

The Panama Papers in Africa: Tax Avoidance, Money Laundering or Illicit Financial Flows?

Olwethu Majola-Kinyunyu LLB, LLM

PhD Candidate, Centre of Criminology,
University of Cape Town, Cape Town, South Africa

Email: olwethu.majola@gmail.com

Abstract

Early in 2016 the international community was shaken by the news of the biggest data leak in history. Political figures, prominent business people, sportstars and even criminals were the topic of discussion in news outlets across the globe. Following the release of the Panama Papers, many called for the leaders who were implicated to resign from their positions and for business executives to be investigated. There were reports of offshore accounts and companies operating in tax havens and accusations of money laundering, terrorism financing and tax avoidance. What do the Panama Papers mean for Africa? This paper assesses the effects of the Panama Papers on the African continent and evaluates whether the responses by African states are sufficient.

What are the Panama Papers?

The 'Panama Papers' is the colloquial term referring to the leak of client documents belonging to Panama-based law firm Mossack Fonseca. Details of the Panama documents were leaked by German newspaper, Süddeutsche Zeitung, in conjunction with the International Consortium of Investigative Journalists (ICIJ), consisting of over 100 media partners in 82 countries (Udo:2016). The leak of these controversial documents has been an important revelation for the African continent because a number of high profile business executives, politicians, their close associates, and multi-national companies operating in Africa, have been exposed for secretive financial dealings. This has raised some ethical and legal questions around financial disclosure and transparency; and the role of

tax haven jurisdictions in the facilitation of tax evasion, money laundering, organised crime, illicit financial flows and other issues of grave concern to the international community.

The Legality of Offshore Accounts and Companies in African Jurisdictions

Holding ownership of a shell company or an offshore account, in most cases, is not unlawful. Operating shell companies out of tax havens can offer a means to reduce one's tax obligations and enables entities the ability to operate their affairs independently and privately. In defense of its operations in Panama, Mossack Fonseca, the law-firm at the center of the Panama scandal, asserted that its clients were not involved in any apparent wrongdoing (Mosioma:2016).

These claims are true, as a number of countries have not issued a general prohibition on the use of offshore financial vehicles. If it is not unlawful to operate an offshore account or to be a director of an offshore company, why is the Panama Papers leak a scandal, and why has this issue generated wide-scale coverage globally and in Africa?

Problems Associated with Offshore Accounts

Although the utilization of offshore jurisdictions, in most cases, may not be a criminal offence, some negative practices have come to be associated with the operation of financial and commercial activities in tax havens. In general countries could prosecute individuals and corporations involved in the operation of offshore business interests, in instances where:

- a public official has failed to disclose the offshore accounts;

- the funds held in the offshore account are the proceeds of crime;

- the offshore accounts facilitate the evasion of tax liability for an individual or corporate entity (Soyele:2016).

The following section will further elaborate on the instances where prosecutions may occur.

Non-Disclosure of Offshore Accounts

In response to the Panama Papers, the initial reaction of most countries was an undertaking to investigate those individuals linked to the scandal. In addition to conducting investigations, South African authorities have advised that they require the disclosure of offshore accounts to institutions such as the South African Revenue Services, the Financial Intelligence Centre and the South African Reserve Bank, in order to ensure that exchange control regulations and tax laws are not contravened. Failing to do so may result in criminal prosecutions under the Exchange Control Regulations of 1961, the Income Tax Act of 1962, and the Tax Administration Act of 2011 (South African Government Press Release:2016). With over 1700 South African individuals named in the Panama Papers, the National Treasury has published an amended draft legislation through which it has

proposed an amnesty of six months, so as to afford those affected, the opportunity to disclose their offshore business interests and accounts. Failure to voluntarily declare one's offshore operations within the amnesty period may result in criminal prosecutions, penalties, the imposition of taxes and asset forfeiture. (South African Government Press Release:2016).

In Kenya, the release of the Panama Papers resulted in uproar about the involvement of the Deputy Chief Justice in four offshore business entities. The question to be answered however, was whether the judge had declared these business interests to the Judicial Service Commission before taking up office as a high court judge. Article 76 of Kenya's Constitution, stipulates that public officials are prohibited from holding bank accounts in foreign jurisdictions; so although the Deputy Chief Justice did not hold an offshore banking account, she was however linked to the banking accounts of the two companies where she was listed as a director (Finnan: 2016).

While not resulting from the Panama Papers, in 2016, the Kenya Revenue Authority signed the Multilateral Convention on Mutual Administrative Assistance in Tax Matters, which primarily targets offshore tax evasion and avoidance. Furthermore, the Tax Procedures Act of 2015 also came into effect, providing for harsher sanctions in cases where persons and corporations participate in foreign tax avoidance practices (Kubania:2016).

The Constitution of the Federal Republic of Nigeria of 1999, stipulates in its Fifth Schedule that public officials designated under the law passed by the National Assembly, may not hold banking accounts in any country outside Nigeria (Soyele:2016). While it is commendable that African jurisdictions have taken remedial steps towards curbing the inappropriate and criminal use of offshore jurisdictions, it would be prudent to ask whether the enactment of legislation is enough? Is the implementation of these laws resulting in serious actions such as suspensions, resignations and prosecutions?

Following the Panama leaks, the Economic and Financial Crimes Commission of Nigeria declared that it would investigate the nationals implicated. (Soyele:2016). Despite the existence of legislation, months of silence ensued, and after much protest, the Nigerian government eventually announced the names of prominent individuals that would be prosecuted for holding large sums of money in offshore accounts. Instrumental in this achievement were the concerted efforts by the Nigerian civil society which looked to the example of the West, and demanded that similar action be taken against those individuals who were involved in secretive jurisdictions (Aneej:2016).

It is interesting to note that before the data leaks such as WikiLeaks and the Panama Papers put a spotlight on offshore accounts, Nigeria and Kenya had already prohibited the use of foreign banking accounts by public officials in their respective constitutions. Although Nigeria has disclosed the names of the individuals who will be prosecuted, there are no known prosecutions relating to the Panama Papers in Kenya. The South African Code of Conduct for Public Servants, on the other hand does not forbid the use of foreign banks by public officials and the proposed amnesty makes no distinction between voluntary disclosures to be made by public officials and individuals not in public service. There are also no known prosecutions in South Africa, relating to the Panama Papers or the holding of offshore accounts and companies.

Offshore Accounts and Money Laundering

Offshore banking accounts operating in secretive jurisdictions may present an opportunity for criminal groups to launder their ill-gotten profits. A criminal and fugitive mentioned in Interpol's most wanted list, Faisal Mohammed, was also included in the Panama Papers as one of the individuals holding large sums of secret funds abroad. Prior to the Panama leak, Mohammed, a Kenyan national had been arrested in Tanzania on charges of illicit ivory trade, in December 2014. (Ngechu:2016).

It is widely known that jurisdictions such as the British Virgin Islands, Switzerland, Seychelles and Panama often keep the details of the financial affairs of their clients concealed from the authorities.

This raises some questions as to why this is the case, and experts are of the view that the motives may be sinister, and that the intention may be to mask the origins of illicit gains or to evade taxes. Undoubtedly, non-transparent financial jurisdictions provide an environment within which criminal activity can thrive. This may be attributed to the fact that the origins of illegal profits are hidden and the identities of those individuals benefiting from them are also not readily transparent; for this reason, accountability, responsibility, regulation and reporting remain at a minimum.

Bank Secrecy Jurisdictions and Illicit Financial Flows

Global Financial Integrity (GFI) defines Illicit Financial Flows (IFFs) as: 'the illegal movements of money or capital from one country to another. GFI classifies this movement as an illicit flow when the funds are illegally earned, transferred, and/or utilized.' Examples of such activities include trade-based money laundering techniques exploited by drug syndicates, trade mis-invoicing by importers seeking to evade customs, VAT and income taxes, corrupt public officials who make use of offshore accounts to conceal illicit gains, and terrorist related funding transferred from the Middle East to Europe. (Global Financial Integrity: 2016).

The Panama Papers disclosed thirty-seven companies as parties to judicial proceedings or investigations involving the exploitation of natural resources in Africa. Corporations created by Mossack Fonseca were reportedly used for anonymous dealings or tax avoidance. In 44 African countries, companies registered in tax havens were involved in oil, gas and other mining explorations. This is an issue of grave concern as the majority of African economies rely on the revenue generated through the exploitation of mineral wealth and resources. In total, the Panama Papers include more than 1,400 companies whose names alone indicate activity in the extractive industries. (Fitzgibbon:2016).

Panama listed companies have also been connected to bribery and corruption, with an estimated \$275 million in bribes, paid in the oil-producing country of Algeria.

Italian authorities described one Panama registered entity as being a 'cross-road of illicit financial flows' distributing millions of dollars to unknown beneficiaries (Fitzgibbon:2016).

The Panama Papers not only confirmed the losses that the continent suffers as a result of IFFs but also shed some light on the existence of IFFs in other commercial industries. Tour operator agencies and companies operating in Southern and Eastern Africa have found themselves embroiled in the Panama Papers scandal; with at least thirty offshore Safari companies revealed to have been incorporated through Mossack Fonseca. Many of these companies are officially registered in the British Virgin Islands while their daily operations continue from Southern and East African countries such as Zimbabwe, Namibia, Botswana, Tanzania and Kenya (Fitzgibbon:2016).

Like the extractive industries, tourism is a major contributor to the economies of African countries. In 2014, tourism on the African continent contributed \$798 million, with a total GDP input of 10.5%. The total number of jobs supplied by this industry in 2014, amounted to 543,500, which accounts for 9.2% of Africa's jobs. (African Development Bank:2015). Tourism is not only a major contributor to the GDP but is also a key foreign exchange earner as many tourists bring foreign currencies. In countries with weak financial controls, foreign currencies can more easily be channel out to tax havens than the local currency. The inability to adequately control forex can impact a countries balance of payments and adversely affect viability of import and export markets.

On the effects of IFFs in Africa, Tatu Ilunga states: 'The secrecy of tax havens and the complexity with which companies can arrange their businesses makes it difficult for developing countries to get a fair deal in the share of revenue from their natural resources.' (Gbandia:2016).

Was Africa's Response to the Panama Papers Sufficient?

The three main categories of African individuals mentioned in the Panama Papers are business people, public officials and individuals linked to criminal

activities. The implication of persons in positions of power and those with great wealth would explain the slow and at times lenient response to the Panama scandal. Accordingly, few African countries have taken decisive action with regard to the investigation, prosecution and subsequent recovery of assets of individuals and corporations linked to the Panama Papers.

South Africa for instance, will offer amnesty to the operatives of undisclosed offshore holdings. Is this the appropriate action to take when entities of this nature have been linked to organised crime, money laundering, illicit trading in wildlife goods and corruption? Will the entities and persons that come forward be probed for these and other offenses, before amnesty is granted?

Nigeria took the firm decision of naming those individuals who will be prosecuted for their involvement in the Panama scandal. This extraordinary feat was achieved primarily through the concerted and coordinated efforts of civil society organisations in the country.

At the regional level, the African Union's (AU) Advisory Board on Corruption issued a statement to the effect that each country should conduct its own investigations into the persons mentioned in the Panama Papers. Although the AU Advisory Board on Corruption has the mandate to advise and develop disciplinary and investigation procedures for corruption and related offences in the public service, aside from a call for investigations, no guidelines for the investigation and prosecution of public officials linked to the Panama Papers has been issued. The inconsistent responses to the Panama Papers across the continent indicates the need for the harmonization of standards.

Recommendations

This article has demonstrated that the illegal use of tax havens and secretive jurisdictions can result in tax evasion, money laundering and IFFs. In order to curb this major stumbling block to development on the African continent, states must take ownership and responsibility for the regulation of the manner

in which funds are being transferred to other jurisdictions. In addition to state responsibility, a number of other key actors are required to take decisive action.

Regional Organisation's Promotion of International Co-operation

- Based on the principle of regional and international cooperation and mutual legal assistance, it is recommended that a regional task force consisting of experts and investigators in the fields of anti-money laundering, transnational organized crime and anti-corruption be established. The task force would be deployed to tax havens such as Panama, in order to establish the nature of the offshore dealings of nationals belonging to the region for which the task force is established.
- The task force would then report to the appropriate regional governmental body or alternatively to a regional committee or commission tasked with analyzing the data and issuing the relevant advice to heads of state and their competent authorities.
- The benefits of the establishment of a regional task force would include cost-saving measures, as the resources of the various members of the consortium would be pulled together in order to achieve a common goal.
- Regional coordination would improve the efficiency of the investigations, as a large number of these transactions and activities are trans-jurisdictional in nature and often affect a number of other neighboring states.
- Independence and transparency would be promoted, as the members of the team would be from different jurisdictions.
- Regional coordination would also ensure that uniform standards for investigations and prosecutions are achieved.
- The repatriation of stolen funds is often very difficult to achieve and the task force would offer a channel through which states and experts can formulate strategies for the recovery of assets.

Reporting by Banking and Financial Institutions

- The grim reality is that the funds that are transferred out of the continent illegally, are channeled through the banking and financial systems. The Mbeki Panel Report on Illicit Financial Flows states that international banks continue to facilitate the transfer of IFFs despite knowing that the funds are not legitimate gains (Mbeki: 2015).
- Local banks often turn a blind eye to transactions originating from their smaller and rural branches, and in some cases these banks create the necessary structures to ensure that IFFs are moved to offshore jurisdictions (Mbeki: 2015).
- African banking institutions therefore have an obligation to exercise caution and perform the requisite due diligence and where necessary report suspicious transfers of monies to tax havens, either to the revenue authorities, the central banks or the financial intelligence centers.

Civil Society Engagement in the Abuse of Secrecy Jurisdictions

- The Mbeki Panel Report highlighted that IFFs, organised crime and money laundering are negatively affecting the African continent's ability to develop. The billions of dollars siphoned out of Africa's reserves could be used for education, health care and other basic provisions, and yet civil society in the countries most affected by IFFs, money laundering and tax evasion, are not vocal about these serious impediments to sustainable development on the continent.
- As demonstrated by the Nigerian case, 'firm' action such as prosecutions are more likely to take place when pressure is exerted on the responsible institutions. Civil society must not only engage the state and other key holders on the enactment of laws criminalizing the unauthorized use of offshore financial vehicles, but should also ensure that these laws are implemented and that the stolen assets are recovered and used for the development of African people.

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