Grey listing? Three statutes in South Africa…….the vigorous implementation and repeal of which might….just might provide veracity and traction to South Africa's claims that it is serious about money laundering compliance.

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Abstract

As of the 9th November 2022, South Africa finds itself squarely a target in the sights of grey listing after failing to meet the standards applied by the FATF[2] to determine a country's rating in terms of *inter alia* money laundering. The SARB[3] and the Minister of Finance have scrambled to introduce a raft of new laws. Inescapable is that such action is a legislative reaction whose impacts, when such actually arrive in statute, are questionable and hardly an effective tool to address what the FATF has found, which can be distilled to being an abject failure to implement existing laws, in particular as regards money laundering.

It can be opined that human nature, over the past 1000 years at least in Southern Africa, has driven tribal chief structures and monarchies, colonialism, apartheid, and the continued corrupt crony capitalism since, all with a same commonality, a culture that lauds achievements of knowingly by means foul and forceful, taking what belongs to another with nary a thought or care. The outcomes have favoured the few and have been and continue to have disastrous impacts on the many, becoming a *status quo* that has existed for centuries.

South Africa has laws that can adequately address what can be argued as a very old ailment….the plague of money laundering, if only the will existed some say, to implement the law. Scholars and commentators have over the past year been vocal about the "*dire consequences, worse than junk status"* that accompanies a country being grey listed. Some have accepted the inevitability.

[2] Financial Action Task Force - https://www.fatf-gafi.org/
[3] South African Reserve Bank - https://www.resbank.co.za/en/home

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Introduction

This paper addressed three specific actions, the implementation of which by the South African state will have real impact well before the looming FATF pronouncement date in February 2023.

There are three occurrences that the state itself is currently enmeshed in where action will make a difference, action of the type that speaks to implementing and repealing certain existing laws, as opposed to making new laws that as with existing laws, might never be implemented.

1. In respect of state owned entities and surplus funds, implement Section 53 (3) of the Public Finance Management Act 1 of 1999 as amended (the "PFMA") to the letter, repeal National Treasury Instruction No 12 of 202/21 and repeal the Corporation for Public Deposits Act 46 of 1984,

2. Implement the Companies Act 71 of 2008 (e.g. Section 11 (2))

3. Implement Exchange Control regulations – the Currency and Exchanges Act 9 of 1933.

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It would be prudent some would argue that the South African state accept that South Africa will be grey listed, especially if the otiose notion that implementing new law, the General Laws Amendment Bill[4], will make any difference.

It would be an error for the powers to overlook the reality as to what the real problem in this instance really is………..an inability to implement existing laws whilst thinking that new law will instead do the trick coupled with amendments of law that actually enable money laundering instead of cauterising it, right inside the Reserve Bank and at the CIPC[5].

It would further be prudent not to take bodies like the FATF and SARS[6] for fools whose intelligence and diligence capacity on financial issues globally and locally are inferior, who can't see income flows and supply chains and tributaries, and who won't find out what they don't know. It won't take such bodies long, if they don't already know, of the causes and sources of financial leakage plaguing South Africa's which operate and have operated for decades in the penumbra, enabled and sustained by the inability to implement existing law. Close inspection reveals that the leakages, which are purposeful, coupled with an inability to implement existing law, which is wilful, added to title drunk ignorant officials and parasitic political appointees is steering South Africa in the opposite direction of its own rhetoric and promises…directly down a path that goes by another name…….money laundering.

A persistent criticism made of the state is its (in)ability and (in)capacity to prosecute those who are complicit in and/or responsible for financial crime which appears to proliferate though all industries, professions and spheres of government presently.

[4] General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill (B18-2022) - https://www.parliament.gov.za/bill/2304475
[5] Companies and Intellectual Property Commission - https://www.cipc.co.za/
[6] South African Revenue Service - https://www.sars.gov.za/

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Notwithstanding no-one should be under any illusions as to the difficulty of prosecution and the implementation of consequences.

This paper addresses specific interventions that the state should consider and implement if it wishes to be taken seriously and not relegated to financial pariah status by the FATF.

Surplus Funds, state-owned entities, Treasury instructions and Corporation for Public Deposits.

In August 2022, deep into a dispute regarding the NAC's[7] Expired Project and Surplus Policy GR003/4/2015[8], that has been simmering since 2014, a remarkable affidavit surfaced – see below.

Information had come to light pursuant to infighting at the NAC board that in 2018 the NAC "*finance team was requested/instructed to open a CPD (Corporation for Public Deposits) account with the South African Reserve Bank*."

The deponent, an employee at the NAC goes on under oath to say

"*In November 2021, National Treasury issued a directive to all public entities informing that it is now mandatory to invest any surplus funds into this CDP account.*

An optimal interest rate was afforded as opposed to the current ABSA call account*. At this point the CPD was already opened but not utilised.*

[7] National Arts Council of South Africa - https://www.nac.org.za/ arising pursuant to the National Arts Council Act 56 of 1997 - https://www.gov.za/documents/national-arts-council-act arising pursuant to Culture Promotion Act 35 of 1983 - https://www.gov.za/documents/culture-promotion-act-30-mar-2015-1200
[8] Made effective by the NAC CEO, the NAC Audit and Risk Committee Chairperson and NAC Board Chairperson on 22 May 2015

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The accountant and myself then proceeded to transfer cash from the ABSA account to the CPD. This was also done to assist the cash flow of the organization.

The two transfers were done on the 5th of November 2021for R5 million and 30th March 2022 for R60 million – 2 transfers of R30 million each.

All financial information presented i.e. cashflows and management accounts related all the bank accounts. The AFS must reflect all bank accounts with amounts."

SWORN AFFIDAVIT

I, Reshma Bhoola
AGE 45 ID NO. 7708110192 086
ADDRESS: Cnr Burger + Cilliers St
Suideroord JHB
STATES UNDER OATH:-

In 2018, the finance team was requested/instructed to open up a CPD [Corporation for Public Deposits] account with the South African Reserve Bank.

In November 2021, National Treasury issued a directive to all Public Entities informing that it is now mandatory to invest any surplus funds into this CPD account.

An optimal interest rate was also afforded as opposed to the current ABSA call account. At this point the CPD account was already opened but not utilised.

The Accountant and myself then proceeded to transfer cash from the ABSA account to the CPD. This was also done to assist the cash flow of the organisation.

The two transfers were done on the 5th of November 2021 for R5 million and 30 March 2022 for R60 million - 2 tranches of R30 million each.

All financial information presented i.e. cashflows + management a/cs reflected all the bank a/c's. The AFS also reflect all bank accounts with amounts.

I KNOW AND UNDERSTAND THE CONTENTS OF THE ABOVE STATEMENT
I HAVE NO OBJECTION IN TAKING THE PRESCRIBED OATH
I CONSIDER THE PRESCRIBED OATH TO BINDING ON MY CONSCIENCE

Bhoola
SIGNATURE

CERTIFIED AND SIGNED BEFORE ME AT Mondeor JHB ON 15th August 2022

COMMISSIONER OF OATH

H.M RAMUHAHWA
FULL NAMES

RANK

SOUTH AFRICAN POLICE SERVICE: MONDEOR
163 ROYAL PARK DRIVE
MONDEOR

2022 -08- 15

In the parlance, the NAC transferred 65 meter (R65 million) of surplus funds to a Corporation for Public Deposits account – to put this into perspective :

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- This R65 million represents 51% of the NAC's 2020 annual budget.

- According the Auditor Geneal report contained in the NAC Annual report 2020-21 "*We draw attention to the fact that at 31 March 2021, the entity had* ***accumulated surplus of R 10,743,660*** *and that the entity's total assets exceed its liabilities by R 18,211,295*" and would have to have generated an additional R54 256 340 surplus funds in the 12 months to 31 March 2022 in order to make the R65 million transfer.

- This is the 12th year in a row that the NAC, one of 20 + agencies of the DSAC[9], has generated surplus funds, mostly never paid to National Treasury as demanded by law and never audited by the Auditor General of South Africa ("AGSA").

As it turns several serious, yet obvious, questions have arisen, none of which have yet been answered by any official at either the DSAC or the NAC:

- How does a state funding agency allocate 51% of its annual budget, R65 million as surplus funds?
- Where did the R65 million transferred as surplus funds actually originate?
- How is the cashflow of the NAC assisted by removing 51% of its cashflow?
- What happened to the interest earned on the R65 million at the CPD bank account *post* to its transfer?

[9] Department of Sports Arts and Culture

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- What happened to the interest earned on the R65 million at the ABSA bank account prior to its transfer?
- Why is SARB competing with the very banks[10] it is the banker to on the basis of interest offered on commercial accounts?

The generation and distribution of surplus funds by state owned entities, as observed and evidenced in practice, falls directly not only into the definition of money laundering but also precisely into the type of behaviour that the FATF finds occurring absent the oversight and implementation of the law.

The legal landscape brings to the fore another apartheid era early 1980's law, also known as a "*stealing law*", the Corporation for Public Deposits Act 46 of 1984 – another "*stealing law*" is the Culture Promotion Act 35 of 1983. According to the National Government of South Africa website

"*The Corporation for Public Deposits (CPD) was established as a subsidiary of the Bank in 1984 after the dissolution of the National Finance Corporation (NFC). The CPD is governed by the Corporation for Public Deposits Act 46 of 1984. The CPD accepts call deposits from the public sector and invests the funds in short-term money-market instruments and special Treasury bills. With the permission of the Minister of Finance, the CPD may also accept call deposits from other depositors.* ***All funds invested with the CPD, and the interest earned on these funds, are payable on demand***".

[10] Standard Bank, ABSA, Nedbank, Investec, RMB and FNB plus all the smaller and commercial banks

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Before delving deeper into the obvious, why *inter alia* the South African Reserve Bank is competing with locals banks on interest rates for deposits, there is a context that must be addressed.

The use of surplus funds to steal money from the state and/or launder money through the state can hardly be said to be new notions – in South Africa's case the state has made 3 regulatory amendments using National Treasury instruments to the governing provision Section 53 (3) of the Public Finance Management Act 1 of 1999, specifically addressing surplus funds:

- National Treasury Instruction 3 of 2015/2016
- National Treasury Instruction 5 of 2017/2018

The above can be summarised as essentially tightening the regulations concerning the use of, and the return to National Treasury of surplus funds. In the case of the NAC, neither of the National Treasury instructions were complied with, unaccounted (and distributed) surpluses were generated each year, as detailed in each Annual Report.

Out of blue to some and inevitable to the sceptical in November 2021 National Treasury issued a new instruction

- National Treasury Instruction 12 of 2020/2021

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This instruction reversed any tightening of the surplus fund abuses, instead factually allowed for the continuance and sustainability of what can only called a looting scheme, enabled by the Corporation for Public Deposits which on scrutiny *inter alia* allows the Reserve Bank to:

- transfer monies banked with the Corporation for Public Deposits anywhere in the world.

- to pay on demand all funds invested with the CPD, and the interest earned on these funds, are payable on demand.

Surplus Funds arise at state-owned entities primarily due to a failure to implement a mandated spend, itself a manifestation of a failure of governance, and if not spent, supposed to be returned to the National Treasury.

Surplus funds are not supposed to be habitual and not supposed to act as the central figure in money laundering schemes. A failure to implement law cannot result in circumventing the law.

Suggested Remedy

The combination of the following:

- **Repeal:**
    - **National Treasury Instruction 12 of 2020/2021 – return to either of the earlier National Treasury Instructions**
    - **Corporation for Public Deposits Act 46 of 1984**

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- **Cease use of, and close the Corporation for Public Deposits and all accounts**
    - **Transfer all amounts to National Treasury, to whom the monies belong**

- **Implement National Treasury Instruction 53 (3) including National Treasury Instruction 5 of 2017/2018 in a harsh and draconian manner – no official at any state owned entity should even think about using surplus funds for nefarious money laundering and theft activities.**

Outcome of the suggested remedy

- A cauterization of the use of surplus funds as theft and money laundering vehicles.
- The savings of tens of billions of rands annually and/or the return of such to National Treasury going forward.
- A real change for the better, in the governance, productivity and financial performance of state owned entities.
- Evidence that robust measures have been implemented using existing law to plug the serious surplus fund abuse hole.

Inescapable questions, the answers to which it is suggested should be discovered

- In the face of the rhetoric from the SARB and National Treasury to the FATF, why are the SARB and National Treasury doing the opposite in fact, enabling a safe haven for (stolen/looted) surplus funds, by mandate?

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- Where did the motivation to resuscitate an apartheid era law, the Corporation for Public Deposits Act 46 of 1984, that should long have been struck off the books, to enable in certain instances, money laundering and theft, come from?

De-registered and non-registered companies, CIPC, compliance with the Companies Act, the banks and SARS

A study, first done in 2018 and repeated again in 2022, on a collecting society SAMRO's[11] publisher full members (read largest earners), 57% in 2018 and 72% in 2022 of said SAMRO publisher full members were either not registered or deregistered, in some instances going back 20 years +, yet were listed as full members.

What these findings unearthed *inter alia* included:

- All of the deregistered and non-registered companies maintained bank accounts to receive on-going royalty payments, regardless of their juristic party status
- SARS would not be inclined to expect tax income from a company that in law did not exist.

[11] Southern African Music Rights Organization NPC – Reg#: 1961/002506/08 - https://www.samro.org.za/

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- There was no mechanism between CIPC and the two parties that need to know, the banks and SARS to alert either as to a company either in deregistration or not registered.
- Deregistered and non-registered companies operate for years owning copyrights, royalty attributions and royalties, without hindrance or reporting.

Delving deeper in the copyright industries it was found that the very real challenge SAMRO has with respect to the majority of its publisher membership being similarly afflicted, non-registered and de-registered, most with the same domino effect, being off SARS books and running bank accounts, is not germane to SAMRO alone, but common to the majority of the copyright industries.,…wherever royalties can be found flowing.

The juristic party memberships of SAMRO, CAPASSO[12], SAMPRA[13], RAV[14], DALRO[15], IMPRA[16], AIRCO[17], many of whom have common or cross-linking data relationships as to who the owners of various copyrights are, populated by deregistered and non-registered companies……….in their thousands.

In silos and close proximity are members of the private sector engaged in the copyright industries, in particular the multi-national so-called major record

[12] Composers Authors and Publishers Association NPC – Reg#: 2014/073024/08 https://www.capasso.co.za/
[13] South African Music Performance rights Association NPO – Reg#: 2000/028009/08 - https://www.sampra.org.za/
[14] RISA Audio Visual Licensing NPO – Reg#: 2000/021434/08 - https://www.rav.org.za/website/music-creators/ owned by Recording Industry of South Africa (RISA) – Reg#: 1995/005158/08 - https://www.risa.org.za/
[15] Dramatic, Artistic and Literary Rights Organisation (PTY) Ltd – Reg#: 1967/005018/07 - https://www.dalro.co.za/
[16] Independent Music Performance Rights Association NPC - Reg#: 2014/025121/08 - https://impra.co.za/
[17] Association Of Independent Record Companies (AIRCO) NPC – Reg#: 2006/007204/08 - https://airco.org.za/

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companies[18], music publishers[19], and the slew of so-called major independents[20], whose royalty payee databases are populated with the same deregistered and non-registered companies, with the same knock-on effect.

Contributory elements to enabling and assisting the continued trading of unregistered and deregistered companies are the following:-

- Lack (as in complete lack) of enforcement of the section 11.2 of the Companies Act 71 of 2008.
- Lack (as in complete lack) of enforcement of the section 79 of the Consumer Protection Act 68 of 2008,
- KYC[21] protocols across the copyright industries.
- No communication or trigger to alert SARS and the banks as to when a company has entered AR[22] final deregistration or liquidation final.
- No access by SARS or the CIPC to the copyright databases which record authorship and ownership of copyright works.

One sector, the royalty rich copyright industries, make wide use of non-registered and de-registered companies as has been highlighted herein. It follows that that this operating of non-registered and de-registered companies outside the purview of SARS has permeated throughout other sector supply chains…..it has…at great cost

[18] Warner Music Group, Sony Music Entertainment and Waner Music Group
[19] Universal Music Publishing, Sony Music Publishing and Warner Chappel
[20] Gallo Music Investments, David Gresham Company, Next Music, Ingrooves/Electromode, Just Music, Select Music, Active Music Publishing
[21] Know your Customer/Client
[22] Annual Return

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to the fiscus and enabling all kinds of financial malfeasance, the very kind the FATF would like to see halted.

Suggested Remedy

The combination of the following:

1. **Implement Section 11 (2) of the Companies Act**
2. **Implement Section 79 of the Consumer Protection Act**
3. **For the future, put in place a two-step auto-notification system for CIPC to alert SARS, the Deeds office and all the banks when**
    a. **A company goes into de-registration/liquidation process – warning.**
    b. **A company goes into Final AR deregistration – bank account closed – confirmed to SARS**
4. **For the present and the past, CIPC to communicate a deadline for all companies in deregistration to comply with the filing of annual returns, or face closure of their bank accounts.**
5. **Develop and communicate a know your client/customer campaign with respect to new company formations as well as existing registered entities**
6. **Embark on a communication/education campaign on the benefits of compliance and downsides of non-compliance to all stakeholders**

Outcome of the suggested remedy

- A cauterization of the use of non-registered and deregistered companies to operate businesses or bank accounts.

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- The savings of tens of billions of rands annually and/or the return of such to National Treasury going forward.
- A real motivation to comply with the Companies Act.
- A sea-change in the governance, behaviour and financial performance of CIPC companies and entrepreneurs.
- Evidence that robust measures have been implemented using existing law to plug a serious non-registered and deregistered companies' abuse hole

The intellectual property industries, compliance with Exchange Control Regulations, the Reserve Bank

Who are the intellectual property industries, one might inquire….they are the vertical and horizontal industries whose principle product and/or service is critically dependent on either of patents, trademarks, copyrights, designs, geographical indicators and/or trade secrets, collectively referred to as the intellectual property industries which with the exception of geographical indicators and/or trade secrets, each has its own statute in South African law.

Pursuant to what some opine as shoddy law in the form of the *Oilwell* decision (2011)[23] which found that the definition of capital did not include intellectual property, the state stepped in and by Presidential *fiat* as of 8 June 2012 amended Section 10 (4) of the Currency and Exchange Act 9 of 1933 to confirm that indeed the definition of capital included intellectual property[24].

[23] Case number 2010/295: Oilwell (Pty) Ltd v Protec International Ltd 2011 (4) SA 394 (SCA)]
[24] The amendments stated: *"(4) For the purpose of sub-regulation (1)(c) –*

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Essentially what the state's amendment confirmed was that Reserve Bank permission was required in order to transfer/export capital, as defined, to persons outside of South Africa or as stated "*a SA resident may not export 'capital' without approval from the SA Reserve Bank*".[25]

Hindsight informs that many the of the intellectual property industries cocked a snook at the state and have continued transferring intellectual property rights across the border to persons outside South Africa *sans* any SARB permission nor notification to the state.

Where and how does South Africa take a financial 'hit' so to speak, it may reasonably be asked or more importantly to what extent does this cost the fiscus and step hand in the money laundering glove?

Considering the copyright industries

Well it starts with global copyright income (from 200 countries across several thousand platforms) and the reporting of that income being removed to persons unknown in places outside South Africa.

Factually the consumption of South African copyright, outside South African is depending whom one speaks to 10 to 50 times the value outside South Africa more than the value generated inside South Africa.

(a) 'capital' shall include, without derogating from the generality of that term, any intellectual property right, whether registered or unregistered; and
(b) 'exported from the Republic' shall include, without derogating from the generality of that term, the cession of, the creation of a hypothetic or other form of security over, the assignment or transfer of any intellectual property right, to or in favour of a person who is not resident in the Republic.""

[25] https://www.thesait.org.za/news/95054/Exchange-control-Oilwell-does-not-end-well - By Ben Strauss (DLA Cliffe Dekker Hofmeyr Tax Alert 15 June 2012).

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So it can be said with reasonable certainty that in excess of 80% of the income generated by South African copyright never touches, or is reported on, onshore in South Africa, keeping in mind that as a creator is to a work, a performer is to a performance.

If SARB were to check its records of compliance by the copyright industries with Exchange Control Regulations – it will find a close to nil record, especially by *all* major players.

What this distils down to is that:

- The vast bulk of globally generated copyright income is neither reported on nor accounted to SARB, nor paid any tax to SARS on.
- The vast bulk of copyright asset ownership has been transferred to persons outside South Africa without SARB permission and such is a daily occurrence.
- The existing Exchange Control Regulations are not being complied with.
- At stake is the reporting, accounting and taxation of the royalty income which currently is unaccounted by persons unknown.
- If the identity of copyright (read intellectual property) authorship and ownership are unknown to both SARB and SARS and their collective global income at source is unknown on an annual basis, it stands to reason and factually that a failure to implement existing law, sees to billions in losses to the fiscus annually.

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In the intellectual property bouquet addressed above, copyright is apportioned with good reason a degree of focus. This does not mean by any means that other actors in the intellectual property bouquet are not similarly afflicted and or enabled by what are exactly the same underlying practices which amount to non-compliance with Exchange Control Regulations.

It can be argued that once again the issue of KYC or KYS[26] comes to the fore, or more correctly its absence, where intellectual property is concerned, as the owners of assets and as annual income flow recipients variously. It can further be argued that such opaque intellectual property ownership/royalty recipients, year in and year out, are precisely the type of ‘grey areas’ or ‘unregulated sectors’ where money laundering flourishes.

Suggested Remedy

The combination of the following:

1. **Implement Exchange Control Regulations to the T with immediate effect.**

2. **Start with**
    a. **copyright**
    b. **Then patents**
    c. **Then trademarks**
    d. **Then the rest of the IP bouquet**

[26] Know your subject

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3. **Offer a 3 month “type amnesty” pending full disclosure. Per sector as relates to**
    a. **Authorship and ownership of intellectual property claimed, in and outside South Africa**
    b. **Proof of previous compliance with Exchange Control Regulations, if not full disclosure**
    c. **Where and how South African intellectual property royalties flow or don’t flow back to South Africa**

4. **Per sector, a code of conduct and best practice is developed and adopted by all the major professional organizations and the state**

Outcome of the suggested remedy

- A direct request for proof of compliance with exchange control regulations along with a list of South African inventory licensed/sold outside South Africa will bring an immediate halt to transferring intellectual property outside the country without due legal process.
- A sea-change in behaviour going forward on an annual basis.
- Industry representation to lessen the damages occasioned by decades of non-compliance.
- The savings of billions of rands annually and/or the return of such to National Treasury going forward.
- A real motivation to comply with the Exchange Control Regulations.

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- Evidence that robust measures have been implemented using existing law to plug a serious non-compliance with exchange control regulations hole, which hole currently costs, and has cost, on an annual basis, billions.

Conclusion

Financial and monetary systems…………like water systems, have the propensity to leak. Countries that are short of water know this all too well…and many have made real steps to reduce leakage from 30%+ to under 10%, a real life necessity. There are those who invest in various intellectual property assets and royalty supply chains who plan their income futures at 75% of the potential with the belief that they are hedged effectively, which would be imprudent for the leakage with intellectual property royalty supply chains and chains of title is in excess of 50%.

Facing imminent censure by the FATF for real failures as regards financial oversight and the lack of enforcement of financial oversight, putting forward new law to be amended and made law is not the only and prudent path to follow. More promises…on top of unfulfilled promises is likely to receive a derisive and tepid response.

Now more than ever before is time for effective and real action as far as those who have found excuse to not only break the law, but also to steal monies with impunity and launder from the sublime to the most heinous across three statutes.

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There is no place in this debate….no exception or limitation that is, for a contrarian view to implementing existing law as regards any of the three parasitic financial practices identified in this paper, that that has traction or veracity. Implementing existing laws, there are many more than addressed in this paper, will make for significant change in the fortunes of the fiscus.

By all accounts, from countries who have been stuck on the FATF list, like Pakistan, to those who have gotten off the list, like Mauritius, being on the FATF list is no walk in the park and the cause of rea; pain and suffering. Mauritius is the current destination of a fair portion, of late of South African intellectual property, occasioned by the directions of professional advisors, the bulk of which does not conform to exchange control regulations.

This paper has address three specific areas of action to speak, to implementing existing laws to make even a small a difference to South Africa's apparently inexorable direction and lean, to being greylisted. Yes, prosecution can be lengthy and extremely difficult in many if not most instances, that is true……….except when the hand is in the proverbial cookie-jar…plea bargaining or jail or both being the only option. When the Steinhoff's can't get away with it, it's open sticks. At the baseline, everyone seeks a better future….a little less poor is the echo, attaining wealth being a significant challenge to most.

End.

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