Historical aspects of customer due diligence and related anti-money laundering measures in South Africa

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Abstract

Purpose – This paper explores the historical aspects of customer due diligence and related anti-money laundering measures in South Africa. Customer due diligence measures are usually employed to ensure that financial institutions know their customers well by assessing them against the possible risks they might pose such as fraud, money laundering, Ponzi schemes and terrorist financing. Accordingly, customer due diligence measures enable banks and other financial institutions to assess their customers before they conclude any transactions with them. Customer due diligence measures that are utilised in South Africa include identification and verification of customer identity, keeping records of transactions concluded between customers and financial institutions, ongoing monitoring of customer account activities, reporting unusual and suspicious transactions and risk assessment programmes. The Financial Intelligence Centre Act 38 of 2001 (FICA) as amended by the Financial Intelligence Centre Amendment Act 1 of 2017 (Amendment Act) is the primary statute that provides for the adoption and use of customer due diligence measures to detect and combat money laundering in South Africa. Prior to the enactment of the FICA, several other statutes were enacted in a bid to prohibit money laundering in South Africa. Against this background, the article provides a historical overview analysis of these statutes to, inter alia, explore their adequacy and examine whether they consistently complied with the Financial Action Task Force Recommendations on the regulation of money laundering.

Design/methodology/approach – The paper provides an overview analysis of the historical aspects of the regulation and use of customer due diligence to combat money laundering in South Africa. In this regard, a qualitative research method as well as the doctrinal research method are used.

Findings – It is hoped that policymakers and other relevant persons will adopt the recommendations provided in the paper to enhance the curbing of money laundering in South Africa.

Research limitations/implications – The paper does not provide empirical research.

Practical implications – The paper is useful to all policymakers, lawyers, law students and regulatory bodies, especially, in South Africa.

"This article was supported in part by the National Research Foundation of South Africa (NRF), Grant Number: 141933. Consequently, the authors wish to thank the NRF for its support. The article was influenced in part by S. Munedzi's Master of Laws (LLM) dissertation, *The Reliance on Customer Due Diligence to Enhance the Combating of Money Laundering under the Financial Intelligence Centre Amendment Act 1 of 2017* (North-West University) 2018, pp. 18-30." In this regard, Ms Munedzi wishes to acknowledge the expert input of Prof HT Chitimira.

Journal of Money Laundering Control
Vol. 26 No. 7, 2023
pp. 138-154
Emerald Publishing Limited
1368-5201
DOI 10.1108/JMLC-01-2023-0016

Social implications – The paper advocates for the use of customer due diligence measures to curb money laundering in the South African financial markets and financial institutions.

Originality/value – The paper is original research on the South African anti-money laundering regime and the use of customer due diligence measures to curb money laundering in South Africa.

Keywords Customer due diligence, Identification, Verification, Money laundering, Measures

Paper type Research paper

1. Introductory remarks

Customer due diligence measures were introduced into the South African anti-money laundering (AML) regulatory framework by the enactment of the Financial Intelligence Centre Act (FICA) [1]. Prior to the amendment of the FICA, customer due diligence was merely referred to as customer identification and verification process in South Africa (Havenga *et al.*, 2007). On the other hand, the concept of customer identification and verification is referred to as the know-your-customer policy in the United Kingdom (UK) (Ahlosani, 2016) [2]. This shows that customer due diligence measures are somewhat interpreted differently in South Africa and the UK. Attempts to regulate and combat money laundering in South Africa have been carried out from as early as 1992 (De Koker, 2006). For instance, the Drugs and Drugs Trafficking Act [3] which was repealed by the Proceeds of Crime Act [4] in 1996 [5] prohibited money laundering in relation drug trafficking offences. The Proceeds of Crime Act 1996 did not have robust money laundering provisions, and it was later repealed by the Prevention of Organised Crime Act 121 of 1998 (POCA) as amended. The provisions of the Proceeds of Crime Act 1996 were flawed, while the provisions of the Drugs Act were more focused on money laundering crimes emanating from the proceeds of drug offences only [6]. Therefore, prior to 1998, there were no adequate statutory provisions that expressly prohibited money laundering activities in South Africa [7]. This approach was not good enough to curb money laundering in South Africa. As a result, there was a need for the policymakers to enact adequate AML laws and/or introduce related measures in South Africa (De Koker, 2004). Eventually, the FICA was enacted, and it amended the POCA. The FICA was also amended by the Protection of Constitutional Democracy Against Terrorist and Related Activities 33 of 2004 ("POCDATARA", ss 2–24), which mainly deals with terrorist financing activities. International bodies such as the Financial Action Task Force (FATF) also played a pivotal role in the introduction of AML laws and customer due diligence measures in South Africa [8]. For instance, the FATF Recommendations influenced the enactment of the AML laws that are used in South Africa (FATF, 2001). Currently, money laundering is mainly outlawed in the POCA [9] and the FICA [10]. The FICA provides for the use of customer due diligence measures by banks and other financial institutions to combat money laundering in South Africa [11]. The FICA has auxiliary measures to aid the effective implementation of its provisions [12], such as Money Laundering Control Regulations (Regulations of GN, 2002).

Money laundering is a global crime, and South Africa is not the only country that prohibits this crime [13]. South African policymakers complied with some international AML recommendations of the FATF to use customer due diligence measures under the FICA [14]. Customer due diligence consists of four internationally recognised elements [15], namely, customer identification [16], record keeping [17], recognition and reporting of suspicious transactions [18] and training [19]. Customer due diligence and other administrative measures were introduced to supplement the prohibition of money laundering that is contained in the POCA [20]. The administrative measures such as customer identification and verification are meant to enable financial institutions to know their customers (De Koker and Henning, 1998a, 1998b) in accordance with the FICA (South African Law Commission Discussion Paper 64, 1996).

From 30 June 2003, the FICA compelled all financial institutions to identify and verify their customers before concluding any transactions with them [21]. The FICA provides a list of the financial institutions that are obliged to conduct customer identification and verification in South Africa [22].

Customer due diligence measures are usually used to ensure that financial institutions know their customers well by assessing them against the possible risks they might pose such as fraud, money laundering, Ponzi schemes and terrorist financing. Accordingly, customer due diligence measures enable banks and other financial institutions to assess their customers before they conclude any transactions with them. Customer due diligence measures that are used in South Africa include identification and verification of customer identity, keeping records of transactions concluded between customers and financial institutions, ongoing monitoring of customer account activities, reporting unusual and suspicious transactions and risk assessment programmes. As indicated above, the FICA is the primary statute that provides for the adoption and use of customer due diligence measures to detect and combat money laundering in South Africa. Prior to the enactment of the FICA, several other statutes were enacted in a bid to prohibit money laundering in South Africa. Against this background, the article provides a historical overview analysis of these statutes to, inter alia, explore their adequacy and examine whether they consistently complied with the FATF Recommendations on the regulation of money laundering.

2. The definition of customer due diligence

Customer due diligence is a process that is used by banks and other financial institutions to request, collect, examine and evaluate relevant information about a customer or potential customer before concluding any transaction. Put differently, customer due diligence processes empower banks and other financial institutions to conduct background checks and other screening requirements on their customers for risk assessments as part of the AML and know your customer (KYC) initiatives that are used by such institutions in South Africa. Customer due diligence is generally a regular investigation process of a new customer's background that is conducted by financial institutions prior to concluding transactions such as the signing of commercial agreements with that customer (Ai and Jun, 2009). Customer due diligence is aimed at assessing the potential risk that may be caused to financial institutions by their customers (Ai and Jun, 2009). The term "due" refers to something that is expected and planned by the relevant authorities (Hornby, 2005), while the term "diligence" could refer to vigilant, careful and methodical work by financial institutions in relation to their offered services and products to detect and combat illicit activities such as money laundering and terrorist financing (Hornby, 2005). For the purpose of this article, the term "due diligence" is a practice or measure that obliges the customers' actions to conform to the financial institutions' policies, procedures, regulations and methodologies to curb illicit practices such as money laundering and terrorist financing [23]. Acquiring knowledge about customers enables financial institutions to apply the relevant risk assessment requirements for each customer [24]. This is important because it empowers each financial institution to apply customer due diligence measures that are relevant to the level of risk each customer poses to the financial institution (De Koker and Henning, 1998a, 1998b). Inconsistencies in the financial institution's knowledge of a customer and the customer's account activities could give rise to money laundering suspicions and/or give rise to money laundering activities [25]. Financial institutions are obliged to report unusual and suspicious transactions to the Financial Intelligence Centre (FIC) in South Africa [26]. Customer due diligence empowers financial institutions to timeously detect illicit transactions such as money laundering and terrorist financing activities in South Africa [27].

3. The definition, typologies and stages of money laundering

Money laundering is generally defined as the concealment of illegally acquired money or property to disguise its real nature, source or origin (Millard and Vergano, 2013). Money laundering is achieved by concluding several transactions that disguise illegal proceeds' source and origin to appear as legitimate transactions or investments [28]. Money laundering also includes converting illegally obtained wealth into assets that cannot be traced back to the money launderers or the underlying crime (Reuter and Truman, 2004). Money laundering may further be committed after another underlying crime such as fraud, corruption and drug trafficking was committed by the perpetrators [29]. Illegally acquired wealth includes cash or property that is acquired through criminal activities by the money launderers [30]. When one commits money laundering, the underlying aim is normally concealing the proceeds of crime to escape prosecution while he or she will still be able to use and control such proceeds [31]. This is usually accomplished through conducting several transactions that will portray the illegal proceeds as products of legitimate transactions [32].

Money laundering also involves a process through which money launderers conceal the origin or owners of the proceeds of crime or the illegal nature of the affected financial transactions [33]. This is normally done to destroy the nexus that exists between the preceding crime and the proceeds of the crime [34]. When the nexus is destroyed, it is difficult for the regulatory authorities and financial institutions to detect money laundering activities [35]. The South African Law Reform Commission defined money laundering as the control of illegally procured money so as to disguise its actual source [36]. The control of illegally procured money is usually carefully done by money launderers to evade prosecution and disguise the laundered proceeds as legally acquired property or money [37]. The POCA prohibits any act or conduct aimed at disguising the source, nature or disposition of the proceeds of crime [38] such as money laundering and it provides for the confiscation of such proceeds [39]. The POCA provides penalties for money laundering and other related crimes [40]. It is noted that several definitions have been provided by different authors. Nonetheless, the definition provided in the Amendment Act [41] is preferred in this article. Money laundering has the effect of disguising or concealing the source or nature of illegal activities [42]. This definition shows that successful money laundering activities use the money or proceeds of crime to further other crimes in a way that makes it difficult or impossible to create a nexus between the perpetrator and the crime to avoid prosecution on the part of the offenders (Kersop and Du Toit, 2015) [43].

There are generally three typologies of money laundering that are common in South Africa Ahlers (2013). Firstly, internal money laundering occurs when money laundering activities are perpetrated in South Africa and the proceeds of such activities also emanate from South Africa. Secondly, incoming money laundering occurs when proceeds from crimes committed in foreign countries are brought into the country and used towards money laundering in South Africa. Thirdly, outgoing money laundering occurs when proceeds of crimes committed in South Africa are exported to other countries for the purposes of money laundering (Ahlers, 2013; Goredema and Madzima, 2009). This shows that money laundering activities are not only committed in one country (Goredema and Madzima, 2009; Henning *et al.*, 1998). Accordingly, South Africa should adequately conform its money laundering laws to the international AML standards.

Money laundering can be broken down into three different stages. Notably, the placement stage is the first stage of money laundering (Madinger, 2011) [44]. It is often labelled the initial stage because it is the stage at which laundered money or illegal proceeds are deposited into the formal financial system (Savla, 2001). Placement relieves money launderers from possessing large amounts of cash since the money is deposited into the

legitimate financial system (Tuba and Van der Westhuizen, 2014). This stage is risky because depositing large amounts of cash into the formal financial system may raise the suspicions of financial institutions [45]. During this stage, money launderers are more vulnerable to detection by financial institutions and/or regulatory authorities because large deposits money raise suspicions of money laundering activities in South Africa [46]. To avoid being detected and raising suspicions, money launderers use several methods to deposit the money to the formal financial system [47]. These methods include smurfing which is the use of many people to deposit small shares of a large amount into a financial institution's system [48]. Money launderers also use blending, which is the use of legit businesses to mix their daily sales with dirty money [49]. The other method used during the placement stage is smuggling. Smuggling is the physical movement of money into the country through border points (Henning and Ebersohn, 2001; Nyaude, 2015). This could resemble the Phala Phala farm scandal where it is alleged were President Cyril Ramaphosa is accused of kidnapping, bribery, money laundering and concealing a crime in relation to the alleged theft of US$4m which was reportedly stashed in the couch from his Phala Phala farm. Ramaphosa allegedly failed to report this incident to the police, but he denied any wrongdoing.

The layering stage is the second stage of money laundering [50]. At this stage, the money launderers separate and distance the proceeds of crime from the criminal activity and/or their illegal source [51]. This is done to avoid detection by relevant authorities. The money launderer creates a money web that involves several people in many jurisdictions so as to mislead the trail of the illicit transaction [52]. The money web is created to destroy the nexus between the proceeds of crime and the preceding crime [53]. This is normally achieved by making payments in expectation of refunds in the form of cheques or cash to acquire legitimate transaction records from financial institutions, thus limiting suspicions of money laundering activities from relevant authorities (Commissioner of South African Reserve Service v Absa Bank, 2003) [54]. Electronic funds transfers are also a much faster method of layering that is conducted even on a long-distance set-up producing minimum audit trail and more anonymity to disguise the proceeds of crime from their source [55]. At the layering stage, money launderers mix laundered money with legitimate money carefully to avoid creating a nexus between the laundered money and the preceding crime [56].

Lastly, there is an integration stage [57]. At integration stage, the laundered money is legally transferred back to the money launderers through formal financial systems [58]. This empowers money launderers to use the criminal proceeds for different purposes. For instance, purchasing property or any other valuables are some of the methods that are used to integrated back money or proceeds of crime to the money launderers without raising suspicions from the financial institutions and regulatory bodies (Goredema and Montsi, 2002). Thus, at this stage, money launderers would have destroyed the nexus between the laundered money or proceeds of crime and the preceding criminal activities by integrating them into the formal financial system [59].

4. Historical overview of the regulation of money laundering in South Africa

Prior to 1986, money laundering was not prohibited in many jurisdictions including South Africa and the UK (Sharman, 2008). To date, more than 170 countries have enacted legislation to prohibit money laundering globally. Money laundering is an international crime hence the establishment of international AML measures by the FATF (Ping, 2008). Under South African common law, the crime of money laundering was not prohibited, and there were no regulations controlling money laundering in South Africa (De Koker, 2003). For instance, the launderers of illicit proceeds were prosecuted as accessories after the

commission of a crime under the South Africa common law (Dustigar, 2000) [60]. An accessory after the fact or after the commission of a crime is a person who unlawfully and intentionally engages in activities intended to enable the perpetrator to evade criminal liability for the crime or assists the perpetrator to evade liability (Snyman, 2014). This shows that there was no statutory regulation for money laundering activities in South Africa prior to 1986 and under common law [61].

The first legislation to prohibit money laundering in South Africa was influenced by international instruments [62]. The Drugs Act introduced the first statutory attempt to regulate money laundering in South Africa [63]. Following the Drugs Act, several other legislations were enacted to control and prohibit money laundering but none of them provided specific AML customer due diligence measures until the FICA [64]. The FICA introduced customer due diligence as an AML measure in South Africa [65]. Thus, the Drugs Act [66], the Proceeds of Crime Act 1996 [67] and the POCA did not provide customer due diligence measures to combat money laundering in South Africa (Williams, 2017). However, the money laundering prohibition that was contained in all these Acts was not good enough to curb money laundering in South Africa (De Koker and Henning, 1998a, 1998b).

4.1 Drugs Act

The enactment of the Drugs Act followed the recommendation to sign the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (United Nations, 1988) (Vienna Convention) by the government advisory council [68]. The Vienna Convention prohibited drug-related money laundering activities and encouraged its signatory jurisdictions to enact relevant laws to prohibit drug-related money laundering [69]. Subsequently, the Drugs Act was enacted to prohibit the acquisition of property or money [70] that proceeds from a defined crime such as drug trafficking or fraud [71]. The Drugs Act did not expressly provide or regulate the implementation of customer due diligence measures to combat money laundering in South Africa [72]. However, it indirectly provided for such measures by imposing a duty upon financial institutions to report suspicious transactions [73] and a duty to establish the source of funds involved in customer transactions [74]. Related duties form part of customer due diligence measures under the FICA [75].

The Drugs Act had several flaws, and one of its major weakness which led to its repeal was that its prohibition on money laundering activities was only limited to drug offences [76]. Thus, it overlooked the fact that money laundering can be committed through various crimes such as fraud and corruption [77]. In other words, its application was wrongly narrowed to drug-related proceeds of crime and overlooked the influence of other possible causes of money laundering such as corruption and fraud [78]. The Drugs Act's AML provisions were not adequate enough to combat money laundering in South Africa [79]. Therefore, there was to enact better provisions to enhance the detection, control and combating of money laundering in South Africa (De Koker and Henning, 1998a, 1998b). The Drugs Act's provisions were not deterrent enough to combat money laundering activities in South Africa [80].

4.2 The Proceeds of Crime Act 1996

When the financial sanctions against South Africa were lifted in 1992, South Africa re-joined the international trade community [81]. This exposed South Africa to criminal abuse by money launderers, and it became a target of international financial crimes such as money laundering [82]. This follows the fact that South Africa began engaging in trade with other countries that exposed it to money laundering activities during such trade transactions (Gordon, 2011). The globalisation of money laundering exacerbated the need for a legislation

to regulate and control money laundering in South Africa [83]. The Proceeds of Crime Act 1996 [84] was enacted with a wide scope of money laundering offences [85]. Unlike the Drugs Act, the Proceeds of Crime Act 1996's provisions on money laundering were not limited to drug-related activities (Itzikowitz, 2000). The Proceeds of Crime Act 1996 was enacted in a bid remedy flaws that were contained in the Drugs Act [86]. The Proceeds of Crime Act 1996 introduced other offences that were not provided in the Drugs Act [87] such as offences of assisting another person to benefit from the possession of proceeds of a crime [88] and misusing information on customer transactions [89].

All suspicious transactions were reported to the Commercial Crime Unit of the South African Police Service (SAPS) under the Proceeds of Crime Act 1996 [90]. Financial institutions were only required to make investigations on the legitimacy of the source of funds and transactions of their customers [91]. This follows the fact that financial institutions were not required to have money laundering control officers to handle suspicious transactions [92]. As a result, the process of reporting and filing reports of money laundering was ineffective due to poor administration [93]. This was also exacerbated by the fact that the SAPS normally has much workload to attend to all matters effectively and timeously [94].

The Proceeds of Crime Act 1996 did not have any provision on the use of customer identification and verification process to detect and curb money laundering [95]. Moreover, the Proceeds of Crime Act 1996 did not provide any customer due diligence measures to prevent money laundering in South Africa. The penalties for money laundering offences under the Proceeds of Crime Act 1996 were insufficient for deterrence purposes in South Africa. These and other shortfalls of this Act led the South African Commission to propose a Draft Bill that was aimed at providing an effective and adequate AML statutory regulatory framework in South Africa (Van Jaarsveld, 2012, 2006; Rahn, 2002). Consequently, the Proceeds of Crime Act 1996 was repealed by the POCA.

4.3 The POCDATARA

It must be noted that the POCDATARA does not expressly prohibit money laundering because it is focused on terrorist activities and related offences associated with such activities (ss 2–3). Put differently, the POCDATARA may only be used to outlaw money laundering activities if they are related to terrorist financing offences (Chitimira, 2020, pp. 36–37; s 4 read with ss 2–3 of the POCDATARA). Persons that engage in money laundering practices to perpetrate, support and finance terrorist activities will be liable for an offence under the POCDATARA (s 4 read with ss 2–3). Moreover, persons who harbour or conceal other persons whom they know or ought reasonably to have known or suspected to have committed terrorism-related activities will be liable for an offence under section 11 of the POCDATARA. All persons are obliged to report the presence of any person suspected of committing or intending to commit terrorism-related offences to the SAPS and/or the FIC [s 12(1) and (2) of the POCDATARA]. Persons who threaten or conspire with any other person, or aid, abet, induce, incite, instigate, instruct, or command, counsel or procure another person to commit terrorism-related activities will be liable for an offence in terms of section 14 of the POCDATARA.

Nonetheless, the POCDATARA does not expressly provide for customer due diligence and other related measures to detect, monitor, assess and combat money laundering activities in the South African financial institutions and financial markets. Consequently, the POCDATATA is not usually used to curb money laundering activities in South Africa (Chitimira, 2020, pp. 36–37).

4.4 The POCA

The POCA prohibits money laundering, racketeering and other illicit activities (ss 2–6). Notably, section 3(1) of the POCA provides that any person convicted of racketeering offences is liable to a fine not exceeding R100 million or to imprisonment for a certain period or to life imprisonment in South Africa. The POCA also provides that any person who engages in unlawful money laundering activities, transactions, agreements or receives property or any proceeds of unlawful activities and/or attempt to conceal or disguise the nature, source, location, disposition or movement of the said property or its ownership or any interest which anyone may have in respect thereof commits an offence (s 4 of the POCA). Moreover, the AML provisions of the POCA have extra-territorial application as stipulated in section 4(b)(ii), which provides that any person that enables or assists another person who commits or has committed money laundering or other related offences in South Africa or elsewhere to avoid prosecution or remove or diminish any property acquired directly or indirectly from such offences will be liable for an offence (Chitimira, 2020, pp. 34–35).

Section 5 of the POCA provides that any person who assist another person to receive benefits from the proceeds of unlawful activities such as money laundering will be guilty of an offence. In addition, any person who knowingly acquires, possess or uses property that is part of the proceeds of another person's unlawful money laundering activities will be liable for an offence in terms of section 6 of the POCA. Nonetheless, accused persons may escape liability if they successfully rely on the defence that they had reported their suspicions in terms of section 29 of the FICA in accordance with section 7A(1) of the POCA. Moreover, the accused persons may also escape liability if they successfully raise the defence that they complied with the applicable obligations in terms of the internal rules of the accountable institution relating to the reporting of suspicious transactions (Chitimira, 2020, pp. 34–35). Section 7A(2) of the POCA provides that accused persons may escape liability if they prove that they reported the possible violations to their managers or persons charged with the responsibility of ensuring compliance with the provisions of the POCA by the accountable institution in question (Chitimira, 2020, pp. 34–35).

Persons convicted of money laundering and related offences are liable to a fine not exceeding R100 million or to imprisonment for a period not exceeding 30 years [s 8(1) of the POCA]. The FIC and other relevant authorities are empowered to recover realisable property and affected gifts from the offenders through civil court proceedings (ss 13–17 read with ss 30–31 and 34–36 of the POCA). In this regard, the courts are empowered to impose confiscation orders and/or restraint orders against the offenders in respect of their illicit proceeds of money laundering and other related unlawful activities (ss 18–29A of the POCA). This is done to recover and preserve the illicit proceeds and/or prohibit the offenders from destroying any property bought by such proceeds (ss 38–45 read with s 48(1) of the POCA).

Nevertheless, the AML provisions of the POCA do not expressly provide for the use of customer due diligence measures to detect, prevent and combat money laundering in the South African financial institutions and financial markets (Chitimira, 2020, pp. 34–35). Put differently, the provisions of the POCA do not provide a variety of measures to detect and curb money laundering activities. This has somewhat negatively affected the combating of money laundering in South Africa. For instance, a lot of illicit activities have continued to occur such as the Gupta family money laundering scandal that was reported between 2017 and 2018 involving several billions of South African rands that were siphoned out through the HSBC Holdings PLC, the Standard Chartered PLC and the Bank of Baroda South Africa, as well as the recent Phala Phala farm scandal is a case in point (Chitimira, 2020, pp. 34–35).

Sadly, these scandals were not timeously detected by the FIC, banks and other regulatory authorities. This could have been caused by the POCA's flawed provisions which do not provide for the use of customer due diligence measures to curb money laundering in South Africa (Chitimira, 2020, pp. 34–35).

4.5 The FICA

4.5.1 Comprehensive due diligence measures. Currently, the FICA provides for the use of comprehensive due diligence measures to detect and combat money laundering in South Africa. Banks and other financial institutions are obliged to adopt and enforce comprehensive customer due diligence measures to detect, prevent and combat money laundering activities that are conducted by high-risk customers in South Africa (Chitimira, 2021, pp. 795–798). Put differently, the FICA requires that financial institutions should carefully obtain all relevant information from their customers, especially, high-risk customers to detect, isolate, investigate and curb money laundering activities that are perpetrated in South Africa and elsewhere (s 21B of the FICA). The FICA obliges all financial institutions to examine the accounts, transactions and source of funds of their customers, including those that are legal persons, trusts and partnerships, prior to, and after any business relationship to effectively detect and curb money laundering and related terrorist activities in South Africa (s 21B of the FICA). Consequently, financial institutions should adopt adequate customer due diligence measures, especially, in relation to their customers that are legal persons, trusts and partnerships [s 21B(1) of the FICA]. Moreover, the FICA stipulates that accountable institutions and other financial institutions that have legal persons, trusts and partnerships customers should comply with the risk management and compliance programme to establish the nature of their customers' business and the ownership and control structure of such business to discourage and combat money laundering activities that are perpetrated by high-risk customers through juristic persons [s 21B(2)–(5) of the FICA]. In other words, the FICA requires accountable institutions and financial institutions to obtain adequate additional information from all the existing and current customers to acquire sufficient knowledge of their accounts and transactions to effectively detect and combat money laundering and related terrorist activities in South Africa (Chitimira, 2021, pp. 795–798).

The FICA requires accountable institutions and other financial institutions to adopt and enforce comprehensive customer due diligence measures to all transactions involving politically exposed persons, their family members and close associates (ss 21F-21H of the FICA). This approach is relatively fair because the FIC and other relevant authorities are statutorily empowered to minimise all possible money laundering risks posed by politically exposed persons that sometimes disguise their illicit dealings and evade liability through the help of their family members and close associates (ss 21F-21H read with ss 28; 28A; 29 and 32 of the FICA; see further De Klerk, 2007, pp. 369–384). The FICA empowers accountable institutions to adopt and apply comprehensive customer due diligence measures to all correspondent banking transactions, especially, those involving politically exposed persons to combat money laundering in South Africa (ss 21F-21H read with ss 28; 28A; 29 and 32 of the FICA; see further De Klerk, 2007, pp. 369–384). Comprehensive customer due diligence measures enable accountable institutions, reporting institutions and other financial institutions to identify and verify the identity of the owners of the accounts in correspondent banks and link such persons to their transactions to determine whether politically exposed persons are involved in those transactions and/or if such transactions constitute money laundering.

The FICA obliges accountable institutions and other financial institutions to use comprehensive customer due diligence measures to detect and scrutinise transactions

involving anonymous customers to curb money laundering and related terrorist activities (ss 20A and 22 of the FICA). Comprehensive customer due diligence measures enable financial institutions to establish the identity of anonymous customers before concluding any transactions or establishing any business relationships with such customers (ss 20A and 22 of the FICA). The FICA obliges all financial institutions to collect additional information such as proof of other transactions that were concluded from any anonymous customer's account to detect, isolate, prevent and curb money laundering activities (Njotini, 2000, pp. 557–573). Accountable institutions should repeat the steps contemplated in sections 21 and 21B of the FICA in accordance with the risk management and compliance programme before any business relationship is established with prospective customers to timeously detect and curb money laundering (s 21D of the FICA). It is also required that accountable institutions keep customer due diligence records and all transaction records obtained in terms of the FICA to trace, detect, investigate and combat money laundering and/or terrorist financing activities in South Africa (ss 22 and 22A of the FICA).

4.5.2 Simplified customer due diligence measures. The FICA also uses simplified customer due diligence measures to curb money laundering in South Africa. Simplified customer due diligence is usually the elementary level of due diligence that is used by banks and other financial institutions to assess the risk posed by their financial customers (De Klerk, 2007, pp. 369–384; Njotini, 2009, pp. 557–573). Simplified customer due diligence measures are used where there is a minimal risk of money laundering and/or terrorist financing activities because they require no verification of the financial customers' identity, accounts and/or previous banking history by accountable institutions and related financial institutions prior to the establishment of any business relationship with such customers. Simplified customer due diligence measures are very difficult to enforce because the FICA does not expressly provide any guidance on who qualifies as a low-risk customer for the purposes of combating money laundering and terrorist financing activities in South Africa (ss 20A-21H of the FICA). Nonetheless, financial institutions effectively and timeously collect basic information relating to their financial customers' name, date of birth, identity number and residential addresses under simplified customer due diligence measures so that they isolate and report suspicious transactions to the FIC and police in terms of the FICA (s 29 read with ss 27–28A; Ryder, 2008, pp. 637–653; De Klerk, 2007, pp. 369–384; Njotini, 2010, pp. 557–573).

4.5.3 Risk-based approach measures. The FICA adopted the risk-based approach in accordance with the FATF Recommendations. This approach requires competent authorities, banks and other relevant persons in South Africa to assess, detect, isolate and understand all money laundering and terrorist financing risks to use appropriate mitigation measures in accordance with the applicable level of risk (Chitimira, 2020, pp. 30–33). Therefore, the private sector, regulatory authorities and financial institutions in South Africa should effectively use appropriate AML and anti-terrorist financing measures in a manner commensurate to the mitigation of money laundering and terrorist financing risks. This entails that financial institutions should carefully recognise all types of risks posed by money laundering and terrorist financing and assess them well so as to adopt robust control strategies to mitigate and monitor the identified risks (Chitimira, 2020, pp. 30–33; Chitimira, 2021, pp. 795–798). In terms of the FICA, the risk-based approach focuses on proactive judgement and actual remedial actions on the part of the regulatory bodies and/or financial institutions rather than a mere post-analysis of data for AML and anti-terrorist financing compliance measures (s 4 of the FICA). The FIC should work hard to understand and detect all the money laundering and terrorist financing risks that are posed by both high- and low-risk financial customers and adopt appropriate measures to combat such risks (s 4 of the FICA). Moreover, the FIC, banks and other financial institutions should effectively and

consistently apply the risk-based approach in addition to customer due diligence measures to detect and combat money laundering activities in South Africa. Put differently, the risk-based approach empowers the FIC, banks and other financial institutions to distinguish between high- and low-risk customers by carefully enforcing the applicable customer due diligence measures to such customers in South Africa (Chitimira, 2020, pp. 30–33; Chitimira, 2021, pp. 795–798).

4.5.4 Ongoing due diligence measures. Ongoing due diligence measures enable banks and other related financial institutions to use customer due diligence measures to collect relevant documents, data and/or information that must be kept up-to-date, accurate and correct by conducting constant reviews of existing records, especially in respect of high-risk financial customers (s 21C of the FICA). Ongoing due diligence measures empower banks and other financial institutions to conduct additional, constant and continuous monitoring procedures on all financial customers to monitor their transactions to timeously detect money laundering and the financing of terrorist activities (s 21C of the FICA; Chitimira, 2020, pp. 30–33; Chitimira, 2021, pp. 795–798).

5. Concluding remarks

As discussed above, South Africa's battle with money laundering could be historically traced to the Drugs Act of 1992 (Drugs Act, 1992). Various statutes such as the Proceeds of Crime Act 1996, the POCA, the POCDATARA and the FICA were enacted in a bid to effectively regulate and control money laundering and related activities such as terrorist financing and drug trafficking (Chitimira, 2020, pp. 30–33; Chitimira, 2021, pp. 795–798). The Drugs Act and the Proceeds of Crime Act 1996 provided a broad ambit of the prohibition of money laundering, but they did not provide for the use of customer due diligence measures to curb money laundering [96]. These Acts were repealed in another bid to effectively curb money laundering in South Africa [97]. The POCA and the POCDATARA also do not provide for the use of customer due diligence measures to curb money laundering [98]. This flaw led to the introduction of customer due diligence measures in the FICA. These measures are welcome as an additional AML tool in South Africa. Nonetheless, more still need to be done by financial institutions and the FIC to ensure that customer due diligence measures are effectively and consistently enforced to combat money laundering activities in South Africa [99]. The recent Phala Phala farm scandal is a case in point [100]. The FIC, banks and other financial institutions should adopt a strict approach with regard to the application of comprehensive customer due diligence measures on politically exposed persons to avoid a repeat of the Phala Phala farm scandal. Moreover, the FICA should be amended to enact adequate provisions for harsher money laundering penalties. Such penalties should be effectively enforced against the money laundering offenders, especially politically exposed persons in South Africa.

Notes

1. 38 of 2001 (FICA) as amended by the Financial Intelligence Centre Amendment Act 1 of 2017 (Amendment Act), see section 21.
2. Havenga, *ibid*; see also W Ahlosani, *Anti-Money Laundering: A Comparative and Critical Analysis of the United Kingdom and the UAE'S Financial Intelligence Units* (Palgrave Macmillan: London, 2016), 205.
3. 140 of 1992 (Drugs Act), see ss 14.
4. 76 of 1996 (Proceeds of Crime Act 1996), see ss 8-14.

5. MN Njotini, "The Transaction or Activity Monitoring Process: An Analysis of the Customer Due Diligence Systems of the United Kingdom and South Africa" (2000) 34 *Obiter* 556-573.
6. I Van Jaarsveld, "Mimicking Sisyphus? An Evaluation of the Know Your Customer Policy" (2006) 27 *Obiter* 228-234.
7. Van Jaarsveld, *ibid*.
8. The international bodies that played an important role in this regard include the FATF, the Basel Committee on Banking Supervision (BCBS), the Bank for International Settlement (BIS), the International Association of Insurance Supervisors (IAIS), the International Organisation of Securities Commissions (IOSCO) and the Egmont Group of Financial Intelligence Units; see also Njotini, *supra n* 8.
9. See ss 4-6.
10. 1 of 2017 (Amendment Act); see also De Koker, *supra n* 10; section 20 of the Prevention and Combating of Corrupt Activities Act 12 of 2004 also creates an offence that overlaps with the money laundering offences of the POCA. Prevention and Combating of Corrupt Activities Act (2004).
11. See ss 20A-21H of the FICA.
12. Van Jaarsveld, *supra n* 8.
13. Njotini, *supra n* 8.
14. Njotini, *ibid*.
15. MN Njotini, *The Verification and Exchange of Customer Due Diligence (CDD) Data in Terms of the Financial Intelligence Centre Act 38 of 2001* (LLM – Dissertation, University of South Africa, 2009), 19.
16. See s 21 read with ss 20A-21H of the FICA.
17. See ss 22-24 read with ss 20A-21H of the FICA.
18. See s 29 read with ss 20A-21H of the FICA.
19. See s 43 read with ss 20A-21H of the FICA.
20. Havenga, *supra n* 3.
21. See s 21(1) read with ss 20A-21H of the FICA.
22. Schedule 1 of the FICA.
23. Njotini, *supra n* 21.
24. De Koker, *supra n* 11.
25. Njotini *supra n* 8.
26. Njotini, *ibid*.
27. Njotini, *supra n* 21.
28. Millard and Vergano, *ibid*.
29. Millard and Vergano, *supra n* 41; see also AB Nyaude, *The Compliance Duties of Commercial Banks with Regard to Online Money Laundering* (LLM dissertation, University of Pretoria: South Africa, 2015) 3-69.
30. Reuter and Truman, *supra n* 43. In terms of section 1 of the *Prevention of Crime Act*, the term means "any property or any service, advantage, benefit or reward which was derived, received or

retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of the *FICA*, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived".

31. Nyaude, *supra n* 43.
32. Kruger (2013); see also I Van Jaarsveld, *Money Laundering Control and Banks – An Analyses of Key Challenges Facing Banks Operating in the E.U., England, South Africa & the Unites States* (Lambert Academic Publishing: German, 2012) 50-500.
33. Van Jaarsveld, *ibid*.
34. Van Jaarsveld, *ibid*.
35. Reuter and Truman, *supra n* 43; see also Millard and Vergano, *supra n* 41.
36. Van Jaarsveld, *supra n* 47.
37. Millard and Vergan, *supra n* 41.
38. See s 4 of the POCA.
39. See s 18 of the POCA, see also Van Jaarsveld, *supra n* 47.
40. See ss 2-3 read with ss 4-8 of the POCA.
41. See s 1 of the Amendment Act.
42. See s 64 of the Amendment Act; see also ss 4-6 of the POCA; Njotini, *supra n* 21.
43. Reuter and Truman, *supra n* 43.
44. Nyaude, *supra n* 44.
45. Savla, *supra n* 65.
46. Tuba and Van der Westhuizen, *supra n* 66.
47. Savla, supra *n* 65.
48. See s 64 of the *Amendment Act*; see also Itzikowitz (2008).
49. Itzikowitz, 2008; see also Njotini, *supra n* 21.
50. Henning and Ebersohn, *ibid*; Madinger, s*upra n* 63.
51. Savla, *supra n* 65; see also Van Jaarsveld, *supra n* 47.
52. Madinger, *supra n* 63.
53. Henning, and Ebersohn, *supra n* 72.
54. Njotini, *supra n* 21.
55. Henning, and Ebersohn, *supra n* 72.
56. Henning, Du Toit, and Nel, *supra n* 62; see related discussion by Nyaude, *supra n* 44.
57. Madinger, *supra n* 63.
58. Nyaude, *supra n* 44.
59. Madinger, *supra n* 63.
60. De Koker, *ibid*; *S v Dustigar* (Durban and Coast Local Division) (unreported) case number CC6/2000.
61. De Koker, *supra n* 87.

62. The adoption of anti-money laundering measures was influenced by the *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1988) (*Vienna Convention*), see article 3(c)(i).
63. See ss 4-6 of the Drugs Act.
64. See s 21 of the FICA. The Proceeds of Crime Act 1996 and the POCA were enacted before the FICA but they did not provide measures to combat money laundering in South Africa.
65. De Koker, *supra n* 87.
66. See ss 4-6 of the Drugs Act; see also Madinger, *supra n* 63.
67. See ss 28-33 of the Proceeds of Crime Act 1996; see also Madinger *Money Laundering: A Guide for Criminal Investigators* 10.
68. Van Jaarsveld, *supra n* 9.
69. Article 3(c)(i) of the Vienna Convention.
70. See s 1 of the Drugs Act. The Drugs Act defines property as money or any other movable or immovable, corporeal or incorporeal thing
71. See s 22 of the Drugs Act. The term "defined crime" was comprised of two components, one subscribes to the meaning of drug offences and the second described the offence. See also s 1 of the Drugs Act.
72. See s 10(2) of the Drugs Act; Nyaude, *supra n* 44.
73. See s 10 of the Drugs Act. See also Van Jaarsveld, *supra n* 9.
74. See s 10 of the Drugs Act. Van Jaarsveld, *ibid*.
75. See s 29 of the FICA.
76. See s 5 of the Drugs Act; see also Van Jaarsveld, *supra n* 47.
77. Nyaude, *supra n* 44.
78. See ss 4-6 of the *Drugs Act*; Nyaude, *ibid*.
79. See s 4 of the Drugs Act; see also De Koker and Henning, *supra n* 98.
80. See s 6 of the Drugs Act.
81. Henning, Du Toit and Nel, *supra n* 62.
82. Van Jaarsveld, *supra n* 47.
83. Van Jaarsveld, *supra n* 47.
84. See ss 28-33 of the Proceeds of Crime Act 1996.
85. Van Jaarsveld, *supra n* 47.
86. Nyaude, *supra n* 44.
87. See ss 29 and 32 of the Proceeds of Crime Act 1996.
88. See s 29 of the Proceeds of Crime Act 1996.
89. See s 32 of the Proceeds of Crime Act 1996.
90. See s 31(1) of the Proceeds of Crime Act 1996.
91. Van Jaarsveld, *supra n* 9.

92. Itzikowitz, *supra n* 119.
93. Van Jaarsveld, *supra n* 47.
94. Van Jaarsveld, *ibid.*
95. De Koker and Henning, *supra n* 98.
96. See ss 4-6 of the Drugs Act & ss 28-33 of the Proceeds of Crime Act 1996; see also De Koker, *supra n* 87.
97. See ss 4-6 of the Drugs Act & ss 28-33 of the Proceeds of Crime Act 1996; see also De Koker and Henning, *supra n* 98.
98. Itzikowitz, *supra n* 119; see also Henning, Du Toit and Nel, *supra n* 62.
99. De Koker, *supra n* 87.
100. Van Jaarsveld, *supra n* 47.

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