

**LAW SOCIETY OF SOUTH AFRICA:
GENERAL LAWS (ANTI-MONEY LAUNDERING AND COMBATING TERRORISM
FINANCING) AMENDMENT BILL**

1. **INTRODUCTION**

The Law Society of South Africa (“LSSA”) supports the fight against money laundering, terrorist financing and proliferation financing. However, we are concerned that, given the nature of legal practice, there may be instances where enforcement may hinder legal practitioners' ability to fulfil their professional obligations and to serve the public interest. With this in mind, we address aspects of the Bill herebelow.

2. **PROPOSED AMENDMENT OF SECTION 3 OF ACT 38 OF 2001**

There seems to be an “or” missing after Section 3(xi). The paragraph should presumably read:

(xi) the investigative division of the Auditor-General[,]; or

3. **PROPOSED AMENDMENT OF SECTION 26C OF ACT 38 OF 2001**

Clause 6(b) proposes the amendment of Section 26C(2)(d) with the inclusion of the phrase: that arose before the date on which the person or entity was identified by the Security Council of the United Nations; or.

It is unclear how accrued interest or other earnings due on accounts holding property affected by a prohibition post the United Nations Security Council resolution is to be dealt with. At present, it seems that the Minister of Finance may permit the provision of services to safeguard this income whilst the resolution persists, however, the position post the amendment is not clear. For example, it is not clear how the interest earned on an investment managed by the law firm, which is affected by a prohibition under section 26B, would be dealt under the proposed amendment.

4. **PROPOSED AMENDMENT OF SECTION 28A OF ACT 38 OF 2001**

The LSSA has identified several concerns regarding the proposed clause 7 of the Bill, which provides for the substitution of Section 28A of the FIC Act, in particular:

Legal Professional Privilege:

- 4.1 The **first** concern resides with the legal professional privilege (“LPP”). It is not clear how the LPP is to be reconciled with the duty to report under the proposed Section 28A (read with Section 26A and Section 26B), i.e. the duty to freeze the property of a person or entity placed on the Financial Intelligence Centre’s Targeted Financial Sanctions List (“TFS List”), the inability to deal with the property of such a person or entity and the constitutional right to representation by a legal practitioner of choice. For instance, should a client’s name, personal details, information relating to property, etc, be provided to a

legal practitioner under the protection of the LPP, and it subsequently transpires that the client is placed on the TFS List, how should the legal practitioner proceed. A client may approach the legal practitioner for the specific purpose of contesting either an anticipated or an issued United Nations Security Council resolution, which may result or has resulted in the client being placed on the TFS List. In such circumstances, would the legal practitioner be obligated to file a Section 28A report even if the information required to file the report is subject to the LPP? Is the legal practitioner obligated to freeze the property of the client in these circumstances? How is the legal practitioner furthermore to proceed, if at all, in order to make use of the relief offered under Section 26C to access the property of the client for, for instance, the release of funds for legal fees?

It is unclear whether the proposed amendment would have the effect of imposing reporting obligations on legal practitioners that may conflict with the common law right to LPP. It is therefore imperative to specifically make provision that the proposed reporting obligations are subject to Section 37(2) of the FICA.

Scrutinising information concerning clients:

- 4.2 The **second** concern relates to the scrutinising of information concerning clients. The proposed Section 28A provides that an accountable institution must, upon notice being given by the Director under section 26A(3), scrutinise its information concerning clients with whom the accountable institution has

business relationships in order to determine whether any such client is a person or entity mentioned in the notice by the Director.

This is understood to require law firms, upon receipt of such notice by the Director, to scrutinise their information concerning **all** their current clients to determine whether the person or entity mentioned in the notice by the Director is a client of the firms. This obligation absolute in nature and applies to all firms, whether large or small and irrespective of the number of clients of the firms. We are concerned that this may have unintended consequences as no provision is made for the different forms of accountable institutions, including the diverse nature of law firms.

This can be illustrated by the following three examples:

4.2.1 A single legal practitioner who operates an office in Kathu in the Northern Cape, with a clientele that is limited to Kathu and the surrounding areas, is obligated to scrutinise its information concerning all its current clients to determine whether such clients are persons or entities mentioned in the notice by the Director. This is despite the fact that there is no South African person or entity that has been sanctioned under a resolution of the United Nations Security Council. Put differently, the single practitioner, whose clientele is restricted to South African clients, will almost certainly not find any of his or her clients in the notice by the Director, unless South African persons or entities have been added to the TFS List. Despite this, the legal

practitioners who has not scrutinised all its current clients will be non-compliant and may face an administrative sanction.

4.2.2 A law firm that assists clients consisting of multiple communities (whether on a pro bono basis or not) must undertake such scrutiny. This can take up a significant amount of time, depending on various factors, including the nature of the firm's clientele and whether or not it has access to software.

4.2.3 A law firm may receive urgent instructions to represent several occupiers on a piece of land who are respondents in an urgent application for an eviction. In such circumstances, the full details of all occupiers may not be available to the firm or even the applicant. This is not uncommon in the South African context. A recent example from the SAFLII website (after having undertaken a cursory search) in the matter of: *City of Johannesburg v Unlawful Occupiers Of Various Units of Various Units At Donovan Macdonald Retirement Centre*, the court describes the situation in relation to First Respondents as follows:

Because the City's papers do nothing to isolate and identify the individual occupants of the Centre who are the source of the unlawful conduct of which it complains, I cannot say how many other "vetted" residents of the Centre are similarly dependent on "unvetted" members of their family or other carers who are present at the Centre technically unlawfully. The City's own investigations, (summarised in a report authored by a company called "Phoka Forensics" which was attached as annexure "PP5" to its founding affidavit), suggest that there is a large number of people resident at the Centre with family members. Without any sense of who these people are, and whether

or not they are the source of the conduct of which the City complains, it is impossible to identify to whom any eviction order should apply

Taking the above examples into consideration, on 17 April 2024, NOTICE NO TFS-560-17/04/2024 was given by the Director of the FIC, which names the following entity:

Entities and Other Groups KPe.029 Name: NATIONAL AEROSPACE DEVELOPMENT ADMINISTRATION Address: Democratic Peoples Republic of Korea Listed on:02/03/2016 Other information: The NATIONAL AEROSPACE TECHNOLOGY ADMINISTRATION (NATA) is involved in the DPRKs development of space science and technology, including satellite launches and carrier rockets.

It is likely that some of the above legal practitioners in the above examples can, in less than one minute, conclude that *NATIONAL AEROSPACE DEVELOPMENT ADMINISTRATION* is not one of their clients. This assessment would, however, not be compliant with the proposed section 28A as the legal practitioners would ostensibly not have **scrutinised** their information concerning clients against the TFS List.

The firm representing *Unlawful Occupiers Of Various Units of Various Units At the Retirement Centre* would have the impractical task of scrutinising the list of *Unlawful Occupiers* after having received the notice from the Director to determine if any of the *Unlawful Occupiers* are on the list.

If the legal practitioners are unable to demonstrate such scrutiny, it would be likely be regarded as non-compliant and they may ultimately attract administrative sanctions. If they consistently fail to do so, they would likely be deemed grossly negligent.

The LSSA is of the view that the proposed clause will impose a disproportionate burden on especially smaller legal practices with limited resources. This may result in large-scale non-compliance in a context where it is common knowledge that there is a very slim likelihood that an individual or entity on the TFS List is located in South Africa.

Another example is NOTICE NO TFS-561-27/04/2024 dated 27 April 2024 which identifies the following individual:

QDi.431 Name: SANAULLAH GHAFARI DOB: 28/10/1994 Designation: Nationality: Afghanistan Identity no: Passport no: Listed on: 21/12/2021 Other information: Leader of the Islamic State of Iraq and the Levant - Khorasan (ISIL - K) (QDe.161). Information Technology Expert. Father's name: Abdul Jabbar. Grandfather's name: Abdul Ghaffar. Photo is available for inclusion in the INTERPOL-UN Security Council Special Notice. INTERPOL-UN Security Council Special Notice web link: <https://www.interpol.int/en/How-we-work/Notices/View-UN-NoticesIndividuals>.

The notice offers no identity or passport number. A search of a local law firm's client list would likely offer no match. Failure to scrutinise information concerning clients would inevitably result in non-compliance – irrespective of how low the probability is that a South African law firm would have the said individual as a client.

Firms are, pursuant to current directives, required to record the manner and outcome of such scrutinising and, upon request from the FIC, to make available such information.

This proposed amendment draws no distinction between a large bank and a single legal or property practitioner. Both are required to undertake the same scrutiny.

The proposal is aimed at imposing a blanket legal obligation on all accountable institutions, which seemingly does not pass the test of rationality. It is questionable whether this proposed statutory obligation is appropriately tailored in the fight against money laundering, terrorist financing and proliferation financing. It will more increase the rate of non-compliance of accountable institutions, including legal and property practitioners.

5. **PROPOSED AMENDMENT OF SECTION 40 OF ACT 38 OF 2001**

5.1 Clause 9(b) – it is not clear why an “or” is included at the end of sub-section “(a)”;

5.2 Clause 9(d) – the “(aa) should be an “(aA)”;

6. **PROPOSED AMENDMENT OF SECTION 42 OF ACT 38 OF 2001**

6.1 Clause 10(a) – the wording “to its clients” has been included, but not underlined;

6.2 Clause 10(b) – the wording “tomaking” should be separated to read “to making”;

6.3 Clause 10(c) – the added duty of having to inform the FIC and the supervisory body of the mitigating steps put in place to address the risks that arise where a foreign country does not permit the imposition of the measures required under FICA is quite onerous. It should be sufficient to set these out in the accountable institution’s RMCP and to identify the risk in the accountable institution’s business risk assessment.

7. **PROPOSED AMENDMENT OF SECTION 46 OF ACT 38 OF 2001**

Clause 11 – it is unclear whether the use of the wording “to give effect to” in subsection (1) is intended as being synonymous with conclude or finalise, or whether it is intended to be wide enough to include the taking of any preliminary steps related to the intended transaction. It is submitted that the

former is more likely intended/should be intended, which would be in keeping with the wording of Section 21(1). It is recommended that Section 46(1) should read: “*An accountable institution that performs any act in the course of concluding a business relationship or single transaction in contravention of section 20A or 21(1) [or (1A)] is non-compliant and is subject to an administrative sanction.*”

8. **AMENDMENT OF SECTION 171 OF ACT 71 OF 2008, AS AMENDED BY SECTION 108 OF ACT 3 OF 2011**

It is unclear whether clause 15 is aimed at a director in his or her personal capacity as the proposed Subsection 8 refers to ‘*a person to whom a compliance notice has been issued*’. This may result in administrative fines being imposed upon directors in their personal capacity – depending on the content of the compliance notice. The LSSA is of the view that the law should clearly provide that fines imposed in this context would be against the company, not the directors in their individual capacity.