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"ANTI-MONEY LAUNDERING COMPLIANCE AND ITS EFFECT ON THE PRACTICE OF LAW IN ZIMBABWE"

BY

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APRROVAL FORM

The undersigned certify that they have read and recommended to the University of Zimbabwe for acceptance; a dissertation entitled:

"ANTI-MONEY LAUNDERING COMPLIANCE AND ITS EFFECT ON THE PRACTICE OF LAW IN ZIMBABWE"

Submitted by YVONNE CHAPATA in partial fulfilment of the requirements of the award of a Master of Laws Degree in Commercial Law

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DEDICATION

To

My son Ethan

For your love and encouragement. Thank you for being my source of inspiration and

My Mother

Thank you for being my rock and pushing me to achieve my dream.

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Firstly, I would like to thank my ever present, Almighty God for seeing me through.

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ABBREVIATIONS

AML	ANTI-MONEY LAUNDERING
BUPSSML	BANK USE PROMOTION AND SUPPRESSION OF MONEY LAUNDERING ACT [CHAPTER 24:24].
CDD	CUSTOMER DUE DILIGENCE
CFT	COUNTER FINANCING TERRORISM
CTR	CASH TRANSACTION REPORT
CP&EA	CRIMINAL PROCEDURE AND EVIDENCE ACT {CHAPTER 9:07]
COBE	COMPANIES AND OTHER BUSINESS ENTITIES ACT [CHAPTER 24;31]
DNFBPs	DESIGNATED NON-FINANCIAL BUSINESS AND PROFESSIONS
FATF	FINANCIAL ACTION TASK FORCE
FCA	FINANCIAL CONDUCT AUTHORITY
FIU	FINANCIAL INTELLIGENCE UNIT
FSRBs	FATF STYLE REGIONAL BODIES
ESAAMLG	EASTERN AND SOURTHERN AFRICA ANTI-MONEY LAUNDERING GROUP
EFT	ELECTRONIC FUNDS TRANSFER
EU	EUROPIAN UNION
G7	GROUP OF SEVEN
IBA	INTERNATIONAL BAR ASSOCIATION
IFT	INTERNATIONAL FUNDS TRANSFER
IMF	INTERNATIONAL MONETARY FUND
KYC	KNOW YOUR CLIENT
LSZ	LAW SOCIETY OF ZIMBABWE
MER	MUTUAL EVALUATION REPORT
ML	MONEY LAUNDERING
MLPC	MONEY LAUNDERING AND PROCEEDS OF CRIME ACT [CHAPTER9:24]
NPA	NATIONAL PROSECUTING AUTHORITY
PEP	POLITICALLY EXPOSED PERSON
STR	SUSPICIOUS TRANSACTION REPORT

UNSCR	UNITED NATIONS SECURITY COUNCIL RESOLUTIONS
UNCAC	UNITED NATIONS CONVENTION AGAINST CORRUPTION
ZACC	ZIMBABWE ANTI CORRUPTION UNIT
ZIMRA	ZIMBABWE REVENUE AUTHORITY
ZRP	ZIMBABWE REPUBLIC POLICE

CHAPTER ONE: INTRODUCTION

1.1 BACKGROUND

One of the current topical issues in Zimbabwe and the world over is the issue of money laundering and ways in which it can be curbed. Anti-money laundering gained momentum when an international organization called the Financial Action Task Force (hereinafter referred to as FATF) was established with a mandate to curb money laundering in July 1989 at a G7 Summit in Paris.[1]The FATF is an intergovernmental body which comes up with legal policies, regulations and operational measures for combating money laundering through its recommendations which recommendations are regarded as the global standard in the fight against money laundering.[2]

The FATF encourages member states to adopt its 40 Recommendations into their national legislation in a manner which suits their circumstances.[3] The FATF 40 Recommendations are soft law hence not binding on member states[4], however non-compliance with them may lead to financial global exclusion.[5]The Recommendations were initially focused on financial institutions however the FATF in 2001 noticed and decided that other professions were vulnerable to be used by criminals to launder money and hence a need arose to extend application of the recommendations to these other professions which includes legal professionals.[6] This was referred to as the "gatekeeper initiative".

The actual recommendation mandating lawyers as reporting entities came in 2003.[7] These non-financial professions and entities known as designated non-financial businesses and professions (DNFBPs) have

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[1] See P Alldridge, *What went wrong with Money Laundering Law?* Macmillan Publishers, London 2016 at page 11

[2] https://www.fatf-gafi.org>about

[3] H Chitimira and M Ncube "*Towards Ingenious Technology and the Robust Enforcement of Financial Markets Laws to Curb Money Laundering in Zimbabwe*" Potchefstroom Electronic Law Journal 2021(24)-DOI on page 14, http://dx.doi.org/10.17159/1727-3781/2021/v24i0a/0727

[4] P Cummings & P Stepnowsky, *My Brother's keeper: An Empirical Study of Attorney Facilitation of Money Laundering through Commercial Transactions* (August 12,2010) U of Maryland Legal Studies Research Paper No.2010-32 on page 11. https://dx.doi.org/10.2139/ssrn.1658604

[5] Note 3 above on page 15

[6] Ministerial Conference of the G-8 Countries on Combating Transnational Organized Crime (Moscow, October19-20,1999) Communique' paragraph 32.

[7] Financial Action Task Force on Money Laundering Annual Report 2002-2003, www.oecd.org>newsroom

mandatory reporting obligations, record keeping, client due diligence and training of employees in terms of the FATF Recommendations.[8]

The FATF stated that lawyers are vulnerable to complex money laundering schemes due to their ability to easily switch between advising on financial and fiscal matters and establishing trusts and corporate entities and completing property and other financial transactions such as investments.[9] FATF's recommendation twenty-two (22)[10] and twenty-three (23)[11] impose obligations of customer due diligence, record keeping and reporting obligations. Not all legal practitioners are the same as the carry out different activities. A risk-based approach to the obligations imposed by the Recommendations was adopted by the FATF in 2007 and application of the FATF Recommendations will differ depending on a number of factors.[12] The interpretative note to Recommendation 23 in particular paragraph 2 requires that each country determines how the reporting obligations would apply.[13]

Zimbabwe is not a member of the FATF.[14] It is however a member of the Eastern and Southern Africa Anti-Money Laundering Group (ESSAMLG) which is an FATF style regional body.[15] ESAAMLG is a regional body which was set up to promote implementation of the FATF's recommendations with particular focus on regional factors.[16] ESAAMLG became an associate member of the FATF in 2010.[17] Zimbabwe has been a member of ESAAMLG since 1999. Although Zimbabwe is not a member of the FATF, as part of the ESAAMLG Memorandum of Understanding Zimbabwe agreed to adopt and implement the FATF's forty Recommendations and the interpretative notes and glossary on Anti-money Laundering and Combating Financial Terrorism and any other measures to prevent and control money laundering.[18]

The main international instruments which address issues of money laundering are the United Nations Convention Against Transnational

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[8] n 3 above on page 15
[9] FATF report on Money Laundering Typologies 2000-2001.
[10] FATF (2012-2022), International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation, FATF, Paris, France, www.fatf-gafi.org/recommendations.html
[11] n 10 above
[12] See K, Shepherd, *The Gatekeeper Initiative and the Risk Based Approach to Client Due Diligence*, The Review of Banking and Financial Services, Vol 28 no4, April 2012 pages 33-43 on page 37
[13] https://cfatf-gafic.org>documents
[14] www.fatf-gafi.org/countries
[15] eurasiangroup.org/en/fatf-styleregionalbodies
[16] fatf-gavi.org/pages/eastern and southern African regional group
[17] See note 8 above
[18] esaamlg.org/index.php

Organized Crime (Palermo Convention).[19] Zimbabwe signed the Palermo Convention in 2000 [20]but only ratified it in 2007. Zimbabwe further acceded to the 1999 United Nations Convention for the Suppression of Financing of Terrorism in January 2013. Zimbabwe enacted its own laws to be discussed herein, to give effect to the FATF Recommendations and passed the Money Laundering and Proceeds of Crime Act [Chapter 9.24] in June 2013 which law is currently the main piece of legislation on the issue of combating money laundering in Zimbabwe. The other law in Zimbabwe pertaining to anti-money laundering is the Bank Use Promotion and Suppression of Money Laundering Act [Chapter 24:24]. In terms of these laws all lawyers in Zimbabwe without distinction are expected to conduct customer due diligence and have reporting obligations amongst others.[21] Zimbabwe is not yet fully compliant with the FATF Recommendations anti-money laundering compliance obligations and has remained under enhanced monitoring by ESAAMLG.[22]According to the Mutual Evaluation Report of 2016 by ESAAMLG[23], only three(3) suspicious transactions reports had been filed by the DNFBP sector from the real estate sector and not from the legal sector.

1.2 PROBLEM STATEMENT

The position in respect of the compliance level by the legal profession with the Zimbabwe AML regime is low. The reporting obligations are viewed as onerous and make the legal practitioners play the role of the police. This has resulted in some reluctance by legal professionals to comply with the AML measures which has led to non-compliance in some instances or partial compliance with the requirements. There is also some worry regarding the resultant effect that compliance with the obligations brings to the profession for example legal professional privilege. This is viewed as a threat to the continuity of the profession and erosion of the profession's earning capacity.

The Law Society of Zimbabwe (LSZ) as a supervisory body has also initiated a stiff regulatory framework which includes mandatory continuous development trainings of lawyers on money laundering. Law firms are expected to come up with their individual money laundering frameworks for their firms and appoint compliance officers. These requirements place an onerous burden on the firms in

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[19] C Goredema (2005), *Measuring Money Laundering in Southern Africa*, African Security Review 14:4,27-37 on page 27

[20] C Goredema, *Beyond Declarations of Intent: Transnational crime initiatives and legislative reform in Zimbabwe*, African Secutity Review 10:3 78-89.

[21] n 3 above page 15

[22] ESAAMLG-Follow-Up-Report- Zimbabwe April 2021

[23]ESAAMLG (2016) Anti-money laundering and counter terrorist financing measures Zimbabwe Second round Mutual Evaluation Report PARAGRAPH 241. http://www.esaamlg.org/reports/me.php

respect of time and financial resources which was not there prior to the designation of the legal profession as a DNFBP. Law firms are expected to submit monthly reports to the Financial Intelligence Unit (FIU) and lawyers fear the effect that would have on their relationship with their clients if it were to be known by the client that they submitted a report about them to the FIU which may result in them being investigated.

The AML regime seems to be best suited to the financial sector rather than the legal profession and all legal instruments refer to financial institutions. The FATF has stated as highlighted above that this has now shifted as other professions have become vulnerable to money laundering. This means therefore that there is need to address in the AML legal framework, issues which are unique to the legal profession and how they are to be taken into account, for example, the effect of the reporting obligations on lawyer -client privilege. Arguments have been advanced that the core of legal professional privilege is the relationship of trust that exists between a lawyer and his or her client.

1.3 RESEARCH OBJECTIVES

1. To investigate the actual effect of the AML compliance requirements on the practice of law in Zimbabwe particularly the effect of reporting obligations on the legal practitioner client relationship.

2. To increase awareness on the subject of anti-money laundering compliance amongst legal professionals.

3. To make recommendations regarding possible reforms to the law so that we have laws which are in tandem with the reality on the ground thereby promoting compliance rather than hinder compliance.

1.4 RESEARCH QUESTIONS

1. What effect does the anti-money laundering regime have on the legal profession?

2. Does compliance with the reporting obligations breach legal practitioner-client privilege?

3. Is there sufficient awareness on the subject amongst the legal professionals and are the legal professionals aware of what is expected of them?
4. What are the reasons for non-compliance with the anti-money laundering regime?

5. Is there need to amend the anti-money laundering laws, if yes what areas require reform?

1.5 SIGNIFICANCE / IMPORTANCE OF THE STUDY

1. This research will be of immense benefit to the legal professionals in practice as they will have a better understanding of the impact of the AML regime to their practice and determine the effect of the compliance requirements on the legal practitioner-client relationship.

2. The research will also assist the regulators like the LSZ and the FIU to have a better understanding of the reasons behind non-compliance the laws.

3. To address areas which need reform so that there is a regulatory framework which is in tandem with the reality on the ground.

4. To raise awareness to the general public so that they appreciate what the law expects from the lawyers. Once there is awareness in the public the fear that lawyers hold regarding the possible continuity threat to the profession will be reduced and compliance would be increased.

1.6 RESEARCH LIMITATIONS

1. The research aims to investigate the anti-money laundering regime for Zimbabwe through the Money Laundering and Proceeds of Crime Act [Chapter 9:24] (MLPC) and its implications on the legal profession with a comparative analysis of Zimbabwe's laws with the laws of other jurisdictions like the UK, Canada and South Africa.

2. Sample size and time
   Interviews are of law firms in Manicaland Province as all the provinces were not possible due to time constraints. The number of law firms to be interviewed compared to the number of law firms currently in Zimbabwe may prove to be a small sample and would not reflect the true position of the actual impact of AML regime on the legal profession.

1.7 RESEARCH METHODOLOGY

Doctrinal analysis methodology

This research will analyse at the primary and secondary legislation on AML available on the subject in Zimbabwe and other jurisdictions like the UK, Canada, Australia. It will also review soft law documents such as the FATF Recommendations as well as policy documents and reports such as mutual evaluation reports by the ESAAMLG on Zimbabwe, Anti-money laundering statutes, journal articles and books analysing the law in Zimbabwe and other jurisdictions.

Qualitative research

The writer intends to conduct structured interviews of the following;

- Legal Practitioners in practice in Manicaland province of Zimbabwe from a traditional set up and one-man band set up. The legal practitioners will be asked the same set of questions and in the same order. The aim of this method is to have a realistic assessment of the impact of the anti-money laundering laws on legal firms in Zimbabwe. An assessment will be made of the data collected to assess the impact of the laws on their practice and the challenges faced if any in implementing the anti-money laundering obligations.
- LSZ compliance personnel;

  As the supervisor the Law Society of Zimbabwe has first-hand information regarding the fears that the profession has regarding implantation of the reporting obligations.

1.8 LITERATURE REVIEW

Charles Goredema[24]
The writer has written a number of articles on money laundering, the writer's main focus is on money laundering offences and how Southern African countries have embraced the issue of money laundering. The current research will focus on compliance issues and how they affect the legal profession.

Peter Alldridge[25]
In addition to the book in note 1 there is also the book entitled Money Laundering Laws[26]. He writes extensively about the subject and simplifies the subject. The writer gives one the basis understanding of money laundering issues but differs with the current research in

[24] n(s) 11 and 12 above
[25] n 1 above
[26] P Alldridge, *Forfeiture, Confiscation, Civil Recovery, Criminal Laundering and Taxation of the Proceeds of Crime*, Oxford, Hart Publishing 2003

that the research is for Zimbabwe and more in line with compliance as opposed to a general discussion on all aspects of money laundering.

Dr P. Maguchu[27]
Outlines the Zimbabwe AML regime and the gatekeeping initiative. This was the first in depth article addressing the issue of the impact of the designation of lawyers as reporting entities however there have now been subsequent developments in the law since that article including the proper amendment of the Money Laundering and Proceeds of Crime Act and the collaborations which now exist between FIU and the Law Society of Zimbabwe. The current research now intends to develop the issue further in light of the changes and assess whether there have been any changes in the manner in which the AML regime impacts the profession.

1.9 CHAPTER SYNOPSIS

CHAPTER 2: International AML regulatory framework.

Briefly outline the international instruments and FATF recommendations.

CHAPTER 3: Zimbabwe's AML regulatory framework.

Analyze regulatory framework of the Zimbabwe Anti-money laundering Regime, how the regime came about and current position.

CHAPTER 4: Comparative Analysis of the Zimbabwean AML regime with that of UK, Canada and South Africa.

CHAPTER 5: Conclusion

Findings regarding effect of the AML compliance obligations on Legal Practitioners;

Recommendations and

Areas for further research.

[27]P Maguchu, *Money Laundering, lawyers and President's Intervention in Zimbabwe*, Journal of money laundering control, Vol 20 no 2pp 138-149

CHAPTER TWO: INTERNATIONAL ANTI-MONEY LAUNDERING FRAMEWORK

2.1 WHAT IS MONEY LAUNDERING?

There are various definitions of money laundering however a few notable definitions are necessary to capture so that there is an appreciation of what money laundering is. James R. Richards[28] captures the different definitions as follows;

> Money laundering is the process by which one conceals the existence, illegal source, or illegal application of income, and the disguises that income or make it appear legitimate; or……money laundering is the process of taking the proceeds of criminal activity and making these proceeds appear legal; or money laundering is the act of converting funds derived from illegal activities into a spendable of consumable form.

Money laundering is defined by the FATF as;

> The conversion or transfer of property, knowing that such property is derived from a criminal offence, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of such actions; the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to , or ownership of property, knowing that such property is derived from a criminal offence of from an act of participation in such offence.[29]

Doug Hopton[30] postulates that the definitions above are traditional definitions which applied historically but there is need to formulate a modern definition which he advances as that:

> money laundering occurs every time any transaction takes place or relationships formed which involves any form of property or benefit, whether it is tangible or intangible, which is derived from criminal activity.

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[28] J Richards,*Transnational Criminal Organizations, Cybercrime, and Money Laundering; A handbook for law enforcement officers, auditors and financial investigators*, CRC Press LLC,1999, Chapter 2(ll)

[29] K Alexander, (2001),*" The International Anti-Money -Laundering Regime: The Role of the Financial Action Task Force"* Journal of Money Laundering Control, Vol.4 Iss3 pp.231-248 on page 233

[30]D Hopton, *Money Laundering: A Concise Guide for All Businesses*, Gower Publishing Ltd, 2006 page 1

The goal of money launderers is to generate income through illegal sources and legitimize those funds whilst ensuring that they hide the source of those ill-gotten funds. The sources of the funds may be organized crime like drug trafficking, illegal arms sale, insider trading, bribery and fraud.[31]

2.2 HOW DOES MONEY LAUNDERING OCCUR?

Money laundering occurs in so many different ways that a discussion of that cannot be exhaustive however it is necessary to highlight some of the ways in which money laundering occurs. Money laundering can occur even when there is no movement of money for example when there is tax evasion (predicate offence). Failure to declare funds in a bank account for tax purposes makes the funds become proceeds of crime.[32]

Smuggling is another way in which money is laundered. Smuggling of cash in across the border and then depositing that cash and transferring it back to the country of origin is money laundering.[33]

Illegitimate funds may be deposited together with legitimate business money hence it will be mixed together without telling which is legitimate and illegitimate. Purchasing of assets like houses using ill-gotten money is a means of laundering money. Professions other than bankers, for example, estate agents and legal practitioners become vulnerable to money laundering as they are involved in selling immovable property.

The aim of money laundering is to disguise the true source of the funds in-order to reduce or eliminate the risks of seizure and forfeiture and the launderer enjoys that money in its disguised form.[34] The aim of establishing an anti-money laundering regime is to reduce the proceeds of various predicate(underlying) crimes, such as drug trafficking, fraud, tax evasion, bribery, embezzlement, theft and corruption from being laundered.[35] An underlying offence (predicate offence) is usually committed first and the result from that offence becomes the source of the ill-gotten .

2.3 EFFECTS OF MONEY LAUNDERING

Money laundering negatively impacts the economic development of a country. The financial sector's integrity is weakened through money laundering as the public will lose confidence and circumvent the

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[31] V Kumar, *Money Laundering: Concept, Significance and its Impact*, European Journal of Business and Management Vol 4, No 2, 2012
[32] n 30 above
[33] www.britannica.com/topic/money-laundering
[34] n 28 above
[35] D Chaikin U4 BRIEF August 2010 No 4 *International anti-money laundering laws. Improving external accountability of political leaders*, www.U4.no

sector altogether which is detrimental to the normal running of a country. Political stabilities of countries are affected as proceeds of organized crime may be used to finance terrorist activities.[36] Money laundering affects people's lives negatively. The effects are endless however what is clear is that money laundering has to be curbed both at a domestic and international level.

2.4. STAGES OF MONEY LAUNDERING

There are different stages of money laundering namely placement, layering and integration.[37] The introduction of the funds of a criminal activity into the formal system is called placement. This can be done by making large sums into smaller inconspicuous smaller amounts to avoid any red flags arising when the amount is subsequently deposited into, for example, financial institutions.[38]

Simply put, layering is the separation of the money from its source to avoid a paper trail.[39] Example of layering are the purchasing of assets or investments, paying off loan or transferring the funds to other countries.

Integration is when the proceeds of crime are brought back into the formal system as if they are from a legitimate source for use by the money launderer.[40] These stages often overlap as they do not occur in that order because it all depends on how the criminals decide to disguise the funds.[41]

Historically money laundering was more or less confined to financial institutions and the laws and regulations for money laundering were targeted at banking institutions,[42] however that position has since shifted as will be discussed in the discussion to follow. Money laundering control has now been extended to other professionals who were previously not covered like legal practitioners as it is believed that they are vulnerable to money laundering schemes sometimes willingly and sometimes without knowing.[43]

2.5 INTERNATIONAL AND REGIONAL INSTITUTIONS AND POLICIES IN AML AND CFT

2.5.1. The United Nations

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[36] n 31 above
[37] M Levi & P Reuter; *Money Laundering*, Crime and Justice, Vol. 34 No 1 (2006) pp 289-375 on page 311
[38] n 3 above on page 3
[39] hg.org/legal-articles/stages-of-money-laundering
[40] n 3 above page 4
[41] n 34 above
[42] n 19 above
[43] www.sanctions.io/aml-guide-for-legal-firms/

i. The United Nations Convention Against Illicit in Narcotic Drugs and Psychotropic Substances (1988) (VIENNA CONVENTION)

The Vienna Convention was adopted in December 1988 and was the first initiative in the fight against money laundering, in addition to its other mandate of dealing with issues of drug abuse. One of the major contributors to money laundering is from drug trafficking.[44] The Vienna Convention made money laundering an extraditable offence which is why in their AML frameworks countries need to have provision for extradition.[45]Article three (3) 1. (b) (i) and (ii) of the Convention criminalize money laundering.[46] Zimbabwe ratified the Vienna Convention on 30 July 1993.[47]The Convention subsequently gave way to the Palermo Convention.

ii. The United Nations Convention Against Transnational Organized Crime (PALERMO CONVENTION)

The Palermo Convention was adopted by the United Nations General Assembly on through resolution 55/25 and came into force on 29 September 2003.[48] According to Goredema[49] the Convention has two goals which are setting standards for domestic laws and encouraging cooperation amongst states in the fight against organized crime. Article 6 of the convention gives a wide definition of money laundering which is more or less similar to the definition of money laundering by the FATF cited in preceding paragraphs. Unlike the Vienna Convention, in the Palermo Convention, the offence of money laundering is no longer restricted to instances relating to drugs but has been extended to all serious crimes. Zimbabwe became a signatory to the convention on 12 December 2000 and ratified the Convention on 12 December 2007.[50]

iii. United Nations Convention Against Corruption

This Convention was established to address the challenges of corruption and it covers many different forms of corruption such as bribery. Bribery is one of the predicate offences in money laundering hence the Convention has an impact on

[44] n 3 above page 17
[45] n 30 page 7
[46] United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988
[47] www.treaties.un.org/Pages/ViewDetails.aspx?
[48] www.unodc.org/unodc/en/orgarnisation
[49] n 20 above page 79
[50] n 46 above

money laundering prevention. Zimbabwe signed the Convention on 20 February 2004 and ratified it on 8 March 2007.The Convention provides for asset recovery where assets are returned to their rightful owners.[51]Zimbabwe has implemented these provisions on asset recovery which are through the Money Laundering and Proceeds of Crime Act [Chapter] in line with the international initiative to end "Safe Havens for Corrupt Funds."[52] This Convention complements the Palermo Convention.

2.5.2. African Union Convention on Preventing and Combating Corruption

This Convention was adopted on 11 July 2003.The Convention was adopted for the prevention corruption and laundering of proceeds of corruption. Zimbabwe ratified the convention on 17 December 2006. Article 6 of the Convention states that:

State Parties shall adopt such legislative and other measures as may be necessary to establish as criminal offences;

a) The conversion, transfer or disposal of property, knowing that such property is the proceeds of corruption or related offences for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the offence to evade the legal consequences of hir or her action.
b) The concealment or disguise of the true nature, source, location, disposition, movement, or ownership of or rights with respect to property which is the proceeds of corruption or related offences.
c) The acquisition, possession or use of property with the knowledge, at the time of receipt, that such property is the proceeds of corruption or related offences.

2.5.3 International Bar Association (IBA)

The IBA is an association of International legal practitioners, bar associations and law societies.[53] The IBA has developed interest in AML/CFT compliance obligations for lawyers and formed a committee

[51] www.unodc.org/en/treaties/CAC
[52] C Matumbi, *Combating Corruption Through Effective Criminal Justice Practices*, International Co-operation and Engagement of Civil Society: The Zimbabwean Perspective, Resource Material Series 107
[53] https://www.ibanet.org

to focus on the regulation of lawyers called The Regulation of Lawyer's Compliance Committee.[54] Within the Regulation of Lawyer's Compliance Committee is a subcommittee called the Anti-Money Laundering and Sanctions Experts Subcommitte which focusses on anti-money laundering legislation and its impact on lawyers.[55] The Anti-Money laundering Experts Subcommittee made notable submissions towards consultations held by the FATF in October 2021 for amendment of the 18-23 FATF 40 Recommendations and subsequent amendments.[56]

2.5.4. The Egmont Group Financial Intelligence Units (The Egmont Group)

The Egmont group is an international organization that facilitates exchange of intelligence sharing by different FIUs. [57] FIUs are required to share information on money laundering intelligence and associated predicate crimes.[58]ESAAMLG is a member of the Egmont Group. The FATF interpretive note to recommendation 29 states that the Egmont Group's documents provide important guidance on how FIUs should function.[59]

2.5.5. The International Monetary Fund (IMF) and the World Bank

The IMF is an international financial organization which formed what is now known as the World Bank (International Bank for Reconstruction and Development-IBRD).[60] It is a lender of last resort. The IMF helps to improve the economies of nations and assist in putting in place international policies against money laundering and terrorism financing. It contributes to the enhancement by countries of their AML/CFT frameworks and makes contributions in the work of the FATF and other organizations.[61]

2.5.6. Financial Action Task Force (FATF).

The FATF is an international organization which was established in 1989 with the aim of setting the minimal standards for anti-money laundering compliance. The purpose amongst others being to reduce financial crime.[62]The FATF members are expected to enact domestic legislation with, anti-money laundering laws and initiatives based on

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[54] n 53 above
[55] n 53 above
[56] n 53 above
[57] https://egmontgroup.org
[58] n 57 above
[59] https://egmontgroup.org/about/financial-intelligence-units/
[60] n 28 chapter 12
[61] imf.org/en/About/Factsheets
[62] n 28 Chapter 12

its forty (40) Recommendations. The Recommendations were first published in 1990 and their focus was on addressing money laundering through drug trafficking. The Recommendations were revised in 1996, 2001,2003 and 2012 to take into account changes in money laundering trends.[63] In 2001 the amendments to the Recommendations extended the FATF's mandate to include issues of terrorist financing and created the initial eight special recommendations which later became nine (9).[64] In particular the amendments brought about the following;

i. Introduction of more predicate offences;
ii. Mandatory Reporting of suspicious transactions;
iii. Non-financial institutions were designated as reporting entities for example legal practitioners;
iv. Issues of cyberpayment money laundering;
v. placement level enforcement.

As part of its mandate the FATF studies the methods and trends used by money launderers called typologies. Those typology reports are produced for everyone annually. In line with those changing trends in money laundering the FATF has also published explanatory materials and interpretive notes on some of the Forty Recommendations alongside amendments made for example the amendments made to recommendations 18-23 in October 2021.[65] This means that policymakers and regulatory authorities also need to keep track of these amendments in order not to be left behind with current trends. Typology reports are made available to appropriate authorities and the public in general in order be aware of new emerging threats and find ways of preventing them. Those anti-money laundering laws which were promulgated using the initial Forty Recommendations would require amendment. In addition, the FATF on 23 October 2008 produced a Risk Based Guide for legal practitioners which is meant to clarify the manner in which the Recommendations should apply to the legal profession.[66] There has been big debate, ever since the designation of legal practitioners as reporting entities by the FATF worldwide, regarding whether or not the designation was justified. Some countries have complied successfully with the Recommendations, for example the United Kingdom whilst others have and are still resisting or partially complying.

[63] https://www.fatf-gafi.org/publications/fortyrecommendations/documents
[64] n 64 above
[65] www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/Explanatory-Materials-R18-R23.pdf
[66]FATF, Risk Based Approach Guidance for Legal Professionals

2.6 RATIONALE FOR INCLUDING LAWYERS AS REPORTING ENTITIES BY THE FATF

Legal practitioners and other professionals were noted by the FATF as being vulnerable to being used by their clients to launder money due to some of the transactions they undertake. Some of the laundering methods identified were:

- client accounts misuse;

- real property purchases;

- trusts and company creation;

- trusts and company management;

- setting up and management of charities.[67]

The report[68] confirms that not all legal practitioners are actively involved in providing the services listed as being methods used to launder money, however it was noted that money launderers were attracted to legal professionals as they believe that the respect and professionalism which comes with the profession protects them from probing by police and the perception that all transactions with a legal practitioner are covered under the legal professional privilege without exception hence the report concluded that legal professionals were indeed vulnerable to money laundering.

It was further noted that due to the wide range of economic activities carried out by legal professionals it becomes advantageous to money launderers to use professionals like lawyers. Risk-based assessments by authorities of different jurisdictions taking into account their circumstances are necessary.[69] This means that there should not be an umbrella application of the forty Recommendations by different countries but a risk assessment is necessary by the policy makers and regulatory authorities to see what would be suitable to their particular situation.

2.7. FATF-STYLE REGIONAL BODIES(FSRBs)

There are eight FSRBs which have been established to circulate to their particular regions the international standards on combating money laundering, financing of terrorism and proliferation.[70] These bodies conduct evaluations of the AML/CFT regimes of member states, recommend areas which can be improved and they also assess

[67] FATF report-Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals, June 2013
[68] n 68 above
[69] n 68 above
[70] www.eurasiangroup.org/en/fatf-style-bodies

the methods of money laundering being employed in their respective regions.[71] These FATF style bodies are:

- Asia/Pacific Group on combating money laundering (APG);
- Caribbean Financial Action Task Force (CFATF);
- Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism of the Council of Europe (MONEYVAL);
- Eurasian Group (EAG)
- Eastern and Southern African Anti-Money Laundering Group (ESAAMLG);
- Inter Governmental Action Group against Money Laundering in West Africa (GIABA)
- Middle East & Northern Africa Financial Action Task Force (MENAFATF) AND
- Task Force on Money Laundering in Central Africa (GABAC).

2.8. EASTERN AND SOUTHERN AFRICAN ANTI-MONEY LAUNDERING GROUP (ESAAMLG)

As already highlighted before Zimbabwe has been a member of ESAAMLG since 1999. ESAAMLG came into being in Arusha, Tanzania in August 1999 with the aim of fighting money laundering through implementation of the then Forty plus Nine FATF Recommendations, in light of regional factors.[72] ESAAMLG became an associate member of the FATF in June 2010.[73] Based on the Forty plus Nine Recommendations, a memorandum of understanding was created which member states like Zimbabwe have to abide by.[74]

2.9. THE FORTY RECOMMENDATIONS OF THE FATF

It is now pertinent to now look at the Forty Recommendations which impose obligations on legal practitioners.

Recommendations 1-4

These recommendations require countries to create a legal framework for money laundering and terrorist financing and for countries to identify the risks associated with their country, countries are expected to cooperate with each other in the fight against money

[71] n 71 above
[72] www.fatf-gafi.org/pages/easternandsourthernafricaanti-moneylaunderinggroupesaamlg.html
[73] n 74 above
[74] n 75 above

laundering through the exchange of information, criminalization of money laundering in terms of the Vienna and Palermo Conventions and adoption of legislative meas2ures similar to those in the Vienna and Palermo Conventions regarding the freezing and confiscation of laundered property of corresponding value, proceeds of money laundering, predicate offences and terrorist financing. [75]

Recommendation 3

Requires countries to criminalize money laundering on the basis of the Vienna and Palermo Conventions.[76]

Recommendation 10: Customer due diligence

This Recommendation although it does not specifically mention its application to legal practitioners in the Recommendation itself, its application to Designated Non-Financial Businesses and Professions (DNFBPs) is specifically mentioned in Recommendation 21. It pertains to the need to conduct customer due diligence (CDD). The CDD measures to be taken are as follows:

a. customer identification and verification on the basis of reliable independent source documents, data or information;
b. Beneficial owner identification, in respect of legal persons and arrangements this includes understanding the ownership and control structure of the customer.
c. obtaining information on the purpose and intended nature of the business relationship;
d. Conducting ongoing due diligence on the business relationship including the source of funds and ant attendant risks.[77]

The recommendation further requires each reporting institution to apply CDD measures on a risk-based approach. The interpretive note to this rule deals with this aspect of CDD measures in greater detail and highlights the customer risk factors which should be considered as follows:

(a) Customer risk factors
- Unique circumstances should be investigated for example geographic distance between the parties
- Non-resident customers;
- Legal persons or arrangements that are personal asset-holding vehicles;

[75] FATF (2012), International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation, FATF, Paris, France, www.fatf-gafi.org/recommendations.html
[76] n 77 above
[77] n 77 above

- Companies that have nominee shareholders or shares in bearer form;
- cash intensive businesses;
- complex ownership business structures.

(b) Country or geographic risk factors
- AML/CFT non-compliant countries;
- Countries subject to sanctions, embargos or similar measures issued by, for example, The United Nations.
- corruption prone countries;
- Countries which have been identified by credible sources as providing funding for terrorist activities.

(c) Product, service, transactions or delivery channel risk factors
- Private banking;
- Anonymous transactions;
- Non-face-to-face business relationships or transactions;
- Payment received from unknown or un-associated third parties.[78]

If an institution fails to conduct these measures it is required not to proceed to conduct any business with that client. The requirements apply to both new and existing customers.

Recommendation 11: Record keeping

This recommendation relates to record keeping. Institutions are expected to keep records of a transaction, client risk profiling and CDD measures for a minimum of five (5) years.[79]

Recommendation 12: Politically Exposed Persons

Institutions are required in terms of this recommendation to conduct enhanced due diligence when dealing with Politically Exposed Persons (PEPs).[80]

Recommendation 15: New technologies

[78] n 77 above, interpretive note to recommendation 10
[79] n 77 above
[80] n 77 above

Institutions are expected to identify money laundering risks associated with new technologies.[81] With the advent of internet banking and non-face-to-face transactions it has become difficult to conduct due diligence hence there is need to keep up to date with technological advancements in order to prevent money laundering.

Recommendation 17: Reliance on third parties

This recommendation allows a third party to rely on CDD measures conducted by a third party (financial institution or DNFBPs who is subject to CDD and record keeping requirements in line with Recommendations 10 and 11 and has an existing relationship with the client.[82]

Recommendation 18: Internal controls and foreign branches and subsidiaries

In terms of this Recommendation financial institutions should ensure that their foreign branches and majority owned subsidiaries apply AML/CFT measures consistent with the home country.

According to recommendation 23 this recommendation also applies to DNFBPs however the application of this Recommendation to legal practitioners without any distinction becomes problematic as highlighted by the IBA AML and Sanctions Subcommittee in its submissions to the FAFT through its participation in the FATF private sector consultation on planned changes to Recommendations 18 and 23 in September 2021. In its submissions the IBA highlighted the differences between law firms and financial groups and how a 'one size fits all' approach to the application of recommendation 18 was problematic. The FATF adopted the submissions and published explanatory materials alongside the amendments.[83] Through the explanatory materials the FATF has clarified the requirements of recommendation 18.[84] This shows how important it is for the legislators to keep track of amendments as they seek to improve the effectiveness of AML/CFT systems.

Recommendation 20: Reporting of suspicious transactions

Reasonable suspicion that funds are proceeds of criminal conduct must be reported to the financial intelligence unit (FIU). According to

[81] n 77 above
[82] n 77 above
[83] n 66 above
[84] n 66 page 4

the interpretive note to this recommendation the criminal act referred to are the predicate offences and it is a mandatory requirement.[85]

Recommendation 21: Tipping-off and confidentiality

Any institution which would have made a tip off is protected by law if they report a suspicious transaction in good faith to the FIU even if they did not know the underlying criminal activity. Further to that any institution which would have made a report is not required to disclose that fact.[86]

Recommendation 22 DNFBPS and customer due diligence

This recommendation and recommendation 23 are the ones which directly deals with DNFBPs and it is pertinent that we capture the actual requirements of the recommendations as follows:

The customer due diligence and record-keeping requirements set out in Recommendations 10,11,12,15 and 17, apply to designated non-financial businesses and professions (DNFBPs) in the following situations:

(d) Lawyers, notaries, other independent legal professionals and accountants- when they prepare for or carry out transactions for their client concerning the following activities:

- real estate purchases;

- management of client money, securities or other assets;

- bank, savings or securities accounts management;

- organizing contributions for the company creation of management

- legal persons or arrangements creation and management.[87]

Recommendation 23; DNFBPs and other measures

This recommendation states that:

[85] n 77, interpretive note to recommendation 20.
[86] n 77 above
[87] n 77 above

The requirements set out in Recommendation 18-21 apply to all designated non-financial businesses and professions, subject to the following qualifications:

(1) Suspicious transaction reporting does not apply to situations covered by professional privilege for lawyers, notaries, other independent legal professionals and accountants acting as independent legal professionals,
(2) Individual countries are free to determine the matters that would fall under legal professional privilege or professional secrecy. Information normally regarded as being covered under professional privilege is information lawyers, notaries or other independent legal professionals receive from or obtain through one of their clients;(a) in the course of ascertaining the legal position of their client, or (b) in performing their task of defending or representing that client in litigation proceedings.
(3) STR reports may be made to the appropriate self-regulatory organizations, provided that there are appropriate forms of cooperation between these organizations and the FIU.
(4) dissuade a client from engaging in an illegal activity by a lawyer or other professional, does not amount to tipping-off.

Recommendations 28 and 29

These recommendations relate to the establishment of a supervisory body and Financial Intelligent Unit respectively. The supervisory body is mandated with the task of monitoring and enforcement of the AML regulatory regime. For legal professionals in Zimbabwe the supervisory role lies with the Law Society of Zimbabwe.

As briefly highlighted in the preceding paragraphs there has been huge debate and in some instances resistance worldwide regarding the justification of designating lawyers as reporting entities as provided for in the recommendations that have been cited. Some jurisdictions have resisted incorporating these recommendations into their national legislation on the basis that the requirements infringed on the independence of the profession and placed onerous burdens on the profession but the majority seem to be moving towards compliance with the recommendations. The reasons advanced by legal practitioners generally as the reasons causing an impediment from compliance with the recommendations are advanced by Ping He[88],as the conflict with the privilege of confidentiality when it comes to suspicious transaction reporting and the client's right to privacy,

[88] P He, 2006, '*Lawyers, notaries, accountants and money laundering",* Journal of Money Laundering Control, Vol 9 Issue 1 pp 62-70

the obligations may make lawyers who receive proceeds of money laundering guilty of the offence of money laundering since possession of proceeds of crime is an offence. Lawyers avoid conducting client due diligence to avoid knowing the source of the funds. The lawyers' way of practicing is therefore affected by the reporting obligations which resultantly affect the lawyers' earning capacity. On the other hand, Ping He[89], states that if there are no reporting obligations imposed on professionals the professionals are indeed vulnerable to money laundering hence his conclusion is that it is inevitable that lawyers become gatekeepers in the fight against money laundering particularly when they attend to economic transactions on behalf of their clients.

[89] n 90 above

CHAPTER THREE: ZIMBABWE'S ANTI-MONEY LAUNDERING REGULATORY FRAMEWORK

3.1 CHAPTER INTRODUCTION

The Anti-money laundering framework for Zimbabwe is established through the Money Laundering and Proceeds of Crime Act [*Chapter9:24*] (MLPC) and other legislation, directives and circulars from the FIU which complement it. Before we can discuss the MLPC Act, it is pertinent to discuss the development of Zimbabwe's AML regime.

3.2 DEVELOPMENT OF AML REGIME IN ZIMBABWE

3.2.1 Zimbabwe has recognized issues of money laundering since the 1990s through the promulgation of the **Serious Offences (Confiscation of Profits) Act, [*Chapter 9:17*][90],** which came into effect on 1st April 1991. The Serious Offences (Confiscation of Profits) Act's objectives are to provide for confiscation of profits of crime. Section 63[91] of the Act established the crime of money laundering. Under the interpretation section, section 2[92] , money laundering offence was defined as "the offence of money laundering referred to in section sixty-three". Section sixty-three referred to money laundering as:

(a) Engagement in a transaction in or outside Zimbabwe, which involves the removal into or from Zimbabwe, of money or other property with the proceeds of crime; or
(b) Receiving, possessing, concealing, disposing of, bringing into or removing from Zimbabwe, money or other property which is the proceeds of crime;

knowing or reasonably knowing that the money or other property was derived or realized, directly or indirectly, from the commission of an offence.

(1) A person found guilty of money laundering will be liable-
    (a) to a fine not exceeding level twelve or twice the value of the property, whichever is the greater, or to imprisonment for a period not exceeding fifteen years or to both such fine and such imprisonment;

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[90] n 20 above page 80
[91] Serious Offences (Confiscation of Profits) Act, [*Chapter 9:17*]
[92] n93 above

(b) In respect of a body corporate, to a fine not exceeding level fourteen or three times the value of the property, whichever is greater.

A reading of what the Act[93] defines as money laundering at the time was more of the predicate offence as what was criminalized was the act of removing from Zimbabwe and concealing the proceeds of crime. The general definition of money laundering which was discussed afore is actually the conversion of dirty money (acquired from a criminal act) into clean or legitimate money which is then used to purchase assets, etc. There was therefore need to refine the definition in order to address the issue of money laundering. No other money laundering predicate offences are included in the Act. The Act however does define in section 2 a specified offence as "a money laundering offence relating to the proceeds of a serious narcotics offence".[94]The Act empowers the police to apply for confiscation and forfeiture orders in respect of any proceeds of crime.[95]

3.2.2. **Prevention of Corruption Act [*Chapter 9:16]***

As highlighted before in the preceding discussion, Zimbabwe is a signatory and has ratified a number of international and regional instruments which are meant to fight corruption namely, the United Nations Convention Against Corruption (UNCAC), United Nations Convention against Transnational Organized Crime (UNTOC) and The African Union Convention on Preventing and Combating Corruption (AUCPCC). Having ratified those instruments Zimbabwe had to promulgate domestic legislation to give effect to theses international and regional instruments. Corruption is one of the major predicate offences or money laundering.

Amongst the notable forms of economic crimes is corruption, which has a link to money laundering. Other economic crimes which manifest themselves in money laundering in Zimbabwe, are fraud, tax evasion, externalization of foreign currency, embezzlement and insider dealing.[96] ESAAMLG[97], identified crimes such as, drug trafficking, illegal trade and smuggling of precious minerals, metals and stones, parallel market activities involving foreign currency and commodities by individuals and companies, corruption, misrepresentation of quality, nature and value of exports and armed

[93] n 93 above
[94] Section 2 of the Serious Offences (Confiscation of Profits) Act
[95] Part II and III of the Serious Offences (Confiscation of Profits) Act
[96] E. Makodza, *Measures to Combat Economic Crime,* www.financialcrimenews.com
[97] Mutual Evaluation/Detailed Assessment Report, Anti-Money Laundering and Combating the Financing of Terrorism, Zimbabwe, August 2007 page 32 paragraph 93

robbery and theft of motor vehicles as serious crimes in Zimbabwe. One of the conclusions by ESAAMLG was that money was being laundered through the banking system and purchasing of assets hence lawyers were found to be vulnerable to money laundering.[98]

The Prevention of Corruption Act [*Chapter9:16*] was promulgated and came into effect on the 7th February 1986. In terms of section 6 of the Prevention of Corruption Act[99] , the Minister may declare a person to be a specified person and cause an investigation into any claims of dishonesty or corruption. This is a positive step in the fight against corruption however the Act is limited in its application as it does not apply to international corruption. In terms of Recommendation 21 of the FATF if one makes a tip off regarding a criminal offence, they are supposed to be protected by the law from being victimized and one such protection is found in section 14 (2) of the Prevention of Corruption Act[100] That section makes it an offence to victimize whistleblowers.

Part II of the Act is specifically assigned to cater for prevention of corruption and penalizes any person who is caught soliciting or accepting a bribe. A person found guilty of breaching that provision would be liable to a fine and imprisonment of up to 20 years or both. The Prevention of Corruption Act is therefore a step in the right direction in the fight against money laundering as it criminalizes money laundering and any corrupt practices which ultimately bring about money laundering. One such practice is bribery which is carried out by public officials particularly in public procurement. Public sector procurement is big business. This is when government acquires goods and services and sells and lets assets.[101]

In 2012 Zimbabwe had a national budget of 3.4 billion United States Dollars and of that amount 800 million United States Dollars was set aside for capital expenditure, which equated to 24% of the budget.[102]Corruption is therefore rife in public procurement which impacts on increased money laundering hence the Prevention of Corruption Act needs to be strengthened in order to prevent money laundering. According to Chitimira and Ncube Zimbabwe's economy started to go down from the 1990s due to a number of factors amongst them the land reform program.[103]There was hyper-inflation and cash shortages, the banking sector collapsed which led to the public losing confidence in banks and an informal sector developed outside the

[98] n 99 above, paragraph 5 of the executive summary.
[99] Chapter 9:16
[100] Chapter 9:16
[101] Section 2(1)(b) of the Public Procurement and Disposal of Public Assets Act [Chapter]
[102] 2012 National Budget Statement
[103] n 3 above page 3

normal banking sector.[104] Zimbabwe has remained a cash society to date which results in high cases of money laundering. Between 2003 and 2006 several banks were closed due to their involvement in money laundering activities.[105]

3.2.3. Bank Use Promotion and Suppression Of Money Laundering Act [*Chapter 24:24*]. (BUPSML)

This Act was brought in to try and address the collapse of the banking sector in the 2000s. BUPSML came into force on 17 February 2004 and the preamble captured the objectives of that act and summarized as follows:

Promoting the use and suppressing abuse of the banking system; identification of all serious crimes including drug trafficking, tracing, freezing, seizure and eventually confiscation of proceeds of crime; establishment of a Bank Use Promotion and Suppression of Money Laundering Unit; requiring financial institutions and cash dealers to put in place measures to assist in combating money laundering.

Section 2 of BUPSML defines money laundering as "any act, scheme, arrangement, device, deception or artifice whatsoever by which the true origin of proceeds of any serious offence is sought to be hidden or disguised".

BUPSML also designated lawyers as reporting entities amongst other professions[106] and set up a Financial Intelligence Inspectorate and Evaluation Unit (FIIE Unit).[107] Reporting entities were supposed to conduct customer due diligence and to report suspicious transactions.[108] In short, the BUPSML was already giving effect to the FATF Forty Recommendations as way back as 2004 after the coming into effect of those requirements, however what was lacking was the enforcement of those provisions. BUPSML also incorporated some of the provisions of the Serious Offences (Confiscation of Profits) Act[109] on the confiscation of proceeds of crime. Both the Vienna and Palermo Conventions provide for the confiscation and freezing of proceeds of crime.[110] The reasoning behind it is that criminals should not be left to benefit from their illicit activities.

3.2.4. Criminal Procedure and Evidence Act [*Chapter 9:07*]. (CP&EA)

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[104] n 105 above
[105] B Fundira, *Money Laundering in Zimbabwe, Confronting the Proceeds of Crime in Southern Africa*, Chapter 3.
[106] First Schedule to the BUPSML Act.
[107] n 107 above
[108] n 107 above
[109] Chapter 9:17
[110] N Kaye, Dans REVUE INTERNATIONALE DE DROIT PENAL 2006/1-2 (VOL. 770 PAGES 323-331

Sections 58-63 of the CP&EA apply to issues of forfeiture of the proceeds of criminal acts. An application would be made to court to grant a forfeiture order by the Attorney General's office. Further in terms of section 365(1) a court may also make an order for restitution of the proceeds of criminal acts to the true owner. This is in line with the provisions of the Vienna and Palermo Conventions and recommendations 3-4 of the FATF.[111]

3.2.5. Extradition Act [Chapter 9:08] And Criminal Matters (Mutual Assistance) Act [*Chapter 9:06*].

The provisions of the Extradition act give effect to the FATF recommendation 2 which calls for cooperation amongst countries in the fight against money laundering. The Criminal Matters (Mutual Assistance) Act[112] also gives effect to the requirement for cooperation and mutual assistance. Article 18 of the Palermo Convention provides for the necessity of mutual assistance amongst states. The Act list the mutual assistance which can be provided as follows;

-obtaining of evidence, documents and other articles

-supplying requested documents and other records

- locating and identifying witnesses or suspects

-executing search or seizure requests

-arrangements the giving of evidence or assistance in investigations by witnesses

-forfeiting or confiscating the property in respect of offences

-pecuniary penalties recovery

-interdicts or freezing of assets subject to forfeiture or confiscation for penalties imposed

-locating property subject to forfeiture penalties.

3.2.6. The Criminal Law Codification and Reform Act [*Chapter 9:23*] (The Code)

This is one of the Acts used to prosecute money laundering offences and predicate offences like theft, fraud, bribery and corruption. Chapter ix of the Code is dedicated to the issues of bribery and corruption.

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[111] n 77 above
[112] Chapter 9:06

3.3 DOMESTIC INSTITUTIONS WHICH ASSIST IN THE FIGHT AGAINST MONEY LAUNDERING.

When the Constitution came in in 2013 it established a number of entities which are meant to fight corruption in terms of section 254.[113] It is pertinent to discuss the roles played by these entities' implementation and enforcement of the AML legislation and giving effect to Zimbabwe's commitments under the United Nations Convention against Corruption and African Union Convention against corruption.

3.3.1. Zimbabwe Anti-Corruption Commission. (ZACC)

ZACC is the main corruption prevention body in Zimbabwe. It was established as an independent commission in terms of section 254 of the Constitution specifically to fight corruption. ZACC has investigative powers. In terms of section 321 (1)[114], the Ant-Corruption Commission Act[115] was promulgated giving ZACC additional functions. ZACC does not have power to prosecute the cases it investigates and they are the National Prosecuting Authority (NPA) for prosecution. One of the challenges which ZACC has been facing is incapacitation and the need to decentralize to ensure wide coverage.

3.3.2. National Prosecuting Authority (NPA)

The NPA is established under Chapter 13[116] to prosecute matters on behalf of the state. Matters referred to it by the investigative bodies like the police and ZACC are prosecuted through the NPA. The challenge which the NPA is facing is incapacity and low remuneration of its officers which makes them vulnerable to bribery by offenders in order to complement their incomes. There is also need to train the staff on money laundering issues so that they are better equipped to prosecute these economic crimes which can tend to be complex.

3.3.3. The Judiciary and the Courts

The judiciary is there to adjudicate on different matters brought before them pertaining to offences committed in terms of the Criminal Code which offences include money laundering and corruption offences. Specialized Anti-corruption courts have been

[113] Constitution of Zimbabwe 2013
[114] n 115 above
[115] Chapter 9:22
[116] n 115 above

established in the High Court and Magistrates Court for tackling criminal cases. This is meant to ensure that offenders are prosecuted for their transgressions and the court has the power to issue forfeiture orders pertaining to any proceeds of crime or the freezing of assets of crime.

The challenge also being faced by the courts is the issue of delays in prosecuting matters hence the public loses confidence in the processor that matters may end up not being prosecuted successfully due to delays. Another issue is lack of resources which may lead to acceptance of bribes by court staff.[117]

3.3.4. The Zimbabwe Republic Police (ZRP)

The ZRP is responsible for enforcing the law, law and order maintenance and investigating cases of money laundering and terrorism financing. Again, there is a challenge of low remuneration and lack of resources in addition to lack of appreciation of the offence of money laundering which leads to poor investigations and ultimately failure to enforce the AML legislations.

3.3.5. Zimbabwe Revenue Authority (ZIMRA)

One or the responsibilities of ZIMRA amongst others is to man Zimbabwe's borders. As highlighted above issues of smuggling are rampant in Zimbabwe. Smuggling of cash across borders, precious metals and drugs is high but it has proceeded undeterred. These are some of the forms in which money is laundered and there is need to capacitate ZIMRA to curb these practices and make the borders less porous. ESSAMLG[118] rated Zimbabwe's institutions as largely compliant from Partially compliant after some of the units like the ZRP undertook enhanced specialized functions for example, the Asset Forfeiture Unit, Counter Terrorism Unit, Police Anti-corruption Unit amongst others. There is therefore constant need to keep abreast of changes in the money laundering typologies and adapt the AML regime to meet those changes.

3.3.6. Law Society of Zimbabwe (LSZ)

The LSZ is an independent body in Zimbabwe responsible for registering all lawyers in Zimbabwe and regulating their conduct. Every lawyer has to register with the LSZ whether in private

[117] ESAAMLG Mutual Evaluation Report for Zimbabwe September 2016 paragraph 72
[118] Anti-money laundering and counter-terrorist financing measures Zimbabwe ,7th Enhanced Follow-up Report &Technical Compliance Re-Rating April 2021

practice or commerce. It is a self-regulating body and responsible for the following;

- Setting up trainings for the continuous development of all legal practitioners;
- Attending to disciplinary issues;
- Controlling admission of new lawyers into the profession.[119]

In line with FATF Recommendation 28 the LSZ was appointed as the supervisory authority for the legal sector.[120]the role of the LSZ is to ensure compliance by the legal practitioners of AML/CFT requirements and come up with supervision and compliance programmes.[121] As a supervisory authority the Law Society is expected to work together with the FIU in coming up with training programs and enforcing compliance. To date the LSZ has come up with guidelines to assist legal firms in implementing the requirements of the AML/CFT legal framework. Several policies and guidelines were put in place after the LSZ entered into a Memorandum of Understanding (MOU) with the FIU for implementation of the AML/CFT reporting requirements as stipulated in the MLPC and foster cooperation. The LSZ has to date pit in place Risk- Based Practice Guidelines for law firms, Information Communication and Technology (ICT) Policy & Cyber-security Risk Mitigation Guide for Law Firms in line with Recommendation 15 of the FATF to keep up to date with new technologies which criminals may use to launder money.

3.3.7. Financial Intelligence Unit (FIU)

An FIU which is a special agency established to collate financial information regarding money laundering and terrorist financing.[122] The FIU's role is to receive, analyze and disseminate to competent authorities' suspicious activity reports, information and data to combat money laundering. FIUs are also expected to be independent in order for them to achieve their role effectively.

The FIU is the principal organ in the implementation of the AML/CFT regime in Zimbabwe. It was established in terms of the MLPC[123] The FIU's responsibilities are amongst others, ensuring compliance with the AML/CFT requirements as prescribed in the MLPC Act, having the oversight role over all DNFBPs[124] and foster cooperation with competent supervisory authorities such as the

[119] www.lawsociety.org.zw/about-lsz
[120]Section 3 (3) of MLPC and First Schedule to the MLPC Act, Part II (13)
[121] Section 3(3) of the MLPC Act TH
[122] www.imf.org/external/np/le/aml
[123] Section 6A of MLPC Act
[124] Section 3 (3) of MLPC Act

LSZ. That cooperation resulted in the MOU which was mentioned above. The MOU was signed in March 2019 to define the relationship between the FIU and LSZ. The MOU sets out the instances when legal practitioners are required to report to the FIU which instances are defined as designated transactions or services.[125] The services are listed in Section 2 of the MOU as:

i) The buying and selling of real estate;
ii) Management of client money;
iii) Management of bank savings or securities accounts;
iv) Organization of contributions for the creation, operation or management of legal persons;
v) The creation, operation or management of legal persons or arrangements and buying and selling of business entities.[126]

It is only when a legal practitioner is engaged in a designated service or transaction that the legal practitioner is bound to make reports and not in any other instance. In terms of the MOU the AML/CFT obligations legal practitioners must comply with are;

i) Customer due diligence before establishment of a new business relationship and ongoing due diligence for existing clients;
ii) Screening clients against the United Nations sanctions lists;
iii) Reporting obligations in respect of cash transactions and suspicious transactions.

The FIU has authority to issue directives in the to ensure that there is compliance by the reporting entity.[127] The FIU issued in January 2021 entitled, Guidance to Financial Institutions and DNFPs on the Risk Based Approach to Implementation of Anti-money Laundering and Combating of Terrorism Obligations (hereinafter called the FIU Guide). Annexure D to the FIU Guide lists a number of possible red flags or indicators of suspicious transactions however the ones likely to apply to legal practitioners are the ones which are listed hereunder:

i) High number of transactions for buying and selling of security without justifiable reason;
ii) Selling of securities at a loss;
iii) Holding securities for a very short period;

[125] Section 2 of MOU
[126] n 125 above
[127] Section 3 (4) of MLPC Act

iv) Where verification of the identity of the client proves difficult;
v) Unusual concern for secrecy by a client;
vi) Excessive use of nominees;
vii) Reluctance to disclose source of funds;
viii) Granting of wide range of powers in Powers of Attorney.[128]

3.4. Current AML/CFT Regulatory Framework for the Legal Profession in Zimbabwe

Zimbabwe introduced the Money Laundering and Proceeds of Crime Act (MLPC)[129] in 2013 in a bid to harmonize its laws relating to money laundering. The MLPC was brought in to address the shortcomings in the AML regime so that it is in line with the FATF Recommendations[130]. Firstly, the MLPC's preamble states the objectives of the Act as;

> For the suppression of the financial system abuse and enabling identification of the unlawful proceeds of all serious crime and terrorist acts, tracing, freezing, seizure and confiscation of those criminal proceeds; repealing the Serious Offences (Confiscation of Profits) Act [Chapter 9:17]; amendment of the Criminal Matters (Mutual Assistance) Act [Chapter 9:06], the Bank Use Promotion and Suppression of Money Laundering Act [Chapter 24:24], the Building Societies Act [Chapter 24:02] and the Assert Management Act [Chapter 24:26].[131]

The MLPC came into effect on 28 June 2013 and defined and criminalized money laundering and terrorist financing. Section 8[132] defines money laundering as

(1) Conversion or transfer by any person of property-
  (a) acquired through an unlawful activity knowingly, believing or suspecting that it is the proceeds of crime; and
  (b) concealment or disguising the illicit origin of proceeds of crime for the purposes of evading the legal consequences of such crime.
(2) The offence of concealing or disguising the true nature, source, location, disposition, movement, or ownership of or rights with respect to property, knowing or suspecting that such property is the proceeds of crime.

[128] FIU Guide pages 45-48
[129] Chapter 9:24, Act NO.4 of 2013
[130] n 20 page 13
[131] Preamble to the MLPC Act
[132] MLPC Act [Chapter 9:24]

(3) acquiring, using or possessing property knowingly or suspecting at the time of receipt that such property is the proceeds of crime…….

The MLPC goes further to criminalize terrorist financing which offence is defined as directly or indirectly providing and collecting funds that would be used in whole or partly to fund a terrorist act or organization.[133] The MLPC establishes the Financial Intelligence Unit (FIU)[134] formerly established in terms of section 3 of the Bank Use Promotion and Suppression of Money Laundering[135] known as the Financial Intelligence, Inspectorate and Evaluation Unit. The FIU has its own governing statutes which gives it separate autonomy to the Reserve Bank of Zimbabwe. The mandate amongst others of the FIU is to:

-receiving of suspicious transactions reports from financial institutions and DNFBPs or any other sources.[136]

-acting as the central point for collation of data

- ensuring compliance with the AML/CFT framework

-working with supervisory/ regulatory bodies and other stakeholders for the prosecution of money laundering offenders.[137]

3.4.1. **Client Due Diligence (CDD)**

The MLPC establishes the AML/CFT obligations for financial institutions and DNFBPs and lists those who are said to be DNFBPs as legal practitioners, accountants, estate agents, precious stones and metals dealers, casino operators, car dealers and trust and company service providers.[138] Lawyers are designated as DNFBPs when engaged in the following transactions;

(i) buying and selling of real estate;
(ii) management of client money, securities or other assets;
(iii) bank, savings or securities accounts management;
(iv) organizing contributions for the creation, operation or management of legal persons;
(v) creating, managing and buying and selling of business entities.[139]

[133] Section 9 (1)
[134] Section 6A
[135] Chapter 24:24
[136] Section 6B of MLPC Act
[137] Section 6(B) of MLPC
[138] Chapter III, Part I, Section 13 of MLPC
[139] Section 13 of MLPC

The obligations imposed on Financial Institutions and DNFBPs are found in sections 13-34 of the MLPC. The obligations which relate to legal practitioners will now be discussed fully so that there is an appreciation of what is expected from legal practitioners under the AML/CFT framework for Zimbabwe.

In terms of MLPC legal practitioners involved in the following transactions on behalf of their clients must verify and identify their client by means of an identity document when;

- Buying or selling of immovable property or any interest in immovable property;
- money, securities or securities accounts management;
- bank, savings or securities accounts management;
- the creation, operation or management of companies pursuant to organization of the contributions;
- buying and selling of business entities and creation, operation or management of legal persons or arrangement.[140]
- Buying or selling of immovable property that is not mediated through a financial institution or estate agent.[141]

Financial Institutions and DNFBPs are required in addition to verifying and identifying clients, to identify and verify the beneficial owner of property.[142] A beneficial owner is defined as a:

(a) The natural and true owner of property who controls the rights to or benefits from property, including the person on whose behalf a transaction is conducted; or
(b) the person with ultimate control over a legal person or legal arrangement.[143]

The Companies and Other Business Entities Act [Chapter 24:31] (hereinafter referred to as the COBE) also defines a beneficial owner as an individual who directly or indirectly holds twenty percent of the company's shares or voting rights. This requirement may prove difficult to fulfil as access to beneficial ownership information may prove to be difficult. In terms of Section 73(10) of the COBE Act the public can have access to who the beneficial owners are after getting the consent of the nominee or through a court order. In the event that the nominee fails to give the consent then whoever requires the information would need to obtain a court order which can prove to be time consuming and costly. There is therefore need to be

[140] Section 15 (b1) of MLPC
[141] Section 15 (2) (a) of MLPC
[142] Section 15 (3) of MLPC
[143] Section 13 of MLPC

harmonization of these provisions to allow for easy access to beneficial ownership information.

The verification of a client's identity is required to be conducted before the establishment of an initial business relationship or a further business transaction.[144] In terms of the proviso to section 16 (1) The verification and identification procedures required under section 15 (1) can only be waived in the interest of not interrupting normal conduct of business and the adoption of a risk management process.

Financial businesses and DNFBPs are required to apply customer identification and verification processes under section 15 (1) even in respect of existing clients and beneficial owners and perform ongoing verification and identification.[145]

The particulars of customer identification required in respect of individuals are the clients full name, date and place of birth.[146]

In respect of legal persons, the following information is required;

- Corporate name;
- Head office address;
- Identities of Directors;
- Incorporation documents;
- Authority to act on behalf of the entity.[147]

For legal arrangements the name of the trustee(s), settlor, beneficiary and details of any other party with authority to manage, vary or control the arrangement.[148]In addition to the identity information, the intended purpose and nature of the business relationship[149]. According to Goredema and Montsi[150]the process of due diligence of clients required involves, performance, of tasks which a reporting entity is not regularly involved in and is deemed to be very difficult.

A Financial institution and DNFBPs are allowed to rely on client due diligence conducted by a third party only when there is no suspicion of money laundering or financing of terrorism, that the third party is domiciled and ordinarily resident in Zimbabwe and the third party is able to provide the identity documents of the client without delay

[144] Section 16 (1) of MLPC
[145] Section 16 (2) and (3) of MLPC respectively.
[146] Section 17(a) of MLPC
[147] Section 17 (b) of MLPC
[148] Section 17(c) of MLPC
[149] Section 17 (e) MLPC
[150] C Goredema & F Montsi, (2002) *Towards Effective Control of Money Laundering in Southern Africa*, African Security Law Review, 11:1, 5-15, DOI: 10.1080/10246029.2002.9627776

upon request.[151]However, such reliance does not absolve the Financial Institution or DNFBPs from the obligations upon it to conduct due diligence and remains responsible in term of the Act.

A Financial Institution and DNFBPs shall adopt a risk assessment and adequate measures to ameliorate that risk when dealing with a client on a non-face-to-face basis.[152]The MLPC deems some clients for example, politically exposed persons to be high risk, for example, clients from jurisdictions that are deemed to be non-compliant with AML/CFT requirements and PEPs hence enhanced due diligence is expected from a reporting entity.[153] A PEP is defined as:

(a) Any person who is in a prominent public position, including but not limited to, a Head of State or of government, a senior government, judicial or military official, a senior executive of a state-owned corporation, or a senior official of a political party; or
(b) Any person who holds a prominent public position of a foreign country, including but not limited to, a Head of State or of government, a senior government, judicial or military official, a senior executive of a state-owned corporation, or senior official of a political party; or
(c) A person who is in or has formerly been in position as a member of senior management of an international organization, including the position of director, deputy director, member of the board or equivalent functions; or
(d) close associate, spouse or family member of a person referred to in paragraphs (a) to (c).[154]

In the event of failure to conduct customer due diligence the Act prohibits establishment of a business relationship or maintenance of an ongoing relationship.[155]In addition to the prohibition the Act imposes a fine and imprisonment for intentionally or negligently failing to conduct customer verification as prescribed.[156]

3.4.2. **Record Keeping**

The MLPC obliges all financial institutions and DNFBPs to keep all records of a transaction for a minimum of five (5) years after the conclusion of the transaction. Records can be kept in hard or soft

[151] Section 18 of MLPC
[152] Section 19 of MLPC Act
[153] Section 20 and 26 A of MLPC Act
[154] Section 13 of MLPC Act
[155] Section 22 of MLPC Act
[156] Section 23 of MLPC Act

copies and should comprise, client profiles, risk assessment reports, suspicious transactions reports and records of the transaction.[157]

3.4.3. Internal Programmes to Combat Money Laundering and Financing of Terrorism

The MLPC obliges Financial Institutions and DNFBPs to put in place programmes for the prevention of money laundering and financing of terrorism taking into account their risk profiles and size of business.[158] The programmes are expected to include internal AML policies[159], screening procedures when hiring staff[160]training of staff to create awareness of money laundering[161], policies and procedures on technological developments[162] and conducting independent self-audits to review and verify effectiveness of the measures in place.[163]

The Financial Institution and DNFBPs are mandated to appoint a compliance officer whose role would be to implement the AML/CFT policy who is at senior managerial level and is knowledgeable about money laundering issues.[164]

3.4.4. Reporting Obligations

A financial institution and DNFBPs are required to file a report if any property or transaction or attempted transaction where there are reasonable grounds to suspect that the transaction involves proceeds of crime or is the proceeds of crime or linked to or is to be used for terrorism.[165] The report has to be made within three working days of forming the suspicion.[166] The report is only required to be made in respect of legal practitioners when engaged in the transactions listed under section 15 (2) (a), (b) or (b1) of MLPC Act.

Legal practitioners are not required to make a report in instances where the legal practitioner is ascertaining the position of his or her client and in litigation proceedings.[167] These instances are covered under legal-practitioner client privilege. This requirement has caused the greatest debates amongst lawyers in different jurisdictions. Where the lawyers are expected to make a report like Zimbabwe, lawyers have found in some instances resisted on the basis that the

[157] Section 24 of MLPC Act
[158] Section 25 (1) of MLPC Act
[159] Section 25 (1) (a) of MLPC Act
[160] Section 25 (1) (b) of MLPC Act
[161] Section 25(1) (c) of MLPC Act
[162] Section 25 (1) (d) of MLPC Act
[163] Section 25 (1) (e) of MLPC Act
[164] Section 25 (2) of MLPC Act
[165] Section 30 (1) (a) and (b) Act
[166] Section 30 (1) of MLPC Act
[167] Section 30 (2) of MLPC Act

requirement goes against lawyer-client privilege.[168] What is clear from the provisions of the MLPC is that it is not in all legal services provided by lawyers that a report is required to be made. Only in instances provided for under the Act.

Regardless of that, lawyers have argued that the requirement still made them whistleblowers against their clients when they are supposed to be protecting the client's interest. Even in instances covered under the Act the lawyers still feel obliged to protect their client's interest as the suspicion might turn out to be baseless but they would have lost a client forever and loss of earning capacity. Further to that the lawyers feel that they are already regulated by their respective law societies and they owe an ethical duty not to assist clients to commit a criminal offence which is sufficient as a deterrent mechanism.[169] The National Risk Assessment Report[170] rated the risk for lawyers for Zimbabwe as 0.48, medium to low. This means that the risk of money laundering through legal practitioners is not a big threat however, the economy in the National Risk Assessment Report was noted to be characterized by high remittances from the diaspora and smuggling and selling of precious stones was noted to be high which make the economy prone to money laundering offences. The interpretive note to Recommendation 23 of the FATF[171] states that each country has to determine what aspects fall under legal professional privilege. It has also been stated that application of the recommendations, which were initially designed for financial institutions to lawyers with their broad spectrum of legal practices and firms, that is, sole proprietors and multi-jurisdictional international firms, varied internal structure and professional and ethical duties would prove to be a mammoth task as the variables are vast.[172]

The FIU has powers to issue directives to complement the AML framework in terms of section 4(1) of the MLPC. Section 30 (5) and (6)[173] stipulates that, directives may be issued by FIU for submission of threshold-based cash transactions reports. Directive No. 09/02/2022 was issued revising thresholds as follows;

[168]IBA, et al, A lawyer's guide to detecting and preventing money laundering, October 2014 page 17
[169] n 68 above page 17
[170] The Second Money Laundering and Terrorism Financing National Risk Assessment, February 2019
[171] n 77 above
[172] n 156 above page 12
[173] MLPC Act

Report type	Old threshold	New threshold
CTR	ZW250 000	ZW$250 000 US$1 000
EFT	ZW500 000	ZW$1,000,000 US$5 000
IFT	US$1 000	US$5 000

Reporting entities are required to submit cash transactions reports as per the above threshold limits whenever they conduct a transaction above those stipulated limits.

A financial institution and DNFBPs are not allowed to disclose that a report has been made to the client.[174] A disclosure may only be made when dissuading the client from engaging in such conduct.[175] The identity of any reporting entity which would have made a suspicious transaction report is protected and no liability shall attach to them for breach of any duty as long as the report was made in good faith.[176]There are penalties which come with failing to comply with the reporting obligations in the form of a fine, imprisonment or both.[177]

FIU is the appointed government agency in charge of implementing the freezing of assets obligations for persons listed on the United Nations Sanctions list as per the United Nations Security Council Resolutions (UNSCRs) made by the United Nations Security Council.[178]Financial Institutions and DNFBPs are required to check the United Nations Sanctions list and freeze the assets of anyone found on that list.[179]

The MLPC appoints Supervisory Authorities to regulate the affairs of reporting entities. The supervisory authority for legal practitioners is the Law Society of Zimbabwe.[180]

Risk-Based Approach

Every financial institution and DNFBPs are expected to assess their money laundering and anti-financing of terrorism risks to which they are exposed and come up with measures to deal with those

[174] Section 31(2) of MLPC Act
[175] Section 31(3) of MLPC Act
[176] Section 32 and 33 of MLPC Act respectively.
[177] Section 34 of MLPC Act
[178] SI 56 of 2019 Part II
[179] n 166 above
[180] First Schedule Part II of MLPC Act

risks.[181]Risk assessment should be made from the beginning of a relationship with a client.[182]in the FATF Guidance[183] risk is divided into three (3) categories, country/geographic risk, client risk and service risk. The risk assessment should take into account reports from national risk assessments or reports from other countries regarding the risks to which lawyers are prone. Every client is subject to the risk assessment and the risks attendant to each particular client may vary due to the type of client they are and also the nature of services sought.[184] The carrying out of company management services is deemed more, risky for solo practitioners.[185]

For legal practitioners the following recommendations regarding risk assessment regarding risk assessment were recommended[186],

i. client due diligence is required in order to fully know the client, intended beneficiaries, source of wealth and purpose of the transaction;
ii. develop an understanding of the nature of the work;
iii. have an understanding of the commercial and personal rationale for the work; look out for "red flag" indicators or suspicion indicators;
iv. the above will dictate the action plan and what risks are attendant to that transaction.

Enhanced client due diligence is required in respect of high-risk clients for example those on the UN Sanctions list and PEPs. Solo practitioners are at a disadvantage as they cannot discuss the course of action with a partner hence, they would have to consult another legal practitioner from another firm or make the decision on their own.

Use of Red Flags in Risk Assessment

It should be noted that red flags arise in different context which are;

-the person/client- in making this assessment the issue amongst others is whether the client is a local or foreigner;

-source of wealth;

-services sought- Services which involve large sums of money have the highest level of risk for example, the setting up of companies or trusts or purchasing of real estate;

[181] Section 12B (1) and (2) OF MLPC Act
[182] FATF RBA Guidance for Legal Professionals page 24
[183] n 172 above
[184] n 172 above on page 24
[185] n 172 page 25
[186] n 175 above

-choice of lawyer- if a client does not complain about the amount of fees charged that can be a red flag, if another lawyer has renounced agency on the same matter, changing a number of lawyers on the same transaction and engagement of several different lawyers.

Zimbabwe's AML regime is in line with the FATF Recommendations however the implementation and enforcement of that AML regime is lacking. Institutions which are supposed to assist in the implementation and enforcement are lacking necessary resources to fully implement the AML framework. It has been noted that there are obligations required from legal practitioners of the AML regime which require to be relooked at in order to encourage compliance and ultimately improve on the effectiveness.

CHAPTER FOUR: COMPARATIVE ANALYSIS OF ZIMBABWE'S AML REGIME FOR THE LEGAL PROFESSION AND OTHER COUNTRIES

There is need to analyse how the Zimbabwean AML regime fares against other jurisdictions hence a comparison will be made with the United Kingdom, Canada and South Africa.

4.1 UNITED KINGDOM. (UK)

4.1.1. Legislation

The primary legislation in the UK for combating money laundering is the Proceeds of Crime Act 2002 (POCA) and The Terrorism Act of 2000. The POCA bill was introduced in 2001 and became law in 2002. POCA made failure to report, particularly suspicious transactions a specific offence.[187]The objective of POCA was to provide for confiscation of proceeds of crime like money laundering so that the criminals do not enjoy those benefits.[188]POCA defines money laundering as the concealment, disguising, conversion, transferring of criminal property or removing it from the UK.[189]

The Terrorism Act was promulgated in 2000 and it imposed counter terrorism obligations on reporting entities. Subsequently amended by the Anti-terrorism Crime and Security Act 2001, the Terrorism Act 2006 and the Terrorism Act 2000 and Proceeds of Crime Act 2002 (Amendment) Regulations 2007.[190]

After the third EU directive in 2005, UK brought in the Money Laundering Regulations of 2007 and the amendments to the Terrorism Act mentioned in the preceding paragraph and POCA. The coming in of the EU fourth Directive saw the Money Laundering Regulations of 2007 being repealed and replaced by the Money Laundering and Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017.[191]

4.1.2. CDD Requirements

Customer due diligence is the basic knowledge regarding the client and after conducting CDD then KYC principles are employed which are more robust and require professionals to collect the data required.[192] Identification of individual clients is getting to know the client then verification is when documents confirming the identity are required

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[187] D Nougayre'de', *Anti-money Laundering and Lawyer Regulation- The response of the Professions*, Fordham International Law Journal Vol 43:2,2019 pages 321-362
[188] smartsearch.com/resources/help-centre/glossary/proceedsofcrime-act-poca
[189] Part of POCA
[190] complyadvantage.com
[191] n 181 above
[192] n 200 above

through reliable source (relevant registry) like an identity document bearing a photograph, full name, address and birth certification.[193] In respect of beneficial owners there is need to establish who the actual beneficiary is, identification information and the nature of the business.[194]CDD is required in the following instances;

- occasional transactions
- when there is a suspicion of money laundering enhanced CDD should be applied;
- presentation of unreliable documents;
- new business relationships.[195]

If CDD and verification is not completed before the establishment of a business relationship then the legal firm is not allowed to establish that business relationship[196] except where it would interrupt normal conduct of business and when there is little risk of money laundering.

Identification and verification of companies requires the name of the legal entity, company registration details, address of the registered office incorporation documents and details of those in decision making positions.[197]Where a company is already subject to CDD measures, the legal firm may apply CDD based on a risk-based approach.[198]

In respect of CDD for a trust there is need on the part of the legal firm to identify who the client is as trusts do not have legal personality in the UK.[199] The client is the one who is due to benefit from the service to be provided, which can be the settlor, trustee or beneficiary.[200]Once the client is established the CDD measure for individuals will apply save for the nature and extent of the assets to be settled if the transaction is to create a trust.[201]

Enhanced Due Diligence (EDD) is required in respect of high-risk clients for example PEPs or where the case has a high-risk element or there is no justifiable reason for the transaction.[202] EDD involves the need to seek additional independent reliable sources to verify information provided and extra measures to understand the nature

[193] Legal Sector Affinity Group Anti-money Laundering Guidance for the Legal Sector 2021, https://www.lawsociety.org.uk/topics/anti-money-laundering/ page 63
[194] n 200 above
[195] n 200 above
[196] n 193 above page 60
[197] n 193 above page 67
[198] n 197 above
[199] n 193 above page 72
[200] n 193 above page 72
[201] n 193 above page 72
[202] n 193 above page 90

and purpose of the transaction.[203]Simplified Due Diligence (SDD) is applied where the client does not present a risk for money laundering.[204]

Ongoing monitoring involves ongoing review and scrutiny of the relationship and transactions done, source of funds and the risk profile.[205] Reliance can be made on third party CDD if the third party can provide in writing the CDD done.[206]

In the UK there is technology specifically designed for the regulatory and compliance functions known as Reg-Tech which helps legal firms with compliance of AML/CFT obligations.[207] Reg-Tech has three categories namely:

-providing an electronic means of conducting identification and verification;

-corporate registry and beneficial ownership checks;

-electronic screening of clients against sanctions lists, PEPs and Adverse media watchlists.[208]

Some of the technology is free whilst some is provided at a fee by third party suppliers. Records are to be kept for a minimum five-year period.[209]

4.1.3. **Record Keeping**

Records are to be kept for a minimum five-year period.[210]

Third party CDD is accepted as long as the third party is able to produce authentic identification documents upon request however the reporting entity remains responsible for CDD.[211]

4.1.4. **AML/CFT Training**

Firms have to ensure that staff and legal practitioners have knowledge about AML and there should be ongoing training on the compliance issues.[212] Training of staff is ongoing and the trainings aim to teach the law and all other issues pertaining to AML/CFT compliance like

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[203] n 193 above page 90
[204] n 193 above page 97
[205] n 193 above page 98
[206] n 193 above page 100
[207] n 193 above page 105
[208] n 193 above page 105
[209] n 200 above
[210] n 200 above
[211] n 200 above
[212] n 183 above

identifying red flags, suspicious activity, record keeping and data protection.[213] Appointment of a Money Laundering Reporting Officer is a must in the UK and that person is responsible for submission of suspicious activity reports (SARs) to the National Crime Agency (NCA).[214]Depending on the size and nature of the law firm, a Money Laundering Compliance Officer may also be appointed to be responsible for ensuring AML compliance.[215]The MLRO is personally responsible to report and may be prosecuted for failing to report under section 331 of POCA 2002. One individual may be appointed for both roles.

4.1.5. **Reporting Obligations**

Suspicious Activity Reports (SRA) is administered by UKFIU which Is housed within NCA. An SRA must be made whenever there is reasonable grounds of suspicion of money laundering to the National Crime Agency regardless of whether money laundering subsequently occurs.[216]The UKFIU receives and processes the reports. SAR reporting is subject to legal practitioner privilege where the information is given during the course of getting advice or in pending or contemplated litigation proceedings.[217] Legal firms who have an MLRO report their SAR through that MLRO but if it is a sole practitioner, he /she becomes the MLRO by default.[218]Failure to make a SAR is a criminal offence under Section 330 of POCA if in the regulated sector. A SAR can be made electronically or post or fax.

The UK employs a risk-based approach which was adopted after the FATF introduced that approach. Prior to the adoption of the risk-based approach the UK had been using the standardized approach where compliance was premised on ticking a list to be fulfilled.

4.1.6. **AML Compliance Institutions**

There are three (3) statutory supervisors which are The Financial Authority, Her Majesty Revenue and Customs (HMRC) and The Gambling Commission and 22 approved Professional Body Supervisors. [219]

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[213] n 193 above page 115
[214] n 193 above page 20
[215] n 197 above
[216] n 193 above page 131
[217] https://www.lawsociety.org.uk/en/topic/anti-money-laundering
[218] n 193 above page 131
[219] n 187 above

i. **Financial Conduct Authority (FCA)**

Main financial services sector regulator, established in 2012 through the Financial Services and Markets Act of 2000. It has investigative powers along with enforcement agencies, supervisory and enforcement authority.[220] Within the FCA is the Office of Professional Body-Anti Money Laundering Supervision (OPBAS), which is the supervisory body for the other twenty-two (22) supervisory bodies.[221]

ii. **Her Majesty's Revenue and Customs (HMRC)**

It is the tax authority and ensures compliance with AML/CFT obligations by accounting service providers, art dealers, estate and letting agents, high value dealers, money service businesses not supervised by the FCA and trust and company service providers.[222]

iii. **Gambling Commission**

It is a non-departmental body established under the Gambling Act 2005. Commercial gaming falls under its regulation.

4.1.7. **Anti-Money Laundering Law Enforcement Agencies**

The UK has a number of enforcement agencies which are going to be mentioned briefly in order to have an appreciation of how complex the whole system is namely;

i. National Crime Agency (NCA)
ii. Serious and organized crime lead agency;
iii. All Police Forces
iv. National Economic Crime Centre (NECC)-deals with enforcement issues both domestically and internationally;
v. Border Force- keeps borders secure and I equivalent to Zimbabwe's
vi. Customs and Immigration Authority;
vii. UKFIU- gathers information regarding Suspicious Activity Reports.[223]

4.1.8. **Terrorist Financing Law Enforcement Agencies**

UK Intelligence agencies and the Home office are the ones who enforce issues relating to terrorist financing.[224]

4.1.9. **Prosecution Agencies**

[220] n 187 above
[221] n 187 above
[222] n 187 above

[223] n 187 above
[224] n 187 above

i. Serious Fraud Office (SFO)-prosecutes and investigates bribery, corruption and serious fraud cases.
ii. Public Prosecution Service Northern Ireland.
iii. The Crown Prosecution Office (CPS);
iv. The Crown Office and Procurator Fiscal Service. (COPFS).[225]

In the UK, the laundering of proceeds of any crime is an offence however the major contributors to money laundering are, cyber-[226]crime, fraud and tax evasion, immigration crime, illegal wildlife trade, theft, robbery, burglary, overseas PEPs, human trafficking and drugs related offences.[227]

The legal sector risk score for money laundering for 2017 and 2020 is rated as high. The services which pose the highest amongst other risks are conveyancing fictitious litigations where foreigners connive to sue each other and damages become payable.[228] According to a survey by the Law Society in 2008, lawyers were spending an average of four (4) hours a week attending to AML compliance issues and making reports. The legal practitioners stated that the regime is "cumbersome". Further the UK separates barristers and solicitors and solicitors who are subject to AML obligations.[229]The process of AML compliance has an administrative cost attached to it and it is time consuming hence most reporting entities in the UK have sought to automate the compliance process using smart technology.[230]

The AML requirements for Zimbabwe and the UK are the same however The UK is a developed country where there is a higher rate of technological advancement which aid in implementing the compliance obligations. Firms in the UK resort to third parties to perform enhanced CDD for them however firms in Zimbabwe do not have that opportunity. In addition, access to the information required for CDD is easily accessible in developed countries due to use of high technology. However even with the aid of technology the firms in the UK still find the process cumbersome, so it is even more cumbersome for those in the developing countries.

4.2. **CANADA**

4.2.1. Canada's anti-money laundering and terrorist financing legislation are the Criminal Code (which applies to all individuals and businesses) and the Proceeds of Crime (Money Laundering) and Terrorist Financing Act (PCMLTA) passed in 2001 and its regulations. Both offences of money

[225] n 187 above
[226] n 187 above
[227] n 187 above
[228] n 187, page 88
[229] n 177 above
[230] n 183 above

laundering and terrorist financing are covered under the Criminal Code.[231] The Criminal Code criminalizes terrorist financing which is defined as knowingly facilitating or financial or service to aid a terrorist group.[232] The PCMLTA was established in 2001 as the legislation to deal comprehensively with money laundering and terrorist financing.[233] PCMLTA applies to reporting entities excluding legal professionals who challenged application of the reporting obligations on them.[234]PCMLTA defines Money laundering as;

> Everyone commits an offence who uses, transfers the possession of, sends or delivers to any person or place, transports, transmits, alters, dispose of or otherwise deals with, in any manner or by any means any property or any proceeds of any property with intent to conceal or convert that property or those proceeds, knowing or believing that all or part of that property or of those proceeds was obtained or derive directly or indirectly as a result of
>
> (a) the commission in Canada of a designated offence; or
> (b) an actor omission anywhere that, if it had occurred in Canada, would have constituted designated offence."[235]

The Financial Transactions and Reporting Analysis Centre of Canada (FINTRAC) is Canada's financial intelligence unit.[236]Lawyers were incorporated as reporting entities in 2001 but the Federation of Law Societies of Canada (the Federation) brought legal action challenging the designation of lawyers as reporting entities to FINTRAC., which litigation started in 2001 and lasted for 15 years.[237] The obligations imposed on the lawyers related to reporting of Financial Transactions Reports, the need to conduct customer due diligence, record keeping, complying with cash limits and that there is no abuse of trust accounts.[238]FINTRAC was given search and seizure powers hence they could approach a law firm and search for information which lawyers were obligated to keep.[239]

The reporting obligations were imposed in instances when receiving or making payments which were not disbursements for fees or bail and penalties were imposed for non-compliance.[240]In 2002 the Attorney

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[231] Anti-money laundering and Terrorism Financing Working Group, Guidance for Legal Profession,2019, www.flsc.ca
[232] Part II.I of the Criminal Code, www.osler.com/en/resources
[233] n 215 above
[234] n 215 above
[235] Section 462.31 (1) of the Criminal Code.
[236] www.fintrac.canafe.gc.ca/intro-eng
[237] n 215 above
[238]n 215 above
[239] n 216 above
[240] n 216 above

General and the Federation agreed to have a binding test case[241] and the court in 2006 granted an interdict prohibiting the application of the obligations on legal practitioners pending the constitutional challenge.[242]The court finally agreed with the Federation in the case of FLSC V Government of Canada in 2015 and struck down the provisions imposing obligations on legal professionals as being inconsistent with the provisions of the Constitution of Canada.[243] The arguments advanced by the Federation were that legal-practitioner client privilege should be protected as the lawyer's duty to their client of commitment was paramount. Their argument was that the state was urning the legal practitioners into government agents through the record keeping and reporting obligations.[244] The court agreed and legislation was duly amended to exclude legal practitioners from the said obligations in favour of self-regulation.[245] The court ruled in favour of self-regulation to fight money laundering and asserted that legislation must respect Constitutional provisions. The federation came up with model rules which the legal profession abides by as their AML/CFT regime.[246]

The model rules are contained in the Guidance[247]which was prepared by the Federation on behalf of all the law societies who then adopt the model rules into their individual codes of conduct for implementation.

4.2.2 **CLIENT CDD**

Identification requirements.

Individuals

Legal practitioners in Canada are expected to identify clients in all transactions regardless of the work to be done through and seek their name in full, home address, contact telephone numbers, employment details.[248]

Corporates

The corporate name in full is required, business type, address and contact details, incorporation details and the details of the person in authority of the company.[249] If someone is acting for a third party, the details of the person giving instructions must be established.

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[241] *The Law Society of British Columbia v AG Canada* 2001 BC 1593
[242] Federation Presentation, Anti-money laundering Dubai IBA 2011
[243] SCC7/2015, www.scc-csc.lexum.com/scc-csc
[244] n 225 above
[245] n 225 above
[246] n 225 above
[247] n 215 above
[248] n 193 above page 7
[249] n 193 above page 7

Verification of the identity of the client is also required which verification can be done through Government documents verifying the identity of the client or credit file located in Canada.[250]Use of a third party to conduct the identification and verification process is permissible as long as they acquire all the information the legal practitioner would have acquired themselves. The CDD is required to be done at the time of being retained to act.[251]

Legal practitioners are required to ascertain details regarding beneficial ownership through production of authentic official documents.[252] The source of the client's wealth must be established in instances where the instructions relate to payment or transfer of funds.[253] There is also a requirement for ongoing monitoring.

4.2.3. **Record keeping and retention**

Records pertaining to the identity of the client, transaction, source of funds and documents provided by the client must be kept for the duration pf the relationship with the client or a minimum of six years, whichever is greater.[254] The legal practitioner is mandated with a duty to withdraw his /her services if it is realized that the transaction is illegal.[255]

4.2.4. **MODEL RULES**

The Federation has come up with model rules which the legal practitioners have to adhere to. Those rules are as follows:

i) **NO CASH RULE**

Legal practitioners are not allowed to accept cash exceeding $7 500, if the amount paid is in foreign currency it should not exceed the equivalent of $7 500 using the official rate of exchange.[256] Acceptance of an amount higher than $7 500 is only allowed when the amount is coming from a financial institution, from a law enforcement agent, to pay a fine or penalty or bail, for professional fees and disbursements.[257]

ii) **RESTRICTION ON THE USE OF TRUST ACCOUNTS**

[250] n 193 above page 8
[251] n 193 above pages 12-15
[252] n 193 above page 12
[253] n 193 page 15
[254] n 193 page 17
[255] n 193 page 17
[256] n 193 page18
[257] n 215 page19

The firm's trust account can only be used for payment of fees for legal services provided. Legal services relate to giving of advice, drafting of documents, court appearances and negotiation of settlements.[258]

From the forgoing it is clear that the Canadian AML regime pertaining to legal practitioners is unique and very flexible. There are no cumbersome procedures which are restrictive to and any penalties for non-compliance. The threat of being prosecuted is excluded which hangs over legal practitioners bearing reporting obligations like Zimbabwe. Self-regulation promotes adherence to the requirements unlike when there is a threat of a sanction. Lawyers in Canada ensure that they follow the model rules voluntarily to ensure that they retain their independence.

4.3. SOUTH AFRICA

South Africa became a member of the FATF in 2003. According to the FATF, South Africa's legal framework for AML/CFT is good however the shortcomings were said to be in the implementation.[259] The main statutes are the Prevention of Organized Crime Act (POCA) (Act 121/1998), Financial Intelligence Act, Act 38/2001 (FICA) and Protection of Constitutional Democracy against Terrorism and Related Activities Act (POCDATARA) ACT 33/2004. POCA deal extensively with AML provisions whilst FICA deals with administrative issues. Schedule 1 of FICA lists all accountable institutions which includes, legal practitioners. The Financial Intelligence Centre (FIC) processes and analyzes data and receives reports from accountable institutions. Schedule 1 of FICA lists all accountable institutions including legal practitioners.

DUTIES OF LEGAL PRACTITIONER IN TERMS OF FICA

4.3.1 CDD OBLIGATIONS

Identifying the client

The law society of South Africa formulated a Risk Management and Compliance Programme (RMCP)[260] which legal practitioners are expected to adopt in coming up with their policies for AML/CFT compliance. In terms of identifying the client there is need to ascertain the following;

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[258] n 215 page 21
[259] FATF 2021, Anti-money Laundering and Counter-terrorist financing measures-South Africa Fourth Round Mutual Evaluation Report, https//www.fatf-gafi.org/publications/mutual evaluations/documents/mer-south-africa-2021
[260] www.LSSA.org.za

-full name verified by an identity document;

-home address with proof of residence;

-contact numbers, occupation and business address if applicable.

If a prospective client is acting on behalf of a third party, the requirements for an individual will be needed in addition to proof of authority to act.[261]

Corporations are expected to provide the full details of the legal name and registration documents, authority of those acting, address, contact details, nature of business and source of funds.[262]When dealing with Domestic Prominent Influential Person (DPIP) there is need to confirm the client's status and determine risk profile. Where the legal practitioner determines that the client poses a high risk then senior management approval must be sought to establish the business relationship. Establish the source of wealth and employ enhanced monitoring of the client's transactions.[263] DPIP may be, President, deputy president, member of parliament, essentially those who hold public office and their immediate family.[264]

4.3.2 **RECORD KEEPING AND REPORTING**

A record of the transaction including identification details and all other CDD information obtained should be kept for a minimum of five years[265]. Cash transactions reports (CTR) should be filled by a legal practitioner whenever a transaction is in excess of the threshold limit of R24 999.99. The obligation relates to both single and a series of transactions which add up to the threshold limit. The CTR should be made within 2 days of the transaction. Section 28 (b) of FICA, several reports may be made when cash in excess of the threshold is

(a) paid by the client
(b) from a person acting on behalf of a client;
(c) from a person on whose behalf the client is acting.

The CTR is filed electronically to the Centre.

Section 29 of FICA requires any person employed by a business to report suspicious transaction reports (STR). The filing of the report should be done within 15 days of the transaction. Section 29 (3) filing of STR should not be disclosed to anybody, this gives rise to tipping

[261] n 244 above
[262] n 244 above
[263] n 244 above
[264] n 244 above
[265] Section 22 of FICA

off. Tipping off attracts criminal sanctions in terms of FICA. The obligation to report electronic wire transfers above the prescribed limits arises from section 31 of FICA.

4.3.3. CONFIDENTIALITY AND PRIVILEGE

Information covered under legal professional privilege is not reportable, that is, information obtained whilst giving general legal advice to a client or in respect of pending or contemplated litigation. Privilege does not apply where it is sought in furtherance of a criminal activity.[266] Confidentiality is said to be wider than privilege since confidential information may not be covered under privileged information. Legal practitioner-client confidentiality may however, be breached through the reporting obligation. [267] Only a compliance officer is supposed to make the report to the Centre.

Failure to make a report, results in a criminal offence being committed. Section 53 of FICA is an example of where an offence is imposed for failure to report as follows;

> Any person who fails, within the prescribed period, to report to the Centre the prescribed information in respect of a suspicious or unusual transaction or series of transactions or enquiry in accordance with section 29(1) or (2), is guilty of an offence.
>
> Any person referred to in section 29(1) or (2) who reasonably ought to have known or suspected that any of the facts referred to in section 29(1)(a), (b) or (c) or section 29(2) exists, and who ***negligently*** fails to report the prescribed information in respect of a suspicious or unusual transaction or series of transactions or enquiry, is guilty of an offence.[268]

In terms of POCA legal practitioners in South Africa may be prosecuted for accepting fees which may have come from the proceeds of crime named tainted fees.[269] Section 5 and 6 speaks to this. Section 4 states that:

> Any person who knows or ought reasonably to have known

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[266] The Financial Intelligence Act, 2001 Precedent Internal rules made available by the Law Society of South Africa (LSSA), Drafted on behalf of the attorney's profession by Norton Rose South Africa incorporated as Deneys Reitz paragraph 45-50.
[267] n 250 above
[268] n 250 above paragraph 95.2.3
[269] J Hamman, *The Impact of Anti-Money laundering in South Africa,* Doctor of Laws, university of Western Cape, 2015

> 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-
>
> (a) the retention of money or the control by or on behalf of the said person of the proceeds of unlawful activities is to facilitate; or
> (b) the said proceeds of unlawful activities are used to make funds available to the said other person or to acquire property on his or her behalf to benefit him or her in any way,
>
> shall be guilty of any offence.[270]

Section 6 goes on to say;

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

According to Hamman[271] the above provisions of POCA means that if a lawyer is paid knowingly or unknowingly using money form proceeds of crime then the lawyer would be guilty of contravening sections 5 and 6 of POCA and prosecuted for accepting those fees. Hamman argues that this would be likely in the cases of criminal defense lawyers who represent criminals who may have committed a criminal act which the lawyer may or may not be aware of. Such a scenario may lead to prosecution of the lawyer and that clearly has a negative effect on the practice of law and the lawyer's earning capacity and ultimately the right to representation by a lawyer for an accused person for fear of arrest. [272]Lawyers who usually do criminal work will find themselves in a difficult position as South Africa is a cash economy mainly because of high numbers of informal traders.[273] In such an economy it can prove to be very difficult to distinguish between legitimate and illegitimate money. On the other hand, there are also high levels of corruption stemming from different activities

[270] Section 5 of POCA
[271] n 253 above
[272] n 253 above
[273] n 243 above

and the notable predicate offences are bribery, fraud, tax evasion and drug trafficking.[274]

CDD OBLIGATIONS

From the discussions above it is evident that legal practitioners do not object to the imposition of conducting CDD on their potential clients. What appears to be the issue is the likely administrative costs which come with the need to identify and verify the client. In the UK for example lawyers may engage a third party to conduct an enhanced CDD. In Zimbabwe the challenge may be the means of fulfilling, the requirements due to incapacitation or lack of technological know-how for example when enquiring or verifying information on corporates one may need to pay a visit to the Company Registry or the Deeds Registry. These Registries are found in Harare and Bulawayo and not the other smaller towns in Zimbabwe. Ease of access to verification information because an issue. Further as noted before the nominee of a company needs to consent to the release of beneficial information in Zimbabwe otherwise there would be need to approach a court for the information to be released. That route comes with a cost element to the reporting entity. In the UK there is provision for automated compliance which reduces the time and cost aspect spend attending to compliance issues.

There seem to be no issues with requirement to keep records however the fact that those documents may be accessed by law enforcement agents through search and seizure makes it a problem.

REPORTING OBLIGATIONS

These obligations are the most contested on the basis that the reporting obligations infringe upon the issues of legal practitioner-client confidentiality rather than privilege. Traditionally, the communications between a lawyer and their client were held in confidence however that confidentiality is not paramount in the face of the cash transaction and suspicious transaction reporting obligations. Like South Africa, Zimbabwe is also a cash economy due to the fact that after the banking sector collapse in the 2000s the citizens resorted to keeping cash out of the banking sector and there is a high informal sector.[275] This therefore makes it difficult to distinguish legitimate cash transactions and illegitimate one used for purposes of laundering money. Lawyers at the end of the day want to earn a living from their trade hence the lawyer may choose not to

[274] n 143 page 18
[275] n 160 above

report after making their own assessment. The risk-based approach should be adopted in such an instance not mandatory reporting. Mandatory requirements are those requirements which face the highest resistance. In Canada Lawyers successfully challenged the imposition of those obligations on them.[276]

PENALTIES

The imposition of penalties on non-compliance with the obligations, which penalties come with a possibility of a custodial sentence has a negative impact on the practice of law. This is why the Canadian Law Societies objected to imposition of obligations upon the lawyers in Canada. The issue of self-regulation becomes more attractive as there is no threat of criminal sanctions. It has been stated that lawyers are already law officers and hold ethical duties to ensure that they are not used by criminals hence self-regulation through the Law Society of Zimbabwe may prove to be effective regulation and lawyers would comply in order to protect the infringement in the manner in which law is practiced.

4.4 CHAPTER CONCLUSION

Having discussed the AML/CFT regime for Zimbabwe in Chapter 3 and the AMLCFT regimes of the UK, Canada and South Africa the following it is evident;

-Countries have made every attempt to adhere to the FATF recommendations in coming up with their legal frameworks. For Zimbabwe and South Africa comes at the implementation stage. Poor enforcement and lack of awareness on the part of the general citizenry regarding these AML/CFT policies is another limiting factor. Even amongst the legal profession there is need to disseminate information regarding what the compliance requirements are and their implications.

[276] *Canada (Attorney General) v Federation of Law Societies of Canada* SCC 7/2015

CHAPTER FIVE: CONCLUSION

5.1 FINDINGS

A questionnaire was used to gather information on the subject which questionnaire is attached as appendix 1. The sample study was from legal firms in Manicaland Province. It should be noted that from the firms interviewed the majority were solo partners and a Professional Assistant or two. The requirement to have a designated compliance officer who is at management level means the partner at the firm has to be the compliance officer. Being an only partner the responsibilities which the partner has to meet are added on, being one person that may lead to unintentional non-compliance due to pressure of work/responsibilities.

There is general understanding and awareness about money laundering and some of the obligations which have been imposed on the lawyers through the MLPC Act in Zimbabwe. There is also consensus that money laundering was on the increase in the world hence some measures had to be taken to curb this surge.

Out of the ten Firms (10) who responded to the questionnaire all the legal practitioners confirmed that they had an anti-money laundering policies at their firms which they were implementing. Just like the Zimbabwean and South African governments discussed above the legal framework is in place however it is the practical implementation of the policies which determines their effectiveness. In practice the obligations tend to be difficult to implement based on a number of factors like the state of the economy, accessibility to the public institutions like The Civil Registrar's office for verification of identity documents, etc.

From the research it is clear that most countries have put in place anti-money laundering measures in line with the recommendations from the FATF which measures have brought mandatory obligations on the legal sector as well as other professionals. Anti-money obligations were initially confined to the financial sector which handle cash transactions as their core business and they have the software and skills to detect money laundering and to also verify client identities and verify them unlike legal practitioners who will face a hurdle in implement ting that requirement. Imposition of those same obligations expected from financial institutions on the legal practitioners has therefore met with some resistance from countries like Canada or partial compliance on part of countries like Zimbabwe due to the impracticality of the requirement.

KYC/CDD obligation

From the responses made all the firms engage in client due diligence at the onset of their engagement by the client but this is basic due diligence as legal practitioners have no access to some of the information which is required for example the need to screen clients against the sanctions list. The client is expected to complete KYC forms which requires the client's personal information, address, contact details, declaration of their source of funds and occupation details. If a client produces a fake identity document there is no practical way of proving it whereas financial institutions can have verification done as they have a department specifically designed to attend to those risk issues.

There was confirmation that legal practitioners do conduct basic know your client procedures but there was no mention of any enhanced due diligence which is imposed on the legal practitioners in terms of Section 15 (1) and 16 (1) of MLPC, particularly when dealing with PEPs and also the need to verify information on the beneficial owner of a company. Such enhanced due diligence comes at a cost which legal practitioners may not be willing to part with and comes with a possibility of losing a potential client.

For legal practitioners outside Harare the need to conduct enhanced due diligence means the need to engage a correspondent lawyer to conduct a search at the Deeds registry or Companies registry. The correspondent lawyer would need to be paid whilst the search itself has a fee attached to it. After engaging in that exercise there is no guarantee that the information will be found as the files may be missing at the time of the search as the Deeds registry and the deeds registry data base is not accessible online. For financial institutions that costs can easily be absorbed into the business unlike lawyers whose earning capacity is determined by how much time they spent working.

In conducting due diligence in terms of the MLPC Act there is a requirement to screen clients against the sanctions list which the legal practitioners did not mention in the responses given hence it is highly likely that some may not be aware of the requirement. There is need to create awareness amongst the legal practitioners of all the requirements for AML/CFT so that there is better appreciation of what all is expected from a DNFBP. The due diligence is expected to be conducted at the beginning of every new business relationship and for existing clients. The due diligence is not a once off requirement but the requirement if for ongoing due diligence which as stated above may prove to be impractical as accessibility to the information sought may not be so possible.

Intentional or negligent failure to conduct due diligence may result in a reporting entity like a legal practitioner being arrested for conduct customer verification proceedings and liable to a fine or imprisonment.[277]

In terms of section 16 of MLPC discussed in Chapter three, legal practitioners are barred from establishing a business relationship if the requirements for CDD have not been done. As already indicated above this in reality may not be practical as the process for CDD in Zimbabwe may not be achieved promptly which can lead to legal practitioners losing business in favour of wanting to meet the CDD obligations. In short, the requirements for CDD have always been adhered to by legal practitioners but what the MLPC Act envisages is not just basic CDD but enhanced CDD which is time consuming and may end up being costly.

Record keeping requirement

As discussed in Chapter three there is a requirement on legal practitioners to keep records of their transactions with their clients. From the responses received legal practitioners were already practicing this hence this is one example of self- regulation and how it is being effectively implemented. However, the challenge which comes with making this already existing self-regulating rule is that failure to comply now has a penalty attached to it as legal practitioners may be liable to prosecution for failing to comply. In addition, legal practitioners view this requirement as a means through which law enforcement agents can gain access to their clients' information through inspections which in terms of the MLPC can be done at any time.[278]The section does not talk of any justifiable reason being present to request the said records and that action may give rise to the breach of legal practitioner-client confidentiality. Once a client feels that their information is at risk of being exposed without their consent they will be reluctant to trust those lawyers who ensure that they comply with the obligations. This may lead to loss of clients.

Reporting obligations

This obligation is the most controversial of them all however there is need to clarify that the reporting obligation only arises in defined circumstances namely:

[277] Section 23 of MLPC Act
[278] Section 24(1) of MLPC Act

i) buying and selling of real estate
ii) the managing of client money, securities or other assets;
iii) the management of bank savings or securities accounts;
iv) the organization of contributions for the creation, operation or management of legal persons;
v) creation, operation or management of legal persons or arrangements, and buying and selling of business entities.[279]

It is not every transaction that a client offers legal services that reporting obligations arise. It is only in respect of the services mentioned above which are of a commercial/financial nature. Further the MLPC Act acknowledges that some information which clients give to their lawyers is subject to legal practitioner -client privilege therefore under the MLPC Act[280], information during the course of giving advice to a client and in the information given in pending or contemplated litigation is protected by and not subject to reporting.

The study showed that despite provision for legal practitioner client privilege mentioned above what the obligations do is to breach legal practitioner-client confidentiality. There is a difference between legal practitioner client-privilege and confidentiality. The duty of confidentiality is a duty which legal practitioners owe to their clients and it extends beyond privileged information.[281] Confidential information may only be disclosed with the consent of the client or when compelled by law.[282]In this instance the legal practitioners are compelled by law to disclose otherwise confidential information.

The major challenge the issue of reporting brings to the profession is that there is the aspect of loss of trust by the client in the legal practitioner. The areas of practice where the lawyer has to report a suspicious report is the area with the lucrative part of legal practice. Commercial work particularly conveyancing is lucrative work which ensures that a lawyer earns a sizable fee. This means that the reporting obligations are a threat to commercial practice. In Zimbabwe the general citizenry lost confidence in the banking sector due to the ever-changing monetary policies which have seen savings being eroded in the blink of an eye.

In the CABS v Penelope Douglas Stone and three Others[283], Stone and Beattie were customers of CABS with a credit balance of US$142 000 in their account when the country was in a multi-currency system and united states dollars was legal tender in Zimbabwe. In 2016 through

[279] Section 13 of MLPC, Memorandum of Understanding between FIU and LSZ Section 2.
[280] Section 30 (2) (b) (i) and (ii)
[281] B Crozier, *Legal Ethics, A Handbook for Zimbabwean Lawyers, LRF* 2009 on page24
[282] B Crozier (n 264 on page 26)
[283] SC15/21

the Presidential Powers (Temporary Measures) Act[284] into effect declaring bond notes and coins as the legal tender in Zimbabwe at par with the United States Dollar. In 2018 through Exchange Control Directive[285]

Stone and Beattie's account was converted to an RTGS at a rate of 1:1. Stone and Beattie were aggrieved and viewed the law as unconstitutional as the bank had a duty to repay upon demand a sum equivalent to the initial sum deposited. Their argument was that the directive[286]compelled CABS to breach its duty to its customers. The Supreme Court held that as long as the directive was law CABS was obliged to abide by it. The directive could only be set aside by a court after a constitutional challenge by the regulated. The duty to have the law declared unconstitutional was the on the bank.

In the present context, as long as the law remains which obliges legal practitioners to report suspicious transactions then the legal practitioners have to abide by it. As was seen in Canada the Federation of lawyers made a constitutional challenge against the government after it sought to impose reporting obligations on legal practitioners and the court agreed that the law was unconstitutional and set aside.

The impact that the law is likely to have in the long run is that clients will buy property from each other, prepare agreements of sales and not transfer property to the new owner because they might not want to be reported. At the end of the day, it would not have served as an effective preventative measure. Further the requirement makes lawyers whistleblowers against their clients against the duty to act in their clients' best interests. Lawyers become the police agist their clients which is contrary to client expectations. In any event there is

CASH TRANSACTION REPORTING (CTR)

In terms of Directive 09/02/2022 the current threshold limits for cash transactions is ZW250 000 and US$1 000. The purpose of the reporting obligation is to dictate where there is big spending which is out of the ordinary spending. The responses from the questionnaire indicated that some of the legal practitioners were not familiar with the cash transaction reporting obligation or the current threshold limits. For those who were aware the response was that the amounts set as limits were impractical and that the amounts should be revised upwards so

[284] SI 133/16
[285] 120/18
[286] n 268 above

that any report made should be a large cash transaction which would ordinarily raise suspicion.

The Zimbabwean economy is mainly an informal economy with the majority of the population involved in informal trading which means their income does not go through the formal banking system. Those individuals transact on a cash basis and can easily save up money to purchase a piece of land for US$ 6 000. The reporting obligation as it stands places on the legal practitioner the obligation to report such a transaction to the FIU. The transaction might be a legitimate one but by virtue of having crossed that limit it becomes reportable transaction.

To show how the amount is impractical is to prove that an ordinary Zimbabwean can have access to the set limits in a day's work for example a lawyer in the over thirty years category is currently able to charge between ZW$96 410- ZW$108 850 per hour which means an amount of ZW250 000 equates to about two and a half hours work. Further the current official Reserve bank auction rate of the US$1 to the Zimbabwean Dollar is 397,3538[287] hence ZW$250 00 is equal to US$629. The amounts set should be in line with current monetary values in the economy in-order for the obligation to have its intended effect otherwise the FIU will end up being inundated with flimsy reports.

5.2. CONCLUSION

The Zimbabwean AML/CFT regime is an adaptation of the FATF recommendations regime which was a very noble and, in some respects necessary in the fight against money laundering however as has been proved it is quite onerous on the legal profession in Zimbabwe and impractical in some instances. Zimbabwe is a developing country with a struggling economy and exchange control challenges and a pubic system which is still developing and not technologically advanced. To then develop an AML/CFT regime with the same characteristics as one from a developing world would prove impractical and onerous on the regulated. There is need to develop a system suited to the Zimbabwean situation which is currently not the case.

CDD requirements which are currently imposed on reporting institutions without distinction are suited to a country with perfectly running systems which would ensure that compliance with the requirements does not become onerous and impractical. Verification expected can only be achieved where the civil registry is easily

[287] www.rbz.co.zw

accessible online. Any verification which can be done would require one to physically attend at the office in question which ends up being costly and time consuming. The obligations bring on added administrative costs to the firm. Non-compliance brings censure through both the FIU and LSZ. A number of firms in Manicaland province have one partner who has to appoint himself the compliance officer on top of his other responsibilities.

Due to the instability in the economy, earning capacity tends to decrease hence any added costs are not welcome which means lee compliance. In light with that the need to retain clients once they have sought a legal practitioner's firm is first price. The obligations have the potential of chasing away clients once they feel that their privacy is being invaded upon. The reporting of a suspicious transaction may turn out to be wrong and the client would be lost. The risk of losing a client against fulfilling AML/CFT obligations means the obligations would be abandoned. There is need to strike a balance based on the circumstances prevailing.

Legal practitioners are a noble profession which is guided by ethical standards of conduct and any deviation from that expected standard brings censure from the client. It is not every circumstance which requires reporting. The issue of mandatory reporting in particular should be set aside in favour of the risk-based approach. Only when the legal practitioner has made an assessment and noted that the transaction requires reporting should the transaction be reported. As an officer of the court with a reputation to protect the possibility of knowingly involving oneself in money laundering or organized crime means there is a possibility of being disbarred.

Each country has its features which are unique to it and different to another. Imposing the requirements in the same manner as a developed country like, the UK is not ideal. In terms of the interpretive note to recommendation twenty-three of the FATF countries are given leeway to choose which aspects for example would qualify as privileged information. The recommendations give countries room to decide what would suit their particular situation.

A "one size fits all" approach" would not be ideal in the circumstances where there are so many variables. Flexibility as opposed to rigidity is more effective which would lead to more compliance rather than resistance. Capacitation of enforcement institutions is necessary so that there is effectiveness in the other sectors thereby eliminating the need to keep extending the obligations to the legal practitioners in Zimbabwe whose risk rating is medium to low. Once there is a clamp down on AML predicate offences like corruption and offenders are prosecuted then the need to impose obligations on legal practitioners

would be eliminated. Further in property sales ZIMRA conducts interviews when processing Capital Gains Certificate. In light of that there is already a n enforcement agency which can absolve the need for legal practitioners to report suspicious transactions. What we have is a duplication of roles which is unnecessary.

There was an indication that not all legal practitioners are well versed with the overall obligations of the AML/CFT regime and that issue has to be addressed so that legal practitioners speak with one voice and lobby the government for amendments to be done to the AML/CFT regime to suit Zimbabwe. Once Zimbabwe has achieved the middle-income status there may be need to then readdress the issues as money laundering typologies are ever changing.

The issue of penalties for non-compliance with the obligations especially CDD requirements should be waived as they cannot be achieved in the current circumstances.

5.3 RECOMMENDATIONS

Having established that the obligations on legal practitioners are onerous there is need for legal practitioners to lobby for an amendment of the MLPC to suit Zimbabwe's circumstances. The possible areas for reform are;

i) CDD requirements which requires DNFBPs to screen clients against the United Nations Sanctions list should be amended or removed and it may be prudent for FIU which has this information at hand to furnish regularly updated sanctions lists to the law firms through its collaboration with the Law Society.
ii) The verification of documents requirements should be amended so that the requirement be left at just retaining copies of the identification document until such a time the Civil Registry is accessible on line for verification of identity documents.
iii) Cash transaction threshold limits should be regularly updated particularly in this current state of the economy to avoid having to report even negligible amounts which also puts pressure on the FIU to deal with a lot of reports which could be baseless instead of focusing on the reports with substance. Quality over quantity. The issue of mandatory reporting should be abandoned in favour of the risk-based approach which gives the legal practitioners discretion after making an assessment whether to report or not.
iv) Removal of the suspicious transaction reporting obligation.

v) There is need to create more awareness amongst legal practitioners regarding the AML/CFT regime as it has a bearing on how they practice and resultantly their earning capacity. The current passive approach by some legal practitioners on issues of anti-money laundering needs to be addressed through more trainings by the LSZ. Once lawyers start taking an active interest it will be possible to speak with one voice over the issues discussed herein and improve the AML/CFT regime so that there is a balance between the needs of the state and the regulated.

5.4. AREAS FOR FURTHER RESEARCH

a) An area that may require research on is the issue of incorporating automated compliance into our AML/CFT regime and it can be done in order to reduce the need for human input and reduce the time spent trying to comply with all the requirements. This may come in handy particularly for solo practitioners who have to balance their need to earn a living and also comply with all requirements needed to run a practice.

b) Another area is on the effectiveness of the AML/CFT regime in Zimbabwe.

c) The role of the courts in the fight against money laundering.

d) Money laundering issues are a global issue and Zimbabwe cannot be left behind as anti-money laundering requirements are needed in some respects as a preventative mechanism however it is only through establishment of legal framework which are best suited to the Zimbabwean situation that the regime can be accepted by those who intend to implement it thereby ensuring compliance and effectiveness. It is of no use to just say there is a legal framework in place which has no significance. Through cooperation the goal will be achieved as all players need each other, that is, the regulated and the regulators and everyone in between.

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APPENDIX 1

A QUESTIONAIRE ON ANTI-MONEY LAUNDERING COMPLIANCE AND THE EFFECT ON THE PRACTICE OF LAW IN ZIMBABWE.

The following research is being done by the writer in partial fulfilment of a Masters in Commercial Law program with the University of Zimbabwe. The purpose of the questionnaire is to assess the effect that the Zimbabwean AML Compliance requirements have on the practice of law.

In terms of the Money Laundering and Proceeds of Crime Act [Chapter 9:24] certain obligations were imposed on lawyers to comply with to combat money laundering.

For purposes of confidentiality no individual and firm names will be required and responses will remain confidential and used for academic purposes only.

The contact details for Yvonne Chapata are:

CELL: 0772 366 379

EMAIL: chapata85@gmail.com

Please answer all the questions.

1. Do you practice as a sole practitioner or partnership at your firm? If in partnership please state how many partners are there at your firm.
   ……
   ……
   ……
2. Are you aware of the AML requirements for legal practitioners in Zimbabwe in terms of the Money Laundering and Proceeds of Crime Act [Chapter]? If yes please briefly highlight what you understand to be the
   requirements……
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3. Are you aware of how the requirements came about? If yes please briefly explain how they came about to be part of the AML regime for Zimbabwe……

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4. Do you have an AML Policy at your law firm?
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5. If the answer to 4 above is yes, please advise if you have been implementing that policy and have you faced any challenges with the implementation of the policy?
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6. Are you aware of the current thresholds for cash transactions?.....
7. Have you recently dealt with a cash transaction? If yes please state the nature of that transaction(s)
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……
8. Did the transaction exceed the current cash threshold limit?.....
..... If yes, did you file a cash transaction report?.....
To whom was the report made?.....
9. Has your firm ever filed a suspicious transaction report?.....
If yes please briefly state the circumstances which gave rise to that report
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……
10. Does your firm conduct client due diligence before a entering into a transaction with a client?.....
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11. Please briefly state the information the client is expected to provide you with as part of the due diligence.
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    ……
    ……
    ……
    ……
    ……
12. How long after a transaction has been concluded does your firm keep the record of that transaction?
    ……
    ……
13. Do you conduct any trainings for legal practitioners and staff on money
    laundering?.....
    .....
    If yes please state how often you do
    so……..
14. What is your opinion regarding the Anti-money laundering compliance requirements in Zimbabwe and what effect if any have these requirements had on the way you practice law?
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15. Please use the space below for any comments or any suggestions you may have that may be relevant to the research.
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THANK YOU/MAZVITA/SIYABONGA.