

COSATU & SACTWU Submission:

General Laws (Anti-Money Laundering & Combating Terrorism Financing) Amendment Bill

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COSATU



SACTWU

Submitted to:

**Standing Committee: Finance
National Assembly
Parliament**

Republic of South Africa

1. INTRODUCTION

The Congress of South African Trade Unions (COSATU) and its affiliate, the Southern African Clothing and Textile Workers' Union (SACTWU), welcome government's tabling of the General Laws (Anti-Money Laundering and Combatting Terrorism Financing) Amendment Bill (GLAB) at the National Assembly.

COSATU and SACTWU welcome the Bill and as a positive step forward by government to address gaps and weaknesses in our existing legislation which hamper the nation's ability to deal with money laundering and terrorism financing and to ensure that South Africa is able to avoid a consequential grey listing if we fail to do so.

Whilst COSATU and SACTWU support the objectives and the necessary interventions provided for in the Bill, we are concerned that the Bill in some instances is not sufficiently clear enough with regards to the definition and issues of beneficial ownership and the modalities for disclosing it and to whom.

We are equally concerned with regards to government's ability and readiness to implement the various provisions provided for in the Bill once it comes into effect.

Our proposals to amend the Bill deals largely with the definition of beneficial ownership and sections in the Companies Act. Our comments also take into account our experience of the Nedlac Task Team on the Companies Amendment Bill, which concluded in 2021.

2. COSATU AND SACTWU SUPPORT FOR THE BILL'S OBJECTIVES

South Africa has felt the consequences of treating corruption, state capture, tax evasion, money laundering and the financing of terrorism with kid gloves. South Africa is only now beginning to turn the corner in the fight against these cancers, and even this will take some time to overcome.

In a very short space of time, corruption and state capture exploded across the state. This has cost the fiscus billions of Rands lost to criminality, it has meant billions more spent on bail outs for collapsing State Owned Enterprises and municipalities.

This has diverted funds needed for public services that workers, the poor and the economy depend on.

This has forced the state to raise taxes further bleeding the salaries of workers and suppressing economic growth.

Many workers have lost their jobs because of this pandemic of criminality from the 1500 at SA Express to 8000 at SAA to a possible 6000 at the Post Office. Workers at Denel spent 18 months without pay. Many municipal workers have been sent home for months at a time with no pay. Public servants were denied their due increases in 2020 and received a below inflation increase of sorts in 2021.

Austerity budget cuts as a consequence further stifle an economy still struggling to recover from Covid-19.

South Africa has a serious problem with money-laundering. Many gangs in the Cape Flats and elsewhere routinely buy legitimate companies, e.g. car dealerships, solely for the purposes of cleaning money earned from criminal activities.

Many corrupt politicians and leaders of organised crime from the Balkans to elsewhere in the continent have used gaps in South Africa's financial laws to hide and launder ill-gotten funds here.

Whilst the threats of terrorism and terrorism financing may not be at the forefront of public attention, they are still serious challenges for South Africa.

South Africa experienced real problems of domestic terrorism in the run up to the 1994 democratic elections from right wing extremists opposed to the elections and later in the late 1990s during the conflicts between PAGAD and gangs in the Cape Flats.

Terrorists internationally have sought to exploit gaps in South Africa's criminal and financial legislation and infrastructure as well.

The United Nations have identified the framework and requirements for member states to contribute towards dealing with the threats of money laundering and terrorism financing. Any member state who fails to do so will be grey listed.

This will come with consequences. Not only administrative restrictions but more critically it will make it much more difficult to attract domestic and foreign investors who will be reluctant and at times barred from investing in a market deemed to be grey listed.

This is a scenario that workers struggling with a stagnant economy, an unemployment rate of 44%, dwindling manufacturing industries, a flood of cheap imports, capital flight, etc. simply cannot afford.

Nor can we afford to send a signal to South Africa or internationally that we are soft on crime.

COSATU and SACTWU support the objectives of the Bill. They are a welcome response by government to address critical gaps in our legislative framework.

COSATU and SACTWU in particular welcome provisions that seek to:

- Standardise provisions for the disqualification of delinquent directors and trustees.
- Clarify categories of domestic and foreign politically exposed persons, and prominent influential persons.
- Strengthen the mandate and responsibilities of the Financial Intelligence Centre.
- Provide for enhanced roles and responsibilities for the Auditor-General and the South African Revenue Service.

- Delineate responsibilities and accountability of the financial institutions.
- Ensure synergy between our legislative framework and our commitments to the United Nations' resolutions.

2.1 Not a Private Matter

The enhanced transparency provisions in the Bill are motivated by our possible grey-listing. But it is also based on the recognition that corporate activity has wide social impact, which is why the Companies Act, for instance, already grants strong rights of access to a broad range of company information.

This was recognised in the case of *Bernstein and Others v Bester and Others*, 1996 when the Constitutional Court held as follows:

“The establishment of a company as a vehicle for conducting business on the basis of limited liability is not a private matter. It draws on a legal framework endorsed by the community and operates through the mobilisation of funds belonging to members of that community. Any person engaging in these activities should expect that the benefits inherent in this creature of statute will have concomitant responsibilities. These include, amongst others, the statutory obligations of a proper disclosure and accountability to shareholders.”

On the Daily Maverick website on 24 October 2021, amaBhungane Advocacy embroidered on this:

“The gist of the sentiment is that while companies may be formed to benefit certain individuals, they are a construct rooted in communities. They are imbued with limited legal liability, which gives people the freedom to use them as a means to test business ideas without necessarily risking personal ruin should they fail – risks that are, to some extent, borne by the community. In exchange for this advantage, companies are not entitled to remain entirely private. This important principle should not be forgotten when engaging with the Bill. While it may introduce new compliance burdens, these are necessary in service of a greater aim.”

Companies' conduct has an impact on customers, workers, government and the communities they operate in. These groups need to be able to understand who actually owns companies.

3. PROPOSED AMENDMENTS

While COSATU supports the objectives of the Bill and understands the urgency to process it, it is important to ensure that this Bill does not only place a bandage over the deficiencies identified by the Financial Action Task Force (FATF).

We need to make changes that will help us to continue to fight corruption and ensure similar problems do not arise in the future. This cannot just be a box-ticking exercise but needs to be sustainable.

We therefore propose some changes to the Bill.

3.1 The Companies Act definition

In this section, we deal with the definition of beneficial ownership inserted by the Bill in the Companies Act, specifically in clause 52(b).

Paragraph (b) of this definition states that the definition “includes but is not limited to a natural person”. By its internationally accepted definition, a beneficial owner should always mean a natural person and nothing else.¹

We propose the removal of this reference in section 52 to ensure the definition only refers to a natural person. The amendment to the GLAB is as follows:

Section 1 of the Companies Act, 2008, is hereby amended by the insertion after the definition of “beneficial interest” of the following definition:

“beneficial owner”—

(a) has the meaning defined in section 1(1) of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001); and

*(b) for the purposes of this Act, in respect of a company, **[includes, but is not limited to,] is** a natural person who, directly or indirectly, ultimately owns or exercises control of a company...*

Without a reference to a natural person, only the first layer of ownership may be pierced and the actual owner may never be revealed. The Bill needs to ensure all layers are pierced to find the actual natural person who benefits from the shares.

We would further propose that the Bill should only introduce a single definition of “beneficial owner” within the Financial Intelligence Centre (FIC) Act. This definition should be sufficiently broad to cater for the various scenarios within which it will be applied. Secondary legislation (such as the Companies Act, Trust Property Control Act, etc.) should not seek to alter or expand the definition as this introduces regulatory uncertainty and creates loopholes that can be exploited.

3.2 Penalties & sanctions

In the Bill, clauses 37 to 42 sets out administrative sanctions for non-compliance.

These clauses refer to the FIC Act, in which, in section 45C, a fine is capped at R10 million for natural persons and R50 million for legal entities. However, having set fines without consideration of a natural person’s net worth or a company’s turnover may result in little or no impact if the person is particularly rich or the company particularly large. This needs to be revised to take into account net worth or turnover.

¹ See for instance, Open Ownership’s guidance to states on definitions, published in July 2021.

3.3 Publishing information

The Bill attempts to improve beneficial ownership data access for law enforcement agencies by mandating the creation of various registers, including, in clause 53, a beneficial ownership register for companies within the Companies and Intellectual Property Commission (CIPC).

We note with disappointment that the Bill does not seem to seek to make beneficial ownership registers publicly available.² The Bill includes a reference in clause 53 to making annual returns available electronically but it is not clear that this would mean that such annual returns would then be publicly available.

FATF has listed the requirement of making beneficial ownership information “publicly available” in their *Guidance on Transparency and Beneficial Ownership* as part of understanding the risk associated with legal persons,³ and particularly in respect of companies’ registers.⁴

Trade unions, shop stewards, workers, civil society and journalists continue to play an important role in uncovering commercial crimes and corruption.

By making beneficial ownership information publicly available, these groups and the public in general can continue to assist in the fights against tax evasion and corruption. This will help to effectively implement a beneficial ownership regime, not just to tick the box.

Currently the Bill, in clause 5 for example, provides for some access to information on beneficial ownership. This amendment of the Trust Property Act limits the availability of the information in the register to “any person as prescribed”, which restricts the categories of people who could access the information.

By not making registers public, we run the risk of such registers being stuck on hard drives and servers in a department somewhere without scrutiny. This would be ticking the box of collecting information but would not help to win the fight against the tax evaders and the corrupt.

Accordingly, we propose the following two amendments to the GLAB to ensure public access to beneficial ownership registers:

1. Clause 53 of the Bill proposes amendments to section 33 of the Companies Act. In order to require proactive disclosure in respect of annual returns, we recommend section 1A be amended so that it reads:

“(a) The Commission must annually publish all annual returns on a publicly accessible platform and make the annual return contemplated in subsection (1) available electronically [to any person] as prescribed to any person.”

² There are only two mentions of public registers in the Bill. They relate to a “register of persons who are disqualified from serving” as a trustee within a trust (Clause 2) or as an office-bearer within an NPO (Clause 13).

³ FATF, *Guidance on Transparency and Beneficial Ownership*, 2014, page 13

⁴ FATF, *Guidance on Transparency and Beneficial Ownership*, 2014, page 13

The Bill's formulation appears to be ambiguous as it could be read to mean that "any person" could be qualified in regulations (by for example allowing only certain classes of person access to the information). Patently, the information should be available to any person without qualification, although the information so made available may be qualified. Our proposal removes the ambiguity.

2. We also recommend an inclusion in subsection (b) to ensure public access to the information governed by this provision. so that it reads:

“(b) The prescribed requirements referred to in this section must be prescribed after consultation with the Minister of Finance and the Financial Intelligence Centre, established by section 2 of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001). The requirements provide for access for members of the public to the register.”

Except for the Companies Act, the government's central register of beneficial ownership available for use by government agencies, whether held by the CIPC or the Financial Intelligence Centre (FIC), should also be publicly available, for the reasons set out above. It is not clear to us that this is the case at the moment.

We also support the information about trusts' beneficial ownership being made available publicly. Trusts' beneficial ownership records at the Masters' offices should mirror how companies' records are envisaged in the Bill to be published and made available – annually but also when updated.

3.4 Personal data & privacy laws

Some may raise concerns about personal data protection and privacy laws when responding to our call for a public beneficial ownership registry.

In South Africa, privacy and data protection concerns are given legal effect through the Protection of Personal Information Act (POPIA). This Act may be proffered as blocking the publication of beneficial ownership data.

Yet, sections 37 and 38 of POPIA list a number of grounds on which processing of personal information is not a breach of the processing conditions in the Act. Part of those grounds include:

- where the public interest outweighs the interference with privacy rights
- national security
- prevention, detection and prosecution of offences
- fostering compliance with legal provisions
- any function carried out by a public body in terms of the law
- to protect the public against financial loss due to dishonesty, malpractice or
- other seriously improper conduct

Any one of these grounds could be relied upon to substantiate publishing beneficial ownership data when concerns are raised regarding privacy rights and data protection laws.

3.5 Exclusion of foreign companies

Section 33(2) of the Companies Act addresses external (or foreign) companies and their obligation to file an annual return. However, the amendments proposed in GLAB do not seem to subject external companies to the beneficial ownership regime.

If this is correct, the differential treatment of local and foreign companies is problematic and the exclusion of foreign companies will create a loophole. This needs to be corrected with amendments made to clause 53 of the GLAB.

3.6 Inspecting uncertificated securities registers

We propose an amendment to section 52(2) of the Companies Act, a section dealing with the inspection of uncertificated securities registers.

To ensure public access to up-to-date details of companies' securities registers, we recommend including a provision requiring the proactive publication of this data. This is not unprecedented: in the past, the central securities depository provided third-party access to uncertificated securities register data.

An amendment to section 52(2) would make that disclosure mandatory and would ensure that such disclosure is not prohibited by POPIA.

This proactive disclosure would relieve companies of the administrative burden of fielding direct requests under section 26 of the Act and does not go further than the right of access provided for in section 26(2) in respect of the content of information to which the access is permitted: it merely makes the access more immediate and effective.

It would also enhance and broaden the understanding and knowledge of ownership and allow for better checks and cross-checks of who owns listed companies – the biggest and most impactful companies in our economy. It will furthermore increase the levels of access to company ownership information, which can only be beneficial in the fight against money laundering, tax evasion and corruption.

We proposed an amendment to section 52(2), so that it reads:

*“A person who wishes to inspect an uncertificated securities register may do so [only] -
(a) Through the relevant company in terms of section 26; [and] or
(b) [in accordance with the rules of] through the central securities depository in accordance with its rules.”*

3.7 Updated records of beneficial ownership

In clause 55, the Bill proposes the addition of two subsections to section 56 of the Companies Act.

These proposed additions introduce important reporting obligations for companies in respect of their beneficial ownership information. However, these provisions do not provide for the disclosure of or access to this information. What is important about the filing of a record under subsection 12 is that it creates a real-time, updated record of a company's beneficial ownership.

This Bill has introduced the requirements for annual disclosure of beneficial ownership through the filing of annual returns under section 33, but subsection 12 of section 56 would require the filing of additional notices within a "prescribed period".

While we cannot know what that prescribed period will be until it is prescribed in terms of the Act, it seems clear that it will be more regular than annual (because of the annual requirements elsewhere in the legislation). We would argue that this should be at least quarterly.

These new sections are commendable and will enable the CIPC to collect information on beneficial ownership throughout the year without having to wait for the annual returns.

However, there is no provision for disclosure of this information or for access to that information. We therefore recommend an additional provision be added, and that the provisions be amended to read:

"(12) A company must file a record with the Commission, in the prescribed form and containing the prescribed information, regarding the natural persons who are the beneficial owners of the company, and must ensure that this information is updated by filing Notices with the Commission within the prescribed period after any changes in beneficial ownership have occurred.

(13) The Commission must make any updates received in subsection 12 available on a publicly accessible platform in the prescribed form and containing the prescribed information for publication.

(14) The prescribed requirements referred to in subsections (12) and (13) must be prescribed after consultation with the Minister of Finance and the Financial Intelligence Centre, established by section 2 of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001). The requirements must provide for access for members of the public to the register."

These amendments will create a two track-system for access to information about companies' beneficial ownership:

- through the publication by the Commission of companies' *annual* returns and
- through the publication by the Commission of updated information as and when it is received

This does not remove the rights of individuals to apply for access to information through the Promotion of Access to Information Act but creates a proactive and up-to-date record which will be accessible to any interested person.

4. CONCLUSION

COSATU and SACTWU welcome the Bill and its provisions as a positive step to ensuring that South Africa remains in compliance with its international objectives and avoid a possible grey listing.

COSATU and SACTWU believe that the provisions of the Bill, including those to ensure greater transparency of the actual owners of companies, will help to address serious gaps in our existing legislative framework and to further capacitate the state to tackle corruption, tax evasion, money laundering and terrorism financing. When company ownership is opaque, these crimes thrive.

Workers cannot afford for government to be soft on crime, in both the public and private sectors. Failure to deal with these cancers eating at the heart of the state, the economy and our fabric as a nation are dire.

Whilst COSATU and SACTWU support this important Bill, it is critical that the gaps that we have identified with regards to the definitions and provisions dealing with beneficial ownership be addressed by Parliament if the Bill is to meet its progressive objectives.

It is equally important that Treasury ensures that the relevant organs of government are provided with the necessary resources to implement the Bill once it is passed by Parliament and assented to by the President. We cannot afford for a repeat of the Sexual Offenders' Registry which went unpopulated, unnoticed and not enforced.

It will also be critical that Treasury working with other key state organs, e.g. the Auditor-General, SARS, NPA, FIC and SAPS ensure that the relevant officials are trained and capacitated to enforce the Bill's full implementation.

This will require similar cooperation and preparation with the financial institutions and other key stakeholders.

Thank you.