

THE REGULATORY DEBATES  
THE REGULATORY DEBATES

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# ***ADD NEW RELEVANT PICTURE***

*For sound and responsive consumer and corporate laws*

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## Editorial

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## Disclaimer

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## THE DIRECTORS EAT SOUR GRAPES AND THE COMPANY'S TEETH ARE SET ON EDGE.



By Ms Pregorina Mabaso-Muvhango, Director, Legislative Drafting, **the dti**

There is a bible proverb which says “the parents have eaten sour grapes and the children’s teeth are set on edge.” The gist of this proverb simply means children suffer the consequence of their parent’s activities. It was used by those in exile to exonerate themselves of the responsibility for the situation they were in. It basically meant that they were not in exile through any fault of their own but rather they were where there because of the sins of others. We have seen lately companies with good potentials being wound up or liquidated because of decisions or lack of decisions on the part of those responsible for them.

Recently there has been a collapse in what could have been the only wholly owned black bank. What made it even more exceptional is that it was situated in the rural areas of Limpopo and thus servicing the traditionally unbanked sectors of the South African community. The report compiled by Advocate Terry Motau<sup>1</sup> stated that the Bank was corrupt, rotten to the core, and therefore incapable of being saved. The truth of the matter is that banks are legal persona they are independent of their owners, and they have rights, privileges, and obligations. The question then is why when those who are authorised to act on behalf of companies such as banks, when they make decisions that are to the detriment of these companies; it is the companies that receive the blow more than the individuals themselves. The report recorded that individuals and companies have been found to have benefitted from the looting of billions from the VBS Bank. I suppose that is why the best way to describe these activities was to call it a heist almost making it seem like criminals walked into the bank with guns and helped themselves to the Bank’s vault to their satisfaction. The VBS Bank is said to have extended overdrafts to favour clients’ accounts that had no deposits and issued payments to individuals in exchange for deposits from state owned entities and municipalities. This is not the normal practice of a mutual bank. The Mutual Banks derive their profits from investing money and by offering interest on deposits and dividends on shares.

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<sup>1</sup> VBS Mutual Bank: The Great Bank Heist by Advocate Terry Motau SC

Another Bank not so long ago African Bank Investments Limited (African Bank) also a unique bank established to cater for the poor by extending credit was in the same situation. Myburgh<sup>2</sup> reported that the demise of the African Bank was not because the bank was not making sufficient provision for bad debts and engaging in unsustainable lending but it was because the CEO and the Board of Directors failed to exercise the necessary care and skill in overseeing the dealings of the company. There was corporate governance failure by the Board. The CEO made unilateral decisions to buy the furniture shop Ellerines for billions (R9.1 billions) of rand without conducting due diligence or seeking full board approval.

The Companies Act<sup>3</sup> has dedicated the whole chapter Part F from section 57 to section 78 on corporate governance. Companies with good potential fail because of corporate governance failure. Shareholders and the Board of Directors are empowered by law to ensure accountability. The shareholders must be confident that the Boards are looking out for their interest. They must place credible social ethics committees which will be accountable and report to shareholders.

Another question to ponder upon is, when such demise befalls companies, the first thing to do is to liquidate the company. However, in liquidating the company, are we not compromising the ability of the company to sue the directors for breach of their fiduciary duties towards the company? Section 76 of the Companies Act provides that Directors can be held liable on the basis of common law for breach of fiduciary duties and can also be sued under delict for loss, damages and costs sustained by the company. The company continues to enjoy the *locus standii* to institute legal proceedings for breach of directors' fiduciary duties.

The bible proverb seems to be proven true, the Board of directors eat sour grapes and the companies teeth are set on edge.

## **INSERT THE RELEVANT PICTURE**

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<sup>2</sup> Myburgh Report on African Bank by Advocate JF Myburgh

<sup>3</sup> Act 71 of 2008

## KNOW MORE ABOUT COMBATTING OF ILLEGAL GAMBLING IN SOUTH AFRICA



*By Ms Bawinile Ngcobo, Senior Inspector: Enforcement, National Gambling Board*

The National Gambling Act, 2004 (Act 7 of 2004) (“the NGA”), places the protection of the public from the harmful socio-economic effects of gambling as central to the regulation of gambling in South Africa. The National Gambling Board (“the NGB”) is mandated in terms of section 33 of the NGA to assist the Provincial Licensing Authorities (PLAs) in ensuring that unlicensed gambling activities are detected in the manner envisaged in section 66(2) and (3) of the NGA. The mandate of the NGB is further enforced by section 65, which provides for the objectives and functions of the NGB, and section 77, which provides for the powers and duties of NGB inspectors. The NGA applies nationally and in harmony with relevant provincial legislation to all matters relating to gambling.

One of the NGB’s roles is to enforce compliance through curbing and monitoring of prohibited and unlawful gambling activities. This is done through investigation of any detected and/or reported violation of gaming law, public complaints, gambling disputes, gathering intelligence on gambling related information, liaison with other law enforcement agencies and monitoring of gambling equipment movement to ensure that illegal gambling is eradicated. Any games offered for money and not offered by a licensed gambling operator and/or not at a licensed gambling venue constitutes illegal gambling. Advertising of unlawful gambling activity is also

prohibited by the NGA. These activities are punishable in terms of S83 of the NGA by a sentence of up to ten years in prison, or a fine of up to R10 million rand, or both. Unlicensed gambling activities come in various forms in the South African context. Interactive gambling is one of the most recent forms of gambling which is prohibited in terms of the NGA including any offering of casino type games on the internet. Online gambling is illegal together with all winnings associated with it. Upon entering the South African banking system, such winnings are confiscated by the banks and reported to the NGB for investigation. If after investigation, it is found that the winnings were indeed lawfully obtained, then the winnings would be paid to the punter. However, if it is found that the winnings are proceeds of illegal gambling, the NGB will apply to the High Court for an order declaring said winnings forfeited to the State.

Registered and sometimes unregistered businesses are offering computer-based gambling/gaming activities fronting as internet lounge/shops. None of these establishments are licensed to offer these activities by any Provincial Licensing Authority (PLA), and would thus be unlawful. Punters should further be wary that these venues are often also not licensed by the Film and Publications Board (FPB) but claim to be and display a fake FPB licence. Unlicensed gambling machines that

resemble licensed casino type slots machines have also been found at shebeens. If such machines were licensed, a licence certificate would be displayed on the wall. Also, other types of unlawful gambling activities that can be found in supermarkets include chinese roulette and cherry masters, which are usually played by inserting a coin, and tend to target school children. These are easily identified as they will not be registered with relevant route operators who are licensed to operate Limited Payout Machines (LPMs). A list of licensed route operators can be assessed by calling the NGB to confirm registration of a licensed site. Unlicensed gambling tables are also found to be operated unlawfully at various entertainment venues, advertised as Poker/ Blackjack Night events where a group of associates gather and place their bets and a winner takes the prize.

All of the above gambling activities warrant joint enforcement investigations, as they will require various activities to be undertaken by various enforcement officials prior to the closing down of the gambling operation. Efforts to curb this type of illegal gambling activities by staff members employed at NGB and PLAs, include:

- Establishment of a multi-enforcement agency task team to develop strategies with the focus on eradicating illegal gambling through information sharing, investigation of alleged contraventions, ensuring successful convictions and confiscation of unlawful winnings
- Education and awareness campaigns aimed at educating the public about social and economic harms resulting from participating in illegal gambling
- Legislative amendments to ensure successful prosecution in respect of unlawful gambling

Other forms of illegal gambling includes playing fahfee, street dice and/or cards, all of which are prohibited in terms of the NGA.

Raids are conducted by the South African Police Service (SAPS) resulting in operators of unlawful gambling activities facing prosecution, and their equipment being confiscated and destroyed in line with applicable provincial gambling legislation. Illegal gambling affects all communities in the following manner:

- Legalised gambling establishment contribute to the economy of the province in which they operate by creating jobs, embark on Corporate Social Investment (CSI) projects and their revenues are taxed as prescribed by the law. However, the unlicensed operations get to benefit from the stake without contributing back to the country's economy, thus causing unfair competition to the legalised industry and monies lost to the fiscus.
- Illegal gambling may contribute to over-stimulation of gambling and expose vulnerable persons to gambling. No programmes are availed by unlicensed operators to assist addicted gamblers as is the case at licensed establishments where problem gamblers can get assistance.
- There are no procedures for attending to gambling related disputes arising from participating in unlicensed gambling operations, resulting in no recourse and mediation in a case of an unresolved disputes.

***Communities are therefore encouraged to report any illegal gambling activities taking place to the NGB at [info@ngb.org.za](mailto:info@ngb.org.za) and or calling 010 003 3475***

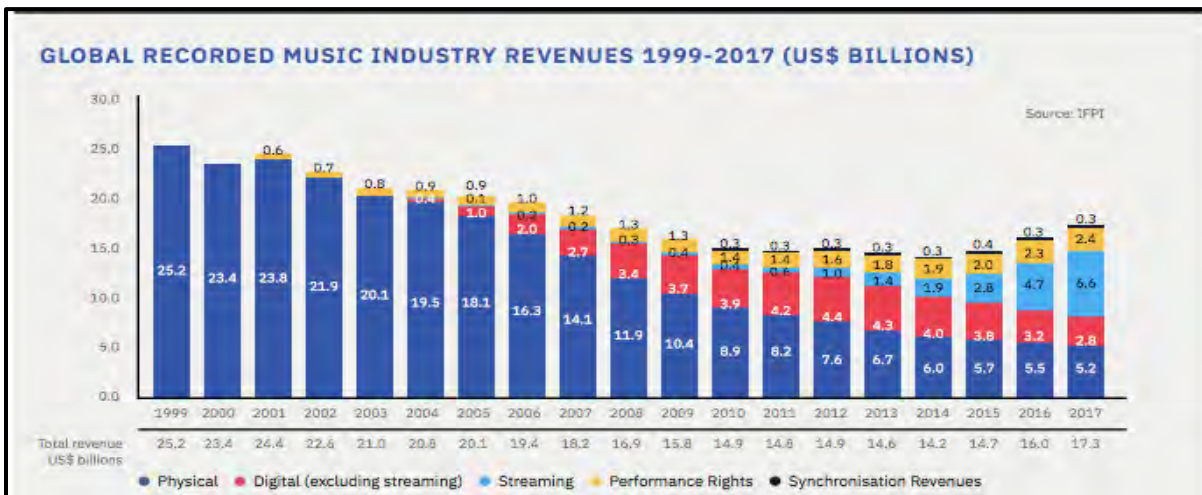
## MUSIC AND THE INTERNET: A CHALLENGE TO RIGHTSHOLDERS AND THEIR COLLECTING MANAGEMENT ORGANISATIONS



*By Mr Wiseman Ngubo, Business Affairs Manager, the Composers, Authors and Publishers Association (CAPASSO)*

The music industry has contended with the idea of digital copyright infringement since the Napster case<sup>4</sup>. Digitisation saw the recorded music industry lose 43% of its revenues within a 14-year period, mostly as a result of digital piracy/ infringement<sup>5</sup> (see figure A below). Such developments continue to challenge rights holders and their collecting management organisations (CMOs) such as the Composers, Authors and Publishers Association (CAPASSO) and requires revisiting the remedies available to them.

Figure A



### IFPI Global Music Report 2018: Annual State of the Industry

In terms of the current legislation, rights holders are afforded three remedies namely; interdict, delivery-up and damages<sup>6</sup>. Digital exploitation of music has spotlighted the shortcomings of each of these remedies thus necessitating additional remedies to be prospected. Section 24 of the Copy right Act grants the rightsholder one

<sup>4</sup> A & M Records Inc v Napster Inc 239 F.3d 1004 (2001)

<sup>5</sup> IFPI Global Music Report 2018: Annual State of The Industry, pg 11.

<sup>6</sup> R Kelbrick, “The Historical Development of Civil Copyright Remedies Commonwealth Jurisdictions” 1997; *CILSA*, 152

of two options in as far as damages are concerned; to either prove actual damages or rely on a reasonable royalty<sup>7</sup>. The actual damages contemplated in section 24 generally take the form of compensation for the loss of profit arising from the infringing action. Digitisation has made that computation a very difficult task for musicians as a whole. As exemplified in Figure A above, between 1999 and 2014, recorded music lost 43% of its value due to digitisation. That macro assessment is easy to illustrate with hindsight, but an individual songwriter would be hard-pressed to showcase that on a single song basis due to audience preferences and consumption patterns.

The difficulty of proving actual damages has been succinctly articulated as follows:

“It is almost unchallenged that provable actual damages frequently fail properly to compensate for the violation of a copyright, because of the intangible nature of the interest so protected and the difficulty involved in presenting to the court an accounting which reflects the real injury inflicted on the aggrieved owner”<sup>8</sup>

In as far as the reasonable royalty claim is a substitute for the erstwhile profit accounts claim, it is plagued by the same problems the account for profit would be in the digital era. Infringement is pitched at no direct financial benefit to the infringer but increases their clout in order to obtain indirect benefit. Spotify (the biggest subscription service in the world) currently operates at a loss and thus would not be paying<sup>9</sup>, the individual who uploads onto YouTube, would not earn unless they meet certain thresholds thus it would be difficult to prove<sup>10</sup>. What is a reasonable royalty payable when there is no profit? Reasonable royalty also relates to an amount that a potential licensee would have paid, meaning that obfuscatory licensees can persist with the risk of only ever having to pay the royalties they should have in the first place, despite infringing copyright and requiring rights holders to go through the trouble of instituting proceedings.

Mass users of musical works escape damage claims by circumventing procedure of obtaining authority prior to usage, and thereafter demanding that CMOs “prove their copyright” as an obfuscatory method to delay making necessary payment. Such proof relies on access to data that the infringers themselves have or control. CMOs must thereafter request the full catalogue of works on the platform in order to make claims on behalf of their members. This is also given reluctantly. If statutory damages existed, licensees, especially mass users would be better incentivised to license upfront as they would be able to almost calculate the potential cost of not doing

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<sup>7</sup> H Dean Handbook of South African Copyright Law (1987) Juta & Co: Cape Town 1-127.

<sup>8</sup> Carroll J. Donohue, Statutory Damages for Copyright Infringement, 24 Wash. U. L. Q. 401 (1939).

<sup>9</sup> <https://investors.spotify.com/financials/default.aspx> (accessed on 01 February 2019).

<sup>10</sup> <https://support.google.com/youtube/answer/72851> (accessed on 01 February 2019).



so. The CMOs would also be able to pursue matters fully knowing that upon successfully proving the infringement; the quantum of the damages would justify the costs of pursuing the matter. Reasonable royalties and actual loss claims are unable to satisfy this claim and interdicts by nature have no monetary incentive.

Statutory damages are imperative in the digital era in that they do not require that loss be demonstrated by the rights holder. They thus serve a dual purpose to firstly, incentive the mass users of copyright content to obtain the necessary licenses whilst also incentivising the rights holder to sue in the event that the licenses are not obtained.

Processing claims for musical works requires investment into systems that can read what is over 45 million lines of data per quarter. Currently, the rights holder is burdened with funding the assessment despite it just not being a financially viable to sue. The averment is thus that defined statutory damages be introduced instead of the reasonable royalty contemplated in section 24. This is particularly important if the view is to introduce general exceptions such as fair use. Statutory damages are crucial function of how these general exceptions work due to the fact that they allow successful plaintiffs to recover substantial monetary damages without any proof that (1) the plaintiff suffered any actual harm from the infringement or (2) the defendant profited from the infringement. This is a crucial weapon for CMOs and rightsholders in the digital era given the sheer amount of music consumed. Without statutory damages, CMOs are left without much of an effective recourse.

**Insert relevant picture**

## COOPERATIVE GOVERNANCE IN ENFORCEMENT OF CONSUMER PROTECTION: A MISSING LINK



By Ms Lekgala Morwamohube, Deputy Director Market Research & Trend Analysis: **the dti**

There is no uniform guiding principle for the adoption and application of effective enforcement strategies and institutional design for consumer protection applicable to all countries across the world.<sup>11</sup> This is due to the difference in socio-economic and political realities existing among nations in the world including budget allocations, composition, structural and functional differences of regulatory authorities. However, there are some common principles that are advocated by various experts in law and economics. One of the principles mentioned is "coordination and cooperation among organs of the State having similar objectives".<sup>12</sup> This principle of coordination and cooperation is a missing link that is currently hindering the effectiveness of consumer protection enforcement in South Africa. In South Africa, the principle of co-operative governance as envisaged in section 41 of the Constitution requires that national and provincial governments co-operate in mutual trust and good faith with one another.<sup>13</sup> Subsequent to that, the Green Paper on the Consumer Policy Framework also highlights that a national consumer law must take cognizance of the concurrent jurisdiction between national and provincial legislation, by providing norms and standards and mechanisms for giving effect to co-operative government.<sup>14</sup>

Enforcement of the Consumer Protection Act within the current framework of cooperative governance as envisaged by the Constitution is characterised by a lot of challenges. Areas of concern amongst others include overlaps in terms of investigations and enforcement, more succinctly in the area of jurisdiction. Issues such as lack of delegated authority or jurisdiction causes enforcement challenges and require an alternative approach. This is also evident in literature. For example, David Miller in his analysis of competition and consumer protection laws mentions that when consumer protection legislations are enforced by various organs having similar

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<sup>11</sup> World Bank, Building Institutions for Markets, World Development Report (2002)

<sup>12</sup> *ibid*

<sup>13</sup> Constitution of the Republic of South Africa

<sup>14</sup> Draft Green Paper on the Consumer Policy Framework, Government Gazette, Vol. 4719, No. 26774 published in September 2004 .

objective, concurrent jurisdiction may result in two or more agencies wanting to address the same issue or none of the agencies addressing the issue because each mistakenly believes that the other is pursuing the matter. There is, therefore, a risk of either a duplication of effort or issues falling through the cracks.<sup>15</sup> The Australian Productivity Commission research report on consumer law enforcement and administration published in 2017 also supports this view by highlighting that a single consumer policy framework characterised by a multiple-regulator model in different levels of government confronts some obvious challenges such as risks of gaps or overlaps in investigations and enforcement including inconsistent approaches to interpreting, administering and applying the law.<sup>16</sup> Whilst one may concur with the views of Gustavo Adolf who asserts that even if it is clear that there exists the problem of jurisdictional overlap on the issue of the competency of regulated sectors, the greatest problem is that of inter-institutional collaboration among officials in public administration who ideally should support one another in the benefit of a common end.<sup>17</sup>

Cooperative governance in consumer protection has been found effective in other jurisdictions that have constitutional mandates of cooperative governance that are similar to South Africa. In a country such as Canada, provincial and territorial offices are responsible for enforcement of the consumer laws in their jurisdictions. The effectiveness of provincial legislations' is made possible through well-established joint enforcement mechanisms such as the Consumer Measures Committee (CMC) that gives effect to co-operative government. The committee is made up of representatives from the federal government as well as every province and territory.<sup>18</sup> The United Kingdom (UK) also formulated the Consumer Protection Partnership (CPP) as part of the government's institutional reform of the consumer landscape. This partnership comprised of sector specific authorities, national departments, consumer groups and business groups amongst others to strengthen consumer protection at local, national and regional level.<sup>19</sup> In conclusion, improved cooperation and collaboration between governments both nationally and provincially is a key priority to facilitate change, achieve consistency and ensure that consumers are protected in the marketplace. Collaborative partnerships such as the CMC in Canada and the CPP in the UK are good practices that can be considered as forums for intergovernmental discussions on issues of consumer protection enforcement and more generally better enforcement of the CPA.

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<sup>15</sup> David Miller, Competition and Consumer Protection: The Relationship in Practice in Jamaica, 5th IDRC PRE-INC Forum on Competition and Development, Available at <[http://www.competition\\_and\\_consumer\\_protection\\_the\\_relationship\\_in\\_practice\\_in\\_Jamaica\\_Mr\\_David\\_Miller.sflb.ashx.pdf](http://www.competition_and_consumer_protection_the_relationship_in_practice_in_Jamaica_Mr_David_Miller.sflb.ashx.pdf)>

<sup>16</sup> Australian Productivity Commission (2017). Research report on Consumer Law Enforcement and Administration.

<sup>17</sup> Gustavo Adolf, Institutional Challenges to Competition Policy in Panama 2014 Available at [www.PANAMA\\_institutional\\_challenges.pdf](http://www.PANAMA_institutional_challenges.pdf).

<sup>18</sup> Canada Law Reviews. <https://thelawreviews.co.uk/edition/the-consumer-finance-law-review-edition-2/1166331/canada>

<sup>19</sup> Consumer Protection Partnership Priorities Report 2015.

## RELIEF FOR HOME LOAN DEFAULTERS AT LAST: THANKS TO SA'S HIGH COURTS AND CONSTITUTION.



By Ms Mafedi Mphahlele, Director Knowledge Management: **the dti**

A home loan is one of the most important and biggest debt that almost every economically active adult would acquire in their lifetime. Access to a home loan is also very important to most South Africans as it was previously not easy especially to the previously disadvantaged South Africans. Home loans in South Africa range from as little as R50 000, 00 to millions of rands depending on one's affordability.

The National Credit Act (NCA) (34) of 2005 made it easier for most South Africans to obtain home loans. However, circumstances change, and people end up falling into arrears, or even, unable to afford to pay off their home loans. The NCA provides a relief mechanism through the provision of the procedures that should be followed to reach an agreement with the bank, in case one is unable to honor the home loan obligations. The banks also rely on set procedures as guided by the NCA.

However, despite the great achievements made by the NCA since its introduction in 2005, there seems to be some casualties. Consequently, accusations that the big banks exploit gaps in the NCA and the defaulting homeowners are common. A recent example in the headlines read "*SA banks sued for R60BN in home repossessions case*"<sup>20</sup>.

In practice, banks are auctioning houses of the defaulting consumers at lower prices below their market value. For example, in December 2018, the Cape Town high court heard a case of a consumer who bought a family home with a bank loan of R39, 000 in 1989. The family was evicted from their home and the property was sold on auction for R10.<sup>21</sup> This kind of practice leaves homeowners homeless with debts still owed to the banks. However, defaulting consumers have now found a recourse in the courts wherein a ruling was made that when

<sup>20</sup> <https://www.fin24.com/Companies/Financial-Services/r60bn-home-repossession-suit-against-banks-20170816>

<sup>21</sup> <https://www.iol.co.za/news/nedbank-sold-our-fully-paid-house-for-r10-9419919>

auctioning primary residences, the courts should set the default reserve price but in exceptional circumstances. The level of the reserve price will then be based on the information provided to the courts such as market valuations. The constitution mandates the courts to impose a reserve price. "A reserve price is anticipated to balance the misalignment between banks and the debtors where execution orders are granted and also ensures that the debtor is not worse off due to unrealistically low prices being obtained and accepted at sales execution."<sup>22</sup>

Furthermore, the Cape High Court ruled that courts have the power to postpone granting a sale in execution application by banks where the outstanding amount on a home loan is relatively small. In these instances, lenders must try to negotiate with homeowners before applying for permission to sell the property on auction. It is believed that "postponement" will give distressed homeowners the opportunity to sell their property privately to settle their bank debt. Homeowners should generally get more compared to what they will get in a forced sale.<sup>23</sup> Another change is that: 'once a defaulting consumer pays off their arrears, their mortgage contract automatically revives. This is not at the discretion of the banks. The court ruled that once the arrears and reasonable costs have been settled, the power to reinstate a credit agreement lies with the consumer and not the credit provider.'<sup>24</sup>

Although, the abovementioned changes come as a huge relief to most defaulting homeowners, it should also be noted that the setting of reserve prices may result in even tighter lending criteria by the banks, such as the need for a borrower to get a surety to stand in as additional security, just in case the bank is unable to persuade a court to allow it to sell the property in future.<sup>25</sup> Some of the regulations in the NCA are being revised. It is hoped that the revised regulations will give much relief to both parties and pave a way for more homeowners to acquire property with manageable risk.

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<sup>22</sup> Ryan, Ciara. 2018. Banks slapped down over home repossessions in Johannesburg court case. Moneyweb

<sup>23</sup> <https://www.businesslive.co.za/bt/money/2018-12-31-homeowners-gain-more-muscle-on-repossessed-houses/>retrieved on 10/01/2019

<sup>24</sup> Ryan, Ciara. 2018. Banks slapped down over home repossessions in Johannesburg court case. Moneyweb

<sup>25</sup> <https://www.businesslive.co.za/bt/money/2018-12-31-homeowners-gain-more-muscle-on-repossessed-houses/>retrieved on 10/01/2019

## CHARACTER EDUCATION – INSTILLING ETHICAL VALUES IN SHAPING SOUTH AFRICA’S FUTURE LEADERS

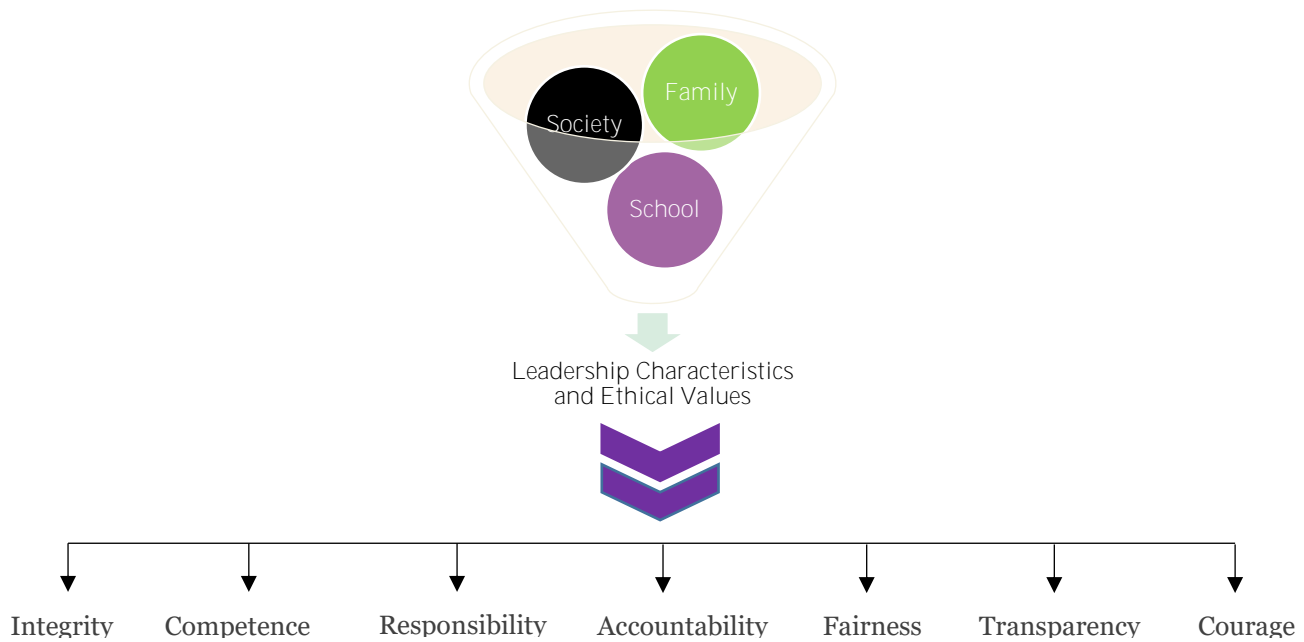


*By Vikeshni Vandayar, Governance and Legal Specialist: Institute of Directors in Southern Africa (IoDSA)*

The children of today are our future leaders, and schools play a vital role as the catalyst in their journey towards both intellectual and ethical well-being. What does governance have to do with character? Everything – the basis of good governance is ethics, ethical leadership links to the character of the leader and his/her values.

I was introduced to this topic of Character Education at The Heart of a Champion Africa Education NPO's Character Education Conference at which I spoke about the governance and link thereto. The conference was established to explore the potential of "character education" as an essential component to add to the educational system amongst South African principals and teachers. This is a commendable initiative to look at improving education practices and exploring pathways to providing a complete development of South African youth – both intellectually and ethically.

There are a number of areas which influence an individual's moral compass – such as, *inter alia*, family, friends, society, school and personal experiences (both negative and positive). Everyone is different, so how can we expect every individual to have the same moral values and views as the next. We cannot. But as does society and community in which we live in, the schooling environment has the ability to instill and set the norm for standards of behaviour/conduct.

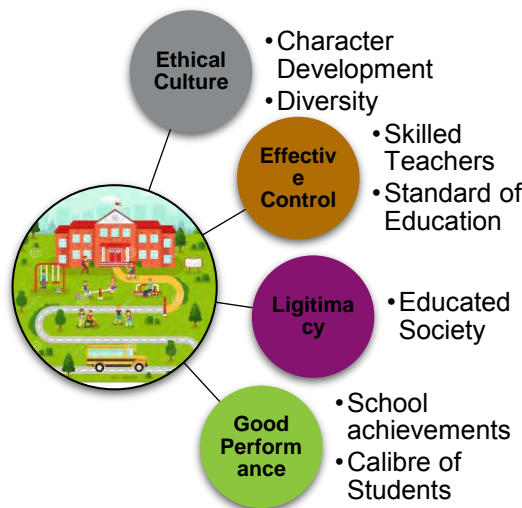


A good leader shows certain ethical characteristics, the IoDSA King IV Report on Corporate Governance™ for South Africa 2016, lists these as namely: Integrity, Competence, Responsibility, Accountability, Fairness, Transparency and Courage. Whilst King IV is often associated in business or corporate South Africa, the ethical characteristics which underpin the outcomes it wishes to achieve are universally applied to every context and individual. These are the characteristics that schools should be aiming to instill in its students so that they can be good leaders one day.

There is no good governance without ethical leadership – the leader dictates the norms and impacts the ethical values underpinning the way in which business or other is conducted. As an individual you have the singular power to determine the road you take and the ethical values you support and live by. The decision to take money from the kitty today when its not your property even if the intention is to pay it back tomorrow – impacts the ethical character built and road that unfolds. One small action leads to another small action, which leads to bigger transgresses over time which are over looked as they have become the norm. The acceptance or turning a blind eye of others unethical behaviour also creates an impression to those around you and who look up to you, on what is right and wrong. By not having the courage to stand up to unethical behaviour – you tacitly form part of allowing it to happen (if you are aware of it). It is for this reason that “organisations” (including the family home) should set the standard of conduct expected in order to provide the individuals who are expected to live by it a compass to refer to. Schools have the ability to teach these key lessons in the classroom and the schooling environment by setting the example for its students at a very young age.

The concept of “going to school” itself brings with it key life lessons such as: commitment, responsibility, discipline, respect, compassion, acceptance, rules/compliance, hard work/worth ethic, sharing etc. Through having to go to school every day, wearing a uniform, listening to your teacher, having to study to pass an exam or failing if you did not, detention or punishment for bad behaviour, interacting with different cultures and individuals, teamwork through sports, and being part of a community etc. – you learn and experience key lessons which shape your character.

*This diagram provides an example of items which may resonate with SGBs under each of the King IV outcomes*



School Governing Bodies (“SGB”) should apply the King IV Principles in a proportional manner with practices which for work it according to the specific environment in which it operates. Whatever practices a SGB incorporates to achieve the King IV Principles, it should ultimately be aiming to achieve the King IV outcomes of those principles namely: Ethical Culture, Effective Control, Good Performance and Legitimacy. These outcomes are universal and thus can be applied to a SGB/School. The SGB should look at breaking down those outcomes to tangible targets which it wishes to achieve that that will indicate whether or not it is achieving those outcomes. For example, character education could be a specific tangible outcome/plan which seeks to ultimately contribute to the School achieving an ethical culture. Teachers play an integral part in shaping students characters and teaching them those ethical characteristics above. A school provides the youth with their first glimpse of good governance and what it means to be part of a bigger eco-system.



## THE EFFECTS OF COUNTERFEITING ON CONSUMER PROTECTION ACT AND THE ECONOMY



By Mr Tshepiso Lefoka, Research Intern: Market Research & Trend Analysis, **the dti**

The Counterfeit Goods Act defines 'counterfeit goods' as both imitations that are substantially identical to the protected goods and colourable imitations that are confusingly similar to the protected goods. African countries including South Africa are particularly vulnerable to the sale of counterfeit goods because so much commercial activity takes place in unregulated markets while resources for fighting counterfeiting are also inadequate. Counterfeited goods and products in South Africa include food, medicines, electrical products, clothing, shoes, cigarettes and beverages. The Consumer Goods Council of South Africa statement on fake goods highlighted that illicit products find their way into the country or are manufactured in counterfeit facilities around the country which makes them easier to sell.<sup>26</sup> Counterfeiting presents new challenge to consumer protection because products are manufactured and distributed outside the legitimate commercial supply chain that provides safeguards to protect product integrity and consumer safety. Counterfeit products affect different industries and impact not only the economy but also consumers' health and safety.

According to the Euromonitor International (2015), counterfeit products affect a number of goods and brands, from consumer goods to other industries. Counterfeit products also inhibit the government from collecting value-added tax, customs and excise duties. The consequence is fiscal loss, increased criminal activities, and potentially greater instability. Given the dangers of counterfeit markets, countries including South Africa must find a way to address this growing threat. According to the Consumer Goods Council Chief Executive Mr Mangozhe as cited in City Press Newspaper article, the estimated size of illicit economy is close to 10% of GDP in South Africa.<sup>27</sup> Counterfeit products have a profound impact because of the associated health risks. For example, an estimate by the World Health Organisation shows that more than 100,000 people die in Africa every year because of counterfeit pharmaceuticals. The South African consumer Protection Act is a law of general application that intersects with many different bodies of law. The creation of a resilient anti-counterfeiting strategy can therefore be a challenging task given the cross cutting nature of the crime, as well as the local

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<sup>26</sup>CGCSA Statement on fake foods retrieved from <https://www.cgcsa.co.za/consumer-goods-council-south-africa-cgcsa-statement-fake-foods/>.

<sup>27</sup><https://city-press.news24.com/Business/illicit-goods-amounts-to-almost-10-of-gdp-20180914>

nuances which come into play. In light of this, an inter-governmental drive that is supported by the private sector intelligence is important in order to drastically reduce the threat of counterfeits. A regulatory framework, setting out the roles and responsibilities of the relevant entities that have a regulatory responsibility for consumer safety and anti-counterfeiting is also crucial. Recent incidents of violence observed in October and November 2018 raised a red flag to the authorities when foreign spaza shops owners were accused by local communities in South Africa for selling fake and/or expired food.<sup>28</sup> Various stakeholders with different legislative mandates were implicated and had to work together to come up with resilient anti counterfeit strategies. Critical authorities involved included the Department of Health, Environmental Health Practitioners Inspectorates in Municipalities, law enforcement agencies, the South African Revenue Authority (SARS), industry organisations such as the Consumer Goods Council of South Africa (CGCSA) and the National Consumer Commission (NCC). This is a recognition of the need to combat counterfeit products especially those that pose health and safety threats.

According to the International Chamber of Commerce (ICC), countries should establish consumer protection policies that encourage the appropriate disclosure of information such as the identity of the business, its legal name and the name under which it trades, its principal geographic address, website and e-mail address or other means of contact, its telephone number and its government registration or license numbers. Furthermore, regulations mandating the display of consumer care numbers or email addresses on products, websites and/or any on other medium to allow consumers to register complaints or to verify whether products are genuine should be developed and enforced. For example, failure to display information should be penalised by regulatory and law enforcement authorities. This is crucial in helping consumers and regulatory authorities to identify illicit traders and differentiate them from those conducting legitimate business operations.<sup>29</sup> In view of the above one can argue that the Consumer Protection Act No 68 of 2008 (CPA) is aligned to the principles of the ICC as highlighted above. For example, Section 22, stipulates that a supplier must disclose information on goods and services in plain and understandable language. Section 24 (2) also stipulates that a supplier must not knowingly apply to any goods a trade description that is likely to mislead the consumer or prospective consumer.<sup>30</sup> With this said, one can say that the regulatory framework to fight counterfeiting or illicit trade is appropriate, the challenge lies with the lack of consumer education and awareness, law enforcement and inter-governmental action that is supported by private sector intelligence.

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<sup>28</sup> The Citizen,( 2018)

<sup>29</sup> International Chamber of Commerce (2016)strengthening consumer protection: measures to adapt the un guidelines for consumer protection to guard against counterfeiting and piracy

<sup>30</sup>Consumer Protection Act No 68 of 2008.

## IMPORTANT CONTACT DETAILS OF CCRD AGENCIES

LEGISLATION	DEPARTMENT/ AGENCY	SWITCHBOARD /CALL CENTRE	COMPLAINTS/ COMPLIANCE LINE OR EMIAL ADDRESS
<b>National Credit Act (Act No. 34 of 2005)</b>	National Credit Regulator (NCR)	011 554 2700	086 062 7627 <a href="mailto:complaints@ncr.org.za">complaints@ncr.org.za</a> For complaints regarding debt counselling: <a href="mailto:dccomplaints@ncr.org.za">dccomplaints@ncr.org.za</a>
<b>Consumer Protection Act (Act No. 68 of 2008)</b>	National Consumer Commission(NCC)	012 428 7726	0124287000 <a href="mailto:complaints@thenc.org.za">complaints@thenc.org.za</a>
	Consumer Goods & Services Ombudsman (CGSO)	011 781 2607	086 000 0272 <a href="mailto:complaints@cgso.org.za/">complaints@cgso.org.za/</a> <a href="mailto:info@cgso.org.za">info@cgso.org.za</a>
	Consumer Goods Council of South Africa(CGCSA)	086 124 2000	<a href="mailto:info@cgcsa.co.za">info@cgcsa.co.za</a>
	National Consumer Tribunal (NCT)	012 683 8140	<a href="mailto:registry@thenct.org.za">registry@thenct.org.za</a>
	National Regulator for Compulsory Specifications (NRCS)	012 482 8700	
<b>Companies Act (Act No. 71 of 2008)</b>	Companies and Intellectual Property Commission (CIPC)	086 100 2471	
	Companies Tribunal (CT)	012 394 3071/ 5553	<a href="mailto:registry@companiestribunal.org.za">registry@companiestribunal.org. za</a>
	Takeover Regulation Panel (TRP)	011 784 0035	<a href="mailto:admin@trpanel.co.za">admin@trpanel.co.za</a>
<b>Liquor Act (Act No. 59 of 2003)</b>	<b>the dti:</b> National Liquor Authority (NLA)	012 394 1683	
<b>Lotteries Act (Act No. 57 of 1997)</b>	National Lotteries Commission (NLC)	012 432 1300/ 1399	012 432 1434 08600 65 383
	National Lotteries Distribution Trust Fund (NLDTF)	086 006 5383	<a href="mailto:nldtf@nlcsa.org.za">nldtf@nlcsa.org.za</a>
<b>National Gambling Act (Act No. 7 of 2004)</b>	National Gambling Board (NGB)	086 722 7713	010 003 3475 <a href="mailto:info@ngb.org.za">info@ngb.org.za</a>

