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Trustees wrongly targeted in rush to avoid greylisting

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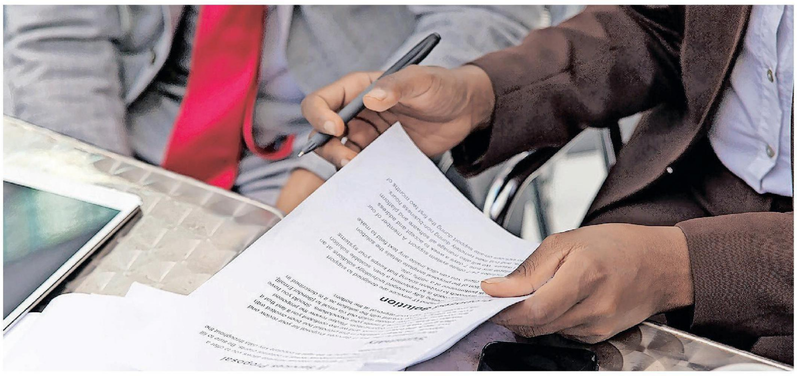
PAKISTAN'S exit from the Financial Action Task Force (FATF) grey list a fortnight ago has brought little cheer to the country's economy, according to media reports, "even as estimates suggest that the cumulative real GDP losses for the country due to the blacklisting had soared to $38 billion".

The severe floods and rising political uncertainty have not helped.

Pakistan's economy is a similar size to that of South Africa's. It has been on the Paris-based global money laundering and terrorist financing watchdog's grey list since June 2018.

But while the Asian country is moving away from under the watchful eye of the FATF, South Africa seems to be moving in the opposite direction, regardless of the Cabinet's approval of a raft of amendment bills in late August.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According to parliamentary reports, the omnibus bill amends the Financial Intelligence Centre Act, the Non-profit Organisations Act, the Trust Property Control Act, the Companies Act and the Financial Sector Regulation Act.

The amendments aim to address about 14 of the 20 areas in which South Africa was found deficient during a peer review of the country by the FATF.

Lawmakers are still rushing to push through changes to other laws to avoid South Africa being greylisted, but they are facing some severe pushback.

One of the laws being polished before it is presented to Parliament is the Protection of Constitutional Democracy against Terrorist and Related Activities Amendment Bill, also known as the anti-terrorism bill.

Last week, Parliament's portfolio committee on police heard several presentations from civil society groups concerned about the potential loss of freedoms due to the loose wording of terms like "terrorist activity" in the bill.

According to reports, more than 26 000 South Africans commented on the bill via the DearSA public participation platform and 99% were against it, mainly for the potentially chilling restrictions on political protest, free expression, the press and religious activity.

Trust-related objections

Other objections to the FATF-related changes came from the Fiduciary Institute of Southern Africa (Fisa), which petitioned the parliamentary standing committee on finance on the inappropriate use of the term "beneficial owner" in the amendments to the Trust Property Control Act, as well as the Anti-Money Laundering and Combating Terrorism Financing Bill's proposed changes to the act, which is being fast-tracked without due consultation with the fiduciary industry.

An urgent submission by Fisa, the professional body representing fiduciary practitioners in South Africa, sought to provide clarity on various provisions of the bill, including the inclusion of trustees in the definition of "beneficial owner" of a trust.

Louis van Vuren, CEO of Fisa, says South Africa is accepting a definition into law that does not exist in legislation.

"In certain jurisdictions, regulations require "beneficial owners" of a legal entity to be identified. However, a trustee, in South African law, does not hold trust property for his or her own benefit, but for the benefit of another person. Therefore, a trustee can never be the 'beneficial owner' of a property held in trust," he says.

"We have no problem with the apparent aim of increased oversight over trust assets under certain conditions, but it would appear that the drafters of the bill have simply lifted the term from foreign legislation without regard for the existing trust law in South Africa."

Van Vuren says the effect of the proposed changes may open the door for premature vesting of certain rights of trust beneficiaries, will encroach on the discretion afforded to trustees, and severely limit the existing rights of trustees and the founder of a trust.

The Fisa submission points out that trusts do not have legal personality in South African law, although certain of the proposed amendments seem to work on the assumption that they do.

Fisa's submission said that there was another way of achieving the apparently desired oversight without jeopardising the legal position and fiduciary duty of trustees.

One suggestion is to place on the trustee reasonable duties of oversight over the individuals involved in the trust by amplifying the definition of "trustee" and by including "trustee" next to "beneficial owner" in the relevant sections where appropriate.

Nobody denies trusts have sometimes been abused, and many industry players recognise trusts remain largely unregulated, which may lead to money laundering and the financing of terrorism.

However, the courts and Sars have presented plenty of case law and guidance notes, to tighten the ropes around trusts.