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Tshinaba, Tshianzi Palesa

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South Africa's greylisting due to deficiencies in its corporate legal framework on illicit financial flows: is there a need for measures enhancing transparency in relation to beneficial ownership?

by

Tshianzi Palesa Tshinaba

under the supervision of

Charmika Samaradiwakera-Wijesundara

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Master of Laws by Coursework and Research Report
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Date: 13 October 2023

DECLARATION

I, _____1614274_____, declare that this Research Report is my own unaided work. It is submitted in partial fulfillment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

I have submitted my final Research Report through TurnItIn and have attached the report to my submission.

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ABSTRACT

On 24 February 2023, the Financial Action Task Force's decision to 'grey list' South Africa sent shockwaves through the Republic, placing it under increased monitoring by the intergovernmental body. The economic consequences thereof are dire: loss of investor confidence, increased difficulty in obtaining donor funding from abroad, among many others. The greylisting is a consequence of South Africa's failure to address the deficiencies in many aspects of its anti-money laundering and counter-terrorist financing regime, including those relating to the obscure beneficial ownership framework designed for companies that operate within its territory.

Motivated by the pressure of being greylisted, the South African government is in the process of establishing a new beneficial ownership regime that is much more transparent and aims to prevent the use of companies by their beneficial owners to facilitate illicit financial flows.

However, the obscurity of the "old" beneficial ownership regime was rooted in the need to protect beneficial owners' privacy and safety. It is on this basis that this paper investigates whether there is truly a need for a new beneficial ownership regime and, if there is, whether the regime being established by the South African government will be effective in preventing and deterring beneficial owners from using companies as vehicles through which they can engage in illicit financial flows in and out of the Republic.

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I. Introduction

The increased use of companies in schemes designed to facilitate illicit financial flows (hereafter referred to as 'IFFs') by obscuring their beneficial ownership structures has become of a matter of great concern to the international community.[1] Beneficial ownership refers to natural persons who have indirect yet ultimate control of and financially benefit from companies.[2] Conversely, legal ownership refers to a natural or juristic person who directly owns or has control of a company, such as a nominee shareholder.[3] The High Level Panel on Illicit Financial Flows from Africa defines IFFs as the use, transfer or earning of money that is illegal and/or deviates from established rules and norms.[4] IFFs have dire consequences, including the hindrance of South Africa's development, transformation and political economy[5] because the illicit transfers of funds to areas beyond its borders depletes the Republic of financial resources.[6]

Thus, the Financial Action Task Force (hereafter referred to as 'FATF') and G20 have been working in tandem to address the misuse of companies for nefarious purposes.[7] The FATF is an "independent, inter-governmental entity responsible for the development and promotion of policies that will protect the global financing system from the threats of money laundering and terrorist financing".[8] Its recommendations enjoy recognition as the global anti-money laundering ('AML') and counter-terrorist financing ('CTF') standard.[9]

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[1] Financial Action Task Force 'Concealment of Beneficial Ownership' (2018), available at *http://www.fatf-gafi.org/publications/methodandtrends/documents/concealment-beneficial-ownership.html*, accessed on 02 February 2023 at page 5

[2] Andres Knobel, Moran Harari & Markus Meinzer 'The state of play of beneficial ownership registration: A visual overview' (2018), available at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3204532,* accessed on 02 July 2023 at page 5.

[3] Ibid.

[4] AU/ECA Conference of Ministers of Finance, Planning and Economic Development 'Understanding the phenomenon of illicit financial flows from Africa' in AU/ECA Report of the High Level Panel on Illicit Financial Flows from Africa (2015), available at *https://au.int/en/documents/20210708/report-high-level-panel-illicit-financial-flows-africa,* accessed on 15 February 2023 at page 23.

[5] Ibid.

[6] Ibid at 51.

[7] 'Identifying the beneficial owner' *De Rebus* 1 October 2017.

[8] Financial Action Task Force *op cit* note 4 at page 2. Financial Action Task Force 'Anti-money laundering and counter-terrorist financing measures – South Africa, Fourth Round Mutual Evaluation Report' (2021), available at *http://www.fatf-gafi.org/publications/mutualevaluations/documents/mer-south-africa-2021.html, accessed on 02 February 2023* at page 2.

[9] Ibid.

The G20 is a global economic governance forum comprised of heads of government who jointly control approximately eighty percent of the world's gross domestic product ('GDP').[10] It was created in response to the Global Financial Crisis of 2008 to facilitate collaboration between its member states when international financial crises arise.[11] South Africa is required, as a G20 member, to implement beneficial ownership transparency (hereafter referred to as 'BOT') measures in accordance with the FATF's recommendations.[12] Beneficial ownership transparency is a mechanism through which the identities of natural persons who own, control or benefit from a company are revealed.[13]

In 2021, FATF – the world's financial crime scrutineer[14] – reported numerous deficiencies in South Africa's compliance with its recommendations relating to the prevention of money laundering and financial terrorism through full disclosure of beneficial ownership in companies.[15] Following South Africa's failure to implement the necessary remedial measures within a period of twelve months,[16] it was greylisted by the FATF in 2023.[17] Greylisting entails the FATF placing a country under increased monitoring because of non-compliance with the entity's anti-money laundering and countering the financing of terrorism standards.[18] Although the FATF identified many deficiencies in South African law, my focus will be on those relating to the disclosure of beneficial ownership.

As enhanced measures to combat IFFs by financial institutions have developed, as has the use of companies as vehicles through which the corrupt continue to conceal the proceeds of their

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[10] Robert Benson & Michael Zurn 'Untapped potential: How the G20 can strengthen global governance' (2019) 4 *South African Journal of International Affairs* 26 at page 549.
[11] Krish Chetty, Urvashi Aneja, Vidisha Mishra, Nozibele Gcora & Jaya Josie 'Bridging the digital divide in the G20: skills for the new age' (2018) 12 *Economics: The Open-Access, Open-Assessment E-Journal* at page 4.
[12] Amanda Manyame 'Beneficial ownership transparency and data protection in South Africa' (2022), available at *https://www.openownership.org/en/publications/beneficial-ownership-transparency-and-data-protection-in-south-africa/*, accessed on 04 May 2023.
[13] Matilda Moyo 'Tackling illicit financial flows, a matter of survival for Africa's development' *Africa Renewal* 15 June 2021.
[14] Financial Action Task Force *op cit* note 7 at page 2.
[15] Ibid at 138.
[16] Wood, Kerin 'South African companies need to take action after FATF greylisting' (27 February 2023), available at *https://www.pwc.co.za/en/blog/south-african-companies-need-to-take-action-after-fatf-greylisting.html*, accessed on 04 March 2023.
[17] 'South Africa greylisting impact: How can legal practitioners help?' *De Rebus* 1 March 2023.
[18] Louis de Koker, John Howell & Nicholas Morris 'Economic Consequences of Greylisting by the Financial Action Task Force' (2023) 81 *Risks* 11 at page 1.

illicit activities.[19] BOT has become an internationally utilised measure to combat the misuse of companies as tools through which illicit financial flows can be facilitated.[20]

Following South Africa's greylisting, its government has developed a number of measures to enhance BOT. However, the obscurity of the nation's "old" beneficial ownership regime served the purpose of protecting beneficial owners' privacy and security.[21] The new BOT measures do away with this protection. Given this purpose, does their personal information being made publicly accessible not discourage their investment in companies and pose a threat to the same economy the measures seek to protect?

That being so, I, through the multidisciplinary lens of law and political economy, aim, first, to interrogate whether there truly is a need for enhanced transparency relating to beneficial ownership in the South African context. Second, it aims to critically analyse the new beneficial ownership regime's effectiveness in addressing the deficiencies in the country's corporate legal framework and achieving the goal of identifying and preventing the occurrence of illicit financial flows in and out of its borders.

In order to achieve the abovementioned aims, I will begin with an analysis of the South Africa's beneficial ownership disclosure regime that will identify the specific deficiencies of the Companies Act 71 of 2008 discovered by the FATF. Thereafter, I will embark on a critical analysis of the "new" beneficial ownership transparency regime, the effectiveness of which will be measured against its stated purpose. This will include discussion of the General Laws Amendment Act 22 of 2022 and its amendments of the Companies Act in conjunction with the Draft Companies Regulations Amendments of 2023.

Conversely, it may be argued that the enhanced BOT measures are unnecessary and therefore ineffective because they may adversely impact the economy by deterring individuals from investing in South African companies. Moreover, it may be argued that there is no need for enhanced measures because South Africa already relied on various sources for information on the beneficial ownership of companies.[22] This approach arguably ensures that companies

[19] Duri, J & Matasane, MA 'Regulation of Beneficial Ownership in South Africa and Zimbabwe' (2017) 1 *Journal of Anti-Corruption Law* at 175.
[20] Manyame *op cit* note 3.
[21] Ibid.
[22] Duri & Matasane *op cit* note 8 at 185.

cannot engage in business with financial institutions without disclosing the beneficial owners' details.[23]

Despite these arguments, however, I favour the prioritisation of curtailing illicit financial flows considering their sheer magnitude[24] and detrimental economic effects and argue that the new legislative interventions may be the correct means to achieve this end. The country's greylisting is a blatant and unfortunate demonstration of the dire consequences that flow from obscure beneficial ownership frameworks. The gaps and deficiencies in South Africa's rules under the Companies Act of 2008 allow such financial flows including those achieved through money laundering, tax abuses and corruption, to flourish[25] at the expense of the country's economic development and survival.[26]

Thus, through the abovementioned critical analysis and with reference to relevant statutory provisions, judicial precedent and academic sources, I will prove the necessity of beneficial ownership transparency in the South African context. In addition, I will illustrate the potential effectiveness of the new beneficial ownership disclosure regime. This paper goes beyond the need to ensure national compliance with international standards, viewing the legal framework for beneficial ownership as a tool through which the facilitation of illicit financial flows through corporate vehicles can be curtailed for the betterment of South Africa's social and economic development.

[23] Ibid.
[24] Moyo *op cit* note 4.
[25] Ibid.
[26] Ibid.

II. Problematising the South African corporate legal framework's "old" beneficial ownership regime:

a) Contextualising South Africa's greylisting and the call for enhanced beneficial ownership transparency measures: the methods and consequences of facilitating illicit financial flows through companies

Prior to outlining the FATF's's findings, the relationship between IFFs, how they occur in companies and beneficial ownership transparency must be established. IFFs that occur through business activity have several purposes including tax evasion and the concealment of wealth.[27] "Money laundering", a central threat to the global financing system and focus of the FATF[28], is an illegal means through which wealth is concealed.[29] This is a colloquial term for the use of revenue generated by illegal activity aimed at concealing the capital's source.[30]

The FATF has identified schemes designed to obscure beneficial ownership of companies[31] for nefarious purposes. This obscurity is a "hide-in-plain sight" strategy used by individuals to conceal their ownership of illicitly obtained assets.[32] The entity highlights nominee directors and shareholders as key vulnerabilities.[33] This is because the nominee's role is often simply to conceal the identity of the beneficial owner.[34] It is further recommended by the entity that countries must consider vulnerabilities and threats relating to domestic and foreign companies and how criminals can use them to facilitate IFFs.[35]

The consequences thereof are dire. Africa loses $50 billion a year to IFFs.[36] In 2017, Global Financial Integrity estimated that South Africa was losing between R200 billion to R400 billion annually to IFFs.[37] They result in loss of revenue and investment capital that could be

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[27] Ibid at 24.
[28] Financial Action Task Force *op cit* note 4 at page 2.
[29] AU/ECA Conference of Ministers of Finance, Planning and Economic Development *op cit* note 16 at page 20.
[30] Donato Masciandaro 'Money Laundering: the Economics of Regulation' (1999) *European Journal of Law and Economics* 7 at page 226.
[31] Financial Action Task Force *op cit* note 1 at page 5.
[32] Ibid.
[33] Ibid at page 6.
[34] Ibid.
[35] Ibid at page 10.
[36] AU/ECA Conference of Ministers of Finance, Planning and Economic Development *op cit* note 16 at page 20.
[37] Shaku, Trevor 'Imperialist theft: How illicit financial flows and capitalism trample human rights in South Africa' *Daily Maverick* 28 November 2021.

used to further development programmes in the continent,[38] the sapping of the rule of law's strength and,[39] of course, greylisting. As a result of the latter consequence, South African companies will face increased costs and delayed execution of transactions because they will be subject to additional requirements to access sources of funding.[40] The economic impact of greylisting on the entire country, however, is dependent on the extent to which authorities are perceived to be acting to address the deficiencies the FATF has identified.[41] There is the risk of decreased demand of exports, reduced investor confidence and less access to international lending and donor funding.[42]

These findings make the importance of preventing the occurrence of IFFs in and out of South African borders and the need for BOT clear. Lifting the corporate veil that shields company owners is acknowledged as a fundamental tool in the prevention of IFFs.[43] This is where the FATF comes into play.

b) <u>The Financial Action Task Force's findings on and recommendations South Africa's anti-money laundering and counter-terrorist financing measures:</u>

Prior to the greylisting, FATF identified eight areas in which South Africa needed to make improvements, the most pivotal for the purposes of this paper being that of giving authorities timeous access to accurate and current beneficial ownership information on companies[44] and implementing sanctions for beneficial ownership obligation violations.[45] The other areas of improvement include demonstration of increased outbound Mutual Legal Assistance requests which aid investigations of money laundering and terrorism financing,[46] increased investigation and prosecution of IFFs,[47] enhanced identification and confiscation of the

[38] Ibid.
[39] Ibid.
[40] Wood *op cit* note 6.
[41] Ibid.
[42] Ibid.
[43] Etter-Phoya *op cit* note 16 at page 3.
[44] Oliphant, Mapula 'South Africa greylisting impact: How can legal practitioners help?' *De Rebus* 1 March 2023.
[45] Ibid.
[46] Ibid.
[47] Ibid.

proceeds and tools utilised to facilitate IFFs,[48] and ensuring implementation of financial sanctions.[49]

Although South Africa must improve its performance in all the areas outlined, the first two are of paramount importance for the purposes of this paper because of their direct connection to and acknowledgement of the role of BOT in preventing IFFs. Moreover, they are most closely related to the improvements that must be made in relation to the law that regulates companies. It is on this basis that I argue that the other areas of improvement relate more to implementation of existing laws rather than the development of corporate laws that enhance the country's compliance with the FATF's recommendations.

In its key findings, the FATF discovered that South African law enforcement struggles to obtain accurate and regularly updated beneficial ownership information about companies and trusts that render it incapable of effectively investigating ML and TF in the corporate arena.[50] The entity notes insufficient BOT as an acute vulnerability and cause thereof because of the frequent use of companies and trusts as vehicles for money laundering and other IFFs.[51]

In respect of Recommendation 24 of the FATF's Mutual Evaluation Report ('MER') – its guidance on transparency and beneficial ownership of legal persons[52] – South Africa was deemed partially compliant.[53] The entity notes that although there are mechanisms in place identifying and describing the kinds and basic features of legal persons that can be formed[54], information on the process of creating legal persons covers mere basic information and lacks any processes for obtaining and recording beneficial ownership information.[55] The deficiencies of greatest concern to the FATF related to the absence of measures to provide authorities with accurate and sufficient beneficial ownership information timeously.[56]

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[48] Ibid.
[49] Ibid.
[50] Financial Action Task Force *op cit* note 4 at page 4.
[51] Ibid at page 5.
[52] Ibid at page 196.
[53] Ibid at page 199.
[54] Ibid at page 196.
[55] Ibid.
[56] Ibid.

I argue that this is because, in the absence of timeous access to beneficial ownership information, authorities are rendered incapable of investigating and halting IFFs before their consequences manifest. If authorities' ability to prevent IFFs in this context is impeded, those who engage in them are emboldened to continue without fear of detection and facing sanctions. The analysis of these deficiencies in South African law below will clearly substantiate the need for BOT.

c) <u>The beneficial ownership regime under the Companies Act 71 of 2008 and Companies Regulations of 2011:</u>

The corporate legal deficiencies leading to South Africa's greylisting are found in the Companies Act 71 of 2008 (hereafter referred to as 'the Act' or 'the Companies Act'), as well as the Companies regulations in GN 351 *GG* 34239 published in terms of s223 and Item 14 of Schedule 5 thereof.[57] One of the most pertinent deficiencies is the absence of a definition for the terms "beneficial ownership"[58] and "beneficial owner". Section 1 of the Act only provides a definition for a "beneficial interest"[59], describing it as a person's right or entitlement to participate in the distribution of company securities, exercise or cause the exercise of rights to such securities or to direct their disposal.[60] A definition of "beneficial ownership" was only introduced in South African law in 2017, but it was in s1(1) of the Financial Intelligence Centre Act 38 of 2001 ('FICA').[61] This substantiates the argument that the "old" beneficial ownership regime under the Act and regulations was obscure and therefore left companies susceptible to misuse for the facilitation of IFFs.[62]

Additionally, s13 and 14 of the Act require all companies incorporated in South Africa to be registered with the Companies and Intellectual Property Commission (hereafter referred to as 'the CIPC' or 'the Commission').[63] They are obligated to file notices with the CIPC when

[57] Companies Regulations in GN 351 *GG* 34239 of 26 April 2011.
[58] Transparency International 'South Africa: beneficial ownership transparency' (2015), available at *https://www.transparency.org/files/content/publication/2015_BOCountryReport_South_Africa.pdf*, accessed on 15 March 2023.
[59] Act 71 of 2008.
[60] Ibid.
[61] It is worth noting that Duri and Matasane highlight FICA as an additional and viable source of beneficial ownership information in the South African context that would arguably render the creation of a new regime unnecessary. However, its focus is on financial institutions, legal practitioners and foreign exchange dealers rather than juristic entities governed by the Companies Act and therefore goes beyond the scope of this paper.
[62] Duri & Matasane *op cit* note 8 at 179.
[63] Act 71 of 2008.

certain changes occur[64], such as a change in the location at which company records are accessible in terms of s25(2)(b).[65] This example illustrates that although the rules appear to provide certainty and specificity, they propagate the Act and its regulations' obscurity through failing to prescribe a time frame in which companies can file a notice of change in the location of company records.[66] This failure increases the risk of IFFs because the absence of an explicitly specific time frame creates ample time and opportunity for beneficial owners to conceal evidence of IFFs contained in company records, rendering the law susceptible to manipulation.

Although s66 of the Act requires companies to have directors responsible for ensuring compliance with lawful requests for shareholder information from their securities registers[67], and Reg. 38 also requires their prescribed officers to do so,[68] the scope of beneficial ownership information required was very limited. Every company was required to establish and maintain a register of its issued securities by s50(1), but s50(2)(a) only required companies to maintain information on the total number of uncertificated securities and s50(2)(b) only requires the names and addresses of people to whom certificated securities have been issued.[69] Moreover, s50(1)(b), read together with Reg. 32[70], does not require the securities register on shareholding to be kept up to date.[71] These requirements make room for nominees to be used to conceal the identities of the true beneficial owners of company securities, which the FATF highlighted as a key vulnerability.[72]

In terms of s56(1), a person ("nominee") can hold or register a company's issued securities in the name of another for the latter's beneficial interest.[73] However, s56(3) attempts to mitigate the risk of this permission being misused for nefarious purposes by setting out several requirements: the registered holder must disclose to the company the identity of the person they have acted on behalf of[74], the identity of every person with a beneficial interest in the

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[64] Ibid.
[65] Ibid.
[66] Financial Action Task Force *op cit* note 4 at page 197.
[67] Act 71 of 2008.
[68] GN 351 *GG* 34239.
[69] Act 71 of 2008.
[70] GN 351 *GG* 34239.
[71] Financial Action Task Force *op cit* note 4 at page 197.
[72] Ibid at page 5.
[73] Act 71 of 2008.
[74] Ibid.

securities[75] and each beneficial interest's extent.[76] Sections 56(4)(a) and 56(7)(a) further require written disclosure of changes in identity information within five business days after the end of that month[77] and record keeping of these changes.[78] Failure to comply with these requirements amount to offenses punishable by fines and/or imprisonment.[79]

Despite implementing the requirements above as safeguards against the risk of subterfuge posed by the obscure beneficial ownership disclosure regime in its totality, and sanctioning parties who breach its requirements, this corporate legal framework fails to mitigate the risk. This is, first, because it does not place the CIPC under any duty to verify the accuracy of the information companies provide.[80] Second, because although the CIPC is responsible for recording information about companies – as illustrated by ss13, 14 and 25(2)(b) above[81] – the Act does not oblige the entity to collect and verify beneficial ownership information of foreign companies.[82]

This is notwithstanding that s186(1) of the Act explicitly stipulates that the CIPC's primary objectives are to maintain accurate, updated and relevant information relating to companies and to provide the public and state organs with access to this information.[83] It is on this basis that Duri and Matasane justifiably argue that the CIPC would be best placed to hold this information so that authorities can obtain it when it is required to investigate IFFs facilitated through the misuse of companies.[84] In the same vein, although the regime grants authorities some power to access beneficial ownership information, they are incapable of exercising it effectively because of the abovementioned statutory limitations placed on the scope and depth of information they can access. While s50(2) of the Act requires company security registers to contain registered security owners and beneficial interest holders' names and addresses, for example, neither the statute nor the Companies regulations require companies

[75] Ibid.
[76] Ibid.
[77] Ibid.
[78] Ibid.
[79] Financial Action Task Force *op cit* note 4 at page 198.
[80] Ibid at page 197.
[81] Act 71 of 2008.
[82] Duri & Matasane *op cit* note 8 at 182.
[83] Ibid at 181.
[84] Ibid at 182.

to establish and maintain information on natural persons with ultimate control or ownership thereof.[85]

It can therefore be argued that enhanced BOT measures are necessary, specifically on the basis that the obscurity of beneficial ownership permitted under the Act and its regulations creates a series of loopholes through which IFFs can occur, particularly through the use of nominee shareholders by beneficial owners. Secondly, the above discussion of the provisions governing beneficial ownership highlight numerous gaps within them that form a breeding ground for individuals to abuse the separate legal personality of the company for the purposes of engaging in illicit activities by using it to conceal their identities as the beneficial owners. Part III of this paper, however, judicial precedent will be used to assess whether there is truly a need to enhance BOT in South Africa.

[85] Ibid at 183.

III. Critical analysis of the enhanced beneficial ownership transparency measures' necessity:

a) The rationale behind the obscurity of the Companies Act and Companies Regulations' beneficial ownership disclosure regime

Prior to concluding that enhanced BOT measures are necessary in South Africa, it is important to establish an understanding of the social, economic, and historical context upon which its 'old' regime was premised. In *Johnston v Johnston,*[86] the court noted that the use of nominee shareholding and ownership became a popular means through which people of colour manoeuvred around the laws of the apartheid regime that prohibited them from owning land in "white" areas.[87] It was noted further that its use as a means to prevent the identification of the beneficial owner of an asset remains prevalent and is applied to securities held in public companies.[88] Thus, according to the court, the ultimate beneficial owner's identity may never be revealed[89], despite the new disclosure requirements provided by the 2008 Act and its regulations[90] discussed in the previous section.

Expanding on the explanation provided by the *Johnston* case, the court in *Dadoo v Krugersdorp Municipality*[91] held that the law does not recognise the notion of companies possessing racial characteristics.[92] Here, two people incorporated a company for the purpose of acquiring immovable property[93] in contravention of law that prohibited persons of Asian heritage from owning land in parts of South Africa.[94] The municipal council subsequently applied to have the transaction for the purchase set aside on the basis that the company was a "fiction" designed to subvert this clear legal prohibition.[95] The court held that the company's ownership of the property was not substantive ownership by its Asian shareholders[96] because

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[86] [2018] JOL 40608 (GJ).
[87] Ibid at para 8.
[88] Ibid.
[89] Ibid.
[90] Ibid.
[91] *Dadoo Ltd and Others v Krugersdorp Municipality* [1920] AD 530.
[92] Tawanda Hondura 'Off the Beaten Track into the Savannah: The Mike Campbell (Pvt) Ltd v The Republic of Zimbabwe Ruling Imperils SADC Investment Law' (2013) *SADC Law Journal* at page 30.
[93] Ibid at 34.
[94] Ibid.
[95] Ibid.
[96] Ibid.

it was its own legal person distinct from its members.[97] The court's ruling, therefore, upheld its separate legal personality rather than conflating it with the legal personalities of its owners and beneficiaries. This conclusion would arguably render the identification of a company's beneficial owners irrelevant, providing insight into the foundation of South Africa's old, obscure beneficial ownership framework.

Similarly, in *Gumede v Bandhla Vukani Bakithi,*[98] the court held that a company with shareholders and directors of African descent ('natives') is not a 'native' itself.[99] The focus was on the company's separate legal personality. The court's statement affirms the argument that the old beneficial ownership framework was obscured by prioritisation of upholding the separate legal personality of the company above identifying the beneficial owners thereof. The court concluded that the company was a separate legal person with no race.[100] Therefore, the law providing that African people could only sue each other in native courts was inapplicable.[101]

Thus, based on the above, one may conclude that South Africa's obscure beneficial ownership framework was premised on the notion that the company, as a juristic person with its own legal personality, is so independent from the natural persons who benefit from and govern them that their identities are [*de facto*] irrelevant. Subsequently, it may be argued that there is no need for enhanced BOT measures in the South African context. The jurisprudence of the courts above affirms this view because they prioritise upholding companies' separate legal personalities rather than their owners' identities. On this basis, it can be inferred that transparency regarding owners' identities is not an issue of great importance in company law. Moreover, the courts' focus on the company's separate legal personality facilitates beneficial ownership concealment through the frequent use of nominee shareholding and ownership. It is important to note that nominee shareholding was highlighted as a vulnerability in the FATF's findings,[102] demonstrating that the courts' approach to beneficial ownership must

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[97] Ibid at 35.
[98] *Gumede v Bandhla Vukani Bakithi Ltd* [1950] (4) SA 560.
[99] Hondura *op cit* note 75 at 35.
[100] Ibid.
[101] Despite the company's separate legal personality having been upheld in favour of natives in the matter, this outcome should not create a perception that they were provided with equitable access to ownership in companies and land upon which to operate them in South Africa's pre-constitutional legislative framework. In the absence of approval from the Governor-General, natives were prohibited from acquiring any interest in land in any areas outside of those specified in the Native Trust and Land Act 18 of 1936.
[102] Financial Action Task Force *op cit* note 1 at page 5.

change to comply with the everchanging international standards created in response to the economic risks that have come with the increased use of companies to facilitate IFFs over time.

Thus, the jurisprudence of the courts in the above matters, while providing clarity regarding the rationale for the beneficial ownership regime's obscurity, cannot be applied to modern South African law. Despite the aim of upholding the longstanding principle of the company being a legal person whose existence is separate from that of its owners and beneficiaries, I argue that the changes brought by the end of the apartheid era and dawn of globalisation have rendered this reasoning defunct. In my view, the continued focus on maintenance of the company's separate legal personality at the expense of ensuring BOT amounts to a failure by the state to adapt its corporate legal framework to the 21st century, an era characterised by immense societal, economic, and commercial change.[103] South Africa's failure to prioritise BOT has, in addition to rendering companies vulnerable to the internationally acknowledged risk of being used as vehicles for the facilitation of IFFs, caused the key deficiencies identified by the FATF.

A similar argument raised against the implementation of enhanced BOT measures relates to the protection of beneficial owners' privacy in a modern global economic context. In its publication on the legal implications of public beneficial ownership data, Open Ownership, an international non-profit organisation that provides governments and companies with BOT guidance, outlines factors that incentivise beneficial owners to conceal their identities beyond the facilitation of IFFs.[104]

The first is that their identities' concealment allows investors such as celebrities to engage in business activities without being watched and subjected to harassment.[105] Closely related to this motive is that of safety.[106] Wealthy investors and public figures express concerns about their information being made publicly accessible leaving them vulnerable to harms including kidnapping, blackmail and identity theft.[107] While Open Ownership was unable to discover

[103] King IV Report on Corporate Governance for South Africa (2016).
[104] The Engine Room, OpenOwnership & The B Team (2019) *Data Protection and Privacy in Beneficial Ownership Disclosure,* available at *https://www.openownership.org/en/publications/beneficial-ownership-transparency-and-data-protection-in-south-africa/*, accessed on 21 April 2023 at page 32.
[105] Ibid.
[106] Ibid.
[107] Ibid.

practical examples in which such harms have occurred because of BOT,[108] it has been reported that company directors are at higher risk of identity fraud.[109] In spite of their making up only 9% of the population, they make up a disproportionate 19% of victims of identity theft across the globe.[110]

While it may be true that enhanced BOT measures will do away with the protection of beneficial owners' right to privacy, does this line of reasoning not then imply that these human rights are absolute? Section 36 of the Constitution of the Republic of South Africa (hereafter referred to as 'the Constitution') permits the limitation of rights by a law of general application (i.e. law that applies to people generally rather than to individual cases) [111] that is reasonable and justifiable in an open and democratic society based on dignity, freedom and equality.[112] Rights must be limited with due consideration of factors including their nature, the importance of the limitation's purpose, and whether there are less restrictive means to achieve the purpose.[113]

Accordingly, does this argument not imply that the right should be prioritised over the governmental mandate to improve the quality of life of all citizens found in the Constitution's preamble?[114] The advancement thereof undermines the aims of the Constitution, because the greylisting was caused, in part, by South Africa's obscure beneficial ownership regime which has the dire consequences economic outlined in Part II, including reduced investor confidence and weakened access to international lending and donor funding.[115]

This impacts all businesses operating within the country and, subsequently, the lives of all citizens living in it because foreign investment has great potential to reduce poverty.[116] The reduction of investor confidence caused by IFFs and the greylisting places South Africa at

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[108] Ibid.
[109] LexisNexis Risk Solutions (2016) 'Who are the victims of identity fraud?' (2016) *Who are the victims of identity fraud?,* available at *https://risk.lexisnexis.co.uk/insights-resources/white-paper/who-are-the-victims-of-identity-fraud-wp-uk*, accessed on 18 April 2023.
[110] Ibid.
[111] Jacques de Ville 'Interpretation of the general limitation clause in the chapter on fundamental rights' (1994) 9 *South African Public Law* 287 at page 298.
[112] The Constitution of the Republic of South Africa, 1996.
[113] Ibid.
[114] Ibid.
[115] Wood *op cit* note 6.
[116] Janvier D Nkurunziza 'Illicit Financial Flows: A Constraint on Poverty Reduction in Africa' (2012) 87 *Association of Concerned African Scholars Bulletin* 15 at page 16.

risk of losing foreign investment to the socioeconomic detriment of its citizens. Moreover, IFFs enable the wealthy to appropriate resources unlawfully for their own benefit and gain access foreign healthcare and educational services with ease, leaving impoverished citizens to fend for themselves.[117] Thus, IFFs increase poverty and economic inequality, further reducing underprivileged citizens' quality of life. It is on this basis that I argue that the limitation of the right to privacy in this context is reasonable and justifiable.

In summary, although the arguments against the necessity of enhanced BOT measures are convincing, the analyses above illustrate their refutability. The prioritisation of the company's separate legal personality rather than its owners' identities has become defunct in light of the increasingly detrimental and widespread impact of IFFs conducted through the concealment of beneficial owners' identities. Second, beneficial owners' right to privacy is not absolute under South African law and the limitation thereof is reasonable and justifiable when one considers the purpose in this context: to prevent the use of companies to facilitate IFFs, which have adverse impacts on poverty reduction and the quality of citizens' lives.

b) <u>The rationale behind the imposition of a new beneficial ownership disclosure regime</u>

Beyond the pressure placed upon South Africa to implement the FATF's recommendations following the country's greylisting and the consequences, judicial precedent and academic sources provide additional substantiation of the argument for enhanced BOT measures. Although the historical reasons for South Africa's permission of beneficial owner identity concealment were rooted in upholding the separate legal personality of the company, it has become protective barrier underneath which criminals can perpetuate IFFs through these juristic entities.[118] South African courts have begun to appreciate the need for BOT in the fight against IFFs,[119] demonstrated by *ST v CT*[120] and the *Africa Opportunity Fund v Shoprite Holdings*[121] cases.

[117] Ibid.
[118] Duri & Matasane *op cit* note 8 at 175.
[119] Ibid.
[120] *ST v CT* [2019] JOL 44432 (SCA).
[121] *Africa Opportunity Fund LP and another v Shoprite Holdings Ltd and another* [2019] JOL 42149 (WCC).

i) *ST v CT*: a judicial acknowledgement of companies' vulnerability to misuse for the concealment of illicit financial flows

This matter centred around a dispute about the accrual due to a spouse (the respondent). wherein the other spouse (the appellant) averred that the former bore the onus of proving that he excluded assets from his estate for the purposes of accrual calculation.[122] One of the issues before the court was the true extent of the appellant's estate.[123] The court found that the appellant held direct and indirect interest in juristic entities both inside and out of South African territory.[124] The respondent contended that the appellant was their true beneficial owner.[125] While addressing the issue, the court noted that making a determination of the estate's value was "fraught with difficulty"[126] because the entities' names were frequently changed and had different financial year ends.[127] It was on this basis that the court pierced the corporate veil and found that the appellant did, indeed, hold full beneficial ownership in them all.[128] The respondent argued that this was an elaborate scheme by the applicant to conceal his assets and the transfer of funds between the entities through the web of the South African and offshore entities.[129]

The court *a quo* held that the appellant was engaging in subterfuge, finding that the entities in question were "shams"[130] he was using to conceal his assets at the expense of the respondent.[131] This decision demonstrates an acknowledgement by South African courts of the potential for parties to use companies and other juristic entities to funnel illicitly obtained assets inside and out of the Republic's borders. Although the Supreme Court of Appeal ('SCA') overturned this judgement in favour of the appellant, it was not because it deemed engagement in subterfuge and the use of companies to conceal assets for sinister purposes issues of great concern. Instead, it was because the court *a quo* gave no satisfactory reasons for concluding that the appellant's intentions were "sinister".[132]

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[122] *Supra* note 98 at paras 11-18.
[123] *Supra* note 98 at para 48.
[124] Ibid at para 50.
[125] Ibid.
[126] Ibid.
[127] Ibid.
[128] Ibid at 50.
[129] Ibid at para 48.
[130] Ibid.
[131] Ibid.
[132] Ibid at para 66.

It may appear that this case is irrelevant for the purposes of this paper because its focus is on divorce proceedings, but its significance lies in the fact that the obscurity of the juristic entities' beneficial ownership led to the respondent bearing the onus of proof thereof.[133] Moreover, it substantiates Duri and Matasane's claim that South African authorities are recognising the need for beneficial ownership transparency[134] and the risk of IFFs occurring in the absence of such transparency. I hold this view because of the haste with which the court *a quo* presumed – albeit without sufficient support according to the SCA – that the appellant was using his businesses as "shams" with sinister motives. However, this case does not delve deeply into the need for BOT, nor does it venture into discussing measures to enhance it.

ii) *Africa Opportunity Fund v Shoprite Holdings*: a practical demonstration of how an obscure beneficial ownership disclosure framework can cause illicit financial flows both in and out of South Africa

The case of paramount importance in the argument for enhanced BOT measures to prevent the facilitation of IFFs in and out of South Africa is that of *Africa Opportunity Fund v Shoprite Holdings*.[135] Shoprite Holdings Ltd ('Shoprite') was a public company duly incorporated as such in South Africa.[136] Its primary listing was on the Johannesburg Stock Exchange ('JSE'),[137] but it was registered as a foreign company in Zambia with a secondary listing on the Lusaka Stock Exchange ('LuSE') following the incorporation of Shoprite Checkers ('SC').[138] SC was a subsidiary based in Zambian territory[139] and provided the LuSE and Zambia's Central Share Depository with shares in the holding company.[140] This was done to facilitate its listing on the LuSE and to allow sale of the shares in Zambia to interested investors.[141]

[133] Ibid at para 65.
[134] Duri & Matasane *op cit* note 8 at 175.
[135] *Supra* note 99.
[136] Ibid at para 7.
[137] Ibid.
[138] Ibid.
[139] Ibid.
[140] Ibid at para 8.
[141] Ibid.

Thereafter, Shoprite appointed a Resident Representative Zambian director[142] whose mandate was to represent the company in Zambia and manage its affairs there.[143] This representative was a partner at a law firm ('LNA'), which he appointed as the transfer agent of shares listed on the LuSE.[144] LNA acted as a nominee tasked with holding the company's treasury shares on behalf of SC[145] and it was mandated to sell these shares in the manner prescribed by the parties' agreement.[146]

Trouble ensued when it was confirmed that the company's Zambian representative and LNA fraudulently traded the treasury shares on the LuSE[147], selling them at a greatly discounted amount when compared to the daily JSE price without transferring the proceeds to Shoprite.[148] The wrongdoers failed to disclose, consult about and account for the transactions in breach of their mandate and instructions given by Shoprite.[149] Thus, Shoprite instituted proceedings in Lusaka against the shares' purchasers – the Africa Opportunity Fund ('AOP') – for a declaration that would nullify the transactions and strip them of share ownership.[150] Whilst awaiting progress in the Zambian proceedings, the AOP instituted proceedings against Shoprite in a South African court, claiming their entitlement to the shares and dividends attached to them.[151]

The most pertinent issue before the court, for the purposes of this paper, was the true beneficial owner of the shares' identity.[152] This is an issue akin to that at hand in *ST v CT.* In both matters, there was confusion about beneficial ownership. However, where the confusion in *ST v CT* related to whether a party was the beneficial owner of the assets in question and the true number of those assets,[153] here, the confusion regards the identity of the assets' true beneficial owner.[154] The uncertainty in this matter arose from the fact that only LNA, as SC's nominee, would be recognised as the seller because they were the registered holder.[155] It is on

[142] Ibid at para 9.
[143] Ibid at para 10.
[144] Ibid.
[145] Ibid at para 11.
[146] Ibid at para 12.
[147] Ibid at para 13.
[148] Ibid.
[149] Ibid.
[150] Ibid at para 14.
[151] Ibid at para 15.
[152] Ibid at para 16.
[153] *Supra* note 98 at para 50.
[154] *Supra* note 99 at para 16.
[155] Ibid at para 77.

this basis that the court held that SC was the shares' beneficial owner, not the holding company,[156] and dismissed AOP's application.

The case clearly illustrates the need for enhanced BOT measures in because it demonstrates the dangers of using nominee shareholders and directors highlighted by the FATF and the large extent to which the old beneficial ownership regime could be manipulated by such nominees to engage in IFFs. This is because, unlike the appellant in the *ST* case, LNA and Shoprite's Zambian representative are confirmed to have engaged in subterfuge, using the company to conceal the IFFs they were facilitating by transferring its shares at discounted amounts. It is an affirmation of the argument that obscurity in beneficial ownership creates a cloak under which wrongdoers can transfer funds fraudulently.

Additionally, it affirms the FATF's claim that the use of nominee shareholders and directors are key vulnerabilities[157] that can create a means through which IFFs are perpetuated. Interestingly, it also shows that nominees, in addition to being used to conceal the beneficial owner's identity for the latter's benefit,[158] can also use their positions for personal gain at the expense of the company and the person for whom they hold shares. In its capacity as Shoprite's nominee shareholder, LNA was able to manoeuvre around the obscure beneficial ownership regime and defraud Shoprite through its existence in two jurisdictions. The delay in the proceedings in Zambia prolonged the process of holding the wrongdoers accountable for their fraudulent sale of Shoprite's treasury shares, compelling the AOP to begin proceedings in South Africa. Thus, the matter also illustrates the need for South Africa to consider the consider vulnerabilities and threats relating to domestic and foreign companies and how criminals can use them to facilitate IFFs[159] as the FATF recommends.

Moreover, the company's existence in more than one jurisdiction creates longer ownership chains[160], making it more difficult to identify the true beneficial owner and creating room them and their nominees to hide IFFs they participate in.[161] Making reference to the corporate legal framework of beneficial ownership that informed the above court's decision, in *De*

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[156] Ibid.
[157] Financial Action Task Force *op cit* note 1 at page 6.
[158] Ibid.
[159] Ibid at page 10.
[160] Ettel-Phoya *op cit* note 16 at page 7.
[161] Ibid.

Sousa v Technology Corporate Management (Pty) Ltd,[162] the court highlighted that where a company's shareholder enters an agreement to transfer or hold shares for another, the validity thereof cannot be questioned.[163] It reiterates the way in which the South African beneficial ownership regime operates in terms of the Act and its regulations discussed in Part II of this paper, to the detriment, in this instance, of the beneficial owner.

A person with beneficial interest in shares has no right to them, nor for them to be registered in their own name.[164] Companies only recognise their registered shareholders.[165] A principal whose name is not in the shares register is usually described as the "beneficial owner".[166] Interestingly, the court acknowledged that while this description is not entirely accurate juristically, it is a "convenient" and "well-understood" label.[167] This statement will be discussed in depth as I interrogate the necessity of enhanced BOT measures below.

iii) Critically assessing the necessity of beneficial ownership transparency from a scholarly perspective:

In the cases of *ST v CT* and *Africa Opportunity Fund v Shoprite Holdings*, there are fundamental commonalities: confusion and uncertainty regarding the beneficial ownership of companies and assets that made the courts' mandate to remedy the matters more difficult. The courts in both matters expressed frustration in the processes of determining the identity of beneficial owners for the purpose of resolving the disputes before them. This is affirmation, Duri and Matasane's claim that South African authorities are beginning to appreciate the need for BOT measures.[168] The alleged concealment of the appellant's assets in *ST v CT* and the fraudulent dealings that occurred in *Africa Opportunity Fund* are clear illustrations of the veracity of scholarly claims that new BOT measures are needed to curb the occurrence of illicit financial flows[169] in and out of South Africa. This is because the obscurement of

[162] *De Sousa v Technology Corporate Management (Pty) Ltd and others and a related matter* [2019] JOL 42358 (GJ).
[163] Ibid at para 73.
[164] Ibid.
[165] Ibid at para 74.
[166] Ibid.
[167] Ibid.
[168] Duri & Matasane *op cit* note 8 at 175.
[169] Ibid at 185.

companies' true beneficial owners creates great difficulty in and makes it almost impossible to ensure that companies are not being abused to facilitate IFFs.[170]

Further support for Duri and Matasane's second argument can be found in the *De Sousa* case's acknowledgement of the description of a beneficial owner's inaccuracy.[171] One can reasonably infer that the court, due to the beneficial ownership regime's obscurity, prioritised convenience at the expense of transparency and clarity in support of South Africa's obscure corporate beneficial ownership framework when it passed its judgement. This advances my argument that the enhanced corporate legal BOT measures are indeed necessary. As highlighted previously, although FICA defined "beneficial ownership" in 2017, there is no such definition provided in any statute for the term "beneficial owner". In its absence, there is uncertainty that prompted the court to rely on an inaccurate description. On this basis, I further substantiate the argument that enhanced BOT measures are needed to bring the confusion the "old" beneficial ownership regime was fraught with to a halt. This would be for the purpose of preventing judicial mismanagement of matters concerning the use of companies as tools for the perpetuation of IFFs.

In addition, arguments for enhanced BOT measures are provided by the Financial Transparency Coalition ('the Coalition'). In its analysis of the European Court of Justice's ruling on beneficial ownership, the Coalition argued that the court's invalidation of European Union law that permitted public access to companies' beneficial owner registries "reversed much of the progress" made internationally to reduce the occurrence of corruption, tax abuses and other such IFFs.[172] The Coalition harshly criticises the court's decision on the basis that it did not consider concrete evidence of the benefits of public access to beneficial ownership information in the fight against money laundering and other IFFs[173], utilising a narrow interpretation of "the right to private life"[174] to prioritise this right over the need to prevent the widescale social and economic harm caused by the concealment of beneficial ownership. As Open Ownership discovered in its consideration of striking a balance between

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[170] Etter-Phoya *op cit* note 16 at page 7.
[171] *Supra* note 149 at para 74.
[172] Financial Transparency Coalition 'EU Court of Justice Ruling on Beneficial Ownership, a Major Blow to the Fight Against Environmental Crimes' (12 December 2022), available at *https://financialtransparency.org/european-court-justice-ruling-beneficial-ownership-major-blow-fight-environmental-crimes/*, accessed on 05 May 2023.
[173] Ibid.
[174] Ibid.

transparency and the right to privacy in respect of BOT, there have not been any practical examples of the infringement of the right to privacy provided[175] to substantiate coming to such a conclusion.

Some of the strongest scholarly arguments for enhanced BOT measures are presented by Radon and Achuthan. They argue that disclosure of beneficial ownership is one of few means through which the prevention of natural resource revenue loss and the "resource curse" that plagues countries rich in natural resources such as South Africa can occur.[176] The "resource curse" is a term used to describe the phenomenon of poor economic performance and poor governance in such countries.[177] The FATF highlights frequent occurrences of governmental corruption such as "State capture" as a vulnerability that has led to the facilitation of IFFs.[178]

State capture is an example of poor governance that has contributed to the country's poor economic performance and renders it a victim of the resource curse. Their arguments are affirmed by those in the report of Ettel-Phoya et al., who explain that IFFs represent continuation of an oppressive model,[179] that plunders African nations' resources for the economic benefit of a few and at the expense of the majority.[180] Law and political economy scholars argue that socioeconomic inequality is conditioned by politically and legally constructed power relations.[181] The historical, social and economic context that birthed our obscure beneficial ownership regime is a testament to this claim. However, the resultant harms of such a regime are far too significant and severe on an economic scale to allow the cycle of inaction relating to beneficial ownership to continue.[182]

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[175] Open Ownership *op cit* note 92 at page 34.
[176] Jenik Radon & Mahima Achuthan 'Beneficial Ownership Disclosure: The Cure for the Panama Papers Ills' (2017) 70 *Journal of International Affairs* 2 at page 85.
[177] Ibid at 86.
[178] Financial Action Task Force *op cit* note 4 at page 4.
[179] Ettel-Phoya *op cit* note 16 at page 4.
[180] Ibid.
[181] Wilkinson, MA & Lokdam, H 'Law and Political Economy' in M Sellers & S Kirste (eds) *Encyclopedia of Law and Social Philosophy* Dordrecht: Springer, (2019) at page 2.
[182] Radon & Achuthan *op cit* note 167 at page 103.

IV. The dawn of a new corporate legal framework: a critical analysis of the effectiveness of the recently developed beneficial ownership regime in tackling illicit financial flows:

In its report, the FATF recommended the amendment of South African legislation for the purpose of granting domestic authorities access to companies' beneficial ownership information[183] and the imposition of sanctions upon non-compliant parties.[184] In our capitalist world economy, markets come with automatic punishment mechanisms[185] for non-compliance with international authorities, and the greylisting of the Republic and the consequences thereof illustrate this clearly.

Recognising the need to comply with the recommendations and address the deficiencies identified therein as a state constrained by the need to attract and maintain foreign investment and funding[186], the South African government signed the General Laws Amendment Act 22 of 2022 (hereafter referred to as the 'GLAA') into law.[187] The National Treasury, in its media statement, expounds on its purpose[188]: to aid South Africa in meeting international anti-money laundering and counter-terrorist financing standards[189] and to combat corruption and fraud.[190] The GLAA makes monumental amendments to the Companies Act for these purposes.[191]

Additionally, as a result of the GLAA's enactment, on 10 March 2023, the Minister of Trade, Industry and Competition published the Draft Companies Amendment Regulations 2023 (hereafter referred to as "the Draft Regulations") for public comment.[192] The implementation of the enhanced BOT measures contained within these amendments is clear confirmation of

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[183] Financial Action Task Force *op cit* note 4 at page 196.
[184] Ibid.
[185] Wilkinson & Lokdam *op cit* note 172 at page 11.
[186] Ibid.
[187] Eric Jordaan 'A register for beneficial owners: new obligations for shareholders' *MoneywebNOW* 20 April 2023.
[188] National Treasury 'Enactment of Key Anti-Money Laundering and Combatting of Terror Financing Laws' (2023), available at *https://www.treasury.gov.za/comm_media/press/2023/2023010601%20MEDIA%20STATEMENT-ENACTMENT%20OF%20KEY%20ANTI-MONEY%20LAUNDERING%20AND%20COMBATING%20OF%20TERROR%20FINANCING%20LAWS%20.pdf*, accessed on 30 April 2023.
[189] Ibid.
[190] Ibid.
[191] Act 22 of 2022.
[192] Draft Companies Amendment Regulations in GN 3151 *GG* 48210 of 10 March 2023.

the nation's acknowledgement that they are, indeed, necessary. Thus, Part IV of this paper will assess of the effectiveness of these measures based on their purpose, through the interdisciplinary approach advocated for by Wilkinson and Lokdam.[193]

In making their case for BOT, Radon and Achuthan acknowledge that enhanced BOT measures alone are not the sole remedy for addressing the corruption and revenue loss of which they speak.[194] They note that beneficial ownership disclosure is most effective when combined with updated laws, law enforcement that is sufficiently compensated and long-term political will to ensure transparency,[195] particularly in African countries. It is on this basis that the law and political economy approach is most suitable: it entails analysis of current affairs and developments from a combination of legal, economic, and political perspectives.[196]

a) The amendments of the Companies Act 71 of 2008 under the new beneficial ownership regime:

One noteworthy change the GLAA has brought to the corporate legal framework regulating BOT is its insertion of the definition of the term "beneficial owner" into s1 of the Companies Act.[197] S55(b) provides that a beneficial owner is an individual who has ultimate ownership of or exercises effective control over a company.[198] It effectively does away with the confusion relating to the term highlighted in the case of *De Sousa.*[199] The provision provides an open list of circumstances under which persons can become beneficial owners, including holding beneficial ownership in the company's securities,[200] exercising or controlling exercise of voting rights that are associated with such securities[201] and the right to appoint or remove members from the company's board of directors[202] and having the ability to materially influence the company's management otherwise.[203]

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[193] Wilkinson & Lokdam *op cit* note 172 at page 1.
[194] Radon & Achuthan *op cit* note 162 at page 88.
[195] Ibid.
[196] Ibid at 2.
[197] Act 22 of 2022.
[198] Ibid.
[199] *Supra* note 153 at para 74.
[200] Act 22 of 2022.
[201] Ibid.
[202] Ibid.
[203] Ibid.

The GLAA also inserts a definition of the term "affected company" into the Companies Act.[204] An affected company is one whose shares are publicly listed or a private one under the control of such a company.[205] Section 60 of the GLAA amends s122 of the Companies Act by inserting a requirement for such affected companies who have received notices of disclosure to file a record of the notice with the Commission in a prescribed form, within a prescribed timeframe.[206] In addition, it requires the Commission to maintain a register of the information contained therein.[207] The effectiveness of this amendment is rooted in its facilitation of authorities gaining access to beneficial ownership information of companies as the FATF raised as an area of weakness in South Africa's beneficial ownership regime.

Furthermore, s50 of the Companies Act has been amended to remedy the weaknesses identified in Part II of this paper. S57 of the GLAA requires companies that do not comply with the definition of an "affected person" to record information prescribed by the Minister of Finance and Financial Intelligence Centre ('FIC') regarding the identities of beneficial owners in their securities registers[208] and, unlike s50 of the Companies Act, obliges companies to update this information in a specific form within a specific timeframe following any changes in beneficial ownership.[209]

Simultaneously, s56 of the Companies Act's heading – "Beneficial ownership in securities" – has been amended to include the phrase "and beneficial ownership of company".[210] The GLAA further amends the provision by requiring affected companies to maintain registers of beneficial interest disclosures[211] and registers of persons holding beneficial interests worth at least 5% of the total number of securities of that class that include the beneficial interests' extent.[212] In terms of s58 of the GLAA, the registers must be updated within a specific timeframe following receipt of a notice requiring disclosure.[213] This amendment of s56 of the Companies Act requires companies not falling within the definition of an "affected person" to file a record with the Commission regarding the company's beneficial owners and update the

[204] Ibid.
[205] Ibid.
[206] Ibid.
[207] Ibid.
[208] Ibid.
[209] Ibid.
[210] Ibid.
[211] Ibid.
[212] Ibid.
[213] Ibid.

information provided by way of filing notices with the Commission within a specific timeframe following changes in such information.[214]

S69 of the Companies Act, which regulates the ineligibility and disqualification of persons as directors or prescribed officers[215], now disqualifies, in addition to persons convicted of activities related to fraud, misrepresentation or dishonesty[216], those who have been convicted of money laundering, terrorist financing or proliferation financing activities as defined in FICA from acting as directors or prescribed officers.[217] Not only is this amendment effective because it fulfils its purpose of directly addressing the risks highlighted by the FATF (i.e. money laundering and terrorist financing)[218], but it can also serve to prevent directors' abuse of companies to perpetuate IFFs for their own benefit. It creates higher, more stringent standards relating to director and nominee director conduct, the latter of which the FATF highlighted as a key vulnerability in its report.[219]

Although free market economies inevitably produce and reproduce inequality,[220] evidenced by the levels of corruption that were able to occur prior to the Act's amendments, it is clear that enhanced BOT measures are necessary to reduce the cronyism and corruption identified by the FATF in South Africa.[221] These amendments, by promoting openness, transparency, accountability[222] and clarity as well as aligning with the recommendations of the FATF, will create a reliable environment in which investors will regain the confidence they may have lost in the Republic following its greylisting.

[214] Ibid.
[215] Act 71 of 2008.
[216] Act 22 of 2022.
[217] Ibid.
[218] Financial Action Task Force *op cit* note 4 at page 5.
[219] Financial Action Task Force *op cit* note 1 at page 6.
[220] Wilkinson & Lokdam *op cit* note 172 at page 6.
[221] Radon & Achuthan *op cit* note 162 at page 93.
[222] Ibid.

b) The amendments of the Companies Regulations, 2011 under the new beneficial ownership regime:

Following the amendments being made to the Companies Act for the purposes of the GLAA,[223] on 10 March 2023, the draft Companies Amendment Regulations 2023 (hereafter referred to as 'the Draft Regulations') was published for public comment. Although they have yet to be promulgated, this paper must engage with them because the proposed amendments supplement those of the Companies Act. Thus, they may play a pivotal role in facilitating the effectiveness thereof through the further clarity and detail they bring to the beneficial ownership disclosure framework. Such clarity, I argue, will lead to greater compliance by companies operating in the Republic.

A clear example of the Draft Regulations' potential to bring clarity to and therefore supplement the amendments of the Companies Act is the definitions of "certified copy" and "Financial Intelligence Centre" they provide.[224] Notably, the Draft Regulations propose the insertion of sub regulation (1A) to Reg. 5, which creates a list of information companies provide that the CIPC can verify at any time continuously.[225] The list includes information about a company's name and registration number, its memorandum of incorporation, its legal type and status and lists of all company directors including their names, and identity numbers or passport numbers where they are not South African citizens.[226] This list explicitly applies to both companies incorporated in South Africa and "external companies", which are foreign companies operating in South Africa.[227] Additionally, sub regulation (2) to Reg. 5 sets out steps the CIPC can take to verify this information.[228]

The effectiveness of this proposed amendment, I argue, lies in that it addresses the need the FATF highlights for regular verification of beneficial ownership information provided by companies in South Africa[229] and provides a mechanism through which the CIPC can do so. Furthermore, it does away with the limitations the Companies Regulations places on access to beneficial ownership information, such as only permitting verification by regulatory agencies

[223] Draft Companies Amendment Regulations in GN 3151 *GG* 48210 of 10 March 2023.
[224] Ibid.
[225] Ibid.
[226] Ibid.
[227] Act 71 of 2008.
[228] Ibid.
[229] Financial Action Task Force *op cit* note 4 at page 198.

where they have reasonable grounds to question whether documents with this information have been altered.[230] However, the use of the word "may" can form the basis of an argument that the proposed amendment does not amount to full compliance with the FATF's recommendations in this regard and renders the sub regulation ineffective. This is because it does not, as the FATF suggests, create a legal duty upon the CIPC to verify the information.[231] It merely permits the Commission to do so.

This wording may be used to argue that the CIPC would not be legally bound to comply and that, therefore, it does not serve the purpose of the amendment nor the new beneficial ownership regime under the Companies Act as a whole. However, its proposed sub regulation (4) of Reg. 5 remedies the shortcomings of sub regulation (1A) because it places upon the CIPC a duty to keep files and records of the information listed in sub regulation (1A)[232] and leaves the counterargument insufficiently supported.

Further substantiating its effectiveness is its attempt to mitigate the risk of IFFs flowing in and out of the Republic by permitting verification of the names and passport numbers of non-South African company directors. Moreover, it obliges the CIPC – using the term "external companies" – to verify the beneficial ownership of foreign companies, which Duri and Matasane highlight as a vulnerability in the old regime.[233]

The Draft Regulations propose amendments to Reg. 30, titled "Company annual returns". The first change is the insertion of the phrase "other related filings" into this heading.[234] Moreover, sub regulation (1) is amended to require all companies, when read together with sub regulation (1A), to file their annual returns with the CIPC.[235] In relation to affected companies in particular, this amendment is effective because it supplements the amended s56 of the Companies Act by requiring the filing of annual returns in addition to its requirement for companies to file copies of their registers of beneficial interest disclosure.[236]

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[230] GN 351 *GG* 34239 of 26 April 2011.
[231] Ibid.
[232] GN 3151 *GG* 48210 of 10 March 2023.
[233] Duri & Matasane *op cit* note 8 at 182.
[234] GN 3151 *GG* 48210 of 10 March 2023.
[235] Ibid.
[236] Ibid.

Should these regulations be promulgated, both external and internal companies would be required to file the applicable certificate of registration ('CoR') form with the CIPC when change in certain information occurs in terms of sub regulation (7A) of Reg. 30.[237] Furthermore, the Draft Regulations insert sub regulation (7B), specifying that failure to submit the relevant CoR form timeously would amount to non-compliance with the Companies Act and the Regulations.[238] One can infer from this wording that failure to comply would amount to a contravention of law, and therefore makes the proposed sub regulations effective because they would deter companies from failing to do so fearing to incur criminal liability. Furthermore, the Draft Regulations call for the insertion of sub regulations (9) and (10), in terms of which the CIPC would be obligated to give any person electronic access to the annual returns filed with it.[239]

Regulation 32 of the 2011 Companies Regulations concerns company security registers. The Draft Regulations propose the insertion of Reg. 32A, which provides a detailed list of the information that must be included in an affected company's beneficial interest disclosure register, including the beneficial owner's exercise of effective control and extent of their ownership – be it direct or indirect – of the company.[240] Reg. 32A in particular would be particularly effective in achieving the purposes of the GLAA because its inclusion of 'indirect' ownership allows beneficial owners to be identified with greater ease, reducing the extent to which they are shielded by the corporate veil which emboldens them to engage in IFFs. Reg. 32B is also proposed, which requires non-affected companies to notify the CIPC of changes to beneficial owners in their securities registers by way of filing, in addition to a CoR form, copies of their securities registers within five business days of updating them.[241]

Based on the above, I argue that the above Draft Regulations would bolster the effectiveness of the GLAA's amendments of the Companies Act because they provide additional clarity and details. They do away with the obscurity of the old beneficial ownership regime. In doing so, not only do they reduce the extent to which the corporate legal framework can be used to facilitate the misuse of companies for the purpose of engaging in IFFs. However, for as long as they are not promulgated, the corporate legal beneficial ownership regime insofar as it

[237] Ibid.
[238] Ibid.
[239] Ibid.
[240] Ibid.
[241] Ibid.

relates to companies is changed solely by the GLAA's amendments of the Act and they are rendered ineffective as a result.

Moreover, even if the Draft Regulations are promulgated to supplement the amendments to the Companies Act, an updated legal beneficial ownership disclosure framework alone is not guaranteed to be effective in preventing IFFs and addressing the FATF's concerns. It is most effective when combined with law enforcement that is sufficiently compensated and long-term political will to ensure compliance with the rules created by the new regime,[242] which are both issues that will hinder the framework's ability to succeed in a developing country fraught with political corruption.

[242] Radon & Achuthan *op cit* note 162 at page 88.

V. Conclusion

The main objective here was to assess the necessity and effectiveness of the enhanced BOT measures being incorporated into South Africa through an interdisciplinary analysis combining legal, political and economic considerations. The basis of this assessment was the greylisting of the Republic caused, in part, by its failure to comply with international beneficial ownership transparency standards despite the historical rationale behind the obscurity of its legal framework.

Beginning with an analysis of the deficiencies in South Africa's beneficial ownership regime and the consequences thereof, specifically its greylisting, I found that the longstanding practice of permitting concealment of companies' beneficial owners is dysfunctional in a post-apartheid democracy that exists within in a modern capitalist economy because it was creating greater opportunities for criminals to use the protection of the corporate veil to engage in IFFs. The FATF's findings were evaluated in conjunction with the regime under the Companies Act and its regulations. This affirmed the view that BOT is necessary, especially in African countries which lose exorbitant amounts of revenue to IFFs.

Following the analysis above, I critically evaluated the necessity of enhanced BOT measures in depth, finding that the ones being implemented by the state are beneficial to the nation's economic wellbeing and will aid in preventing its struggling economy from worsening. It was from this juncture that I assessed the effectiveness of the new beneficial ownership regime, finding that although the legislature is making great strides in complying with the FATF's recommendations, a new legal regime is not the only means through which the fight against IFFs can be won.

Despite arguments that enhanced BOT measures are not necessary for the numerous reasons outlined above, these are outweighed by the force of the lost revenue, the economic damage caused by IFFs executed through companies and the uncertainty created by the old regime. These socioeconomic consequences serve as glaring demonstrations of the harm caused by obscure beneficial ownership frameworks. However, political decision-making and the making of laws does not occur in a socioeconomic vacuum.[243]

[243] Wilkinson & Lokdam *op cit* note 172 at page 12.

In law and political economy scholarship, it is trite that socioeconomic inequality is conditioned by politically and legally constructed power relations. While the fact that deficiencies in South African corporate law are being addressed is undoubtedly something to be celebrated, in a society riddled with financial crime, a culture of cronyism and corruption, the effectiveness of the new regime hinges on compliance. Bearing South Africa's history of non-compliance with the FATF's recommendations in mind, one can only hope that the political will to prevent IFFs and further damage to the socioeconomic landscape. Secondly, that the new regime will aid in deterring individuals who hold beneficial interest in companies from engaging in illicit financial activities at the expense of the Republic's economic development and survival.

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