Regulatory Debates

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For sound and responsive consumer and corporate laws

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Disclaimer

EDITOR'S NOTE

Welcome to the last issue of *Regulatory Debates* for the 2020/21 financial year. This edition comes at a challenging time, with the COVID-19 pandemic putting severe strain on our economy, society, healthcare systems, businesses and industries. These challenges are not unique to South Africa, but rather a global phenomenon.

Many things have changed since the emergence of COVID-19 in early 2020, including the implementation of regulations around lockdowns, restrictions on business activities, and bans on domestic and international travel. The pandemic has had a significant impact on our economy as businesses have closed down, jobs have been lost and unemployment is at an all-time high, with a resultant loss of income. In addition, we have seen an increase in hospitalisations and COVID-19-related deaths.

In light of the devastating impact of this pandemic on the people of our country, our first article on page 3 looks at how loan sharks have gained traction in our communities. Loan sharks have been in existence for many decades and are part of South Africa's social fabric despite being in defiance of our credit laws. On page 6 we look at business rescue as an economic remedy to COVID, and how it can support our struggling businesses and protect much-needed jobs.

As custodians of the liquor Act, our focus is on the ban of alcohol during the lockdown as justification to promote health and social well-being. We also try to engage consumers on issues of travel cancellations and refunds during the pandemic. Most consumers had their holidays cancelled due to restrictions emanating from the spread of the virus.

On page 14 we provide some non-Covid-related information in the form of fundraising through game of chance. The article looks at how non-profit organisations and clubs can raise funds for good causes through available lotteries schemes.

We hope these articles will trigger constructive debate and inspire positive contributions to policy development to improve the lives of ordinary South Africans now and beyond the pandemic.

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NO QUESTIONS ASKED: THE RISE OF LOAN SHARKS IN LOCKDOWN SOUTH AFRICA

Magnus Godvik Ekeland: Department of Anthropology and Development, Radboud University, The Netherlands

Written back in the early days of the South African lockdown, the stoicism of my research participants strikes me. When President Cyril Ramaphosa announced the commencement of a national lockdown at the end of May 2020, I was entering my sixth month of ethnographic fieldwork in the rural townships of the Sundays River Valley in the Eastern Cape, a region home to some of the country's largest game reserves, and I continued my field research until I left in late October.

Before the pandemic, residents had already been grappling with a year-long drought and a job market in deep crisis, defined by precarious contracts, low wages and high unemployment. With the lockdown, the tourism and hospitality sector in which most found work also shut down.

My chief interest during the early days of my fieldwork was neither loan sharks nor money lending, but rather how notions of wellbeing could be studied through looking at how money was shared within households. Wellbeing had been the topic of my MA thesis in anthropology at the University of Oslo, which was based on fieldwork in Fiji. I had imagined myself continuing to work in Oceania, but when I came across this project I found it resonated well with my wider interests in topics such as social protection and precarious labour.

Having grown up and spent the better part of my life in Norway, loan sharks was something I associated with Nordic noir crime fiction, which also says something about how exotic this figure appears from the privilege and comfort of Norwegian middle-class life. As my fieldwork in the Eastern Cape progressed, I soon discovered that real-life loan sharks (commonly known by the Afrikaans term *skoppers*) were far from the image of the slimy mobster holding court in a dimly lit room I had in my mind.

In Sundays River Valley, most loan sharks are respectable elderly women, often pensioners, staying in some of the more spacious township houses. Unlike mobsters, they do not rely on threats of violence to ensure compliance, but rather hold on to their clients' IDs or social grant cards as deposit (social grant beneficiaries receive a bank card that they can use at cash machines to carry out transactions with their grant money).

Loan sharks usually have access to a stable income, either from their own job or that of their partner. They are often involved in various informal trades. Some sell liquor or prescription drugs, others meat. It is notoriously difficult to set up an interview with a skopper about their business: Their activities are both illegal and morally frowned upon. All the sharks I have been talking to passionately deny taking IDs or grant cards as collateral, and insist that they only accept clients with stable employment. Despite such statements, it is not uncommon to see sharks lurking around cash machines with a stock of grant cards on the day when the grants are paid out. Surprisingly, loan sharks have not received much coverage in the local papers, but their significance has only increased during lockdown. My fieldwork suggests that it is predominantly the women of the household who borrow money. Usually women are the beneficiaries of the childcare grants and, since it is harder for women to find employment, their IDs are often the ones loan sharks hold on to.

Apart from the income from work and social grants, households get by through the support they can get from their social networks. While these transfers of money between family and friends are key for economic survival, they also entail a good deal of tensions and frictions. If anything, the lockdown amplified these frictions even more. Since there was never a lot of money circling in the community in the first place, decisions to lend money to family and friends have a significant impact on the household budget.

Those who needed cash are not eager to borrow from their networks either. Rumours about who is asking whom for money spread fast, thus exposing personal financial circumstances to public scrutiny. Jealousy and envy are also an issue, and those who obtained loans in this way felt that they risked to attract the resentment of people who might take issue with their success in securing financial resources, and resort to malevolent occult means to harm them. Loan sharks, on the other hand, guaranteed privacy. As one research participant explained to me: The loan sharks' interest rate is usually 50% per month, although, depending on the amount, it can be even higher. In comparison, money-lending opportunities on the formal market charge 30% per month. The advantage with loan sharks is that people get money the same day, while the other loans require a formal application process and can take weeks to be processed.
As more weeks went by under lockdown, money became scarcer. While many households had several members working before, families were now lucky if they had a single salary coming in. People who were previously more financially independent were now embroiled in tensions over money with family members who could still fetch an income. Here too loan sharks were often preferred avenues for borrowing money than asking close family.

The lockdown also reduced mobility to urban areas, as drivers heading to town were more reluctant to pick up strangers and if they did they charged exorbitant rates. This meant less access to banks, formal lending institutions and urban relatives. Where else to go, but to the loan shark next door?

More recently, skoppers have become instrumental in bankrolling informal alcohol sales, which surged as a result of COVID-19 restrictions on formal sales and distribution. During the ban on alcohol sales, which lasted for most part of the period from end March to mid-August 2020, there was a short-lived boom in the sale of infamous home brews known as ginger or pina-pina. The ban was eventually lifted, but sales were restricted to four days a week, Monday to Thursday.

This created a niche for those looking to make a profit out of weekend drinkers. Many households took out loans to stockpile the popular Black Label lager beer and Klipdrift brandy, which were resold informally at premium prices at the weekend when formal distribution was closed. One research participant told me he had borrowed thousands of rands and defaulted on a bank loan, but was confident that with the profits from his weekend sale he would be able to pay back all that he owed.

Loan sharks thrived during lockdown also because of the insufficient economic response from national government, which did expand its safety nets, including the establishment of additional welfare grants and food relief for the most vulnerable, but in practice, especially in the initial phase of the pandemic restrictions, major bureaucratic delays as well as widespread allegations of fraud and corruption hampered the delivery of these relief measures.

Beyond the immediate needs caused by the COVID-19 restrictions and the ensuing economic crisis, more structural interventions to curb people's reliance on informal lending are needed. The key issues remain that of high unemployment and poor service delivery – something that many disenfranchised rural and urban communities experience across South Africa.

The research data suggests that the amounts borrowed from loan sharks are generally small, and the loans are usually taken out towards the end of the month. Use of informal lending avenues is also closely tied to the fluctuations in the local labour market for piece jobs, which unfortunately is still a major source of income not only for the unemployed, but also for those in formal employment whose wages are too low to cover household needs. The market for piece jobs is highly unstable, and goes through ups and downs with changes in the formal economy – when a national economic crisis such as that spurred by the lockdown ensues, piece jobs also rapidly dry up.

The recently introduced Social Relief of Distress (SRD) grants, which cover all unemployed adults (unlike pre-existing social grants tied to disability, child support or elderly age), are a welcome and much-needed intervention. What is needed, however, is a more permanent solution, as the SRD payments have only been developed so far as temporary measures. The South African government is now considering the introduction of a basic income grant for all working age unemployed people, which would provide much more stability to a large sector of the population not currently entitled to any welfare grants beyond the temporary relief measures.

These grants would provide households with more options as the end of the month draws near. It is doubtful loan sharks can ever be fully eliminated, certainly not until the structural dimensions of high unemployment and low wages in a highly precarious and unequal capitalist economy are addressed. The conditions, however, under which people make decisions about borrowing can be improved.

BUSINESS RESCUE: ECONOMIC REMEDY FOR COVID-19

By Professor Raj Rajaram: Senior Lecturer School of Accounting, Economics and Finance, University of KwaZulu-Natal

The COVID-19 virus has ruthlessly battered the world's economy and the health of its citizens. The timing of the pandemic and the subsequent lockdowns could not have been worse for South Africa. Our economy, already grappling with low GDP growth and high levels of unemployment, suffered the simultaneous downgrading of credit ratings by Fitch and Moody's. The combined impact of the COVID-19 lockdown and the rating agencies' downgrades will cause many businesses in our economy to spiral into financial distress and shed thousands of jobs. Companies experience financial distress when they are unable to meet creditor payments, thereby increasing the possibility of insolvency.

Financial distress

When a company experiences financial distress, it can either be liquidated, undertake an informal turnaround or file for a legislated business rescue. The preferred route for a financially distressed company is to prevent a forced liquidation due to the detrimental impact that business closures and job losses have on our communities. Many companies that experience financial distress will consider the feasibility of business rescue as a means for a financial rehabilitation.

Concerns around business rescue

Since the adoption of business rescue legislation, there has been many questions around the success rate and effectiveness of business rescue. Due to the low success rate of business rescue in South Africa, there are doubts as to whether business rescue provides a remedy for a distressed company. There are concerns that business rescue is another costly addition to the inevitable liquidation of financially distressed businesses. In fact, some researchers have interpreted business rescue legislation as a lengthy and expensive liquidation.

It is worth noting, however, that there are several examples of successful business rescues in South Africa. These cases have demonstrated that if the legislation is properly implemented and managed, the potential for an improved success rate does exist.

Improving the chances of a successful business rescue

How can the chances of success be improved? Firstly, business stakeholders should gain an understanding of our business rescue legislation and the circumstances in which it should be implemented. Not all companies that experience financial distress are suitable for the business-rescue mechanism. Business rescue is not a substitute for the liquidation procedure. Companies that cannot be financially rehabilitated should apply to be liquidated rather than file for a business rescue.

Secondly, management of financially distressed companies should consult extensively about utilising the business rescue legislation to rehabilitate financially distressed companies. Consultations should include shareholders, employees, trade unions, bankers, creditors and possible funders. Many stakeholders prefer an active and supportive role during the business-rescue application process rather than being informed at a late stage about management's decision to enter into business rescue.

Research indicates that the earlier a financially distressed business enters into business rescue, the better the chances of the rescue being successful. Management should therefore pay close attention to detecting financial distress in the business as early as possible. This can be achieved by considering early warnings of financial distress such as such as liquidity problems, carefully analysing financial ratios that may indicate financial distress and undertaking scenario planning for the business. The early detection of financial distress will facilitate an earlier application for business rescue, thereby improving the chances of a successful rescue.

In the event that management decides to apply for business rescue, an effort must be made to communicate details of the filing to all stakeholders as soon as possible. Due to tight deadlines that exist when a company is in business rescue, important decisions and planning must be undertaken prior to the application for the business rescue. For example, the chances of success will be immensely improved if the company being rescued arranges for post commencement funding as early as possible. One of the major reasons for failed business rescues is the lack of funding for the business rescue.

Finally, the skills of the person appointed as a business rescue practitioner is vital to the success of a business rescue. Business rescue legislation specifies that the practitioner should possess a legal, business or accounting qualification. Research indicates that it is also important for the practitioner to possess mediation, conflict resolution, restructuring and decision-making skills.

Conclusion

In summary, business rescue legislation can most certainly be utilised to minimise the negative impact of COVID-19. The financial rehabilitation or economic rebirth of distressed companies in our current recessionary environment will result in the saving of jobs, a more resilient business sector and, ultimately, a stronger democracy. A thorough understanding of the legislation and careful planning and implementation of a business rescue, however, is vital for the legislation to serve as an economic remedy.

THE LOCKDOWN LIQUOR BAN: BEYOND THE COVID-19 PANDEMIC

By Pregoria N Mabaso: Director, **the dtic**

On 5 March 2020, the first case of COVID-19 was confirmed in South Africa. On 15 March 2020, in response to the outbreak of the coronavirus, President Cyril Ramaphosa declared a national state of disaster in terms of the Disaster Management Act, No. 57 of 2002. On 26 March 2020, South Africa was placed under level five lockdown, with enforced travel bans, social distancing, and the closure of schools and universities. Citizens were restricted to their places of residence, and allowed to leave only to access healthcare or essential items. The restrictions, however, did not apply to essential service workers, who were given written permission to continue to deliver essential services. During the December 2020 festive season, the President announced a move to lockdown level three, which included a prohibition on the sale, on-site consumption, distribution and transportation of liquor.

The ban on the sale of liquor during lockdown seems to have had striking health benefits. An article published in the *African Journal on Primary Health Care and Family Medicine* showed that there were fewer alcohol-related hospital admissions. It referred to Groote Schuur Hospital in Cape Town as an example, which reported 66% fewer trauma admissions. Other contributing factors may have played a significant role, including the restrictions on travel, less traffic during lockdown, and limitations on the culture of binge drinking, which often occurs at drinking outlets close to people's homes and is associated with violence.

According to the police crime statistics, the initial ban on liquor resulted in a reduction in contact crimes, including attempted murder from 1 300 to 443 cases, rape from 2 908 to 371 cases, and assault from 11 876 to 1 758 cases. There was a sharp reduction in the number of unnatural deaths in the country, from between 800 and 1 000 to approximately 400 per week, as recorded in the national register.

The Director of Alcohol Research at the South African Medical Research Council, Professor Charles Parry, in his presentation to the portfolio committee on health said that fewer admissions to trauma units (more than 5 000 less per week) could be attributed to the liquor ban. In addition, the council's data showed a decrease in excess deaths in South Africa, suggesting that the lockdown, with its alcohol ban and decrease in vehicle use, may have saved the lives of more South Africans than what the coronavirus was confirmed to have claimed during the period of the ban.

Trauma patients who enter healthcare facilities and do not require admission contribute to overcrowding and increased risk of transmission of COVID-19 between patients and emergency room (ER) staff, while those who require surgery consume critical resources such as theatre time and skilled staff. The latter may potentially be deployed to other areas of need in the hospital.

An initial ban on liquor came into effect at midnight on 26 March 2020 and was later lifted on 7 April 2020, only to be reinstated on 16 April 2020. During the time of the lifting of the ban, the national Department of Health announced that there had been an 80% increase in trauma-related cases in Gauteng alone. It modelled an estimation of about 3 400 alcohol-related trauma presentations across public, secondary and tertiary hospitals in one week. This suggests that a liquor ban could result in a maximum reduction of liquor-related trauma presentations.

According to the South African Liquor Brandowners' Association (SALBA), the Beer Association of South Africa (BASA), VinPro, Liquor Traders Association of South Africa (LTASA) and the Liquor Traders Council of South Africa (LTCSA), the ban on liquor sales affects up to one-million people working as part of the industry value chain. The industry acknowledges the impact of liquor on the health system during the pandemic, but is of the view that there is a need to understand the complexity of alcohol-related trauma so as to focus on effective interventions and measure of impact. The industry said that this requires government to provide access to health and liquor-related information across the healthcare system.

During the December 2020 festive season, South Africa reached one-million cases of COVID-19 and experienced a second wave of infections that left private and public hospitals in some provinces in short supply of ICU beds and oxygen. Despite warnings from experts, events took place, with alcohol-related trauma cases such as stabbings and car crashes placing an additional burden on health workers and facilities in the midst of the rise in COVID-19 hospital admissions.

The country's subsequent move back to level three during the month of December saw a drastic decrease in hospital admissions of trauma-related cases. The Chris Hani Baragwanath Hospital trauma rescue centre, which is usually the busiest on New Year's Eve, was reportedly empty, pointing to liquor as the major contributor to trauma-related cases. Fewer admissions on New Year's Eve were recorded at hospitals in other provinces too, such as the Western Cape.

Regardless of whether the decline in hospital admissions was a result of the ban of liquor, it is clear that the COVID-19 pandemic has redirected South Africa to reflect on the issue of liquor sales and consumption and how to mitigate the impact. This may require that government introduce strict regulations in consultation with the liquor industry and communities. The current focus on the great contribution made by the liquor industry to the fiscus must not supercede the impact of liquor on the wellbeing of our communities.

CANCELLATIONS AND REFUNDS DURING A PANDEMIC FROM A CONSUMER PROTECTION POINT OF VIEW (CANCELLATIONS PART 1)

By Monique van der Merwe: Information Compliance Officer, SERR Synergy (Pty) Ltd[1]

Since the national COVID-19 lockdown was declared in South Africa, travel bans were imposed, borders were closed, and the cancellation of gatherings and events became necessary to limit the spread of the virus. This unprecedented pandemic certainly prepared the world to manage uncertainty and left us with insight into how to move forward beyond this time. This article focuses on what we can expect with regard to non-performance, defaulting and the cancellation of agreements during and after this pandemic.

What factors should be considered when accepting cancellations and providing refunds?

- The Consumer Protection Act (CPA) makes provision for consumers to cancel an advanced reservation, booking or order for the supply of any goods or services, irrespective of the existence of a *force majeure* event. Thus a consumer (natural or juristic persons – with an asset value or annual turnover of less than R2 million at the time of the transaction – to whom goods and services are promoted or supplied in the ordinary course of business and for consideration) may cancel the advance reservation, booking or order and the supplier may impose a reasonable charge for cancellation under normal circumstances.
- Should performance of either party become impossible due to an “act of God”, the supplier can rely on the *force majeure* rule – if provided for in the signed agreement – as it allows parties to a contract to be excused from having to perform.
    - This clause within the agreement can only be relied upon if the clause is drafted in such a way that provision is made for the specific event rendering performance impossible. These clauses should make provision for epidemics and pandemics as very few agreements currently do. The inclusion of pandemics in a *force majeure* clause is what determines whether a party can be excused from its obligations specifically during COVID-19 and similar events in the future.
    - Usually, with *force majeure* clauses, obligations of both parties are only suspended until the event that renders obligations to be unfulfilled has passed and performance under the contract can be resumed and restored to the extent to which is possible.
    - It is important to note that consumers cannot institute civil action against suppliers for damages during the *force majeure* event if the clause is correctly drafted in the agreement.
- Should an “act of God” occur without the provision of *force majeure* in agreements, suppliers should propose an alternative date (at no extra charge) for services to be rendered.
- If a service cannot be performed on an alternative date for whichever reason, the consumer is allowed to request a full refund of their deposits and prepayments.
- A consumer is permitted a full refund as the CPA provides for fair, reasonable and just treatment. Thus, if no service could be rendered, it is only fair that the consumer should not be held liable for payment.
- The Act provides that suppliers should keep prepayments and deposits paid by consumers separately as this money belongs to the consumer and not the supplier.
- Considering these factors stated in the Act, the supplier is able to charge a reasonable cancellation fee, but only with the consumer’s consent:
    - Outstanding amount at the time of cancellation

[1] https://serr.co.za/service/consumer-law-compliance

- Value of the transaction
  - Value of any goods that the consumer retains
  - Value of any goods to be returned to the supplier
  - Original duration of contract
  - Consumer's losses/benefits in terms of the transaction
  - Nature of the goods/services
  - Period of cancellation notice given
  - The reasonable potential for the supplier to find a replacement by the contract delivery date
  - Industry practice
- To clarify, if a consumer cancels an agreement before the *force majeure* event took place (for instance, national lockdown) due to discomfort or concern, they cannot rely on the *force majeure* clause to avoid paying cancellation penalties, only after the official announcement of *force majeure* and if there are no other factors to consider as stated above.

Conclusion

It is clear that drafted agreements will provide the most guidance in the event of cancellations and refunds, not only during a pandemic, but also under normal circumstances. For this reason, it is imperative to ensure that agreements are drafted in accordance with current legislation and that both parties are protected. Should the existing agreements not support any required measures, the common law and CPA should be used as guidance in this regard.

CAN THE LAW INTERVENE IN CONTRACTUAL ARRANGMENTS BETWEEN PARTIES, IN LIGHT OF THE NEED FOR GREATER CONSUMER PROTECTION IN TIMESHARE AGREEMENTS?

By Zodwa Matiwane: Director, **the dtic**

Timeshare rights are derived from agreements concluded between consumers and timeshare developers. Provisions in these agreements pose numerous challenges, including the absence of a cancellation clause, which means the consumer is bound by a lifelong contract; timeshare package schemes, such as the points and club systems, are problematic because of the unavailability of holiday accommodation; consumers often suffer misrepresentations made during sales presentations; the value of the points that the industry sells to consumers does not match the accommodation offered; unpredictable annual increases to levies and membership fees linked to membership levels; and the inaccessibility of the clubs' annual general meeting minutes as well as inadequate handling of complaints by the clubs.[2]

It is not always disclosed to prospective buyers that timeshare resorts had been built over many years and many are therefore oversubscribed. The implication is that a consumer who owns a timeshare interest cannot derive the intended benefit. As a result, timeshare holders end up paying for their holidays instead of using their points or membership. There is an option to sell points, but this is a challenge since the market is already saturated, leaving timeshare holders in a position where they cannot recoup the money paid towards the levies.

Another huge concern is that of escalating maintenance costs or annual levies; these are paid indefinitely irrespective of whether a timeshare holder can afford them or is too old or ill to use the holiday properties. For example, in *Flexi Holiday Club v La Lucia Shareblock Limited* [3], the High Court held that failure to pay levies might result in the consumer losing his or her time-sharing interest and this is not limited to share blocks. Payment of levies continues even after death, with the obligations passing on to the heirs who would have inherited the time-sharing interest. Management fees can be very high depending on the points acquired by the consumer.

In 2014, the National Consumer Commission (NCC) received numerous complaints regarding timeshare agreements that consumers were attempting to cancel without success. These complaints led to an enquiry into the vocational ownership/timeshare industry by the NCC in terms of section 88(3) of the CPA. Where the cancellation fee is exorbitant, it also effectively takes away the right to cancel.

In such cases, should the law be able to intervene and offer relief to affected customers, either by setting aside the contract or by changing its terms. A key concern is that any tampering with the binding force or sanctity of contracts based on vagueness or ignorance will undermine legal and economic certainty, since the contracting parties will not know if the agreement will be amended to the detriment of either party. The basis of a contract is either consensus, which is an actual meeting of the minds of the contracting parties, or the reasonable belief by one of the parties that there is consensus. The elements of consensus can be expressed as follows:

- The parties must agree on the consequences they wish to create
- The parties must intend to bind themselves legally
- The parties must be aware of their agreement

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[2] www.the-NCC report on time share.co.za – accessed, 20 January 2020.
[3] [2012] three All SA 49 (SCA) (30 March 2012) accessed, 20 January 2020.

The contract's implications are responsibilities, the contents of which are claims and duties to be performed; if the parties are wrong on either of these elements of the obligations, there is neither agreement nor dissensus[4].

Victims of unconscionable contracts were relieved by enacting the CPA through the introduction of generalised abstract terms that contractual provisions must be fair, just, and reasonable, and that conduct may not be unconscionable, all of which inform the values of public policy and good faith. This aligns with South Africa's law of contract with the values of fairness and equity that inspire the country's Constitution and Ubuntu[5]. The CPA[6] was enacted to promote and advance consumers' economic and social welfare in South Africa. The CPA does not apply to all agreements[7] and it is therefore imperative to ascertain if timeshare agreements fall within the definition of either goods or services in terms of the CPA. Some timeshare agreements make provision for credit in instances where a purchaser cannot pay the purchase price. The NCA[8] becomes applicable insofar as the credit granting provisions are concerned.

The classification of a timeshare as either "goods" or "services" is essential because it determines the remedies available to the consumer; the former is regulated by sections (55), (56) and (61) and the latter by section (54) of the CPA. The supply of all rights in the immovable property, except the sale thereof, will constitute a service for timeshare agreements**.** Also, section 14(4) of the CPA allows regulation of fixed-term consumer agreements to adequately protect consumers who conclude timeshare agreements.

In conclusion, timeshare agreements need to be regulated appropriately. The need for a consolidated and dedicated piece of statute that explicitly regulates timeshare schemes cannot be overemphasised. With the proliferation of new models of timeshares, industry regulation and timeshare agreements are necessary. This will help eradicate unscrupulous marketing practices, which in turn will improve consumer confidence. Section 14(4) of the CPA allows for further regulation of fixed-term consumer agreements to adequately protect consumers who conclude timeshare agreements.

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4 Van Der Merwe S "General Principles of Contracts" 2007 (3rd edition) Juta: Cape Town
5 *Ubuntu* is a Nguni Bantu term meaning "humanity".
6 Consumer Protection Act (No.68,2008)
7 s5(2) CPA (Act 68, 2008)
8 National Credit Act (Act 34, 2005)

FUNDRAISING THROUGH GAME OF CHANCE AND THE LAW

By Makhosazana Lindhorst: Senior Manager Regulatory Compliance and Enforcement, National Lotteries Commission

It is common practice for non-profit organisations (NPOs) or clubs to raise funds using game of chance. These kinds of fundraising schemes are inter alia in the form of raffles and/or prize-based competition. This is not a new phenomenon, but dates back to the days prior to the promulgation of the Lotteries Act 57 of 1997 ("the Act"), which led to the establishment of the National Lottery, for the purpose of generating revenues for good causes, and the National Lotteries Commission ("the Commission"), the tegulator of lotteries and sports pools.

NPOs were authorised to collect revenues from the public by the Fundraising Act of 1978. In raising funds, NPOs used to add a "chance" element, where members of the public who donate or a buy a ticket to support the identified cause would have an opportunity to win a prize. Prizes were distributed by lot or chance, which meant the winning was based on sheer luck. The introduction of the Act brought these activities within the ambit of the Act, as the schemes conform with the definition and purpose of lotteries. The Act defines a "lottery" to include "any game, scheme, arrangement, system, plan, promotional competition or device for distributing prizes by lot or chance or any game, scheme, arrangement, system, plan, promotional competition or device which the Minister may by notice in the Gazette declare to be a lottery". A lottery is a game of chance and winnings are based on sheer luck.

Other than the National Lottery, there are three forms of lotteries recognised by the Act: (1) private lottery; (2) lotteries incidental to exempt entertainment; and (3) society lottery. The regulatory requirements for the private lottery are that it can only be conducted by the private club and only members of the club can participate in the scheme, e.g. a golf club. Lotteries incidental to exempt entertainment can be conducted by a club or NPO, and should be linked to an entertainment event, e.g. dinner or bazaar. The total revenues to be raised on both schemes shall not exceed R10 000, the value of the prize shall not exceed R5 000 for lotteries incidental to exempt entertainment and R10 000 for private lotteries, and the value of the ticket price shall not exceed R10. The general rule is that no organisation can conduct a lottery scheme unless authorised by the Commission. However, any organisation designing a scheme and conducting same in line with the above regulatory requirements is not required to register with the Commission and may not exceed the prescribed limitation, unless an exemption is granted by the Commission. Failure to adhere to the regulatory requirements constitute an offence.

Society lotteries on the other hand may be conducted by NPOs and any organisation intending to conduct this scheme is required to register with the Commission. The total value of revenues to be raised shall not exceed R2 000 000 and the value of prizes shall not exceed R1 000 000, and there is no limitation on the value of the ticket price. These schemes are conducted for the purpose of raising funds for good causes and shall not be used by private companies or individuals as a profit-making scheme. Through our regulatory compliance and enforcement initiatives we have witnessed non-compliance with the law. It is therefore imperative to consult the Commission before conducting any scheme to ensure that it is conducted in accordance with the law.

SOCIO-ECONOMIC IMPACT ASSESSMENT SYSTEM: A REAL GAME CHANGER OR TICK BOX EXERCISE?

By Mokgadi Mathonzi: Director, **the dtic**

Cabinet introduced the Socio-Economic Impact Assessment System (SEIAS) in 2015 as an ex-ante policy analysis tool for application in the assessment of the likely impact of policies and legislation. The system replaced the Regulatory Impact Assessment (RIA) with the aim of improving the policy development processes across government and ensuring alignment of regulatory interventions with national priorities of government.

Cabinet had introduced the RIA in 2007 with same intent of ensuring that regulatory interventions serve the policy objectives of government. The RIA is applied globally as a "smart regulation" tool aimed at assisting governments to make difficult choices with limited resources. It is now a requirement in most of the Convention on the Organisation for Economic Co-operation and Development (OECD) countries and developing countries.

At the time, the Policy Coordination and Advisory Services (PCAS) Unit in the Presidency had oversight of the implementation of the RIA. With the change of administration in 2009, and the replacement of PCAS by the National Planning Commission and the Department of Performance (later Planning), Monitoring and Evaluation (DPME), the responsibility for the envisaged continued practice of RIAs became unclear.

The DPME subsequently assumed the responsibility of institutionalising and overseeing RIAs. In doing so, the RIA underwent a review and the process culminated in the introduction of the SEIAS.

The move from the RIA to the SEIAS did not fundamentally change the overall aim and focus of the impact assessment, which remained the improvement of the quality of political and administrative decisions in pursuit of evidence-based policymaking. Just like the RIA, the SEIAS put emphasis on clarifying the existing problem, the need and objective for regulation, alternative options for addressing the problem, and the assessment of costs and benefits. Ultimately, the assessment should demonstrate that the benefits for regulation justify the costs. One notable change was the tabular format of the assessment tool, allowing for presentation of the impact assessment at a broader and more qualitative level.

Some of the reasons advanced for the transition from the RIA to the SEIAS were that the RIA was costly for the state in that it relied mostly on the use of consultants, especially for the quantitative analysis of policy impacts on the economy. Another point of criticism was that the RIA did not focus the analysis on how the proposed regulation would contribute to national priorities of government as identified in the National Development Plan (NDP). These priorities include economic growth and inclusion, job creation, social cohesion, safety and security, environmental sustainability, and building a capable and developmental state. The RIA was not mandatory and the decision to undertake the impact assessments and the sign-off thereof lay with government departments. The SEIAS on the other hand was mandatory, thus compelling each department to submit any proposed policy and legislation with a SEIAS report certified by the DPME for such a proposal to be considered by Cabinet and Parliament.

The SEIAS was said to be a simplified approach to conducting RIAs, for application by government officials. Specifically, the nature of the SEIAS tool provided for the qualitative assessment of impact, with less emphasis on quantitative analysis.

"SEIAS recognises that many costs and benefits cannot be quantified realistically. It therefore focuses principally on identifying costs and benefits analytically, and points to the specific areas where quantification would assist in evaluating policy impacts[9]".

Although there has been a high level of compliance (probably due to the mandatory nature of the application of the SEIAS), the system has been criticised as a mere tick-box exercise. The SEIAS is not an independent undertaking as it is designed to be applied by the owners of the policy or legislation in question. For this reason, others regard it as a subjective endorsement of the proposals that a department seeks to advance rather than an objective assessment of both the negative and positive impacts. In addition, stakeholders bemoaned the fact that the SEIAS reports for some high-impact policies and legislation were approved without any in-depth analysis of impact. The qualitative nature of the tool and lack of clarity on how primary research and quantitative analysis should be integrated into the SEIAS may have contributed to the said criticism.

Notwithstanding a record number of 543 proposals (Bills, policies, regulations, high-impact strategies and programmes) that were subjected to the SEIAS from June 2015 to March 2020, a review of the SEIAS pointed to several implementation gaps and challenges[10]. For example, it was found that there was insufficient use of evidence to inform legislative amendments, as well as a proliferation of new policies and laws without clear rationale and proper conceptualisation in the form of discussion documents and green papers.

Furthermore, there was a tendency to separate the SEIAS from the policy and law-making process, therefore using the SEIAS for compliance purposes. Lack of sufficient capacity within the Presidency SEIAS Unit to conduct extensive analysis of impact on some of the complex policies and legislation was also cited as one of the challenges. The unit will mitigate these gaps by instituting a panel of experts to assist with the analysis of some of the policy and regulatory proposals from government departments. Departments will be required to develop discussion documents (green papers) to inform policies and legislation and utilise the SEIAS throughout the policy and legislative development cycle.

Given the aforementioned, it is clear that the SEIAS is still a work in progress and more is yet to be done by both the Presidency and government departments to enhance the system and its application for it to be a well-oiled machine. A good gesture is the realisation that some policies and legislation would require expert analysis of impact and for the SEIAS tool to provide for such.

As evidenced by the findings of the SEIAS review, it cannot be said that the SEIAS has been a real game changer in its first five years of implementation. Until its value add is understood and its application is credible to inform decision-making on regulatory options, it will remain an afterthought and a tick-box exercise undertaken at the end of the value chain. It is expected that the response measures to address the identified challenges and continued introspection of the application of the system will go a long way in asserting the value of the SEIAS and its essence in the policy development process.

Having said this, it is worth mentioning that the Presidency has brought back the PCAS in the form of the Policy and Research Services Unit to reiterate the importance of evidence-based policymaking. The SEIAS unit was transferred from the DPME to this newly established structure to oversee the policy development process within government and ensure that the SEIAS becomes embedded in the process. A recent milestone achieved by the

[9] SEIAS Guidelines, DPME, 2015
[10] The Presidency Cabinet Memorandum 04 of 2020

unit is the approval of the National Policy Development Framework by Cabinet in December 2020. Departments will soon be required to follow the processes outlined in the framework when developing policies and legislation. It is envisaged that these developments will standardise and improve policy development in government.

IMPORTANT CONTACT DETAILS

LEGISLATION	DEPARTMENT/ AGENCY	SWITCHBOARD/ CALL CENTRE	COMPLAINTS/COMPLIANCE LINE/EMAIL	
National Credit Act (Act No. 34 of 2005)	National Credit Regulator (NCR)	011 554 2700	086 062 7627	complaints@ncr.org.za For complaints regarding debt counselling: dccomplaints@ncr.org.za
Consumer Protection Act (Act No. 68 of 2008)	National Consumer Commission (NCC)	012 428 7726	012 428 7000	complaints@thencc.org.za
	Consumer Goods and Services Ombudsman (CGSO)	011 781 2607	086 000 0272	complaints@cgso.org.za/ info@cgso.org.za
	Consumer Goods Council of South Africa (CGCSA)	086 124 2000		info@cgcsa.co.za
	National Consumer Tribunal (NCT)	012 683 8140		registry@thenct.org.za
	National Regulator for Compulsory Specifications (NRCS)	012 482 8700		
Companies Act (Act No. 71 of 2008)	Companies and Intellectual Property Commission (CIPC)	086 100 2471		
	Companies Tribunal (CT)	012 394 3071/ 5553		registry@companiestribunal.org.za
	Takeover Regulation Panel (TRP)	011 784 0035		admin@trpanel.co.za
Liquor Act (Act No. 59 of 2003)	**the dtic**: 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