UNIVERSITY OF NAMIBIA

FACULTY OF LAW

TOPIC: THE IMPACT OF THE IMPLEMENTATION OF LEGISLATION COMBATING TRANSNATIONAL ORGANISED CRIME ON THE DETTERENCE OF MONEY LAUNDERING IN NAMIBIA

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SCHEDULE A

I the undersigned, hereby declare that the work contained in this disswrtation for the purpose of obtaining my degree of LLB (Honours), is my own original work and that I have not used any other sources than those listed in the bibliography and quoted in the references.

Signature:…….

Date:……

Supervisor's certificate

I, N Horn hereby certify that the research and writing of this dissertation was carried out under my supervision.

Supervisor's signature …….

Date ……..

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DEDICATION

In memory of Grethe Kapuire, Marukua (Mummy) Kazondunge

and Supii Katjita-Mbirijona

For their love and support.

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DEFINITIONS

1. **Affected gift -** made by a defendant not more than seven years before the fixed date; or (b) made by a defendant at any time, if it was a gift - I) of property received by that defendant in connection with the commission of an offence or related criminal activity carried out by him or her or any other person; or (i) of property which directly or indirectly represented in that defendant's hands property received by him or her in connection with the commission of an offence or related criminal activity.

2. **Realizable property-** any property held by defendant concerned, any property held by a person whom that defendant has directly or indirectly made any affected gift, the instrumentality of an offence attributed to a defendant.

3. **Instrumentality of an offence**- refers to any property which is concerned in the commission or suspected commission of an offence at any time before or after the commencement of this Act, whether committed within the Republic or elsewhere;

4. **Proceeds of unlawful activities -** means any property or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived;

5. **Property -** refers to money or any other movable, immovable, corporeal or incorporeal thing and includes any rights, privileges, claims and securities and any interest therein and all proceeds thereof;

6. **Unlawful activity -** means any conduct which constitutes a crime or which contravenes any law whether such conduct occurred before or after the commencement of this Act and whether such conduct occurred in the Republic or elsewhere.

7. **Accountable institution** – refers to any person or institution referred to in Schedule 1 of the Financial Intelligence Act including branches, associates or subsidiaries outside of that person or institution and a person employed or contracted by such person or institution;

ABBREVIATIONS:

POCA – Prevention of Organized Crime Act

FIA – Financial Intelligence Act

FICA – Financial Intelligence Centre Act

FIC – Financial Intelligence Centre

SA POCA – South African Prevention of Organized Crime Act

ESAAMLG – Eastern Southern Africa Anti-Money Laundering Group

FATF – Financial Action Task Force

UK – United Kingdom

UN – United Nations

ABSTRACT

Money laundering has become a prominent phrase all over the world and the international community has joined forces to try and combat money laundering over the years. Countries like Namibia have always fallen prey to criminal syndicates especially due to a lack of anti-money laundering legislation which we did not have until recently, which is why elite businessmen like Koby Alexander managed to launder large sums of money in Namibia. We have also had numerous cases of corruption in Namibia, which is one crime that overlaps with money laundering in many instances. A good example would be the recent Afrisam case where over 70 million Namibian Dollars was disappeared and could not be accounted for, which is a large sum and obviously most if not part of the 71 million was laundered. Then there was the 30 million which disappeared in the Avid SSC scam, most of if not all of which was also laundered. Leading to an inference that in Namibia if we are to prosecute corruption we would ultimately have to prosecute money laundering as well due to their close relationship. What this paper aims to do is look at how far Namibia has come with its anti-money laundering legislation compared to the pre anti-money laundering era, as well as in comparison with other countries like South Africa. It will look at the competence of our courts to impartially apply the current anti-money laundering legislation without the influence of politics due to the nature of money laundering cases with elements of corruption. However the ultimate goal of the paper is to look into the two pieces of legislation being POCA and FIA in light of how it has changed the Namibian legal position with regard to money laundering as well as how effective it has been in deterring the crime in its short time, by looking at cases that has come before our courts under POCA.

CHAPTER 1

INTRODUCTION

"Sustainable International interest in money laundering and the closely related issue of confiscation of the proceeds of crime arose in the 1980's primarily within a drug trafficking context. During the early nineties, the prevention of money laundering evolved into an important foreign-policy and financial management priority in both the major and minor financial centers throughout the world"[1], the paper will give light to this quote in discussing the history of money laundering in Namibia as well as how anti-money laundering legislation is applied to detect, combat and deter the crime of money laundering.

BACKGROUND

Money laundering has been observed to be a very problematic crime both nationally and internationally, and has caused many countries to enter into numerous agreements to try and detect and deter the crime as it strikes at the very heart of a countries economy. Most developed countries have put in place measures in place in trying to achieve the above goal and have in the process discovered the crucial link between corruption and money laundering, subsequently emerging as one of the problems that has caused most preventative measures put in place to prove ineffective, leading to more conventions and agreements aimed at addressing the shortcomings. Namibia like many African countries has recently enacted a statute aimed at criminalizing money laundering as well as a statute that puts preventative measures in place, being the FIA[2] and POCA[3] respectively.

Nsudano[4] describes money laundering as "the manipulation of illegally acquired wealth in order to obscure its true source or nature". He goes on to define money laundering as the conversion of illicit cash to another asset, the concealment of the true source or ownership of the illegally acquired proceeds, and the creation of the perception of legitimacy of source and ownership.

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[1] See Itzikowitz, A. 1999. "The Prevention and Control of money laundering in South Africa", *Journal on Contemporary Roman-Dutch law*, Vol. 62, No 1-4 at page89

[2] Financial Intelligence Act 2 of 2007

[3] Prevention of Organized Crime Act 29 of 2004

[4] Nsudano, PM. 2003. A Comparative Legal Analysis of the Contemporary Treatment of Money Laundering under the Jurisdictions of Namibia and South Africa. LLB Dissertation. Windhoek: University of Namibia. At page 1

It is obvious from the above definition and description of the concept under discussion that contrary to popular believe that the money laundered is not merely money that is obtained from drug trafficking, human trafficking and most illicit activities, but all monies that are obtained by illegal means such as robbing a bank or money that is acquired through corrupt means or even fraud. Before the Prevention of Organized Crime Act[5] which criminalizes money laundering in Namibia, people could launder money as much as they could and they would not be prosecuted for the crime of money laundering but rather a crime like theft. However the inception of the above legislation as well as the Financial Intelligence Act[6] into our legal system has been a step towards the right direction, the question to be answered is whether the implementation of such statute does in fact have an impact on tackling the continuous growth of money laundered through corruption and other activities which threatens our already fragile economy.

This paper aims to look at the close relationship between corruption and money laundering to help indentify certain challenges that are often encountered by our courts in their application of anti-money laundering legislation. Many developing countries Namibia being one, experience problems in prosecuting money laundering, mainly due to a lack of evidence, bribery of officials, death of crucial witnesses, death of suspects (which was the case in the Avid case were 30 million of the Social Security money was defrauded) lack of prosecution capacity and credibility of witnesses amongst others. However the current situation in Namibia and research has revealed that very few corruption cases make it to court and the rate of conviction in such cases has even proven to be lower.[7]

The above is confirmed by the recent case of the *The Prosecutor General v Teckla Lameck & 3 Others V Festus Lameck & 7 Others* [8] where Teckla Lameck a member of the Namibia Public Service Commission did remunerative work outside the scope of her duties and in violation of section 3 (2) of the Public Service Commission Act[9] she and 3 other defendants were charged

[5] 29 of 2004
[6] 3 Of 2007
[7] Goredema, C & Madzima, J. 2009. A report on An assessment of the links between corruption and the implementation of anti-money laundering strategies and measures in the ESAAMLG region. Published in Monograph No 108, October 2004. Available at: http://www.issafrica.org/pubs/Monographs/No108/Chap1.htm last accessed on 27 July 2011
[8] POCA 1/2009
[9] 2 of 1990, the section states that a member of the public service commission may not do remunerative work without the consent of the president.

under the Anti-Corruption Act[10], Mrs. Lameck received 42 million from this transaction which are proceeds of crime according to POCA. We have Koby Alexander[11] who was charged with shares backdating in the U.S, our courts have failed to find Mr. Alexander guilty of the crime of money laundering and have also failed to extradite him to the United States to face prosecutions for the crimes he has committed. The Koby Alexander case is discussed in the next chapter to highlight the elements of money laundering and how our courts struggle to convict people guilty of such crimes.

Nevertheless Namibian courts even with the amount of independence given to the judiciary by the constitution struggle to convict individuals of organized crimes more specifically money laundering and corruption, more so due to the fact that most government officials are usually involved in this crimes and somehow the Executive has some form of influence over the other two organs of state. This has been apparent in the NDF scandal of the millions of dollars that vanished and no prosecution came of it, the Avid case which involved one of the Ministers and many more.

An additional problem experienced by the courts through the prosecutions of money laundering cases is really the lack of prosecution capacity, as the financial intelligence act is still in its infant stages one wonders whether our judges and prosecutors are equipped enough to deal with cases of such a complex nature. How much do our prosecutors and judges really know about money laundering and how far have they familiarized themselves with the Acts to effectively apply them? These are questions that pop into our minds when we think of the possible reasons why people get away with the crime of money laundering.

The Prevention of Organized Crime Act referred to as POCA in this paper clearly stipulates in section 4 to 6 the acts which constitute money laundering, the Financial Intelligence Act which to be referred to as FIA takes more of a detecting and preventative role in that it established the Financial Intelligence Centre to which suspicious behavior is reported and who are responsible for investigating such suspicions. What's more is that the content of the Acts and the measures

[10] 8 of 2003

[11] See Werner Menges. 2008. Koby Disputes Money Laundering Claim. T*he Namibian Newspaper*, dated 17 March 2008 Available at: http://www.namibian.com.na last accessed on 26 July 2011. See also another article by Werner Menges in the Namibian titled: Court Unfreezes Kobi's Accounts. Dated 14 December 2006. Available at http://www.iss.co.za/pubs/Monographs/No90/Chap2.html last accessed on 27 August 2011.

that have been put in place, especially those by FIA aim is to detect and subsequently deter this money laundering far as reasonably possible. The question is whether our justice system can effectively make use of the legislation in place.

Since POCA and FIA only came into effect in 2009 it would not apply to all cases such as the Avid SSC, it however makes provisions for Asset forfeiture, Preservation of Property and Restraint orders which will all be explained in detail in the next chapters. What should be noted is that the law makers tried as far as possible to cover as many pitfalls so as to pave the way for the ultimate deterrence of the crime in Namibia.

Ultimately it can be said that with a commendable constitution, statutes like the Financial intelligence Act, The Prevention Of Organized Crime Act, the Anti-Corruption Act[12] and the many conventions that Namibia has ratified in its attempt to address the crime of money laundering, the question of whether such measures have been effective still remains. Does the fact that our legislation on money laundering is still in its early stages have an effect on how our courts apply the law and the low rate of conviction in such cases or is there another reason? Have our judicial officers and those that are expected to investigate and prosecute this crime been properly trained and been made aware of all the necessary complexities of the crime and how to best apply the acts in place to get the desired effect? These are all issues the paper aims to address in an attempt to find answers and solutions to this problem that has proven to be an eminent threat not only to our economy but also our democracy.

STATEMENT OF THE PROBLEM

The main objective or problem the paper aims to address is the delay in the prosecution of those accused of the crime of money laundering by the office of the prosecutor general, if this problem is to persist it may adversely impact the effective implementation of the anti-money laundering legislation by the courts to deterring money laundering in Namibia.

LITERATURE REVIEW

Money laundering seems to be a trendy subject of discussion especially internationally and just as it is vastly spoken about it has also been equally written about. However most of the literature

[12] 8 of 2003

on money laundering is on developed countries such as the United Kingdom and many of the writers on the subject are international writers such as the likes of Dr. W.C. Gilmore who wrote on the "International Efforts To Combat Money Laundering, Barry Rider and Michael Ashe who wrote a book on "Money Laundering Control". Gilmore, Rider and Ashe wrote on ways to Combat and Control money laundering and their focus was mainly on developed countries and international instruments (some of whom Namibia has actually ratified).

Writers such as Kristine Karsten and Andrew Berkley in their book titled "Arbitration: Money Laundering, Corruption and Fraud" wrote about the relationship between money laundering, corruption and fraud and how they are often intertwined and the dangers of ignoring the links between these crimes. Others such as Edward Elgar has written on the scale and impacts of money laundering, their focus was on developed states and also seem to have identified the relationship between corruption and money laundering and the dangers of such relationship. Nevertheless, all the above mentioned writers do not specifically focus on how they apply their legislation on organized crime or on how effective such legislation is in curbing the problem, more importantly they do not make specific mention of how their judiciary dealt with implementation of the relevant legislation during their early stages.

In Namibia there are no books written on money laundering, nonetheless several papers especially dissertations by previous law students have been written. Nsudano did a comparative analysis between how the South African and Namibian Jurisdiction treat Money laundering cases, the paper was written in 2003 which was before the Financial Intelligence Act came into effect and thus does not give an idea of how our courts have managed to deter money laundering through the implementations of the Acts.

Others such as Mwapole focused on the Anti-Corruption Commission in his/her Dissertation in 2008 and a Master Student Shaningwa focused in the Namibian Anti-Corruption Commission strategies in his/her Master's thesis in 2007, their focus was on Namibia and even though they discussed cases such as the Avid case and so forth they did not focus on our courts and their ability to try such cases as well as the relationship between corruption and money laundering and how it influences the amount of convictions in money laundering cases.

My contribution to the literature on money laundering has specifically more to do with our courts and how a lack of independence of our judiciary more specifically the office of the prosecutor general could influence the way cases involving money laundering are dealt with by our courts. Moreover the focus will be more on case studies in Namibia and the difference in the way they approached money laundering cases before the act and how their approach is likely to change with the implementation of POCA and the FIA, in addition a comparative study with other jurisdiction like South Africa and the UK will be done. The plan is to look at the effectiveness of the relevant legislation in controlling the crime, which in essence means that the research will make use of what has been written, but with a specific focus on Namibia and how the courts have applied the anti-money laundering legislation. This particular research would be crucial so as to help us prevent further threats to our economy as well as determine what is causing the real delay in prosecuting people like Teckla Lameck. More importantly the study will help make us aware of the change that criminalizing money laundering has on our justice system and whether such legislation is likely to successfully tackle the problem Namibia experiences with deterring money laundering if properly implemented by our courts.

PURPOSE OF THE STUDY

The main intention of the study is to try and look at our anti money laundering legislation, especially POCA and see how it has changed the justice system since its inception. The study also aims to look at how far Namibia is in implementing the legislation and the prospect of detection, prevention and deterring of money laundering. Further the identification of the relationship between money laundering and corruption, how they are intertwined and showing how in most cases money obtained through corruption is also laundered is a crucial part of the study. The study will look at the independence of our courts and the office of the prosecutor general (which has the mandate of deciding who gets prosecuted) when it comes to dealing with cases of money laundering.

CHAPTER 2

INTRODUCTION

Namibia like so many other countries in the world did not recognize money laundering as a crime from the onset, even though money laundering has existed for as long as crime has. This chapter aims to look at the Namibian position before POCA and FIA came into effect as well as the place of money laundering under the common law, reference will be made to Namibian cases before POCA and FIA which had elements of money laundering. The chapter will further look at some statutory provisions which criminalized certain acts that are also known to have characteristics of money laundering, by looking at how such legislation failed to criminalize money laundering even with the proof of its existence in the various offences. At last the chapter will introduce both POCA and FIA by giving a summary of their aims, functions and application under the Namibian legal system.

2.1. THE NAMIBIAN COMMON LAW AND MONEY LAUNDERING

When we look at the definition of money laundering which includes amongst others the cleaning of property so as to disguise it from its true origin, knowing that such property was derived from the proceeds of crime. It is evidenced that most common law crimes be it theft, bribery, fraud etc have elements of money laundering in that after a person steals money they try and conceal the true origin of the money by investing such monies in legitimate businesses, opening bank accounts etc as a form of legitimizing the proceeds.

The above position is observed in different cases that have been before our Namibian courts, the outcome of such cases clearly showed the Namibian position with regard to money laundering under common law. Because of the common law position and the lack of legislation aimed at detecting and deterring money laundering, Namibia has been vulnerable to money laundering especially by organized crime networks. This is understandable when you look at the amount of money laundered through shebeens, taxi businesses and other businesses such as night clubs.

There have been plenty of cases that have been brought before our Namibian courts during the years that have had elements of money laundering, but since it was not an offence under

common law the accused persons where usually be charged with theft or any common law offence that could be associated with their actions.

- ✓ **KOBY ALEXANDER CASE**

Mr. Alexander is an Israeli businessman who is wanted by the United States government for over 33 criminal charges of which one is illegal stock-options backdating scheme which involved shares in a New York based company Comverse Technology Inc of which Mr. Alexander himself was a co-founder in 1982. Mr. Koby Alexander came to Namibia in late 2006 after having been granted a work permit for two years by the Namibian government, he transferred over N$ 100 million to Namibia in July 2006. Mr. Alexander was however arrested in September 2006 after the US government requested the Namibian government to extradite him to the US so that he could stand trial, he was released on bail but his two bank accounts were frozen by the bank of Namibia in October 2006. The court subsequently ordered that Alexander have access to his accounts in December 2006, which money was converted to local currency and transferred to Metcalfe Legal Practitioners (Alexander's lawyers) trust account.[13]

Koby's case is noticeably one of money laundering even though his lawyer in a letter written to the Ministry of Justice alleges that the money that is alleged to be the proceeds of the shares-backdating does not form part of the money transferred to Namibia.[14] Who really knows that the amount transferred to Namibia does not form part of the alleged proceeds of crime? Then again since at the time of his arrest in Namibia the new anti-money laundering legislation was not enforce he could not be charged with money laundering, even though the bank was able to freeze his accounts a mere court order was enough to enable him to have access which enabled him to launder the money by transferring same to Metcalfe's trust account. The lack of anti-money laundering legislation and the fact that the common law had not criminalized it caused Namibia to fall prey to all forms of money laundering and you can be sure that Kobi Alexander is not the only one who managed to take advantage of Namibia to launder money.

[13] See Werner Menges. 2008. *Koby disputes money laundering claim.* T*he Namibian Newspaper*, dated 17 March 2008 Available at: http://www.namibian.com.na last accessed on 26 July 2011. See also another article by Werner Menges in *the Namibian* titled: *court unfreezes Kobi's accounts*. Dated 14 December 2006. Available at http://www.namibian.com.na last accessed on 26 July 2011.

[14] See Werner Menges. 2008. *Koby disputes money laundering claim*. T*he Namibian Newspaper*, dated 17 March 2008 Available at: http://www.namibian.com.na last accessed on 26 July 2011.

- ✓ **Cheques Stolen From The Namibian Broadcasting Corporation (NBC)**

In 2002, the Namibian police discovered a scam that involved 30 cheques which were stolen from NBC, the cheques were said to have been physically transported to centre's which were 800 kilometers outside Windhoek and deposited in accounts of persons resident in these places. Three people were subsequently arrested of which one was a well known owner of a popular driving school as well as a fleet of taxis, he was alleged to have received N$ 63 000 of the proceeds. Another suspect was the owner of a Lodge near Ondangwa who was arrested in April after bank officials reported her attempts to negotiate payment of a cheque for N$163,570.[15]

The above case has all the elements of money laundering, the deposits made of the money in the different accounts is a way of concealing the money from its true source and legitimizing such amounts by getting it into the banking system. The facts that one of the suspects was the owner of a driving school and taxi fleets and the other suspect was the owner of a lodge also shows possible laundering of the money through their businesses, such businesses are usually referred to as dummy companies because they are usually formed for purposes of laundering money.

Since Namibia had not passed any anti-money laundering legislation at the time of the above case, it can be assumed that the suspects were probably charged with theft or fraud or both and could still enjoy the proceeds of their crime after they completed their sentence if no confiscation order was made in terms of the Banking Institutions Act[16] which will be discussed in detail later in this chapter.

However it seems there was a high level of awareness of the money laundering problem especially among the people in charge of law enforcement in Namibia and banking institutions, but it was obvious that the non banking institutions that are also frequently victims of money laundering did not have much of an appreciation of the implications and occurrence of money laundering in their respective sectors. In comparison to the sectors that had an awareness of money laundering those who were unaware formed the utmost percentage, leading to a postulation that such lack of attentiveness may have been due to the fact that money laundering

[15] Ray Goba article, *MONEY LAUNDERING CONTROL IN NAMIBIA*, Profiling Money Laundering in Eastern and Southern Africa, Published in Monograph No 90, December 2003 at page 6. Available at: http://www.iss.co.za/pubs/Monographs/No90/Chap2.html last accessed on 27 August 2011 on

[16] 2 of 1988

was not considered a crime. The postulation was followed by the acceptance by many "that even though the possibility of cash forming part of the proceeds of crime during a commercial transaction carried out in cash, the absence of any indication to such effect entitles the business people to assume that the source of such cash is legitimate".[17]

The above findings displays the lack of awareness of the money laundering problem in the past due to a lack of legislation criminalizing it, the circumstance does not seem to have changed much with the implementation of the anti-money laundering legislation, whether more people are now more aware of money laundering now that it has been criminalized is discussed in the next chapter.

Under the common law intentional receipt of stolen property is considered a crime, this is one of the elements of money laundering as defined by the current legislation but was not considered money laundering for purposes of the common law. The above vividly shows that the common law did not recognize money laundering as a criminal offence, although over the years it has been observed to be one of the main features of organized crime.[18] When looking at common law crimes such as fraud, theft, murder, bribery and so forth we can see that most of the above crimes have elements of money laundering because any proceeds that come as a result of the above crimes are usually concealed and legitimized so that the criminals can benefit from such proceeds.

2.2. STATUTORY CRIMES

Possession of stolen property (or property believed to have been stolen) and being unable to give a satisfactory answer on how such property came into your possession constitutes a statutory offence.[19] The above scenario has elements of money laundering because if the property is stolen

[17] Ray Goba article, MONEY LAUNDERING CONTROL IN NAMIBIA, Profiling Money Laundering in Eastern and Southern Africa, Published in Monograph No 90, December 2003. Available at: http://www.iss.co.za/pubs/Monographs/No90/Chap2.html; last accessed on 27 August 2011 on

[18] Ray Goba article, MONEY LAUNDERING CONTROL IN NAMIBIA, Profiling Money Laundering in Eastern and Southern Africa, Published in Monograph No 90, December 2003. Available at: http://www.iss.co.za/pubs/Monographs/No90/Chap2.html; last accessed on 27 August 2011.

[19] David Layman Vincke, F & Heimann (Eds). 2003. *Fighting Corruption (A corporate Practice Manual* Paris: ICC Publishing S.A. At page 89

it already forms part of proceeds of crime for purposes of the crime of money laundering, but since money laundering was not a crime before the coming into force of POCA[20] no one could be charged for money laundering, nevertheless punishment was effected through charging someone with a common law crime or one covered by statute at the time. Before the anti-money laundering legislation came into force there were other important legislation that aimed at combating money laundering and basically recognized money laundering as a crime even though it did not criminalize it, one of these legislation is the Banking Institution Act .

- ✓ **The Banking Institution Act 2 Of 1988**

The act applies to banking institutions in Namibia and brought forth an exception to the confidentiality and secrecy that generally binds baking institutions in that it permits disclosure of confidential information for purposes of instituting criminal proceedings, such disclosure also extends to the criminal proceedings. The act further authorizes baking institutions to disclose information to a police officer investigating an offence under our law, however such disclosure should be limited affairs and accounts of the customer who is a suspect in the investigation. Important provisions of the Act that pertains to the combating of money laundering are those that authorize the Bank of Namibia to carry out supervisory functions, its powers to freeze accounts, compel disclosure and impose reporting obligations on banks.[21]

The above provisions helped combat money laundering in Namibia in the absence of anti-money laundering in that the Bank of Namibia could order the freezing accounts of individuals that triggered suspicious transactions and may have had funds that formed part of the proceeds of crime. The fact that the bank can compel disclosure as well as impose reporting obligations on banks to report suspicious transactions was a good way to detect money laundering through the banking institutions as well as a way of preventing the crime.

The Act also makes provisions for Namibian court that makes a confiscation order during criminal proceedings to ask a foreign state to assist them in enforcing a confiscation order if an application is made to the court, if the person against whom the order is made has property in

[20] Prevention of Organized Crime Act 29 of 2004

[21] Ray Goba article, MONEY LAUNDERING CONTROL IN NAMIBIA, Profiling Money Laundering in Eastern and Southern Africa, Published in Monograph No 90, December 2003. Available at: http://www.iss.co.za/pubs/Monographs/No90/Chap2.html; last accessed on 27 August 2011 at page 19

that country and if the property in Namibia are not enough to satisfy the order. The provisions do not require a criminal conviction before they are invoked, it should also be distinguished that one of the important features of the provisions is that there need not be prove of a direct link between the crime and the money or property before such order can be enforceable. It is also vital to note that at the time of the passing of this Act Namibia did not have legislation which criminalized money laundering, thus the confiscations where usually in respect of common law crimes such as theft and fraud or statutory crimes like drug trafficking or vehicle theft. The above is also done in respect of the issuing of restraint orders by the Namibian High court, the one thing that sets the restraint order apart is the fact that the order has the effect of freezing the assets which prevents them from being stripped, further the restraint orders precedes the confiscation order. [22]

Although the above provisions appear to have been a positive attempt by the banking institutions, it is still apparent from the face of the abovementioned provisions in respect of confiscations that the fact that the act did not criminalize money laundering made it difficult to confiscate most of the proceeds of crime since laundering is done in many ways which do not always include banking institutions, same can also equally apply to restraining of property.

The main defect of the act, especially in its pursuit to detect and deter money laundering is that the Act only applies to banking institutions a and does not cover other financial institutions which are not banks[23], the fact that the net casts by the Act to combat money laundering only spreads across banking institutions limits the combating of money laundering across Namibia especially the detection and deterring of money laundered through accounting institutions like law firms, real estate companies etc.

In summary it is apparent that even though the Banking Institution has helped combat money laundering through financial institutions in certain respect, its limitations still called for anti-money laundering legislation as a crime as complex as money laundering need water-tight legislation aim at addressing every corner vulnerable to the money laundering trail. According to

[22]See Goba, R. 2003. *MONEY LAUNDERING CONTROL IN NAMIBIA, Profiling Money Laundering in Eastern and Southern Africa*, Monograph. At page 20 . Available at: http://www.iss.co.za/pubs/Monographs/No90/Chap2.html last accessed on 27 August 2011.
[23] Ibid 20

Goba[24] Its limitations also limited the conducts of a criminal that could be punishable by law as well as the amount of participants that could be held accountable, which usually creates a scenario where criminals benefit from conduct that would generally be regarded as a crime but does not warrant punishment due to the absence of adequate laws to deal with it.

2.3. PREVENTION OF ORGANIZED CRIME ACT[25]

The above act criminalizes money laundering in Namibia it has been enforce since May 2009, thus by virtue of POCA money laundering is now a crime and a person can be charged with various counts of money laundering under that act. This means that persons can be charged with theft and fraud and also money laundering without the risk of splitting charges, as money laundering is now considered a crime in its own respect and criminal can no longer hide in the shadow of the common law which did not consider the concealment and disguising of proceeds of crime as an offence. The application and content of POCA as well as the way in which it aims to detect and prevent money laundering in Namibia will be discussed in the next chapters.

2.4. THE FINANCIAL INTELLIGENCE ACT[26]

The financial intelligence act plays a significant role in the fight against money laundering in Namibia especially when it comes to its detection and prevention the act puts preventative measures in place to try and deter money laundering especially through financial institutions and accounting institutions such as law firms.

The Act came into operation on 5 May 2009, this act is important and compliments POCA in that it established the Financial Intelligence Center which is based at the Bank of Namibia. The Financial Intelligence Centre plays a very crucial role in the fight against money laundering in that is does the ground work through its intelligence by looking into the accounts of the suspects and searching every possible area during its investigations. Even though information discovered

[24] Ibid p23
[25] 29 of 2004
[26] 3 of 2007

during their investigations cannot be used in court as evidence against the person, the information gathered through the investigation is forwarded to the central bank and the Namibian Police to help speed up the investigation.

The core purpose of FIA is to combat money laundering by imposing a duty on accounting institutions such as legal practitioners to report certain transactions to the Bank of Namibia. Supervisory bodies also have a duty to report certain information to the Financial Intelligence Centre (FIC) which is tasked with the responsibility of regulating the FIA as well as receipt and investigations of reports in terms of the FIA.[27]

The law society as a supervisory body also has an obligation to take certain steps to ensure that the bodies that they are responsible for such as law firms comply with obligations imposed on them by the act. Here are a few steps that bodies such as the law societies are expected to take to protect the legal practitioners from money laundering by clients:[28]

- They are expected to "Adopt the necessary measures to prevent or avoid having any person who is not fit and proper from controlling, or participating, directly or indirectly, in the directorship, management or operation of an accountable institution"

- To also "Examine and supervise accountable institutions, and regulate and verify, through regular examinations, that an accountable institution adopts and implements compliance programs."

- Further "Issue guidelines to assist accountable institutions in detecting suspicious patterns of behavior in their clients and these guidelines shall be developed taking into account modern and secure techniques of money management and will serve as an educational tool for reporting institutions personnel"

- As well as "Co-operate with other enforcement agencies and lend technical assistance in any investigation, proceedings relating to any unlawful activity or offence under the Act."

[27] Law Society. 2010. *Information Manual to Legal Practitioners*. Windhoek: Published by the Law Society of Namibia. At page 4
[28] Ibid page 4 - 5

FIA provides that only practitioners with fidelity funds can receive money it has been observed that in that the act ought to be amended in that respect to provide for all practitioners so as to enable proper protection especially with regard to aspects of money laundering.[29]

Nevertheless the measures put in place by the Act as well as the law society to protect legal practitioners against money laundering by clients can only be effective as far as the law society does what is required by it in the act, more especially with regard to educating legal practitioners and the legal fraternity on the dangers of money laundering and how they can help in curbing it.

Having regard to the prevention of illegal monies being deposited into the trust account, the Financial Intelligence Act has stretched the obligations to Law firms and legal practitioners by giving them the obligations to verify clients as mentioned earlier in the chapter.[30]

The duties imposed on law firms, accounting firms, insurance brokers and many other accounting institutions aim at preventing any suspicious conduct or transactions between the clients from going undetected, which is a way of preventing illegal monies from being deposited into trust accounts without detection. Furthermore, in respect of law firms the Act does not allow for lawyers to use the defence of attorney and client privilege when an obligation to report arises, which means that a legal practitioner is expected to report any suspicious behavior that may cause them to believe that client wants to use the firm to launder money although there are exceptions as attorney and client privilege does not completely fall away. It should however be noted for purposes of this paper that the duty to report is only limited to professional relationships, which means that if such information surfaces during a dinner party or gossips at social events the legal practitioner would not be obliged to report same to the FIC.[31]

It is concluded that legislation and the law society have put in place stringent measures, measures that not even the legal practitioner can elude aimed at curbing the issue of money laundering in law firms, and safe to say the obligations imposed on the legal practitioners not only help protect them from falling prey of having their firms used to launder money by clients, but also helps prevent deposit of illegal monies into trust accounts especially through the process of identifying

[29] Law Society. 2010. *Information Manual to Legal Practitioners*. Windhoek: Published by the Law Society of Namibia. At page 5
[30] Ibid page 6
[31] Ibid page 13

and verifying of clients. Most members of the legal fraternity are of the view that the acts imposes ridiculous obligations on law firms which may result in allot of firms losing clients and money through the lengthily process of identification and verifying, but the law stands as it is until is challenged and whether the measures put in place do help detect and prevent money laundering in Namibia as it is aimed to do only time can tell.

In summary we can plainly see that money laundering was not considered a crime in Namibia under common law even though most common law crimes such as theft and fraud had traces of money laundering. The old Namibian statutes also did not criminalize money laundering, although the Banking Institution Act recognized the money laundering problem and implemented provisions aimed at addressing the problem in banking institutions, legislation that would case the net wider was required as a lack of criminalizing money laundering still served as a great flaw to its deterrence. Furthermore cases such as Koby Alexander and other cases that came before the Namibian courts and clearly have been observed to contain features of money laundering could not be properly adjudicated due to a lack of legislation aimed at addressing money laundering. Finally with the ushering into force of the new legislation on money laundering there is hope of a change for the better in our efforts to combat money laundering especially since POCA has finally been able to criminalize money laundering, while FIA is in charge of putting the measures in place that are aimed at detecting and preventing the crime.

CHAPTER 3

3.1. MONEY LAUNDERING DEFINED

Burchell[32]defines money laundering as the process which gives dirty money a cloak of respectability and in that way such money is hidden from the eyes of the authorities. He further quotes Jeffrey Robinson who defines money laundering as "the source of illegally obtained funds is obscured through a succession of transfers and deals in order that those same funds eventually are made to reappear as legitimate income".

Simply put money laundering is the intentional act which involves the cleaning of money that is considered dirty (because it forms part of the proceeds of a criminal activity) and legitimizing such dirty money through the three stages of money laundering which has the effect of concealing the true source of the money being the result that the launderer desires in addition to being able to enjoy the proceeds without the risk of punishment.

The criminality on which money laundering is based is not restricted to just one or more defined forms of conduct, it is linked to the proceeds of unlawful activities[33]. This should be noted during the process of detecting money laundering, the above shows that one of the main indicators of identifying whether a crime has features of money laundering is by looking at whether the proceeds alleged or suspected to have been laundered forms part of the proceeds of unlawful activities.

It seems that from above, it can be inferred that the standard that statute aims to set is looking at the origin or the alleged laundered proceeds before we can determine whether one has committed the crime of money laundering or not. The above also clearly shows us that a person can commit numerous acts of money laundering in as far as he or she tries to conceal the origin of the proceeds of unlawful activity, the conduct can be anything that the person does to dispose of the proceeds be from buying luxuries goods to buying groceries at a local supermarket, as long as the money being used is the proceeds of unlawful activity the person would be guilty of the crime of money laundering.

[32] Burchell, J & Milton. (Eds).2005. *Principles of Criminal Law: Third Edition*. Claremont: Juta and Company. at page 986

[33] Ibid page 988

All the same money laundering is considered the world's third largest business in terms of value, although it is said no one really knows with a degree of certainty how big it is its shadowy character causes it to grow at a fast phase.[34] The growth of money laundering especially in a country like Namibia would be a death sentence to our economy, which is why the legislation in place has tried to address as many loopholes caused by money laundering as possible whether they will be effective in doing so is yet to be seen.

Burchell[35] describes the three stages of money laundering as follows:

3.1.1. The Three (3) Stages Of Money Laundering

1. The first stage is popularly known as placement which involves circumventing the reporting system in place (which in the Namibian context would be the accounting institutions as defined by the acts and banking institutions), and placing the money in a bank or other institution. Another method of placement is called 'smurfing' which involves the reduction of large amounts of money and distributing the smaller amounts amongst allot of people who in turn take the money to financial institutions.

2. The process that hides the illegal origin of the money by way of a chain of transactions in order to render the proceeds accessible in a 'legitimate guise' is called layering and is the second stage in the money laundering process. The tainted funds are then used to buy and sell property or are invested in legitimate schemes such as insurance.

3. The final stage is called integration and is where the criminal regains control of the proceeds of the unlawful activity without fear of exposure.

[34] Vincke, F & Heimann (Eds). 2003. *Fighting Corruption (A corporate Practice Manual)* Paris: ICC Publishing S.A. at page 91-92

[35] Burchell, J & Milton. (Eds).2005. *Principles of Criminal Law: Third Edition*. Claremont: Juta and Company. At page 986

3.1.2. Law Firms And Their Vulnerability To Money Laundering

The Financial Task Force (FATF) has reported that lawyers are mostly used to establish corporate entities through which money is laundered by their client, they also provide the use of the trust accounts which clients use as a form of placement (the first stage in the money laundering process).[36]

Lawyers are quite vulnerable to money laundering especially those that may find themselves struggling to meet ends meet, can easily fall prey to money laundering the and Kobi Alexander case mentioned in the previous chapter is a good example of how lawyers are used in the money laundering process. This is why FIA included lawyers in its list of accountable institutions who are obliged to do the following in an effort to combat money laundering and avoid falling prey to clients who want to use them to launder money:

- Identify and verify new and existing clients
- Keep records of identities of clients and transactions entered into with clients
- Report certain transactions to the Financial Intelligence Centre
- Formulate and implement internal rules
- Train employees
- Appoint a responsible person to monitor compliance.[37]

The above obligations on accountable institutions have not had a positive impact, especially for lawyers and law firms in that some of the requirements under verification and more especially the internal rules which requires informing clients of the FIA. Informing clients about FIA especially the importance of making them aware that not all information they disclose is protected by professional privilege under FIA, but things are not as easy as they look on paper in practice. Lawyers deal with clients from all walks of life, the elite, the literate and the illiterate, it would not be easy to inform clients about FIA and have a successful verification in respect of every client even the educated ones.

[36] Vincke, F & Heimann (Eds). 2003. *Fighting Corruption (A corporate Practice Manual)* Paris: ICC Publishing S.A. at page 93

[37] Law Society. 2010. *Information Manual to Legal Practitioners*. Windhoek: Published by the Law Society of Namibia. At page 6-7

Imagine a scenario where a lawyer is expected to explain the provisions of FIA to an elderly Oshiwambo speaking client, whose main purpose for consulting with you is because they want to divorce their wife of 30 years who has been living with another man for the past 15 years? Surely this person is not interested in knowing about FIA and he will not understand most of what you tell him anyway. How do you explain FIA to a person who is not even familiar with the constitution and is not even interested in knowing their rights unless it is for purposes of the case for which he or she has approached you, it makes the work of the lawyer more complex and time consuming and time is money for a lawyer. Which means now clients will be charged more for consultation due to the time spent on verification and explaining the FIA provisions which are relevant for the relationship your about to establish or one that is already in existence with respect to existing clients, not to mention the fact that clients do not always want to disclose where they are going to get the money to pay the legal fees even if such funds do not form part of unlawful activities (people are generally very secretive with their finances).

So evidently allot of attorneys are not keen in implementing the measures suggested by FIA and the Law Society, in fact it is possible that even though FIA has been enforce for two years now most attorneys have failed to implement most of the requirements if not all in respect of their day to day dealings with clients. This means that the supervisory bodies may have to go back to the drawing board and come up with other ways to get the accounting institutions to implement this measures which we hope will deter money laundering in Namibia.

3.1.3. The Relationship Between Money Laundering and Corruption

For purposes of this study it is important to note the importance of the relationship between money laundering and corruption which is something that is often overlooked in the fight to detect, combat and deter money laundering in Namibia and the world at large. The relationship between money laundering and corruption ought to be highlighted and visibly pointed out so that we are left with no doubt that corruption and money laundering are two completely different offences, while it is unmistakable from practice that the two overlap in many instances and it can also be inferred that the crime of corruption more often than not leads to money laundering especially in Namibia.

Corruption is said to have numerous names under which it has been observed to hide, it also takes many forms of which one of those forms have been identified as money laundering. It is also said to be of great relevance to the principle of constitutionalism, due to the fact that it undermines the very spirit of constitutionalism such as good governance, the rule of law and independence of the Judiciary.[38]

We need not look far to see that the above statement is true, this has been clearly demonstrated by cases like the Avid SSC case where money was fraudulently obtained from a parastatal under the facet of being invested while certain individuals dispersed the money amongst themselves. The Social Security Commission lost 30 million dollars as a result of the Avid scam and this was money that was obtained through corrupt means and consequently laundered in order to hide its origin. Their many examples in Namibia, such as the recent GIPF where millions of government employee's pension money was lost through investments but have since not been able to be accounted for. People who steal this money always end up laundering the money, by buying expensive cars cash, buying property, taking luxuries holiday, giving donations and so forth. The Koby Alexander case mentioned earlier where it is clear that some if not all the money that he brought into Namibia formed part of the proceeds of unlawful activity.

It is also important to note that just like money laundering corruption also forms part of the crimes which feature under organized criminal activity, hence it is expected that measures designed to tackle money laundering must also be extended to address the problem of corruption.[39]

3.2. INTERNATIONAL LAW AND MONEY LAUNDERING

The illegal use of banking and financial institutions to conceal the origin of money has existed for decades, money laundering in the traditional sense has been known to be associated with 'tax

[38] Peter, M.C & Masabo, J. 2009. "Confronting grand corruption in the public and private sector: A spirited new initiative from Tanzania." *Namibian Law Journal.* Volume 01; issue 02 at page 49.

[39] Ray Goba article, MONEY LAUNDERING CONTROL IN NAMIBIA, Profiling Money Laundering in Eastern and Southern Africa, Published in Monograph No 90, December 2003. At page 11. Available at http://www.iss.co.za/pubs/Monographs/No90/Chap2.html. last accessed on 27 August 2011)

evasion and the mafia' and was seen as a neglected problem before the late 1980's. Since the late 1980's it became a growing global concern especially with the blossoming of narcotics trade and the continuous disposal of proceeds of illegal activities by organized crime networks which have increased over the years.[40]

It is apparent that money laundering has not always been considered a crime, even by the international community which may be because it is a crime that is so complex in nature and done in such a secretive manner that the effects although crucial are not always felt immediately by its victims.

Money laundering has also been known to have been increasingly associated with illicit drug trafficking which subsequently led to its recognition in the United Nations Convention Against Illicit Drug Trafficking[41], its recognition in the abovementioned convention led to a realization by the international community that money laundering was not only confined to proceeds obtained from drug trafficking but also those from other crimes including common law crimes such as fraud, theft etc. It has been observed that practices that feature the definition of money laundering are associated with criminal activity even though it was not exclusively recognized as money laundering.

The international community after realization of the effects of this complex crime, especially to the world economy as well as its relationship with terrorism which has threatened international peace for decades decided take steps to detect and prevent money laundering through anti money laundering legislation which are:

3.2.1. Financial Action Task Force (FATF)

The FATF was established by a Group of seven (7) summits which took place in Paris in 1989, it has been observed as the international standard setter of the fight against financial terrorism and money laundering. FATF is responsible for the promotion and development of national and global policies in the quest to eliminate the threat of money laundering, in 2001 development of standards in the fight against terrorist financing was added to its responsibility. Notwithstanding

[40] Vincke, F & Heimann (Eds). 2003. *Fighting Corruption (A corporate Practice Manual)* Paris: ICC Publishing S.A. At 89

[41] 1988 UN convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances

the abovementioned responsibilities the FATF's main responsibility is to ensure that the global communities take actions to combat money laundering and terrorist financing.[42]

The FATF seem to be one of the first international instruments to take an aggressive stance in trying to combat money laundering, especially since before the late 1980's the global community did not see it for the threat it was. It also seems to have tried to carefully cover what the Convention Against Illicit Drug Trafficking had disregarded even though it had recognized the crime.

It should be noted that since its establishment in 1989 the FATF has established what is known as the series of money laundering recommendations which was done in 1990 and the special recommendations aimed at tackling the prominent threat of terrorist financing in 2001, the 1990 and 2001 recommendation are collectively known as the 40+9 recommendations whose initial endeavor was to unite anti-money laundering and terrorist financing efforts into one universal instrument. The 40 recommendations are intended to provide measures against money laundering as well as encompass the justice system, law enforcement, financial system and those responsible for regulating them and international cooperation, the recommendations also set out principles to be applied as well a certain standard for the actions to be taken.[43]

The global communities' efforts to combat money laundering and the financing of terrorism have been designed to attack criminal and terrorist organizations through their financial operations, their strategy is to deprive the criminal of the means to act and gain. They also gain knowledge on how their financial networks work so as to prevent their future operations.

3.2.2. Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG)

The above instrument is more a regional convention than an international one, which is also identified as a FATF protocol as is was formed to help implement FATF 40 recommendations regionally.

[42] Available at: http://www.anti-moneylaundering.org/FATF.aspx (reference) (last accessed on 27 August 2011)
[43] Available at: http://www.anti-moneylaundering.org/FATF.aspx (reference) (last accessed on 27 August 2011)

The ESAAMLG main purpose is to implement the recommendations made by the FATF as well coordinate measures to combat money laundering and the financing of terrorism. In order to see whether the FATF recommendations are implemented by their member states, ESAAMLG conducts self-assessment programs which are designed to evaluate the progress made by the member states in implementing the FATF recommendations.[44]

Namibia, South Africa, Zambia and many other African states are parties to the above instrument and are thus expected to have anti-money laundering legislation as part of their obligations to the convention. Like FATF there are countries that are given the mandate to oversee or observe that the instruments affairs runs smoothly and that is serves the purpose it was created for, these countries are the United Kingdom and the United states who are developed stated and have had a head start in the fight against money laundering.[45]

3.2.3. UN Convention against Transnational Organized Crime[46]

The September 11th Attacks on the United States also triggered an aggressive stance on money laundering and financial terrorism, in fact the UN Convention Against Transnational Organized Crime was established after the nine eleven attack.

Unlike the previous UN conventions and previous international instruments, the Palermo Convention took a more thorough approach in an attempt to deal with as many issues relevant to combating of organized crime as possible. Article 6 of the Palermo Convention requires the member states to criminalize the laundering of proceeds of crime through legislation and other measures more specifically in the context of their fundamental principles of domestic law.[47]

According to Goba[48] the convention lists the following conducts as ones to be criminalized:

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[44] Available at: http://www.anti-moneylaundering.org/FATF.aspx (reference) (accessed on 27 August 2011)
[45] Available at: http://www.anti-moneylaundering.org/FATF.aspx (reference) (accessed on 27 August 2011)
[46] The United Nations Convention Against Transnational Organized Crime of 2000 (also known as the Palermo Convention)
[47] Ray Goba article, MONEY LAUNDERING CONTROL IN NAMIBIA, Profiling Money Laundering in Eastern and Southern Africa, Published in Monograph No 90, December 2003.: Available at: http://www.iss.co.za/pubs/Monographs/No90/Chap2.html: last accessed on 27 August 2011) on
[48] Ray Goba article, MONEY LAUNDERING CONTROL IN NAMIBIA, Profiling Money Laundering in Eastern and Southern Africa, Published in Monograph No 90, December 2003. At page 22. Available at: http://www.iss.co.za/pubs/Monographs/No90/Chap2.html:last accessed on 27 August 2011

- Converting or transferring property with the knowledge that such property forms part of the proceeds of crime, such conversion and transferring should be for purposes of concealing the illegal origin of the said property, helping a person involved in the commission of the predicate offence to evade the legal consequence of his or her action;

- Disguising the true nature, source, location, disposition, movement or ownership of rights to property the concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights to property, while knowing that such property is the proceeds of crime

- The possession, acquisition or use of property with the knowledge at the time of receipt of such property that such property forms part of the proceeds of crime.

- Participation and conspiracy to commit such offences as well as assisting in the commission of such offences.

"In terms of the Convention, member states are required to criminalize participation in an organized criminal group and the laundering of the proceeds of crime, to institute comprehensive domestic regulatory and supervisory regimes for banks and non-banking financial institutions and other bodies particularly susceptible to money laundering in order to deter and detect all forms of money laundering (with emphasis placed on requirements for customer identification, record-keeping and the reporting of suspicious transactions), to criminalize corruption and to adopt measures to combat it, to freeze, confiscate and forfeit assets, to extradite offenders, to render mutual assistance in transnational criminal matters and to foster international cooperation in law enforcement." Ray Goba[49].

The above quote is a reflection of most of the provision found in Namibia's anti-money laundering legislations, being POCA and the FIA respectively. Namibia has ratified the

[49] Ray Goba article, MONEY LAUNDERING CONTROL IN NAMIBIA, Profiling Money Laundering in Eastern and Southern Africa, Published in Monograph No 90, December 2003. Available at: http://www.iss.co.za/pubs/Monographs/No90/Chap2.html At page 14: last accessed on 27 August 2011

Palermo Convention which explains why it followed the recommendations proposed by the convention, based on the content of the FIA and POCA it is evident that Namibia met its obligations in terms of the convention. Namibia has criminalized money laundering, it has made provisions for accountable institutions which are not necessarily banks to be regulated by the FIA, and it has also put verification measures in place in respect of new and existing clients of accountable institutions amongst other things.

3.2.4. Protocol on Combating Illicit Drug Trafficking in the SADC Sub-Region[50]

The SADC protocol like the Palermo Convention requires member states to adopt domestic legislation that aims to address drug trafficking, money laundering and related problems. The protocol requires the domestic legislation to have effective measures in place which will deal with the proceeds from drug trafficking, which should be inclusive of the tracing, seizure, freezing, confiscation and forfeiture of the proceeds of drug crimes. It also advocates the adoptions of laws to provide mutual assistance in the prevention and detection of laundered proceeds of illicit drug dealings. The protocol also obliges states to curb corruption which results from illicit drug trafficking as well as the establishment of independent anti-corruption agencies.[51]

The above protocol has also been ratified by Namibia, unlike the Palermo Convention the SADC protocol limits the laundering of proceeds to that from drug trafficking, our anti-money laundering legislation however provides for all forms of organized crime. The implementation of the Anti-Corruption Act serves as a fulfillment of Namibia's obligation under the SADC protocol and since money laundering and corruption are closely linked if legislation in respect of both crimes is effectively implemented by our court, it will have the effect of deterring both crimes.

3.5. POLITICAL INFLUENCE IN NAMIBIA VESUS EFFECTIVE IMPLEMENTATION OF POCA BY OUR COURTS.

[50] The SADC Protocol

[51] Ray Goba article, MONEY LAUNDERING CONTROL IN NAMIBIA, Profiling Money Laundering in Eastern and Southern Africa, Published in Monograph No 90, December 2003 . At page 13-14: Available at: http://www.iss.co.za/pubs/Monographs/No90/Chap2.html last accessed on 27 August 2011.

3.5.1. Constitutional Concept Of Separation Of Powers

Having dealt with the relationship between corruption and money laundering which is an essential part of this paper, we are able to observe the negative effect that interference especially from the executive may have on outcomes of cases, especially ones that have characteristics of both corruption and money laundering. Leading to the decision to look at the above doctrine, to assist us in determining whether our Namibian constitution can come to the aid of the courts in corruption cases, especially those cases were the accused persons are also charged with money laundering, so as to verify the prospects of success of our anti money laundering legislation.

The doctrine of separation of powers is a doctrine one cannot leave out in a discussion of this nature as it is one of the ideologies that often sets a constitutional state apart from non constitutional states. For purposes of this paper it is important to look at whether the checks and balances that are done under the doctrine of separation of powers so as to ensure that none of the organs of state will interfere with judicial implementation of money laundering provisions found in POCA and the FIA. An adherence to the constitutional concept of separation of powers is important in the battle to deter money laundering in Namibia, as mere application of the appropriate legislation would not be adequate. The three organs of state need to work together in ensuring that the judiciary is given the support needed to successfully apply and implement these instruments for the desired outcome which is the detection, prevention and deterrence of money laundering in Namibia.

The doctrine which was developed by Montesquieu divides government authority into three organs namely the Legislative, Executive and Judiciary. It is however argued that a total separation of powers is an ideal that has not yet been realized. (Which means as much as we would love for a government were each organ of state is left to exercise their powers without negative interference from one or the other two organs of state, it is not possible especially with the check and balances that come with the doctrine and the fact that in reality one organ of state is more likely to have more power and would exercise such power when their interests are at stake. (Own emphasis). The main objective of the doctrine is to avoid power from being concentrated into one organ of state (such as was the case during legislative supremacy), but rather be divided among the three organs of state. It also includes a process of checks and

balances where the one organ is held accountable to another so that they do not abuse their powers, constitutional states have been observed to have achieved partial separation of powers rather than the complete separation of powers aimed by the doctrine.[52]

In the Namibian Context although our courts are seen to be independent and impartial, one cannot without a doubt say we have been able to achieve complete separation of powers as it would be a mere illusion. The doctrine is a very influential part of our legal system and our Constitution has made sure to protect the independence of our courts from being abused by the two branches and our precedents are an indication that our courts avoid being influenced by the powers of the other two organs of state in most of their decisions.[53]

In view of the above we can conclude that in respect of the doctrine of separation of powers, the Judiciary has managed to retain its independence over the years and although it is subject to the checks and balances that are required under the doctrine, our precedents have shown that when it comes to applying the law our courts are only subjected to the constitution and no other body or organ. Thus for purposes of the implementation of POCA in High Profile cases (those with traces of corruption), we can rest assured that if they do reach the courts the legislation is likely to be effectively implemented just as the previous legislations in previous cases. Hence all we can do is wait for the Judgments of cases such as the *Lameck* case as well as that involving Ms Majiedt who is alleged to have defrauded her previous employer of 70million.

3.5.2. The Independence Of The Judiciary

The main basis for looking at the independence of the judiciary is to determine whether our courts are independent enough to take impartial decisions even if it means going against the executive which often has an interest in most corruption cases involving government officials.[54]

The independence of the judiciary is a imperative component of any country governed by the principle of constitutionalism, frequently overlooked in a society consumed by corruption. In a

[52] Burns, Y & Beukes, M. 2007. *Administrative Law under the 1996 Constitution:* Third Edition. Durban. Lexis Nexis. at page 30

[53] Horn, N & Bosl, A. (Eds). 2008. *The Independence of the Judiciary*. Windhoek. Macmillan Education Namibia. at page 211

[54] Peter, M.C & Masabo, J. 2009. "Confronting grand corruption in the public and private sector: A spirited new initiative from Tanzania." *Namibian Law Journal.* Volume 01; issue 02 at page 53

country like Namibia which believes in constitutionalism the judiciary plays a very important role as it is entrusted with the duty of deciding who is right and who is wrong, the judiciary and its officers such as the judges, magistrates, prosecutors and other judicial officers are expected to be fair and impartial in making their decisions, the judiciary as an organ of state is also expected to be independent especially from political pressure.[55]

Nevertheless some believe that most judicial organs especially in African countries are in the hands of the executive as well as the hands of the corrupt, question is whether Namibia falls within this lot. Judging from our case law and the number of cases that were decided against the state it would seem that our judicial system is doing better than most African countries or those of some of the countries in the world when it comes to its independence. We can say that there are areas that need to be protected in order to maintain the current independence of the judiciary, as it is constantly under threat especially with the various corruption cases that come before our courts involving some big names in government, often this cases remain pending for years and it can be inferred that the judges are cautious to make judgments and put away important political figures that have a great influence in Namibia. Moreover how can we really say our judiciary is independent if there is still some form of influence of the executive, otherwise how would one explain the continuous delay in the handing of judgments in cases such as Avid and Lameck to name a few.

Judicial power is vested in our courts by virtue of Article 78 (1) of the Namibian Constitution, in *S v Heita and Another*[56] "the court emphasized that it was not only the independence of the Judges that had to be protected, but their dignity and effectiveness as well. This case emphasized the importance of the public and the two organs of state to respect the independence of the judiciary, as this is the only way an individual can be sure that the tribunal he or she is to seek redress to in terms of article 18 is an impartial one."[57]

The above case demonstrated the fact that independence of the judiciary was inclusive of the protection of the dignity of the judicial officers which in turn would positively impact their

[55] Peter, M.C & Masabo, J. 2009. "Confronting grand corruption in the public and private sector: A spirited new initiative from Tanzania." *Namibian Law Journal.* Volume 01; issue 02. At page 53
[56] 1992 NR 403 (HC)
[57] Horn, N & Bosl, A. (Eds). 2008. *The Independence of the Judiciary*. Windhoek. Macmillan Education Namibia. At page 211

effectiveness. Thus if we are to combat a problem as complex as money laundering we need to ensure that our courts are ready to effectively apply the relevant legislation, currently we cannot say with certainty until they start making their ruling on cases before them with elements of money laundering.

Nonetheless many felt that in the recent Election Case the High Court did not demonstrate judicial independence in that it seems to have taken the side of the ruling party which is also the executive, they however applauded the Supreme court when its sent the case back to the High court for the merits of the case to be heard, the supreme court decision gave many hope and faith in the independence of the judicial system.[58]

Since this case seems to be going to and fro between the High Court and the Supreme court one can still detect some form of caution on the part of the judiciary to make a ruling that would be against the ruling party, yet again they also seem to be set on applying the constitutional provisions so as to make a just decision. Yet it seems to be obvious that when it comes to cases that really matter and require a stance against the government, there is usually a tardy approach in giving judgments which is why we are sitting with pending cases like the **Avid SSC**, the **ODC**, the **NDF** where millions of money got lost an and have yet not been accounted for and many more which have not come before our courts like the GIPF scandal the involved close to 600 million of the public funds that cannot be accounted for.

Peter Von Doep[59] conducted a study on the connection between politics and judicial decisions, according to him after he did his study he discovered that the Namibian judiciary has performed well in terms of its independence from the other branches of government. He goes further to state that there is a consistency in the judicial independence in that the decisions do not differ regardless of the period they were made or the type of case, the decisions have managed to follow a consistent pattern.[60]

[58] Peter, M.C & Masabo, J. 2009. "Confronting grand corruption in the public and private sector: A spirited new initiative from Tanzania." *Namibian law journal*. Volume 01, Issue 02. At page 54
[59] See Horn, N & Bosl, A. (Eds). 2008. *The Independence of the Judiciary*. Windhoek. Macmillan Education Namibia. at page 177
[60] Ibid p 177

In his findings he states that there is no indication of any political influence on decisions taken by judges[61], this means that contrary to popular belief our courts are not being influenced by the executive as it is not evidence in their cases. He further stated that he also found that the recent appointees have not made decisions that are more likely to be in favor of government than those made by the once before them.[62]

In brief it can be postulated from Van Doeps findings that our judicial system is still maintaining a neutral position with respect to its independence, this is due to the fact that even with Van Doep's positive findings it is difficult to completely accept that our judiciary is in essence independent from political influence especially in relation to crimes such as corruption and money laundering. Finally, it is safer to say that our judiciary has made progress in ensuring that they retain independence from the other two organs of state as evidenced by the decisions of our judicial officers over the years, be that as it may we cannot for purposes of organized crime such as money laundering say with certainty that our judiciary is independent enough to effectively apply the relevant legislation judging from the cases currently before court, thus all we can do is wait for the judgments and hope that they maintain the same independence they have in respect to the other cases.

3.5.3. Independence Of The Prosecutor General

The case of *Ex Parte: Attorney –General, Namibia. In re: The Constitutional Relationship between the Attorney-General and the Prosecutor –General*.[63] stated the relationship between the Attorney General and the Prosecutor General and made it plain that the prosecutor general is independent and is not subject to any direction or superintendence by the attorney general, which means that the executive does not have an influence on any decision made by the prosecutor general all they require is that the prosecutor general give them a report when they are dealing with high profile cases which may be of public interest so that they have a form of insight when they report to parliament.

[61] See Horn, N & Bosl, A. (Eds). 2008. *The Independence of the Judiciary*. Windhoek. Macmillan Education Namibia. at page 188-189
[62] Ibid p 192
[63] 1995 (8) BCLR 1070

The aforesaid sound positive but many would agree that the way things look on paper is completely different to what happens in practice, if the discretion lay solely with the prosecutor general some high profile cases would have been prosecuted and not disregarded until the public forgot about them. Then again since the prosecutor need not give reasons for their decision it would still remain a mystery as to why some cases never go to court, especially since in terms of POCA the prosecutor general is the one in charge of bringing application for forfeiture, confiscation, restraint and preservation orders against accused persons.

The GIPF scandal is a good example of cases that have elements of corruption and money laundering, but for reasons only known to the prosecutor general the case has not yet been brought before court. Surely it cannot take this long for the office of the prosecutor general to decide whether there is a prima facie case, more so due to the fact that it is unmistakable that someone or certain persons are where involved in the causing the 600million to disappear. Surely the public cannot be expected to sit back and accept things as they are, investigations cannot take so long with all the measures out in place by the anti-money laundering legislation to detect the crime. What is currently happening with the GIPF scandal is almost similar to what happened a few years back where the NDF lost 30 million yet to date no one was ever prosecuted. How can the office of the prosecutor general be able to say with confidence and expect the public to believe that they are truly independent from government and political influence, if the above cases and many others that are probably being kept under wraps show the complete opposite?

The office of the Prosecutor General may in fact be independent contrary to popular belief, but such independence is very difficult to discern and trust due to its structure that does not allow for transparency in how they make their decisions to prosecute. Needless to say that, if the above remains as is, then it would really be difficult for money laundering to be deterred in Namibia as the courts will not have an opportunity to effectively implement POCA and FIA if the office of the prosecutor general fails to make the decision to prosecute in the first instance.

According to Von Doepp[64] the lack of transparency and consistency in the office of the prosecutor general leads to an unequal application of the law and recommends that there be a review of the decisions made by prosecution so as to allow the court to determine whether they

[64]Horn, N & Bosl, A. (Eds). 2008. *The Independence of the Judiciary*. Windhoek. Macmillan Education Namibia. At page 111

acted within their powers when making a particular decision, because prosecutors can be easily bribed and many people will get away with corruption and money laundering merely because they were able to pay off the prosecution which does happen. He further concludes by saying we can find comfort in knowing people with be brought to justice if the courts remain independent and if the judicial service commission continues to function properly and while the practice of docket disclosure is still enforce (protecting accused from malicious prosecution), further he says our current system is much better even with its flaws as it is more preferable to a system where the executive influencing and impacting prosecutorial decision making which is a much more dangerous route.[65]

To sum up we can say that Namibia even with the shortcomings that are in the system which is the case in many other legal systems seems to show a positive prospect of effectively applying POCA and combating money laundering, however it can only be done if our courts remain independent and provided our prosecutor general retains its independence from the Attorney General which is led by a political appointee. Like it was averred earlier practice is often different from what we read in books and articles, thus even though studies have been done as to the independence of our judiciary it is important that we remain skeptical of certain areas so as to make room for other solutions in the event that our judiciary lets us down.

3.6. CURRENT IMPLEMENTATION OF POCA BY NAMIBIAN COURTS: A CASE STUDY

Namibia unlike South Africa and other countries that have had anti money laundering legislation for over a decade has not made decisions on money laundering cases, it has however made restraint and preservation orders to prevent suspects from disposing of property that is suspected to have emanated from unlawful activities most of which are unreported.

[65] Horn, N & Bosl, A. (Eds). 2008. *The Independence of the Judiciary*. Windhoek. Macmillan Education Namibia. At page 111

The high profile case of *The Prosecutor General v Teckla Lameck & 3 Others V Festus Lameck & 7 Others*[66] is one such case where our courts made a restrain order in respect of their property, the court held as follows:

- In terms of section 24(1) (a) (i) and (ii), the court had to be satisfied that the defendants were to be charged with an offence and "that there are reasonable grounds for believing that" a confiscation order may ensue. To grant the order sought, it only needed to appear to the court on reasonable grounds that there might be a conviction and confiscation order in respect of one or more- not all- the offences alleged by the applicant.

You can see when you read this case that all defendants could be charged and be found guilty under the Anti-corruption Act, which meant that they satisfied the requirements of the Act of showing that such defendants could be found guilty of one of the offences.

- The first point the court had to make is that in terms of s18 of POCA proceedings under sections 24 and 25 are regarded as civil proceedings. It furthers stated that it follows the approach where it decides whether a prima facie case has been made out when a restraint order is sought.

- In terms of sec 91 (3) of POCA the court may have regard to hearsay evidence presented to it provided it "would not render the proceedings unfair". Which led them to granting the restraint order and concluding that they had reasonable grounds to believe that the four defendants would be found guilty of the offence under the Anti Corruption Act?

The decision of our court to grant the above order in this case was a step in the right direction and a precedent for future cases, showing that our judges will not shy away from applying the provisions under POCA if and when the opportunity arises. Now what we need is the judgment in order to enable us to determine whether our courts are willing to go all the way in applying POCA because clearly money was laundered by the four 3 defendants in this case as they were alleged to have bought luxurious cars and so forth.

[66] POCA 1/2009

Another case that was reported in the Namibian on 27 July 2011[67] showed how our courts froze the bank accounts of two suspects, suspected of drug trafficking and money laundering. This shows that with the coming into force of POCA the state is able to prevent suspects from accessing and benefiting from proceeds of an offence they have committed, the Olivier's who are from Swakopmund are a good example of the application of POCA and FIA.

Another case that demonstrates the detection of money laundering by FIA through the Financial Intelligence Centre and the relevant law enforcement agencies involved in the process is a recent case that involved a NAMDEB employee a one Uuyuni who was charged with money laundering after suspicious transactions were detected at the bank, some N$200 000 being deposited in an account with his name while he just makes N$ 9500 a month. The court order for his accounts to be frozen but his attorney managed to get the court to allow for the release of the money.[68]

All the above cases are evidence of the effectiveness of POCA in detecting money laundering which lead to a positive outlook in the fight against money laundering as law enforcement seem to be working well with the Bank of Namibia in trying to combat money laundering , so far it looks promising. However there are some cases that leaves us uncertain as to whether POCA and FIA will be effective or whether the corrupt top officials in government will ensure that cases of money laundering which involve them will not reach the courts, how will this be prevented with daily bribes and death threats associated with these money laundering.

A case which could easily cause one to doubt the effectiveness of our anti-money laundering legislation is the recent Afrisam Cement Namibia case, where one of their former employee a one Mrs. Majiedt defrauded them of 71 million over a period of 3 years. Mrs. Majiedt was arrested by the anti-corruption commission, this case has a shocking effect because it is quite difficult to comprehend how a company as big as Afrisam can be defrauded of such a large amount of money without detecting same. How does so much money go missing and know one know that it is even missing? And what of our financial institutions, how could they not have detected those large sums because surely she could not have kept all that money in her house. A case such as this one questions the effective detection of suspicious transaction and as well as the

[67] See Lister, G. 2011. "Man Charged with Money Laundering" by Denver Kisting. *The Namibian.*25 July 2011. Volume 25, No. 138. Windhoek; The Namibian Press.

[68] See Lister, G. 2011. "Accounts Frozen Under Organized Crime Act". By Werner Menges. *The Namibian.* 8 August 2011. Volume 24, No. 148. Windhoek; The Namibian Press.

effectiveness of the measures put in place by FIA. Surely somewhere somehow our system needs urgent attention if large monies are being laundered on a daily basis without detection.

Is the fact that the Financial Intelligence Center which investigates and looks into these types of transaction has to send the report to Nampol for them to investigate such person delay the process, or do they speed up the process and the delay takes place at Nampol? Surely somewhere there is a loose end that we have not identified.

All that can be said after having looked at a few cases that are before our courts it is important to note for purposes of completion that although the Avid SSC came before our courts way before FIA and POCA were passed if there are still individuals that have access to part of the 30 million and are still laundering such proceeds, say Mr. Kandara's wife was left with some money and has bought property or disposed of the money in one way or another after the implementation of the Act, such person would be guilty of money laundering under POCA and such actions would then preclude the court to apply the act retrospectively in terms of section of POCA. The same can apply to a case like the Koby Alexander, NDF scam etc. It is important for our law enforcement agencies to be mindful of the provisions of the Act so as to effectively apply it and examples of people like Mrs. Majiedt and Mrs. Lameck. With the progress made by our courts since the implementation of the Acts, all we need is judgments for the cases currently before our courts than we will be able to have some form of idea on the way forward.

CHAPTER 4

By looking at how far Namibia has implemented the anti-money laundering legislation as well as the possible successful implementation of such legislation it is important to do a comparative study with other common law countries. The common law countries chosen in this paper are the United Kingdom due to the fact that Namibia has inherited allot from English Common law more specifically in the law of evidence which forms a very important part of our criminal justice system. Another common law country would be our neighboring country South Africa, from which Namibia has inherited most if it's legislation more importantly because our anti-money laundering legislation are somewhat similar (another inheritance on Namibia's part).

Just like Namibia, South Africa has come a long way in their fight against money laundering and their legislation to combat money laundering was implemented over a decade before the Namibian legislation came into force, South Africa would be a good jurisdiction to look at not only because of the similarities in most of our laws including those on money laundering, but also because it has evolved in their application of their anti-money laundering legislation and thus has precedent that our courts can use as precedent in cases brought before them. It is also important to look at South Africa in light of where they are coming from, how they implemented their statutes which will help us learn from their experience over the years.

The United Kingdom has recent Acts that are specifically aimed at combating money laundering even though as a developed state they have fought money laundering for longer, thus we will also look at how they have applied their legislation and how their precedents can help Namibia successfully apply POCA in cases that are currently before our courts.

4.1. LEGISLATION GOVERNING MONEY LAUNDERING IN THE UK AND SOUTH AFRICA

Proceeds Of Crime Act[69] of the UK provides for money laundering offences and makes reference to different types of money laundering acts that can be prosecuted being;

[69] Of 2002

- ✓ Mixed cases in which money laundering can be charged or included in an indictment which include:

    1. Own proceeds which are also referred to as self laundering where the defendant is usually the author of what is known as the predicate offence.

    2. Laundering that is done by a person or persons who are not the authors of the said predicate offence.

- ✓ The other is cases which involve money laundering being the only charge capable of proof or usually the easiest charge to prove a good example would be where a drug dealer launders the proceeds of the drugs through different transactions, sometimes the laundering is said to be easier to prove than the drug dealing itself.

In one of the cases before their courts on the issue of money laundering *R v Montila*[70], the court held that "The offence of money laundering under the Proceeds of Crime Act 2002 s.328(1) would only be committed where the property in question was "criminal property" at the time of the relevant arrangement; the appellant, who had knowingly submitting false mortgage applications on behalf of third parties, was not guilty of the offence, because when he entered into the relevant arrangements with the mortgage brokers the property in question was not criminal in the hands of the mortgage company."

The above case demonstrates the important role played by the terms 'proceeds of unlawful activity', thus just like Namibia the courts in the United Kingdom can only charge a person or person with the crime of money laundering if the proceeds such person is alleged to have laundered are proceeds of crime. So if our Namibian courts are to charger a person with money laundering it is imperative that they first establish that such proceeds emanate from a crime as defined in POCA, the South African law is also similar to that of the UK and Namibia in this respect.

[70] (2004) UKHL at page 50

South Africa had a Proceeds of Crime Act[71] which criminalized the laundering of money emanating from proceeds of Drug Trafficking, even though this Act criminalized money laundering it only limited the money that could be laundered to money that formed part of proceeds of drug trafficking. Even though the above act provided for confiscation of proceeds of crime, it was only limited to offences under the Drug And Drug Trafficking Act[72]. As a result of the limitations and with the South African commission realizing that any attempt made to regulate the confiscation of proceeds of crime ought to go hand in hand with measures to combat money laundering[73], a new legislation was introduced which is the Prevention of Organized Crime Act[74] which will for purposes of this paper be referred to as 'SA POCA'.

SA POCA repealed the Proceeds of Crime Act and provides for the following in respect of money laundering, the Act states the following in its preamble;

- ✓ The act introduces measure to combat money laundering
- ✓ It prohibits money laundering and gives rise to obligations to report certain information
- ✓ Also provides for the recovery of proceeds of unlawful activities through restraint orders, civil forfeitures and confiscation orders.
- ✓ The civil forfeiture of criminal property that was used to commit an offence as well as property that is the proceeds of unlawful activity or owned or controlled by or on behalf of an entity involved in terrorist and related activities.

As its evidenced by the above found in the preamble of SA POCA, we can clearly see the similarities with POCA in Namibia which is why the precedent set by South Africa is important to us, as it would enable our courts to confidently apply the relevant legislation without too much caution arising from the infancy of the legislation. The United Kingdom's Proceeds of Crime Act

[71] Of 1997
[72] Of 1992
[73] See Itzikowitz, A. 1999. "The Prevention and Control of money laundering in South Africa", *Journal on Contemporary Roman-Dutch law*, Vol. 62, No 1-4. At Page 89
[74] 121 of 1998

is also not too different as it also criminalizes and also makes provision for different types of money laundering which broadens its application to money laundered through the proceeds of as many offences as possible.

The United Kingdom also has what they refer to as the Civil Forfeiture of the Proceeds of Crime Bill[75] the bill also makes mention of the types of money laundering but its three main objectives are:

1. To provide for confiscation of property of a person if the court finds it to be more probable than not that such person has engaged in serious crime related activities, without the requirement for conviction of such person first.

2. To enable the State to recover the proceeds of serious crime related activities as a debt payable to the state.

3. Finally to permit law enforcement authorities to effectively identify and recover property

The Civil Forfeiture of the Proceeds of Crime Bill has allot in common with both SA POCA and POCA in that it makes provision for the confiscation of property emanating from proceeds of unlawful activities, it however differs in respect of confiscation not requiring conviction first because under SA POCA and POCA conviction is a prerequisite for a confiscation order. It can be inferred that the difference in the requirement for conviction and the lack of such requirement is influenced by the fact that both South Africa and Namibia have written constitutions that upholds fundamental rights of which the right to property and ownership is one, whereas the UK has an unwritten constitution and although fundamental rights are protected such provision would not trigger the type of uproar that it could trigger in the South African and Namibian courts.

The UK case of *Jsc Bta Bank v Ablyazov & Ors*[76] however shows that regardless of the fact that conviction is not a prerequisite for conviction they still uphold important fundamental rights such

[75] Bill of 2002
[76] (2009) EWCA Civ at page 1124

as the privilege awarded to an accused not to incriminate themselves under section 328 of the Proceeds of Crime Act. The UK position demonstrated by the court in the above case shows that fundamental rights are upheld even if such persons are charged with a crime as serious as money laundering. Their position does however not preclude one from making the inference that their decision to allow confiscation of an accused persons assets prior to conviction is a form of a violation of such accused right to property and ownership, let alone their presumption of innocence which is something that Namibia holds dear.

The United Kingdom also takes a much more liberal approach when it comes to suspicion, because whereas in Namibia and South Africa the suspicion of one being guilty of money laundering is required to be based on reasonable grounds, the UK courts have shown by their approach in the case of *Shah v HSBC Private Bank (UK) Ltd*[77] that to them the mere fact that a possibility of such person committing the crime is 'fanciful' is more than sufficient for such person to be charged, this position was confirmed in *R v Da Silva.*[78]

Finally with regard to the criteria for suspicion the case of *K Limited v National Westminister Bank And Others*[79] the court refused to grant an injunction requiring a bank to pay money to a customer, "where the bank had reported a suspicion of money laundering and sought consent, nor would the court permit cross-examination as to the grounds for the bank's suspicion; it was a subjective test and there was no legal requirement that there should be reasonable grounds for suspicion. The bank had adopted the correct procedure to avoid a tipping off offence, when application was made for the injunction, by instructing solicitors to write pursuant to section 333 (2) (c) and (3) of the Proceeds of Crime Act 2002 identifying the bare fact that the bank had made a disclosure to Customs."

Namibia on the other hand requires that there be a reasonable ground for suspicion, in fact in the Lameck case the court states that "it only needed to appear to the court on reasonable grounds that there might be a conviction and confiscation order in respect of one or more- not all- the offences alleged by the applicant." Thus under our law which is similar to that of South Africa,

[77] (2010) EWCA CIv at page 31
[78] (2006) EWCA Crim at page 1654
[79] (2006) EWCA Civ at page 1039

proving reasonable ground for suspicion is necessary before the court can make any order under POCA.

With the definition of money laundering, the issue of suspicious transactions etc gives rise to the question of whether proceeds that emanate from tax evasion could be regarded as proceeds of unlawful activity even though the income that gives rise to the payment of tax is often of a legitimate nature.

Contrary to the court's decision in R v Gabriel[80] were the court held that profits that are made through legitimate trading could not be regarded as criminal property because of mere failure to declare such profits to the Inland Revenue, it further held that such lack of declaration could give rise to a criminal offence but such offence did not make the initial trading from which the income emanated illegal. In of R v IK[81] the court gave clarity as to whether proceeds emanating from tax evasion could also be laundered and regarded as proceeds of unlawful activity, by holding that that such proceeds even though the income is derived from a legitimate trade also forms part of what is considered 'criminal property'.

The above decision also demonstrates the position in respect of both Namibia and South Africa in that tax evasion is a criminal offence in both countries, so if a person working as a nurse for example where to evade tax even though their income is legitimate such monies that where to be paid to Revenue would form part of proceeds of unlawful activity and if such person was to buy property with such monies or deposit it into a bank account etc would for purposes of our law be considered money laundering.

It would seem that both the Namibian and South African anti-money laundering legislation are very similar in the what they consider to be a suspicion and when a confiscation order (which will be more thoroughly discussed below) can be given and by the court, whereas the UK differs in respect of when they make their confiscation order and their criteria in determining suspicion. It is however visible from the above case law and legislation that all three countries agree in respect of what constitutes unlawful activities.

[80] (2006) EWCA Crim at page 229
[81] (2007) EWCA Crim at page 491

4.2. RESTRAINT ORDERS

Restraint orders are said to be generally aimed at preventing suspects or rather defendants from getting rid of any property or profits while being investigated.[82]

Restraint orders are orders that the court makes in respect of property that is suspected to form part of the proceeds of unlawful activities, what the court aims to achieve with this order is to restrain a person from disposing of or attempting to dispose as well as any other dealing with the said property. An application to have such property restrained can be made by the Prosecutor General's office without giving notice to the party or parties that may be affected by the order, such order is usually in a form of an Exparte application. The order is in a form of a Rule Nisi, thus the parties involved are given a chance to oppose the application on the return date[83].

All three countries make provisions for restraining orders in their legislation, the UK provides for such orders to be made in the Civil Forfeiture of Proceeds of Crime Bill (Part 2 section 15 to 25), Namibia provides for it in (chapter 5 section 24 and 25) of POCA. In SA POCA restraint orders are provided for in sections 25 and 26 of the act.

4.3. PRESERVATION ORDERS

Section 51 of POCA is said to deal with preservation orders, preservation includes the seizure of property shown to be an instrumentality of an offence referred to in schedule 1 or the proceeds of unlawful activities.[84]

According to the South African legislation Preservations orders like Restraint orders are made when there is reasonable ground for the court to believe that certain property (which includes movables and immovable's) form part of proceeds of a crime, they are brought to the High Court by way of an application and notice of such order is required to be given to all parties who have an interest in the property against which such order is brought, it must also be published in the

[82] Available at http://ossafrica.com/esst/index.php?title=Summary_of_the_Prevention_of_Organised_Crime_Act,_no._121_of_1998_(With_Amendments) last accessed on 27 August 2011)

[83] Section 24 to 25 of the Prevention of Organized Crime Act 29 of 2004

[84] See the case of *The Prosecutor General v Teckla Lameck & 3 Others v Festus Lameck & 7 Others* POCA 1/2009

Government Gazette. A preservation order expires in 90 days after the date notice is published in the Gazette, however if there is a danger of such property being disposed of or removed during the 90 day period the police may by law seize such property to prevent its removal or disposal.[85] In Namibia, the duration is 120 days after the publication in the Gazette, the UK does not make mention of a preservation order thus it is inferred that their restraint order also serves as a preservation order.

There are instances where a court after considering various factors can set aside a preservation order such as in the case of *NDPP v Gouws*[86] where respondent's Opel Mazda motor vehicle was taken into custody after 62 units of shucked abalone was found in the boot of his vehicle. The vehicle was seized by the police, and he pleaded guilty in the in the Port Elizabeth Magistrates Court and sentenced to pay a fine of R1500.00 or undergo 90 days' imprisonment. The magistrate ordered the release of the vehicle. The police did not return the vehicle despite the magistrate's order to do so and successfully apply for a preservation order before Ludorf J, who also heard the later application for forfeiture of the respondent's vehicle.

The learned Judge dismissed the application for forfeiture and set aside the preservation order. At paragraph 196 i-197 b of his judgment the learned Judge held that: "The public's interest of course also demands due consideration and recognition of the sanctity of ownership and the protection thereof by law" and warned that the power to deprive ownership should be exercised conservatively and observed that justice demanded a balanced approach in weighing the interests of the community in protecting a national asset such as abalone against the sanctity of private ownership. The learned Judge concluded as follows: "What is required is what has been termed a 'proportionality analysis' in which the nature and the value of the property subject to forfeiture is assessed in relation to the crime, the roll the property played in its commission and the interests and deprivation of owners, and those of the community in insisting on the prevention of crime"

The above indicates that even though the car can be regarded as an instrumentality of an offence for purposes of both SA POCA and POCA, the court will not always grant a preservation order

[85] http://ossafrica.com/esst/index.php?title=Summary_of_the_Prevention_of_Organised_Crime_Act,_no._121_of_1998_(With_Amendments) last accessed on 27 August 2011

[86] 2005(2) SACR 193(EC)

in that they have to weigh up the individual's right to ownership and the interest of the community as a whole. In this case the court seem to have found that when proportionally analyzed the community would not be prejudiced if the accused person retains the vehicle. This view would not be favorable in most jurisdiction as it can said to defeat the who rationale behind preservation and forfeiture orders, in that if the court would consider the rights of an accused person to ownership whilst he had use the very instrument to commit a crime against the society does not make sense, but then again it should be noted that every case is judged on its own merits.

A preservation order although it places restrictions on the use of the property against which the order is made, also makes provisions for the living expenses of the affected person and his or her household.[87] Furthermore, the affected persons are given an opportunity to defend such order and can often have it overturned. These preservation orders usually result in the freezing of bank accounts which is something that Namibia does quite often, it did it with the Accounts of *Koby Alexander* in 2008 and in the recent case that involved a Namdeb employee a one Mr. Uuyuni who is alleged to have laundered up to N$ 200 000[88]. In both Mr. Uuyuni and Mr. Alexander's cases they got access to their accounts after petitions by their lawyers.

However, preservation orders although provided for in the UK and South African anti-money laundering legislation are not commonly applied, but they seem to be quite popular in the few Namibian cases that have come before our courts under the new anti-money laundering legislation.

4.4. CONFISCATION ORDERS (CRIMINAL CONFISCATIONS)

Confiscation orders give the court the right to confiscate any ill-gotten gains[89]. This means that whenever a convicted person is found to have benefited from a crime the court may issue a

[87] Available at http://ossafrica.com/esst/index.php?title=Summary_of_the_Prevention_of_Organised_Crime_Act,_no._121_of_1998_(With_Amendments) (accessed on 27 August 2011)

[88] See Lister, G. 2011. "Accounts Frozen Under Organized Crime Act". *The Namibian.* 8 August 2011. Volume 24, No. 148. Windhoek; The Namibian Press.

[89] http://ossafrica.com/esst/index.php?title=Summary_of_the_Prevention_of_Organised_Crime_Act,_no._121_of_1998_(With_Amendments) (accessed on 27 August 2011)

confiscation order, instructing them to repay the State an appropriate amount in addition to any punishment imposed for the offence. The amount confiscated can however not be more than the value of the proceeds that formed part of the unlawful activity, the amount confiscated should be linked to the amount by which criminal has benefited. The confiscation order also takes into account both the value of all realizable property and that of the affected gifts, bribes made by the defendant and any legal obligations they may have to another party.[90]

It is important to note that under Chapter 5 (Part 2) of SA POCA confiscation orders do not apply retrospectively, criminal confiscation are only in respect of proceeds of crime and not the instrumentalities of a crime, further criminal confiscation are *in personam*[91]

In the South African case of *South African Inland Logistics CC And Others v Camila Singh Of KPM Services (Pty) Limited And Others*[92] the court explained the rationale behind confiscation orders by stating that "In my view the primary object of any confiscation order is to deprive the convicted person of his or her ill-gotten gains. What makes a forfeiture order in terms of s 48 of POCA also distinguishable from a confiscation order, is that it is not dependent upon a successful prosecution as is an order in terms of s 18 of the Act."

The above case illustrates the position of South Africa as well as that of Namibia with regard to conviction preceding a confiscation order, unlike the United Kingdom that does not require a conviction before they make a confiscation order. It is clear from the above case that in terms of SA POCA that forfeiture orders can be made before one is convicted.

In one of the controversial South African cases which involved the current South African President Mr. Jacob Zuma, *S v Shaik and Others*[93], the court granted a confiscation order in respect of certain properties that it considered to be proceeds of unlawful activities in terms of section 18 of SA POCA.

[90] Available at: http://ossafrica.com/esst/index.php?title=Summary_of_the_Prevention_of_Organised_Crime_Act,_no._121_of_1998_(With_Amendments) (accessed on 27 August 2011)

[91] Latin phrase meaning 'in person', for purposes of this paper it means that the criminal confiscations can only be able to executed against the property of the accused in his own personal capacity and not against that of third parties.

[92] (10314/2009) 2010 HC (KZN) (10 JUNE 2010)

[93] 2008 (5) SA 354 (CC

O'Regan ADCJ described the concept of confiscation orders as a process where "a criminal court is conferred with power to make a confiscation order against a person who has been convicted a crime and were such court has found that such person benefited from the particular crime. He goes on to say that in order for a confiscation order to be made, the court must find that the person convicted of the offence has derived a benefit from the offence of which he or she has been convicted or of any offence. The court may then make an order that the person pay to the State 'any amount it considers appropriate'."

The above also describes the Namibian position regarding confiscation orders in that chapter 5 section 32 provides for confiscation of property in the same circumstances as those described in the *Shaik*[94] case. *R v Green*[95]demonstrates the position the UK courts take when a confiscation order is made in respect of property in the possession of several defendants by holding that for purpose of confiscation proceedings where there is more than one defendant involved, where one defendant receives money or any other property jointly or on behalf of numerous other defendants they are all deemed to have received the whole of it for purposes of confiscation proceedings. The amount each defendant is not the test but rather the capacity in which such defendant receives the property or money.

4.5. FORFEITURE ORDERS

This order has the effect of forfeiting to the state all or any of the property to whom the application relates notice of the making of the application, it can thus be inferred that a restraint order is a prerequisite for a forfeiture order.

Unlike in respect of restraint orders the UK requires that parties be given notice when the commission applies for an asset forfeiture order and such application can only be done if a restraining order is in force, this is provided for in section 33 (1) and (2) of the Civil Forfeiture of Proceeds of Crime Bill.

[94]2008 (5) SA 354 (CC
[95] (2007) EWCA Crim at page 1248

The Namibian and South African position also requires that there be a preservation order that has already been issued against defendant, only then can an application be made to the High Court to have all property subject to the preservation order forfeited to the state.[96] Furthermore in all three jurisdictions the proceedings regarding forfeiture are civil in nature and thus require that facts be established on a balance of probabilities as emphasized by the court in the South African case of *Phillips and Others v NDPP*[97].

In *Prophet v NDPP*[98] the court reaffirmed the above in respect of forfeiture when Nkabinde J stated the following: "POCA uses two mechanisms to ensure that property derived from unlawful activity or an offence or used in the commission of an offence is forfeited to the State. Sections 12-36 provide for the forfeiture of the benefits derived from the commission of an offence but its confiscation machinery can only be implemented once a defendant has been convicted. Sections 37 -62 on the other hand specifically make provision for forfeiture of proceeds of and properties that are used in the commission of a crime which is also effected subsequent to a conviction."

In National *Director Of Public Prosecutors v George Smith*[99] the court ruled by stating the following "In the matter before me, Smith was not formally charged with the offence. His passenger was. His two previous convictions of possession of dagga were for such small quantities that it could hardly be said with conviction that he lived off the proceeds of dealing in dagga. The State elected not to charge Smith for possession of the dagga, but Noble. The State accepted his plea explanation which put Smith in the clear. The considerations that were applied when this election was made are also applicable to the decision whether or not to order forfeiture of the vehicle. The possibility that the vehicle was an instrumentality of crime is perhaps not a remote one, but Noble's plea explanation placed it beyond the reach of the instrumentality

[96] Available at: http://ossafrica.com/esst/index.php?title=Summary_of_the_Prevention_of_Organised_Crime_Act,_no._121_of 1998_(With Amendments) last accessed on 27 August 2011

[97] 2008 (5) SA 354 (CC).

[98] 2007 (2) BCLR 140 (CC) at paragraph 60

[99] UREPRTABLE; 2010, CASE NO: 3438/09 (DELIVERED ON 29 JULY 2010)

category for purposes of forfeiture. The public interest would not be served in my view, to declare the vehicle forfeit."

However, there have been criticisms advanced to the tune that the procedures in relation to some of the orders such as confiscation orders are a violation of individuals rights to a fair trial in that they refer to criminal confiscations but say the proceedings are civil in nature thus the civil rules of evidence would apply, yet during the proceedings they apply the criminal onus of prove beyond a reasonable doubt.[100] This criticism is motivated by the fact that confiscation orders are another form of punishment on the accused person by the state in addition to punishment given at the end of the criminal trial in the case where a person is convicted.

Another criticism is with regard to deprivation of property, the issue is whether asset forfeiture of assets constitutes an arbitrary deprivation of property which is a right protected under the three jurisdictions respective constitutions. In First National Bank of *SA Ltd (t/a Wesbank) v Commissioner, South African Revenue Services; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* [101] the South African constitutional court held that is was permissible for a person to be deprived of property by virtue of a legislative provision if such deprivation is in the interest of society at large. What the court weighs up is the sacrifice defendant is expected to make by giving up their property or right to ownership and the public purpose such deprivation is intended to serve.

The aforementioned are possible criticisms that our courts would have to deal with when dealing the respective orders provided for under POCA, whether our judicial officers are ready for the challenges that await them or not is not a question that can be answered with complete certainty. All our court needs to consider when faced with the issue of violating fair trial and due process rights as well as the right to property all that needs to be considered and weight up is the interest of the community as a whole and that of the individual, plus there is no reason for a person to benefit from a crime and if forfeiture orders are not done then such persons would still be able to benefit from his own wrong doing which would not be just.

[100] Burchell, J & Milton, J. 2010. *Principles of Criminal Law: Third Edition*. Claremont: Juta and Company. At page 1011 - 1012

[101] 2002 (4) SA 769 (CC) at paragraph 97 and 98

CHAPTER 5

CONCLUSION

Having looked at money laundering in Namibia under the common law as well as money laundering under the new anti-money laundering legislation and all other relevant factors that were considered in order to determine the capabilities of our Namibian courts to effectively apply anti-money laundering legislation as well as the effectiveness of the legislation in detecting, preventing and deterring money laundering in Namibia. The following were the findings:

- In respect of the Namibian position prior to the new legislation it is clear from the cases that were addressed in the paper as well as others that were consulted that the common law did not identify money laundering as a crime and when it did identify it as a crime provisions were only made to punish the particular individuals by confiscating their properties, of which such confiscations were limited to money or proceeds that were identified as flowing from drug trafficking. Thus even though the accused in the Avid SSC scam and Koby Alexander laundered money they could not be charged with money laundering as it was not an offence at the time.

- After having looked at the various cases that have come before our courts after the implementation or the new anti-money laundering legislation, the international instruments and the concept of judicial independence it can be concluded that since the inception of both FIA and POCA our law enforcements have been able to make various arrests and even preserve certain assets belonging to accused persons. This means that the implementations have helped detections of suspicious transactions and that were often overlooked and the obligations put on accountable institutions by FIA help detect and in some instances even prevent money from being laundered because many know that they cannot make large deposits of money that they cannot account for without bringing attention to themselves.

- Another finding is that even though our prosecution is neither transparent nor consistent in executing its mandate, the fact that our Judiciary still maintains a form of independence means there is hope for the effective implementation of the two legislations. Such hope would however need to be had with caution knowing that what happens in practice and in some cases have shown that the judiciary is not entirely independent from the executive (mainly government). Like in any other country the Namibian judiciary is not immune to the influence of the government, which is why even though the legislation is applied it is bound to be more effectively applied in cases such as the one of Majiedt and Oliever because they do not seem to show any close ties with government officials. However high profile cases such as the Lameck and even the Avid SSC case that involve some high profile individuals can easily drag on and in the end result in no conviction, at the end of the day it is a general principle of life that the big fishes always get away with anything.

- With regard to the legislation and position of Namibia in comparison with other countries, it was found that Namibia's anti-money laundering legislation is very similar to that of South Africa. The United Kingdom is slightly different but most of the important provisions such as restraint orders, forfeiture etc. are similar to that of Namibia and South Africa. Although South Africa seem to have been effective in implementing their legislation they seem to face criticisms of the forfeiture orders and confiscation orders violating fundamental rights like the right to ownership and the presumption of innocence, due to the fact that these orders deprive one of their assets.

  But can one really call assets they stole or acquired through unlawful means theirs? Which is what brings us to the issue of a violation of the presumption of innocence when an order such as the preservation order is given, POCA requires that the prosecutor general show that there are reasonable grounds to believe that the person against which the order is to be made would be found guilty of the particular crime. Many would say the very presumption of possibly finding the person guilty defeats the presumption of innocence, yet again the very purpose of such order is to make sure that if such proceeds

emanate from the unlawful activity the person cannot dispose of them or enjoy them. Imagine in the Lameck case these accused are on bail and can spend the money on anything or even continue to launder such money, which is what the courts try to avoid by preserving them or forfeiting such proceeds to the state. This is possible one some of the challenges our courts will face, which is why lawyers are so easily able to get their clients to have access to their bank accounts even after it has been frozen, which was evident in the Lameck and Uyuni cases.

Finally all that can be said is that compared to the time when we had not criminalized money laundering we are now in a much better position with the inception of FIA and POCA in our criminal justice system. Even though their cases like the Majiedt case that make us question the possible effectiveness of the measures put in place to detect money laundering, we still have hope because the very same legislation has brought people like Uuyuni, Olivier, Lameck and even Majiedt before our courts now it is up to our courts to set precedent and pave the way forward by clearly showing the place of money laundering in Namibia.

We need to step away from the shadows of caution and fear of the powerful and remember that everyone is equal before the law and in a country like Namibia that has a supreme constitution we need not answer to anyone but the constitution. Since money laundering does not only do harm to an individual but has society at large as its victims when we consider a violation of fundamental rights like the presumption of innocence and the right to property, the court needs to consider weighing up the rights of the individual against that of society. Surely the right of one person cannot be more important than that of a society, surely our courts cannot allow for a person who has stolen over 30 million of public funds to retain a house that he or she bought with such money, would surely defeat the purpose of justice.

RECOMMENDATIONS

In view of the above conclusion it is recommended as follows:

1. It is obvious that our legal position has changed since the coming into force of the anti-money laundering legislation, hence I would recommend that in addition to the

preservation orders and the freezing of accounts under POCA, our courts hand down judgments in respect of the pending cases like the Avid SSC, Lameck and others.

2. It is imperative four our courts to ensure that once they freeze a defendant's accounts a mere application by defendants lawyers does require them to give an order availing such funds, (which was the case in the Uyuni and Koby Alexander) as it would ultimately defeat the very purpose of the preservation order.

3. Since we cannot be completely reliant on the office of the prosecutor general to bring people that commit the crime of money laundering to justice, it is recommended that the ministry of justice comes up with a ways to ensure that the office of the prosecutor general is partially transparent, so as to limit possible abuse of their independence to the detriment of the justice system as a whole.

4. Finally it is also recommended that the law enforcement agents such as the police be properly educated on the crime of money laundering so that they can properly carry out their investigations in this regard, further supervisory bodies such as the law society should have occasional visits at the respective law firms to ensure that they are carrying out their obligations under FIA.

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