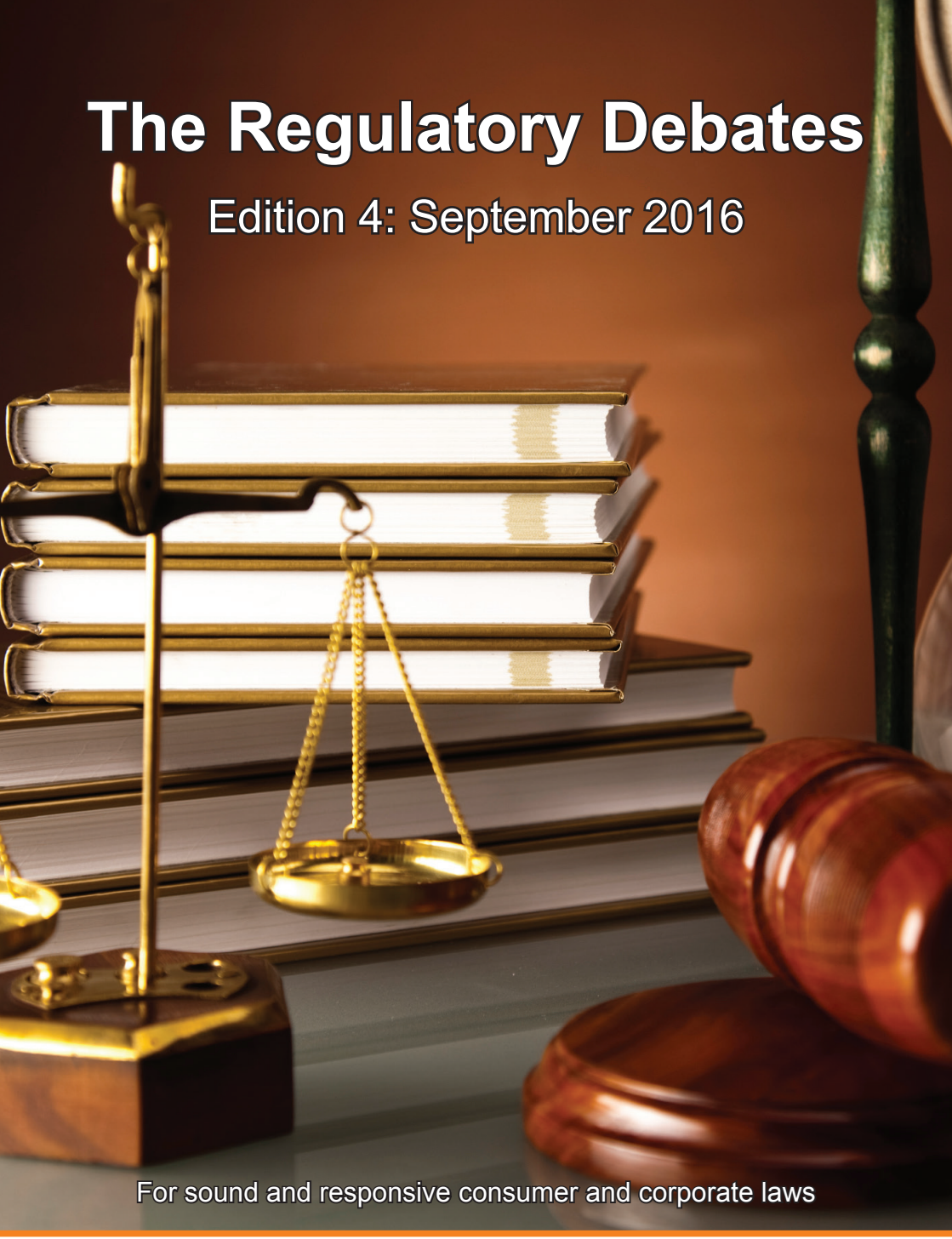
# The Regulatory Debates

## Edition 4: September 2016



For sound and responsive consumer and corporate laws

the dti
Department:
Trade and Industry
REPUBLIC OF SOUTH AFRICA

## LIST OF ARTICLES



## DISCLAIMER

## EDITORIAL

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## GLOBAL LESSONS ON COMMERCIAL DISPUTE RESOLUTION

By ***Marion Shaer, Director Conflict Dynamics***


The Companies Tribunal has extended the reach of mediation as a way of dealing with disputes by training and accrediting its commissioners as commercial mediators. In spite of this, the uptake of commercial dispute resolution has been limited. Should policymakers consider making mediation either mandatory or possible in the instruction of a Judge or magistrate? How can policymakers build the confidence of the private sector to use mediation? Can South Africa adopt a public-private partnership similar to Nigeria?

In Africa, commercial mediation either has been or is being established as a mainstream process for the resolution of commercial disputes in Namibia, Kenya, Rwanda, Ghana, Ethiopia and Uganda. In Nigeria, the Lagos Multi-Door Courthouse (LMDC) was established in 2002 as a public-private partnership between the High Court of Justice, Lagos State and a private dispute-resolution consultancy. The overarching objective of the LMDC is to facilitate dispute resolution within the Nigerian Justice System. It is the first court-connected Alternative Dispute Resolution (**ADR**) centre in Africa.

Namibia instituted a mediation option for High Court matters in 2014. It has been reported by the Judge President, Petrus Damaseb,,that millions of dollars have been saved in legal fees, the court roll has decreased from a two-year to six-month waiting period and parties have more control over the outcomes of their cases.

In the United Kingdom (UK), revised civil procedure rules were first introduced in 1999. The UK Government recognised the importance of ADR and in 2001 and again in 2011 committed that government legal disputes would be settled by mediation or arbitration

whenever possible. This was followed in 2012 by the Business Dispute Resolution Pledge, whereby industry bodies and a significant number of major companies pledged their support for ADR, and most major law firms committed themselves to exploring ADR where appropriate. The result: in 2016 an audit of the mediation market revealed that more than 10 000 commercial mediations had taken place in the previous 12 months, saving business £2.8 billion in management time, relationships, productivity and legal fees.

In Europe, active mediation takes place in the context of commercial disputes in France, Italy, Denmark, Finland, Ireland, Germany, Sweden, Greece, the Netherlands, Spain, Portugal, Belgium and Norway. Commercial mediation is emerging in Russia, Bosnia, Slovenia, the Czech Republic and Slovakia. These trends culminated in the recent European Union (EU) directive on ADR, which aims "to facilitate access to dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings" (art 1). The directive applies where two or more parties to a cross-border dispute of a civil or commercial nature attempt, by themselves and voluntarily, to reach an amicable settlement to their dispute with the assistance of a mediator.

In the United States (US), similar developments have taken place. Mediation is mandatory in states including Oregon, California, Texas and Florida, and the multi-door court house concept is well-established in courts around the country. In Asia and the Middle East, commercial mediation is either established or emerging in Singapore, Hong Kong, China, Thailand, Japan, Bangladesh, India, Saudi Arabia and Israel. It is also well-established in Canada, Australia and New Zealand, and emerging in South America.

## Lessons

A 2006 study revealed that conflict in British business cost about £33 billion a year. UK research has also shown that a dispute with the value of £1 million typically burns up more than three years of a line manager's time. The legal costs and delay inherent in adversarial litigation are not the only disadvantages that research has identified. The cost to a country of providing a court system to deal with adversarial conflict is substantial. These costs combined put enormous financial drain on an economy.

The most obvious advantage of mediation is the speed at which the process can be convened and concluded. Recent research conducted by the centre for effective dispute resolution in the UK revealed that 67% of cases mediated settle on the day of the mediation, and a further 20% settle within a few weeks of mediation. The aggregate settlement rate at mediation being about 87%. These outcomes are usually achieved at

a significantly reduced cost. In addition, because of its consensual nature of mediation, the parties retain ultimate control over both the process and its outcomes. This may have a positive impact on relationships that have significantly deteriorated in the course of the dispute.

And perhaps the most crucial advantage of mediation is its success in jurisdictions where it has been carried out effectively. An 80% to 90% settlement rate is realistically achievable in the right environment. Considerations such as the cost of business conflict, and the inherent qualities of adversarial court-based litigation or arbitration, are equally applicable in South Africa. More acute, perhaps, is the consideration of access to justice.

The government, legal and business community must give serious consideration to pledge to use ADR as an alternative or an adjunct to litigation, particularly in claims initiated by or against the state. All levels of the judiciary should be educated about the benefits of mediation and the many instances where mediation is in fact already encouraged in our legislation.

The current mediation rules at Magistrates and High Court levels should be amended to make mediation either mandatory or possible on the instruction of the Judge or magistrate, as it is in Namibia, and Judges should be encouraged to consider the failure to engage in mediation as a factor in making costs orders in their judgements.

The growth of commercial mediation on the dispute resolution landscape in South Africa has the potential to offer huge benefits.

## HOW EFFECTIVE IS MANDATORY AUDIT FIRM ROTATION?

By ***Likani Lebani***

Mandatory audit firm rotation (MAFR) has over the recent past attracted substantial attention culminating in a wide ranging debate. The key arguments in support of MAFR are that it opens up the audit market and therefore allows other firms to take part consequently reducing market concentration – a major issue for those concerned about the dominance of the Big Four . Opponents of MAFR argue that it is costly, time consuming and affects audit quality. The use of the same audit firm not only allows for a better understanding of the company being audited but also enables the auditors to invest knowledge in an effort to better understand the functions of a given entity .

In South Africa, section 92 of The Companies Act, 2008 (Act No 71 of 2008) provides for the rotation of individual auditors only and is not applicable to firms. More specifically,

> An individual may not serve as an auditor or designated auditor of a company for more than five consecutive years. An individual that has served as an auditor or designated auditor for a company for more than two or more consecutive years, then ceases to be an auditor, the individual may not be appointed again until after the expiry of at least a further two years .

This article aims to address whether a change in the current South African legislative architecture around mandatory auditor rotation would in any way result in a better off outcome. South Africa has a different historical context from most countries and the issue of transformation is critical to address the development of human capital. MAFR is currently viewed as separate from transformation. However, it can be used to change the audit market structure and lead to a superior socio-economic outcome than would be the case if the two issues are treated separately.

It is not disputed that the audit market structure, including advisory and forensic services needs radical change - the smaller black-owned accounting/audit firms account for a small share of the audit fees at the macro level. This said, transformation should move beyond what happens at audit firm level and instead create opportunities for the smaller firms to accrue a substantial share of the national audit fees. A question that begs an answer is whether MAFR could in any way influence the audit market structure and performance whilst at the same time maintaining quality, independence and objectivity or more generally good corporate governance?

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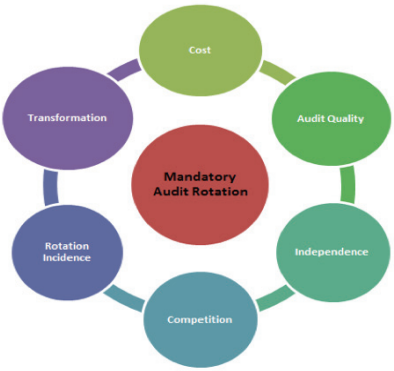
1. *The Big 4 audit firms refer to the four largest accounting and audit firms - PricewaterhouseCoopers, Deloitte Touche Tohmatsu, Ernst & Young, and KPMG.*
2. *PCAOB (2011) Concept Release on Possible Revisions to PCAOB Standards Related to Reports on Audited Financial Statements, No. 2011-003.*
3. *CIPC (2015) Guidance Note: Audit and Accounting Requirements of the Companies Act 71 of 2008, Rotation of Auditors, Section 92, CIPC.*

**Graphic 1: Issues around Mandatory Audit Firm Rotation**




Cost-commonly cited are prohibitive switching costs. Closely related to this argument is that they are not enough adequately qualified companies to audit publicly listed companies and hence rotation should be avoided . This line of thought is to a great extent associated with the larger audit firms than the companies being audited. To a great extent, the views of audit committees and shareholders are silent on this matter which in turn lends support to the argument that such a view could be a strategy to maintain dominance by the Big 4 . Arguably, audit committees and shareholders would not be averse to a rotation of audit firms if such is meant to increase financial reporting integrity.

Audit quality -There is no universal empirical evidence that suggests that a rotation of audit firms significantly affects audit quality. To a great extent audit firms tend to be the most concerned about this issue yet company audit committees are not known to have explicitly expressed this view, at least from what is available in the literature.

Independence- There is insufficient research that shows a positive correlation between MAFR and audit independence or objectivity, including professional conduct . Independence is also a matter of perception (in spite of Principle 3.9 of King III and sections 94(7) (a) and (f) of the Companies Act). While it can be argued that independence is a function of time, no one time frame can sufficiently guarantee independence. For instance, in an effort to ensure independence, the International Federation of Accountants Code of Ethics has a seven-year cooling period, while other jurisdictions have five.

Competition- Rotation has the potential to lead to more of the smaller firms being appointed by big corporates especially the listed companies. However, it is also possible that rotation only occurs among the Big 4, which effectively will not change the market

structure.

Rotation incidence - Empirical evidence suggests that the direction of change in auditor appointments is related to company size. The implication of the aforementioned scenarios is that large companies that are currently audited by the Big 4 have a low propensity to appoint auditors outside this market segment. To this end, some form of nudging may be required to change this conduct more particularly in those markets where human capital is segregated along race.

Transformation - International literature lends no support to issues of transformation when dealing with MAFR perhaps because it is irrelevant at the global level. In South Africa, the issue of transformation cannot be treated in isolation from firm conduct. Given the uniqueness of the country's history, MFAR has the potential to transform the accounting and audit industry in a manner that is representative of the country's demographics. Partner rotation at the audit firm level and reliance on professional codes of conduct from both SAICA and IRBA is not sufficient as it encourages dominance by the same firms and hence the need to seriously consider MAFR.

All of the above indicates that MAFR is a contentious issue in both theory and practice in South Africa.

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4. *Fontaine, R; Khemakhen, H.; Herda, D. (2013) What do Audit Committees think about Mandatory Audit Firm Rotation, Auditing and Management Accounting at the Mercator School of Management, Faculty for Economics, University of Duisburg-Essen.*
5. *A study by Fontaine et al (undated) investigates the perceptions of audit committees on MAFR and concludes that switching firms after 3-5 years is a good corporate governance practice.*
6. *Jones et al. (2012) in Fontaine et al (2013)*
7. *In a study on German companies for the period 2005-2010, it was established that for companies with a balance sheet of less than Euro100 million, the probability for change from Big 4 to another Big 4 was 0.39, with a probability of 0.61 that they changed instead to a non-Big 4. For companies with a balance sheet between Euro100-500 million, the probability of change from a Big 4 to another Big 4 was 0.76. For companies with balance sheet in excess of Euro500 million that were audited by the Big 4, the probability of change to another Big 4 was 0.86.*

## THE MMM EXPERIENCE- PYRAMID SCHEME OR LEGITIMATE FINANCIAL SCHEME?

By ***Evelyn Masotja***

Much has been said about MMM, in the media, on the streets, in the Boardrooms, public platforms and homes. Like it or not, this scheme has made headways in our society. This article gives a snapshot of the scheme but more than that, it aims to assess your viewpoint about MMM. Let's unpack it briefly.

What is MMM? This is a system that was named after its Russian founders Sergey Mavrodi, Vyacheslav Mavrodi and Olga Melnikova, with the three Ms standing for their surnames. MMM arrived in South Africa in 2015. What makes MMM such an attractive scheme is that it offers 30% per month return on investment.

According to the National Consumer Commission (NCC), MMM is a scheme that can be described as a pyramid. The Consumer Protection Act 68 of 2008 (CPA), in section 43 (3) provides that a pyramid scheme is any scheme that offers returns 20% above the repo rate, it is also referred to as a multiplication scheme.

MMM works like a donation scheme where participants transfer money to one another. The scheme does not have a central bank account. MMM South Africa, refers to the scheme as a stokvel, which 'allows people to help each other'. A minimum investment is R100. Once registered, an investor could log and enter into a personal office. The investor then asks to give help; the system then pairs the investor with someone who needs help. Once the funds are transferred, the investor is given 'Mavro', which is the internal currency of the system, to match the amount invested, expected to grow by 30% per month.

Sergey Mavrodi, is a convicted Russian who has been dubbed a fraudster, established the scheme. It was the first and biggest pyramid scheme that hit Russia in the 1990s. In Russia, Mavrodi was sentenced for four and a half years in prison. Around 10 million people lost their savings and as a result it is claimed that 50 people committed suicide from losing their fortunes. The scheme resurfaced in 2011.

It is estimated that a 138 million people from 107 countries are part of the scheme. Thousands of South Africans are registered on the scheme. In 2015, the Communist Party of the Russian Federation warned about the schemes running in South Africa, India and the Philippines

It is alleged, early this year, the global unit of MMM, collapsed after a failed BitCoin experiment failed to pay out clients. According to WhatIs.com, Bitcoin is a digital currency also called crypto-currency that is not supported by any country's central bank or government. They can be traded for goods or services with vendors who accept Bitcoins as payment. The Republic of Bitcoin was a synthetic country which united participants from many different countries who provided and received help with bitcoins. In response to this, the scheme posted a notification on its Facebook page saying that it had to close down the Republic of Bitcoin stating it was an experiment and unfortunately it failed. This website promised to pay 100% returns a month, which did not materialise. The scheme denies that there was a collapse of the global unit though.

The NCC has warned consumers from participating in the scheme It has also warned that participating in a pyramid scheme is a criminal offense. Consumers were also warned to look at the bigger picture about the scheme and refrain as they may incur losses. The Hawks also opened an inquiry into the scheme.

In its own defence, MMM South Africa denies that it is a Ponzi scheme. It also claims it is not an investment scheme but a platform to exchange donations between members. All members are informed they are donating spare money but not investing. It argues that the NCC or the SA Courts have never proven that it is indeed a Ponzi scheme. It is reported a number of participants have decided to approach the courts to clarify the matter.

Recently, there have been challenges raised concerning the scheme, with some customers claiming they have not seen the returns to their investments. An increasing number of participants complain about not getting cash from other participants. The accounts are also anonymously frozen by the leaders of the scheme. One user told the media that she was blocked access to getting money from other users for two months. Others on the other hand have experienced this as a blessing as it has brought so much

relief from financial difficulties evidenced by the testimonials provided by the consumers.

Some South African participants have reacted strongly to the criticism regarding the scheme and have criticised banks that have frozen their accounts. One South African bank closed around 2000 accounts at the beginning of 2016. The consumers have defended the scheme that is seen as a relief to their financial challenges. The recent collapse of the scheme was blamed on the banks and the media's attempt to discredit it, as the scheme has posed as an alternative to the banks.

The banks have reacted differently to the scheme, with some freezing accounts, others letting customers be, others saying they do not tolerate criminal activity, that this is confidential information but overall that they comply with applicable legislation.

The scheme warns customers that it does not guarantee anything concerning the returns; they may not be paid at all and could lose all their money. One thing guaranteed is that the scheme like other financial speculative activities is a risk. As a pyramid scheme, it is a criminal activity as per the CPA. But, what is your take about the scheme? What has been your experience with MMM? Do you see it as a pyramid or Ponzi scheme? What would you say has been the highlight for you since participating in MMM? If not participating, what have been your reasons? Do you know friends, family or colleagues participating? What advice would you give them?

## LESSONS FOR SOUTH AFRICA FROM THE EU ON ALTERNATE DISPUTE RESOLUTION FOR CONSUMERS?

By ***Dr Jacolien Barnard and Prof. Corlia van Heerden (Consumer Protection Law Cluster, Department of Mercantile Law, University of Pretoria)***


In July 2015 the European Union (EU) Directive on Alternative Dispute Resolution for Consumer Disputes (2013/11/EU) was implemented into the EU member states. The aim of the ADR Directive in the EU is to solve contractual disputes between consumers and traders (suppliers or businesses) regardless of whether the agreement was concluded offline or online or whether or not the trader is situated in another member state (Recitals 4-6). The ADR Directive provides for a set of quality requirements that an ADR body or entity tasked with resolving consumer disputes should adhere to in member states which include regulatory mechanisms for control. As part of these mechanisms for control, the ADR Directive introduces an Online Dispute Resolution Platform (ODR platform) for the particular purpose of more efficient online redress for online consumer agreements (which will be discussed in the next edition of the Regulatory Debates). This article explains the approach of the EU and raises the question if there are indeed lessons for South Africa to improve in the area of consumer protection enforcement?

Transparency, effectiveness, fairness, liberty and legality are all requirements for a successful ADR body. Also critical is the collection of information and co-operation, this includes information between ADR bodies and the European Commission (EC) but also between ADR bodies or entities and national authorities enforcing legal acts on traders. Each member state must provide the EC with information and details of the "Competent Authority" within that member state which serves as a centralised authority and a "single point of contact" from which ADR bodies can distribute information and channel disputes (Chapter IV). The Directive describes the particular information that *must be given to*

the Competent Authority by the ADR bodies within that member state which include the particular entities' procedure, jurisdiction, structure, fees and contact information. This must in turn be provided to the EC as well as to the traders and consumers within that industry or region. It is the responsibility of the Competent Authority to channel consumer disputes to the correct ADR body, educate and inform but also to provide guidance on best practices, shortcomings and recommendations about particular ADR bodies (Article 20). (In South Africa it seems that the National Consumer Commission would play a pivotal role in this regard).

The Directive states that the objective for the establishment of an ADR body should be to resolve a larger amount of smaller consumer claims quickly, efficiently, objectively and at a low cost. This in turn saves public expenditure by keeping smaller consumer claims out of the courts whilst moving towards private or industry funding for dispute resolution. ADR mechanisms should not only be user-friendly but also serve as a mechanism for collective redress where mass issues can be identified and resolved with generic solutions. An ADR body should also serve as a source of expert advice to consumers and must include market surveillance and feedback mechanisms to keep track of trends and issues within a particular industry or market.

The ADR Directive sets out different frameworks for the establishment of an ADR body or mechanism (varying from existing mediation or conciliation frameworks to public-private frameworks) but confirms the importance of impartiality and transparency of the ADR body and its funding and the remuneration of its adjudicative members. Certain consumer disputes are not suitable for ADR redress and the consumer should never be deprived of his or her right to access to the courts (recitals 25, 43 and Chapter II article 10).

Certain obligations are placed on traders who participate in ADR mechanisms. The wording of the Directive indicates that it should not be mandatory for a trader to take part in a particular ADR mechanism unless the national law of the member state provides otherwise in a particular industry (recital 49). However, if a trader falls under the jurisdiction of a particular ADR mechanism, this should be clearly indicated on the trader's website, place of business and agreements with consumers. The trader has a duty to assist consumers on the procedure for ADR redress as well as the contact details of the particular ADR body.

In the light of the enforcement and redress provisions in terms of the Consumer Protection Act 68 of 2008 (CPA) and in particular Alternative Dispute Resolution (section 70) and Enforcement of rights by consumers (section 69), the EU ADR Directive serves as a good guideline as to the core qualities of a successful ADR mechanism for consumer

redress and enforcement. This would mean to test whether or not (in a South African context) an ADR mechanism complies with the qualities of impartiality, transparency, effectiveness and fairness. The ADR Directive further indicates the importance of co-operation between all stakeholders which in the South African situation would be all the possible industry, provincial and national authorities enforcing consumer rights in terms of section 69. Section 69(c) of the CPA lists a number of avenues of redress which include existing and newly established ADR mechanisms such as provincial consumer courts, industry ombuds (the Goods and Services Ombuds) as well as the NCC. One should also take into account the recent publication of the proposed industry code of practice for the Advertising and Marketing Industry (GN 449, No. 40159 26/07/2016). The role of the NCC as the "Competent Authority" cannot be overstated in that it is the "hub" and link between ADR mechanisms, suppliers and consumers. Hodges and Creuzfeldt, describes one of the main functions of such a Competent Authority to "provide a source of expert advice to consumers, through a triage function prior to examination of any claim". Taking into account the wording of section 69(d) which states that approaching a court with jurisdiction is only possible if all other avenues of redress fail, the ADR Directive confirms the importance of out-of-court dispute resolution mechanisms but also that a consumer may never be deprived of the right to access to justice and the (civil) courts as a constitutional right. Disclosure of information and consumer education by ADR mechanisms is clearly just as important globally as in South Africa. The ADR Directive confirms the importance of providing an updated list of ADR mechanisms available to consumers by the "Competent Authority" (NCC) but also how important it is for all suppliers in the supply chain to inform consumers of their right to redress and the appropriate ADR mechanisms available to the consumer and the process to be followed.

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8. *Hodges, C. & Creutzfeldt, N. (2013). "Implementing the EU Consumer ADR Directive" The Foundation for Law, Justice and Society (2013) p 3 https://www.law.ox.ac.uk/sites/files/oxlaw/implementing_the_adr_directive.pdf visited on 14/08/2016).*

9. *The ADR Directive is available on the website of the EC: http://ec.europa.eu/consumers/solving_consumer_disputes/non-judicial_redress/*

## COURT RECOGNISES MINORITY SHAREHOLDER RIGHTS

By ***Mafedi Mphahlele***

The case involving Sovereign Foods, a poultry group based in Uitenhage, the first by minority shareholders to go to court. The court passed a judgement favouring minority shareholders who hold 11% of shares in the company . The deal involved introducing a black empowerment shareholder and also implementing an executive remuneration plan that is alleged to be controversial and could result in the company losing money.

The court found the information was confusing and misleading and the packaging did not comply with the requisites of clarity, specificity, sufficient information or explanatory material. The judge also said they treated the minority shareholders unfairly, unjustly, unreasonably and oppressively.

This was in the context of Section 163 (Subsection 1) of the Companies Act 71 of 2008 which refers in particular to the treatment of minority shareholders. This case is the first battle between majority and minority shareholders to reach a court in SA. Usually, minority shareholders' grievances are ignored , or their grievances are taken to regulators, for example, the JSE or the Takeover Regulation Panel (TRP) or the Companies & Intellectual Property Commission (CIPC), or worse, they could sell their shares after enduring defeat in disputes with majority shareholders. Such disputes would not go far because the minority shareholder is usually small and cannot, in most cases afford legal fees or even, does not have enough support or information to reach the courts. This judgement in this case, awarded 50% of costs to be paid by the minority shareholder. The judgement is critical and sets an important precedent in issues pertaining to minority shareholder rights.

For now, the minority shareholder is a victor, however, the majority shareholder is left with the following options: to appeal the judgement, or to come up with a revised proposal that would sit well with all shareholders and still lead to the company being profitable and compliant with the SA regulations and JSE conditions.

Another case involves Dave Woollam, the executive director of Summit Financial Partners, who amid the allegations of reckless lending against Lewis group has initiated a section 165 Derivative action against four directors. This means he has obliged the Lewis Board to inquire into the conduct of its directors and determine whether they are

delinquent . This has been referred to in the media as the most potent weapon available to minority shareholders and the first such action to be taken against a JSE-listed companies.

Section 165 (2) of the Companies Act: 'a person must serve a demand on the company demanding that the company commences or continues legal proceedings, or takes related steps to protect the interests of the company '. Once a company has received such a demand, it has 2 options. It can, within 15 business days of receiving the demand, apply to court to set aside the demand only if the demand is frivolous, vexatious or without merit section 163(3) or it must proceed in terms of section 163(4). Lewis group is seeking legal advice but maintains that the allegations are frivolous and vexatious and/ or without merit (Section 163 (4).

The charges by Woollam include lack of corporate governance, multiple breaches of the NCA and the issuance of consolidated financial statements that do not conform with International Financial Reporting Standards . Except for the obvious violation of the NCA, issues of the responsibilities of directors are emerging, a topic that arose from the critics after the African Bank Investment Limited debacle. The argument has always been that directors must account and be penalised for the bad decisions they make. This is spelled out clearly in section 76(3) of the Company's Act that states that directors must exercise the powers and perform the functions of a director in good faith and for a proper purpose in the best interests of the company; and with the degree of care, skill and diligence that may reasonably be expected of a person carrying out the same functions in relation to the company as carried out by that director, and having the general knowledge, skill and experience of that director.

If Woollam succeeds in this case, this would be a trend-setting year for minority shareholders and a case in point for adherence to good corporate governance. Whatever the outcome of this case, there certainly is hope for the future of the minority shareholder in South Africa.

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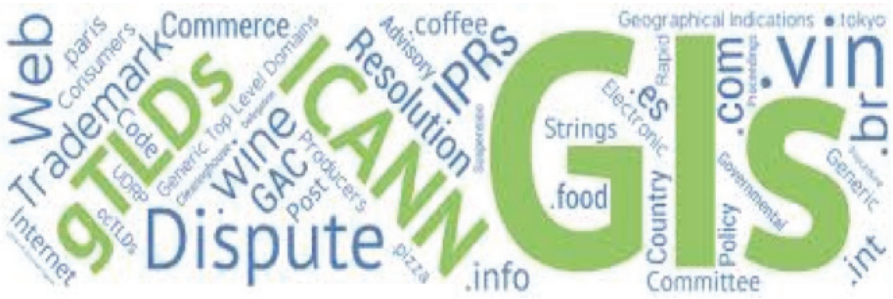
10. *Crotty, Ann (2016). Little help for small investors: a court judgement has drawn new outlines for the fair treatment of minority shareholders. Financial Mail. P.20*
11. *Mngomezulu, Sibani.( 2016) Shareholder rights and minority protection in SA: a comparative analysis. Pretoria: Barloworld*
12. *www.pressreader.com/south-africa/cape-times/20160614/282046211377136.Lewis shareholder sticks to his guns: battle over directors set to play out in court. Retrieved on 2016.06.17*
13. *Tony Tshivhase incorporated. (2012) Without prejudice Journal.p.26.*
14. *Crotty, Ann (2016). Little help for small investors: a court judgement has drawn new outlines for the fair treatment of minority shareholders. Financial Mail. P.20*

## GEOGRAPHICAL INDICATORS AND THE CASE OF "SAVANNAH TEQUILA"

By ***Bharti Daya***




Intellectual property rights have become incredibly important not to mention controversial because of the potential economic value of commercially viable ideas. More recently, the popular alcoholic cider, Savannah (an alcohol based apple cider) has come under attack by Mexico after the launch of a new product "Savannah Tequila" for the use of "Tequila". Mexico maintains that "Tequila" is manufactured from agave grown only in five Mexican states and tequila can therefore only be produced in Mexico. Mexico's maintains that Tequila enjoys protection under the Trade Related Aspects of Intellectual Property Rights (TRIPS) agreement and the case is still subjudicae and is a protected geographical indicator.

Geographical indicators are a public policy tool and the negotiations around GI's have become highly controversial as the negotiations around GI's gathers pace at the international level. What are GIs? According to the World Intellectual Property Organisation (WIPO), a geographical indicator (GI) is a "sign used on products that have a specific geographical origin and possess qualities or a reputation that are due to that origin. In order to function as a GI, a sign must identify a product as originating in a given place. In addition, the qualities, characteristics or reputation of the product should be essentially due to the place of origin. Since the qualities depend on the geographical place of production, there is a clear link between the product and its original place of production."

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*15. Bowen, S. (2008) Case Study: Tequila. North Carolina State University. United States*

In the negotiations around geographical indicators, Europe is at the fore of the negotiations and has submitted a long list of products across various sectors. Examples of these include, but are not limited in the alcohol industry, names such as “grappa”, “ouzo”, “port”, “sherry”, “Scotch whisky” and “champagne”. In the food industry names such as “cheddar” “gouda” and “Parmigiano-Reggiano” and “feta” have come under dispute in the negotiations under the TRIPS Agreement for GI’s.

In these cases, the EU maintained that these names required protection and are unique products because of their place of origin. They also maintained that South African producers could not use these names. The negotiations on GI’s therefore has a significant impact on agricultural trade and therein lies the challenge, because for years South African producers and consumers have been using these names for products and not necessarily associating the product and their names with their place of origin. The question that inevitably comes to mind is how active are policy makers in defending South African brands and indigenous knowledge?

The protection afforded to these products will no doubt have an economic impact, however South Africa also needs to be proactive in protecting South African names such as “Rooibos”, “Hoodia”, “biltong”, “Karoo” and other products unique to South Africa which are being produced and sold internationally. Are South African policy makers doing enough to protect indigenous knowledge and indigenous products? Are we proactive enough?

## CONSUMER PRIVACY: HOW SAFE IS CONSUMER INFORMATION?

By ***Lekgala Morwamohube***


The collection and use of consumer information has recently exploded with the advent of internet and online commerce including social media. According to Section 11 of the Consumer Protection Act 68 of 2008 (CPA), a consumer has a right to privacy and can refuse to accept or to pre-emptively block, any approach or communication if the approach or communication is primarily for the purpose of direct marketing. However, Internet commerce and its ability to increase the capability of commercial entities to gather and make use of consumers' personal information have made the law's ineffectiveness, in the area of privacy, much more apparent . According to the findings of the 2015 Norton Cyber-security Insights Report, over 8.8 million South Africans became victim to cyber-crime in 2015 and (67%) felt that it is more difficult to control their personal information as a result of smartphones and the Internet .The report further indicates that 76% of South Africans cited identity theft is a serious problem affecting most South Africans lately. In responding to this challenge, the National Consumer Commission (NCC) has recently joined 11 enforcement authorities of the London Action Plan international Cyber Security Enforcement Network whereby Memorandum of Understanding (MoU) was signed in June 2016 to promote international cooperation and activities targeting unlawful spam and other related problems . These include online fraud and deception, phishing, and dissemination of viruses as well as unsolicited calls and texts . The MoU strengthens the international fight against this global problem and provides a framework for information and intelligence sharing among enforcement agencies around the world. Several projects are underway to increase joint working and intelligence sharing activity with members of the LAP which might bolster South Africa's regulation of unsolicited communications.

Notwithstanding the participation of the NCC in the LAP, the Protection of Personal Information Act (POPI) 04 of 2013 has also received much media coverage recently. There has been much debate about its implications and also in terms of the implications for

the commercialization of intellectual property (IP) in South Africa. Does POPI adequately protect consumers 'personal information? Few examples can be highlighted in relation to this question. For example, at present, spam is regulated on an opt-out basis in South Africa which means that a marketer can send unsolicited communications to a consumer, but must allow the consumer to opt out from receiving further communications. When the Protection of Personal Information Act (POPI) comes into force, this will change to an opt-in system of regulation. Under such a system, marketers will not be allowed to send unsolicited communications without consumers' consent unless one of POPI's specific requirements is met. Furthermore chapter 3 of POPI says that when businesses intend to use consumer personal information for marketing of goods or services, the consumer must be informed thereof and give his/her consent Failure to do so is an offence, punishable by a fine or imprisonment of up to 12 months, or both.

16. *Berkey, J. (2000). Implication for the WTO for Food Geographic Indications. American Society of International Law. Volume 5. Issue 4. Washington D.C. retrieved https://www.asil.org/insights/volume/5/issue/4/implications-wto-protections-food-geographic-indications*
17. *Tindall, C. D (2002) Argus rules: commercialization of personal information*
18. *the Norton Cyber-Security Insight Report 2015*
19. *The London Action Plan international cyber-security Enforcement Network news update, June 2016 accessed from http://londonactionplan.org/news/commitment-to-international-cooperation-london-action-plan-members-sign-mou/*
20. *Ibid*
21. *Chapter 3 of the Protection of Personal Information Act 04 of 2013*

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