

Authors: AJ Hamman and RA Koen

CAVE PECUNIAM: LAWYERS AS LAUNDERERS

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CAVE PECUNIAM: LAWYERS AS LAUNDERERS**AJ Hamman*****RA Koen******1 Introduction**

In South Africa there is something almost sacrosanct about an attorney's trust account. It is the prescribed destination of all funds paid in trust by a client to an attorney.¹ Clients tend to have complete confidence in the fact that their money is entrusted thus. Its very designation as trust money encourages such confidence.² The trust account is also the account in respect of which the Attorneys Fidelity Fund requires an annual audit to determine if an attorney is awarded the Fidelity Fund Certificate which he requires to practise.³ All in all, the trust account is the barometer of the good standing of a law practice, and the index of its trustworthiness.⁴ Hence the aura of vulnerability which surrounds it.

However, with sacrosanctity comes vulnerability. Because of the high level of credence it enjoys, an attorney's trust account can be transformed easily into an instrument of crime. A person who has access to the trust account could manipulate it readily in pursuit of a criminal purpose. What is more, the violation could be secreted unceremoniously behind the veil of credibility which attaches to the account. The attorney's trust account is especially attractive to persons who or organisations which seek to launder money.⁵ It is akin to a one-stop laundromat: money goes in dirty on one side, wends its way through an unbroken cleaning cycle and emerges spotless on the other side.

* Abraham Hamman. BA, LLB, LLM (UWC). Lecturer in the Department of Criminal Justice and Procedure, Faculty of Law, University of the Western Cape. Email: ajhamman@uwc.ac.za.

** Raymond Koen. LLM, PhD (UWC). Associate Professor in the Department of Criminal Justice and Procedure, Faculty of Law, University of the Western Cape. E-mail: rkoen@uwc.ac.za.,

1 The terms lawyer and attorney are used interchangeably throughout this contribution.

2 See Lewis *Legal Ethics* 269; and LAWPRO 2003 www.practicepro.ca.

3 See ss 41 and 42 *Attorneys Act* 53 of 1979.

4 See *Hirschowitz Flionis v Bartlett* 2006 3 SA 575 (SCA) para 30.

5 Shepherd 2002 *Probate & Property* 26.

The methods in which an attorney's trust account may be transformed into a money laundering device are manifold. Reference to four such methods must suffice here. Firstly, the attorney himself may use his trust account to wash the proceeds of his own criminal activities; secondly, the attorney may be recruited and remunerated by a crime syndicate to make his trust account available to it as a laundering expedient; thirdly, criminal clients may deposit criminal proceeds into an attorney's trust account as payment for fake transactions and then receive back clean money as a refund when said transactions supposedly fall through; fourthly, criminal clients may use the attorney's trust account as a bank account into which to deposit criminal proceeds for onward transmission to various payees on the instructions of the clients.⁶ Thus, counterfeit trust account machinations can be the work of the attorney himself, or they may occur with or without his knowledge or participation. In any event, the attorney's trust account, which was conceived as the beacon of unblemished lawyering integrity, becomes the vehicle of squalid criminality.

This article is concerned with the abuse of the attorney's trust account as a conduit for laundering money and with the transformation thereby of the attorney into a money launderer. Of course, there always will be dishonest attorneys who, relying upon a utilitarian calculus, choose to become launderers themselves or to co-operate with launderers.⁷ It is to be hoped, however, that such conscious crookedness is rare, and that an attorney's trust account becomes a money laundering portal primarily because the attorney has become the victim of launderers posing as clients. What is more, the internet explosion has made it possible to move money virtually instantaneously through cyberspace.⁸ This development has brought new challenges for attorneys who now have to negotiate the dangers posed to the integrity of their practices by the new forms of money laundering known collectively

6 See, for example, *S v Price* 2003 2 SACR 551 (SCA); *Pillay v S* [2004] 1 All SA 61 (SCA); *S v Rossouw*, Unreported, Wynberg Regional Court, Case Number B1679/09 (SHD163/09); and *S v Hattingh*, Unreported, Bloemfontein Regional Court, Case Number 17/518/10. All of these cases are discussed in detail in section 6 below.

7 See Lewis *Legal Ethics* 269.

8 Weatherford *History of Money* 248: "Throughout its history, money has become steadily more abstract. By moving at the speed of light, electronic money has become the most powerful financial, political and social force in the world. Money has become even more like God: totally abstract and without corporeal body."

as cyberlaundering.⁹ The point is that, wittingly or unwittingly, an attorney's trust account may become a criminal contrivance and its holder a criminal with relative ease. This essay may be comprehended as a *caveat jurisconsultus* of sorts, alerting attorneys to the dangers of money laundering and warning them of the need to prevent their trust accounts being captured by money launderers.

2 The anti-money laundering legal regime

The global explosion of money laundering since the 1980s is self-evident and needs no extended discussion or proof. Suffice it to say that South Africa, too, has become a destination of choice for organised crime syndicates seeking ways to legitimise the proceeds of their criminal adventures. It is well-known, too, that the globalisation of money laundering elicited a concerted response from the international community. The Paris-based Financial Action Task Force (FATF) was established in 1989 as the flagship body to combat money laundering, and has formulated a set of guidelines, known famously as the 40+9 Recommendations,¹⁰ to give structure and direction to the international anti-money laundering crusade. In June 2003, the FATF accepted South Africa as its thirtieth member.¹¹ On 20 February 2004, South Africa ratified the UN Convention against Transnational Organised Crime (UNCTOC or the Palermo Convention),¹² thereby agreeing to be bound, *inter alia*, by its anti-money laundering provisions.¹³ Similarly, South Africa ratified the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the Vienna Convention),¹⁴ the United Nations Convention against Corruption (UNCAC or the Merida Convention)¹⁵ and the African Union Convention on Preventing and

9 See Ping 2004 *JMLC* 48; Phillipsohn 2001 *JMLC* 87; Hugel and Kelly 2002 *JMLC* 57; and Joyce 2001 *JMLC* 146.

10 These consist of the forty FATF recommendations pertaining to international standards on combating money laundering and the financing of terrorism and proliferation, and the nine special FATF recommendations on terrorist financing.

11 FATF 2009 www.fatf-gafi.org.

12 The Palermo Convention (UNCTOC) was adopted by General Assembly Resolution 55/25 on 15 November 2000 and entered into force on 29 September 2003.

13 See especially Aa 6 and 7 UNCTOC.

14 The Vienna Convention was adopted on 20 December 1988 and entered into force on 11 November 1990.

15 The Merida Convention (UNCAC) was adopted by General Assembly Resolution 58/4 on 31 October 2003 and entered into force on 14 December 2005.

Combating Corruption (the AU Convention)¹⁶ on 14 December 1998, 22 November 2004 and 11 November 2005 respectively, and is constrained to implement the anti-money laundering aspects of these instruments also.¹⁷

In compliance with its international obligations, South Africa has developed a comprehensive legal structure to combat money laundering. The primary anti-money laundering statutes are the *Prevention of Organised Crime Act* (POCA),¹⁸ the *Financial Intelligence Centre Act* (FICA),¹⁹ and the *Protection of Constitutional Democracy against Terrorism and Related Activities Act* (POCDATARA).²⁰ The overall purpose of POCA is to regulate racketeering and to outlaw the criminal activities of gangs. It also criminalises money laundering and contains a reporting obligation for businesses coming into possession of suspicious property. The primary objective of FICA is to identify the proceeds of unlawful activities and to combat money laundering activities. To this end, it establishes the Financial Intelligence Centre²¹ and the Money Laundering Advisory Council,²² and creates certain money laundering control obligations.²³ POCDATARA prohibits the facilitating and financing of terrorism and criminalises terrorist financing.²⁴ It makes terrorist financing a predicate offence for money laundering.²⁵

None of the anti-money laundering laws in South Africa is dedicated to attorneys and their trust accounts. Also, the statutes do not highlight the use of attorneys' trust accounts as vehicles for money laundering. However, the legislature no doubt was aware of the dangers and the laws have been drafted with a broad enough ambit to include attorneys as potential launderers. In this connection, FICA is the statute which is most pertinent to the problem of an attorney's trust account being used or enlisted as a money laundering site. FICA is structured by a broad framework of anti-

16 The AU Convention was adopted on 11 July 2003 and entered into force on 5 August 2006.

17 See A 3 of the Vienna Convention; Aa 14, 23, 52, 54 and 57 of UNCAC; and A 6 of the AU Convention.

18 *Prevention of Organised Crime Act* 121 of 1998.

19 *Financial Intelligence Centre Act* 38 of 2001.

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

21 Section 2 of FICA.

22 Section 17 of FICA

23 See ss 28 and 29 of FICA.

24 See long title and s 4 of POCDATARA.

25 FATF *Mutual Evaluation Report* 7. In the context of money laundering, a predicate offence is a crime (such as theft, fraud or bribery) which produces the proceeds to be laundered and which founds the charge of money laundering. See further A 2(h) of UNCAC.

money laundering measures. It creates a matrix of obligations, including customer identification, record-keeping requirements and internal controls for an assortment of institutions which or persons whom criminals may designate as potential instrumentalities of money laundering. These range from banks, securities and investment firms and insurance companies, through *bureaux de change*, money remitters, casinos and dealers in travellers' cheques and money orders, to the professional practices of lawyers, brokers, estate agents and accountants.²⁶ Given its centrality to the concerns of this article, FICA will feature prominently in the ensuing discussion.

3 Reporting obligations under FICA

The dangers of attorneys' trust accounts falling prey to the machinations of money launderers are addressed primarily in sections 28 and 29 of FICA, which provide for mandatory cash threshold reporting (CTR) and mandatory suspicious transaction reporting (STR) respectively.²⁷ In terms of section 28, an attorney²⁸ is required to submit to the Financial Intelligence Centre a CTR²⁹ in respect of all cash transactions³⁰ constituting payments to and receipts from a client or his agent in excess of the prescribed threshold of R24 999-99.³¹ Interestingly, the CTR obligation applies to both single transactions and to a series of transactions, each of which is below the threshold but which, if aggregated, constitutes a fraction of a composite transaction which amounts to R25 000-00 or more.³² The CTR must be filed within

26 See Schedule 1 of FICA.

27 Section 1 of FICA defines a "transaction" as "a transaction concluded between a client and an accountable institution in accordance with the type of business carried on by that institution". Although this is a quite tautologous and otherwise problematic definition, it has the merit at least of encompassing attorneys, who head the list of accountable institutions in Schedule 1. For considerations of the difficulties entailed in the statutory definition of "transaction", see De Koker "Money Laundering in South Africa" 88; and Itsikowitz "Legal Professional Privilege" 78-79.

28 Section 28 places the duty to file a CTR upon an accountable or a reporting institution, and an attorney is an accountable institution.

29 In this essay the abbreviation CTR means either "cash threshold reporting" or "cash threshold report"; and STR signifies either "suspicious transaction reporting" or "suspicious transaction report". The meaning in each case will be apparent from the context.

30 In terms of s 1, cash includes (a) any money designated as legal tender and used as a medium of exchange in any country, and (b) travellers' cheques.

31 FIC 2001 www.fic.gov.za. Regulation 22B of the regulations to FICA.

32 FIC 2010 www.fic.gov.za 3-4. This amounts to an attempt to prevent smurfing or structuring, that is, the process by which a big amount of dirty money is broken up into many smaller parts and deposited by a large number of different people in order to bypass the anti-money laundering reporting thresholds.

two working days of the attorney or a member of his practice becoming aware that a cash transaction exceeding the threshold has been concluded. It would appear that section 28 is founded upon the principle that cash transactions in excess of the prescribed threshold are suspicious *ipso facto* and must be brought to the attention of the Financial Intelligence Centre. The CTR may be comprehended as an attempt to deploy a quantitative dictate in order to restrict opportunities for money laundering.

Section 29 of FICA turns upon notions of knowledge and suspicion and may be understood as the qualitative *copula* of section 28. As already intimated, it creates a reporting *onus* in respect of suspicious and unusual transactions. The compass of its *onus* is wider than that of section 28 in that it applies to any person who runs, manages or works for a business. All the personnel constituting an attorney's practice would fall within this compass and thereby incur a legal obligation in respect of STRs. In particular, section 29(1)(a) places an obligation on any such person to file an STR pertaining to his knowledge or suspicion of the receipt or imminent receipt by the business of the proceeds of unlawful activities; section 29(1)(b) creates identical STR obligations in respect of those business transactions which facilitate or are likely to facilitate the transfer of the proceeds of unlawful activities, or which are not manifestly lawful, or which are aimed at evading any FICA reporting duty, or which may pertain to tax evasion;³³ and section 29(1)(c) replicates the STR duty in relation to the use or imminent use of the business for money laundering purposes. The STR must be filed within 15 working days of the person having become aware of the transaction in question,³⁴ and must contain the particulars prescribed by Regulation 23 of the regulations to FICA. Section 29(2) prescribes a similar STR duty in respect of dodgy transactions which, if concluded, may have caused the business to be used, *inter alia*, for money laundering purposes. In a word, then, section 29 makes the reporting to the Financial Intelligence Centre of unlawful or suspicious transactions, including money laundering transactions, mandatory for all members of a business, including a legal practice.

33 Section 29(1)(b) consists of five paragraphs. Paras (i) to (iv) each may be read, in whole or in part, as money laundering controls. Para (v) deals exclusively with terrorist financing.

34 FIC 2001 www.fic.gov.za. Regulation 24 of the regulations to FICA.

Knowledge and suspicion are the operational triggers for section 29 and thus require some consideration. The knowledge criterion is binary: it is 'real' or 'constructive' according to whether the person who is required to file the STR knew of or reasonably ought to have known of the money laundering motif of the transaction in question. Section 1(2) delineates real knowledge to include both positive or actual knowledge and negative knowledge constituted by wilful ignorance;³⁵ that is, a conscious election to turn a blind eye to an adulterated transaction in order to fabricate an absence of knowledge. Section 1(3) is concerned with constructive knowledge and approaches it in terms of the standard of the reasonable person. It provides, essentially, that a person reasonably ought to have known that a business transaction was tainted if the conclusions he ought to have drawn would have been the conclusions of a reasonably diligent and vigilant person with his attributes and in his position. In other words, a person is deemed to have constructive knowledge of a money laundering transaction if a reasonable person in his shoes would have adjudged the transaction to be besmirched. The point is that the person invested with knowledge, whether real or constructive, of a money laundering transaction in his place of business has a legal obligation to file an STR with the Financial Intelligence Centre.

As intimated above, the section 29 reporting obligation arises also if a person who runs, manages or works for a business reasonably ought to have suspected that a given transaction was tainted by the malodour of money laundering. The criteria contained in section 1(3) apply also to the determination of whether or not a person reasonably ought to have had the suspicion which entrains a reporting obligation. The legal consensus seems to be that the suspicion in question should be an objectively reasonable one, that is, a suspicion which a reasonable person in the same position would have formed and entertained.³⁶ In other words, a person who runs, manages or works for a business is encumbered with a legal obligation to file an STR in respect of any transaction which a reasonable person in his position would have considered suspicious and unusual.

35 Van der Westhuizen 2004 *De Rebus* (1) 37.

36 See Itsikowitz "Legal Professional Privilege" 78-79; and Van der Westhuizen 2004 *De Rebus* (2) 37.

For attorneys, the anti-money laundering reporting regime of FICA revolves around the quantitative-qualitative bifurcation between sections 28 and 29. An attorney must be alive to and comply with the requirements of both sections in order to avoid being prosecuted as a money launderer. Needless to say, there will be some overlap in practice, sometimes considerable, between his obligations under the two sections, in the sense that a transaction which exceeds the threshold of R24 999-99 prescribed in section 28 well may qualify as a suspicious and unusual transaction under section 29. In such a case, the attorney will have to submit a CTR as an accountable institution as well as an STR as a person running or managing or employed by a business. Be that as it may, sections 28 and 29 constitute a tandem endeavour to generate an anti-money laundering milieu and to enlist the assistance of attorneys in doing so. What is more, it is an endeavour which has a strong comminative dimension. Thus, failure by an attorney to file a CTR in terms of section 28 and an STR in terms of section 29 is criminalised by sections 51 and 52 respectively,³⁷ and section 68 prescribes maximum penalties for such non-reporting, namely, 15 years' imprisonment or a fine of R10 million. Evidently, its drafters were resolute about deploying FICA as an anti-money laundering deterrent, extending also to the trust accounts of attorneys.

Section 29 has an additional sting in the tail. Section 29(3) prohibits a person who has filed or must file an STR from disclosing this fact or anything about the contents of said STR to anybody, including the person who is the subject of the STR. The prohibition is pressed home in section 29(4), which forbids a person from disclosing any knowledge or suspicion that an STR has been or must be submitted, or from disclosing anything about the contents of the said STR. Again, the prohibition is all-embracing and includes disclosure to the person who is the subject of the STR in question. Together, sections 29(3) and 29(4) constitute a comprehensive injunction against so-called tipping off. Both subsections make provision for four identical exceptions, when disclosure of the STR or its contents may be permissible.³⁸ However, these exceptions are narrow and do not detract significantly from the "no

37 The criminalisation effected by s 52 includes the negligent failure to submit an STR report. It would appear that attorneys are required always to adhere to the standard of the reasonable person in relation to unusual and suspicious transactions.

38 Disclosure is permissible if it is done in terms of the discloser's statutory powers and duties or to implement the provisions of FICA or for the purpose of legal proceedings or in terms of a court order.

tipping off"-principle embedded in section 29. In the context of this article, this principle means that once an attorney has reported or is about to report a client in terms of section 29, he may not inform the client that he has made or is about to make the STR, nor may he give the client any information about the contents of the STR. The same would apply to any other member of the attorney's practice who knows or suspects that an STR has been or must be filed in relation to a specific client. The prohibition against tipping off makes eminent sense within the anti-money laundering purpose of FICA. Warnings by attorneys or their staff to dodgy clients of STRs and their contents undermine this purpose directly by giving such clients the opportunity to take evasive action in relation to possible investigations by the Financial Intelligence Centre. Hence, tipping off in contravention of sections 29(3) and 29(4) is criminalised by sections 53(1) and 53(2) respectively. A person convicted of tipping off may be punished with imprisonment not exceeding 15 years or a fine not exceeding R10 million.³⁹ In terms of possible punishment, the legislature evidently regards tipping off a dodgy client to be as serious an offence as not filing an STR on such a client.

By way of conclusion it bears noting that section 31 of FICA creates a reporting duty in respect of electronic funds transfers in excess of a prescribed threshold into and out of the country. It applies to attorneys as accountable institutions. The provision patently is a response to the internationalisation and escalating digitalisation of money laundering referred to earlier and to the concomitant magnification of the vulnerabilities of accountable institutions. However, section 31 has not been promulgated yet. In March 2012, the Financial Intelligence Centre issued a Consultation Document on the implementation of section 31.⁴⁰ Implementation ought to occur in the not too distant future, when section 31 will complement section 28 as the quantitative aspect of the reporting regime of FICA.

39 Section 68 of FICA.

40 FIC 2012 www.fic.gov.za.

4 FICA, confidentiality and legal professional privilege

The reporting regime of FICA requires attorneys to provide the Financial Intelligence Centre with information about their clients, information which may well have been obtained from or supplied in the course of the conduct of the attorney-client relationship. FICA seeks to allay the fears which this situation naturally engenders by expressly protecting the legal professional privilege.⁴¹ In terms of section 37(1), the FICA reporting requirements trump whatever secrecy and confidentiality obligations an attorney may owe his client.⁴² However, the legal professional privilege between attorney and client has survived. Needless to say, the protection afforded the privilege is not a blanket one: it is limited to confidential attorney-client communications made in respect of legal advice or litigation in progress, pending or proposed;⁴³ and to confidential attorney-third party communications made in respect of litigation in progress, pending or proposed.⁴⁴ The latter protection would encompass, for example, confidential communications between an attorney and an advocate and an attorney and witnesses. Confidential attorney-client communications which do not resort under section 37(2) are not privileged and thus not protected.

In theory, then, FICA's reporting obligations do not transgress upon the well-established common law right to legal professional privilege. Indeed, section 37(2) confirms the common law in this regard. In practice, however, there is every likelihood that an attorney's complying with his duty to render a CTR or STR will violate the trust relationship with his client. Whereas the legal professional privilege may be decisive, the attorney-client relationship transcends it, comprehending also such crucial ethical matters as trust, confidence, security and reliability. In the day-to-day world of legal practice, the distinction between legal professional privilege and attorney-client confidentiality is a purely formal one.⁴⁵ The theoretical distinction between privileged and unprivileged confidences is a practical fetter upon the *desideratum* of an unencumbered attorney-client relationship as an essential

41 Section 37(2) of FICA.

42 See De Koker "Money Laundering in South Africa" 107; Itsikowitz "Legal Professional Privilege" 80.

43 Section 37(2)(a) of FICA.

44 Section 37(2)(b) of FICA.

45 For a useful discussion of this distinction, see Itsikowitz "Legal Professional Privilege" 73-75.

element of the fair trial right to legal representation.⁴⁶ Certainly, clients tend to expect that all communications with attorneys will be confidential and hence privileged; they conflate confidentiality and privilege. The point is that the reporting requirements of FICA present the attorney with a most disagreeable election: betray your client's confidence or betray your legal obligations to report. FICA makes no attempt to regulate or resolve this conundrum. The attorney is left to his own devices. If he fails to comply with his reporting duties he runs the risk of being prosecuted as a launderer for his omission. If he does comply, he almost certainly will subvert the principle of attorney-client confidentiality. That is a most unenviable ethical burden with which to saddle an attorney.

The problem is exacerbated in respect of criminal lawyers. It is in the nature of the work of defence practitioners that they routinely deal with clients who are shady and suspect, and who may deposit the "proceeds of unlawful activities" into the practitioner's trust account to be defrayed later in respect of legal advice and representation provided by the practitioner. Indeed, the criminal lawyer is much more likely to be paid with dirty money than practitioners in other professions.⁴⁷ He probably knows or suspects that many of his clients are crooks whose funds are obtained nefariously. Such a conclusion is inevitable, more or less, when the client or his agent hands over to the lawyer large sums of cash as a fee retainer or as bail money. However, it may well be reached also in those situations where a felonious client uses an electronic method of transferring tainted funds into his lawyer's trust account. Regardless of the route by which the monies find their way into his trust account, the attorney is obliged to report such suspicious transactions to the

46 Note should be taken here of the issue of lawyers being paid with dirty money for their services, an issue which entails major ethical and constitutional questions around the right to legal representation. All attorneys face a plurality of perils in exercising their professional responsibilities of providing paid representation to clients. They can become ready targets of criminal prosecution if they allow a suspicion to arise that, in order to secure payment of their fees, they are prepared to open the gate to the money laundering process. In South Africa to date no lawyer has been prosecuted for accepting dirty money as fees. But this cannot be ruled out in future, given that the legislature amended FICA in 2008 with the insertion of s 43A. This section empowers the Financial Intelligence Centre or a supervisory body such as a Law Society to issue directives to attorneys to provide information, reports or statistical returns as requested and to surrender any document as required. S 43A has been described by Mabanga and Pile 2008 secure.financialmail.co.za as a crackdown on dirty money. It well may be enlisted as a mechanism to police the acceptance of tainted fees in the legal profession.

47 Bussenius 2004 *German LJ* 1045.

Financial Intelligence Centre or face the prospect of prosecution as a money launderer.

Be that as it may, there is no gainsaying the fact that confidential attorney-client communications are not protected by the legal professional privilege if they do not relate to legal advice or litigation. The attorney features as a gatekeeper in international anti-money laundering discourse and strategy.⁴⁸ The reporting obligations of FICA require attorneys to take seriously their gatekeeper designation. All in all, these requirements give effect to the FATF recommendation that designated non-financial businesses and professionals be drafted as troopers in the anti-money laundering crusade.⁴⁹

5 Lawyers in the money laundering process

Section 1(1) of FICA defines money laundering as "an activity which has or is likely to have the effect of concealing or disguising the nature, source, location, disposition or movement of the proceeds of unlawful activities or any interest which anyone has in such proceeds". This part will traverse the ways in which legal practitioners typically can become involved, advertently or inadvertently, in money laundering activities via the attorney-client relationship. Economic crimes are committed for the primary purpose of enriching the perpetrators and their families and associates. Money laundering is the route to severing the nexus between the crime and its proceeds, and to the latter being enjoyed openly and even conspicuously. It is a process of criminal legitimization which the perpetrators will seek to facilitate and expedite in every which way, including enlisting the skills and resources of legal professionals, with or without their assent.

The money laundering process generally is a triadic one, commencing with placement, proceeding through layering, and terminating with integration.⁵⁰ Placement is the stage at which the proceeds of an economic crime, often bulk cash,

48 Shepherd 2002 *Probate & Property* 26.

49 See FATF *Recommendations* Recommendation 23.

50 Richards *Transnational Criminal Organizations* 46; and Madinger *Money Laundering* 7.

are converted into a more portable and less suspicious form⁵¹ and injected into the financial system.⁵² This can be a taxing exercise for the money launderer, because it is difficult to conceal and move plenty of cash without arousing suspicion.⁵³ Obvious placement choices such as banks, casinos and currency exchange *bureaux* are no longer feasible since their employees nowadays are trained to detect money with a possible illegal provenance.⁵⁴ As the anti-money laundering campaign has gathered momentum, so money launderers have had to rummage for alternative placement sites. One such site upon which they have lighted is the attorney's trust account.⁵⁵

Criminals can pose as clients to engage the services of a legal practitioner and then use the access thus obtained for the placement of funds, either directly or indirectly. Direct placement usually takes the form of deposits into the attorney's trust account supposedly as fee payments for fictitious services to be rendered by the attorney. Property transfers can be a very useful direct placement mechanism also, since they invariably involve huge amounts of money being deposited in trust with conveyancing attorneys for seemingly standard legal transactions. Indirect placement refers to the use by criminals of the services of legal practitioners to establish and register financial or commercial entities, such as companies, close corporations and trusts, which will be used as placement vehicles for illegally-obtained assets.⁵⁶ The same would apply to the drafting and execution by attorneys of various forms of contracts such as leases, deeds of sale, mortgages and loan agreements. The point is that there is no shortage of ways in which the trust account and other resources of a legal practice can be used as placement tools and, thereby, in which lawyers can become knowing or unknowing parties to a money laundering scheme.

The second stage in the money laundering process is referred to as layering.⁵⁷ This stage focuses upon the creation of false paper trails by means of a series of

51 Richards *Transnational Criminal Organizations* 48.

52 Van Jaarsveld 2004 SA *Merc LJ* 694.

53 Van Jaarsveld 2004 SA *Merc LJ* 694.

54 Van Jaarsveld 2004 SA *Merc LJ* 694.

55 See LAWPRO 2003 www.practicepro.ca: "For those who prefer not to leave a paper trail, lawyers' trust accounts are an attractive alternative to traditional financial institutions."

56 See Itsikowitz "Legal Professional Privilege" 86.

57 Hinterseer 1997 *JMLC* 155; and Moodley 2008 repository.up.ac.za.

transactions across several locations and jurisdictions. Layering is a form of sleight of hand which relies upon the rapid and frequent movement of the funds in question in order to hide their true origin and to make them indistinguishable from legitimate funds.⁵⁸ Lawyers participate in layering when they shift dirty money deposited with them by a client or when a business form which they have created for a client is deployed for this purpose. In either case, their expertise is pressed into the service of a criminal design to legalise the illegal. Typically, the client would have deposited an amount into the attorney's trust account for services to be rendered in future, allowing the money to remain in the account for some time, even allowing the attorney to use some or all of it to make a trust investment in terms of either section 78(2)(a)⁵⁹ or section 78(2A)⁶⁰ of the *Attorneys Act* 53 of 1979. Alternatively, the client may instruct the attorney to transfer the money, in whole or in part, to third parties, which may include business entities created by the attorney for the client, as payment for services supposedly rendered or goods supposedly supplied by such parties. Of course, money being dispensed from the trust account of an attorney is legitimate. And, by necessary implication, the attorney has become a party to the process of layering the proceeds of crime.

Even the formal process of conveyancing is prone to being diverted as a layering mechanism. It is possible for a property which has been sold to be resold again and again before registration in the name of the original purchaser takes place. In the Deeds Office it is not uncommon for simultaneous transactions to take place, where one property is registered in the name of a number of people on the same day.⁶¹ If the original purchase was made with black money,⁶² such serial registrations amount to layering the money through a number of transactions to conceal its odious provenance. Attorneys can assist launderers also in the so-called reverse property

58 Van Jaarsveld 2004 *SA Merc LJ* 694.

59 In terms of s 78(2)(a), an attorney may use such trust money as is not needed immediately for a designated purpose to make trust investments with a bank or building society. In terms of s 78(3), the interest generated by such investments accrues to the Attorneys Fidelity Fund.

60 Section 78(2A) allows an attorney to use funds being held in trust for a client to make trust investments on behalf of the client. The investment must occur on the written instructions of the client, to whom the interest generated by the investment accrues.

61 See s 14 of the *Deeds Registries Act* 47 of 1937. See also *Nel Conveyancing* 12.

62 This is a generic term for the proceeds of corruption or other illegal activity, and which the money laundering process seeks to legitimise.

flip, which is prevalent in the real estate business.⁶³ The money launderer will find a willing seller from whom he will buy a property at a price well below its market value, paying the balance under the table to the seller, who thereby receives value for his property. After taking transfer of the property the launderer then resells the property for its real value, realising a profit in the process. For example, the launderer and willing seller agree that the former buy a property actually worth R1 million for R500 000-00. He pays a deposit of R100 000-00 and arranges a mortgage bond of R400 000-00. He pays the balance of R500 000-00 to the seller covertly, using his illegal funds. He takes transfer of the property. After a while, he puts the property on the market and sells it for its true value of R1 million. He has flipped the property for a profit of R500 000-00. This is layering *par excellence*: everything (bar the under-the-table payment) was done through the good offices of a conveyancer and a paper trail of legitimate transactions has been created and a seemingly honest profit has been made.

Integration is the final stage of the money laundering triad.⁶⁴ This is the stage at which the laundered money, its links to illegality now sundered, is reintroduced into the mainstream economy. Integration occurs by way of such financial instruments as cheques, letters of credit, securities, bank notes, bills of lading and guarantees.⁶⁵ These instruments constitute so many routes for the money to be blended back into the financial system and to be made available as legitimate earnings.⁶⁶ Such perambulation makes it virtually impossible to discern the illegal lineage of the money because it would have passed through various bank accounts, a number of businesses or different jurisdictions in order to remove the last whiff of its sordid derivation. In a word, integration is about manoeuvring the laundered money through a circuit of transactions at the end of which it can be invested freely and spent with impunity.

63 Richards *Transnational Criminal Organizations* 58. Legal property flipping is a way of making a substantial profit from the rapid purchase, renovation and resale of a property. The reverse property flip is an illegal profit-making device and fits easily into a money laundering scheme.

64 Hinterseer 1997 *JMLC* 155; Moodley 2008 *repository.up.ac.za*; and Richards *Transnational Criminal Organizations* 49.

65 Richards *Transnational Criminal Organizations* 50.

66 Van Jaarsveld 2004 *SA Merc LJ* 694.

An attorney's practice can become implicated easily in the process of integration. For example, if a client has made a tainted fee deposit into an attorney's trust account and the attorney has rendered the services as instructed by the client, he is entitled to transfer the fees from his trust account into his business account. Once so transferred, the fees become part of the attorney's legitimate income and can be utilised by him for such items as salaries, rental and telecommunications, and for his own subsistence. Here the attorney himself is the beneficiary of the integration process. A crooked client can benefit in various ways as well, in that any dodgy deposit into an attorney's trust account by such a client stands to emerge free of any criminal blemish. Characteristically, after a period of time has elapsed, and with no or minimal services having been rendered, the client terminates the mandate of the attorney, who then refunds the money or the bulk of it. Such a deposit may be part of a smurfing-type scheme⁶⁷ devised by a crime syndicate in terms of which various attorneys are furnished with identical instructions in respect of fictitious transactions to be performed sometime in the future and separate deposits are made into each attorney's trust account, for later refunding. Any deposit so refunded from an attorney's trust account is decontaminated and may be used by the erstwhile client with complete licence. And if the money was invested by the attorney in terms of section 78(2A) of the *Attorneys Act* the client will enjoy a double benefit, in the sense that the money has been cleaned and it has increased.

Again, conveyancing transactions lend themselves readily to integration schemes. The serial registration of one property in the names of a number of different purchasers in a composite conveyancing transaction⁶⁸ has the effect that, once registration in the name of the last purchaser has been effected, the dirty money with which the scheme commenced is clean and ready to be used in the mainstream economy. The same applies to the flipping of a property which results in the purchaser making a hefty profit.⁶⁹ The profit in question, albeit generated by unconscionable manipulation, is perfectly legal for having passed through an attorney's trust account, and the profiteer is at liberty to transact with it as he

67 See fn 32 above.

68 See fn 56 above.

69 See the discussion of flipping in section 5 above.

pleases. The success of both serial registrations and reverse flips depends crucially upon the trust account of the attorney being available as a conduit of integration.

It is apposite to conclude this section with the observation that the tarnished property transaction is in many ways a money laundering archetype. Usually it telescopes the stages of the money laundering process: placement is achieved by the dirty money being deposited into the attorney's trust account; layering occurs when the attorney disburses the dirty money to fund the various aspects of the property transaction; and integration is effected when the property has been transferred from seller to purchaser and becomes a legitimate asset at the disposal of the money launderer. Money laundering which is accomplished via a property transaction through an attorney's trust account is marked usually by an economy of device since the process is focused upon a single *situs*.

It would appear that money launderers are rather partial to the material facticity of property and routinely rely upon the skills of lawyers to devise property transactions through which to launder criminal proceeds. Property transactions are attractive to money launderers because they invariably involve the movement of large amounts of money, from a few hundred thousand to millions of rands. Property transfers are staples for conveyancers who attend to thousands of registrations of properties and mortgage bonds in the various Deeds Offices across South Africa on a daily basis. Such transfers are regulated minutely and seldom attract attention for being suspicious, making them a typology of choice for money launderers. A lawyer who is willing to use property transactions as a façade for channelling huge amounts of illegally obtained money through his trust account does much to advance the cause of the money launderer.

The FATF has included lawyers amongst those professionals who have become the common elements in complex money laundering schemes.⁷⁰ The truth of this classification is self-evident. Lawyers can become complicit in money laundering in all its stages. The attorney's trust account has proved to be an excellent haven for hiding illicit gains from the prying eyes of law enforcement officials. Although the

70 FATF Report on Money Laundering Typologies 14.

different law societies in South Africa supervise and oversee the handling of trust monies by practitioners, they generally do not enquire after the source of these monies. A chartered accountant must do an annual trust audit and the report must be submitted to the relevant law society.⁷¹ However, the audit is concerned with assessing the practitioner's level of compliance with the requirements stipulated for the conduct of the trust account. It is not a reporting requirement for the practitioner to divulge the origin of monies in his trust account. It is precisely this lack of transparency which makes the attorney's trust account a target of choice for money launderers, and which can inculpate the attorney in any or all of the stages of the money laundering process.

6 Prosecuting lawyers as launderers

There are very few South African cases in which attorneys have been prosecuted for money laundering. This well may indicate that South African attorneys are honest generally and have resisted successfully the dangers and lures of becoming money launderers or becoming entangled in the designs of money launderers. Alternatively, the dearth of cases may mean that money launderers have not turned their attention to the trust accounts of South African attorneys on any significant scale yet. There is also, of course, the cynic's perspective in terms of which South African attorneys are rarely prosecuted for money laundering not because they are vigilant gatekeepers but because they are adept at concealing their money laundering shenanigans from auditors and other prying eyes. Be that as it may, at this juncture there appear to be only two reported South African cases in which attorneys faced criminal charges founded upon their participation in a money laundering scheme.

In the case of *Price*,⁷² the attorney was charged with fraud in connection with the theft and laundering of two cheques. Price was part of a crime syndicate which stole two cheques drawn by Mercantile Registrars Limited, one for the amount of R325 000-00 and the other for the amount of R1 620 000-00. The first stolen cheque was

71 The various law societies have rules which require their members to undergo an annual audit in order to apply for a Fidelity Fund Certificate. See, for example, Rule 13 of the Rules of the Cape Law Society (Law Society of the Cape of Good Hope 2007 www.capelawsoc.law.za) and Rule 70 of the Rules of the Law Society of the Northern Provinces (Law Society of the Northern Provinces 2012 www.northernlaw.co.za).

72 *S v Price* 2003 2 SACR 551 (SCA).

deposited into Price's trust account at Standard Bank. The cheque was deposited with Price's knowledge, and was cleared for payment into his account by a syndicate member who worked for Standard Bank. Another member of the syndicate intercepted and destroyed the paid cheque when it was returned to Mercantile Registrars Limited.

After the money had been paid into his trust account, Price drew a trust cheque for the amount of R323 632-00,⁷³ payable to Tjeriktik Eiendomsbeleggings Bpk. This cheque was deposited into a bank account by yet another syndicate member and the bulk of the money was withdrawn periodically.⁷⁴ Price undertook a layering exercise in respect of the money by creating a dummy file in the name of the EM Gorton Trust. He used this dummy file to document fraudulently that one of the trustees had deposited the cheque into his trust account for a property transaction, that the transaction had fallen through and that, at the trustee's request, he had refunded the money to Tjeriktik Eiendomsbeleggings Bpk.⁷⁵

The second stolen cheque was not deposited into Price's trust account. Instead, it was deposited into the trust account of Stephen Martin, a tyro attorney whom Price had recruited to help wash the stolen funds. Martin was supposed to be paid R25 000-00 for accepting the R1 620 000-00 into his trust account as payment for a fake business transaction and then repaying the money (to the second appellant, a certain Labuschagne) by way of an uncrossed trust cheque when the transaction supposedly collapsed.⁷⁶ However, Martin later withdrew from the scheme and he was then instructed to issue a trust cheque in favour of Good Hope Financial Services Trust for the full amount of R1 620 000-00. In the meanwhile, Martin had reported the scheme to the police, and when Price and his cohorts went to collect the cheque from Martin, they were arrested.⁷⁷ Thereby, the loss of the R1 620 000-00 was averted.

73 Price held back R1 368-00 (R1 200-00 plus VAT) as a fee.

74 By the time the scheme was exposed, all but R8 964-01 of the R323 632-00 had been withdrawn.

75 Price was supposed to have been paid R100 000-00 for his role in the scheme, but apparently he was swindled by the syndicate and ended up with only the fee of R1 200-00 (plus VAT).

76 The idea was that Labuschagne would cash the uncrossed trust cheque at a bank.

77 *S v Price* 2003 2 SACR 551 (SCA) para 14.

Price was charged with and convicted of two counts of fraud. He received a prison sentence of 15 years on each count (to run concurrently)⁷⁸ and was ordered to pay R326 140-10 to Standard Bank as compensation for its loss in respect of the first cheque.⁷⁹ In dismissing Price's appeal against his sentence, Farlam JA held that:⁸⁰

The crime was carefully planned. Its execution involved the co-operation of a number of accomplices. In addition, the use of an attorney's trust account for what amounts to the laundering of the proceeds of crime is an important aggravating factor. Conduct of this kind by a practising attorney is reprehensible and cannot be tolerated.

The trial judge had commented similarly on Price's involvement in the criminal enterprise, and on his attempt to corrupt a junior colleague:⁸¹

He was part of a syndicate. He knew exactly how the crimes were to be committed. He related to attorney Martin that a person would steal a cheque and that the cheque would then be deposited into a trust account, and further steps would be taken. On one occasion accused No 1 made his trust account available for the stolen cheque. He wrote out a cheque and handed it to a co-conspirator ... On the second occasion accused No 1 involved a friend who happened to be a junior attorney ... His profession as an attorney required of him the utmost honesty. A breach thereof puts the crime in an even more serious light.

The case of *Price* is a classic example of the way in which an attorney's trust account can be transformed into an instrumentality of money laundering. The syndicate in which Price was involved was extremely well organised: it had the capacity to steal cheques, clear them for payment, and then intercept and destroy the paid cheques when they were returned to the drawer. But the entire scheme turned upon the availability of his trust account through which to wash clean the money so acquired. In this sense, the case highlights the attractions which an attorney's trust account holds for money launderers and the dangerous temptations for attorneys, which accompany the prospects of easy money.

The case of *Pillay*⁸² arose out of a robbery by an armed gang, some of whom were police officers. The robbery netted a massive amount of R31 million. Pillay was one

78 These were minimum sentences prescribed by s 51(2)(a)(i) of the *Criminal Law Amendment Act 105 of 1997*.

79 The compensation order was made in terms of s 300 of the *Criminal Procedure Act 51 of 1977*.

80 *S v Price* 2003 2 SACR 551 (SCA) para 32.

81 Cited by Farlam JA in para 23.

of nineteen accused facing charges of robbery with aggravating circumstances. He was convicted eventually as an accessory after the fact to robbery on the strength of his having facilitated the laundering of a portion of the proceeds of the robbery. Pillay did not participate in the robbery itself. However, a few months after the robbery he acted as the attorney for one of the robbers, a police sergeant by the name of Hanujayam Mayadevan, in the purchase of a night club for R1,2 million. Mayadevan paid the purchase price in cash, with money snatched in the robbery. The state alleged that Pillay was aware of the criminal provenance of the money and that he had helped to launder it, thereby incurring accessorial liability. He drafted two deeds of sale: the first reflected a purchase price of only R250 000-00 and did not identify any purchaser; the second recorded a purchase price of R420 000-00 and identified one Logan Chetty as purchaser. According to the court, Pillay's deflation of the price and evasion about the identity of the purchaser were "obviously consistent with an attempt to exclude any reference to Mayadevan and to conceal the large amount of money involved".⁸³ However, Pillay claimed that the actual purchase price of R1,2 million was to be paid by way of a deposit of R400 000-00 and three instalments, two of R250 000-00 each and one of R300 000-00, to settle the balance of R800 000-00. He averred that a deed of sale to this effect had been signed by the parties, but was unable to produce it.

A chartered accountant who performed an audit of Pillay's trust account revealed that he had received three cash payments in quick succession into the said account, which he credited to the Embassy Night Club.⁸⁴ The three payments amounted to R420 000-00, which coincided with the purchase price in the second deed of sale. According to Pillay, he paid the R420 000-00 by way of trust cheques to the six members of the close corporation which owned the night club.⁸⁵ The remainder of the purchase price was paid by Mayadevan in cash instalments. However, these did not pass through Pillay's trust account as had the R420 000-00. The cash was delivered to his office, where the sellers were in attendance. The money was handed

82 *Pillay v S* [2004] 1 All SA 61 (SCA).

83 *Pillay v S* [2004] 1 All SA 61 (SCA) para 60.

84 The first amount was R249 050-00; the second was R169 850-00; and the third was R1 200-00.

85 *Pillay v S* [2004] 1 All SA 61 (SCA) para 46.

to the sellers who divided it immediately amongst themselves. All of the instalments remained unreceipted. The court described this procedure as "bizarre".⁸⁶

In the result, Pillay was adjudged to have been aware that the money paid by Mayadevan was part of the illegal proceeds of the robbery. What is more, Pillay himself guaranteed payment of the balance of R800 000-00 by signing an acknowledgment of debt for that amount in favour of the sellers. The court inferred that "he must have been extremely confident that the money would be forthcoming", and hence that he was "aware of its source".⁸⁷ The legal arrangements in terms of which Mayadevan was able to purchase the Embassy Night Club anonymously at the deflated price of R420 000-00 amounted to a scheme to launder R1,2 million emanating from the robbery. Pillay had used his trust account and his offices to implement this scheme, thereby assisting his client to replace a black asset with a legitimate one. The scheme was designed to help his client evade justice, leading to his conviction as an accessory after the fact to robbery and a sentence of five years' imprisonment. As in *Price*, here too we see an attorney, with malice aforethought, transforming his trust account from a guarantee of financial propriety into a mechanism of criminal improbity.

In both *Price* and *Pillay* the attorneys were not charged with money laundering *per se*. The remainder of this section will consider two unreported cases in which lawyers did face charges as launderers. In the case of *Rossouw*,⁸⁸ money laundering was one of a number of charges brought against an attorney.⁸⁹ The charge related to Rossouw's alleged participation in the financial stratagems of a certain Eben Greyling, one of his clients.⁹⁰ The state's case against Rossouw was founded, *inter alia*, upon the following averments. Greyling ran the Gallagher Fund, an offshore investment fund operating out of Hong Kong. He sought to solicit investments from

86 *Pillay v S* [2004] 1 All SA 61 (SCA) para 55.

87 *Pillay v S* [2004] 1 All SA 61 (SCA) para 69.

88 *S v Rossouw*, Unreported, Wynberg Regional Court, Case Number B1679/09 (SHD163/09).

89 The money laundering charge was one of five different charges. The other four were fraud, contravention of s 11(1) of the *Bank Act* 94 of 1990, contravention of s 2(a) of the *Financial Institutions (Protection of Funds) Act* 28 of 2001 and contravention of Regulation 10(1)(c) of the *Exchange Control Regulations* as promulgated in terms of the *Currency and Exchanges Act* 9 of 1933. There was also a sixth default charge of conspiracy to commit the five main crimes.

90 Greyling negotiated a plea bargain independently of Rossouw and accepted a sentence of eight years' imprisonment, three of which were suspended for five years. He also agreed to testify against Rossouw.

South Africans. Rossouw acceded to Greyling's request to have South African investors in the Gallagher Fund deposit their investments into his trust account. An amount of some R11,5 million was deposited into Rossouw's trust account by local investors in terms of this arrangement. According to the state, these deposits were received fraudulently, not as *bona fide* investments, but as contributions to a pyramid scheme allegedly designed to enrich Greyling and Rossouw personally. There was also an attempt to legitimise the scheme by incorporating the Gallagher Fund as Gallagher Corporate (Pty) Ltd, in which Rossouw acted as the intermediary between Greyling and the person who effected the conversion. The state alleged that both Greyling and Rossouw appropriated for themselves funds invested in the scheme.⁹¹ Like all pyramid schemes, this one folded when it could no longer attract investments. Rossouw tried to placate fearful investors by explaining that the delay in the repayment of their funds had been occasioned by a problem in Hong Kong.

The money laundering charge preferred against Rossouw on the strength of these allegations was formulated in terms of section 5 of the Prevention of Organised Crime Act 121 of 1998. The section provides that:

Any person who knows or ought reasonably to have known that another person has obtained the proceeds of unlawful activities, and who enters into any agreement with anyone or engages in any arrangement or transaction whereby—
(a) the retention or the control by or on behalf of the said other person of the proceeds of unlawful activities is facilitated; or
(b) the said proceeds of unlawful activities are used to make funds available to the said other person or to acquire property on his or her behalf or to benefit him or her in any other way,
shall be guilty of an offence.

Put briefly, section 5 criminalises the conduct of one person which is aimed at assisting another person to retain or enjoy the proceeds of that other's unlawful activities. In other words, the section renders criminal efforts by one person to launder the proceeds of the unlawful activities of another person. By relying upon section 5, the state was alleging that Rossouw had assisted Greyling to retain and benefit from the proceeds of his fraudulent scheme by making his trust account available to launder said proceeds.

91 Greyling apparently used the appropriated funds to buy an expensive property, a helicopter and two racing cars.

However, despite being charged, Rossouw was never tried. The state had prevaricated unduly in commencing with the prosecution, and Rossouw's attorney had scheduled an application for a permanent stay of prosecution. However, the state failed to file its opposition to the application timeously, and requested a further postponement. Naturally, the defence objected. The court brought proceedings to an end by striking the matter off the roll for unreasonable delay.⁹²

In the case of *Hattingh*,⁹³ an attorney (who was also a conveyancer) faced a raft of 66 charges of fraud, theft and money laundering arising from a property scheme in which he purloined a total sum of R55 million rand from four prominent South African banks, namely, ABSA, Standard Bank, First National Bank and Nedbank.⁹⁴ The scheme included Hattingh's registering properties which he acquired in the names of his relatives, and registering two mortgage bonds from two different banks against the same property. The scheme was apparently so complex that in certain cases of double-bonded properties it was not possible to establish the identity of the second mortgagor. The charge of money laundering emanated from the fact that he had used his trust account as a conduit for the purloined funds, depositing them into the account when he first received them from the banks and then later withdrawing them for personal use. In other words, he had operated his trust account as a vehicle through which to launder the proceeds of his unlawful activities. He has the distinction of being a self-interested launderer, having committed fraud and theft himself and then washing his loot through his trust account. Hattingh was convicted of all charges and sentenced to an effective 20 years behind bars, with the money laundering conviction carrying a suspended sentence of eight years' imprisonment.⁹⁵

It is not possible to draw any firm conclusions from the four cases discussed above and it would be patently unwise to attempt to do so. As intimated earlier, the paucity of cases may be interpreted optimistically or cynically. However, neither interpretation negates the need for sustained vigilance by attorneys, as gatekeepers,

92 There remains the theoretical possibility that the state can request the matter to be enrolled again.

93 *S v Hattingh*, Unreported, Bloemfontein Regional Court, Case Number 17/518/10. Regrettably, the court papers pertaining to this case were not available, and the discussion of the case is thus based on information published in the media.

94 Stuurman 2010 www.publiceyenews.com; and Van Rooyen 2010 www.volksblad.com.

95 Stuurman 2010 www.publiceyenews.com; and Van Rooyen 2010 www.volksblad.com.

about the integrity of their trust accounts. If they demonstrate anything, the cases canvassed in this section confirm the persistent perils which attorneys have to negotiate in order to protect their trust accounts from criminal contamination.

7 Conclusion

The money laundering industry is predatory, and its members are on the lookout always for new avenues through which to legitimise their black products. There is little doubt that of late the attorney's trust account has become an alluring prospect for money launderers. Certainly, no money launderer is likely to forgo an opportunity to use the attorney's trust account as a mechanism through which to implement his prime objective of decontaminating black money. The direct implication of their trust accounts being in the cross-hairs of money launderers is that attorneys face persistent possibilities of being drawn into money laundering schemes, wilfully or not. Perforce, therefore, it is incumbent upon the honest attorney to be vigilant about the threat posed by money launderers and to be diligent about his responsibilities as gatekeeper to repel advances from them.

The legislature has sought to ensure that attorneys do fulfil their gatekeeping duties by imposing upon them the reporting obligations contained in sections 28 and 29 (as well as those to be promulgated in section 31) of FICA.⁹⁶ These obligations may be onerous and strain considerably the confidentiality which is the centrepiece of the attorney-client relationship upon which every law practice is founded. Be that as it may, the legislature evidently considers money laundering to be a greater malignity than any trespass which these statutory obligations may constitute upon the existential imperative of lawyering. The reporting obligations are designed to enlist attorneys as anti-money laundering gatekeepers, and reluctance or resistance is threatened with serious state punishment.

There is little to be said for the knavish attorney who elects to become a launderer himself or to place his trust account at the disposal of launderers, except perhaps to hope that he is exposed, prosecuted and convicted, as has happened already to a

⁹⁶ The constitutionality of these provisions is debatable. However, the question is too vast in its scope to be considered and adjudged within the confines of this article.

handful of his brethren. However, if the scrupulous attorney does as the law requires he will probably avoid becoming imbricated unwittingly in the artifices of money launderers, and thereby maintain the sacrosanctity of his or her trust account.

Bibliography

Bussenius 2004 *German LJ*

Bussenius A "Money Laundering by Defence Counsel - The Decision of the Federal Constitutional Court" 2004 *German Law Journal* 1045-1055

De Koker "Money Laundering in South Africa"

De Koker L "Money Laundering in South Africa" in Goredema C (ed) *Profiling Money Laundering in Eastern and Southern Africa* (Institute for Security Studies Pretoria 2003)

FATF *Mutual Evaluation Report*

Financial Action Task Force *Mutual Evaluation Report by Eastern and Southern Africa Anti-Money Laundering Group on Anti-Money Laundering and Combating the Financing of Terrorism* (Paris FATF 2009)

FATF *Recommendations*

FATF International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation - FATF Recommendations (Paris FATF 2012)

FATF *Report on Money Laundering Typologies*

Financial Action Task Force *Report on Money Laundering Typologies 2000-2001* (Paris FATF 2001)

Hinterseer 1997 *JMLC*

Hinterseer K "An Economic Analysis of Money Laundering" 1997 *JMLC* 154-163

Hugel and Kelly 2002 *JMLC*

Hugel P and Kelly J "Internet Gambling, Credit Cards and Money Laundering" 2002 *JMLC* 57-65

Itsikowitz "Legal Professional Privilege"

Itsikowitz A "Legal Professional Privilege/Intermediary Confidentiality: The Challenge for Anti-Money Laundering Measures" in Goredema C (ed) *Money Laundering Experiences* (Institute for Security Studies Pretoria 2006)

Joyce 2001 *JMLC*

Joyce BP "E-diligence: Money Laundering Risks in the Electronic Arena" 2001 *JMLC* 146-149

Lewis *Legal Ethics*

Lewis E *Legal Ethics: A Guide to Professional Conduct for South African Attorneys* (Juta Cape Town 1982)

Madinger *Money Laundering*

Madinger J *Money Laundering: A Guide for Criminal Investigators* 3rd ed (CRC Press Boca Raton, FL 2011)

Nel *Conveyancing*

Nel H Jones: *Conveyancing in South Africa* 4th ed (Juta Kenwyn 1991)

Phillipsohn 2001 *JMLC*

Phillipsohn S "The Dangers of New Technology-Laundering on the Internet" 2001 *JMLC* 87-95

Ping 2004 *JMLC*

Ping HE "New Trends in Money Laundering - From the Real World to Cyberspace" 2004 *JMLC* 48-55

Richards *Transnational Criminal Organizations*

Richards J *Transnational Criminal Organizations, Cybercrime, and Money Laundering* (CRC Press Boca Raton, FL 1999)

Shepherd 2002 *Probate & Property*

Shepherd K "USA Patriot Act: Surprising Implications for Transactional Lawyers" 2002 *Probate & Property* Sep 26-30

Van der Westhuizen 2004 *De Rebus* (1)

Van der Westhuizen M "Interpreting Section 29 and the Obligation to Report: Part 1" 2004 *De Rebus* Apr 37-38

Van der Westhuizen 2004 *De Rebus* (2)

Van der Westhuizen M "Interpreting Section 29 and the Obligation to Report: Part 2" 2004 *De Rebus* May 37-38

Van Jaarsveld 2004 *SA Merc LJ*

Van Jaarsveld IL "Following the Money across Cyber Highways: A Herculean Task or International Challenge? Some Thoughts on Money Laundering on the Internet" 2004 *SA Merc LJ* 685-694

Weatherford *History of Money*

Weatherford J *The History of Money* (Three Rivers Press New York 1997)

Register of cases

Hirschowitz Flionis v Bartlett 2006 3 SA 575 (SCA)

Pillay v S [2004]1 All SA 61 (SCA)

S v Hattingh, Unreported, Bloemfontein Regional Court, Case Number 17/518/10

S v Price 2003 2 SACR 551 (SCA)

S v Rossouw, Unreported, Wynberg Regional Court, Case Number B1679/09
(SHD163/09)

Register of legislation

Attorneys Act 53 of 1979

Code of Laws of the United States of America (United States Code)

Criminal Law Amendment Act 105 of 1997

Criminal Procedure Act 51 of 1977

Deeds Registries Act 47 of 1937

Financial Intelligence Centre Act 38 of 2001

Prevention of Organised Crime Act 121 of 1998

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

Register of international instruments

United Nations Convention against Corruption (2003)

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

United Nations Convention against Transnational Organised Crime (2000)

African Union Convention on Preventing and Combating Corruption (2003)

Register of Internet sources

FATF 2009 www.fatf-gafi.org

Financial Action Task Force 2009 Members and Observers: South Africa
www.fatf-gafi.org/countries/s-t/southafrica/ [date of use 18 Jun 2012]

FIC 2001 www.fic.gov.za

Financial Intelligence Centre 2001 Regulations in terms of the Financial Intelligence Centre Act
www.fic.gov.za/DownloadContent/RESOURCES/GUIDELINES/regulations.pdf
[date of use 22 Nov 2012]

FIC 2010 www.fic.gov.za

Financial Intelligence Centre 2010 Guidance Note 05 on Section 28 of the Financial Intelligence Centre Act, Act 38 of 2001
www.fic.gov.za/DownloadContent/GuidanceNotes/Guidance%20Note%205.pdf
[date of use 25 Jun 2012]

FIC 2012 www.fic.gov.za

Financial Intelligence Centre 2012 Consultation Document Relating to the Commencement of Section 31 of the Financial Intelligence Centre Act 38 of 2001 as Amended

www.fic.gov.za/DownloadContent/NEWS/PRESSRELEASE/s31%20implementation-consultation%20document%20for%20website-mar2012.pdf [date of use 25 Jun 2012]

Law Society of the Cape of Good Hope 2007 www.capelawsoc.law.za

Law Society of the Cape of Good Hope 2007 Rules of the Law Society of the Cape of Good Hope www.capelawsoc.law.za/docs/Clsrules2007.pdf [date of use 26 Jun 2012]

Law Society of the Northern Provinces 2012 www.northernlaw.co.za

Law Society of the Northern Provinces 2012 Rules of Law Society of the Northern Provinces
www.northernlaw.co.za/images/stories/files/rulings/LSNP_RULES._AS_PER_23_FEB_2012.pdf [date of use 26 Jun 2012]

LAWPRO 2003 www.practicepro.ca

LAWPRO 2003 Respecting the "Trust" in Trust Account
www.practicepro.ca/LAWPROMag/march2003_trusts.pdf [date of use 18 Jun 2012]

Mabanga and Pile 2008 secure.financialmail.co.za

Mabanga T and Pile J 2008 Crackdown on Dirty Money
secure.financialmail.co.za/08/0530/moneyinvest/bmoney.htm [date of use 18 Jun 2012]

Moodley 2008 repository.up.ac.za

Moodley M 2008 The Extent and Security Implications of Money Laundering in South Africa

repository.up.ac.za/bitstream/handle/2263/8679/Moodley_Extent%282008%29.pdf?sequence=1 [date of use 27 Jun 2012]

Stuurman 2010 www.publiceyenews.com

Stuurman J 2010 Property Schemer up for Sentencing

www.publiceyenews.com/2010/11/05/property-schemer-up-for-sentencing/

[date of use 18 Jun 2012]

Van Rooyen 2010 www.volksblad.com

Van Rooyen M 2010 Juan Hattingh Skuldig Bevind oor R55 m

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List of abbreviations and acronyms

AU	African Union
CTR	Cash threshold report/reporting
FATF	Financial Action Task Force
FIC	Financial Intelligence Centre
FICA	<i>Financial Intelligence Centre Act</i>
JMLC	Journal of Money Laundering Control
POCA	<i>Prevention of Organised Crime Act</i>
POCDATARA	<i>Protection of Constitutional Democracy against Terrorism and Related Activities Act</i>
SA Merc LJ	South African Mercantile Law Journal
STR	Suspicious transaction report/reporting
USC	<i>United States Code</i>
UNCTOC	United Nations Convention against Transnational Organised Crime
UNCAC	United Nations Convention against Corruption

CAVE PECUNIAM: LAWYERS AS LAUNDERERS**AJ Hamman*****RA Koen******SUMMARY**

The attorney's trust account is an enticing prospect for criminals seeking ways to launder money acquired illegally, and the attorney whose trust account is abused in this way stands to be branded and punished as a money launderer. The overall aim of the article is to identify the dangers which money launderers pose to attorneys and to highlight the need for vigilance in the face of these dangers. It analyses the anti-money laundering reporting obligations imposed on attorneys by the Financial Intelligence Centre Act and considers impact of these obligations upon the attorney-client relationship. Some of the ways in which a law practice may become implicated in the placement, layering and integration stages of the money laundering process are discussed, and cases which deal with attorneys' involvement in money laundering schemes are presented.

KEYWORDS: trust account; attorneys; money laundering; FICA; confidentiality; legal professional privilege; reporting obligations; cash threshold; suspicious transaction; tipping off

* Abraham Hamman. BA, LLB, LLM (UWC). Lecturer in the Department of Criminal Justice and Procedure, Faculty of Law, University of the Western Cape. Email: ajhamman@uwc.ac.za.

** Raymond Koen. LLM, PhD (UWC). Associate Professor in the Department of Criminal Justice and Procedure, Faculty of Law, University of the Western Cape. Email: rkoen@uwc.ac.za.