

REGULATION OF BENEFICIAL OWNERSHIP IN SOUTH AFRICA AND ZIMBABWE

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ABSTRACT

Criminals despise transparency. Beneficial ownership transparency measures are aimed at ensuring that the structure of corporate vehicles is evident and that their real owners do not hide behind the corporate veil. South Africa and Zimbabwe have been struggling to prevent and combat money laundering, corruption and tax crimes. Competent authorities in both countries are starting to appreciate the importance of beneficial ownership transparency measures in the fight against economic crime. This paper examines whether South Africa and Zimbabwe have made progress in establishing effective legal frameworks on the beneficial ownership of legal persons and legal arrangements. It discusses the Financial Intelligence Centre Amendment Act 1 of 2017 which establishes beneficial ownership transparency measures for South Africa. It goes on to discuss the Zimbabwean situation regarding beneficial ownership and its regulation. Lastly, it makes certain recommendations concerning the beneficial ownership regimes of both countries.

1 INTRODUCTION

Corporate vehicles play a vital role in commerce and trade. However, these vehicles are prone to abuse by criminals for illegal activities such as money laundering, corruption and tax crimes.¹ Due to enhanced anti-money laundering

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1 Organisation for Economic Co-operation and Development (2001) *Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes* Paris: OECD Publications at 34-36.

and combating the financing of terrorism (AML/CFT) measures introduced by financial institutions, criminals have turned to corporate vehicles to launder proceeds of crimes.² Criminals take advantage of the corporate veil to disguise their involvement in the legal person or legal arrangement which they use as a conduit for their illegal activities. In such cases, scant information will be provided on the ultimate beneficiaries of the income of the legal person or arrangement. This creates problems for law enforcement agencies who will find it difficult to identify the natural persons controlling or owning the corporate vehicle.

Recently, attempts have been made at the highest levels to address the misuse of corporate vehicles and to increase the transparency around those who ultimately own, control or benefit from these vehicles.³ The Financial Action Task Force (FATF) has been at the forefront in setting international AML/CFT standards by way of a bundle of Recommendations. These Recommendations are followed, diligently for the most part, by states all over the world. The latest FATF Recommendations were published in 2012.⁴ Recommendations 24 and 25 provide for measures which FATF member countries ought to adopt regarding the acquisition and retention of information on beneficial ownership of legal persons and legal arrangements.

Recommendations 24 and 25 turn on the notion of a beneficial owner. The FATF defines a beneficial owner as:

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 persons who exercise ultimate effective control over a legal person or arrangement.⁵

Beneficial ownership transparency measures are measures aimed at preventing legal persons and legal arrangements from being abused criminally, by ensuring that beneficial ownership information is accurate, up-to-date and readily available

2 FATF (2006) "The Misuse of Corporate Vehicles, including Trust and Company Service Providers" at 1, available at <http://www.fatf-afi.org/documents/documents/themisuseofcorporatevehiclesincludingtrustandcompanyserviceproviders.html> (visited 20 October 2017).

3 Martini M & Murphy M (2015) "Just for Show?: Reviewing G20 Promises on Beneficial Ownership" *Transparency International* at 7, available at https://www.transparency.org/whatwedo/publication/just_for_show_g20_promises (visited 20 October 2017).

4 FATF (2012) "International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation", available at www.fatf-gafi.org/recommendations.html (visited 15 September 2017).

5 Glossary of the FATF Recommendations (2012).

to competent officials.⁶ The FATF Recommendations provide a framework for rendering visible the true owners of corporate vehicles, making it difficult for criminals to become involved without exposing their identities. The ultimate purpose of beneficial ownership transparency measures is for the corporate veils of legal persons and legal arrangements to be lifted and for the details of their real owners to be manifest.

Apart from sharing a border, South Africa and Zimbabwe are good trading partners. The close business relationship between the two countries led to the signing of a pact in 2016 to avoid double taxation of companies and to prevent tax evasion.⁷ However, despite their geographical proximity and common business interests, the two countries are at different stages in the implementation of the FATF Recommendations on beneficial ownership.

Both South Africa and Zimbabwe are member states of the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) which is responsible for combating money laundering in the region by implementing the FATF Recommendations. South Africa is also a member state of the FATF, as well as of the Group of 20 (G20) which consists of the prominent developed and emerging economies around the world. In November 2014, G20 leaders adopted the High-Level Principles on Beneficial Ownership Transparency, describing financial transparency as a “high priority” issue.⁸ These G20 Principles are aligned with the FATF Recommendations on beneficial ownership. For some years, South Africa did not comply with the FATF Recommendations or G20 Principles in this regard. However, it has started to show some progress in establishing beneficial ownership transparency measures. In 2017, it introduced legal measures to regulate beneficial ownership and the risk-based approach for financial institutions and designated non-financial businesses and professions (DNFBPs).⁹

Zimbabwe is not a member state of either the FATF or the G20. However, it made a commitment to implement the FATF Recommendations by becoming a member state of ESAAMLG. In 2016, a mutual evaluation report by ESAAMLG

6 FATF (2014) “FATF Guidance on Transparency and Beneficial Ownership” at 11, available at <http://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-transparency-beneficial-ownership.pdf> (visited 27 September 2017).

7 *The Agreement Between the Government of the Republic of South Africa and the Government of the Republic of Zimbabwe for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (published in Government Gazette 40577 of 27 January 2017) at 186.

8 G20 (2014) “High-Level Principles on Beneficial Ownership” at 1, available at <https://star.worldbank.org/star/document/g20-high-level-principles-beneficial-ownership-transparency> (visited 25 September 2017).

9 Financial Intelligence Centre Amendment Act 1 of 2017.

revealed the deficiencies in Zimbabwean AML/CFT laws, including those on beneficial ownership.¹⁰ Zimbabwe has high levels of economic crime and its flawed beneficial ownership transparency measures have undermined the fight against corruption, tax crimes, money laundering and terrorist financing. Many corporate vehicles, particularly in extractive industries such as diamond mining, operate without identifying the politically exposed persons who are alleged to be the ultimate beneficiaries of their business activities.¹¹ This circumstance has facilitated economic crime, with more than US\$15 billion reported to have been lost in the diamond industry.¹²

This paper presents a comparative study of South African and Zimbabwean transparency measures on beneficial ownership for legal persons and legal arrangements. It will examine the progress made by the two countries in establishing such measures. And it will offer suggestions on how best the two countries can strengthen their beneficial ownership regimes.

2 THE AML/CFT LEGAL FRAMEWORKS IN SOUTH AFRICA AND ZIMBABWE

This section introduces the key statutes relied upon by South Africa and Zimbabwe to prevent and combat money laundering and terrorist financing.

2.1 South Africa

The major AML/CFT laws in South Africa are the Prevention of Organised Crime Act 121 of 1998 (POCA) and the Financial Intelligence Centre Act 38 of 2001 (FICA). Section 4 of POCA criminalises money laundering in general. FICA was enacted in an attempt to protect the South African financial system against abuse for illicit purposes. It established the Financial Intelligence Centre which has a primary objective of assisting in the identification and combating of money laundering and terrorist financing activities in South Africa.¹³ In May 2017, the Financial Intelligence Centre Amendment Act 1 of 2017 was published in the Government Gazette. The amendment seeks to strengthen FICA by introducing a risk-based

10 ESAAMLG (2016) "Anti-Money Laundering and Counter-Terrorist Financing: Zimbabwe" *Mutual Evaluation Report* at 7, available at <http://www.fatf-gafi.org/publications/mutualevaluations/documents/mer-zimbabwe-2016.html> (visited 29 September 2017).

11 Global Witness (13 February 2012) "Diamonds: A Good Deal for Zimbabwe?" at 2, available at <https://www.globalwitness.org/en/reports/diamonds-good-deal-zimbabwe/> (visited 29 September 2017).

12 Peter E (3 June 2016) "Digging for the missing \$15 billion of diamond revenue in Zimbabwe", available at https://www.huffingtonpost.com/elisa-peter/digging-for-the-missing-1_b_10255282.html (visited 5 October 2017).

13 Secs 2 & 3 of FICA.

approach to customer due diligence and placing it at the centre of South Africa's AML/CFT regime.¹⁴

2.2 Zimbabwe

Zimbabwe updated its anti-money laundering laws in 2013 with the enactment of the Money Laundering and Proceeds of Crime Act 4 of 2013 (MLPCA). Notably, the MLPCA does not define money laundering, but rather gives a list of money laundering offences.¹⁵ Zimbabwe has an established financial intelligence unit, known officially as the Bank Use Promotion and Suppression of Money Laundering Unit (BUPSML Unit). It is the main regulator of AML/CFT in Zimbabwe.¹⁶ However, the BUPSML Unit has been a toothless watchdog, unable to prevent millions of dollars being lost every year through illicit financial flows (IFFs). In 2015, the Governor of the Reserve Bank of Zimbabwe revealed that the country had lost US\$500 million that year, referring to IFFs as a major leakage affecting the economy.¹⁷ Despite the establishment of AML/CTF measures in Zimbabwe, they hardly are understood and implemented by the intended addressees. For instance, the 2016 Mutual Evaluation Report by ESAAMLG revealed that many financial institutions and DNFBPs in Zimbabwe, barring large banks and large financial institutions, have little or no knowledge of the money laundering or terrorist financing risks facing the country.¹⁸

3 BENEFICIAL OWNERSHIP TRANSPARENCY MEASURES IN SOUTH AFRICA AND ZIMBABWE

Prior to 2017, South African law contained neither a definition of beneficial ownership nor measures to regulate beneficial ownership, which left corporate vehicles exposed to risks of money laundering and terrorist financing. South Africa remedied the deficiencies in its AML/CFT laws by amending FICA. Section 1(1) of FICA now includes a definition of a beneficial owner of a legal person as:

- a natural person who, independently or together with another person, directly or indirectly—
- (a) owns the legal person; or
 - (b) exercises effective control of the legal person.

14 Long title of the Financial Intelligence Centre Amendment Act, 2017.

15 Sec 2 read with Sec 8 of the MLPCA, 2013.

16 Secs 3 & 4 of the Bank Use Promotion and Suppression of Money Laundering Act 2 of 2004.

17 Mtomba V (27 December 2015) "Illicit Financial Flows Cost Zim \$500 million" *The Standard*, available at <http://www.thestandard.co.zw/2015/12/27/illicit-financial-flows-cost-zim-500-million/> (visited 11 October 2017).

18 ESAAMLG (2016) at 12.

The amendment to FICA also introduced comprehensive measures on beneficial ownership.

When Zimbabwe enacted the MLPCA in 2013, it introduced beneficial ownership measures as well. A beneficial owner is defined in Zimbabwean law as:

- (a) a natural person who ultimately owns or controls the rights to or benefits from property, including the person on whose behalf a transaction is conducted; or
- (b) a person who exercises ultimate effective control over a legal person or legal arrangement.¹⁹

At least the notion of a beneficial owner has been settled in the AML/CFT regimes of both countries.

FATF Recommendations 24 and 25 require that FATF members ensure the existence of “adequate, accurate and timely information” on beneficial ownership of legal persons and legal arrangements respectively, and also that such information be accessible to competent authorities “in a timely fashion”. Here, it is important to distinguish between basic information and beneficial ownership information. Basic information encompasses general information, such as the name or directors of the company, which is available readily to the public, whereas beneficial ownership information goes further to examine the actual person who owns or controls the company. This beneficial ownership information ought to be available to competent authorities.²⁰

The sources of beneficial ownership information include “company registries, financial institutions, DNFbps, the legal person itself, and other national authorities, such as tax authorities or stock exchange commissions”.²¹ The FATF requires its member countries to deploy one or more of the following mechanisms to obtain information on beneficial ownership of legal persons:

- (a) Requiring companies or company registries to obtain and hold up-to-date information on the companies’ beneficial ownership;
- (b) Requiring companies to take reasonable measures to obtain and hold up-to-date information on the companies’ beneficial ownership;
- (c) Using existing information, including: (i) information obtained by financial institutions and/or DNFbps, in accordance with Recommendations 10 and 22; (ii) information held by other competent authorities on the legal and beneficial ownership of

19 Sec 13 of the MLPCA, 2013.

20 FATF (2014) “FATF Guidance: Transparency and Beneficial Ownership” at 11, available at <http://www.fatf-gafi.org/documents/news/transparency-and-beneficial-ownership.html> (visited 8 October 2017).

21 FATF (2014) at 18.

companies (eg company registries, tax authorities or financial or other regulators); (iii) information held by the company as required above in Section A; and (iv) available information on companies listed on a stock exchange, where disclosure requirements (either by stock exchange rules or through law or enforceable means) impose requirements to ensure adequate transparency of beneficial ownership.²²

The *FATF Guidance on Transparency and Beneficial Ownership*, released in 2014, provides important advice regarding sources of beneficial ownership information and mechanisms to acquire such information. The remainder of this section will examine whether South Africa and Zimbabwe have established effective mechanisms for obtaining adequate, accurate and timely information on beneficial ownership.

3.1 Company Registries

As a rule, all companies in a country ought to be logged in a national company registry. The company registry records such basic information as the company's name, its legal form and status, its registered address, its memorandum and articles of association, its directors, and its shareholders (including their names, number of shares and category of shares).²³ This information should be available publicly and readily accessible to financial institutions, DNFbps and competent authorities of other countries.²⁴ A company registry which is pro-active and fully functional in this way permits competent authorities to obtain beneficial ownership information from one centralised source.²⁵ However, the problem with many company registries is the reliability of the information. For example, company registries often include documents containing unverified information or information which is out of date.²⁶

3.1.1 South Africa

Information pertaining to companies and other legal entities in South Africa is recorded by the Companies and Intellectual Property Commission (CIPC). The main objectives of the CIPC, as stipulated in section 186 of the Companies Act 71 of 2008, is to maintain "accurate, up-to-date and relevant information concerning companies, foreign companies and other juristic persons, and concerning intellectual property rights, and the provision of that information to the public and

22 Para 8 of the Interpretive Note to FATF Recommendation 24.

23 Paras 4 & 5 of the Interpretive Note to FATF Recommendation 24.

24 Para 13 of the Interpretive Note to FATF Recommendation 24.

25 FATF (2014) at 20.

26 FATF (2014) at 20.

to other organs of state". There is no obligation under the Companies Act for the CIPC to collect and verify information on beneficial ownership of companies. Foreign companies are required to be registered with the CIPC within 20 business days of commencing operations and the Commission is required to maintain a register of such companies.²⁷ However, there is no requirement for the CIPC to establish the beneficial ownership structure of the foreign companies. Therefore, there is a shortcoming in the South African AML/CFT measures, as the CIPC would be an obvious agency to hold such beneficial ownership information, thereby making it easier for competent authorities to obtain the information when required.

3.1.2 *Zimbabwe*

All companies in Zimbabwe are required to be registered with the Registrar of Companies in terms of section 5 of the Companies Act (24:03), which was enacted in 1951 and has been amended several times. Basic information on companies is held by the Registrar. However, and despite the potential abuse of corporate vehicles by criminals, no laws in Zimbabwe require the Registrar of Companies or any other such institution to establish and verify beneficial ownership information for corporate vehicles.²⁸ Companies are obligated to submit annual returns to the Registrar of Companies, together with any changes regarding the shareholders, directors or addresses of the company.²⁹ However, there is low compliance with this obligation and the Registrar lacks the capacity and resources to pursue non-compliant companies.³⁰ A company can be a shareholder using its legal name. Also, foreign companies can be legal owners of companies in Zimbabwe. There is no requirement in the Companies Act for submission of beneficial ownership information of a shareholder company or foreign company to the Registrar of Companies.³¹

3.2 **Acquisition of beneficial ownership information**

As noted above, countries may require companies to acquire and keep up-to-date information on beneficial ownership.³² A number of factors should be considered for the effective implementation of this mechanism, including: whether companies keep records of shareholders, whether companies are empowered to request

27 Sec 23(1) & (5) of the Companies Act, 2008.

28 ESAAMLG (2016) at 16.

29 Sec 123(1) of the Companies Act, 1951.

30 ESAAMLG (2016) at 102.

31 ESAAMLG (2016) at 103.

32 Para 8 of the Interpretive Note to FATF Recommendation 24.

updated information from their shareholders, and whether shareholders are required to reveal the names of persons on whose behalf they are acting.³³

3.2.1 *South Africa*

South Africa requires that every company maintain records of basic company information, such as its memorandum of incorporation, its directors, its annual general meetings, its annual financial statements and accounting, notices of minutes of all meetings of shareholders, and its securities register.³⁴ The information must be accessible at an address within the country.³⁵ In terms of the 2008 Companies Act, information on directors must be disclosed and a securities register must be established containing information on the identity of each person with a beneficial interest in the securities held, the number and class of securities held by each person with a beneficial interest, and the extent of each beneficial interest. The Act also requires that the securities register contain the names and addresses of the registered owner of the securities and any holders of a beneficial interest in the securities.³⁶ However, it does not require companies to establish and hold information on the natural persons who ultimately own or control a legal person.

3.2.2 *Zimbabwe*

Companies in Zimbabwe are required to keep basic company information, which includes their memorandum of incorporation, their directors and their shareholders.³⁷ However, shareholder information relates to legal ownership of the company and does not extend to beneficial ownership information. The use of nominee shareholders in order to evade statutory restrictions on company ownership continues to be practised in Zimbabwe. A company can be a majority shareholder (holding company) of another company (subsidiary company).³⁸ However, there is no obligation for companies to collect and hold information on the natural person owning or controlling the holding or subsidiary company. In other words, the current legal framework in Zimbabwe does not require companies to obtain or retain beneficial ownership information regarding their composition.

33 FATF (2014) at 23.

34 Sec 24(3)-(4) of the Companies Act, 2008.

35 Sec 25 of the Companies Act, 2008.

36 Sec 50(2) of the Companies Act, 2008.

37 Sec 115 of the Companies Act, 1951.

38 Sec 143 of the Companies Act, 1951.

3.3 Measures to acquire beneficial ownership information

As an alternative to the requirement in §3.2 above, countries may require companies to take reasonable measures to acquire and keep up-to-date information on beneficial ownership.³⁹ Needless to say, the meaning of reasonable measures in this context needs clarification.⁴⁰ Be that as it may, neither South African nor Zimbabwean laws establish an obligation for companies to take reasonable measures to obtain and hold up-to-date information on beneficial ownership. For these countries to implement such a mechanism, they will have to define reasonable measures and decide whether companies have a say in determining their content.⁴¹

3.4 Existing beneficial ownership information

Besides requiring companies to acquire or to take steps to acquire beneficial ownership information, countries may rely on beneficial ownership information which already is in the possession of different sources.⁴² Viable alternative sources of such information may include financial institutions, DNFBPs, tax authorities, land or motor vehicle or movable property registries, stock exchange and commercial databases.⁴³ It has been suggested that the availability of these kinds of sources may enhance the compliance of companies with beneficial ownership transparency measures and refine mechanisms to obtain beneficial ownership information.⁴⁴

3.4.1 South Africa

According to section 21(1) of FICA, as amended in 2017, accountable institutions in South Africa are required to establish and validate the identity of every client, and of any person acting on behalf of the client or on whose behalf the client is acting. Accountable institutions include financial institutions, lawyers, trustees, estate agents, authorised securities and foreign exchange dealers, insurance companies, casinos and money remitters.⁴⁵ Where a business relationship had been established before the 2017 FICA amendment, the accountable institutions are prohibited from conducting any further business without establishing and verifying

39 Para 8(b) of the Interpretive Note to FATF Recommendation 24.

40 FATF (2014) at 23.

41 FATF (2014) at 23.

42 Para 8(c) of the Interpretive Note to FATF Recommendation 24.

43 Van der Does de Willebois E *et al* (2011) *The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It* Washington DC: World Bank Publications at 77.

44 FATF (2014) at 25.

45 Schedule 1 of FICA, 2001.

the identity of the client and any other person representing the client or whom the client is representing.⁴⁶

In accordance with the risk-based approach, as introduced by the 2017 amendment to FICA,⁴⁷ accountable institutions are required to take additional due diligence measures when dealing with legal persons or legal arrangements in order “to establish the nature of the client’s business and the ownership and control structure of the client”.⁴⁸ For legal persons, accountable institutions have to:

- (a) establish the identity of the beneficial owner of the client by—
 - (i) determining the identity of each natural person who, independently or together with another person, has a controlling ownership interest in the legal person;
 - (ii) if in doubt whether a natural person contemplated in subparagraph (i) is the beneficial owner of the legal person or no natural person has a controlling ownership interest in the legal person, determining the identity of each natural person who exercises control of that legal person through other means; or
 - (iii) if a natural person is not identified as contemplated in subparagraph (ii), determining the identity of each natural person who otherwise exercises control over the management of the legal person, including in his or her capacity as executive officer, non-executive director, independent non-executive director, director or manager; and
- (b) take reasonable steps to verify the identity of the beneficial owner of the client, so that the accountable institution is satisfied that it knows who the beneficial owner is.⁴⁹

The new measures on beneficial ownership have been received well in South Africa. They were overdue and necessary to curb economic crime in the country. The prohibition on dealing with corporate vehicles without acquiring and verifying beneficial ownership information will go far to prevent criminals from abusing these vehicles for illicit purposes. The use of shell companies for tender fraud is prevalent in South Africa.⁵⁰ This problem now has been addressed by the amended FICA, with a view to ensuring transparency and fair competition in the awarding of tenders by the government.

46 Sec 21(2) of FICA, 2001.

47 See §3.6 below.

48 Sec 21B(1) of FICA, 2001.

49 Sec 21B(2) of FICA, 2001.

50 Lexis Nexis (19 April 2017) “Beneficial Ownership Under the Spotlight”, available at <http://www.polity.org.za/article/beneficial-ownership-under-the-spotlight-2017-04-19> (visited 20 September 2017).

Companies listed on the Johannesburg Stock Exchange (JSE) are obligated to abide by the JSE Listing Requirements. These Listing Requirements define a beneficial owner in relation to a security as the:

person or entity holding any one or more of the following:

- (i) The *de facto* right or entitlement to receive any dividend, interest or other income payable in respect of that security; and/or
- (ii) The *de facto* right or entitlement to exercise or cause to be exercised, in the ordinary course of events, any or all of the voting, conversion, redemption or other rights attached to such security; and/or
- (iii) The *de facto* right or entitlement to dispose or cause the disposal of the company's securities or any part of a distribution in respect of the securities.⁵¹

Black Economic Empowerment (BEE) companies are required by the JSE Listing Requirements to ensure that their beneficial owners are BEE-compliant.⁵² Also, every listed company is required to disclose any direct and indirect beneficial interests of its directors, the details of major shareholders with a direct or indirect interest in 5% or more of any class of the company's capital, and the amount of such shareholder's interest.⁵³ Together with the new legislative requirements on beneficial ownership transparency measures, the JSE can be an important source for competent authorities to access beneficial ownership information of listed companies.

In sum, South Africa relies upon different sources for information on beneficial ownership of legal persons. This approach ensures that legal persons cannot enter into any business relationship with financial institutions and DNFBPs without disclosing details of the natural persons who exercise control over or own the corporate vehicle in question.

3.4.2 Zimbabwe

Zimbabwe has not made effective efforts to regulate beneficial ownership of corporate vehicles. An obligation for financial institutions and DNFBPs to identify and verify beneficial ownership information relating to customers and transactions

51 See definitions section of the JSE Listing Requirements, available at <https://www.jse.co.za/content/JSERulesPoliciesandRegulationItems/JSE%20Listings%20Requirements.pdf> (visited 2 November 2017).

52 Para 4.32 of the JSE Listing Requirements. See also Adeleke O & Humby TL (2016) "Regulatory Requirements Pertaining to Ownership, Operational and Financial Disclosure in South Africa: Beneficial Ownership and Tax-Benefit Disclosures" *Open Society Foundation for South Africa* at 7, available at http://www.osf.org.za/wp-content/uploads/2017/01/OSF-Extractives-Working-Paper_Beneficial-Ownership-and-Tax-Benefit-Disclosures.pdf (visited 4 November 2017).

53 Paras 8.63(c) & (e) of the JSE Listing Requirements.

only arises during the course of a prescribed transaction under the MLPCA.⁵⁴ However, only foreign-owned banks and insurance companies tend to comply with this obligation, while other financial institutions and DNFBPs tend not to comply.⁵⁵ There is a general lack of understanding of the concept of beneficial ownership amongst the supposed gatekeepers, which affects the reliability of beneficial ownership information held by financial institutions and DNFBPs in Zimbabwe.⁵⁶

In 2013, the Securities and Exchange Commission of Zimbabwe issued a Directive which created an obligation for stock brokers at the Zimbabwe Stock Exchange to register all nominee shares in the names of the natural persons who own or control the shares, and for all unclaimed shares to be transferred to a licensed custodian.⁵⁷ The Commission informed ESAAMLG assessors that the Directive was being implemented effectively and that all listed companies are required to register every share in terms of the Companies Act.⁵⁸ The registration of beneficial owners and the holding of their particulars make the Securities and Exchange Commission of Zimbabwe an important avenue through which competent authorities may obtain beneficial ownership information.

Overall, though, Zimbabwe has insufficient transparency measures on beneficial ownership of legal persons. Therefore, the conclusion reached by ESAAMLG during its mutual evaluation was that Zimbabwe is non-compliant with Recommendation 24 of the FATF.⁵⁹

3.5 Beneficial Ownership Information of Legal Arrangements

According to FATF Recommendation 25:

countries should ensure that there is adequate, accurate and timely information on express trusts, including information on the settlor, trustee and beneficiaries, that can be obtained or accessed in a timely fashion by competent authorities.

Recommendation 25 goes on to exhort countries to “consider measures to facilitate access to beneficial ownership and control information by financial

54 Sec 15(3) of the MLPCA, 2013.

55 ESAAMLG (2016) at 103.

56 ESAAMLG (2016) at 103.

57 Securities and Exchange Commission of Zimbabwe (2013) “Transfer of Scrip Held by Securities Dealing (Stockbroking) Firms to Licensed Custodians”, available at <http://www.seczim.co.zw/investor-information/press-releases/88-public-notice-on-transfer-of-scrip-to-custodians-2013> (visited 2 November 2017).

58 ESAAMLG (2016) at 103.

59 ESAAMLG (2016) at 153.

institutions and DNFBPs” conducting customer due diligence for legal arrangements in terms of FATF Recommendations 10 and 22.

The level of compliance by South Africa and Zimbabwe with FATF Recommendation 25 is considered below.

3.5.1 *South Africa*

Trusts in South Africa are governed by the Trust Property Control Act 57 of 1988 (TPCA). Every trust in the country is registered with the Master of the High Court within whose jurisdiction the trustee’s assets are located.⁶⁰ The TPCA does not require the Master of the High Court or the trustee to obtain and keep beneficial ownership information of the trust. However, the 2017 amendment to FICA introduced detailed provisions on beneficial ownership for trusts. Where a natural person is acting in pursuance of a trust agreement as a client, accountable institutions are required to establish the name and number of the trust, the address of the Master of High Court where the trust is registered, the identities of the founder, each trustee, any authorised persons acting on behalf of the trust, and each beneficiary named in the trust deed or any other founding instrument.⁶¹ If beneficial ownership information is not provided in the trust deed or any other founding instrument, the accountable institutions are required to ensure they have particulars on how the information can be obtained.⁶²

Evidently, the South African AML/CFT legal framework contains detailed transparency measures on beneficial ownership of legal arrangements. However, the Trust Property Control Act is in need of an amendment to require the various Masters of the High Court to obtain and hold beneficial ownership information of trusts registered within their jurisdiction.

3.5.2 *Zimbabwe*

Trusts in Zimbabwe are governed by the Deeds Registries Act (20:05). In terms of section 5 of the Act, every trust in the country is registered with the Registrar of Deeds. However, there is no obligation under the Act for trustees to acquire and hold information on beneficial ownership. Neither is there any obligation for the Registrar of Deeds to obtain and keep beneficial ownership information. However, the MLPCA does require financial institutions and DNFBPs to acquire and verify the following information for a legal arrangement: “the names of every the trustee, the settlor, and beneficiary of an express trust, and of any other party with authority to

60 Sec 3 of the TPCA, 1998.

61 Sec 21B(4) of FICA, 2001.

62 Sec 21B(4)(e)(ii) of FICA, 2001.

manage, vary or otherwise control the arrangement”.⁶³ Regrettably, not all trustees are known to be customers of financial institutions and DNFBPs. Information on trustees who are customers is fragmented and largely depends on the reliability of the particular financial institution or DNFBP. Beneficial ownership information for trustees will be more reliable and accessible if held by a central authority such as the Registrar of Deeds.

3.6 Risk-Based Approach and Beneficial Ownership

In 2012, the FATF introduced a risk-based approach (RBA) to combating money laundering and terrorist financing. According to this approach:

countries, competent authorities and financial institutions, are expected to identify, assess and understand the ML/TF risks to which they are exposed and take AML/CFT measures commensurate to those risks in order to mitigate them effectively.⁶⁴

FATF Recommendation 1 points out that the RBA is the cardinal principle for the effective implementation of all the FATF Recommendations and is an important foundation for the efficient allocation of resources across the AML/CFT regime. The main maxim of the RBA is that countries should require financial institutions, DNFBPs and other sectors exposed to ML/TF risks to ensure enhanced AML/CFT measures where there are higher risks, and simplified measures where there are lower risks.⁶⁵

Countries usually conduct national risk assessments to identify, assess and understand the ML/TF risks to which they are exposed and to allocate resources accordingly. Such a RBA is essential to the establishment of a national AML/CFT regime, including laws and strategic plans.⁶⁶ Incorrect national risk assessments imply that the AML/CFT regime will not address the actual dangers faced by the country and indeed may lead to an increase in these dangers.

The RBA and transparency measures on beneficial ownership form an integral part of an effective AML/CFT regime. Risk assessments are key to identifying and assessing the ML/TF threats to which legal persons and legal

63 Sec 17(c) of the MLPCA, 2013.

64 FATF (2014) “Guidance for the Risk-Based Approach: The Banking Sector” at 6, available at <http://www.fatf-gafi.org/publications/fatfrecommendations/documents/risk-based-approach-banking-sector.html> (visited 22 October 2017).

65 Para 2 of the Interpretive Note to FATF Recommendation 1.

66 FATF (2013) “National Money Laundering and Terrorist Financing Risk Assessment” at 4, available at http://www.fatf-gafi.org/media/fatf/content/images/National_ML_TF_Risk_Assessment.pdf (visited 20 October 2017).

arrangements are exposed. These threats may be alleviated by effective measures on transparency and beneficial ownership of corporate vehicles. Beneficial ownership information is also important to financial institutions and DNFBPs conducting customer due diligence. For instance, a beneficial owner who is a politically exposed person is regarded as a high risk customer and hence subject to enhanced customer due diligence.⁶⁷

3.6.1 *South Africa*

The 2017 amendment to FICA introduced the RBA and placed it at the centre of South Africa's AML/CFT regime.⁶⁸ In line with the new RBA to AML/CFT, South Africa is meant to conduct a national risk assessment programme in order to identify and understand the ML/TF hazards to which the country is exposed.⁶⁹ The information obtained from the national risk assessment will assist accountable institutions in the implementation of the RBA in their AML/CFT measures. Therefore, it is important that South Africa launches its national risk assessment programme promptly, so that accountable institutions may apply the RBA to their AML/CFT frameworks sooner rather than later.

Each accountable institution is required to establish, maintain and implement an AML/CFT risk management and compliance programme.⁷⁰ According to the Financial Intelligence Centre, in order to deal with ML/TF risks, the accountable institutions must formulate systems and controls to manage the risks, and the application of the risk management systems and controls must be commensurate to the extent of the assessed risks.⁷¹ The programme adopted by each institution should enable it to implement the RBA and should include the manner in which the institution will, among other things, conduct enhanced customer due diligence when dealing with legal persons, trusts and partnerships.⁷² Manifestly, the RBA, as elaborated in the risk management and compliance

67 FATF Recommendation 12.

68 National Treasury (2017) "A New Approach to Combat Money Laundering and Terrorist Financing" at 1, available at <http://www.treasury.gov.za/legislation/regulations/FICA/A%20new%20approach%20to%200combat%20money%20laundering%20and%20terrorist%20financing.pdf> (visited 30 October 2017).

69 National Treasury (2017) at 3.

70 Section 42(1) of FICA, 2001.

71 Financial Intelligence Centre (2017) "Guidance Note 7 on the Implementation of Various Aspects of the Financial intelligence Centre Act, 2001" at 24, available at <https://www.fic.gov.za/Documents/Revised%20draft%20guidance%20Ver2%20Aug%202017%20CLN.pdf> (visited 10 November 2017).

72 Section 42(2)(f) of FICA, 2001.

programme, is central to the identification and verification of beneficial ownership information of corporate vehicles by accountable institutions in South Africa.

3.6.2 Zimbabwe

The RBA is part of Zimbabwe's national AML/CFT strategic plan for 2015 to 2018.⁷³ This strategic plan includes the identification, assessment and mitigation of national ML/TF risks. Zimbabwe conducted its national risk assessment in 2015. The risk assessment report listed the top five money laundering predicate offences as smuggling, illegal dealings in precious stones, corruption, fraud and tax crimes.⁷⁴ It singled out financial institutions as being most exposed to money laundering risks, and identified lawyers, real estate agents and dealers in precious stones as the most vulnerable DNFBPs. The report concluded that Zimbabwe's money laundering risk was medium-high and its terrorist financing risk was relatively low.⁷⁵

The transparency of legal persons and legal arrangements was rated as medium-high.⁷⁶ However, the Zimbabwean national risk assessment has been criticised for not identifying and assessing broadly the threats to and vulnerabilities of corporate vehicles.⁷⁷ The concern with corporate vehicles was narrow, with a focus on the obligations of financial institutions under the MLPCA and omitting other important laws governing corporate vehicles, such as the Companies Act. Further, the national risk assessment did not consider the issue of transparency of foreign-owned companies or the problem of nominee shareholders.⁷⁸ Therefore, the national risk assessment incorrectly ignored beneficial ownership of corporate vehicles, and this has affected the fight against money laundering and terrorist financing in Zimbabwe. It is essential for the next national risk assessment to pay specific attention to beneficial ownership of legal persons and legal arrangements.

73 National Anti-Money Laundering and Combating Financing of Terrorism Strategic Plan for the Period: 2015-2018 (2015) at 7, available at <http://www.fiu.co.zw/wp-content/uploads/2017/07/Zimbabwe-AML.CFT-Strategic-Plan-for-2015-2020.pdf> (visited 10 November 2017).

74 Summary of the Money Laundering and Financing of Terrorism National Risk Assessment of Zimbabwe (July 2015) at 9, available at <http://www.fiu.co.zw/publications/> (visited 20 October 2017).

75 Summary of the Money Laundering and Financing of Terrorism National Risk Assessment of Zimbabwe (July 2015) at 8.

76 Summary of the Money Laundering and Financing of Terrorism National Risk Assessment of Zimbabwe (July 2015) at 18.

77 ESAAMLG (2016) at 99.

78 ESAAMLG (2016) at 101.

3.7 Access to Beneficial Ownership Information by Competent Authorities

When competent authorities, especially law enforcement authorities, are investigating financial crimes involving corporate vehicles, they need access to both basic and beneficial ownership information. Timely access to such information matters in the fight against economic crime. Unnecessary delays in obtaining information by competent authorities provide ample opportunity for criminals to strategise in order to escape liability. Therefore, countries are required to ensure that competent authorities possess the powers, mechanisms and expertise to secure timely access to both basic and beneficial ownership information relating to legal persons.⁷⁹ For legal arrangements, competent authorities should have timely access to beneficial ownership information held by trustees and other parties, such as financial institutions and DNFBPs, as well as to information on the residence of the trustees and on any trustee's assets in the possession or under the management of a financial institution or DNFBP.⁸⁰

3.7.1 *South Africa*

In South Africa, competent authorities may obtain information on companies from the CIPC, which has a duty to ensure efficient and effective availability of registers to the public and other organs of state.⁸¹ However, the CIPC only holds basic information on companies and not beneficial ownership information. Accountable institutions are required to maintain basic and beneficial ownership information of legal persons and legal arrangements.⁸² In terms of section 24(1) of FICA, as amended in 2017, the accountable institutions must ensure that information is available readily to the Financial Intelligence Centre and other supervisory bodies.⁸³ However, the section fails to prescribe timely access to such information for law enforcement agencies, such as the police and tax authorities. An authorised representative of the Financial Intelligence Centre is entitled to access, during working hours, to public documents held by or on behalf of an accountable institution.⁸⁴ For access to private information held by an accountable institution, the Financial Intelligence Centre is required to obtain a warrant from a competent court.⁸⁵ Any requested institution is required to provide assistance without delay to enable authorised access to records by the Financial Intelligence Centre.⁸⁶ All in all,

79 Para 12 of the Interpretive Note to FATF Recommendation 24.

80 Para 4 of the Interpretive Note to FATF Recommendation 25.

81 Sec 187(4)(c) of the Companies Act, 2008.

82 Sec 22(1) of FICA, 2001.

83 Sec 24(1) of FICA, 2001.

84 Sec 27A(1) of FICA, 2001.

85 Sec 27A(2) of FICA, 2001.

86 Sec 27A(5) of FICA, 2001.

the recently amended FICA provides effective measures on access to basic and beneficial ownership information by competent authorities. However, there remains a need to expand section 24(1) to include timely access to such information by law enforcement agencies.

3.7.2 Zimbabwe

In Zimbabwe, basic information on legal persons and legal arrangements is available to the public, and competent authorities can access such information without any difficulties. Law enforcement agencies may request information held by the Registrar of Deeds and Registrar of Companies using a requisition form which contains the case number and in which reasons for the request are specified. The Registrars usually take between one and three days to provide the requested information.⁸⁷ However, the Registrars only hold basic information and not beneficial ownership information.

Financial institutions and DNFBPs are required to maintain basic and beneficial ownership information of their clients, which information should be available to the BUPSM Unit or other competent authorities in a timely manner. Information held by financial institutions and DNFBPs is obtained through an application by the Prosecutor General to court.⁸⁸ If so ordered by court, the requested entity should provide the requested information timeously.⁸⁹ The process takes a day to complete and it has been reported that requested entities are co-operative.⁹⁰

Section 28(1) of the MLPCA provides that failure to keep records or to furnish requested information to the BUPSM Unit or competent supervisory authority constitutes a criminal offence. However, the section does not include failure to co-operate with law enforcement agencies. This is a *lacuna* which needs to be addressed. Still, Zimbabwe has an effective legal framework on timely access to basic and beneficial ownership information by competent authorities.

4 OVERALL COMPARATIVE ANALYSIS

South Africa has made significant changes to its AML/CFT regime in order to provide for beneficial ownership transparency measures. All accountable institutions are required to acquire and keep beneficial ownership information for legal persons and legal arrangements before entering into any business

87 ESAAMLG (2016) at 103.

88 Sec 76 of the MLPCA, 2013.

89 Sec 76(5) of the MPLCA, 2013.

90 ESAAMLG (2016) at 104-105.

transaction. South Africa has introduced the RBA into its AML/CFT regime, which will play a central role in the identification and verification of beneficial ownership of corporate vehicles. However, the country ought to launch its national risk assessment programme soon in order to assess the ML/TF perils to which it is exposed. Also, the Companies Act ought to be amended to require the CIPC to obtain and retain information on beneficial ownership of companies. Further, the Masters of the High Court should be required to obtain and hold beneficial ownership information of trusts. There are legal provisions in FICA on timely access to information by the Financial Intelligence Centre and supervisory bodies. However, these provisions need to be expanded to include law enforcement agencies such as the police and tax authorities.

Zimbabwe has not made significant progress in establishing transparency measures on beneficial ownership. Legal persons and legal arrangements are not required to acquire and keep information on beneficial ownership. The Registrar of Companies and the Registrar of Deeds have no obligation to establish, verify and hold beneficial ownership information of registered companies and trusts. Legislative measures are needed to compel corporate vehicles, together with registrars of such vehicles, to obtain and keep such information. Financial institutions and DNFBPs are the only institutions in Zimbabwe required to obtain information on corporate vehicles. However, there is generally non-compliance with or ignorance of this obligation. Hence, there is an imperative to educate financial institutions and DNFBPs on their obligation to obtain beneficial ownership information of corporate vehicles.

The last Zimbabwean national risk assessment did not look at the ML/TF risks to which legal persons and legal arrangements are exposed. Zimbabwe should pay urgent and extensive attention to the risks of corporate vehicles being abused for ML/TF purposes. Zimbabwe has effective measures on timely access to information held by deeds and company registries, financial institutions and DNFBPs. However, the information is not kept up to date. Zimbabwe should raise awareness amongst all deeds and company registrars, financial institutions and DNFBPs on the need for keeping accurate and current information on beneficial ownership.

5 CONCLUSION

Legal persons and legal arrangements are prone to abuse by criminals attempting to take advantage of the corporate veil to disguise their illicit activities. The increased abuse of these vehicles has caught the attention of the international community, leading to the formulation of FATF Recommendations 24 and 25

relating to legal frameworks on beneficial ownership of legal persons and legal arrangements. Beneficial ownership transparency measures are crucial to combating economic crime. Identifying the real owners of corporate vehicles reduces corruption and other illegal activities, particularly by politically exposed persons who are prone to conflicts of interests, bribery, embezzlement and the like.⁹¹

The concept of beneficial ownership is still relatively new in both South Africa and Zimbabwe. South Africa recently introduced beneficial ownership transparency measures which are in the early days of implementation. Zimbabwe's legal regime has noticeable deficiencies regarding beneficial ownership transparency measures. Where there is an obligation to acquire and hold beneficial ownership information, it has been revealed that the designated institutions are non-compliant, not least because they are ignorant of the concept. There is a clear need to educate financial institutions and DNFBPs in Zimbabwe on beneficial ownership and other AML/CFT laws.

The RBA and transparency measures on beneficial ownership form an integral part of any effective AML/CFT regime. The RBA is deployed by financial institutions and DNFBPs to acquire information on beneficial ownership. Where a beneficial owner is a politically exposed person, enhanced due diligence is required. The availability of beneficial ownership information to competent authorities should not be taken lightly. There should be effective measures allowing competent authorities timeous access to beneficial ownership information. However, the first step should be to ensure that the information has been collected, is accurate and is current. In this regard, both South Africa and Zimbabwe should concentrate on educating and raising awareness amongst companies, trustees, DNFBPs, financial institutions and other relevant parties of the value of beneficial ownership transparency measures.

91 Adeleke & Humby (2016) at 9.