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## The Business Sector

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This chapter reviews Botswana's integrity mechanisms within the business sector. It examines the role of state-owned businesses, by far the majority in Botswana, as well as the emerging privately owned business sector. It compares the role of various kinds of legislation relating to unlisted and listed companies, and the role of oversight bodies.

In addition to relying on legislation and practice relating to business in Botswana, the authors of this chapter conducted an extensive survey of listed and unlisted companies, and conducted interviews with people in the business sector.

## Resources and structure

The business environment consists of both government and privately owned businesses. Private businesses, however, are a new phenomenon in Botswana. The discovery of mineral deposits around the 1970s signalled the emergence of the modern business sector in the country. While it is clearly evident that Botswana's economy is primarily diamond driven, there has also been some urge for economic diversification from minerals to the industrial sector. Nevertheless, the performance of the industrial sector, particularly manufacturing, has not been satisfactory.

Botswana's economic system is liberal and market-orientated like those of its counterparts within the region. The government has continued to play a large economic role, both in development planning and as a financier. In doing so, it has also realised the need for the involvement of the private sector as a player in the economy and has bolstered private sector confidence by introducing new legislation and regulations with a view to creating a friendly business environment.

The government has reviewed the Industrial Development Act, 1988 so as to simplify licensing procedures. The Companies Act, 1999 was similarly reviewed in order to simplify the registration of companies. The government has also encouraged foreign direct investment in the hope of stimulating growth of the domestic private sector through partnerships and joint ventures with foreign companies. To encourage investment, foreign owned companies receive tax exemptions for five years and unlimited profit repatriation.

The Botswana Development Corporation (BDC) has played a significant role in support of private sector development in Botswana. In the financial year ending June 2005, the BDC disbursed P58.3 million, compared with P24.5 million in 2004 in both loan and equity financing. The BDC financed projects in property, food, tiles and manufacturing.

The legislative framework provides for private businesses to operate free from government interference. This is consistent with observable practices in that as long as private businesses do not contravene any legal requirements, they are largely left to their own devices. In fact, some citizens, the private media, politicians and employees allege<sup>1</sup> that private businesses are afforded too much independence such that some are even able to 'abuse' employees. Businesses in the tourism sector operating in the popular tourist destinations of North-Western Botswana are most commonly accused of this practice.

Although the government has drafted and adopted a competition policy in 2004, no legislation has been effected yet. Its absence is a cause for concern. Instead, the conduct of business, at least as far as good governance and reporting are concerned, is influenced by the Stock Exchange listing requirements and conditions. The Botswana Stock Exchange (BSE) has an elaborate set of rules governing the conduct of listed companies. During the financial year

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1 Articles in local newspapers.

2005/2006, two companies were threatened with de-listing after failing to file their results within the stipulated period. However, these rules only apply to the listed companies, while hundreds of unlisted companies are not affected. Though the absence of major corporate scandals (such as ENRON and Parmalat, for example) in Botswana may provide an indicator that these regulations are effective, the fact that they have not been updated or amended especially in light of the said corporate collapses may be a weakness. The United States of America, for example, passed the Sarbanes-Oxley Act in the aftermath of the ENRON scandal. Other countries revised respective legislation and practices regarding off-balance sheet financing as attempts to plug the loopholes that allowed the ENRON collapse to happen.

Though the business and financial environments in Botswana are less complex than those where these scandals occurred, the lack of new or amended regulations such as those referred to, means that Botswana is not up-to-date as far as international trends in corporate governance and business conduct are concerned. Given that Botswana is keen to attract foreign direct investment, it is desirable that legislation and regulations be improved in order to cope with the increased activities and complexities that may be brought by new investors. Further, the country is in the process of privatising major industries, which is also likely to increase complexity in the business sector. Many of the organisations targeted for privatisation are unique and hence governed by specific laws that should cease to be effective upon privatisation, further problematising the business and financial environments.

As at the end May 2007, privatisation was still in its 'embryonic' stage since many of the targeted organisations had not yet been privatised. The majority of targeted organisations (including utility companies) still enjoy government control and support. There was, however, a heated debate over the ongoing privatisation of Air Botswana, pitting the executive against the legislature, and drawing in interested parties from all quarters. It is, therefore, difficult at the time of writing this chapter to assess the extent to which privatised businesses are free from government interference.

The Companies Act<sup>2</sup> largely governs the conduct of individual companies in Botswana. The Act covers all aspects, starting with company formation and ending with liquidation or winding up. It specifically demands that all associations of more than 20 people, whose primary objective is to pursue a profit-making venture, should be registered as a company. The Societies Act, 1972 also specifically prohibits the registration of such associations as societies, hence complementing the Companies Act. The process of company registration is also elaborated in the Act, which states that a minimum of two people may form a private company while the minimum is seven for a public company. The members are required to submit copies of the articles and memorandum of association to the Registrar of Companies. In practice, the process of registration can take anything from two weeks to three months

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2 Cap. 42:01.

depending on, among other things, the number of applications submitted and the extent to which the relevant documents have been properly prepared. Once registered, the company can obtain a trading license and then commence operations.

The Act also requires that all registered companies submit returns to the Registrar of Companies on an annual basis to declare, among other things, their operating status. Those who fail to submit their returns may be struck off the register. Although the Registrar of Companies does not have field officers or inspectors dedicated to checking the registration of operating companies, the laws regarding registration are very effective in practice. The laws are complemented by requirements of other institutions in the country, most notably financial institutions, utility companies, customers, other big companies and government agencies such as the Unified Revenue Service and the Public Procurement and Asset Disposal Board (PPADB). To meet the requirements of the Banking Act and banking (anti-money laundering) regulations, financial institutions demand proof of registration as a condition for opening and maintaining bank accounts. Most big companies and customers also prefer to make and receive payments by cheque, indirectly 'forcing' companies wishing to trade with them to have bank accounts. Utility corporations, like financial institutions, are also required by their respective legislation to demand proof of registration as a condition for providing utilities, whereas agencies such as the PPADB require proof of registration for doing business with government. Failure to observe the laws regarding company registration makes operating a company almost impossible.

The winding up of companies is provided for in the Companies Act and complemented by the Insolvency Act, 1965 and can be of two forms – voluntary or forced. Voluntary liquidation is permissible if shareholders apply to the courts stating their reasons for winding up the company. Forced liquidation is also provided for in cases where the government, creditors or other interested parties apply to the court for the company to be liquidated or wound up. These laws are again very effective in practice as evidenced by the number of companies wound up, largely due to the actions of creditors.

The conduct of companies is further heavily influenced by the Banking Act's anti-money laundering regulations, the Proceeds of Serious Crimes Act, 1994 and the Corruption and Economic Crime Act, 1994. The Banking Act, by its control of the conduct of financial institutions, indirectly makes demands on the conduct of other institutions' financial affairs. The anti-money laundering regulations in particular require financial institutions to demand certain information, behaviour and conduct from customers (including corporate bodies). The regulations also require commercial banks to have anti-money laundering policies, programmes and procedures, which include monitoring the use of banking services by customers with the objective of detecting and reporting suspected money-laundering behaviour and activities. The Act also empowers the Bank of Botswana, who through the Bank of Botswana Act, 1996, supervises the commercial banks, to audit the anti-money laundering programmes of banks.

The regulations provide for penalties to be imposed on banks and bank employees who fail to meet the requirements of the regulations. The control of money laundering in practice is, however, proving difficult. A 2004 report by the Directorate on Corruption and Economic Crime (DCEC) found that money laundering is a new phenomenon that is not adequately understood by the general public, prosecutors, magistrates and other law enforcement officers. The regulations were only enacted in 2003 and seem adequate enough, but need to be supported by a rigorous public education campaign.

The DCEC, alongside the Botswana Police Service, is charged with investigating corruption and economic crime. The Corruption and Economic Crime Act, however focuses mainly on corruption involving a public body and its officials. This is perhaps a weakness in that private-to-private corruption appears secondary, at least as far as the Act goes. However, section 34 of the same Act appears to cover private-to-private corruption in that it provides for people who are suspected of 'living beyond their means' and those in possession of 'unexplained property' to be investigated. The extent to which this is effective is difficult to determine, since no information on the frequency, outcome and other details of such investigation was available. The 2004 report of the DCEC reported that investigations of 72 cases of corruption and money laundering were opened. A few of these cases involved 'private' economic crimes such as the bribery of commercial bank employees by criminals to transfer funds from unsuspecting customer accounts to criminals' accounts, and the bribery of lawyers to allow trust accounts be used for money laundering. These were therefore, cases of money laundering more than outright private-to-private corruption.

The majority of cases related to situations involving bribery and attempted bribery of public officers and obtaining money from the government through false pretences. No cases of 'outright' private-to-private corruption such as an individual (not a public officer) bribing an officer of a private company, for example, were reported. Section 384 of the Penal Code clearly deals with private-to-private corruption. However, information on the extent to which private-to-private corruption is prevalent is not readily available. Moreover, the fact that the Corruption and Economic Crime Act concentrates on public rather than private corruption appears to indicate that private corruption is not effectively contained in practice. Furthermore, none of the DCEC education campaign activities reported in the 2004 report involved the private sector. The present situation, therefore, perhaps creates the public impression that private-to-private corruption is not corruption, making it difficult to monitor and contain. This is clearly a weakness with an associated loophole in the law and one would recommend that the Corruption and Economic Crime Act be amended accordingly.

Though the DCEC has an intelligence unit, it relies almost exclusively on reports from the public and public institutions. For example in 2004, less than 2 percent of the cases recorded by the Directorate were as a result of intelligence activities. Unlike other forms of crime, corruption and economic crime often result in lost opportunities rather than the direct

deprivation of assets or liberty. This, therefore, tends to make corruption difficult to identify and also provides less incentive to report it (compared to other forms of crime). To tackle these problems, it is recommended that the intelligence unit should be empowered to take a more proactive role in identifying suspected cases of corruption and economic crime.

Some companies, however, have realised the dangers of corruption and have started developing their own anti-corruption initiatives. The (small) number who reported having such initiatives are mainly those whose operations make their staff more vulnerable to being corrupted by customers and other third parties. Such initiatives include training workshops on corruption and the inclusion of anti-corruption modules in induction programmes for new staff. However, none of the company annual reports analysed included any reports or statement on anti-corruption.

## **Integrity**

Access to company information in Botswana is generally difficult.<sup>3</sup> Listed companies are largely comfortable with discussing information already in the public domain, such as information contained in the annual reports. But even when they choose to discuss such information, company executives tend to delegate the disclosure of such information to public relations personnel, who 'specialise' in portraying their companies in very bright colours. As such, researchers are often not able to obtain vital information.

Unlisted companies, on the other hand, largely find it difficult to disclose even basic information such as turnover, profits, liquidity and balance sheet positions. Other than filling in annual returns with the Registrar of Companies, there are no requirements on unlisted companies to publicly disclose information. This secrecy about company information makes it difficult to assess private sector integrity mechanisms.

However, analyses of the contents of company reports do not reveal strong anti-corruption concerns in the private sector. Instead, there is strong evidence of concerns with corporate social responsibility in general and HIV/AIDS in particular. Directors' statements largely outlined the corporate social agenda and HIV/AIDS initiatives for staff. These statements were in many cases corroborated by media reports on the company's activities. All the companies surveyed for this chapter reported having some sort of anti-corruption and anti-bribery initiatives. Companies in the financial services sector in particular reported having specific initiatives for sensitising and training staff to adopt anti-corruption and anti-bribery positions. One very large company surveyed (not in the financial services) surveyed

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<sup>3</sup> See for example, Othata, O and T.I. Magang, 2004. 'Towards a Critical Understanding of the Unwillingness of Organizations and Organizational Participants in Botswana to Participate/ Assist in Accounting Research'. *BIAC Journal of Business Management and Training*, Vol. 1, Issue 1.

emerged as having very strong anti-corruption initiatives that are closely linked to the nature of its operations and product. These initiatives were actively enforced and appeared very effective as evidenced by the dismissal of some employees for allegedly contravening the initiatives. Others reported having codes of conduct or ethics that included some aspects of anti-corruption and anti-bribery. Interesting though is that all the companies surveyed reported that such anti-bribery and anti-corruption initiatives were solely for staff and not for members of boards of directors, sub-contractors and other third parties.

None of the 'small' unlisted businesses (including micro enterprises) had written codes of conducts, or anti-corruption and anti-bribery initiatives. Instead, they reported reliance on personal values to guide staff to shun corruption and bribery. Further, small businesses were generally of the opinion that corruption was very rare in transactions involving the private sector only. This, they explained, was because private sector staff, unlike their public sector counterparts, did not generally expect 'kickbacks' and facilitation payments. Members of the public corroborate this view: there is a widespread perception that bribery and corruption are more prevalent in the public than the private sector. These observations cause real concern especially because the government, pending privatisation, remains a key player in business. Perhaps the time has come for the government to concentrate on identifying and addressing the causes of public sector corruption as an integral part of fighting corruption. That way, the spread of corruption into the private sector may be easier to prevent.

Another finding was that business associations in general did not have any explicit mandatory anti-corruption and anti-bribery rules. For example, information contained on the Botswana Confederation of Commerce, Industry and Manpower (BOCCIM) website makes no reference to anti-corruption and anti-bribery. Another observation was that the BOCCIM membership form does not enquire about the applicant's anti-bribery, anti-corruption and governance initiatives and practices. There is clearly a potential here for BOCCIM, as the largest and arguably most organised trade association, to play a critical role in promoting good practices in business. This said, there are indications that BOCCIM is concerned with transparency, since one of the resolutions of the 9th NBC was 'to promote a culture of openness and inclusiveness to encourage investors and exporters.'

Regarding corporate governance, most listed companies surveyed followed or complied with specific corporate governance recommendations such as the King Code, the Cadbury Code and the Turnbull Recommendations. These standards were exclusively mentioned in some annual reports. None of the surveyed companies, however, mentioned the Organisation for Economic Co-operation and Development (OECD) standards. In fact, some respondents were not familiar with such international standards. In addition, none of the companies subscribed to the UN Global Compact, and it was not clear whether they were aware of the initiative.

A final observation was that though many companies had websites, these served primarily as advertorials and e-service points, rather than providing information on the integrity of the company and its operations. Also, only 12 of the listed domestic companies had websites linked to the BSE website. This somewhat lack of visibility on the web, especially by listed companies, compounds the problem of poor transparency in business. It could certainly be beneficial if at least the BSE had some requirements regarding websites and the type of information they should contain. The government and BOCCIM could also pronounce on websites especially for VAT registered firms.

## **Transparency**

For a small fee, the general public can inspect data on registered companies at the Registrar of Company's office. The data that can be accessed includes most notably, annual returns, directors' names and their professions, the numbers of shares in circulation, company members and the registered offices. Companies listed on the BSE also disclose the same information in their published annual reports, which are available for public consumption. In addition, the BSE has detailed disclosure requirements for listed companies, but these do not include anti-corruption and corporate social responsibility. The requirements most notably include issuing pre-cautionary press releases as well as disclosure of any information of significant stakeholder interest to the BSE, which must also be published in the local press. Impending takeovers and acquisitions are specifically mentioned as information of significant interest to stakeholders. In practice, the requirement on pre-cautionary press releases appears to be followed as a number have been published in the past two years. An analysis of all financial reports available on the BSE website on 30 September 2006, revealed no disclosure of corporate social responsibility and anti-corruption initiatives. Instead, the reported information focused almost exclusively on company performance. Hard copy versions of the full annual reports do disclose corporate social responsibility activities and HIV/AIDS initiatives, but not anti-bribery and anti-corruption initiatives.

There are no requirements on disclosure for non-listed companies on corporate social responsibility and anti-corruption initiatives. Interviews and media reports, however, reveal that many non-listed companies do engage in such activities and one company in particular also gave details about its anti-corruption initiatives. This augments the recommendation that BOCCIM can play a role in lifting the veil of secrecy surrounding private company operations by setting disclosure requirements for members.

## **Complaints and enforcement mechanisms**

There is no financial services authority or similar stock market oversight body in Botswana. This leaves the BSE as the main regulator of the conduct of listed companies and general stock exchange affairs. The absence of such a body leaves the BSE with an onerous task. Given



the government's ambition of making Botswana attractive for foreign direct investment, one would recommend that such a body be established. The establishment of such a body is crucial, more so since whistleblowing is not a common phenomenon in Botswana. With the exception of one company, all the companies surveyed for this chapter reported having no whistleblowing procedures and provisions. The one company with whistleblowing procedures utilised a South African-based toll free phone in service. It was not, however, possible to determine the extent to which the service is effective and how whistleblowers are protected because such information is only available in South Africa.

The absence of whistleblowing provisions in many companies and the absence of a stock market oversight body together make fighting improper conduct in the business sector difficult. It also fosters a culture of secrecy surrounding business operations. The operations of businesses, particularly private (unlisted) companies are a closed book and as such, any anti-corruption initiatives that they may have remain largely unknown to the public. There is also no publicly available record of any company consulting the public regarding anti-corruption initiatives. The activities of various trade associations are also largely not reported to the public, and such associations do not have explicit anti-corruption and anti-bribery policies and requirements. What they have are general codes of conduct but without proper policing and enforcement structures.

This closed book and somewhat carefree approach to fighting corruption and bribery by businesses makes it difficult for improper and corrupt practices in the business sector to be uncovered and made known. As such, no significant cases of whistleblowing and corruption allegations against companies have been in the public domain in the last two years. Instead, allegations of public rather than private sector corruption dominate public debate. The majority of members of the public and private business persons interviewed as part of this study were of the view that private sector corruption was less rampant and hence less devastating as public sector corruption. Allegations of unfair labour practice such as unfair dismissals, poor remuneration packages and poor working conditions are more commonly associated with companies, than outright corruption and bribery. Even so, they still cautioned that it is possible that the public generally regards private businesses as purely private, and as such may consider reporting private sector corruption an act of meddling in private affairs. Either way, more public education is required in order to sensitise the public to demand disclosure of private business activities, as well as to demand proper and transparent business conduct. Trade associations could also make transparency of operations and anti-bribery initiatives key conditions of membership. This will go a long way in 'opening up' private companies and making it easier to control corruption.

## **Relationship with other pillars**

The business sector plays a key part in Botswana's national integrity system. It interacts mostly with and relies to a great extent on public sector agencies, public contracting and law enforcement agencies. In particular, the government, through public sector organisations, maintains relations with the business sector and as such certain requirements promulgated by agencies such as the PPADB influence integrity in the business sector. For example, private firms wishing to do business with the government have to register with the PPADB and registration depends on fulfilling the requirements set by the government. A good number of private firms in the construction and civil engineering and information technology industries depend largely on business with government for survival. This relationship with government agencies has also led to an interaction between business and the judiciary. Both parties can seek redress for breach in the courts.

Certain legislation and regulations foster interaction between the business sector and law enforcement agencies. The Banking Act and banking (anti-money laundering) regulations, for example, require co-operation between the Botswana Police Service and the DCEC in the fight against corruption and money laundering. Commercial banks in particular are required to have procedures for detecting money laundering and must report suspicious transactions to the law enforcement agencies.

Law enforcement has in the past demonstrated its ability to keep the business sector clean. There have been cases where company directors or owners have been investigated for corruption and attempted bribery. The media also plays a key role in keeping the business sector clean. Media reports have in the past carried articles alleging wrongdoing by some business people, but it is not clear whether these were investigated.

## **Conclusions and recommendations**

Although there are adequate laws and regulations governing business, there are four main areas of concern.

- There is the culture of secrecy surrounding business. Apart from the fact that the laws and regulations on disclosure are not compelling enough, businesses in general prefer keeping their information a secret.
- The general public appear to concur with the perception that private business is the prerogative of the owner and, as such, third parties have no right to demand information about operations.
- The DCEC appears to focus mainly on corruption involving public officers and public institutions. This has created the perception among the public that private-to-private corruption is 'not corruption' but a private deal.

- The lack of an 'independent' financial services regulator and an independent business oversight body mean that Botswana is lagging behind in enforcing business sector integrity. Already, there have been media reports alleging that the country is becoming a haven for money laundering because of this inadequacy.

Unless ways can be found to address these concerns, the quest for cleanliness and transparency, including the general fight against corruption in the business sector, will remain elusive.