# REGULATORY DEBATES

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## Editorial

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## How to assist victims of reckless lending: Does the punishment fit the crime?

**By Prof Reghard Brits**

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When dealing with the problems surrounding reckless lending, the first choice naturally is to try to prevent it by making sure that consumers only conclude credit agreements that they can afford to pay back. Although the National Credit Act has set in place measures like pre-agreement affordability assessments, reckless lending still happens and therefore the Act also contains provisions on how to deal with the negative consequences of such reckless credit agreements. In one sense, these remedies can function as a "punishment" for the credit provider who is "guilty" of reckless lending, but a more appropriate way to look at these remedies is that they are aimed at providing relief for the consumer who fell victim to the reckless lending – especially if the reckless credit agreement causes the consumer to become over-indebted.

The Act provides a number of ways in which consumers can be assisted if it is found that they had been the victims of reckless lending. Depending on the type of reckless credit, (1) the agreement can be suspended for a period, (2) all or part of the consumer's obligations can be set aside and/or (3) the repayment schedule can be rearranged. There are quite a number of uncertainties regarding the legal principles of reckless credit,[1] but the most important question relates to how a court should decide on the ideal remedy when faced with the facts of a particular case. Should the agreement be suspended or should the obligations be set aside? And how much of the obligations should be set aside: all or only some? If only some, how should one determine the appropriate amount? The case of *Absa Bank Ltd v De Beer*[2] is a good example of where all the obligations under a recklessly granted mortgage agreement were set aside. However, was it appropriate under the circumstances to effectively write off the entire loan?

One possible guideline to answer these questions can be found in the principles of constitutional property law, which derive from the rule in section 25(1) of the Constitution that "no law may permit arbitrary deprivation of property". When a consumer's obligation to repay a loan is set aside (whether partially or fully), the credit provider clearly experiences a "deprivation" of its "property", since a claim to receive payment is a form of "property". Therefore, it is important to ensure that the deprivation is not "arbitrary". Generally speaking this means that there must be a sufficient reason for the credit provider loosing its rights. There must be an appropriate relationship between the purpose of the deprivation and the effect thereof on the credit provider.

What this comes down to in the reckless credit context, is that the relief granted to the consumer must be linked to the purpose of the remedy, namely to rectify the negative consequences of the reckless credit. To give a simple example: if a loan was granted recklessly and the effect was that the consumer is made over-indebted by R100, then it would be appropriate (and constitutionally acceptable) to set aside R100 of the debt – or to suspend the agreement until the consumer is R100 less over-indebted. The damage caused by the reckless credit would be rectified and the credit provider only has itself to blame for this loss. However, one can easily see that it would be drastic and out of proportion to set aside R500 if the reckless credit caused the consumer to be over-indebted by only R100. In other words, it would probably be arbitrary for the credit provider to lose R500 when the damage its actions caused was only R100.

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[1] For more detail, see R Brits "The National Credit Act's remedies for reckless credit in the mortgage context" (2018) 21 *Potchefstroom Electronic Law Journal* 1-34, available online at <https://journals.assaf.org.za/index.php/per/article/view/2955> (accessed 09-07-2019).
[2] 2016 (3) SA 432 (GP).

In conclusion, reckless lending is unlikely to stop unless courts are willing to grant the necessary remedies to both punish guilty credit providers and bring relief for effected consumers. However, it is important that the "punishment should fit the crime". The goal should be to rectify the damage caused by the credit provider's actions. It should not be to give the consumer an added bonus of effectively "free credit" or to cause the credit provider a greater loss than its actions deserve. It is within this fine balance that the remedies aimed at addressing reckless lending should be considered.

## Steinhoff: Regulatory failure at many levels

**By Prof Jannie Rossouw**

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The shock collapse of the Steinhoff group of companies in December 2017 will continue to dominate the South African business landscape for many years to come. At the same time, shock waves will continue in some international markets where Steinhoff had a large international financial presence, for instance the Netherlands and Germany. It is still not exactly clear what happened at Steinhoff and what caused the spectacular collapse, despite an investigation, the delay of the publication of its financial statements and the restatement of earlier financial statements. A general picture of fraud and dereliction of duty can be reconstructed, but until such time as Steinhoff or the authorities bring charges against responsible individuals, some guesswork will remain necessary.

In an analysis of Steinhoff, it is necessary to focus on aspects that have emerged to date. The executive management of Steinhoff was characterised by an overpowering chief executive who tolerated no criticism and bulldozed his way through the group. For this, he was handsomely rewarded in the form of an exorbitant salary and benefits.[3] In a news article published by Fin 24, Steinhoff argued that salaries and bonuses were paid, to the former CEO by its board based on an incorrect understanding of the firm's financial position[4] Unfortunately, rewarding of chief executives in the form of exorbitant salaries and benefits tends to make chief executives believe that they are invincible once completely overpaid by their boards of directors. The first matter of clarity is therefore that executive remuneration requires urgent review. If boards of companies and chief executives cannot apply voluntary restraint, governments should step in and tax such exorbitant behaviour. This will help to protect chief executives against themselves, as they will understand that their remuneration is not a true reflection of their abilities.

Clearly, the CEO should realise by now his own limited abilities and offer to repay some of the money the Board of Steinhoff "bestowed" on him. But understanding any form of honour is probably beyond the comprehension of a BIG EGO, as is the lack of understanding of any regulatory structure.

Secondly. The Board members of Steinhoff had no comprehension of their responsibilities and were asleep at the wheel. For this total lack of discharge of fiduciary duty, the Board members were also handsomely rewarded. To add insult to injury, some of the Board members demanded extra pay after the collapse of the company, apparently

[3]Financial mail news article. Accessed from https://www.businesslive.co.za/fm/fm-fox/2019-06-26-exclusive-pay-back-the-money-steinhoff-demands-r874m-from-markus-jooste/.
[4] Fin24 news article. Accessed from https://www.fin24.com/Companies/Retail/steinhoffs-r1bn-claim-against-jooste-and-la-grange-5-things-you-need-to-know-20190701.

because they had to “perform extra duties”. They were probably only performing their duties for the first time! Again, expecting any repayment of Board fees by Board members will remain a dream. However, it raises the more important question whether the Board members of Steinhoff at the time of the collapse are at all fit and proper to serve on any other Board of a public company. These Board members presided over a total failure of any form of Board governance or regulation of activities of the company.

Thirdly, Steinhoff’s collapse sheds doubt on the existence of “corporate governance” in any form or construct, let alone in support of an improved regulatory framework. In theory, corporate governance briefly implies that the Board of a company should ensure regulatory checks and balances on the conduct of the chief executive and other executives and other activities. As is shown in the case of Steinhoff, in practice the perception of successful corporate governance in the eyes of chief executives implies that the Board “eats out of their hands “. The general understanding of corporate governance should therefore be revisited to assert the authority of the Board over the chief executive. This will be uncomfortable for many chief executives who got used to having their own way with their board members.

Fourthly, the external auditors of Steinhoff were clearly not fit for the job and failed in every instance of regulation. If proper audits were performed before, it would not have been necessary to restate earlier financial statements.

Lastly, Steinhoff faces litigation over a large spectrum, ranging from partners in businesses bought previously to litigation by its own shareholders. It is difficult to judge the merits of this litigation, although the litigation of its own shareholders against Steinhoff cannot be explained. In the final analysis, Steinhoff as a group of companies is owned by its shareholders. Are shareholders therefore effectively bringing legal action against themselves? The regulatory implications of such an action is unclear, but some lawyers might benefit handsomely from such actions. From the facts that can be established about Steinhoff, it is clear that the collapse of the group triggered in December 2017 implies a failure of regulation in many respects. It is still too early to speculate whether Steinhoff will survive, but there is no doubt that the collapse will be taught at business schools as a case study in regulatory failure for many years to come.

## The Consumer Protection Act – Enforcement loopholes[5]

**Dr Tshepiso Scott**

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With the introduction of the Consumer Protection Act 68 of 2008 ("**CPA**"), a range of rights were introduced with the view to providing better protection to consumers in their dealings. The question that arises, however, is whether these rights are truly valuable in light of existing enforcement loopholes?

***The dilemma***

In brief, section 69 of the CPA entitles persons seeking to enforce their consumer rights to approach the Tribunal, an applicable ombud with jurisdiction, an industry ombud, a consumer court, an alternative dispute resolution agent, the Commission, or a court with jurisdiction (as a matter of last resort). Unfortunately, the lack of a clear hierarchy in the enforcement procedure currently prescribed by the CPA, has resulted in multiple issues including forum-shopping by consumers, an overlap in investigations by varying enforcement bodies and an overall frustration in relation to enforcing consumer rights. It is unquestionable that a clearer and more efficient enforcement system ought to be introduced for purposes of enforcing the provisions of the CPA.

It is worth emphasising at this stage, that there is no necessity to overhaul the current enforcement system in its entirety. Instead, the existing enforcement mechanisms embodied by the CPA should to be streamlined in order for the enforcement process to be more effective.

***Comparative foreign jurisdictions***

The position in India is that a consumer seeking to lodge a complaint may, as a point of departure, approach the consumer protection council for advice on an appropriate right of recourse, and will also be guided by the jurisdictional requirements as to whether she will approach the district forum or the state and national commission. The consumer may also appeal to higher forums in the event that she is unhappy with the outcome of the lower forum.

On the other hand, in the United Kingdom, the consumer will approach the relevant enforcers, which ultimately approach an ordinary court in order to enforce the claim. In the background, the Consumer Markets Authority will be kept abreast on matters that are being handled by each enforcer, which indirectly prevents overlaps in investigations or enforcement procedures in relation to consumer complaints. It is submitted that guidance can be taken from both these systems.

***Possible solutions***

It is suggested that in the South African context, the first step in all consumer-related matters should be for consumers to approach the provincial consumer protection authority. This would, of necessity, require that the provincial consumer legislation be aligned fully with the current CPA. It would also require that resources be invested by the state to ensure that functional consumer courts and offices are established in all nine provinces.

Once a complaint has been lodged with the provincial consumer protection office, the office should screen the matter and advise the consumer to refer it either to an ombud with jurisdiction, an industry ombud, or any other ADR forum, within a set time period (eg., three business days). The logic is that the provincial consumer protection

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[5] Extracts from Scott T: *The realisation of rights in terms of the Consumer Protection Act 68 of 2008* (LLD Thesis, University of South Africa) – LLD supervisor: Professor Phillip Stoop.

office will be able to assess which forum would be best suited to handle the complaint, taking into account the expertise and resources required in respect of that complaint. Should there be no other suitable forum in the view of the provincial consumer protection office, the office must then handle the matter internally or refer it to the consumer court.

In the event that any of the bodies to which the matter has been referred are unable to resolve the dispute within a set time period (eg. fifteen business days) the consumer, or the body to whom the matter has been referred, may refer the matter back to the provincial consumer protection office, which must then investigate and either resolve the matter, or refer it to the consumer court for prosecution. Ideally, consumer-related matters should be resolved by the provincial consumer protection office within 30 business days of the second engagement with the consumer.

Furthermore, an aggrieved party should be able to lodge an appeal with the Commission. The Commission should then conduct further investigations into the matter and decide whether or not to refer the matter to the Tribunal. This process should ideally not take longer than fifteen business days. Thereafter, the matter should then be heard by the Tribunal. Where an appeal is heard by a single member of the Tribunal, it should be possible for a further appeal to be made to a full bench of members, and thereafter, the final judgment may be handed down by the Tribunal.

Lastly, it may also be worthwhile to adopt the UK's central record-keeping mechanism. In this respect, the Commission may maintain such a record-keeping function, which would align well with its monitoring function as set out under section 99 of the CPA. All the records accumulated in each financial year may then be published in the annual report of the Commission.

# Conduct of Financial Institutions (COFI) Bill and Consumer Protection - Are we focusing on the diagnosis versus finding the cure?

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The Twin Peaks financial sector reforms are already underway with the Financial Sector Regulation (FSR) Act (9 of 2017) having been signed into law by the President of South Africa in August 2017. First implemented in Australia in 1998, the Twin Peaks model establishes two designated authorities that will regulate the prudential regulation of financial institutions and conduct of financial institutions. The Financial Sector Conduct Authority (FSCA) has been established as the market conduct regulator and the Conduct of Financial Institutions (COFI) Bill is one of the proposed legislation that will give effect to the FSR Act, specifically for the purpose of promoting responsible conduct of financial institutions, fair treatment of financial customers, financial education, and maintaining the integrity of South Africa's financial markets. COFI has also been published for comment as financial consumers await the comprehensive transformation of the South African financial regulatory landscape that Treasury assures that the Twin Peaks reforms will bring. COFI in particular, aims to improve consumer protection in the financial services industry through the introduction of a regulatory framework that is:

- activities-based
- principles-based
- outcomes-based
- risk-based, and
- proportional

This article discusses whether these reforms will practically solve, or 'cure', the issue of market abuse in South Africa's financial sector? Or will COFI merely become a 'bandaid over a gaping wound'? Customers have not been treated fairly by the financial services sector and the enactment of the National Credit Act (34 of 2005) and the Consumer Protection Act (68 of 2008) have not adequately addressed this issue of market misconduct. COFI aims to address this specifically. National Treasury has stated that moving to risk-based regulation will allow for flexibility in rule-making as it will permit differentiation of rules-based on the conduct-risk profile of the business entity or the activity that the business entity engages.[6] In order to assess whether this move towards risk-based regulation will achieve its intended outcomes, it is useful to consider its criticisms and whether this approach was deemed successful in the jurisdiction of its origin - Australia.

Risk-based prudential regulation focuses on the activities of an institution that pose the greatest risk to the financial system.[7] What this means is that if a financial institution breaches a rule but the breach does not have a major

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[6] National Treasury: Republic of South Africa (2018), 'Explanatory Policy Paper accompanying the Conduct of Financial Institutions Bill: Paper accompanying the first draft of the COFI Bill', available at http://www.treasury.gov.za/twinpeaks/CoFI%20Bill%20policy%20paper.pdf

[7] D Diamond and R Rajan (1998), 'Liquidity Risk, Liquidity Creation and Financial Fragility: A Theory of Banking', *NBER: The Center for Research in Security Prices*, Working Paper No. 496 (July 1998), available at https://www.nber.org/papers/w7430

impact or pose significant risk to consumer protection, the regulator will not act or treat the breach as a priority - the focus of the regulator is therefore on risks and not rules.[8] This approach is predicated on outcomes and is closely aligned with both the principles-based and outcomes-based approaches that the South African Twin Peaks model will also introduce. But the risk-based approach has been heavily criticized for allowing regulators to expend a disproportionate amount of energy on assessing the institution as opposed to focusing on the necessary regulatory response.[9] This has led to the criticism that risk-based regulation mostly fails to correctly identify the risks that accumulate within the banking system. This failure results from financial institutions over-relying on quantitative risk models as a primary source for understanding and addressing risk, where these quantitative models make use of historical data which does not pay too much attention to the *behaviour* of market players.[10] This is relevant to consumers because it is the very *behaviour* of financial institutions, and other non-financial business entities which also offer financial services and products, that COFI seeks to regulate. Can COFI adequately do so through the risk-based approach? Can COFI achieve this through the principles-based and outcomes-based approaches since they are not without their criticisms as well?

The outcomes-based approach fits within the 'regulation by objective' paradigm upon which the Twin Peaks model is based. It allows the regulator to set the purpose of which it is to achieve particular and concrete outcomes, but some of the main critiques of this approach include: it allows the likelihood that the regulator may identify the incorrect objectives; or even where the regulator identifies the correct objective it may fail to adjust these in light of changed circumstances; or the regulator may be captured by the financial industry, or political forces, that will impose its own objectives.[11] This last point on regulatory capture becomes more relevant and applicable in contexts where financial institutions have a monopoly in the market, or at the very least where they operate as oligopolists.

In South Africa, banks do operate as oligopolists which has empowered them to engage in abusive consumer targeted practices - a finding that was made by the Jali Commission in 2008. This oligopolist structure has not changed and will prevail even after COFI is enacted. Will regulators take this into account as they attempt to regulate and curb the behaviour of financial institutions that operate in a highly concentrated sector - it is no secret that the top four South African banks own over 90% of the banking sector assets in the financial sector. The principles-based approach does not presently appear to be suited in this context especially since it allows the setting of broad principles and industry standards which risks a light touch and self-regulatory approach to supervision and regulation of the financial sector. Hector Sants, Chief Executive Officer of the Financial Services Authority in the United Kingdom, phrases this concern in the following simple manner 'a principles-based approach does not work with individuals who have no principles'.[12] The Twin Peaks reforms are still in their early stages and COFI is only in Bill format. Treasury is likely to consider and address the above concerns before the final version

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[8] J Black (2015), 'Regulatory Styles and Supervisory Strategies', in: N Moloney, E Ferran, and J Payne (eds), *The Oxford Handbook on Financial Regulation* (Oxford University Press: Oxford), 265

[9] J Black (2004), 'The Development of Risk-Based Regulation in Financial Services: Canada, the UK and Australia', *ESRC Centre for the Analysis of Risk and Regulation*, available at http://www.lse.ac.uk/law/people/academic-staff/julia-black/Documents/black19.pdf

[10] J Winter (2012), 'The Financial Crisis: Does good corporate governance matter and how to achieve it?', in: E Wymeersch, K Hopt, and G Ferrarini (eds), *Financial Regulation and Supervision: A Post-Crisis Analysis* (Oxford University Press: Oxford), available at https://www.oxfordscholarship.com/view/chapter-12

[11] A Schmulow (2017), 'Financial Regulatory Governance in South Africa', 25(3) *African Journal of International and Comparative Law* 393, 409-410

[12] L Elliott and J Treanor (2015), 'Revealed: Bank of England Disarray in the Faces of Financial Crises', *The Guardian* (07 January 2015), available at https://www.theguardian.com/business/2015/jan/07/revealed-bank-england-disarray-financial-crisis

of COFI is enacted and signed into law. However, it is important to note that risk-based, principles-based, and outcomes-based regulation under Twin Peaks did not work well in Australia as financial institutions continued to engage in consumer abusive practices twenty years after the Twin Peaks model was enacted - and this has led to recent public demands for the reform of Australia's consumer protection legislation.[13] Hopefully, South Africa will not suffer a similar fate.

## Cyber Risk and Directors' Liabilities: South Africa and the rest of the world

**By Mafedi Mphahlele**

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Organisations, both public and private, spend a lot of money on sophisticated technology, then spend a lot of time feeding those technological systems with information that is usually, their personal, confidential and their intellectual capital, then have to ensure that those systems are not only up to date and intelligent but are also safe and secure. As a result, it is only fair to say that cybersecurity should be one of every organisation's top priorities, and, a director's liability. With automation and increasing digitization of organizations, comes the risk of cybersecurity. This has become an area of much concern because the risk is high, financially and materially. It is also unavoidable that criminals are always ahead of every invention.

In SA alone, "The foundational act from which the other acts derive is the Electronic Communications and Transactions Act (ECT) of 2002 (RSA, 2002). The Regulation of Interception of Communications and Provision of Communication-Related Information Act (RICA) was also promulgated in 2002 (RSA, 2002). The Protection of Personal Information (POPI) Bill was released in 2009, and enacted in 2013 (RSA, 2009; RSA, 2013), but has yet to come into full effect. Protection of personal Information Act and the establishment of the regulatory office to implement the Act are some of the developments relating to cybersecurity in SA. The National Cybersecurity Policy Framework was released at the end of 2015 (SSA, 2015), followed by drafts of the Cybercrimes and Cybersecurity Bill (Department of Justice and Correctional Services, 2017)[14].

In corporate governance, the failure to implement appropriate cyber security or cyber risk management measures could constitute a breach of directors' fiduciary duties. "Fiduciary duties were established by way of the common law, and have largely been codified by the Companies Act No 71 of 2008 (Companies Act) Section 77. Directors could therefore conceivably face personal liability to the company and to third parties for a breach of these duties that relates to cyber risk. South African common law principles stipulate that any person who contravenes the Companies Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention. A breach of fiduciary duty could lead to regulators taking action against directors or executives"[15].

[13] A Lattyn and Y Lam (2018), 'The Future of Consumer Protection in Australia: New Product Design and Distribution Laws On the Way', *Clyde & Co* (08 October 2018), available at http://www.mondaq.com/australia/x/743080/Dodd-Frank+Wall+Street+Reform+Consumer+Protection+Act/The+Future+Of+Consumer+Protection+In+Australia+New+Product+Design+And+Distribution+Laws+On+The+Way

[14] Van Niekerk B. 2017. Analysis of Cyber-Incidents in South Africa. The African Journal of Information and Communication (AJI),20,113-132

[15] https://www.nortonrosefulbright.com/en-za/knowledge/publications/b0dae4a0/cyber-risk-and-directors-liabilities-an-international-perspective

Furthermore, there is the Companies and Intellectual Property Commission (CIPC) which is a watchdog of violations of the Companies Act where complains can be handled accordingly and action taken as per legislation.

King IV also places an obligation on the board of a company to be aware of and address the risks relating to cyber incidents. The board is tasked with overseeing business continuity and resilience arrangements as well as the business' proactive monitoring of cyber incidents. This means that cybersecurity should be an agenda item in board meetings.[16] However, King IV, has limits in terms of power of enforcement.

Literature mentions the following: "financial loss, denial of service, defacement, data corruption, system penetration. Most articles warn of the relative loss of revenue and reputation[17]" whilst very little is said about Director's liability. Depending on the nature of the contravention, a director may face civil fines, administrative fines, penalties and even a period of imprisonment"[18].

In Canada, US, UK, Germany, the UAE, for example, legislative and changes to highlight the risk to Company's IT systems and information have been introduced more prominently since 2016. Globally, most countries are guided by what is called General Data Protection Regulation (GDPR). Much emphasis is placed on the director's duties of care, diligence and skill as well as good faith. "[19]Directors also face liability for omissions or misrepresentations in public disclosures and a notice published directors who ordered or authorised the collection or holding of personal information without taking reasonable security measures necessary to ensure the protection of that information". Cyber security strategies are also given priority in the countries mentioned above. This way, directors ensure that the organisation's IT infrastructure and data are safe and secure. This also falls under risk management area of company boards of directors.

In conclusion, there have been a few to known cases and incidences of cyber risk and reporting and penalties around the world."[20] About SA, one author says: "The data available were limited to what is reported publicly"[21]. Another author observes that "A relative lack in corporate South Africa when it comes to knowledge on cybersecurity is noted. One wonders how many SA corporations have a cyber-security strategy in place[22]. It should be noted that it is mostly, usually big multinational companies and or listed companies whose cyber security breaches are reported. "Until it is mandatory for South African organisations to report cyber-incidents, it will be difficult to conduct in-depth assessments of the composition of threat activities and their impacts" Overall, the prevalence of perpetration factors and actors, and the impacts, that this study found in South Africa are consistent with reported international cyber incident trends [23]"

To date, the world over, "There is little authority at this stage for how regulators and courts will deal with the issue as it relates specifically to cyber risk, it is anticipated that, in the event of a cyber-incident, the directors' and officers' conduct will be assessed in the context of their overall duties to the company and shareholders and their overall

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[16] https://www.golegal.co.za/cybercrime-data-breach-risks/. Retrieved on 19/07/2019
[17] https://www.golegal.co.za/cybercrime-data-breach-risks/. Retrieved on 19/07/2019
[18] https://www.fia.org.za/blog/what-is-a-directors-liability-following-a-cyber-breach/ retrieved on 26/07/2019
[19] https://www.nortonrosefulbright.com/en-za/knowledge/publications/b0dae4a0/cyber-risk-and-directors-liabilities-an-international-perspective. Retrieved on 17/07/2019
[20] https://mg.co.za/article/2018-06-18-liberty-breach-should-never-have-happened-cybersecurity-expert retrieved on 19/07/2019
[21] Van Niekerk B. 2017. Analysis of Cyber-Incidents in South Africa. The African Journal of Information and Communication (AJI) ,20,113-132
[22] https://mg.co.za/article/2018-06-18-liberty-breach-should-never-have-happened-cybersecurity-expert retrieved on 19/07/2019
[23] Van Niekerk B. 2017. Analysis of Cyber-Incidents in South Africa. The African Journal of Information and Communication (AJI),20,113-132

risk management function risks. Regulators must be prepared to introduce, deal with, enforce and implement regulations to curb breaches in cybersecurity which are now an emerging part of every organisation.

## Cannabis infused alcohol, the newest trend challenging alcohol policy

**By Lekgala Morwamohube**

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Alcohol infused with hemp or cannabis is becoming a worldwide trend wherein major drinks companies are investing in or planning to launch cannabis infused drinks.[24] On 18 September 2018, the Constitutional court of South Africa, ruled that the personal use of cannabis is not a criminal offence. Following that, the Durban-based Poison City Brewing company released the first local cannabis-infused 4% beer in October 2018. The 4% alcohol beer is manufactured with hemp oils and lacks tetrahydrocannabinol hereafter referred to as (THC) which is the psychoactive component of cannabis.[25] In a space of four months after its launch, the Durban Poison Cannabis lager had already sold nearly 1 million bottles through Tops at Spar outlets in Gauteng and KwaZulu-Natal at R18 a bottle.[26] JSE-listed beverages group Distell backed by RCL Foods' has reached a "distribution support" agreement with Poison City Brewing because demand for Durban Poison Cannabis Lager had "overwhelmingly exceeded capacity.[27]

Internationally, brands such as Heineken and Corona have already announced that they are developing dagga-infused products, with some of the products on the shelves already. This shows that brewing companies are eyeing this growing market and this will have an impact on the regulation of the liquor industry mainly clarity on cannabis product regulations in relation to cannabis-infused alcoholic beverages.

In the US for example, the Alcohol and Tobacco Trade Bureau which regulates the alcohol industry, issued an industry statement that the US will accept alcoholic beverages derived from parts of the hemp plant that do not contain Cannabidiol (CBD), such as hulled hemp seeds and hemp seed oil.[28] The term 'hemp' means the plant Cannabis sativa L. and any part of that plant, including the seeds and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.[29] The bureau further released a policy, which dictates how manufacturers may use Hemp-CBD in their alcohol products. The Policy sets forth the requirements for formulas and statements of process producers may use. In seeking approval for an alcohol beverage product with hemp, producers must submit an analysis conducted by a U.S. lab of the hemp component (oil, seeds, et cetera) that will be used in the product, specifying the amount of THC detected, if any, and also specifying the lowest level of THC that could be detected by that particular laboratory. Once the hemp components are tested for controlled substances, detailed records are kept at the manufacturing premises for inspection. Once a producer

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[24] https://www.beveragedaily.com/Article/2018/08/01/Molson-Coors-Canada-creates-JV-for-cannabis-beverages?utm_source=copyright&utm_medium=OnSite&utm_campaign=copyright

[25] Who owns Whom. African Business Information. THE LIQUOR INDUSTRY Report October 2018

[26] http://www.fastmoving.co.za/news/retailer-news-16/cannabis-products-are-flying-high-12733

[27] Spotong Magazine, April 2019 edition. Accessed from https://www.spotongmag.co.za/articles/the-tavern-tatler-9247.html.

[28] https://www.cannalawblog.com/the-ttb-clarifies-its-position-on-adding-cbd-to-alcoholic-beverages/

[29] U.S. Alcohol and Tobacco Tax and Trade Bureau Industry Circular Number: 2019 – 1 issued on 29 April 2019

receives approval from the Bureau, the producer must then comply with state rules and regulations[30]. With this said, the capacity of the South African labs to test the hemp component in order to qualify that the Cannabis infused alcohol lacks tetrahydrocannabinol (THC) which is the psychoactive component of cannabis becomes critical.

The policy decision on cannabis product regulations in relation to cannabis-infused alcoholic beverages also becomes an urgent matter for consideration.With the legalisation of commercial recreational use of cannabis and cannabis products which had commenced in 2018, a number of questions about what activities are permissible on or in premises licensed to manufacture or sell alcoholic beverages are in the policy agenda in countries like the US. For example, California as the most populous U.S. state, had taken steps to clarify cannabis product regulations and mentioned that as a state, they will not allow cannabis-infused alcoholic beverages. In California, cannabis cannot be sold in the same premises as alcoholic beverages, any product that contains both cannabis and beverage alcohol cannot be sold at premises licensed with either an Alcoholic Beverage Control (ABC) license, Secondly, regulations issued by the California Department of Public Health prohibit the sale of “edible cannabis products” as alcoholic beverages. (Title 17, Cal. Code of Regs., section 40300)[31]. In conclusion, it can be argued that legalisation of commercial recreational use of cannabis and cannabis products in South Africa will call for review of alcohol policy in one way or another.

[30] https://www.cannalawblog.com/the-law-on-cbd-infused-alcoholic-beverages/
[31] https://www.cannabisbusinesstimes.com/article/california-cannabis-alcohol-regulations/

## Contact details

| Legislation | Department or agency | Switchboard/call centre | Complaints/ compliance line | Email address |
|---|---|---|---|---|
| National Credit Act (Act No. 34 of 2005) | National Credit Regulator (NCR) | 011 554 2700 | 086 062 7627 | complaints@ncr.org.za For complaints regarding debt counselling: dccomplaints@ncr.org.za |
| Consumer Protection Act (Act No. 68 of 2008) | National Consumer Commission (NCC) | 012 428 7726 | 012 428 7000 | complaints@thencc.org.za |
| | Consumer Goods and Services Ombudsman (CGSO) | 011 781 2607 | 086 000 0272 | complaints@cgso.org.za/ info@cgso.org.za |
| | Consumer Goods Council of South Africa (CGCSA) | 086 124 2000 | | info@cgcsa.co.za |
| | National Consumer Tribunal (NCT) | 012 683 8140 | | registry@thenct.org.za |
| | National Regulator for Compulsory Specifications (NRCS) | 012 482 8700 | | |
| Companies Act (Act No. 71 of 2008) | Companies and Intellectual Property Commission (CIPC) | 086 100 2471 | | |
| | Companies Tribunal (CT) | 012 394 3071 012 394 5553 | | registry@companiestribunal.org.za |
| | Takeover Regulation Panel (TRP) | 011 784 0035 | | admin@trpanel.co.za |
| Liquor Act (Act No. 59 of 2003) | the dti: National Liquor Authority (NLA) | 012 394 1683 | | |
| Lotteries Act (Act No. 57 of 1997) | National Lotteries Commission (NLC) | 012 432 1300/ 1399 | 012 432 1434 08600 65 383 | |
| | National Lotteries Distribution Trust Fund (NLDTF) | 086 006 5383 | | nldtf@nlcsa.org.za |
| National Gambling Act (Act No. 7 of 2004) | National Gambling Board (NGB) | 086 722 7713 | 010 003 3475 | info@ngb.org.za |

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