Anti-Money Laundering and the "Beneficial Ownership" Amendments to South Africa's *Companies Act* 71 of 2008

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Abstract

The "beneficial ownership" (BO) amendments to the *Companies Act* 71 of 2008 (the *Companies Act* 2008) were introduced in response to requirements set by the Financial Action Task Force (FATF). These amendments are just one part of a broader anti-money laundering (AML) framework introduced by South Africa in response to the country's much publicised recent "grey listing" by FATF. The amendments aim to provide useful information to law enforcement agencies about the natural persons that are the beneficial owners of companies. The South African AML legislative regime is comprehensive but lacks implementation and investigative skills largely due to the lack of expertise in money laundering detection in law enforcement agencies. Unfortunately, the amendments suffer from several defects as identified in this article. The definitions of "affected company" and "beneficial owner" are critiqued. In addition, the authors argue that the failure to create a criminal offence for failing to disclose BO information is a weakness in the *Companies Act* 2008's AML efforts. The impact of these disclosure obligations on small to medium enterprises is discussed and it is argued that the increased administrative burden and potential compliance costs need to be justified by a likelihood that the amendments will be effective in curbing money laundering in South Africa.

Keywords

Companies; money laundering; shell companies; Financial Action Task Force; *Companies Act* 71 of 2008; beneficial ownership.

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1 Introduction

Companies are capable of being used by bad actors for illicit activities like money laundering and terrorism financing.[1] The Financial Action Task Force (FATF)[2] further underscores this point by noting that “despite the essential and legitimate role that corporate vehicles play in the global economy, their unique legal status also lends them to be used in complex schemes designed to conceal the true beneficial owners”.[3] Such companies referred to by the FATF are commonly called "shell companies" or "front companies".[4] These shell or front companies are akin to special purpose vehicles used in corporate finance transactions in that they have no employees, place of business, or activities other than acting as a conduit.[5] In South Africa, the Department of Trade, Industry and Competition (DTIC), like the FATF, also noted that "transparency in respect of beneficial ownership reporting is becoming a matter of concern internationally”, adding that key global economies such as the United States of America and the European Union have made efforts “to address the matter of the identity of the holders of the beneficial interests in a company”.[6] Criminals take

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1 See FATF 2010 https://www.fatf-gafi.org/en/publications/Methodsandtrends/Moneylaunderingusingtrustandcompanyserviceproviders.html 4-5. Also see Duri and Matasane 2017 *Journal of Anti-Corruption Law* 175. Dhana explains that "[v]arious methods, such as complex company structures and simulated transactions, are employed to conceal and move unlawful proceeds." See Dhana 2022 *JCCLP* 30. ..

2 FATF is an intergovernmental organisation established in 1989 by the G7. It has become a global money laundering and terrorist financing watchdog which sets and enforces international standards that aim to prevent illegal activities harmful to society, which activities are related to money laundering and terrorist financing.

3 Including, in many respects, “the real reason for holding assets and conducting transactions”. See FATF 2023 https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Guidance-Beneficial-Ownership Legal-Persons.html 4.

4 It has been said that "a front company is an incorporated company that creates the impression of lawful business activities, but behind this facade, the company is committing illegal activities." See Dhana 2022 *JCCLP* 30.

5 Locke 2016 *SALJ* 160.

6 See 4.1 of Background Note and Explanatory Memorandum in Gen N 586 in GG 45250 of 1 October 2021 (Draft Companies Amendment Bill, 2021). At 4.8, the DTIC explains that "[t]here are a multiplicity of reasons supporting legislative measures to determine the ultimate owners of beneficial interests in a company”. The DTIC gives these reasons as:

(i) fraud and tax evasion which can thrive when company ownership is opaque and

(ii) company ownership arrangements which can be misused for illicit purposes and other crimes including money laundering (proceeds of corruption) and terrorism finance.

advantage of company ownership structures to conceal their association with a company that conducts illegal activities.[7]

Money laundering is a global crime, as illicit proceeds of crime are often moved between countries in the money laundering process.[8] Regulation enforcing disclosure and transparency in respect of company ownership has been introduced to counter these offences.[9] The Financial Action Task Force (FATF), an international anti-money laundering (AML) watchdog, which sets standards and goals for AML domestic legislation, takes the position that the misuse of companies for illegitimate purposes can be reduced if relevant investigative authorities are provided with information regarding beneficial ownership.[10] Beneficial ownership (BO) regulation is an attempt to identify the true owners or controllers of entities used for illegitimate purposes. South Africa has now taken a firm step in this direction with the *General Laws (Anti-Money Laundering and Combatting of Terrorist Financing) Act* 22 of 2022 (hereinafter the *AML Act*).

The *AML Act* amends several statutes, including the *Companies Act* 71 of 2008 (the *Companies Act* 2008). On 24 May 2023 Parliament enacted amendments to the Companies Regulations, 2011 to confer a mandate on the Companies and Intellectual Properties Commission (CIPC) to collect and maintain BO information.[11] The amendments have as a whole brought several onerous and potentially confusing compliance and disclosure obligations into the realm of South African company law compliance. From a political perspective these amendments were a response to shortcomings in South Africa's AML legislation as identified by the FATF.[12] It was hoped

7 Duri and Matasane 2017 *Journal of Anti-Corruption Law* 176; Chandra 2020 *Mich J Int'l L* 179-180; Bieler 2022 *Fordham Journal of Corporate and Financial Law* 193-196.

8 Hatchard 2018 *Denning LJ* 200.

9 Duri and Matasane 2017 *Journal of Anti-Corruption Law* 194-195; Hatchard 2018 *Denning LJ* 200.

10 FATF 2023 https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Guidance-Beneficial-Ownership-Legal-Persons.html 4. "[T]he need for accurate and up-to-date information on the beneficial owners is a key factor in the investigation of offenders who might otherwise hide their identities behind a corporate structure." See Zigo "Beneficial Ownership Regulation" 48.

11 The Companies and Intellectual Property Commission (CIPC) is probably the most important regulatory institution for companies in South Africa: its functions include the registration and deregistration of companies, and the receipt and storage of statutorily required company documents. See ss 186(1) and 187(4) of the *Companies Act* 71 of 2008 (*Companies Act* 2008).

12 IMF 2021 https://www.imf.org/en/Publications/CR/Issues/2021/10/06/South-Africa-Detailed-Assessment-Report-on-Anti-Money-Laundering-and-Combating-the-482069 11. See also clause 1.5 of the Memorandum on the objects of the Companies Amendment Bill B27-2023.

that the amendments would prevent South Africa's being placed on the FATFs "grey list" of jurisdictions under increased monitoring.[13]

The FATF has identified several weaknesses in South Africa's AML and countering the financing of terrorism (CFT) legislation and has consequently placed South Africa on its "grey list". *Inter alia* the FATF determined that in South Africa "[t]he proactive identification and investigation of ML networks and professional enablers is not really occurring";[14] it was noted that law enforcement agencies face difficulties in obtaining accurate and updated beneficial ownership information about companies,[15] and that "accurate and current BO information ... is not easily available."[16] The FATF has observed that South African companies are often abused for the purposes of money laundering and corruption, including financial crimes related to government tenders.[17] The FATF recommended that South Africa should substantially improve its methods of ensuring the maintenance of "accurate, up-to-date, and verified" BO information that is readily available to competent authorities.[18] This is what the *AML Act* attempts to achieve.

Nominee asset-holding structures are a common phenomenon world-wide.[19] The formation of nominee shareholding structures is an established practice in South Africa.[20] This is especially so for listed shares traded on the Johannesburg Stock Exchange (JSE), where nominee shareholding is mandatory.[21] The relationship between a nominee and the person for whom he is holding shares is well understood at common law.[22] The problem that regulators face is that nominee ownership structures can be used to conceal a "true owner" of an asset by keeping his name off public records associated

13 See FATF 2023 https://www.fatf-gafi.org/en/publications/High-risk-and-other-monitored-jurisdictions/Increased-monitoring-june-2023.html 11.

14 FATF 2023 https://www.fatf-gafi.org/en/publications/High-risk-and-other-monitored-jurisdictions/Increased-monitoring-june-2023.html 11.

15 FATF 2023 https://www.fatf-gafi.org/en/publications/High-risk-and-other-monitored-jurisdictions/Increased-monitoring-june-2023.html 12.

16 FATF 2023 https://www.fatf-gafi.org/en/publications/High-risk-and-other-monitored-jurisdictions/Increased- monitoring-june-2023.html at 19.

17 FATF 2023 https://www.fatf-gafi.org/en/publications/High-risk-and-other-monitored-jurisdictions/Increased- monitoring-june-2023.html at 141.

18 FATF 2023 https://www.fatf-gafi.org/en/publications/High-risk-and-other-monitored-jurisdictions/Increased- monitoring-june-2023.html at 141.

19 FATF 2023 https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Guidance-Beneficial-Ownership-Legal-Persons.html 49.

20 *Oakland Nominees (Pty) Ltd v Gelria Mining and Investment Co (Pty) Ltd* 1976 1 SA 441 (A) 448.

21 See 3.70 and 3.90 of JSE 2019 https://www.jse.co.za/sites/default/files/media/documents/2020-02/EquitiesRules.pdf.

22 This relationship is governed by the law of agency, with the registered holder or nominee acting as the agent for his principal, the "true owner" of the shares. See *Oakland Nominees (Pty) Ltd v Gelria Mining and Investment Co (Pty) Ltd* 1976 1 SA 441 (A) 453; Cassim *et al Contemporary Company Law* 327.

with the company.[23] Criminals will often make use of shell companies (that is, companies with no significant operations or assets) and complex control and ownership structures that utilise layers of shareholding by proxies to obscure BO information.[24] The challenge for law enforcement and prosecutorial services is obtaining information regarding the natural persons ultimately controlling and benefitting from companies through which money is laundered.[25]

As part of the move towards transparency in respect of nominee holdings, nominees holding securities in public companies must disclose the number and class of securities held for other persons, the extent of those holdings, the identity of the person on whose behalf the securities are held, and the identity of all persons that hold beneficial interests in securities held by the nominee.[26] Public companies with securities held in a nominee capacity must also maintain a register of the disclosures made in terms of section 56.[27] This last requirement is not applicable to private companies, although the Draft Companies Amendment Bill, 2021 intends to introduce further beneficial interest-disclosure obligations for *all* companies.[28]

Prior to the *AML Act* South African law did not compel companies to disclose the identity of the human beings that could be said to be "owners" of a company. Certain reporting obligations, such as director, shareholder, and beneficial interest-holder disclosures, have been in place for certain companies for some time, but the information gathered thereby was limited. In complex structures the CIPC and law enforcement agencies would not know outright whether a particular company has a beneficial owner, and if so, who such a beneficial owner is.

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23 FATF 2023 https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Guidance-Beneficial-Ownership-Legal-Persons.html 51. The DTIC is of the view that "authorities and the public need to know not only who the registered shareholders of a company are, but also whether they hold those shares on behalf of others, and, in the case of owners that are companies or trusts, who ultimately own the beneficial interest in those shares." See 4.9 of Background Note and Explanatory Memorandum on the Draft Companies Amendment Bill, 2021.

24 FATF 2023 https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Guidance-Beneficial-Ownership-Legal-Persons.html 4-6.

25 Duri and Matasane 2017 *Journal of Anti-Corruption Law* 176.

26 Section 56(3) of the *Companies Act* 2008. See Cassim *et al Contemporary Company Law* 327-328.

27 Section 56(7)(*a*) of the *Companies Act* 2008; 3.83 of the JSE Listings Requirements (JSE 2019 https://www.jse.co.za/sites/default/files/media/documents/2019-04/JSE%20Listings%20Requirements.pdf).

28 Clause 13 of the Bill proposes to impose an obligation on the company, where the identity of persons who hold a beneficial interest, including the true owner, is unknown, to request from the registered security holder each quarter to provide details of beneficial interest holders. See Background Note and Explanatory Memorandum to the Draft Companies Amendment Bill, 2021 at 3.1.3.

This article will analyse the AML amendments and the accompanying disclosure obligations now applicable to private companies, close corporations and non-profit companies, to gauge whether the extra compliance burden on small to medium enterprises (SMEs) is worth it. In other words, the article seeks to establish whether the AML amendments could help to reduce the amount of money laundering conducted through shell companies. This article describes how companies are used for money laundering, discusses the importance of adequate BO disclosure regulation in the fight against money laundering, critically analyses the relevant AML amendments to the *Companies Act* 2008, discusses whether and to what extent the amendments contribute to the fulfilment or frustration of South Africa's company law objectives, and analyses whether and to what extent the amendments comply with the expectations of the FATF. This article makes a significant contribution to the field of company law and anti-money laundering law by analysing one of the most recent AML amendments and its potential impact on the prevention of money laundering offences committed by shell companies.

2 Money laundering and shell companies

Money laundering and corruption are secret crimes.[29] A money launderer requires a working environment that will not cause too much noise, and a shell company provides such a platform. Money launderers often deal with the distribution of huge amounts of cash, and a shell company enables them to clean the dirty money and reintroduce it into the banking system as money derived from legitimate proceeds. A company, whether a shell company or a front company, enables money laundering to occur at an alarming rate and prevents its detection and prosecution. This section first examines the definition and regulation of money laundering in South Africa. This is then followed by an analysis of the phenomenon of shell companies.

2.1 Defining and regulating money laundering

Money laundering is a scourge in South African society which enables corruption to flourish. Money launderers, however, are left with a dilemma: how do they prove their money has not been obtained from illegal proceeds, once they want to reintegrate it into the legitimate banking system? In order to be able to spend money openly and legitimately criminals will seek to ensure that there is no nexus between the illegal activity and the proceeds of their crime.[30] They also tend to construct reasonable explanations for the apparently legal proceeds upon investigation.[31] Consequently, criminals

29 Stojanovski "Crime and Corruption Cases" 122.

30 OECD 2009 https://www.oecd.org/ctp/crime/money-laundering-awareness-handbook-for-tax-examiners-and-tax-auditors.pdf 9.

31 OECD 2009 https://www.oecd.org/ctp/crime/money-laundering-awareness-handbook-for-tax-examiners-and-tax-auditors.pdf 9.

seek to launder dirty or black money before investing it or spending it in the legal economy.[32] Money laundering does not have a universal legal definition, but it is often defined as a process by which offenders launder dirty money into clean money, thus, covering up the proceeds of criminal activity and make them appear legitimate.[33] The FATF defines money laundering as the processing of criminal proceeds to disguise their illegal origin, an act which enables criminals to enjoy these profits without revealing their source.[34]

Money laundering is facilitated by way of a three-stage process known as placement, layering and integration.[35] Firstly, placement involves circumventing the reporting system and placing the money obtained from illegal proceeds in a bank or similar institution.[36] In South Africa any cash amount above R50 000 must be reported to the Financial Intelligence Centre in accordance with the *Financial Intelligence Centre Act* 38 of 2001.[37] This process is known as the cash threshold report (CTR) and is an important tool to combat money laundering. The CTR amount was increased in 2022 from R25 000 to R50 000.[38] However, money launderers have invented ways to evade the CTR reporting measure. They often employ so-called "smurfs", who deposit the illegal proceeds of the money launderer.[39] For example, if a money launderer wants to deposit R200 000 on one day, he can simply ask five of his smurfs to deposit R40 000 each, which sums will not be detected by the Financial Intelligence Centre. Banks have also found a way to combat this practice by strengthening their customer due diligence (CDD), know your customer (KYC) and suspicious transactions reporting (STR) measures. CDD, KYC and STR are put in place by a bank once a new client opens a bank account and a large amount of money as described above is deposited into the account.[40]

Secondly, layering refers to hiding or concealing the illegal origin of the money by way of a series of transactions to render the proceeds accessible in a legitimate market.[41] Transactions, structures or measures which

32 OECD 2009 https://www.oecd.org/ctp/crime/money-laundering-awareness-handbook-for-tax-examiners-and-tax-auditors.pdf 9.
33 Korejo, Rajamanickam and Said 2021 *JMLC* 726.
34 FATF 2023 https://www.fatf-gafi.org/en/pages/frequently-asked-questions.html#tabs-36503a8663-item-6ff811783c-tab.
35 See generally Weismann *Money Laundering*.
36 Burchell *Principles of Criminal Law* 911.
37 See FIC 2022 https://www.fic.gov.za/wp-content/uploads/2023/09/2022.10-MR-CTR-Regulations.pdf. Also see ss 28 and 77(1)(a) of the *Financial Intelligence Centre Act* 38 of 2001.
38 FIC 2022 https://www.fic.gov.za/wp-content/uploads/2023/09/2022.10-MR-CTR-Regulations.pdf.
39 See generally Starnini *et al* "Smurf-Based Anti-Money Laundering".
40 See, for example s 29 of the *Financial Intelligence Centre Act* 38 of 2001.
41 Burchell *Principles of Criminal Law* 911.

facilitate layering include shell companies, electronic transfers, false invoicing, offshore placements and other methods.[42] The Organisation for Economic Co-operation and Development (OECD) defines layering as a process of taking illegal income and "transfer[ring] and split[ting] it frequently between bank accounts, countries, individuals and/or corporations, thus distancing it from its criminal origin."[43] Layering is a crucial part of the process of money laundering. Thus, the Parliament of the Council of Europe expressed its shock with the release in 2016 of the Panama Papers, evidence of one of the worst global money launderings scandals ever:

> Besides billionaires, celebrities and criminals, the names of 143 politicians and their associates from around 50 countries are mentioned in the documents as having used offshores for tax avoidance and tax evasion purposes. Even though legitimate ways of using tax havens exist, offshore jurisdictions are known for the creation of shell companies hiding the real beneficial owners. Such practices are common for aggressive tax avoidance, hiding illicit wealth and for the concealment of financing of terrorists, drug cartels, criminals and corrupt politicians.[44]

Thirdly, integration encourages the criminal to "regain control over the proceeds of the underlying criminal activities without fear of detection."[45] The term refers to creating an apparently legal origin for the criminal proceeds by disguising the ownership of the assets, doing business with oneself and acquiring "badges of wealth" such as luxury homes and vehicles.[46] Integration is an important tool enabling the money launderer to ultimately avoid detection by the tax or law enforcement authorities.[47]

Money laundering is a global problem and is well planned, as is illustrated by the above description of the stages of money laundering. This raises the question whether money launderers should at all be bothered by legislation and law enforcement, including the new amendments included in the *General Laws Amendment Act*. The South African AML legislative regime is comprehensive but lacks implementation and the state lacks the necessary investigative skills largely due to the lack of expertise in money

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42 Burchell *Principles of Criminal Law* 911.

43 OECD 2019 https://www.oecd.org/ctp/exchange-of-tax-information/money-laundering-awareness-handbook.htm 18. Also, see generally De Koker *et al Money Laundering and Terror Financing*.

44 See Council of Europe 2016 https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23018&lang=en.

45 Smit *Clean Money, Suspect Source* 12. Also see Burchell *Principles of Criminal Law* 911; *S v Van der Linde* 2016 2 SACR 377 (GJ) (hereafter *S v Van der Linde)* para 113.

46 OECD 2019 https://www.oecd.org/ctp/exchange-of-tax-information/money-laundering-awareness-handbook.htm 18.

47 OECD 2019 https://www.oecd.org/ctp/exchange-of-tax-information/money-laundering-awareness-handbook.htm 18.

laundering detection within law enforcement agencies.[48] This criticism was raised in the FATF Mutual Evaluation Report when it evaluated and assessed South Africa's ability to combat money laundering and terrorist financing. Some of the main critiques raised by the FATF include state capture, the lack of the proactive identification of money laundering networks, and the inability of law enforcement agencies "to readily obtain accurate and updated BO information about companies and trusts adequate to enable effective investigation of ML and TF."[49] The latter criticism is one of the reasons why the South African Parliament included an amendment to the *Companies Act* 2008 to address BOs who are not declaring their interests in their companies, but more on this later. What is clear is that South Africa has serious issues with prosecuting money laundering, and this can be addressed only if there is sufficient cooperation among the various law enforcement agencies involved, which include the South African Police Service, the Special Investigative Unit, the Directorate for Priority Crime Investigation (also known colloquially as the Hawks), and other agencies. The law enforcement agencies provide police dockets to the National Prosecuting Authority (NPA), which decides whether to prosecute or not. It remains to be seen how the new amendments to the *Companies Act* 2008 and other laws will be implemented. Their successful implementation is the responsibility of the law enforcement agencies and the NPA. The suspension of the Aspirant Prosecutor Programme of the NPA in September 2023 means that hundreds of new prosecutors will not be able to join the NPA, which only adds to the challenges faced by the NPA in prosecuting money laundering.[50]

South Africa's fight against money laundering is largely indebted to the efforts conducted by the global AML regime, which is spearheaded by the United Nations (UN) and the FATF. Money laundering is regulated globally by the *UN Convention against Transnational Organised Crime*,[51] the *UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*[52] and the *UN Convention against Corruption*.[53] Money laundering is also regulated regionally by the *African Union Convention on Preventing and Combating Corruption*.[54] The FATF Recommendations also play a major role in combatting money laundering and terrorist financing

48 See FATF 2021 https://www.fatf-gafi.org/content/fatf-gafi/en/publications/Mutualevaluations/Mer-south-africa-2021.html.

49 FATF 2021 https://www.fatf-gafi.org/content/fatf-gafi/en/publications/Mutualevaluations/Mer-south-africa-2021.html.

50 See NPA 2023 https://www.npa.gov.za/media/suspension-aspirant-prosecutor-programme-2024-intake.

51 *United Nations Convention against Transnational Organised Crime* (2000).

52 *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1988).

53 *United Nations Convention against Corruption* (2005).

54 *African Union Convention on Preventing and Combating Corruption* (2003).

offences, and will be discussed in detail in the next section in so far as they relate to companies. South Africa has signed and ratified all the above conventions and has domesticated these provisions in its laws as provided for in section 231 of the *Constitution of the Republic of South Afric*a, 1996.[55] Domestically the offence of money laundering is regulated by the *Prevention of Organised Crime Act* (*POCA*),[56] the *Protection of Constitutional Democracy against Terrorism and Related Activities Act*,[57] and the *Financial Intelligence Centre Act*.

Money laundering is regulated by section 4 of *POCA*. Money laundering is committed when certain acts such as bribery, racketeering or any other predicated offences are performed in respect of unlawful activities, which results in the concealment of illegal proceeds or property.[58] Section 4(b)(i) adds that money laundering is committed when this illegal property is concealed or disguised. Money laundering is complete only once the illegal property has been concealed, otherwise, the offence is known as bribery only or possession of drugs, for instance, depending on the facts of the case. In *S v Van der Linde* the accused was charged with money laundering and other predicated offences after he deposited the cheques of one company into another company he controlled in an effort to defraud the South African Revenue Service by claiming fraudulent tax refunds.[59] The South Gauteng High Court, however, found the accused not guilty of money laundering due to a lack of the clear concealment of the funds by the accused.[60] The court held that "there was no interruption in the flow of money, which may make it difficult for the authorities to investigate or trace."[61] In *S v Moosagie*[62] the accused deposited money into an estate agent's trust account and subsequently withdrew small amounts, which was a clear concealment of funds, as opposed to the facts in the case of *Van der Linde*.[63] If a company openly conducts transactions and complies with

55 Section 231 of the *Constitution of the Republic of South Africa*, 1996 states that "(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3). (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time. (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation."

56 *Prevention of Organised Crime Act* 121 of 1998 (*POCA*).

57 *Protection of Constitutional Democracy against Terrorism and Related Activities Act* 33 of 2004.

58 De Koker "Money Laundering" 84.

59 *S v Van der Linde* paras 6, 115.

60 *S v Van der Linde* para 125.

61 *S v Van der Linde* para 125.

62 *S v Moosagie* (CC 29/2010) [2012] ZAECPEHC 31 (17 May 2012).

63 See *S v Van der Linde* para 123.

the AML legislative requirements, then it cannot be thought to commit money laundering, except if it is used as an ML (money-laundering) shell company.

2.2 Shell companies

A shell company may act as a tool for the money launderer to clean dirty money. Transparency International defines a shell company as:

> a limited liability entity having no physical presence in their jurisdiction, no employees and no commercial activity. It is usually formed in a tax haven or secrecy jurisdiction and its main or sole purpose is to insulate the real beneficial owner from taxes, disclosure or both. Shell companies are also referred to as international business companies, personal investment companies, front companies, or 'mailbox'/'letterbox' companies.[64]

Shell companies can be publicly traded or privately held.[65] It is important for the bank to know the identity of the owner of the company in order to determine the legitimacy of the assets and to conduct a risk-based assessment.[66] Privately owned shell entities tend to be more susceptible to money laundering. Thus, the US Department of Treasury explains that:

> the vulnerability of the shell company is greatly compounded when it is privately held and beneficial ownership can more easily be obscured or hidden. Lack of transparency of beneficial ownership can be a desirable characteristic for some legitimate uses of shell companies, but it is also a serious vulnerability that can make some shell companies ideal vehicles for money laundering and other illicit financial activity.[67]

A shell company is effective for the owner because he can circumvent domestic and international regulations due to the obscurity of the identity of the owner and the entire enterprise.[68] The obscurity and conduct of a shell company can be explained in the following example of bribery as the predicated offence for money laundering in a shell company:

> the recipient of the bribe creates a corporate vehicle to hide the assets and any connection that he may have to them. In cases in which the official is given a concealed stake in the venture or the company offering the bribe, these corporate vehicles become the opaque link between the corrupted party and the wealth acquired.[69]

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64 Transparency International 2023 https://www.transparency.org/en/corruptionary/shell-company.

65 US Department of Treasury, Financial Crimes Enforcement Network 2006 https://www.fincen.gov/sites/default/files/shared/LLCAssessment_FINAL.pdf 4.

66 Transparency International 2014 https://transparency.eu/wp-content/uploads/2016/09/TI-EU-Policy-Paper-Beneficial-Ownership-1.pdf 2.

67 US Department of Treasury, Financial Crimes Enforcement Network 2006 https://www.fincen.gov/sites/default/files/shared/LLCAssessment_FINAL.pdf 4.

68 Gilles 2019 *MJIL* 5.

69 World Bank 2011 https://star.worldbank.org/sites/default/files/puppetmastersv1.pdf 39.

The use of shell companies is rife and presents a major problem for law enforcement agencies. In 2011 the World Bank reported that out of 213 grand corruption investigations, 150 of these investigations were related to the use of companies and resulted in the money laundering of approximately US$56.4 billion.[70] The enormousness of the problem cannot even be quantified due to the secret nature of money laundering. The extensive abuse of shell companies for the purposes of committing money laundering make the work of bankers, financial managers, regulators, accountants and law enforcement key in combatting this evil.[71] And of course this duty to combat money laundering through the use of shell companies is hampered when the beneficial owner of the company is unknown. The next section analyses this point in detail.

3 The FATF AML/CFT beneficial ownership recommendations

The FATF is an international inter-governmental body established in 1989 by countries to set standards and promote the effective implementation of measures aimed at combatting money laundering and terrorist financing.[72] The FATF encourages countries to take steps to prevent and mitigate the risk of nominee shareholders and nominee directors being used for ML or TF (terrorist financing) purposes.[73] The FATF has produced a set of Recommendations (the FATF Recommendations) on money laundering and terrorist financing, outlining measures that states should adopt to address these crimes.

Recommendation 24 provides guidance and standards promoting disclosure, record-keeping and the transparency of beneficial ownership of companies as an AML/CFT measure:

> Countries should ensure that there is adequate, accurate and up-to-date information on the beneficial ownership and control of legal persons that can be obtained or accessed rapidly and efficiently by competent authorities, through either a register of beneficial ownership or an alternative mechanism… [c]ountries should take effective measures to ensure that nominee shareholders and directors are not misused for money laundering or terrorist financing. Countries should consider facilitating access to beneficial ownership and control information.[74]

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70 See World Bank 2011 https://star.worldbank.org/sites/default/files/puppetmastersv1.pdf 117; Gilles 2019 *MJIL* 5.

71 Pacini *et al* 2020 *Kan J L & Pub Pol'y* 3-4.

72 FATF 2023 https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Fatf-recommendations.html.

73 FATF 2023 https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Guidance-Beneficial-Ownership-Legal-Persons.html 47.

74 FATF 2023 https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Fatf-recommendations.html 22.

The FATF defines "beneficial owners" as

> [T]he natural person(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted. It also includes those natural persons who exercise ultimate effective control over a legal person or arrangement. Only a natural person can be an ultimate beneficial owner, and more than one natural person can be the ultimate beneficial owner of a given legal person or arrangement.[75]

The FATF recommends that reasonable measures should be taken to verify the identity of beneficial owners and their status as beneficial owners. In other words, the FATF recommends that countries should implement verification measures to ensure accurate data in BO records/registers.[76] These verification measures could include manually reviewing the information and documents submitted, as well as manual or automated cross-checking of information with relevant government organisations.[77] The persons responsible for verification should include companies themselves and the body responsible for maintaining the BO register.[78] The two main aspects of information that require verification are the identity of the natural person recorded as a BO, and the basis upon which the person is identified as a BO.[79]

The FATF also recommends that countries use an ownership threshold to determine whether a person is a BO. Such a threshold could even consider combined ownership interests.[80] The FATF advises that this ownership threshold should not exceed 25% and that countries who have conducted a ML/TF risk assessment and concluded a high ML/TF risk should impose a lower ownership threshold.[81]

The revised Recommendation 24 expressly requires countries to use a multi-pronged approach (i.e. an approach that utilises various mechanisms)

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75 FATF 2023 https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Guidance-Beneficial-Ownership-Legal-Persons.html 15. The FATF explains that reference to "ultimate" ownership or control refers to situations where ownership or control is exercised through a chain or by means of indirect control.

76 FATF 2023 https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Guidance-Beneficial-Ownership-Legal-Persons.html 16. According to Bieler, "verification is partially about ensuring accurate data, but on the assumption that the data of bad actors is likely inaccurate, it is predominately about unearthing suspicious information that might signal foul play." Bieler 2022 *Fordham Journal of Corporate and Financial Law* 214.

77 FATF 2023 https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Guidance-Beneficial-Ownership-Legal-Persons.html 23.

78 FATF 2023 https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Guidance-Beneficial-Ownership-Legal-Persons.html 23.

79 FATF 2023 https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Guidance-Beneficial-Ownership-Legal-Persons.html 23.

80 FATF 2023 https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Guidance-Beneficial-Ownership-Legal-Persons.html 16.

81 FATF 2023 https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Guidance-Beneficial-Ownership-Legal-Persons.html 16.

to BO ownership information collection and record-keeping.[82] Recommendation 24 also advises that competent authorities should have timely access to information that adequately and accurately reveals BOs. [83] In this regard a register of beneficial ownership is a sensible option:

> A register holding beneficial ownership information can be an effective mechanism because it allows competent authorities to access such information from a direct source in a rapid and efficient manner (often in real time). Such effectiveness is generally conditional upon the register having sufficient resources to perform its tasks and on its ability to request additional information when it has doubts on the information it receives.[84]

The FATF identifies two important challenges for the effective implementation of a BO register: the application and enforcement of adequate sanctions for non-compliance with BO disclosure requirements, and the capacity of the body responsible for maintaining the register to perform its role. [85] In South Africa the body responsible for maintaining the BO register is the CIPC.[86]

4 New BO disclosure obligations introduced by the AML Act

4.1 The definition of "affected company"

The definition of "affected company" introduced by the *AML Act* is key to establishing whether a particular company is obliged to disclose BO information. In terms of the amendment to section 1 of the *Companies Act* 2008 "affected company" means a regulated company as set out in section 117(1)*(i)* and a private company that is controlled by or a subsidiary of a regulated company because of any circumstances contemplated in sections 2(2)*(a)* or 3(1)*(a)* of the *Companies Act* 2008. In terms of s 117(1)(*i*) of the *Companies Act* 2008, a "regulated company" is defined as a company to which the Takeover Regulations and Part C of the *Companies Act* 2008 apply, in accordance with section 118(1) and (2) of the *Companies Act* 2008. In terms of section 118(1) of the *Companies Act* 2008 the Takeover Regulations and Part C of the *Companies Act* 2008 will apply "with respect to an affected transaction or offer involving a profit company or its securities" if the company is a public company, a state-owned company (unless

82 FATF 2023 https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Guidance-Beneficial-Ownership-Legal-Persons.html 5.

83 FATF 2023 https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Guidance-Beneficial-Ownership-Legal-Persons.html 4.

84 FATF 2023 https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Guidance-Beneficial-Ownership-Legal-Persons.html 30.

85 FATF 2023 https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Guidance-Beneficial-Ownership-Legal-Persons.html 30.

86 Section 56(14) of *the Companies Act* 2008.

exempted in terms of section 9 of the *Companies Act* 2008), or a private company where:

> (i) the percentage of the issued securities of that company that have been transferred, other than by transfer between or among related or inter-related persons, within the period of 24 months immediately before the date of a particular affected transaction or offer exceeds 10%; or
>
> (ii) the Memorandum of Incorporation of that company expressly provides that the company and its securities are subject to this Part, Part C and the Takeover Regulations, irrespective of whether the company falls within the criteria set out in subparagraph (i).[87]

Regulated companies, and hence affected companies, are defined in relation to an affected transaction. Affected transactions are defined by section 117 of the *Companies Act* 2008 as transactions that amount to:

(i) the disposal of all or the greater part of a regulated company's assets;

(ii) mergers and amalgamations involving regulated companies;

(iii) schemes of arrangement of regulated companies;

(iv) the acquisition of, or announced intention to acquire, a beneficial interest in any voting securities to the extent mentioned in section 122(1), namely the 5% and multiples of 5% thresholds;

(v) mandatory offers in terms of s 123 of the *Companies Act* 2008; and

(vi) compulsory acquisitions in terms of s 124 of the *Companies Act* 2008.

It seems that a company can be an affected company only in relation to an affected transaction. Does this mean that a company not contemplating an affected transaction is not an affected company? What if a private company sells shares to outsiders every three years? Will it sometimes be a regulated company (and hence an affected company) and sometimes not?

It is not clear why the definition of an "affected company", a concept that regulates what company ownership disclosures a company must make to the CIPC, was drafted in alignment with a definition that establishes which companies and transactions are subject to Takeover Regulations and the jurisdiction of the Takeover Regulation Panel (TRP). Surely the purpose of company ownership disclosure is not the same as the rationale for takeover regulation. From a practical perspective, the way that the definition of "affected company" has been crafted is not ideal for the purpose of the mandatory compliance obligations, because in several conceivable scenarios it may not be easy to say whether the company is an affected company or not. It should be noted that the Companies Amendment Bill B27-2023 intends to make a change to the determination of when a private

87 Section 118(1)(*c*)(i) of *the Companies Act* 2008.

company becomes a regulated company. This amendment will be important for BO disclosure purposes because, as discussed above, it will affect which companies are affected companies. Once the Amendment Bill is passed, a private company will be a regulated company if it has ten or more direct or indirect shareholders and meets or exceeds the turnover or asset value threshold to be determined by the Minister of Trade, Industry and Competition in consultation with the TRP.[88] However, this approach would also result in uncertainty, as the shareholding in private companies, as well as their turnover and asset value, can change over time. A fluid and uncertain approach to when a company should make BO disclosures and to whom (JSE or CIPC), based on the number of its shareholders and its asset value/turnover at a given time, is still not ideal. It is submitted that the problem is aligning the definition of affected company with the definition of regulated company in the first place.

Contestations on interpretation aside, it is at least clear that "affected companies" are public companies, state owned companies, and some private companies,[89] while non-affected companies are most private companies,[90] all close corporations, and all non-profit companies.[91] It is also clear that the new obligations pertaining to BO disclosure and filings to CIPC will apply exclusively to non-affected companies (as contradictory as that sounds). Affected companies with securities listed on an exchange, as well as their subsidiaries and controlled entities, are exempted from filing BO information with CIPC on the understanding that such information is already filed with a recognised securities exchange such as the JSE.[92]

4.2 The disclosure obligations of non-affected companies

In terms of the amended section 33 of the *Companies Act* 2008 the mandatory annual return filing must now be accompanied by a securities register or members register (for non-affected companies).[93] The securities register that must now accompany the annual return must include details as to the extent of the beneficial interests held in the company's securities and

88 See s 16 of the Companies Amendment Bill B27-2023.

89 That is, private companies that fall under the definition of "regulated company" in terms of section 118(1) of *the Companies Act* 2008.

90 It is probable that most private companies do not voluntarily submit themselves to the Takeover Regulations. Since private companies do not often change significant shareholding, it is improbable that a small percentage of private companies will become regulated companies because of s 118(1)(*c*)(i) of *the Companies Act* 2008.

91 These are companies that are not "regulated companies", and hence cannot be "affected companies".

92 CIPC Guidance Note 2 of 2023 in terms of Regulation 4(1)(a) of the Companies Regulations.

93 Section 33(1)(aA) of the *Companies Act* 2008, as amended by s56 of the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Act, No. 22 of 2022, Gazette No. 47815, Notice 1535.

the identity and personal details of the holders of beneficial interests.[94] Furthermore, the securities register must be kept up to date and updated within 10 business days after any changes to its securities register.[95] Thus, the requirement that had previously applied only to public companies is now also applicable to private companies, close corporations and non-profit companies.

Section 58(d) of the *AML Act* introduces section 56(12) into the *Companies Act* 2008, in terms of which companies that do not qualify as "affected companies" must file with the CIPC a record of the individuals who are beneficial owners of the company, and must ensure that this record is updated after any changes in their beneficial ownership.[96] This must be done as part of the BO filing process on the CIPC's eServices platform. CIPC will then maintain a BO register.[97] Furthermore, in terms of the new section 50(3A)(a) of the *Companies Act* 2008, non-affected companies must record in their securities registers prescribed information regarding the natural persons who are the beneficial owners of the company, and must ensure that this information is updated within 5 days after any changes. The new Regulation 32B provides that non-affected companies must update changes to their securities register with CIPC within 10 business days. Therefore, a non-affected company must file with the CIPC an annual return and its securities register or members register (as the case may be) every year, (and this register must include information regarding its BIs and BOs), as well as periodic BO filings and amendments to the securities register as changes occur. In terms of the new Regulation 5(1)(1A), the CIPC may at any time and on a continual basis verify the information filed with it, including ID numbers and addresses. The CIPC has indicated that in terms of this power, BO filings must be accompanied by certified copies of the identity documents/passports of all BOs.[98]

4.2.1 Who is a beneficial owner of a company?

Section 55 of the *AML Act* introduces into section 1 of the *Companies Act* 2008 the definition of "beneficial owner" in respect of a company to mean "an individual who, directly or indirectly, ultimately owns that company or exercises effective control of that company, including through—"

> (a) The holding of beneficial interests in the securities of that company;

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94 In terms of the amended Regulation 32(3) of GN R351 in GG 34239 of 26 April 2011 (Companies Regulations, 2011) as amended.

95 Regulation 32(3A) of the amended Companies Regulations, 2011.

96 Also see Regulation 32(B) of the amended Companies Regulations, 2011.

97 The new s 56(14) of the *Companies Act* 2008 provides that the CIPC must maintain a register of the information contained in the register of beneficial owners.

98 See CIPC 2023 https://www.cipc.co.za/wp-content/uploads/2023/05/USER-GUIDELINES-BO-LEGISLATIVE-REQUIREMENTS.pdf 12.

(b) The exercise of, or control of the exercise of the voting rights associated with securities of that company;

(c) The exercise of, or control of the exercise of the right to appoint or remove members of the board of directors of that company;

(d) The holding of beneficial interests in the securities, or the ability to exercise control, including through a chain of ownership or control, of a holding company of that company;

(e) The ability to exercise control, including through a chain of ownership or control of:

(i) A juristic person other than a holding company of that company;

(ii) A body of persons corporate or unincorporate;

(iii) A person acting on behalf of a partnership;

(iv) A person acting in pursuance of the provisions of a trust agreement; or

(f) The ability to otherwise materially influence the management of that company.

A conceptual difficulty with the BO definition is that, strictly speaking, it is not possible to own a company. A company is a juristic person and as such cannot be owned by another person.[99] Such terms are commonly used in practice to denote the ownership of a company's shares, but it is still not legally accurate to state that a person owns a company. It is possible to benefit from a company's activities through receiving dividends as a shareholder. One can also be said to control a company through either being a director, or through exercising votes at shareholder meetings. Presumably this is what the BO concept denotes: a person that benefits from or controls a company's activities.

It seems that non-affected companies are obliged to investigate whether there is an identifiable, human, ultimate owner, beneficiary or controller of a company. The examples through which beneficial ownership can be established are not a closed list and must ultimately be read in conjunction with the key elements of the definition that speaks of an individual that "ultimately owns" or effectively controls a company. However, no definitions of "ultimately owns" or of "effective control" are provided.

The instances of beneficial ownership in terms of the definition are merely indicators of beneficial ownership. If one of those scenarios is present, then it is possible that there is a BO. A company with a straightforward ownership and control structure that has been disclosed to the CIPC via its securities

99 According to s 19(1) of *the Companies Act* 2008, a company is a juristic person that "has all the legal powers and capacity of an individual." The *Companies Act* 2008, before the AML amendments, refers in several sections to "ownership", but only in respect of securities or property, not in respect of a company.

register and director information filings would probably not have to submit any BO information. However, the wording of the *Companies Act* 2008 is not clear in this regard. It is not explicitly provided that every company must have a BO.[100] Conceivably there are scenarios where it may be difficult, if not impossible, to say that any one or more natural persons is an ultimate beneficiary or effective controller of a company. In these cases the relevant company would not in terms of my interpretation have to make any BO filings. A contrary interpretation creates an unnecessary compliance burden for small to medium enterprises that mostly use close corporations and private companies. These types of entities often have basic shareholding and control structures.[101] It would also make little sense to compel BO filings for non-profit companies with no single identifiable beneficiary, or for non-profit companies with no members.

In its guidelines regarding BO filings the CIPC advises that a natural person that has 5% ownership of a company should be recorded as a BO of the company.[102] The CIPC has also made provision for a beneficial ownership disclosure form that is to be completed for complex ownership structures.

The inclusion of beneficial interest holdings as an indicator of beneficial ownership means that the beneficial interest concept can be used to assist in the identification of a BO. Section 56(1) reiterates the common law position by providing that, except to the extent that a company's Memorandum of Incorporation provides otherwise, a company's securities may be held by one person for the beneficial interest of another person. Section 1 of the *Companies Act* 2008 defines "beneficial interest" in a company's securities as

> the right or entitlement of a person, through ownership, agreement, relationship or otherwise, alone or together with another person, to:

100 The first author has reached out to the CIPC via its eServices platform to ask whether every company has a BO, but no meaningful response has been received.

101 Admittedly, these are precisely the types of entities that are often used in the money laundering process.

102 CIPC 2023 https://www.cipc.co.za/wp-content/uploads/2023/05/USER-GUIDELINES-BO-LEGISLATIVE-REQUIREMENTS.pdf 2, 8. According to the DTIC, several of the early implementers of public beneficial ownership registers, including the United Kingdom and Ukraine, adopted a 25% threshold. This has been criticised as being too high. There appears to be increasing recognition internationally that the 25% threshold leaves many relevant beneficial owners outside of the disclosures net. According to ownership transparency advocacy groups, a lower threshold for the publication of information is in line with current international trends. A number of countries have applied lower thresholds, recently including Argentina (1 share or above), Senegal (2%), Nigeria (5%), Paraguay (10%), Kenya (10%) and the Cayman Islands (10%). See 4.16 and 4.17 of Background Note and Explanatory Memorandum on the Draft Companies Amendment Bill, 2021.

> (a) receive or participate in any distribution in respect of the company's securities;
>
> (b) exercise or cause to be exercised, in the ordinary course, any or all of the rights attaching to the company's securities; or
>
> (c) dispose or direct the disposition of the company's securities, or any part of a distribution in respect of the securities,
>
> but does not include any interest held by a person in a unit trust or collective investment scheme in terms of the Collective Investment Schemes Act, 2002 (Act No. 45 of 2002).

Depending on the extent of the securities held, the holders of beneficial interests in a company's securities can easily fit the definition of BO of a company, especially read with the CIPCs 5% ownership threshold guideline. Since share rights may be severed among more than one person, it is possible to have more than one holder of beneficial interests in respect of the same security. CIPC has indicated that it is also possible to have more than one BO of a company.[103]

It can be noted that there are now two definitions of "beneficial person" in the *Companies Act* 2008: beneficial interest holders and beneficial owners. Both have different but related reasons for existing: the former is about the disclosure of the ownership of any holder of a beneficial interest in a company's securities for the purpose of transparency in respect of security ownership, while the latter is about uncovering the natural persons that ultimately benefit from or control a company. One important difference between these two concepts is that the holder of a beneficial interest in a company's securities may be a natural person or a juristic person, while a beneficial owner can only be a natural person.

There is a substantial body of case law wherein South African courts have reflected on the meaning of "beneficial owner" in company law. In *Oakland Nominees (Pty) Ltd v Gelria Mining and Investment Co (Pty) Ltd*[104] the Appellate Division (AD), discussing the phenomenon of a person holding shares on behalf of another person, remarked as follows:

> A nominee is an agent with limited authority: he holds shares in name only. He does this on behalf of his nominator or principal, from who he takes his instructions. The principal, whose name does not appear on the register, is usually described as the 'beneficial owner'. This is not, juristically speaking, wholly accurate; but it is a convenient and well-understood label.[105]

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103 CIPC 2023 https://www.cipc.co.za/wp-content/uploads/2023/05/USER-GUIDELINES-BO-LEGISLATIVE-REQUIREMENTS.pdf 10.

104 *Oakland Nominees (Pty) Ltd v Gelria Mining and Investment Co (Pty) Ltd* 1976 1 SA 441 (A).

105 *Oakland Nominees (Pty) Ltd v Gelria Mining and Investment Co (Pty) Ltd* 1976 1 SA 441 (A) 453.

Similarly, in *Standard Bank of South Africa Ltd v Ocean Commodities Inc*,[106] the AD stated:

> In some instances, however, the registered shareholder may hold the shares as the nominee, i.e. agent, of another, generally described as the 'owner' or 'beneficial owner' of the shares. This fact does not appear on the company's register, as it is the policy of the law that a company should concern itself only with the registered owner of the shares…The term 'beneficial owner' is, juristically speaking, not wholly accurate, but it is a convenient and well-used label to denote the person in whom, as between himself and the registered shareholder, the benefit of the bundle of rights constituting the share vests.[107]

In *Independent Community Pharmacy Association v Clicks Group Ltd*[108] the Constitutional Court, per Rogers J writing for the majority of the court, remarked that "[i]t is in connection with shares that one most often comes across a distinction between 'nominal ownership' and 'beneficial ownership'".[109] Rogers J observed that the exact legal rights enjoyed by the "beneficial owner" depend on the circumstances, adding that:

> unless a person is in law the owner, to call them a 'beneficial owner' merely conveys that they have personal rights against the owner entitling them to some or all of the benefits which accrue to the actual owner.[110]

In a minority judgment, Majiedt J remarked that:

> [T]he terms 'beneficial ownership', 'beneficial interest' and 'beneficial enjoyment' have been used *interchangeably* by our courts to describe a situation where there is a severance of interests (legal rights, entitlements or powers) that comprise ownership… [111]

Majiedt J's observations are correct. At common law, it was recognised that the term "beneficial owner" in the company law context referred to the person legally entitled to shares and share rights through his nominee in whose name the shares are registered. The Department of Trade, Industry and Competition (the DTIC) also seems to use the two terms interchangeably.[112] It seems that the common law understanding of

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106 *Standard Bank of South Africa Ltd v Ocean Commodities Inc* 1983 1 SA 276 (A).

107 *Standard Bank of South Africa Ltd v Ocean Commodities Inc* 1983 1 SA 276 (A) 289.

108 *Independent Community Pharmacy Association v Clicks Group Ltd* 2023 6 BCLR 617 (CC).

109 *Independent Community Pharmacy Association v Clicks Group Ltd* 2023 6 BCLR 617 (CC) para 233.

110 See *Independent Community Pharmacy Association v Clicks Group Ltd* 2023 6 BCLR 617 (CC) para 236.

111 *Independent Community Pharmacy Association v Clicks Group Ltd* 2023 6 BCLR 617 (CC) para 161. The word interchangeably is underlined for the purpose of emphasis only.

112 See part 4.1 of Background Note and Explanatory Memorandum to the Draft Companies Amendment Bill, 2021 where the DTIC makes the following observations in this respect: "Transparency in respect of beneficial ownership reporting is becoming a matter of concern internationally. In both the United States and the European Union, efforts have been made to address the matter of the identity of the holders of the beneficial interests in a company."

"beneficial owner" is found in the definition of "beneficial interest" in terms of section 1 and 57(1) of the *Companies Act,* 2008. This distinction in terminology will hopefully not be lost on practitioners. Although the courts have often referred to a holder of a beneficial interest (in the words of the *Companies Act* 2008) as a "beneficial owner", this is not the same "beneficial owner" introduced into s 1 of the *Companies Act* 2008. Under the *Companies Act* 2008 not every holder of a beneficial interest (while such a person would qualify as a beneficial owner at common law) will be a beneficial owner in terms of the *Companies Act* 2008, and not every beneficial owner of a company necessarily holds beneficial interests in a company's securities.

If the securities of a non-affected company are held in nominee capacity for the benefit of a holder of a beneficial interest, this may indicate that there is a beneficial owner. If the holder of beneficial interests is a human being that holds 5% of the company's issued shares, then it is easier to determine the beneficial ownership. But if such a holder is another company in a foreign jurisdiction, for instance, the obligation of the company to investigate its beneficial ownership can become quite challenging. Companies do have some investigative power in this regard. In terms of section 56(5) of the *Companies Act* 2008, a company that knows or has reasonable cause to believe that any of its securities are held by one person for the beneficial interest of another may by notice in writing require either of those persons to:

> (a) confirm or deny that fact;
>
> (b) provide particulars of the extent of the beneficial interest held during the three years preceding the date of the notice; and
>
> (c) disclose the identity of each person with a beneficial interest in the securities held by that person.

Such information must then be provided to the company within 10 business days after receipt of the notice requiring disclosure.[113] This provision can be useful to companies to identify persons that hold beneficial interests in the company's securities. However, the *AML Act* does not insert a provision allowing companies to similarly request information regarding their beneficial owners.

4.2.2 Penalties for non-compliance

Sanctions are an important component of a country's response to the FATF Recommendation 24's requirements. The FATF encourages the creation and enforcement of appropriate criminal, civil and administrative sanctions

113 Section 56(6) of the *Companies Act* 2008.

and liability for breaching the BO disclosure requirements.[114] Countries should strive to ensure that their sanctions are adequate and suitably dissuasive, and sufficiently broad to regulate a variety of scenarios.[115]

The CIPC aims to enforce and promote compliance with the *Companies Act 2008* and other applicable legislation.[116] If the CIPC receives a complaint of non-compliance from a person with standing, it may investigate the complaint.[117] The CIPC has several investigative powers in terms of the *Companies Act* 2008, including the right to summon any person to appear before it and to provide evidence regarding a matter under investigation.[118] After an investigation the CIPC may refer a matter to the NPA if the CIPC is of the opinion that a person has committed an offence in terms of the *Companies Act* 2008 or other legislation.[119]

The CIPC may also choose to issue a compliance notice to a person that has violated a provision in the *Companies Act* 2008.[120] If the recipient of a compliance notice fails to satisfy its requirements, the CIPC may make an application to court for an order imposing an administrative fine on the wrongdoer.[121] The maximum administrative fine that a court can impose for failure to comply with a compliance notice issued by the CIPC is 10% of the respondent's turnover for the period during which the non-compliance persisted, or R1million, whichever amount is greater.[122] The CIPC may also refer non-compliance with a compliance order to the NPA for prosecution as a criminal offence.[123] In terms of section 214(3) of the *Companies Act* 2008, it is an offence to fail to comply with a compliance notice issued by the CIPC, but only if such non-compliance has not already be sanctioned through a court-imposed administrative fine. This means that a person may not receive an administrative fine and also be prosecuted due to not complying with a compliance notice. A person found guilty of the offence of non-compliance with a compliance notice is liable to a fine or imprisonment for a maximum of 12 months, or to both a fine and imprisonment.[124]

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114 FATF 2023 https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Guidance-Beneficial-Ownership-Legal-Persons.html 53.

115 FATF 2023 https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Guidance-Beneficial-Ownership-Legal-Persons.html 53.

116 Section 186(1)(*d*) and (*e*) of the *Companies Act* 2008.

117 Section 169(1)(*c*) of the *Companies Act* 2008.

118 Section 176(1) of the *Companies Act* 2008.

119 Section 170(1)(*f*) of the *Companies Act* 2008.

120 Section 170(1)(*g*)(i) of the *Companies Act* 2008.

121 Section 171(7)(*a*) of the *Companies Act* 2008.

122 Section 175(1), read with s 175(5) of the *Companies Act* 2008 and Regulation 163 of the amended Companies Regulations, 2011.

123 Section 171(7)(*b*) of the *Companies Act* 2008.

124 Section 216(*b*) of the *Companies Act* 2008.

The *Companies Act* 2008 contains criminal penalties that are applicable to the falsification of BO information. In terms of section 214(1) of the *Companies Act* 2008, "A person is guilty of an offence if the person—"

> (b) with a fraudulent purpose, knowingly provided false or misleading information in any circumstances in which this Act requires the person to provide information or give notice to another person;

This offence must be read in the light of the broad definition of "knowingly" in section 1 of the *Companies Act* 2008.

Any person who was in a position in which he reasonably ought to have known of the false or misleading nature of information submitted, or to have investigated the correctness of the information, can "knowingly" provide false information in terms of section 214(1*)(b*) of the *Companies Act* 2008*.* However, the reach of this offence is limited by the fact that it requires a fraudulent purpose. Innocent errors will not fall foul of section 214(1)(*b*) of the *Companies Act* 2008.

One potential area of weakness in this framework is that there is no direct criminal offence for failing to provide accurate BO information where there was a duty to disclose, despite CIPC calling for such an offence.[125] There is no obligation for a natural person to disclose his/her beneficial ownership.[126] The *AML Act* did not create such a duty or an offence for not disclosing accurate BO data. However, even if there were, it is unlikely that criminals would identify themselves to CIPC as BOs.

5 Conclusion

The BO amendments to *the Companies Act* 2008 were introduced in response to AML requirements set by the FATF. These amendments aim to provide useful information to law enforcement agencies about the natural persons that are the beneficial owners of companies as part of its broader AML framework. The amendments must be viewed in context, however, as part of a broader regulatory framework tasked with identifying and punishing the offence of money laundering and related economic crime offences.

The reporting of suspicious transactions will likely remain a key avenue of ML detection. Therefore, banks and other financial institutions should be proactive when they deal with suspicious transactions. The BO disclosure of companies could be very useful to complement KYC and suspicious transaction reporting practices, as a complete and accurate BO registry might assist in tracing the source and beneficiaries of money laundering and terrorist financing. However, establishing a complete and accurate BO

125 See Ensor 2023 https://www.businesslive.co.za/bd/national/2023-05-15-cipc-wants-criminal-sanction-for-non-disclosure-of-beneficial-ownership/.

126 Dhana 2022 *JCCLP* 32.

register might prove to be impossible in the light of criminals' desire to remain hidden.

The *AML Act* introduced confusing and burdensome compliance obligations into the *Companies Act* 2008. The authors have identified the definition of "affected company" and the failure to define the "effective control" and "ownership" of a company as areas that require refinement. It is submitted that the CIPC should continue raising awareness of the BO disclosure requirements,[127] and that parliament should address the difficulties identified in this article through remedial legislation, perhaps as part of the Companies Amendment Bill B27-2023. Notwithstanding the complexity of the BO disclosure obligations, it is submitted that the new amendments will not make any difference if there is ineffective coordination and dialogue between the CIPC, the NPA and the law enforcement agencies.

A clear and obvious cost of the BO disclosure regulations is an increase in compliance costs for companies.[128] Companies may have to investigate and consult lawyers to determine whether they should make BO disclosures, and who their BOs are. This burden will be felt particularly by private companies, close corporations and non-profit companies to which BO disclosures to CIPC apply. These are precisely the entities that can ill afford unnecessary compliance costs. If the additional disclosure obligations imposed on SMEs are likely to support law enforcement agencies' efforts to combat ML, one might conclude that the end justifies the means. However, at this stage the impact of the BO requirements on the detection and prosecution of ML offences is impossible to measure. We can only hope for the best.

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127 The CIPC has hosted several webinars on this point and has issued Guidance Documents on BO filings.

128 Rutledge 2010 *Journal of Passthrough Entities* 50.

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List of Abbreviations

AD	Appellate Division
AML	anti-money laundering
AML Act	General Laws (Anti-Money Laundering and Combatting of Terrorist Financing) Act 22 of 2022
BO	beneficial ownership
CFT	countering the financing of terrorism
CIPC	Companies and Intellectual Property Commission
CTR	cash threshold report
CDD	customer due diligence
Denning LJ	Denning Law Journal
DTIC	Department of Trade, Industry and Competition

FATF	Financial Action Task Force
FIC	Financial Intelligence Centre
IMF	International Monetary Fund
JCCLP	Journal of Corporate and Commercial Law and Practice
JMLC	Journal of Money Laundering Control
JSE	Johannesburg Stock Exchange
Kan J L & Pub Pol'y	Kansas Journal of Law and Public Policy
KYC	know your customer
MJIL	Melbourne Journal of International Law
Mich J Int'l L	Michigan Journal of International Law
ML	money-laundering
NPA	National Prosecuting Authority
OECD	Organisation for Economic Co-operation and Development
POCA	Prevention of Organised Crime Act 121 of 1998
SALJ	South African Law Journal
SMEs	small to medium enterprises
STR	suspicious transactions reporting
TF	terrorist financing
TRP	Takeover Regulation Panel
UN	United Nations
US	United States