



# THE REGULATORY DEBATES

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*For sound and responsive consumer and corporate laws*

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## Editor's note

Welcome to the first issue of Regulatory Debates for the 2018/19 financial year.

This edition sees some changes to our editorial team as we bid farewell to former editor Dr Evelyn Masotja, who has been appointed Deputy Director-General: CCRD. We wish her well in her new role and thank her for her contribution to Regulatory Debates.

This year is an important one for South Africa. Not only does it mark the centenary of the birth of Nelson Mandela, but also President Cyril Ramaphosa's Thuma Mina call for all South Africans to unite to fix the nation. To this end, CCRD has made progress with regards to the following legislation:

1. the National Gambling Amendment Bill was published in Government Gazette No. 41787 of 20 July 2018;
2. the Companies Amendment Bill was approved by Cabinet on 22 August 2018;
3. the Copyright Amendment Bill is currently in Parliament; and
4. the National Credit Amendment Bill is in Parliament.

Our Regulatory Debates team has also been hard at work researching trends that affect policymaking, including corporate governance and IT. Turn to page 15 to learn more about the need to regulate IT and how it can be used to implement policy.

On page 8, we take a look at GMO labelling in South Africa and why current regulations may be difficult to implement. This is particularly relevant in a time when we are battling with food-borne diseases such as listeriosis.

As the custodians of Intellectual Property, on page 18 we put the focus on the Fourth Industrial Revolution and artificial intelligence. Will South Africa as a developing country allow for protection with regards to the ownership of rights to work produced by robots? Issues of copyright and misappropriation are raised on page 20. This is rife in Africa and South Africa where a lack of awareness around copyright law leaves room for exploitation.

We hope these articles encourage debate and knowledge-sharing and help drive positive contributions to policymaking that will ultimately improve the lives of ordinary South Africans.

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Disclaimer: The views expressed in this publication are those of the authors and do not necessarily represent the views of **the dti**. Articles are solely for the purpose of debate and to highlight trends regarding the implementation of legislation.

## What does good corporate governance have to do with director liability?



By Vikeshni Vandayar, Governance and Legal Specialist: Institute of Directors in Southern Africa (IoDSA)

The Institute of Directors in Southern Africa's King IV Report™ is a voluntary code for corporate governance in South Africa. King IV came into effect from 1 April 2017 and is a universal code that applies to all organisations, irrespective of the nature, size or industry in which they operate. It is, however, the responsibility of each organisation to proportionally apply the recommended practices found in King IV according to its specific circumstances and current governance maturity level.

Directors of companies are bound by certain legal duties in terms of the Companies Act. They can be held both civilly and criminally liable if found to be in breach of these fiduciary duties.

But what is the inter-play between these legal duties and good governance, as contained in the King IV Report on Corporate Governance™ for South Africa?

Sections 75 and 76 of the Companies Act set out the expected duties of a director<sup>1</sup>. The Act, however, does not address how individual directors can show that they have exercised their powers and performed the functions as expected. Corporate governance codes therefore come into play to provide necessary guidance to both the board and individual directors with regard to implementation of good governance during board duties, decision-making processes and throughout the organisation.

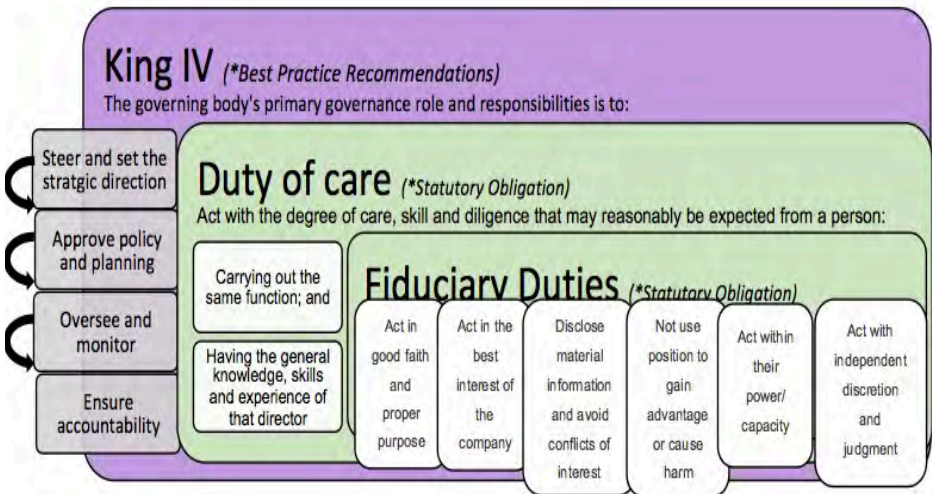
The King Report sets out best practice recommendations for the roles and responsibilities of the Board and individual directors, and has been used by South African courts as the standard of conduct reasonably expected from a director. The current King IV Report is therefore the benchmark against which directors should compare their conduct and actions<sup>2</sup>. The diagram below is a high-level summary of a director's statutory fiduciary

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1 See the IoDSA General Guidance Note on Director Duties for a more comprehensive overview of director duties in terms of the common law and the Companies Act as well some example of case law, accessible via <http://www.iodsa.co.za/page/Guidancenotes?>

2 See the Corporate Governance Network's Paper on The Business Judgement Rule for more information, accessible via <http://www.iodsa.co.za/page/ForumCGN?>

duties as per the Companies Act and the overarching King IV's view on the leadership required by the Board.



The Board of a company must be satisfied that it is achieving the main governance outcomes of ethical culture, good performance, effective control and legitimacy, irrespective of the practices and methods implemented. The Board and directors can then take comfort that they perform their functions within the context of the fiduciary duties expected of them.

The consideration and application of the higher standards outlined in King IV (to that of the minimum statutory obligations) provides directors with an extra mechanism to mitigate potential liability and could be their saving grace when things go wrong.

## Regulating online liquor sales



By Pregoria N Mabaso-Muvhango:  
Director, Legislative Drafting, the dti

Online shopping has become a convenient and time-saving option in our fast-paced and busy lives. More and more people are shopping for clothes, gifts, groceries, medication and even liquor online. According to Slice Intelligence, which is an e-commerce data provider company that measures digital commerce directly from the consumer across all retailers, the online sale of beer, liquor and wine grew by 32,7% in 2017, while wine recorded the largest online sales (65%).<sup>3</sup> Slice Intelligence highlights that 60,8% of the growth in online beer, liquor and wine sales came from the expansion of app-based alcohol delivery service Drizly Inc.<sup>4</sup>

This points towards the need to regulate the online liquor business. In South Africa, liquor consumption is extremely high per capita as compared to international standards. As a result, authorities cannot afford to allow for third-party providers to be unregulated. South Africa's liquor legislation should include regulation of online licences and provide clear guidelines for the use of third-party providers.

In South Africa, no person, whether natural or juristic, can manufacture, distribute or sell liquor without a licence or registration certificate issued by authorities. The licence is issued in respect of specific premises, and any person who is issued with a licence or registration certificate is required to carry out its activities only in or from the registered premises. Liquor premises can only be run legally from a property zoned for the type of premises being applied for. So does this imply that one cannot conduct a liquor business from an online platform? A so-called three-tier system exists in South Africa that requires the sale of liquor to flow from manufacturer to distributor to retailer. In effect, one cannot take an online order and ship directly from warehouse to consumer. There are certain exceptions, however, such as micro manufacturers, which have inherent distribution powers and may supply directly to the retailer.

Alcohol industry expects ask the question as to what premises must be licensed in the case of an online wine sales business? Some believe the licensed premises should be the office where the administration relating to wine sales takes place. A number of online

<sup>3</sup> Digital Commerce Website 360 website. <https://www.digitalcommerce360.com/2018/03/15/online-sales-of-beer-liquor-and-wine-grew-by-32-7-in-2017/>

<sup>4</sup> <https://www.digitalcommerce360.com/2018/03/15/online-sales-of-beer-liquor-and-wine-grew-by-32-7-in-2017/>



wine sales businesses have been licensed in this manner. One cannot believe, however, that the intention of having a registered liquor premises was to establish a domicile address.

The question whether it is necessary to use an administration office as the premises to be licensed poses a challenge. If offices are used as registered premises, how will inspection take place? According to Cronje, in many cases the owners of online wine sales businesses conduct business from their homes and licences have successfully been obtained in respect of the owners' residential properties. Liquor licences have been issued where applications specifically state that only administration would be conducted on the premises and that no persons would visit such premises for the purpose of sales. In addition, no wine would be received, stored at or dispatched from the premises.

Leverage can be applied where a micro manufacturer, distributor or retailer already in possession of a liquor licence is looking to expand to include online trading. There is a trend to use the online technology of third-party providers for innovative marketing and brand experience, allowing consumers to connect with a product by simply using an app on their cellphones. The customer clicks on the app, selects the product and enters their credit-card information. The third-party provider will then send the information to the retailer, which processes the payment and arranges for delivery of the liquor. Does this activity fall within the liquor industry?

Going forward, it will be critical for South Africa's liquor legislation to include regulation of the online industry and provide clear guidelines for those making use of third-party providers.

## Why current GMO labelling regulations may be difficult to implement

By Likani Lebani, Director: Market Research and Trend Analysis (the dti)

South Africa is one of more than 60 countries<sup>5</sup> in the world that has some form of mandatory labelling laws on foods containing genetically modified organisms<sup>6</sup> (GMOs) or ingredients. In July 2016, the United States (US) became the 65<sup>th</sup> country to require the labelling of foods containing GM ingredients. Through this new statutory instrument, US Federal agencies have until 2018 to establish standards, which will require the disclosure of GM ingredients through “text, a symbol, toll-free number or a digital link (such as a QR code) that can be read by a smart phone”.<sup>7</sup> While this is a unique approach to traditional GM mandatory labels, the sudden change of position by the US authorities effectively forced the Food and Drug Administration Agency (FDA) to change its position of regulating the end product, rather than the process used to make the product. This effectively aligns the US regulatory framework with that of the European Union (EU) and a few other jurisdictions. However, unlike in the EU, the US is yet to determine the threshold under the amended laws



5 <http://www.centerforfoodsafety.org>

6 “genetically modified organism” means an organism the genes or genetic material of which has been modified in a way that does not occur naturally through mating or natural recombination or both, and “genetic modification” shall have a corresponding meaning; (GMO Act, 1997)

7 The Agricultural Marketing Act of 1946

In the EU, the traceability and labelling regulations come into effect whenever any ingredient in a particular food item is more than 0,9% GMO. The list of ingredients must indicate “genetically modified” or “produced from genetically modified [name of the organism]”. The EU law requires that where products contain, consist of or produced from authorised GMOs, they must be clearly labelled as such<sup>8</sup>. These requirements do not apply to foods containing authorised GM material of less than 0,9%, provided that this presence is adventitious or technically unavoidable. Undoubtedly, the EU has one of the most stringent regulations in the area of GMO labelling in spite of the fact that it imports more than 30-million tonnes of food and feed from the major world producers of GM products<sup>9</sup>. Other countries allow for a greater degree of GMO inclusion, for example, South Korea at 3% and Japan at 5%.<sup>10</sup> The fact is that there is no scientific basis for setting a threshold because there is no conclusive scientific evidence that GM foods are unsafe. In general, threshold determination is a balancing act that should be based on pre-market conditions, specifically testing capabilities, costs and the interests of various stakeholders such as producers, processors and consumer groups.

In South Africa, Regulation 7 in terms of Section 120(1) of the Consumer Protection Act states that labelling provisions apply to goods approved for commercialisation by



8 GMOs (Regulation (EC) No 1829/2003 and No 1830/2003)

9 <http://www.europarl.europa.eu>

10 <https://gmo.geneticliteracyproject.org>

the Executive Council for GMOs and to all goods containing at least 5% of GM content, irrespective of whether they are produced in South Africa or elsewhere. The provision applies to any good, ingredient or component. When a product has a GM content of at least 5%, it must be indicated as “contains GMOs”. In the case where the product is produced directly from GM sources and no testing is needed, the product must be labelled “produced using genetic modification”. In circumstances where one can argue that it is scientifically impractical to test the GM content, labelling is still mandatory, but must bear the label “may contain GMOs”.<sup>11</sup>

South Africa, unlike the EU countries, has a liberal threshold, which on the face of it should be easily implementable. The major challenge lies in the traceability of GM products/ingredients throughout the food production chain, from seed production to retail shelves (as is the case in the EU). In the absence of a traceability system, it is not possible to tell the source of GM products or where non-GM products get contaminated. This is further exacerbated by the absence of a mandatory segregation requirement from farm to retail. Under these conditions, the implementation and enforcement of Regulation 7 remains in doubt. A related area of concern is the lack of baseline data with regards to the stock of GM and non-GM products in the country, both locally produced and imported products. In the absence of such baseline data, it is increasingly difficult for the consumer regulator and related departments (for example, the Department of Health) to monitor whether companies are complying with the GM labelling requirement or if GM imports are gradually displacing local non-GM products.

For a developing country such as South Africa, the issue of costs is one dimension that requires close scrutiny for a number of reasons. First, GM labelling affects all companies – whether or not producing GM foods since the product mix, and possibly shelf space, has to be reconfigured. Second, the burden lies on producers to prove that products are GM free or below the threshold. By implication, the costs of determining such may be passed on to consumers leading to higher food prices. In order for the regulations to have effect, every company in the supply chain (seed producers-farmers-storage-logistics-processor etc.) will have to test and document every batch of product received, which currently is not the case. This would be a costly exercise that requires well-functioning laboratories and uniform standards if the results are to be credible. All this considered, the need to balance diverging interests, costs and the ‘right to know’ principle, a label like

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<sup>11</sup> Regulation 7(6) of 2011.

“May contain GMO” would be more appropriate for South Africa because of the lower associated costs. With time, a stricter mandatory requirement, like the current 5%, may be introduced and over time even stricter thresholds such as the 0,9% in the EU, only if such a need exists. On the basis of trade patterns between South Africa and the EU, alignment with the EU does not seem to offer any substantial benefits when compared to that between the US and the EU.

In conclusion, it is important to note that mandatory GM labelling is a complex issue that involves competing values and interests – the ‘right to know’ versus the need to avoid sending a wrong message that GM foods are unsafe, but also the need to maintain economic viability throughout the food chain. This being the case, the focus of attention has over the years shifted from initial concerns over food safety and risk to the consumer ‘right-to-know’ principle. The rationale is that consumers have a right to know what they are consuming. Whether they include GM products in their day-to-day shopping is ultimately their choice, but they must at the very least be informed of the ingredients contained in their food in order to be able to make an informed decision.



## Transformation on paper or in practise?



By Mafedi Mphahlele, Director:  
Knowledge Management (the dti)

Strategic plans, policies, procedure manuals and annual reports all boast the word ‘transformation’. The introduction of black economic empowerment (BEE), followed by broad-based black economic empowerment (B-BEEE) legislation and the subsequent establishment of a B-BEEE Commission is proof that transformation is a serious matter in the corporate world. Most companies have invested a lot of time and resources in an effort to transform, with diversity, employment equity and HR development managers even creating units to address issues of organisational transformation.

With headlines like “Old boys club still pulling strings<sup>12</sup>, however, it is fair to assume that the South African corporate sector is far from being transformed. A case in point is Imperial Motors Holdings, where an Indian female chartered accountant, Adila Chowan, was appointed Group Financial Manager in 2012 and promised career progression, including promotion to Chief Financial Officer<sup>13</sup>. Two years later, Chowan was not appointed in the post despite having done well at her job, applying for the vacant post when advertised, and allegedly doing well in the interviews and psychometric testing. She handed in her



12 2018. Old boys club pulling strings. The Mercury. 10 May. Pg 4

13 <https://www.biznews.com/leadership/2018/04/06/chowan-imperial-lessons-judgement-sa-corporate-executives/> retrieved on the 10/04/2018.

resignation letter, but withdrew it after the CEO promised her a CFO post within the Imperial Group within one year. A meeting in 2015, however, brought matters to a head. Chowan claimed that the CEO referred to her gender, race and employment equity. Words like “female employment equity” and “technically competent” were allegedly uttered in the subsequent meetings. Chowan lodged a grievance. She was suspended while an investigation was under way, and dismissed in September 2015 after her complaint was found to have no substance. She approached the North Gauteng High Court for relief, in a case referred to as “South Africa’s court case of the year”<sup>14</sup>.

In a 32-page judgment, the court ruled in Chowan’s favour<sup>15</sup>. The CEO and one of the group’s financial managers subsequently resigned. Chowan is further suing the company for loss of earnings and impairment to her dignity to the tune of R28 million. The court is yet to make a ruling on this.<sup>16</sup>



There is no doubt that the CEO in question was a good leader, with 40 years’ experience<sup>17</sup> and willing to do everything by the book or in the best interests of the company. There is more to transformation, however, than just ticking boxes. Work has to be done to effect actual change, and the case brings to light the serious nature of transformation in South Africa’s corporate world. It can, however, be acknowledged that such acts of discrimination do not always happen intentionally.

14 2018. Old boys club pulling strings. The Mercury. 10 May. Pg 4

15 2018. Old boys club pulling strings. The Mercury. 10 May. Pg 4

16 <https://www.fin24.com/Companies/Industrial/how-race-gender-blunder-cut-short-lambertis-40-year-corporate-career-20180419>

17 <https://www.biznews.com/leadership/2018/04/06/chowan-imperial-lessons-judgement-sa-corporate-executives/>

Furthermore, women are subject to subtle covert discrimination as people are not even aware of their own biases<sup>18</sup>.

This being the first case to go public and even bear costs (financial and image related), one writer summed it up well: "Imperial Holdings CEO may have inadvertently done his South African corporate peers a huge favour by labelling a financially competent and experienced black accountant as a 'female employment equity' person, just as he was seemingly unconscious of his own prejudice in favouring a less experienced white male for the post of his company's chief financial officer."<sup>19</sup>

This brings the focus to the soft issues of the subject: transformation of the mind. In the case of Imperial Holdings, the chair of the Board did admit in testimony that the company is in support of transformation, but that the Board and management structure is male-dominated. The motor industry is traditionally male-dominated and perhaps it is easier to keep the status quo than to change, presenting a huge challenge to modern corporate governance.

The case highlighted above is indicative of the worldwide problem of the 'unbreakable glass ceiling'. The CEO of Qatar Airways recently commented in an interview that his job is not for a woman because it is very challenging. He later apologised, claiming his initial comment had been a joke. In another case, a newspaper recently reported on a female engineer fighting for equal pay at Google. She and two other women are said to be suing Google for discrimination<sup>20</sup>. These incidences could be the result of a deeply entrenched traditionally patriarchal culture.

Breaking the glass ceiling is much harder than building it because it is up to the builder to decide how hard it should be for the breaker to break it. It would be an insult to any and every profession and practising professional to transform and comply at the expense of merit. That would just be 'tokenism' or window-dressing, which is also costly in the long run. People who work hard, have proved themselves and qualify, however, should be given a fair opportunity. Twenty-odd years later and some companies are reaping the fruits of real transformation, while others are paying the price for not doing so.

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18 2018. Executive intelligence. Emotional blackmail. Destiny magazine. June, pg 110

19 <https://www.biznews.com/undictated/2018/04/11/lamberti-employment-equity-debacle-friedman/>

20 <http://markets.businessinsider.com/news/stocks/fin24-com--a-female-engineers-fight-for-equal-pay-at-google-6100887>



## Do digital behaviour-change interventions help reduce alcohol consumption?



By Lekgala Morwamohube, Deputy Director: Market Research and Trend Analysis, the dti

The World Health Organisation (WHO) forum on alcohol, drugs and addictive behaviours has confirmed that states are not on track for the achievement of alcohol indicators and there are no signs that the global target to reduce harmful alcohol use by 10% in 2025 will be achieved.<sup>21</sup> The 2016 projected estimates on the indicator for harmful use of alcohol (per capita consumption of pure alcohol for persons over 15 years of age) also reveal that alcohol use globally has remained around 6.4 litres per person annually.<sup>22</sup>

These findings clearly indicate that the alcohol attributable burden is increasing and poses the question of whether public education or mass media programmes are making any impact. Empirical findings have already confirmed that such programmes alone are ineffective in reducing the harmful use of alcohol.<sup>23</sup> That said, can digital behaviour change interventions (DBCIs) help reduce excessive alcohol consumption, particularly among young adults? DBCIs are delivered via computer technology such as smartphone apps, websites, computer programs, wearable devices and telecommunications, and can address the cost, time and training barriers experienced when delivering brief interventions in person.<sup>24</sup>

Recent research findings from a systematic review of digital interventions for alcohol reduction by United Kingdom researchers reveal that interventions delivered by smartphone apps have the potential to help people reduce their consumption of alcohol. It is necessary, however, to ensure that an app's design and functionality is appropriate for its intended purpose and target population.<sup>25</sup> DBCIs appear to reduce alcohol consumption, but most researchers argue that greater understanding is needed for their mechanisms of action.

21 WHO forum on alcohol, drugs and addictive behaviours. Enhancing public health actions through partnerships and collaboration 26-28 June 2017, WHO headquarters Geneva, Switzerland. Retrieved from [http://www.who.int/substance\\_abuse/activities/fadab/msb\\_adab\\_gas\\_progress\\_report.pdf](http://www.who.int/substance_abuse/activities/fadab/msb_adab_gas_progress_report.pdf). *ibid*

22 WHO World Health Statistics 2017. Retrieved from [http://www.who.int/gho/publications/world\\_health\\_statistics/2017](http://www.who.int/gho/publications/world_health_statistics/2017)

23 Martineau, FP; Graff, H; Mitchell, C; Lock, K (2013) Responsibility without legal authority? Tackling alcohol-related health harms through licensing and planning policy in local government. *Journal of public health (Oxford, England)*. ISSN 1741-3842 DOI: 10.1093/pubmed/fdt079.

24 Garneth C, Muirhead CR, Brown J & Hickman M 2018. Behavior change techniques used in digital behavior change interventions to reduce excessive alcohol consumption. Published by the Society of behavioral medicine 2018.

25 Garneth C, Muirhead CR, Brown J & Hickman M 2018. Behavior change techniques used in digital behavior change interventions to reduce excessive alcohol consumption. Published by the Society of behavioral medicine 2018.



A study on the effect of a text message in reducing hazardous drinking among injured patients who have been discharged from trauma wards was published in 2018 by the Society of Behavioural Medicine. It found that mobile phone text-message approaches

did reduce hazardous drinking.<sup>26</sup> The study found that communicating via text message is cost-effective, highly scalable and has the potential to transform access to health promotion information and services due to the high uptake of mobile phones globally, and has become “one of the most frequently used forms of mobile communication”.<sup>27</sup>

In supporting the abovementioned views, Garneth et al. argue that the theory of motivation postulates that human actions are determined by what they most want or need at any moment in time and that new behaviours are enacted only when the motivation to change is strong enough to overcome competing wants and needs.<sup>28</sup>

Therefore, it is possible that increasing the motivation to reduce consumption may be a more effective behaviour change strategy for digital interventions without face-to-face engagement than increasing self-regulation skills, which will subsequently be diminished by the consumption of alcohol. Interventions that are grounded in established theories of behaviour change, and include approaches that address social norms, build self-efficacy and enhance skills to resist pressure to use alcohol, have been found to be more effective than those lacking a theoretical framework<sup>29</sup>

Considering the speed of technology and the current statistics on the use of smartphones in South Africa, is it viable for policymakers to consider DBCIs when developing the national strategy for the reduction of alcohol consumption? In my view, policymakers need to view this emerging evidence as important because it is highly possible that there will be an increase in the number of smartphone apps being used as DBCIs in the world, including in South Africa. This might be similar to apps such as Uber and Taxify, which have gained momentum in South Africa. Is the country ready to regulate these apps? Hence the need to be proactive with legislation.

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26 Sharpe S, Kool B, Whittaker R, Lee A.C., Reid P, Civil I, Walker M, Thornton V and Ameratunga S (2018). Effect of a text message intervention to reduce hazardous drinking among injured patients discharged from a trauma ward: a randomized controlled trial. Published in Digital Medicine. Retrieved at <https://www.nature.com/articles/s41746-018-0019-3.pdf>. Retrieved in 10 July 2018.

27 Sharpe S, Kool B, Whittaker R, Lee A.C., Reid P, Civil I, Walker M, Thornton V and Ameratunga S (2018). Effect of a text message intervention to reduce hazardous drinking among injured patients discharged from a trauma ward: a randomized controlled trial. Published in Digital Medicine. Retrieved at <https://www.nature.com/articles/s41746-018-0019-3.pdf>. Retrieved in 10 July 2018

28 *ibid*

29 Tebb K P, Erenrich R K, Bradner Jasik C, Berna M S, Lester J. C. Ozer E M 2016. Use of theory in computer-based interventions to reduce alcohol use among adolescents and young adults: a systematic review

## The Fourth Industrial Revolution and artificial intelligence: Who owns the rights?



By Tshepiso Lefoka, Research Intern: Market Research and Trend Analysis, the dti

According to Munholland (2016), the First Industrial Revolution used water and steam power to mechanise production; the second electric power to create mass production; and the third electronics and information technology to automate production.<sup>30</sup> The Fourth Industrial Revolution is building on the third and is characterised by a fusion of technologies that are blurring the lines between the physical, digital and biological spheres like robots.<sup>31</sup> Artificial Intelligence (AI) forms part of the Fourth Industrial Revolution and is defined in Wikipedia as “intelligence demonstrated by machines in contrast to the natural intelligence displayed by humans and other animals.”<sup>32</sup> Based on these technological

advancements, most jurisdictions are moving into protecting the developments of future technology to stimulate innovations and adapt technology revolution by compensating the creator and innovator of an output, even if it is a robot, through the copyrights or patent grants.

The European Union has already acknowledged the importance of AI-based machines and robots and has called for the consideration of a Civil Law Rule of Robots, recognising the need for a specific legal status for robots.<sup>33</sup> New Zealand recently recognised animals as sentient beings, calling for the development and issuance of codes of welfare and ethical conduct following the court case of the monkey selfie copyright dispute.<sup>34</sup> The High Court of India has also recently declared the Ganges and Yamuna rivers as legal entities that possessed the rights and duties of individuals).<sup>35</sup>

According to South Africa's intellectual property law, ownership of rights is given to the person/author/creator of the invention or idea to provide recognition and protection

30 The Fourth Industrial Revolution and How It Will Affect Supply Chain, Posted on May 2018 by Glen Munholland

31 Schwab K (2015). The Fourth Industrial Revolution: What It Means and How to Respond. Published in Foreign Affairs Magazine by the Council on Foreign Relations. Retrieved from <https://www.foreignaffairs.com/articles/2015-12-12/fourth-industrial-revolution>. Retrieved on 11 July 2018

32 Free Encyclopedia. Retrieved from [https://en.wikipedia.org/wiki/Artificial\\_intelligence](https://en.wikipedia.org/wiki/Artificial_intelligence)

33 European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL)). Retrieved from <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2017-0051+0+DOC+PDF+V0//EN>. Retrieved on 11 July 2018

34 [https://www.reddit.com/r/photography/comments/8egiwf/court\\_sides\\_with\\_human\\_in\\_copyright\\_fight\\_over/](https://www.reddit.com/r/photography/comments/8egiwf/court_sides_with_human_in_copyright_fight_over/)

35 <https://gizmodo.com/when-will-robots-deserve-human-rights-1794599063>

By Andres Guadamuz, Senior Lecturer in Intellectual Property Law, University of Sussex, United Kingdom. [http://www.wipo.int/wipo\\_magazine/en/2018/01/article\\_0007.html](http://www.wipo.int/wipo_magazine/en/2018/01/article_0007.html)



of certain indicators of indigenous knowledge. The question is, will South Africa as a developing country give enough space to the protection of technology, particularly with regard to the ownership of rights to work produced by a robot using AI? Schwab (2015) argues that government systems and public authorities need to adapt to the Fourth Industrial Revolution as a matter of survival, and failure to do so will result in increased trouble.<sup>36</sup> This will be particularly true in the realm of regulation. Schwab's views are based on the fact that the current systems of public policy and decision-making evolved alongside the Second Industrial Revolution, when decision-makers had time to study a specific issue and develop the necessary response or appropriate regulatory framework. Schwab's view is that such an approach is not feasible in the Fourth Industrial Revolution, given its rapid pace of change and broad impact. This means regulators must continuously adapt to a new, fast-changing environment so that they can truly understand what they are regulating. To do so, governments and regulatory agencies will need to collaborate closely with business and civil society.<sup>37</sup>

South Africa has started preparing for the Fourth Industrial Revolution. The 2018 State of Nation Address (SONA) highlighted the establishment of a Digital Revolution Commission (DRC), which will include both the private sector and civil society. The DRC will ensure that the country is in a position to seize the opportunities and manage the challenges of rapid advances in information and communication technology (SONA, 2018).<sup>38</sup> The Public Policy and Government Relations Senior Manager at Google South Africa echoed the same sentiments, saying government should formulate future-oriented legislation that will be able to accommodate the future technology revolution (Google South Africa 2018).<sup>39</sup>



36 Schwab K (2015). The Fourth Industrial Revolution: What It Means and How to Respond. Published in Foreign Affairs Magazine by the Council on Foreign Relations. Retrieved from <https://www.foreignaffairs.com/articles/2015-12-12/fourth-industrial-revolution>. Retrieved on 11 July 2018.

37 *ibid*

38 The State of National Address, 2018 by the President of the Republic of South Africa, Mr. Cyril Ramaphosa. <https://www.thesouthafrican.com/sona2018-read-the-full-text-of-cyril-ramaphosas-address-here/>

39 Research interview with Public Relations Manager at Google South Africa. Conducted on 24 April 2018 by Market Research and Trend Analysis Chief Directorate.

## Copyright: Misappropriation vs ethical borrowing and appreciation



By Mafedi Mphahlele,  
Director: Knowledge Management,  
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African arts and culture has been dominating the headlines lately. Globalisation and technology has increased its exposure and the appreciation of its vibrancy, which has resulted in duplication in the name of art. This puts the focus on issues of ownership, exploitation and misappropriation.

Misappropriation is when one uses a design and neither acknowledges nor compensates the inspiration or original owner of the inspiration. This is rife in Africa and South Africa, where copyright laws are not well known. It has been reported, for example, that fashion power house Louis Vuitton has been using the Lesotho blanket design in its production of expensive shirts that cost about R33 000. The

same Lesotho blanket designs are used by Basotho designers in the production of capes and coats at what would be considered a reasonable price of less than R2 000.

Laduma Nongxokolo Maxhosa's Khanyisa cardigan designs were reproduced by retailer Zara on its range of socks. This is considered an infringement not only of the copyright Act, but also of the Designs Act and Intellectual Property Act.

According to Zara, "Inditex, the holding company of Zara, has the utmost respect for individual creativity and takes all claims concerning third-party intellectual rights very seriously. As a preventative action, the process to immediately remove this item both from our stores and online was activated at the moment this situation was brought to our attention"<sup>40</sup>. Zara has removed the range from its stock<sup>41</sup> and Maxhosa has taken Zara to court<sup>42</sup>.

Dr Esther Mahlangu, who is world-renowned for her artistic use of Ndebele prints, has collaborated with big brands such as BMW and singer John Legend. This can, however, be considered 'fair use' in that Mahlangu is acknowledged for her work.

It must be noted that being a member of an indigenous community does not make you the original owner of a cultural design. The rights to that design belong to the community. One can, however, be inspired by the design. That said, when 'borrowing' from an original creator, you must acknowledge and compensate the creator accordingly.

40 <https://www.w24.co.za/Fashion/Style/maxhosa-takes-legal-action-against-zaras-copyright-infringement-20180425-2> retrieved on 13/06/2018

41 <https://www.w24.co.za/Fashion/Style/maxhosa-takes-legal-action-against-zaras-copyright-infringement-20180425-2>

42 <https://www.businessinsider.co.za/maxhosa-by-laduma-takes-legal-action-against-zara-over-copy-cat-design-2018-4>

## The evolution of new gambling modes



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Until recently, gambling was a relatively straightforward land-based activity, which regulators oversaw according to location (casino, race track, etc.) and gambling modality (slots, sports betting, poker, etc.). The Fourth Industrial Revolution has disrupted this universe, blurring the lines between traditional gambling modes and making it increasingly hard for regulators

to distinguish between different games, location and jurisdiction. Who, for example, is responsible for regulating betting on the outcome of the spin of a roulette wheel? Or, as we discuss here, how do we regulate high-value slot machines that supposedly simulate the game of bingo?

In South Africa, the National Gambling Act makes provision for two categories of electronic gaming machine: high-value slots, which are found exclusively in casinos; and limited payout machines, which are found in pubs and taverns.

As casino licences are extremely difficult and expensive to obtain, innovative gambling operators have developed electronic bingo machines, which are virtually identical to the slot machines found in casinos. Unlike traditional bingo, electronic bingo involves no meaningful player involvement, and is clearly little more than an attempt to develop a third form of gaming machine not originally permitted in the National Gambling Act. Indian casino operators in the US have embraced similar strategies, seeking to pass off high-value bingo machines as simply a new variant of bingo (a Class II machine), which, in the US, can be licensed exclusively by Tribal Gaming Authorities. Unlike casino slot machines (Class III machines), these do not require any federal regulatory approval.

The licensing of high-value bingo machines by Provincial Licensing Authorities is thus a direct challenge to the provisions of the National Gambling Act, and raises important constitutional questions about the powers of provincial and national arms of government.

Can the Provincial Licensing Authorities amend the definition of bingo in their Provincial Gambling Acts to allow for the licensing of electronic bingo machines? Or does the definition of bingo in the National Act, which clearly envisages an interactive game involving several players, prevail?

Most forms of gambling are areas of concurrent competence, which means that both provincial and national authorities have legislative authority. In most cases, provincial licensing authorities issue licences to operate, while the national regulator establishes norms and standards for the industry as a whole.

Since 2005, Provincial Licensing Authorities have tentatively begun to licence electronic bingo machines, while the national authorities have opposed the issuing of such licences. The existing casino licensees have consistently challenged the legality of such licences. Two court rulings, *Akani Egoli (Pty) Ltd and others v Chairperson of the Gauteng Gambling Board and others* (2006) and *Peermont Global North West v Chairperson of the North West Gambling Board* (2016), have rejected the claim that electronic bingo is an evolution of the traditional game of bingo, and ruled that electronic bingo machines are nothing more than disguised slot machines.

Despite this, Provincial Licensing Authorities continue to licence electronic bingo as it is an attractive source of gambling revenues. At present, there are approximately 4 700 licensed electronic bingo machines in five provinces. These are generally found in 'bingosinos' located in shopping centres. Some 'bingosinos' have more slot machines than the smaller casinos, notably the up-market Marco Polo (300 EBTs) and Goldrush Morula (480 EBTs). Unlike casino licences, bingo licences do not require massive investment in infrastructure or the very high licensing fees per machine.

When the Court in *Akani* stated that electronic bingo was not bingo and could not be licensed to operate outside casinos, the Gauteng Provincial Legislature responded by changing the Gauteng Gambling Act so that electronic bingo was unambiguously included in the provincial definition of bingo. The Limpopo and Eastern Cape legislatures later chose the same course of action. The consequence is that there is conflict between the provincial legislation and the National Gambling Act.

In South Africa, conflicts between provincial and national legislation are regulated by Section 146 of the Constitution. The Section makes it clear that provincial legislation



prevails over national legislation unless it can be illustrated that the conditions listed in Section 146 are met. Those conditions are that national legislation will prevail: in specific cases of necessity; if the national legislation deals with a matter that 'cannot be regulated effectively' by the provinces on an individual basis; in matters that require 'uniformity across the nation' in order to 'be dealt with effectively'; or to prevent 'unreasonable' provincial action. We argue that these conditions are not met in the case of the new definition of electronic bingo and consequently provincial definitions of bingo should prevail.

Until quite recently, federalism has enjoyed little favour in South Africa, despite the fact that both the interim and the Final Constitution created significant legal space for decentralisation. The Constitution also provided substantial possibility for democratically accountable regional and local government. The few judgments dealing with the legislative competence of provinces have set out what has been described as a functional approach to federalism, which encourages judges to find the 'optimal balance of power' between national and provincial governments in order to ensure that the structures of government created by the Constitution work together as a coherent whole.

In accordance with this position, we argue that judges should keep the future of our young democracy in the line of vision when they make decisions about bingo and the future of gambling in the country. They should resist the understandable temptation to treat gambling as an unsalubrious industry unworthy of support. Instead, they should assist the democratic process by acknowledging the powers of provinces to regulate areas over which they have competence. The solution for those opposed to the proliferation of high-value slot machines does not lie in top-down attempts to force licensing consistency at the expense of provincial powers and democratic processes. Rather, they should focus their energies on enhancing public participation processes and ensuring greater community input into provincial licensing decisions.

## Important contact details of CCRD agencies

LEGISLATION	DEPARTMENT/ AGENCY	SWITCHBOARD/ CALL CENTRE	COMPLAINTS/ COMPLIANCE LINE OR EMIAL 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: dcomplaints@ ncr.org.za
	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 Protection Act (Act No. 68 of 2008)	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	

LEGISLATION	DEPARTMENT/ AGENCY	SWITCHBOARD/ CALL CENTRE	COMPLAINTS/ COMPLIANCE LINE OR EMAIL ADDRESS	
Companies Act (Act No. 71 of 2008)	Companies and Intellectual Property Commission (CIPC)	086 100 2471		
	Companies Tribunal (CT)	012 394 3071/ 5553		registry@companiestribunal. org.za
	Takeover Regulation Panel (TRP)	011 784 0035		admin@trpanel.co.za
Liquor Act (Act No. 59 of 2003)	<b>the dti:</b> 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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