

COSATU & SACTWU Submission:

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

**Standing Committee:
Finance**

National Assembly

11/10/2022



Introduction

- COSATU & SACTWU welcome government's tabling of this Bill at the National Assembly.
- It is 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 SA is able to avoid a consequential grey listing.
- Whilst COSATU & SACTWU supports the Bill, we are concerned that the Bill in some instances is not sufficiently clear enough with regards to the definition and disclosing of beneficial ownership.

Support for the bill's objectives

- SA 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.
- Corruption & state capture have cost the fiscus billions of Rands lost to criminality; it has meant billions more spent on bail outs for collapsing SOEs & municipalities.
- It 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, have not received their wages and were denied increases.
- Austerity budget cuts as a consequence further stifle an economy still struggling to recover from Covid-19.

Support for the bill's objectives

- 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.

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 by the Constitutional Court in 1996:
 - *“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.”*

Amendments: definition

- By its internationally accepted definition, a beneficial owner should always mean a natural person and nothing else.
- 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.
- Clause 52: paragraph (b) of the definition of beneficial ownership states that the definition “includes but is not limited to a natural person”. We propose the removal of this reference in section 52.
- We would further propose that the Bill should only introduce a single broad definition of “beneficial owner” within the Financial Intelligence Centre (FIC) Act. 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.

Amendments: publishing info

- 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. 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, and particularly in respect of companies’ registers.
- By making beneficial ownership information publicly available, unions, shop stewards, workers, civil society and journalists 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.

Amendments: publishing info

- 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 amendments to the GLAB to ensure public access to beneficial ownership registers: clause 53 (a) and (b) of the Bill which proposes amendments to section 33 of the Companies Act, to require proactive disclosure in respect of annual returns.
- 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.

Amendments: personal data

- 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 used as an excuse to block 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
 - prevention, detection and prosecution of offences
 - fostering compliance with legal provisions
 - to protect the public against financial loss due to dishonesty, malpractice
- 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.

Amendments: updated records

- In clause 55, the Bill proposes the addition of two subsections to section 56 of the Companies Act that would require the filing of additional notices within a “prescribed period”. 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.
- 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.

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.