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For sound and responsive consumer and corporate laws

the dti
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Trade and Industry
REPUBLIC OF SOUTH AFRICA

towards full-scale industrialisation and inclusive growth

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Editorial

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Age restriction on the sale and consumption of alcohol – a corporate justice perspective

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Abuse in the sale and consumption of alcohol has serious negative effects on the lives of children and the youth. The extensive distribution and retailing of alcohol means it is readily available to many people, including vulnerable groups like youth below the age of 21. Unfortunately, young people may not appreciate the impact of liquor on their growth and development. Despite this, the liquor business continues to contribute toward undermining the fundamental rights of young people by focusing on profiteering at their expense. The Department of Trade and Industry (**the dti**) published the proposed National Liquor Policy[1] and Liquor Amendment Bill[2], which increase the legal drinking age from 18 to 21, to address this problem. The proposed restrictions are a timely reflection as they coincide with the recent developments in international law on the United Nations Guiding Principles on Business and Human Rights, which require corporates to honour human rights.

Research shows that drug and alcohol abuse is prevalent in South Africa.[3] It is reported that children as young as 13 years of age are drinking because alcohol is socially acceptable, easily available in shebeens, and liquor stores are allegedly selling to under-age drinkers.[4] Research further revealed that children who are under the influence of alcohol put themselves in compromising and dangerous situations, making them vulnerable to robbery and rape, fights and death.[5] Scientific research has shown that the brain continues to develop throughout adolescence, well into young adulthood and fully matures around the age of 21.[6] Alcohol impairs brain function in relation to memory,

1 *Government Gazette* No. 40319, 30 September 2016.

2 *Ibid.*

3 South Africa has the worst drinking habits compared to countries worldwide. 60% of South Africans drink alcohol higher than the worldwide average of 52%. The levels of alcohol consumption amounts between 10 and 12.4 litres per citizen per year, whilst the worldwide consumption is 6.2 litres: accessed from www.enca.com/.../what-needs-be-done-end-south-africas-status-natio...eNCA. "Time to Put Brakes on South Africa's Big Drinking" 2015-08-24. See also Provincial Medical Research Council *Substance Abuse Trends in the Western Cape* (2000-2005) Unpublished paper.

4 Department of Social Development *National Drug Master Plan 2013-2017* (2013): accessed from http://www.dsd.gov.za/manuals/master_plan.pdf on 2017-06-3.

5 Goode's "The Sociology of Drug Abuse" in Bryant & Peck *21st Century Sociology, A Reference Handbook* (2007) 416. *The Star* (2008-04-12). The newspaper reported an incident of a 14-year-old girl who passed out in the morning around 7am at school.

6 World Health Organisation "Global Status Report on Alcohol and Health" 2014: accessed from www.who.int/substance_abuse/publications/...alcohol.../msb_gsr_2014_1.5 on 27 July 2017. See also Human Rights Campaign Foundation *Prevention*

moto-skills and coordination.[7] It alters a person's perceptions, orientation and may manifest careless behaviour.

Constitutionally, the right to health care[8] is fundamental and contributes towards the preservation and strengthening of the development and well-being of a person.[9] Primarily, parents have the duty to care for their children and families, including the provision of health care and well-being.[10] The Constitutional Court in the *Government of the Republic of South Africa v Grootboom*,[11] pointed out that children and families can receive care from the state, which includes the provision of legal and administrative infrastructure for protection. This means that the proposed age restriction is consonant with the Constitution since the state has the secondary duty to protect everyone against any form of abuse or infringement of rights. The ability of an individual to achieve personal fulfilment, enjoy the right to health and a quality livelihood must also be connected to the right to human dignity.[12] It is important to strike a balance between these rights and the right to equality (personal choice), through the lens of the Constitution. This will help derive a reliable judgment about which rights must prevail.

I opine that the constitutional limitation approach be applied over personal autonomy, if justifiable in an open and democratic society based on human dignity, equality and freedom.[13] Thus, the personal choice to buy and consume alcohol requires stricter control and limitation, consistent with the developing capacities of a person based on human dignity, equality and freedom. Alcohol is abusive and infringes on the right to human

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Substance Abuse Among LGBTQ Teens (2015): accessed from www.hrc.org.teensubsranceabuse. According to the science of adolescent, brain develops rapidly throughout teenage years, the process continues until around 25 years of age. Thus, many children under the age of 21 who drink alcohol, do not have the cognitive capacity to make decisions about how much to drink.

7 *Ibid*.

8 Section 28(1)(c) of the Constitution. See Budlender & Proudlock in Proudlock *et al.* (eds.) *South African Child Gauge* (2007/2008) 41; see Liebenberg & Pillay (eds.) *Resource Book on Social and Economic Rights* (2000) 315.

9 Section 2 of the Children's Act. See also Lawrence-Karski "Legal Rights of the Child: The United Nations States and the United Nations Convention on the Rights of the Child" (1996) *Int Journal of Children's Rights* 29.

10 *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC), par 77. The right to "family care" or "parental care" in the Constitution. S 1(1) of the Children's Act defines "care" as follows:"(c) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards;".

11 The appellants in the Constitutional Court judgment of *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC), challenged the correctness of the lower court judgment in *Grootboom v Oosternberg Municipality* 2000 (11) BCLR 1169 (CC); 2000 (3) BCLR 277 (CC): where an urgent application to the High Court invoking their constitutional rights to adequate housing under s 26 and the children's rights to special protection under s 28 was made.

12 S 10 of the Constitution

13 S 36 of the Constitution

dignity, the right to health of persons below maturity age and degrades development.[14] Thus, alcohol must be restricted for young people to find protection under our laws. The proposed legislative framework on liquor should be supported on the premise of protecting young people from substances that are abusive and harmful to their development.[15] The costs of dealing with addiction in alcohol and the need to protect young people must outweigh the desire to promote autonomy. In conclusion, the United Nations Guiding Principles on Business and Human Rights,[16] also known as the Ruggie Principles, created a norm of responsibilities that intersect government and business as key role players in upholding human rights. They break new ground with the requirement that corporates must take responsibility for respect of human rights and ensure that the rights of young people to health, dignity and development override profit generation.

The state of SOCs: What is wrong?

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South African State-Owned Companies (SOCs)[17] of interest will be those classified in the Public Finance Management Act, 1999 (Act No. 1 of 1999) as Schedule 1 State-Owned Enterprises (SOEs) and Schedule 2 SOEs.[18] Schedule 1 SOEs are constitutional institutions, comprising commissions, while Schedule 2 institutions are major public entities such as South Africa Airways (SAA) and the South African Broadcasting Corporation (SABC). The Companies Act 71 of 2008 established the term 'state-owned company', which is defined in Section 1 as:

14 Ss 27(1)(a) of the Constitution: socio-economic rights in relation to health, food, water, social security.

15 S 9(3) of the Constitution.

16 Developed in 2011 by the former UN Secretary-General's Special Representative for Business and Human Rights, John Ruggie. The UN Human Rights Council endorsed the Principles in resolution 17/4 of June 2011. The Principles are built on a three-legged framework in recognition of:

(a) the duty of the state to protect;
(b) the duty of corporate to respect; and
(c) the need for greater access to remedy both judicial and non-judicial human rights violations – for victims of business-related abuse.

17 The words State-Owned Companies (SOCs) and State-Owned Enterprises (SOEs) will be used interchangeably in this article.

18 *Rating Corporate Governance of SOEs: Moving Towards Improved Performance*, University of Stellenbosch Centre of Corporate Governance in Africa. US

i. an enterprise that is registered in terms of this Act as a company, and either is listed as a public entity in Schedule 2 or 3 of the PFMA, 1999 (Act No. 1 of 1999);

ii. is owned by a municipality, as contemplated in the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000);

iii. falls within the ambit of the PFMA, which means that it needs to comply with additional provisions over and above those of the Companies Act.[19]

The Government is a major shareholder in SOCs. In South Africa, SOCs are governed by corporate governance rules and their general management is based on the Companies Act, King Reports (King IV report released in 2016), and the PFMA, among others.[20] The Department of Public Enterprises produced a document entitled *Protocol on Corporate Governance* in 2002, with a view of inculcating the principles of good governance in SOEs. Despite this, the state of SOCs have been plagued by challenges ranging from financial and human resources (high senior staff turnover) to general corporate governance issues. According to McGregor (2012), scandals, court cases, corruption among boards or executives, and constant turnover of board members and directors in SOCs are indicators of failure on corporate governance matters.

The following are a few cases with signs of poor corporate governance blunders in the South African SOEs structures:[21]

19 State-Owned Companies, the New Companies Act, PFMA & King 111 in perspective, PWC. https://www.pwc.co.za/en/assets/pdf/companies-act-steering-point-4.pdf.

20 Protocol on Corporate Governance.

21 http://www.fin24.com/Economy/top-6-leadership-void-and-losses-plague-these-state-companies-20170324

No	SOEs	Governance Matters
1	Eskom	The former acting CEO was replaced by another acting CEO, who was also embroiled in a scandal within months of appointment. The former acting CEO was re-appointed under a cloud of controversy and resigned again. The acting CEO is now appointed. There has since been suspensions, re-appointments, rescinding of appointments and an appointment of a new acting CEO.
2	SAA	Seven CEOs have been fired in the last four years and SAA has been without a permanent CEO since 2015. A new CEO is expected to be appointed in 2017. The board chairperson has been hauled to the Companies Tribunal for alleged delinquent behaviour.
3	SASSA	Controversy almost compromising social grants of more than 17 million people. Appointed its second acting CEO in two weeks as another official takes sick leave.
4	PetroSA	CEO fired in 2010 and the acting CEO resigned in 2016. Chairperson of the board and another three members resigned, leaving the board with no quorum as a minimum of three members is needed to make decisions. To date, reports state that only two board members are left at PetroSA.
5	PRASA	Fired CEO in 2015 due to a number of irregular contracts worth billions of rands. Acting CEO gave himself a 350% salary increase. The board was fired with the acting CEO then later reinstated by the courts.
6	SABC	Entire board fired in 2016 for management blunders and legal disputes. The CEO is fired in 2017.

It has also been reported that nine of South Africa's SOEs have incurred R700 billion in

debt over the last financial year,[22] a challenge for the Minister of Finance and South Africa as a whole. The snapshot above of the various scandals and issues taking place in SOEs is evidence of corporate governance problems. In 2011, the University of Stellenbosch was tasked with developing a SOC matrix to evaluate the performance of SOCs. The matrix was adapted for private-sector institutions to cover Schedule 2 entities. The matrix incorporates Public Investment Corporation (PIC) governance principles, South African corporate governance standards as well as international best standards practice.[23] The matrix focuses on disclosure, compliance and performance[24] and consists of 94 indicators outlined as follows:

i. board and committee composition,

ii. accountability – compliance to various rules and disclosures, and

iii. remuneration – salaries, bonuses and other incentives and benefits.

It is interesting that South Africa finds itself with huge corporate governance challenges around the time when the King IV report was launched and lauded both nationally and internationally. As Nicky Jeffery of Grant Thornton puts it: "Regulations will always impact the business landscape, which should drive innovation and growth. Governance must be proactive, spotting and responding to challenges and opportunities rather than conforming."[25] In conclusion, corporate governance of SOEs cannot be underestimated judging by the state of South Africa's economy and the recent junk status bestowed upon the country by two rating agencies. This situation and problem will not be easy to solve as long as the appointment of SOEs is more of a cadre deployment than appointment on merit.

22 www.biznewspm.com/aerticle/soes-rack-upr700bn debt/retrieved on 2017/06/08.

23 University of Stellenbosch Centre of Corporate Governance in Africa. 2012. Rating Corporate Governance of SOEs: Moving Towards Improved Performance.

24 University of Stellenbosch Centre of Corporate Governance in Africa. 2012. Rating Corporate Governance of SOEs: Moving Towards Improved Performance.

25 Jeffrey, Nick. 2016. Grant Thornton Corporate Governance Report. Grant Thornton, UK.

The National Credit Act as a tool to protect and educate[26]

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Financial literacy is in essence the ability to understand how money works, how a consumer can earn money or make more. In particular, it refers to the set of skills and knowledge that allows a consumer to make informed and effective decisions with all of their financial resources. The Financial Services Board's 2014 report on financial literacy in South Africa, prepared by the Human Sciences Research Council (HSRC), revealed that South African consumers have an average financial literacy index, implying that there is room for improvement. The results also underscored the importance of disclosure of information to consumers and resources they need to make sound and informed financial decisions.[27] The predecessors of the National Credit Act "NCA"[28] did not command credit providers to make proper disclosures to consumers. It required that only basic disclosures be made to the consumers. In essence, it was only selective disclosures that were made and it regularly happened that not all the costs of credit were disclosed. In reality, it was only interest rates that were disclosed and there were also no penalties for non-compliance.

Prior to the NCA coming into effect, **the dti** conducted market research on the apparent weaknesses in the prior consumer-credit legislation.[29] The research indicated that consumers were not aware of their credit rights. Consumers also generally did not receive a copy of their credit agreement beforehand, and contracts were often quite lengthy, leaving consumers with no time to read through them before signing. The language used in contracts was also too difficult for ordinary consumers to understand, even if they did read it. Hence, consumers only realised the complete impact of the credit

26 This article is in extract from the following article: Pearson, Stoop and Kelly-Louw 'Balancing responsibilities – financial literacy' 2017 20 *Potchefstroom Electronic Law Journal* available at http://journals.assaf.org.za/per/article/view/1378/2118.

27 See FSB 2014 *2014 Annual Report* https://www.fsb.co.za/NewsLibrary/FSB%20Annual%20Report%202014.pdf.

28 See the repealed *Credit Agreements Act* 75 of 1980 and *Usury Act* 73 of 1968.

29 See **the dti** *A Market Research Report: Credit Law Review* (**the dti** 2002).

agreement when they received their first account. Consumers often felt cheated as it was not disclosed to them when they signed their credit agreements whether the interest was charged on a monthly or an annual basis.[30]

The NCA addressed many of the weaknesses mentioned above and vastly improved on the disclosures that need to be made to consumers. Credit providers must also now make full disclosures of all the costs of the credit. The Act expressly states that credit agreements must be in plain and understandable language.[31] In addition, consumers also have the right to receive any document and information in one of South African's 11 official languages (at least two official languages to choose from).[32] However, ensuring that credit information is disclosed in a standardised format and in plain understandable language will not be enough to ensure that consumers fully understand the impact of their credit agreements. This is where consumer education, at school and adult level, is crucial in producing a well-informed financial consumer.[33] Unfortunately, disclosure is ineffective if there are low levels of financial literacy. This makes it critical for the NCA to not only rely on disclosure as a tool to protect and educate consumers, but to also focus on promoting financial literacy among consumers. Several factors would likely limit a consumer's ability to overcome a lack of disclosure and transparency, irrespective of a credit provider's compliance with disclosure requirements. These include (a) consumers' disinclination to read detailed contractual terms; (b) consumers' pre-existing expectations suggesting a successful contractual relationship, which would obviate certain contractual terms coming into play; (c) consumers not reading contractual terms properly, as they have other complex decisions to make (such as whether to contract in the first place); (d) consumers not understanding the formal terms, irrespective of them being transparent; (e) consumers' idea that they do not need to understand the contractual terms, as suppliers are unlikely to change them; (f) consumers not understanding how a term will affect them in practice; and (g) competitors expressing equivalent terms differently, which makes it difficult for consumers to compare.[34]

30 Kelly-Louw 'The prevention and alleviation of consumer over-indebtedness' 2008 20 *South African Mercantile Law Journal* 200 at 212-213.

31 See s 64 of the NCA.

32 See s 63(1) of the NCA.

33 See Kelly-Louw 2008 20 *SA Merc LJ* 200 at 214.

34 For reasons why consumers accept standard terms without reading them, and related issues, see also Naudé 'Unfair Contract terms legislation: the implications of why we need it for its formulation and application 2006 *Stellenbosch Law Review* 361 at 366-369. See also Donnely and White 'The effect of information based consumer protection' in Twigg-Flesner et al *The Yearbook of Consumer Law 2007* (2008) 271 at 283-284 (the limits of transparency, and an essential presumption underlying fairness in the form of disclosure – consumers will act rationally on the basis of information received).

The other side of the coin, however, is that disclosure at least provides some basis for consumers to give informed consent and enables them to ascertain their rights and duties in the event of a dispute. Although standardisation of the way in which credit agreements and terms of credit agreements are presented (for example, in terms of section 93 read with regulations 30 and 31) may speak to some of the issues identified above, it will still not address all these issues – it may not make it more likely that a consumer with a low level of financial literacy will actually read and understand his credit agreement – hence the importance of measures aimed at improving the financial literacy of consumers. Although the NCA firmly focuses and depends on disclosure as its main tool to protect and educate consumers, it fortunately also conferred a limited duty on the NCR to educate consumers.

While the NCA makes provision for compulsory disclosures, failure by a credit provider to comply with the disclosure provisions does not invalidate the credit agreement. Credit providers who do not comply with all the disclosure provisions of the NCA simply run the risk of being fined up to either R1 million or 10% of their annual turnover during the preceding financial year, whichever is the greater. Credit providers who fail to comply with these provisions of the NCA also place themselves at risk of being deregistered by the National Credit Regulator (NCR).

In conclusion, it cannot be denied that prescribing the disclosure of information regarding credit and consumer-credit rights to consumers is a useful tool to educate consumers. However, proper disclosures are still just one tool, and what is truly needed are tools (and ways in which) to also improve the financial literacy of consumers. As mentioned above, proper disclosure will have no expectation of success if the low levels of financial literacy in South Africa are to continue. General financial education and empowering consumers is vital to provide them with knowledge so that they can take responsibility for their credit matters as well as encouraging them to read before signing any contracts related to credit.

Board diversity: Where are the women?

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The representation of women on South African boards is an important topic that deserves much attention. South Africa has regulatory and self-regulatory measures that embrace diversity in the corporate environment. The 2013 Broad-Based Black Economic Empowerment Codes of Good Practice and King IV make applicable reference to race and gender diversity at board level. Research has shown that the more diverse the company board, with the representation of women, the higher its performance.[35] The diverse board can solve complex problems, be more innovative and relate with different stakeholders and customer groups.[36]

The GMI ratings 2013 Women on Boards survey, which included data on 5,977 companies in 45 countries around the world, found that 11% of women hold board seats globally. The study also found that South Africa ranked fifth in the world at the time, with 17,9% female representation on the boards of the 59 companies included in the research.[37] In addition, 96,6% of South African boards had one female member, 40,7% had three and 5,1% had women chairpersons.[38] The 2013 study entitled *Where are the Women: Inclusive Boardrooms in Africa's Top Listed Companies,* which was commissioned by the African Development Bank and comprised 307 listed companies, found that Africa is ranked top among emerging regions when it comes to women board membership, standing at 14,4% compared with 9,8% for Asia Pacific, 5,6% for Latin America and 1% for the Middle East. Africa follows Europe and the United States. The study found that close to a third of African companies have boards with not a single woman, while two-thirds have one woman member.[39] The GMI survey study showed that South Africa has done well to encourage diversity in boards.

35 Catalyst, The Bottom Line: Corporate Performance and Women's Representation On Boards (2004–2008) (2011). And, Linda-Eling Lee, Ric Marshall, Damion Rallis, and Matt Moscardi, Women on Boards: Global Trends in Gender Diversity on Corporate Boards (MSCI, November 2015): p. 4.

36 http://www.iodsa.co.za/news/135560/South-Africa-is-a-Leader-in-Gender-Diversity-on-Corporate-Boards-says-New-Study.htm.

37 https://www.calstrs.com/sites/main/files/file-attachments/gmiratings_wob_042013-1.pdf.

38 Ibid.

39 https://www.weforum.org/agenda/2015/06/how-can-we-increase-the-number-of-women-in-africas-boardrooms/.

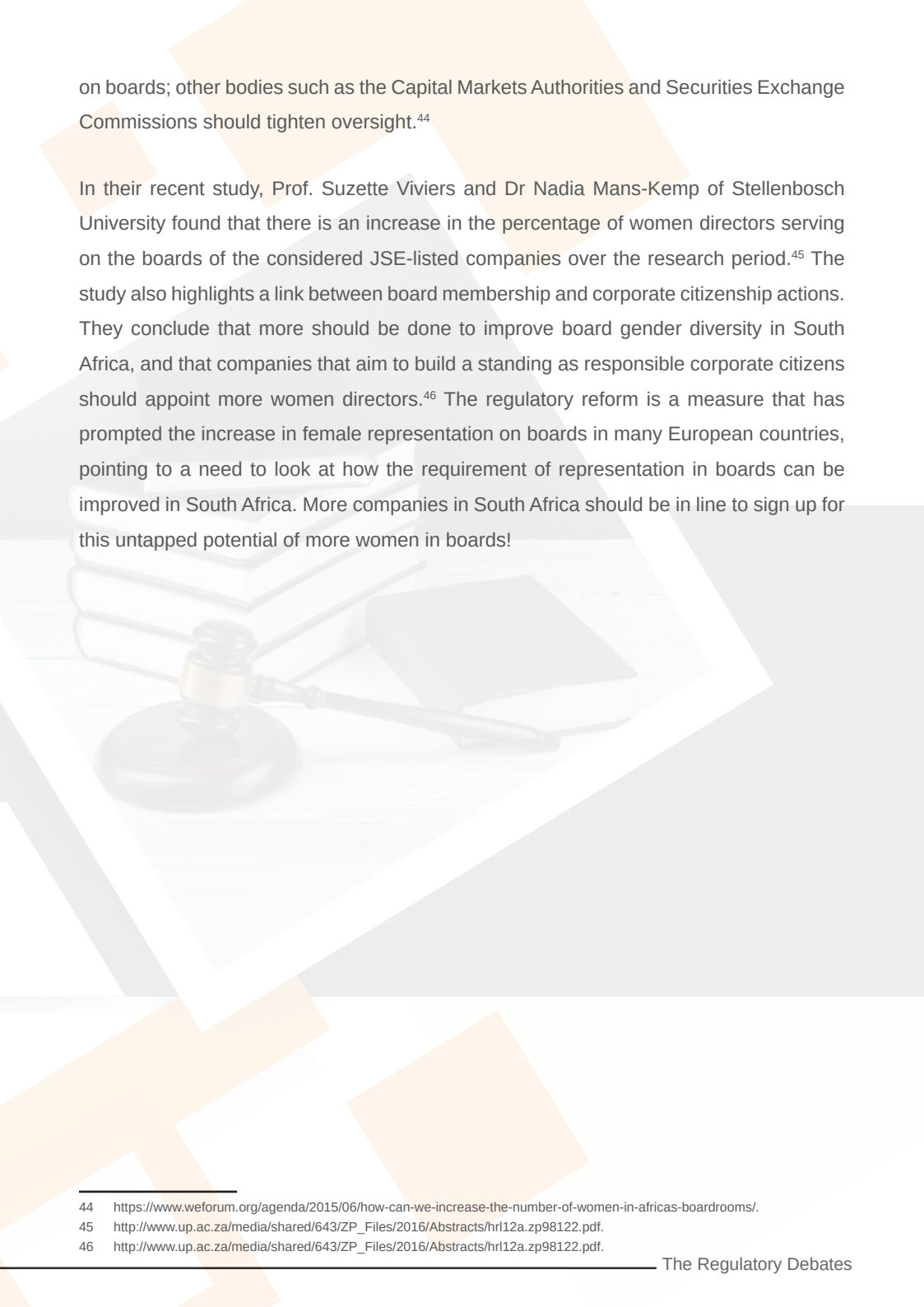
An article on diversity in the boardroom, published by Deloitte in 2015, finds that external regulatory pressures from international organisations such as the European Commission (EC) encourage gender diversity across the world.[40] The EC came up with a directive aimed at considerably increasing the presence of women in boards throughout the European Union by setting a mandatory minimum goal of 40% women among non-executive directors of companies, with a focus on public limited companies. The commission aimed to promote gender equality in economic decision-making and to maximise the talent pool of candidates for a more equal gender representation. According to the Deloitte article, other European countries such as Norway took this initiative further. Norway introduced a requirement for the 40% representation of both genders on boards in 2005, when the Norwegian Public Limited Liability Companies Act was amended. Other law reforms occurred in France, Italy and Spain. Norway, Sweden and Finland continue to lead the developed world in their percentage of female directors, with 36,1%, 27%, and 26,8% respectively.[41] Other studies show that countries with no regulatory measures to address gender diversity lag behind. Taiwan (4,5%), South Korea (4,1%) and Japan (3,5%) were the lowest.[42]

Despite the positive developments highlighted above, there are perceptions that boardrooms across corporate South Africa still reflect a traditional structure with similar groups of people and a lack of diversity. The reason often given is that there is a shortage of suitable women executives to take up board positions. But is this really the case? Are companies making a real effort to find candidates? Some argue that this is an excuse because viable, skilled women executives are available, but simply not approached. Research shows that the low levels of female board representation could be ascribed to gender stereotyping and visibility of executive women. Studies also find that the nomination committees still rely heavily on the male counterparts or male networks to identify board candidates. [43]How can more women be reached? The study by the African Development Bank proposes making available gender aggregated data on women directors in annual reports, including stronger language on gender diversity in corporate governance codes, and compelling companies to have women representatives

40 https://www2.deloitte.com/content/dam/Deloitte/za/Documents/governance-risk-compliance/ZA_Board_Diversity_2.PDF
41 http://www.iodsa.co.za/news/135560/South-Africa-is-a-Leader-in-Gender-Diversity-on-Corporate-Boards-says-New-Study.htm.
42 http://www.catalyst.org/knowledge/women-corporate-boards-globally.
43 http://www.fin24.com/Opinion/women-in-the-boardroom-the-right-and-the-bright-thing-to-do-20170307

on boards; other bodies such as the Capital Markets Authorities and Securities Exchange Commissions should tighten oversight.[44]

In their recent study, Prof. Suzette Viviers and Dr Nadia Mans-Kemp of Stellenbosch University found that there is an increase in the percentage of women directors serving on the boards of the considered JSE-listed companies over the research period.[45] The study also highlights a link between board membership and corporate citizenship actions. They conclude that more should be done to improve board gender diversity in South Africa, and that companies that aim to build a standing as responsible corporate citizens should appoint more women directors.[46] The regulatory reform is a measure that has prompted the increase in female representation on boards in many European countries, pointing to a need to look at how the requirement of representation in boards can be improved in South Africa. More companies in South Africa should be in line to sign up for this untapped potential of more women in boards!



44 https://www.weforum.org/agenda/2015/06/how-can-we-increase-the-number-of-women-in-africas-boardrooms/.
45 http://www.up.ac.za/media/shared/643/ZP_Files/2016/Abstracts/hrl12a.zp98122.pdf.
46 http://www.up.ac.za/media/shared/643/ZP_Files/2016/Abstracts/hrl12a.zp98122.pdf.

Social and Ethics Committee report: Should it be a key audit matter?

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The role of the social and ethics committee (SEC) has in the recent past gained prominence largely owing to the failure of many companies to address work, social, economic and environmental issues.[47] The crippling 2012 mining strike in the platinum industry, which lasted for close to five months, saw some mines in the Rustenburg area lose up to 40% of platinum production. It is posited that the strike and subsequent loss of 34 lives could have been avoided had a well-functioning SEC been in place. A broader thesis is that the future of the South African mining industry actually depends more on social capital (or trust and assurance that companies are kind-hearted towards communities in which they operate) than the actual ore reserves of the various mineral resources. More succinctly, Rossouw (2013) argues that for South African mining companies, this social capital should best be considered as a "social licence to operate" without which the company or industry would find it difficult or almost impossible to do business.[48] The implication is that companies should not only act as responsible corporate citizens, but also use their SEC reports, integrated annual reports and other channels to communicate more transparently with their stakeholders, particularly the workers, communities and investors.

In the lexicon of auditing, the SEC report is part of other information (OI). OI is defined as any financial and non-financial information in the annual report other than the financial statements and auditor's report. It is important to note that the inclusion of non-financial information is common practice in audit reports. However, current practice dictates that the auditor reads (but not audit) OI in respect of the audited financial statements with no reporting obligations unless there are flaws or material misrepresentation of OI. Effectively, this equates to reporting by exception, which

47 The SEC is a statutory board committee established in terms of section 72 of the Companies Act (read with Companies Regulation 43).

48 Rossouw (2013) The Changing Ethics of Business, Ethics Institute of South Africa.

as argued needs revision by way of elevating the SEC report to the status of a Key Audit Matter (KMA).[49] The rationale is that the diverse scope of SEC functions as defined in the Companies Act of 2008 or, put differently, the statutory requirement for the SEC to report and monitor the four key responsibilities related to the workplace; natural, economic and social environments present a possibility for misstating the SEC-related OI. The consequence is a material inconsistency between the OI and financial statements, which in turn has the potential to generate negative economic externalities.

In an effort to address the aforementioned inconsistencies, the enhancement of audit reports with a focus on how OI is presented was introduced in Singapore in December 2016 through the Enhanced Auditors Report (EAR) guidelines. The new auditor's report is now required to: include a separate section to identify OI; describe the auditor's responsibilities in relation to OI; report on any uncorrected material misstatement of OI, or when there is none, to categorically state, for example, that "there is nothing to report" or "there is no exception to report". While the OI is still not audited, there are some significant changes worth noting. The auditor is now required to "read and consider" OI. The new Singapore Standard on Auditing, SSA 720, requires the auditor to learn and understand as well as to think or contemplate when establishing material inconsistency on OI (Liang, 2017[50]). Other issues require that the auditor responds and reports on the same. In relation to the former, the auditor must confirm its existence. Secondly, once confirmed, to "discuss the matter with management to rectify the material inconsistency". Thirdly, "when no correction is made by management, to escalate the discussion on the matter with those charged with governance (TCWG) before reporting"[51]. With regards to the former, the auditor must categorically report a situation even when there is no exception.

Given the significance of a situation where a deficit in social capital occurs, including its potential to disrupt industrial and mining activities in South Africa, it is important to relook how companies report on their corporate citizenship outcomes,

49 The International Standard on Auditing (ISA) 701 defines key audit matters (KAM) as those matters that, in the auditor's professional judgment, were of most significance in the audit of the financial statements of the current period. KAM are selected from matters communicated with those charged with governance.

50 Liang, F.S. (2017) Through the SSA 720 Lens, Other Information in an audit report (Part 1 and 2). Available at http://isca.org.sg/.

51 Ibid.

at least as outlined in their SEC reports. Without a doubt an audited SEC report will provide a deeper understanding of the risk factors that affect a company's prospects to survive, particularly mining and manufacturing companies or, more generally, those with a substantial public interest score as currently defined in the Companies Act Regulations. Notwithstanding the practical challenges in effecting this requirement, an audited SEC report will ensure that companies report more information in an honest and transparent manner to help both their internal and external stakeholders as well as any potential investors to make informed decisions on financial and non-financial matters. Including the SEC report as a KAM will help draw the attention of TCWG to ensure that companies contribute and perform well on the sustainable development goals – a unique aspect of the South African legislative framework that governs companies.

The above said, other practical hurdles may need consideration and include the current capacity of auditors to conduct this function (that is, the availability of appropriate staff in terms of knowledge and experience on SEC-related OI – which if not available still presents an opportunity for creating increased demand for audit professionals). Overall, an audited SEC report will not increase the cost of doing business, but rather enhance transparency and concomitantly ensure that potential investors understand the business from both a financial and non-financial perspective. Further guidelines will, however, be required to roll out the proposed initiative in line with both the Companies Act and the Audit Professions Act.

Be on the lookout for unregistered credit providers

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Government has tried to promote a fair and transparent credit market, but many consumers who are struggling financially find themselves in a desperate position and are prepared to do anything to get their hands on cash. Consumers need to be aware of the dangers of unlawful, unregistered loan providers, also known as “mashonisas”.

Mashonisas are an integral part of the community to whom they loan money and often use exploitative practices for loan repayments. Formal credit providers require collateral and security, credit history and a host of other information before providing credit, which pensioners and low-income households would not ordinarily qualify. Mashonisas make access to credit far easier for low-income households, but this is often accompanied by exploitative practices that place vulnerable households in a debt spiral resulting in great financial distress. Such practices include holding the client’s bank cards, personal identification numbers and identity documents, and even resorting to violence and blackmail. Moreover, according to a study conducted by Polly Mashigo from the Tshwane University of Technology, mashonisas charge between 30% and 50% interest rates on monies loaned. These interest charges are exorbitant in comparison to those of formal credit providers. In terms of regulation 42 of the National Credit Act (NCA), the interest for unsecured credit agreements must not exceed (RR + 21% per year = 28%). Consumers must therefore also be cautious of the interest rates being demanded.

The NCA now offers pensioners and low-income households protection from these micro-lenders. All credit providers, including mashonisas, are required to register with the National Credit Regulator (NCR) under the NCA. Failure to register will render the agreement unlawful in terms of section 40(4) of the Act. If a credit provider does not display a sign and certificate from the NCR, then it is a good indication that this is an illegal provider and the NCR should be notified.

The NCA regulates the provision of consumer credit and provides safeguards to

consumers if the agreement falls within its scope. Certain requirements need to be met for the agreement to fall within the ambit of the NCA. There must be a credit agreement between a credit provider and a consumer. Until recently, reckless lending has been normal business practice for many credit providers. A reckless credit agreement results in a consumer becoming over-indebted and unable to repay his or her debts or fund his or her basic living expenses. Consumers who are struggling to pay their existing credit agreements were granted new credit without regard to the real consequences, particularly if legal action had to follow. Unfortunately, in that event, the options for legal recourse are severely limited. Firstly, your agreement is rendered unlawful and, secondly, the amount loaned would have been forfeited to the State for failure to register as a credit provider. The unregistered creditor would not be able to claim restitution under the unlawful agreement, but rather by way of an unjustified enrichment action.

A credit agreement entered into by an unregistered credit provider that was unaware of the requirement to register appears to be a good example of an unlawful agreement where there is little or no turpitude on the part of the credit provider. Although, courts retain the discretion to allow or deny restitution of an unjustified enrichment in such an instance, this is good authority on which to rely and be successful in any legal action of such a nature.

It is, however, difficult to enforce this aspect of the NCA because mashonisas are all over the country, not easily detected and either stationed at pension payout points or mobile, waiting to prey on helpless victims. The law requires mashonisas to register as credit providers in an attempt to prevent reckless credit, however, obligations exist not only for the credit provider, but also for the prospective consumer.

Regulation of consumer protection in the digital world

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South Africa is one of the largest business to consumer (B2C) e-commerce markets in Africa and is one of the regional leaders in internet and mobile phone penetration[52]. The 2016 report on online retail in South Africa published by World Wide Worx shows that online shopping has grown at a rate of more than 20% since the turn of the century and will double over the next five years (2016 to 2020).[53] In essence, this shows that every aspect of life is captured and stored in some digital form, and online transactions are emerging as a key driver and enabler of socio-economic benefits in South Africa. Based on the above statistics, there is a clear indication that online transactions will become a dominant market in future South Africa and will challenge policy makers to tailor regulations to the new realities of e-business. It will be necessary to promote consumer confidence by affording consumers the same institutional and legal rights and protection in an electronic environment as they are at present accorded in a traditional face-to-face retail environment.

According to Radhakrishna (2015), electronic transactions separate traditional commerce from the electronic environment and also challenge the existing legal and regulatory infrastructures. Although there are advantages with online transactions, there are also institutional and legal challenges and uncertainties around issues of security of online payment, absence of privacy policy and the inability to inspect goods prior to purchase that policymakers cannot ignore. Although service providers remain confident that the benefits of the online world outweigh the potential risks, the critical point to consider is that the pace of growth and innovation raises major challenges to regulators. The existing laws may not fully protect consumers and other vulnerable groups as they participate online. This is highlighted by the 2014 survey of consumers' international memberships,

52 Business Wire Website. Accessed on http://www.businesswire.com/news/home/20160527005713/en/South-Africa-B2C-E-Commerce-Market-2016-- .

53 World Wide Worx (2016) Online Retail in South Africa 2016 Executive Summary Report. Accessed from http://www.worldwideworx.com/retail2016/.

whereby 80% of respondents felt that legislation, regulations and standards relating to redress are ineffective at keeping pace with the digital economy.[54] Evidence suggests that having universal rules to govern online interactions is not always realistic because of the diversity of standards and norms, be they legal, cultural or social. However, sound, swift and flexible regulations are needed to ensure that consumers are protected online. Emphasis is placed on proactive policy and regulatory measures as well as co-regulatory and self-regulatory initiatives that educate and empower consumers as essential tools to protect the rights of all users in an open, transparent and inclusive digital world.[55]

Globally, countries such as China, where online shopping has grown dramatically since 2010, have incorporated new regulations of online shopping to protect consumers' rights and interests. This law regulates the transaction rules stipulated by third-party e-retailing platforms and the liability of providers of these platforms.[56] The European Commission has also announced a legislative initiative for the online purchase of digital content as one of the key initiatives of the Digital Single Market strategy during the updating of EU consumer laws.[57] However, the Commission is still skeptical about the announcement of new rules for the online purchase of tangible goods, mainly the fragmentation it would create between the online and offline worlds. It therefore recommended that the legal guarantee rules for tangible products are not split between online and offline regimes, but are firstly looked at within the Regulatory Fitness and Performance Programme (REFIT) evaluation, which assesses the challenges in protecting consumer rights from an early pre-contractual stage to the last stage of enforcement.[58]

In South Africa, online transactions are regulated by both the Electronic Communications and Transactions Act (ECT) and the Consumer Protection Act (CPA) in conjunction with other laws. The ECT Act has its own consumer protection provisions, but it will still be necessary to call for harmonisation between the two laws, particularly around the consumer's right of return of goods from online transactions. It is also important to strike

54 Building digital world consumers can trust: Proposed recommendations from the consumer movement to G20 member states Building a digital world consumers can trust. March 2017

55 Consumer international Blog. The challenge of regulating new digital services. Accessed from https://consumersinternational.blogspot.co.za/2015/07/the-challenge-of-regulating-new-digital.html

56 Dixit S and Sinha AK (2016) E-Retailing Challenges and opportunities in the global Marketplace. Published by IGI Global in the United States of America.

57 The European Commission (2015) A Consumer-Driven Digital Single Market BEUC Strategy Accessed from the http://www.beuc.eu/publications/beuc-x-2015-088_a_consumer-driven_digital_single_market.pdf

58 Ibid

a balance in such a way that policy and regulations do not create unnecessary barriers to new companies entering the market and thus resulting in missed opportunities for consumers in terms of price reduction and service diversification.

There are currently useful guidelines and principles available to assist regulators and legislators in developing policy frameworks around the protection of consumers in the online world such as the OECD e-commerce guidelines published in March 2016.[59] The 2015 Best Practice Guidelines by the International Telecommunications Union (ITU) on global regulatory developments in relation to Information and Communication Technology (ICT) also recommends that regulators should specifically recognise the importance of the following when introducing policy frameworks around protection of consumers in online transactions:[60]

- adopting cross-sectoral regulatory frameworks that address the specificities of mobile services and apps, and provide consumer protection, freedom of choice and the proper exercise of consumer rights;
- multi-stakeholder collaboration to ensure that the rights and interests of both consumers and suppliers are protected;
- educating and empowering consumers by providing platforms for user-friendly and up-to-date comparisons of service offers and tariffs;
- informing consumers about legal provisions and complaint/redress procedures and promoting a culture of cybersecurity; and
- ensuring consumers are not bound to a specific mobile service provider or app, and should retain their ability to choose and switch between providers.

59 Consumer Protection in E-commerce OECD Recommendation (2016) Accessed at https://www.oecd.org/sti/consumer/ECommerce-Recommendation-2016.pdf

60 Consumers international Blog (2015). The challenge of regulating new digital services. Accessed from https://consumersinternational.blogspot.co.za/2015/07/the-challenge-of-regulating-new-digital.html

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