require increased security to prevent laundering in large companies.

Real estate agents are the most vulnerable accountable institutions as they stand to lose income in the form of commission when reporting suspicious transactions to FICA. As the first line of defence against money laundering real estate agents need a certain level of financial assurance when reporting suspicious transactions. This includes a portion of forfeited monies, which could be routed to a fund for real estate agents which can be claimed upon on a case-by-case basis.

FICA, POCA and POCDATARA provide sufficient legislation for the prevention, reporting and punishment of money laundering and/funding of terrorism. POCA can however be improved by using a multi-faceted approach to prosecution, similar to that which is used in Australia.¹⁷¹ This improvement may help investigators allocate resources to different levels of money laundering. Using the multi-faceted approach depending on the amount laundered as well as knowledge or intention allows prosecutors to target lower-level launderers to testify against higher level offenders in exchange for plea bargaining agreements.

Issues however remain with the implementation and impact on accountable institutions. The forfeiture of fees needs a potential overhaul with a better outline of what is regarded as prima facie proof of money laundering. The access to records albeit a very useful tool for the prosecution must find a middle ground without severely impacting a defence attorneys' ability to defend his/her client. Cooperation between prosecuting authorities and accountable institutions are vital

170 Frans C *The Impact of Client Record Keeping on the Legal Profession in South Africa* (Unpublished LLM thesis, University of the Western Cape, 2017).

171 [Australia's Federal Prosecution Service 'Money Laundering' Available at https://www.cdpp.gov.au/crimes-we-prosecute/money-laundering](https://www.cdpp.gov.au/crimes-we-prosecute/money-laundering) (Accessed 01 August 2021).

in the fight against money laundering. The governing bodies of these accountable institutions as well as the NPA must meet and come to an amicable solution regarding these key issues.

The low prosecution rate of money laundering in South Africa needs improving by better equipping law enforcement to deal with these types of crimes.¹⁷² In the 2020 national budget speech, Finance Minister Tito Mboweni has allocated R2.4 Billion to the National Prosecuting Authority, the Special Investigating Unit (SIU) as well as the Hawks. Thus, enabling government to appoint 800 investigators, 277 prosecutors to alleviate the backlog emanating from the Zondo commission.

These funds will also be used to set up five new commercial crime courts to deal with speciality crimes in South Africa.¹⁷³ In addition to the above government has also promised R985 million to the Directorate for Priority Crime Investigation to alleviate the backlog of corruption cases in South Africa.¹⁷⁴ In addition to this commitment it is suggested that government create a separate department of the Hawks to deal with money laundering. This tunnel vision approach will lead to a greater focus on combatting money laundering in real estate.

5.4 CONCLUSION

The law in South Africa regarding money laundering meets the recommendations of the FATF for KYC, the risk-based approach and reporting requirements. By creating FICA, POCA and POCDATARA, South Africa is on the right track to combat money laundering and the funding of terrorism. Unfortunately, the legislation is not perfect with the access to records and the forfeiture of funds

172 De Lange J & Versluis JM 'Rising Crime, low prosecution rates: How law enforcement in SA has all but collapsed' Available at <https://www.news24.com/citypress/News/rising-crime-low-prosecution-rates-how-law-enforcement-in-sa-has-all-but-collapsed-20191021> (Accessed 01 August 2021).

173 Business Tech 'Government Allocates R2.4 billion to fight crime – including hiring 800 Investigators' Available at <https://businesstech.co.za/news/budget-speech/377423/government-allocates-r2-4-billion-to-fight-crime-including-hiring-800-investigators/> (Accessed 28 February 2020).

174 Business Tech 'Government Allocates R2.4 billion to fight crime – including hiring 800 Investigators' Available at <https://businesstech.co.za/news/budget-speech/377423/government-allocates-r2-4-billion-to-fight-crime-including-hiring-800-investigators/> (Accessed 28 February 2020).

creating a potential divide between the NPA and accountable institutions. Legislation needs to enable greater communication between supervisory bodies and FIC to lighten the investigatory load when dealing with rogue agents enabling money laundering.

Money laundering should be discussed in government with greater importance and investigations should lead to charges and prosecutions not only Commissions of Enquiries. As the legislation will continue to be critiqued and improved, it is of great importance that the proper measures be put in place to implement the laws. This includes a strong police force and a prosecution ready to act without prejudice, fear or favour.

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