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A risk assessment of Beneficial Ownership Transparency in South Africa

Prepared by the Public Service Accountability Monitor (PSAM), Rhodes University and submitted to the Financial Intelligence Centre

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Definitions

BO	-	Beneficial Ownership
BODS	-	Beneficial Ownership Data Standard (developed by Open Ownership)
BOT	-	Beneficial Ownership Transparency
CW	-	Corruption Watch
DPSA	-	Department of Public Service and Administration
FATF	-	Financial Action Task Force
GDP	-	Gross Domestic Product
MER	-	Mutual Evaluation Report
ML	-	Money Laundering
NACS	-	National Anti-Corruption Strategy
NAP	-	National Action Plan
NT	-	National Treasury
PARI	-	Public Affairs Research Institute
PA	-	Prudential Authority
PEP	-	Politically Exposed Person
PRM	-	Public Resource Management
PSAM	-	Public Service Accountability Monitor
SARB	-	South African Reserve Bank
UNODC	-	United Nations Office on Drugs and Crime

Introduction

The Public Service Accountability Monitor (PSAM) was established in 1999 and works across six African countries; Zimbabwe, Tanzania, Zambia, Malawi, Mozambique and South Africa. Our aim is to contribute to addressing particular societal problems originating from systemic public resource management (PRM) failures.¹

The PSAM recognises that weak public procurement is a serious threat to public finances for governments around the globe. The OECD², UNODC³ and EU⁴ have identified public procurement as a government's number one corruption risk. Approximately 57% of foreign bribery cases prosecuted under the OECD Anti-Bribery Convention involved bribes to obtain public contracts.⁵ Analysis of the typologies of corruption in reports such as the World Bank's Puppet Masters Report⁶ (and numerous academic articles) show public procurement and spending are a major source of illicit funds.

Weak public procurement has been highlighted as a significant challenge to South Africa's development objectives, and ability to effectively manage public resources and ensure value for money.⁷ The Auditor-General's 2020-21 Public Finance Management Act (PFMA) Audit Outcomes General Report has identified and assessed the extent of "Uncompetitive or unfair procurement processes" across 383 national and provincial departments and public entities and its results in this regard are alarming and telling of the current state of play. In summary the AG [found](#) that:

The number of auditees at which we identified material non-compliance with supply chain management legislation declined from 37% in the previous year to 31%. However, this was partly because procurement decreased due to budget cuts. It is thus early days to celebrate an improvement in supply chain management compliance, especially given the many procurement failures observed during the height of the pandemic and reported in our special reports.

Uncompetitive and unfair procurement processes, inadequate contract management, and non-compliance with the legislation that requires auditees to procure certain commodities from local producers remain common. There has also been little action to address the concerns we have raised year after year about contracts being awarded to employees and their families

¹ PSAM acknowledges the complexity of societal problems and that they often interrelate and impact upon the realization of human rights.

² <http://www.oecd.org/gov/ethics/public-procurement.htm>

³ https://www.unodc.org/documents/corruption/Publications/2013/Guidebook_on_anti-corruption_in_public_procurement_and_the_management_of_public_finances.pdf

⁴ http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/organized-crime-and-human-trafficking/%20corruption/docs/acr_2014_en.pdf

⁵ <http://www.oecd.org/corruption/oecd-foreign-bribery-report-9789264226616-en.htm>

⁶ <https://openknowledge.worldbank.org/handle/10986/2363>

⁷ See page 424 of the National Development Plan 2030 -

https://www.gov.za/sites/default/files/gcis_document/201409/ndp-2030-our-future-make-it-workr.pdf

*without the necessary declarations of interest being made, and about non-compliance with the legislation that prohibits department employees from doing business with the state.*⁸

At 14% of South Africa's GDP, public procurement plays a crucial public function. Testifying at the Zondo Commission, National Treasury's acting chief procurement officer Willie Mathebula noted that in 2017 more than 50% of the annual R800 billion procurement budget was lost due to intentional abuse of the system.⁹

The cases presented in the Zondo Commission,¹⁰ include revelations of corruption that illustrate how the system has been abused for personal gain. In one instance, millions earmarked for small-scale black dairy farmers under a program called Zero Tolerance for Hunger was redirected to a family of wealthy business executives and their associates. In another, a state-owned railway relied on by millions of people to travel to work fell into "almost total ruin," according to the commission, as a result of theft and mismanagement. The country's state-run broadcaster — the main source of news for many communities — was run by a CEO who was found to have axed stories critical of the government and gave valuable contracts to former President Jacob Zuma's son. Persons at the state intelligence agency used public money and set up a parallel spy network.¹¹

More than R7.8-billion of Covid-19 procurement corruption was flagged by the Special Investigating Unit (SIU) in its final consolidated report, out of the more than R14.4-billion of contracts the unit investigated, procurement irregularities amounted to more than R7.8-billion from 2803 contracts awarded to 1 217 services providers.

Concerns with money laundering (ML) in South Africa were highlighted in the latest Financial Action Task Force (FATF) [Mutual Evaluation Report \(MER\)](#) as follows:

A reasonable number of ML convictions is being achieved but only partly consistent with South Africa's risk profile. Cases largely concern self laundering and few cases of third-party ML and foreign predicate offenses are prosecuted. The proactive identification and investigation of ML networks and professional enablers is not really occurring. Most ML convictions relate to fraud cases and there are fewer investigations and successful prosecutions relating to other high-risk crimes. In particular, ML cases relating to "State capture" have not been sufficiently pursued.

South Africa has achieved some good results proactively pursuing confiscation of criminal proceeds, particularly using civil forfeiture powers but has had less success recovering assets from "State capture" and proceeds which have been moved to other countries. Some recent cases suggest that this situation is improving.

⁸ See page 9 of

<https://www.agsa.co.za/Portals/0/Reports/PFMA/202021/Consolidated%20PFMA%20General%20Report%202020-21%20-%20FINAL%208%20December.pdf?ver=2021-12-08-114517-993>

⁹ <https://allafrica.com/stories/202110120006.html>

¹⁰ <https://www.statecapture.org.za/site/information/reports>

¹¹ <https://www.washingtonpost.com/world/2022/06/22/south-africa-corruption-zuma-gupta/>

The MER was published in October 2021, and FATF have indicated that South Africa runs the very real risk of being 'greylisted' if they do not take appropriate action to address money laundering (ML) and terrorist financing (TF) risks. South Africa became a member of FATF in 2003 and this is the fourth MER of South Africa. A "grey-listing" by the FATF may result in regulators in the US, UK, EU, Japan and China imposing restrictions on transactions between their domestic banks and South African lenders, including penalties and fines for breaching such restrictions.¹² Grey-listing could lead to capital and currency outflows, and transactional, administrative and funding costs for banks.¹³ The SARB 2022 [Financial Stability Review](#) highlighted the following as potential impacts:

- Higher transactional, administrative and funding costs for domestic banks;
- Restrictions on cross-border transactions, which will affect imports and exports, leading to a decline in GDP;
- Reputational damage to South Africa's financial system, which could have negative capital and currency implications; and
- The inability of South African banks to maintain correspondent banking relationships with offshore institutions.

The FATF's latest MER found that while South Africa has "*a solid legal framework to fight money laundering and terrorist financing*" it has "*significant shortcomings implementing an effective system, including a failure to pursue serious cases*". Across [11 ratings dealing with on the efficiency of implementing legislation](#), South Africa was scored critically weak.

Open Ownership (OO) provides four use cases of BOT in public procurement: Preventing corruption and fraud; improving service delivery through competition; verifying eligibility in strategic and preferential public procurement; and improving procurement systemically.¹⁴ While the South African government has taken some steps to try and introduce BOT, it's clear that far greater commitment, urgency and consequences are required to address weaknesses that have endured for too long. Reports from the Auditor-General and the Zondo Commission of Inquiry reveal in great detail the extent of failed leadership and how abuse of public office has occurred. High level policy efforts to try increase BOT in South Africa - with limited implementation to date - include:

- In 2015, the government endorsed the G20 Countries' High-Level Principles on Beneficial Ownership Transparency. Following this, Cabinet appointed an Inter-Departmental Committee, within the DPSA, to "work towards the harmonization and integration of the required domestic legal framework".¹⁵ This Committee was to create an integrated National Beneficial Ownership Framework, to work through the Open Government Partnership (OGP).

¹² <https://www.bloomberg.com/news/articles/2022-06-15/south-africa-may-tighten-laws-to-combat-financing-of-terrorism>

¹³ In [an open letter](#) to South Africa, former Standard Bank Group CEO highlighted a range of knock on effects from the higher cost of borrowing including further weakening of the rand, inflation spikes and increased interest rates making it more expensive to buy food, and fuel, and to buy property and cars. The impact on cross border transactions could have severe consequences for trade.

¹⁴ Open Ownership, "Beneficial Ownership Data in Procurement", 2021.

¹⁵ <https://www.opengovpartnership.org/members/south-africa/commitments/ZA0023/>

- South Africa's [Third National Action Plan](#) (NAP) 2016-2018¹⁶ included a commitment to create a Beneficial Ownership (BO) register. The main objective was described as to “[t]ake concrete actions to implement the G20 High Level Principles on Beneficial Ownership Transparency and to meet the Financial Action Task Force (FATF) standards regarding the beneficial ownership of companies and other legal arrangements such as trusts”.
- South Africa's 4th [National Action Plan 2020 - 2022](#) states “BOT remains crucial for South Africa's open governance, and stemming the tide against corruption, money laundering and illicit financial flows” and makes two commitments: “To review the progress made in the 3rd Country Action Plan and align it with the priorities of the 6th Administration, especially the work done under the Security Cluster” and “To propose the course of action on carrying forward with the BOT commitment under the OGP auspices given the sixth Administration priorities”.¹⁷

South Africa should have introduced new legislation and amendments to existing legislation - while some of these reform processes started some time ago, and have undergone several iterations – it is abundantly clear that more urgency is required to introduce significant reforms to ensure that weaknesses and gaps are more meaningfully addressed, funds are better used and accounted for and the FATF grey listing avoided. Reform processes related to the following Bills are especially in need of greater attention:

- The Companies Amendment Bill
- The Public Procurement Bill

The PSAM note that greater **transparency** is a key requirement for beneficial ownership registries to be effective at combatting corruption facilitated through the exploitation of legal entities.¹⁸ Urgent steps need be taken to obligate record keeping and greater publication of and access to certain beneficial ownership information.

The PSAM have considered the submission of Corruption Watch (CW) and readers will note reference to it and where aspects are endorsed or emphasised within this submission.

The remaining sections of this submission are structured as follows:

- Problem Statement
- Experience from other countries on BOT.
- Endorsement of and reference to Corruption Watch's submission.
- Current inadequacies in legislative arrangements, including insufficient transparency.
- Easing the burden on whistleblowers.
- Inadequate laws to reduce conflicts of interest.
- Red flag indicators for exploitation of legal entities
- Financial sector failures
- Privacy vs Transparency
- Key Recommendations

¹⁶ <https://www.opengovpartnership.org/documents/south-africas-third-national-action-plan-2016-2018/>

¹⁷ <https://www.opengovpartnership.org/documents/south-africa-action-plan-2020-2022/> see at p. 15.

¹⁸ <https://www.transparency.org/en/news/how-public-beneficial-ownership-registers-advance-anti-corruption>

Problem Statement

The use of anonymous shell companies and other complex financial structures that conceal the true beneficiaries and enable opportunities for illicit financial flows and tax evasion, not only frustrate revenue collection but can also significantly impact on service delivery and constitutional law provisions requiring that public procurement systems are fair, equitable, transparent, competitive and cost effective. Continued and widespread abuse of procurement rules and regulations have cost South Africa billions of rands, severely impacting upon communities constitutional rights, eroding public trust in government and their responsibilities to provide services and account for their conduct. Failure to act appropriately to address these risks, now threatens to cause further harm to both public and private finances, with far reaching and severe consequences.

Now, more than ever, it is critical that South Africa takes clear and decisive steps to create a comprehensive, functional and accessible BO registry. This will improve oversight bodies, duty bearers and the public's ability to conduct due diligence on legal entities and the persons who control and benefit from them. Criminals commonly use legal entities and opaque legal arrangements to hide ownership, masking both their own assets and laundered funds. Transparency of beneficial ownership data (and public procurement processes) is essential to reducing opportunities for the misuse of legal entities and the abuse of public resources and institutions.

Experience from other countries on BOT

The objectives of BOT align with open contracting's objectives: understanding who is the ultimate owner of a company would assist in identifying corrupt procurement processes; knowing whether different companies are ultimately controlled by the same people would assist in ensuring procurement processes are more competitive and therefore improve service delivery; and knowing whether the legal owner of a company is the ultimate owner would ensure that preferential procurement goals are given effect to in procurement processes.¹⁹ In fact, the links between BOT and procurement are so close that many countries – Open Ownership identifies Bangladesh, Colombia, Egypt and Moldova – have adopted beneficial ownership transparency solely to achieve broader procurement goals.²⁰

Many other countries have committed to or implemented some form of beneficial ownership registry. According to Open Ownership of a total of 223 countries that have committed to BOT, 117 countries aim to establish a central register while 106 have committed to a public register. Further, 80 countries have implemented BOT, with 39 central registers, and 31 public registers.²¹

The International Monetary Fund also recognised the importance of linking procurement and BOT: in many of their COVID-19 Relief packages – including South Africa's – the IMF included requirements that governments publish the details of contracts awarded during the pandemic with details of the successful companies' beneficial owners.

The Ukrainian State Audit System transitioned to open data-driven monitoring in 2018 and immediately tripled the amount of monitored cases in just over a year (from 3,000 in 2018 to 9,000 in 2019).

¹⁹ Open Ownership, "Beneficial Ownership Data in Procurement", p. 9.

²⁰ Open Ownership, "Beneficial Ownership Data in Procurement", p. 3.

²¹ <https://www.openownership.org/en/map/?commitment=public®ister=register-online>

The Open Contracting Partnership includes the following examples of where BOT (and other elements of open contracting) has been effective at addressing fraud and corruption²²:

- Data on [prosecutions tracked by the OECD Anti-Bribery Convention](#) shows that 57% of bribes were paid to win public contracts.
- In the EU, the [European Commission calculated](#) that Member States lose around €120 billion (around US\$163 billion) each year to corruption – only marginally less than the European Union’s total annual budget. More than four out of ten companies say that a range of illegal practices in public procurement procedures are widespread, particularly specifications tailor-made for specific companies (57%), conflict of interest in bid evaluation (54%), collusive bidding (52%), and unclear selection or evaluation criteria (51%).
- In the [Slovak Republic](#), a law implementing open contracting enabled civil society to monitor and identify cases of corruption exposing hospital scanners bought at double the normal price from a shell company connected to a high-ranking politician and cancelling contracts for expensive seafood, cognac and luxury cars. Almost 8% of the public now checks at least one contract or receipt online every year. The initiative cost less than US\$1m in total to implement.
- In [Bogota, Colombia](#), open contracting data was used by Bogotá’s education department and the national public procurement agency to help provide more than 800,000 high-quality meals for school children each day and break up a US\$22 million price-fixing scheme. The number of suppliers for meals increased from 12 to 55.
- In [Ukraine](#), in just three years the DoZorro community of civil society and citizen procurement monitors flagged 21,000 tenders, 30% of which were resolved. More than 1,200 tenders were revised, 59 criminal charges pressed, and 198 sanctions issued.
- In [Kazakhstan](#), emergency COVID-19 procurement in Kazakhstan amounted to nearly US\$1 billion between the start of the pandemic to September 2020. Contracts worth over US\$2 million were cancelled or terminated following investigations by data monitors. Four investigations by procurement watchdog Zertteu Research Institute that revealed red flags led to the cancellation of US\$400,000 worth of emergency procurement contracts.
- [Nigerian civil society](#) has created an open contracting data platform, Budeshi, to publish and review details of more than 10,000 MDA contracts worth a total of more than 226 billion Naira (approximately US\$591 million) since 2014. Their efforts flagging irregularities during the pandemic have led to the Bureau of Public Procurement committing to a new e-procurement system to improve contract data and improve anti corruption enforcement.
- In [Indonesia](#), civil society created a platform using open contracting data to monitor Covid-19 procurement. They identified deals that were awarded to companies without previous experience, found 14% of contracts awarded through direct procurement exceeded the maximum amount allowed, and that the central government had only distributed a fraction of the personal protective equipment needed by health workers treating COVID-19 patients.
- In [Kosovo](#), 46 civil society organizations monitor public contracting using the government data platform and self-developed tools that connect to the government database. About 20 cases of suspected corruption in public procurement have been submitted to the public prosecutor’s office as of December 2021.

²² <https://www.open-contracting.org/impact/evidence/>

Endorsement of and reference to Corruption Watch’s submission.

The PSAM appreciate the observations provided by CW in the “background” section of their submission which explain the concept of a “separate legal personality” and how this influences entities and the extent to which they are controlled and owned. We also note the complexity that arises when a legal entity owns another legal entity and the difficulty in establishing who in fact benefits ultimately from such arrangements. We also note and reiterate the concerns that CW raise when the actual identity of persons who control, own and benefit are hidden behind a range of opaque corporate ownership structures. Such a layered and often non-transparent structure creates opportunities for evasion and circumvention of laws that seek to prevent corruption, conflicts of interest and other forms of illegality.

We also endorse and reiterate CW observations that control over legal entities can be exercised in various ways, including through family links. Social and political allegiances and various forms of power can also be used to influence who ultimately benefits from action and sometimes inaction concerned with legal entities.

The PSAM endorse the observations contained in the CW submission which consider whether an appropriate legal definition of “beneficial owner” exists currently in South Africa. PSAM support the adoption of a single definition across registries that currently exist, those that may be created or if a central registry is created in due course, which we submit is preferable.

The PSAM echo CW sentiments that reforms proposed in the Companies Amendment Bill, if adopted will only produce real impact if competent authorities capacity is strengthened to support implementation, compliance and effective sanctioning where entities fail to adhere.²³

Current inadequacies in legislative arrangements, including insufficient transparency.

South Africa’s National Development Plan 2030 emphasises the need to:

“Create a transparent, responsive and accountable public service. State information, including details of procurement, should be made openly available to citizens.”²⁴

The World Bank, OECD and UNODC’s 2020 [Good Practice Guide to Preventing and Managing Conflicts of Interest in the Public Sector](#) states that:

“Transparency, or the lack of it, in the bidding process plays an important role in properly preventing/managing COI [Conflicts of Interest]. Publicizing the selection and evaluation criteria, as well as the justification for awarding the contract is a good practice that allows competitors a better opportunity to properly participate in a procurement procedure and civil society and the media to engage in public oversight of procurement decisions.”

²³ See page 8-9 of the Corruption Watch submission to the FIC.

²⁴ See page 447 of the National Development Plan 2030 available at https://www.gov.za/sites/default/files/gcis_document/201409/ndp-2030-our-future-make-it-workr.pdf

Efforts to reform South African procurement legislation to address widespread abuse and to enable open access to procurement information remains stunted. There continues to be resistance and inadequate will to bring about reforms that would serve the public interest and reduce abuse.

While various laws have been introduced to try and reduce corruption and advance accountability, ethical conduct and greater oversight, reports from constitutional oversight bodies, commissions of inquiry and judgments of courts document in great detail the widespread failure to abide by laws with little to no consequence for those implicated. The [National Anti-Corruption Strategy 2020 - 2030](#) provides the following overview:

“Corruption has become endemic in South Africa. It undermines democracy and impacts negatively on service delivery, human and socio-economic development, job creation and public trust in government, as well as investor confidence in the country. Corruption manifests in all spheres of society and occurs in the public sector and in the private sector. Corruption, having permeated key institutions in both the public and private sector, poses a threat to national security, undermines the rule of law and institutions vital to ensuring the centrality of the state as a protector and promoter of the rights of its citizens. There is a need to unify anti-corruption efforts across sectors to address the scourge of corruption and to demonstrate the commitment of government, business and civil society to achieve the vision of the National Development Plan 2030 of a corruption-free South Africa, and a society in which key values, such as integrity, transparency and accountability, guide the actions and behaviour of its citizens.”²⁵

Easing the burden carried by whistle-blowers.

The brazen and rampant nature of corruption within the private and public sector in South Africa not only means that government and communities pay too much for services, but that whistle-blowers who act in the public interest to expose corruption, often do so at great risk to their personal safety. Despite the existence of the Protected Disclosures Act - like so many other laws of South Africa - its provisions are regularly not implemented. Often persons required by the Act to investigate protected disclosures do not. Rather than leaders commending and defending the actions of whistle-blowers, many face isolation, threats and lose their employment. South Africa is increasingly profiled as a country where whistleblowing gets you killed and those who are involved in the threatening or murder of whistle-blowers are allowed to continue with their actions - and often these person's identity remains unknown and shielded from scrutiny.

Were South Africa to implement extensive reforms to require beneficial ownership transparency, including public access to certain parts of central BO register, the burden carried by whistle-blowers would be eased and a greater number of persons would be able to access information that may lead to action to prevent opportunities for corruption. If the links between legal entities were more readily ascertained, and the identities of their beneficial owners more readily accessible, not only would it provide better evidence to inform decision-making, it would also enhance crime-fighting, bolster

²⁵ See page 8 of the National Anti-Corruption Strategy 2020-2030 available at https://www.gov.za/sites/default/files/gcis_document/202105/national-anti-corruption-strategy-2020-2030.pdf

whistleblowing (while reducing threats) and increasing the potential for ethical and accountable action both in the public and private sector.

The actions of murdered Gauteng Health Department whistle-blower Babita Deokaran are used as a case study to consider this aspect further and to showcase the potential benefits that a more accessible beneficial ownership registry could bring. On 27 July 2022 News24 ran with a news article titled **“SILENCED | Babita Deokaran tried to stop 'secret' Tembisa Hospital payments to ANC leader²⁶**. In summary, the article details how three weeks before she was murdered, Deokaran raised the alarm over payments from Tembisa Hospital to ANC Ekurhuleni leader Sello Sekhokho. He had three companies supplying medical equipment at vastly inflated prices. Health department CFO Lerato Madyo instructed Deokaran to pay Sekhokho - and told her to keep it secret. The article explains further that *“The whistleblower reported the splurge to department CFO Lerato Madyo and called for an immediate investigation and a stop on payments worth R104 million. Ten months after she was gunned down in a hit-style killing outside her south Johannesburg home, the payments out of the hospital have yet to be probed in their entirety. Six alleged assassins face murder charges, while the Hawks investigation into their paymaster remains open.”*

The article proceeds to explain and note that ***“What Deokaran did not know at the time was that Sekhokho had three separate entities supplying medical goods to Tembisa.”²⁷***

To support Deokaran’s concerns that there were possible fraudulent transactions, she considered weekly payment runs and reported that *“Of the R166 million earmarked to pay thousands of suppliers to the province’s hospitals and clinics, R104 million was needed to pay those of Tembisa Hospital alone.”* In a letter addressed to the Health CFO Madyo, Deokaran reported that *“This immediately caused alarm.”* *“A further search was conducted on the internet for some of the companies to whom payment was due for release and these companies could not be identified as legitimate,”²⁸* The News24 article proceeded to explain that:

When Deokaran looked at the hospital's buying patterns, she found that most of the purchase orders were valued at under R500 000. Goods or services above that threshold require a public tender process. Below that mark, the hospital’s CEO can sign off.

Her report described how hospital management had embarked on a buying spree, outstripping other larger central academic hospitals like Steve Biko in Pretoria and Charlotte Maxeke in Johannesburg

Furthermore the News24 article explains that:

²⁶ <https://www.news24.com/news24/southafrica/investigations/silenced-babita-deokaran-tried-to-stop-secret-tembisa-hospital-payments-to-anc-leader-20220727-2>

²⁷ Bolded by the writer’s of this submission for emphasis.

²⁸ <https://www.news24.com/news24/southafrica/investigations/silenced-our-lives-could-be-in-danger-inside-babita-deokarans-r850m-fraud-probe-20220725>

Deokaran had, according to the report, stopped the monthly payment run to these suppliers and where these businesses had been paid, arranged with the provincial treasury to recall the money from the banks.

She also delivered a warning: her analysis indicated that these companies were also doing business with other health facilities in the province.

"While this seems prevalent in Tembisa Hospital, there is a high possibility that there are possible fraudulent transactions in other facilities as well," Deokaran wrote.

and that

'Our lives could be in danger'

Beyond the report, Deokaran raised her suspicions about Tembisa Hospital extensively with Madyo. The day prior to filing the report, she sent Madyo a WhatsApp message at 18:45 which read: "Hi please call me when you can. I need to discuss a matter with you urgently."

Within two minutes, Madyo placed a call to Deokaran, and the pair spoke for 13 minutes. Deokaran referenced the interaction in the opening line of her report.

On August 11, little more than a week before she was murdered, Deokaran sent a chilling WhatsApp message to Madyo.

She wrote: Morning CFO I am just worried that the guys in Tembisa are going to realise we are not releasing their payments and know that we on to something. Our lives could be in danger.

Had Deokaran and like-minded whistle-blowers had timeous access to a BO registry enabling them to better identify the real beneficiaries, their ability to flag matters and motivate for action to prevent abuse of resources would have been greatly enhanced. It would also reduce the often lonely burden that many whistle-blower's carry when trying to support corrective action where suspicious transactions are concerned. Often whistle-blower reports are not acted upon unless the report reaches the public domain. Were South Africa to create a central BO registry that enables public access to certain of its data, it would support and nurture whistleblowing, strengthen preventive checks and balances, enhance accountability mechanisms, oversight and also support disciplinary and criminal processes. Making BO data public broadens the base of accountability stakeholders and increases the likelihood of multiple sources becoming aware of potential or actual conflicts of interest, corruption etc.

The OpenLux investigations summarised below show how the publication of BO data reduces the risks often faced by whistle-blowers. A Transparency International article titled "OUT IN THE OPEN: HOW PUBLIC BENEFICIAL OWNERSHIP REGISTERS ADVANCE ANTI-CORRUPTION"²⁹ explains further:

²⁹ <https://www.transparency.org/en/news/how-public-beneficial-ownership-registers-advance-anti-corruption>

“A few months ago, we learned the extent to which the world’s rich and powerful have been [offshoring their wealth](#) in Luxembourg, a small country in the heart of Europe. What’s more, individuals suspected of corruption or under investigation for various crimes in their home countries have apparently been able to hide behind Luxembourgish companies when [buying real estate](#) and [doing business](#) elsewhere.

*These investigations - known as OpenLux - are noteworthy for another reason, too. **Unlike other major exposes that have relied on document leaks - often at great risk to whistleblowers - OpenLux reports were based on the analysis of public records. Journalists and civil society were able to access information on Luxembourg-based companies owners - individuals who ultimately own, control or benefit from said companies - in a government register.***³⁰

In 2018, the European Union (EU) adopted an anti-money laundering directive, which requires its member states to establish publicly accessible registers of beneficial ownership. Luxembourg was [one of the first countries to follow through](#), making its register public the following year.

Prior to that, in 2016, the United Kingdom (UK) became the first country in the world to set up a public register of companies beneficial owners.”

and that:

“Examples from the UK and the EU show that beneficial ownership registers represent a trove of information for investigators, media and civil society. Beneficial ownership registers are the tool that can allow them to lift the veil of opacity and connect the dots. The resulting impact extends far beyond Europe, strengthening the case for public beneficial ownership registers to become the norm everywhere.”

Inadequate laws to reduce conflicts of interest

While various South African laws seek to regulate and prevent those in service of the state from conducting business with government departments and public entities, often these laws are flouted with inadequate consequences for implicated persons. According to the DPSA:

*“As of April 2020, the PSA had up to 1 539 public service employees who were regarded as conducting business with the state. Of those, 1 111 were from the provincial departments, and 428 were from national departments.”*³¹

Furthermore, concerns have been raised that declarations of interest by senior public servants are often inadequate. For instance in 2021 the Public Service Commission reported³² that:

³⁰ Bolded by the drafters of this submission for emphasis purposes.

³¹ <https://pmg.org.za/committee-meeting/31013/>

³² <https://www.sanews.gov.za/south-africa/concerns-managing-conflict-interest-government>

“There are SMS [senior management service] members who submitted their financial disclosure forms, but did not make full disclosure of their registrable interests.

A total of 3048 SMS members in the public service were found to have interests in companies. From this total 638 (21%) of SMS members did not disclose their interests in companies.”

The Standard Bidding Documents (SBD), specifically through the SBD4 form titled *“Declaration of Interests”*, requires bidders to disclose links of the bidding company to an individual employed by the state and/or involved in the adjudication of the bid. However, this form stipulates only that directors of supplier companies be provided, whereas BOT envisages that individuals who are the ultimate owners or controllers of a company – which may or may not be the directors – should be provided. The CW submission also makes the point that once the SBD4 “form is submitted, no verification takes place. The form sits with the procuring entity (which is decentralised in South Africa), it is not digitised, nor has a common data standard been used. Data that is sourced in this manner is of limited use. At best, it can be used after the fact as evidence of non-disclosure - but the damage will have already been done at that point.”³³ Under such circumstances the PSAM support the CW recommendation that National Treasury incorporate a BO data field within its supplier registration process.³⁴

The limitation on the recording of only director information on the SBD4 form also has detrimental effects to verify whether public servants who are members of the Senior Management Service (SMS) have interests in or benefit from these legal arrangements. In February 2021, the DPSA published amendments to the Public Administration Management Act (PAMA) aimed at tightening provisions to prevent employees from conducting business with the state, especially where employees are directors of companies (as defined in the Companies Act, 2008) that conduct business with the state. One of the limitations of the amendment is that it does not adequately address situations where employees might not be directors of such companies but are nonetheless the ultimate beneficiaries. Corruption Watch also emphasise in their submission that: *“Public officials are prohibited from conducting business with the State or holding a directorship position in a company conducting business with the State in terms of section 8 of the Public Administration Management Act. However, the Act is silent when it comes to shareholding and there are no BO disclosure requirements. Furthermore, employees of State-Owned Companies fall outside the ambit of the Act. It is critical that public officials and the PEPs that are linked to them can be identified and flagged when they operate through entities - particularly when engaged in business with the State.”*³⁵ PSAM endorse the CW call that *“The data registry on public officials and their interests within the Department of Public Services and Administration (as well as the Public Service Commission) should follow a single data standard and be capable of being used to verify other sources of BO data.”* PSAM would also recommend that Parliament use the same data standard to record the interests of its MPs and staff who are required to declare their interests.

In a 2021 submission compiled by PARI with support from PSAM the following points were made regarding the Companies Amendment Bill:

³³ Corruption Watch submission to the FIC, p.20.

³⁴ Ibid.

³⁵ Ibid.

In the South African Companies Act Amendment Bill, there is a requirement that some companies must include their securities register, register of disclosure of beneficial interests, and latest financial statements in its annual returns filing with Companies and Intellectual Property Commission (CIPC). However, civil society organisations' advocacy has focused on expanding this obligation to all companies, and to allow the public to access all this information through a request to the CIPC.

For instance, in a presentation to the Portfolio Committee on Public Service and Administration on 17 February 2021, the Public Service Commission (PSC) reported that 638 (21%) of SMS members who have interests in companies did not disclose their companies and 69 (11%) of these members were repeat offenders. By adopting mandatory provisions to disclose information about true owners of companies (including shareholders or other beneficiaries who ultimately exercise control over a company), the current Bill will go a long way towards enabling the identification of senior public servants who commit perjury in the completion of their annual financial disclosure declarations and the provision of concrete evidence on the basis of which disciplinary action can be taken.

Were the Companies Act Amendment Bill to contain clear and robust beneficial ownership provisions, including making certain key information public and easily accessible it could support improved monitoring. It could also be used to enhance compliance by members of Parliament with their obligations to disclose their financial interests in line with Parliament's Code of Conduct.³⁶

There is clearly a need for government to know who it is doing business with. Not only to prevent corruption where the true beneficial owners are concealed in order to avoid detection, but also where companies or shareholders amend agreements to take advantage of the PPPFA, claiming BBBEE scores which are not congruent with the operations of the organisation and the objectives of the PPPFA (which is to transform ownership to address historical disadvantage).

The Public Procurement Bill, currently under consideration, would repeal the Preferential Procurement Policy Framework Act (2000) and Regulations. The preamble of the draft Bill explains that it seeks to "create single regulatory framework to eliminate fragmented procurement prescripts." To date, there have been limited developments and there is no clarity on timelines for the Bill's consideration and processing through Parliament.

Legislative reforms to procurement in South Africa are long overdue and if momentum gathers to ensure enhanced laws in this regard, the following call must also be borne in mind if the country is to change its current trajectory and move towards a more robust, efficient and effective process:

The accountability and regulatory weaknesses that have enabled this environment will not be addressed by improvements in legislation alone. Legislative reform in procurement must be accompanied by concerted strengthening of capacity in key public institutions such as the National

³⁶ [Code of Conduct for NA and Permanent NCOP Members - Parliament of South Africa](#)

*Prosecuting Authority (NPA), the Special Investigations Unit (SIU) and the Directorate for Priority Crime Investigations which requires adequate resourcing within the fiscus.*³⁷

Red flag indicators for exploitation of legal entities

CW has been monitoring cases of corruption in South Africa since 2012. Through their investigations they have identified a number of red flag indicators,³⁸ as have investigative journalists. PSAM has also identified areas or indicators of potential concern that could present opportunities for misuse and abuse to occur - we appreciate that not all of these concerns necessarily mean that persons involved are implicated in unlawful conduct:

- Individuals with multiple directorships.
- Companies under the same directors with multiple identical or similar names.
- Companies with no online presence, or physical address (or the address for a company contracted for millions of rands worth of work is operating from a residential address, with no business premises).
- Companies with directors who are closely associated with or related to senior government representatives.
- Companies with no track record of similar work to that contracted by state.
- Companies with very recent incorporation dates, or those who have recently seen changes in directors, or sudden changes to dormant companies (who have failed to submit annual returns and risk deregistration by CIPC)
- Government employees, especially those who have responsibilities related to procurement processes (SCM, bid adjudication, contracts and payments) who appear to be living well beyond their means.
- Tenders awarded at inflated prices (relative to reference price registry, or historical pricing for similar goods and services).
- Non compliance with procurement processes and regulations (advertising tenders, consideration of bids, minimum number of quotes, cancellation and reissue of tenders).
- Nominee arrangements - where a nominee appears to be the director or shareholder of a company whereas in fact the actual owner remains secret and exercises control. As CW note in their submission: *“Currently there is no prohibition against nominee arrangements in South Africa. Nominee shareholders and directors should be licensed and subject to anti-money laundering requirements, including the identification of beneficial owners. Importantly, nominee shareholders and directors should also be obliged to disclose the identity of the beneficial owner who nominated them.”*³⁹

Financial sector failures

The Prudential Authority (PA) of the SARB is responsible for anti-money laundering and counter-financing of terrorism (AML/CFT) supervision of banks, mutual banks and life insurers. In March 2021 the PA embarked on its second banking sector risk assessment by surveying 34 banks. The [assessment](#)

³⁷ BJC and Imali Yethu joint submission to National Treasury. Available online: http://psam.org.za/wp-content/uploads/2020/07/Submission-to-Treasury-on-Procurement-Bill_June-2020.pdf

³⁸ See Corruption Watch submission to the FIC, p.17 onwards.

³⁹ Corruption Watch submission to the FIC, p.16.

focused on the money laundering, terrorist financing and proliferation financing (ML/TF/PF) risks identified within the banking sector for the period 1 October 2018 to 31 December 2020. The PA assessment found common threats and vulnerabilities, including fraud, bribery and corruption, Ponzi/pyramid schemes, environmental crimes, tax-related offences or crimes, illicit cross-border flows, criminals using money mules, and drug trafficking, human trafficking and cybercrime, including emerging technologies.⁴⁰

In addition, the PA found the banking sector wanting in terms of **identifying domestic prominent influential persons (DPIPs), obtaining beneficial ownership information**, using trade products and advanced payments, and not identifying cryptocurrencies and exchanges as client types.⁴¹ Furthermore, according to the PA *“analysis of the beneficial ownership information revealed that two of the five largest banks have the highest number of beneficial owners that were identified as DPIPs, and one of the five large banks also had the highest number of beneficial owners identified as foreign prominent public officials across the sector.”*⁴²

It is quite clear from the PA assessment that the banking and insurance sectors have been found wanting. Government and role-players in the financial sector have failed to act comprehensively and in a principled manner to address concerns raised in MER’s.

Privacy vs Transparency

Despite increasing advocacy around BOT, and evidence of the effectiveness of BOT initiatives, there is still resistance. In some cases, over-inflated concerns with privacy, and inadequate understanding of the Protection of Personal Information Act (PoPIA) are used to try and justify existing practices. The POPIA contains various exemptions (see section 37 and 38) that provide clear grounds to process personal information. As the CW submission⁴³ summarises, parts of those grounds relate to:

- 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; or
- to protect the public against financial loss due to dishonesty, malpractice or other seriously improper conduct.

The PSAM appreciate that there are legitimate privacy concerns regarding certain information that should not be made publicly or widely available as it may pose risks to persons safety. **PSAM support**

⁴⁰ <https://www.dailymaverick.co.za/article/2022-07-28-financial-sector-walloped-by-prudential-authority-over-terror-funding-and-laundering-risks/>

⁴¹ Ibid (The drafters of this submission have bolded the text for emphasis).

⁴² <https://www.dailymaverick.co.za/article/2022-07-28-financial-sector-walloped-by-prudential-authority-over-terror-funding-and-laundering-risks/>

⁴³ Corruption Watch submission to the FIC, p.30.

the CW recommendation that there be a tiered data-sharing structure and access can be restricted depending on who the user is.⁴⁴

Key recommendations

- Settle upon a single and comprehensive definition of “beneficial owner” that is used across legislation.
- Create a central BO register that has tiered levels of openness.⁴⁵
- Learn from the lessons and achievements in other countries.
- Revise the Public Procurement Bill and Companies Amendment Bill to address concerns raised by the MER and to advance BOT and the commitments contained in the NAP and NACS.
- National Treasury should incorporate a BO data field in its supplier registration process.
- Reforms are need in the financial sector to advance compliance and BOT.
- Actual consequences for non-compliance and to support deterrence.⁴⁶
- Recognise the diverse and systemic support that a comprehensive BO register can provide to enhancing accountability actors, governance processes, whistle-blower’s and ultimately the delivery of public services and the realisation of constitutional rights.
- While the South African government has made a number of commitments to open contracting principles, and increasing transparency of public spending. Currently, open contracting platforms are not used properly and many entities do not report bids and award details. PSAM urge NT and related authorities to ensure compliance with reporting requirements and to insist that entities provide the following details after the award of a contract:
 - Contract value
 - Contractor details (company name, CIPC registration #)
 - Director details
 - Beneficial ownership details
- The data registry on public officials and their interests within the DPSA, PSC and Parliament should follow a single data standard and be capable of being used to verify other sources of BO data.

⁴⁴ Ibid

⁴⁵ The PSAM endorse and echo the sentiments contained in the CW submission, especially at pages 29 - 31; and 33 - 35.

⁴⁶ The PSAM endorse the observations and recommendations of CW, see pages 31 - 32 of their submission. As the latest MER has found, South Africa has significant shortcomings implementing an effective system, including failure to pursue serious cases.