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Consumer protection measures in the new and developing regulatory framework for the South African insurance industry

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ABSTRACT

The financial services industry in South Africa is often perceived as guilty of unfair and prejudicial practices. To curb this perception, the government has introduced several new legislative measures, specifically in insurance law.

This research paper will examine consumer protection measures in the insurance industry's new and developing regulatory environment. This investigation aims to provide an answer to the following research question: “How will the proposed regulatory framework impact consumer protection in the insurance industry?” Several Ombud determinations and High Court judgments indicated that consumers need regulatory protection.

The Twin Peaks regulatory model will be compared with preceding legislative measures. Historically speaking, South African insurance law was significantly influenced by the legal systems of other countries, such as the United Kingdom. Given the said history, a comparative analysis of South African insurance law and the UK system is essential - to see how we can improve our existing legislative framework.

Treating Customers Fairly (TCF) principles are an essential feature of the new regulatory framework in South Africa. The said principles clearly indicate what is expected from insurers when dealing with their customers. This study seeks to determine whether the new regulatory framework is likely to improve the protection that consumers and policyholders enjoy.

The findings of this study will show whether the Twin-Peaks model is likely to encourage and ensure a fair, safe and stable insurance market and achieve one of its primary goals, namely, to protect consumers in the insurance sector. In addition, the study aims to assess whether the current legal environment will lead to higher levels of integrity, fairness, transparency, and meaningful disclosure in the industry.

SECTION 1

1.1 Background

Financial regulations are constantly changing in South Africa. In an attempt to establish a suitable regulatory framework with the objective of protecting consumers, rules are continuously reviewed and amended. International trends have a significant influence on lawmakers in South Africa.[1] The previous statutory framework was 'proof positive' that the insurance industry in South Africa has always been highly regulated. Millard submitted that "although legislation plays an important role in regulating the insurance industry, common law principles and precedents (case law) are also important sources of insurance law".[2]

Precedents are an essential source of insurance law, especially when one considers the role that judgments such as *Mutual and Federal Insurance Co v Oudtshoorn Municipality* played in developing the South African Insurance law.[3] Statutes that have for years been regulating the insurance industry include the Long-Term Insurance Act (LTIA),[4] Short-Term Insurance Act (STIA)[5] and the Financial Advisory and Intermediary Services Act (FAIS).[6] Both the LTIA and STIA have as their objectives the regulation of matters such as the registration of insurers, as well as certain other activities and functions of insurers. Both of these Acts contain provisions on prudential matters, as well as on market conduct. The market conduct regulations are found in two sets of Policyholder Protection Rules (PPRs) in terms of the LTIA and STIA.[7] Millard argues that, even though the LTIA

[1] Millard "The Impact of the Twin Peaks Model on the Insurance Industry" 2016 PER/PELJ 19.
[2] Millard "CoFi and T (CF): Further Along the Road to Twin Peaks And A Fair Insurance Industry" 2018 THRHR 374.
[3] *Mutual and Federal Insurance Co v Oudtshoorn Municipality* 1985 1 SA 419 (A).
[4] Long-Term Insurance Act 52 of 1998.
[5] Short-Term Insurance Act 53 of 1998.
[6] Financial Advisory and Intermediary Services Act 37 of 2002.
[7] Millard 2018 THRHR 377.

and STIA regulate market conduct, "the true revolution on market conduct regulation was … brought about by the FAIS Act as it contains strict rules on the conduct of financial advisors and intermediaries".[8]

The sections that provided for prudential matters in the LTIA and STIA were repealed and replaced by the new Insurance Act,[9] which came into effect on 1 July 2018. This Act's objectives are:

> "To provide for a legal framework for the prudential regulation and supervision of insurance business in the Republic that is consistent with the Constitution of the Republic of South Africa, 1996, and promotes the maintenance of a fair, safe and stable insurance market; to introduce a legal framework for microinsurance to promote financial inclusion; to replace certain parts of the Long-term Insurance Act, 1998 and the Short-term Insurance Act,1998; and to provide for matters connected therewith."[10]

The difference between the new Insurance Act on the one hand, and the LTIA and STIA on the other, lies in the degree of focus placed on prudential issues in particular. The latter two statutes contain rules on both prudential and market conduct matters, while the Insurance Act has a strong prudential focus.[11]

By regulating primarily prudential matters, the Insurance Act gives effect to the first part of the adopted Twin Peaks model. The promulgation of the Conduct of Financial Institutions (CoFI) Bill will see the completion of the second and final part of the Twin Peaks model, which is the regulation of the market conduct of financial institutions. The first draft of the CoFI Bill was published in December 2018, and

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[8] *Ibid*.
[9] Insurance Act 18 of 2017.
[10] See the purpose of Act 18 of 2017.
[11] Millard 2018 THRHR 379.

the second draft on the 29th of September 2020.[12] Once enacted, the CoFI Act will replace the PPRs under both the LTIA and STIA and the General Code of Conduct in terms of the FAIS Act.[13]

It has been contended that the legislature's decision to separate prudential and market conduct regulation will have far-reaching consequences for the insurance sector.[14] Against such a backdrop, the question emerges as to the impact of this new statutory framework on consumers and what changes this will bring about for the industry.

1.2 Research question

How will the proposed regulatory framework impact consumer protection in the Insurance Industry?

The purpose of this research paper is to answer the question of whether the proposed regulatory framework will introduce sufficient measures to protect consumers in the insurance industry. Answering this question will require comparing the previous statutes, current legislation and the relevant introduced bills. Legal precedent will also play an important role, as it constitutes an essential source of insurance law.

1.3 Methodology

For this research, a variety of sources are used, and these include:

- **i.** Legal textbooks;
- **ii.** Legislation;
- **iii.** Journal articles;
- **iv.** Case law (the FAIS Ombud determinations);

[12] National Treasury Notice 519 of 2020.
[13] *Ibid*.
[14] Millard 2018 THRHR 390.

v. Government or other official publications;

vi. Comparative sources.

Foreign jurisdictions like the UK that have influenced (and still influence) South African insurance law will also be investigated.

1.4 Proposed structure

Section 1 of this research paper consists of the Research Proposal. Section 2 focuses on the previous laws that regulated the South African insurance industry, specifically the extent to which they protected consumers. Section 3 discusses the development of these laws. Specific legislation will be assessed. Section 4 is an in-depth analytical comparison between English insurance law and South African insurance law. Section 5 deals with the current laws and proposed bills. This section also assesses the improvements made as far as consumer protection measures are concerned. Section 6 (the final sectio) sets out the findings of this research and provides an answer to the research question above.

1.5 Delimitations

General Consumer Protection statutes that do not directly impact insurance companies will not be discussed, e.g. the Consumer Protection Act 68 of 2008.

Other aspects of the regulation of the insurance business in general, which are not pertinent in the context of market conduct, will also not be discussed in any detail.

SECTION 2

Background of the South African insurance industry and the introduction of consumer protection measures

2.1 History of the South African insurance industry

As alluded to in the previous section, financial regulation in South Africa is ever-changing and evolving. Previously, the insurance industry functioned under the auspices of the Financial Services Board (FSB). The FSB was a statutory body that derived its powers from the Financial Services Board Act.[15] Sham summarises it well when he states:

> "The insurance industry was governed by the FSB, which scope was a combined focus which included the regulation for both prudential and conduct matters relating to financial institutions and the provision of financial services. In this scope banks were not included."[16]

The general regulatory model for financial services operational at the time was informally called the "silo" regulation and supervision model. The said model focused on supervising a specific industry (such as insurance or banking).[17] Under the previous legal dispensation, specific regulations focused on specific sectors, leaving a number of general overarching matters under-regulated or unregulated, including the adequate protection of consumers of financial products.

The "silo" model continued to exist for quite some time, which fact is evidenced by the separate existence of both the LTIA and STIA. The latter two pieces of

[15] Financial Services Board Act 97 of 1990.

[16] Sham A Comparison Between The COFI Bill and FAIS Act In Light of The TCF Requirements (LLM dissertation 2012 UJ) 7. Available from: http://hdl.handle.net/102000/0002 (Accessed: 22 August 2020.)

[17] Millard 2016 PER/PELJ 19.

legislation replaced the Insurance Act 27 of 1943, which had governed the insurance industry up to that time.[18] Both the LTIA and STIA aimed to regulate, *inter alia,* the registration of insurers.[19] Both Acts focused more on insurers than on consumers. The Acts prohibit the provision of both long-term and short-term insurance services by the same company.[20] Section 8(6) of the STIA (as amended) prohibits short-term insurers from issuing funeral and assistance policies, as such policies may be provided only by long-term insurers. Prior to the 2001 amendment of these two Acts, the issue of consumer protection had not been sufficiently addressed and that is why there was a need to introduce amendments in the form of PPRs. According to the 2014 Treasury Discussion Paper, financial institutions were able to take advantage of the situation and mistreat their clients, with the latter having no specific laws to rely on for protection.[21] Inadequate rules existed to address the unfavourable situation of consumers in the insurance industry.[22] The introduction of PPRs in 2001 (in terms of LTIA and STIA) was an important step to address this unfairness.

2.2 The introduction of PPRs into insurance law

The PPRs were first published in the Government Gazette on 23 February 2001, and they came into operation in July 2001. They were first amended in 2004, and there has been a further round of amendments since then.[23] The PPRs are promulgated in terms of section 62 of the LTIA and section 55 of the STIA, respectively. The main objective of these rules was to provide consumers of insurance products with protection. Millard argues that the main aim of the 2001

[18] Benfield & Vivian "Insurance in the 1990s: The Long-Term Insurance Market 1990-2000" 2003 South African Journal of Economic History 280.
[19] Millard 2018 THRHR 377.
[20] Surtherland "Insurance Law" 2006 Annual Survey of South African Law 540.
[21] National Treasury "Treating Customer Fairly in The Financial Sector: A Draft Market Conduct Policy Framework for South Africa (December 2014) 6. http://www.treasury.gov.za/public%comments/FSR2014/Treating%20Customers%20Fairly%20in%20the%20Financial%20Sector%20Draft%20MCP%29Framework%20Amended%20Jan2015%20WithAp6.pdf.
[22] *Ibid.*
[23] Millard 2018 THRHR380.

amendments to the LTIA and STIA was to introduce PPRs which would engender vitally necessary market conduct regulation.[24]

2.3 Consumer protection measures in the 2001 PPRs

Measures worth noting in relation to the 2001 PPRs include rules concerning disclosures and special regulations regarding the marketing of products directly to the public. Such rules applied equally in both the LTIA and STIA. The purpose of establishing rules on disclosure was to enable policyholders to make informed decisions regarding long-term or short-term insurance products and to ensure that insurers and intermediaries conduct business honestly and fairly, as well as with due care and diligence.[25]

As far as the disclosure rules in terms of these Acts are concerned, an intermediary or insurer bore the responsibility of proving that the disclosure was made.[26] The onus being on the insurer implies that it is incumbent on the insurer, or the intermediary who assisted the consumer with purchasing the relevant product, to demonstrate that the insurer did make the disclosure in dispute. Rule 3(a) of both sets of PPRs further provided that the disclosures must be in plain language and structured in a way that it promotes easy understanding or comprehension and avoids uncertainty or confusion. Any written or printed disclosures, including any policy or policy alteration issued to policyholders, must be issued in a clear and legible font size, spacing and format.[27] These rules placed an obligation on insurers and intermediaries to ensure that consumers fully understand the relevant insurance product before purchasing. “Plain language” means that even a person without formal education should be able to understand the features of the product. The PPRs also addressed the matter of duplication of disclosures to the same

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[24] *Ibid.*
[25] Rule 2 of both set of 2001 Policy Protection Rules (PPRs).
[26] Rule 3(a) of both set of 2001 PPRs.
[27] Rule 3(b) of both set of 2001 PPRs.

policyholder. Moreover, it was particularly stipulated that there need not be a duplication or repetition of disclosures unless there are material or significant changes that have occurred which will affect such policyholder.[28]

Both sets of rules provided for obligatory disclosures. (It is noted that the wording of the relevant provisions differs slightly between the two sets of PPRs.) In this regard, the rules required intermediaries to ensure that certain disclosures are made when dealing with policyholders, especially at the commencement of such dealings. These disclosures should be made in writing, and where they are made orally, they must be confirmed in writing at a future stage or by using any appropriate electronic medium or telefax.[29] These obligatory disclosures include the disclosure of full names, titles and designations of intermediaries; postal and physical addresses of intermediaries' head offices and relevant service offices; as well as telephonic and electronic communication details of contact persons.[30] The disclosure of such details to a policyholder is of fundamental importance, as it enables a policyholder to make informed decisions about the product being offered to such policyholder. To ascertain the identity of a person selling an insurance product is crucial for holding such person accountable in instances where unfairness or impropriety occurred in the relevant person's dealings with a policyholder. One could convincingly argue that the introduction of the PPRs to the insurance sector represented a major step in the right direction as far as consumer protection is concerned. Other important disclosures included the legal status of an intermediary, as well as the confirmation of any contractual relationship with the insurer or various insurers.[31] The objective of this rule is to provide the policyholder with an option to confirm such information with the relevant insurer or insurers. The 2001 PPRs did not only impose disclosure duties on intermediaries – insurers are similarly required to make certain disclosures.

[28] Rule 3(e) of both set of 2001 PPRs.
[29] Rule 4.1 of both set of 2001 PPRs.
[30] Rule 4.1 (b) of both set of 2001 PPRs.
[31] Rule 4.1 (c) of both sets of 2001 PPRs.

In terms of Rule 4.3 of both sets of PPRs, regarding the variation of a policy, an insurer had a duty to disclose *inter alia* the name, class or type of policy and the nature and extent of the benefits. Rule 4.3 also mentioned considerations such as disclosure of the manner of payment or giving of benefits. Moreover, in cases where the policy has an investment component, brief details of how the policy's value has been determined must be provided. Also required is a disclosure on the possibility to share in bonuses or surpluses of any kind.[32]

The measures introduced by the PPRs to protect consumers of insurance products are intended to instil consumer confidence in the industry and protect consumers from unfair treatment by insurers and intermediaries. Furthermore, "the PPRs were introduced to put consumers at the centre of the financial services dealings, as some financial institutions have on occasion conducted their business in a manner that is prejudicial to their customers".[33]

Financial institutions are aware that most consumers do not understand their insurance policies' wording and do not know how to interpret policy clauses. Consequently, insurers have been known to amend policies unilaterally and arbitrarily to suit their purposes.[34] An attempt was made to deal with such malpractice and unfairness through the introduction of Rule 7.1 of the LTIA PPRs, which stipulated that:

> "No insurer or intermediary may advise or ask a policyholder to terminate an existing policy and replace it wholly or partially with a replacement policy, without disclosing to the policyholder the potential implications, cost and consequences of such replacement, including fees and charges being

[32] Rule 4.2 (e) of both set of 2001 PPRs.
[33] National Treasury Discussion Paper (December 2014) 6.
[34] FAIS Newsletter: Publication of 2016. Compliance Reports 4. https://www.fsca.co.za/Regulated%20Entities/Regulated%20Entities%20Documents/Newsletter%20Volume%2020.pdf.

paid twice, the influence of age on the premium payable, any tax advantage lost, waiting period for claims under new policy…".[35]

The PPRs in terms of both the LTIA and STIA differed to some extent. However, both sets of rules were intended to offer protection to consumers. Rule 10.3 of the STIA PPRs prohibited the insurer from unilaterally terminating the policy without directly notifying the policyholder; or by satisfying itself that the intermediary has notified the policyholder; or if neither of the two means above is possible, by the publication of such notice in two editions of a newspaper circulating in all areas in which it is reasonably believed that policyholders reside.[36]

Another important consumer protection measure worth mentioning is the right of policyholders to lodge a complaint (Rule 12.1 of the LTIA PPRs). In terms of this rule, if there is a contravention of the PPRs by any party involved in a policy held by a policyholder, he or she may lodge a complaint with the party involved, and if such complaint is not resolved to the former's satisfaction, the complaint may be referred to the Registrar.[37] This is one of the key measures in the regulation of long-term insurance, as it ensures that unfairness does not go unaddressed. This rule was considered a boost to consumer confidence in the industry, as it afforded consumers avenues they could explore in case of discontentment with how either the insurer or independent intermediaries had conducted their business. Not only do these rules constitute a mechanism to monitor and regulate how insurers conduct their business, they also provide for penalties in cases where the insurer or the intermediary contravened rules. If an insurer or intermediary are found guilty of an offence, they are liable to a penalty or a fine in terms of section 66(1)(c) or section 67(1)(c) of the LTIA.[38] With regard to short-term insurance, Rule 15 of STIA PPRs makes provision for penalties to be levied in the event of rule contraventions.

[35] Rule 7.1 of LTIA 2001 PPRs.
[36] Rule 10.3 (b) of STIA 2001 PPRs.
[37] Rule 12 .1 of LTIA 2001 PPRs.
[38] Rule 14 of STIA 2001 PPRs

2.4. Conclusion

As elaborated above, the PPRs in terms of the STIA and LTIA were introduced to bring about much-needed change to the insurance industry, which typically has been known to be one-sided. As the entity that drafts insurance policies, an insurer is generally in a favourable position relative to a consumer. Accordingly, PPRs tend to favour policyholders more than insurers. They serve as a counterweight to the traditional imbalance between insurers and consumers.[39] The PPRs are an important set of measures that have brought fairness into the insurance industry, with the ultimate aim of putting all the parties to an insurance contract in an equitable position. The latest version of PPRs will be discussed under section 5 of this paper. The following section discusses recent developments in relation to the rules directed at protecting consumers of insurance products.

[39] Huneberg "Consumer Protection Measures in Non-life Insurance Contracts: A South African and Australasian Trend" 2019 OBITER 170.

SECTION 3

Consumer protection measures in terms of the FAIS Act

3.1 Introduction

The previous section discussed the introduction of measures to protect insurance consumers from unfairness. The provisions contained in the PPRs laid the ground for development of these measures. It has been set out below that even after the first publication of PPRs, the public outcry about insurance companies did not end. This is evident by the release of a 2014 National Treasury discussion document.

The discussion document released by National Treasury in December 2014 raised the concern that customers in the financial sector were not protected sufficiently in South Africa and suggested that more had to be done to ensure that the providers of financial products and services treated their customers fairly.[40] Excessive fees, a wide range of incomprehensible charges, as well as the design and sale of inappropriate products served as examples of unfair (even abusive) treatment of customers in the financial industry.[41] It called for the development of rules and other legislation to address the dissatisfaction existing with the industry. However, it was also submitted that the true revolution in market conduct regulation was introduced by the FAIS Act, which also finds application in the insurance sector.[42]

In light of this discussion, this paper will now discuss the consumer protection measures introduced in terms of the FAIS Act. This is to determine the extent of protection afforded to consumers of financial services and products, particularly consumers in the insurance industry.

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[40] National Treasury Discussion Paper (December 2014) 6.
[41] *Ibid*.
[42] Millard 2018 THRHR 377.

3.2 The FAIS Act

The FAIS Act was promulgated on the 30th of September 2004 and signalled a new dispensation for intermediaries and advisors.[43] When the FAIS Act was enacted, its main legislative functions were to control all activities relating to financial services rendered by financial institutions.[44] This was later reformulated by the Financial Services Board Amendment Act[45] to indicate that the "… first function of the Act was to supervise the compliance with the law governing financial institutions and the provision of financial services".[46] The Financial Services Board (FSB) was empowered "… to promote initiatives and programmes by financial institutions and bodies representing the financial services industry to educate and give information to the users and prospective users of financial products and services".[47]

The FSB has also been assigned duties that relate to consumer protection. In this regard, Van Zyl submitted that:

> "The assignment to the FSB of objectives relating to consumer protection was in line with modern international trends, especially during the first decade of the FSB's existence. During this time, consumer protection (with its concomitant ideals of integrity, fairness, transparency and disclosure in the rendering of a financial service), became one of the main objectives of financial services regulation all over the world."[48]

After the FAIS Act's promulgation, there was hope that this would change the way financial institutions conduct their business. By liaising with internationally

[43] Hatting Millard *The FAIS Act Explained; A guide to Understanding the Financial Advisory and Intermediaries Act 37 of 2002 (*2010) 1.
[44] Van Zyl *Financial Advisory and intermediary services manual* (2004) 1-7.
[45] Financial Services Board Amendment Act 12 of 2000.
[46] S 2 of Act 12 of 2000.
[47] *Ibid.*
[48] Van Zyl 1-8.

representative organisations such as the International Association of Insurance Supervisors (IAIS), the International Organisation of Securities Commissions (IOSCO), the African Association of Insurance Supervisors, and the International Network of Pension Regulators and Supervisors (INPRS), the FSB, in its capacity as regulator and administrator of the FAIS Act, ensured that regulation in the space of intermediaries was kept on the highest level possible.[49]

The FAIS Act was drafted with the FSB carefully noting any possible inconsistencies between the FAIS Act and the PPRs (in terms of the LTIA and STIA).[50] Expectations were that the FAIS Act would provide for more effective consumer protection interventions than the PPRs. The FAIS Act created a regulatory framework for intermediary and advisory services in relation to financial products. The Act also applies to insurance products. The FAIS Act finds application in how insurance companies and intermediaries conduct their business. The law relating to intermediaries is of paramount importance since many insurance contracts are concluded through insurance intermediaries. An insurance intermediary performs acts that result in the conclusion or renewal of insurance contracts.[51]

3.3 Consumer protection measures in the FAIS Act

The FAIS Act's objective is to protect consumers who are adversely affected by the market conduct of financial services providers.[52] The PPRs in terms of the LTIA and STIA were introduced to offer protection to the consumers of insurance products. This serves as proof of the legislature's determination to regulate the industry in order to instil confidence in consumers.

[49] Van Zyl 1-7.
[50] Hatting Millard 4.
[51] Havenga *The Law of Insurance Intermediaries* (2001) 1.
[52] Hatting Millard 43.

3.3.1 Advice in terms of the FAIS Act

In the 'definitions' section of the FAIS Act, 'advice' is defined as "any recommendation, guidance or proposal of a financial nature furnished by any means or medium to any client or group of clients."[53] Advice in terms of the Act would, among other things, pertain to the purchase of any financial product or the investment in any financial product.[54] It has been submitted that the legislature meant to give this term an extensive meaning in order to include as many recommendations and proposals as possible, along with as much guidance as possible, under the FAIS Act. The reason for this is to spread the consumer protection net as wide as possible. The need for protecting consumers continues to grow as the members of the public are generally not well-versed in financial products.[55] Financial products are sophisticated and complicated in nature, and therefore consumers must obtain proper guidance from advisors before committing themselves to insurance contracts. It follows that in order to find out whether advice was issued, the factual situation between the client and the person advising the former should be analysed.[56] In situations where a consumer claims that advice had been given, the presumption in the Act is that advice had actually been given. This results from the wide meaning assigned to the term "advice", and, consequently, the alleged adviser bears the onus to rebut this presumption.[57] Providers of financial services and products and their representatives are advised against giving advice without holding proper credentials.[58]

[53] S 1 of Act 37 of 2002.
[54] Hatting Millard 6.
[55] Hatting Millard 43.
[56] Van Zyl 1-13.
[57] Hatting Millard 43.
[58] Hatting Millard 44.

3.3.2 Intermediary services

The FAIS Act does not define intermediary services. However, it sets out the meaning of the term in detail. It can, among other things, mean any act other than furnishing advice that a person performs for or on behalf of a client or product suppliers, which leads to the entering or offering to enter into any transaction relating to a financial product with a product supplier.[59] This is the case even if the client may only enter into such a transaction in the future after the intermediary service has been rendered.[60] It has been submitted that even though intermediary services are not defined in the Act, it would have been impossible to provide consumer protection in terms of the Act without including intermediaries.[61]

3.3.3 The client-advisor/intermediary relationship

Before the introduction of the FAIS Act, the relationship between clients and advisors (agents) was regulated by the law of agency. This means that the mandatary or agents had a common law duty to act with care and skill, good faith and to be accountable.[62] The question is whether the FAIS Act materially changed the legal position in terms of common law and whether this Act is an improvement of the previous dispensation. Put differently, does the FAIS Act come with a new and different standard that is an improvement on the standard of reasonable care and skill as well as the duty to act in good faith that had always formed part of South African common law?[63]

It has been postulated that the FAIS Act introduced a brand-new dispensation where the duties and obligations of advisors and intermediaries towards clients are now based on legislation. The Act assigns responsibilities to all the intermediaries

[59] S1 (3) of Act 37 of 2002.
[60] S1 (1)(a) of Act 37 of 2002.
[61] Hatting Millard 44.
[62] Havenga 4.
[63] Hatting Millard 82.

who fall within the ambit of the Act. In addition, the Act provides for sanctions in the case of non-compliance, which include debarment.[64] This also means that in a situation where a client is prejudiced owing to the adviser or intermediary's non-compliance with his or her duties, such breach of statutory duty is indicative of wrongfulness.[65] Furthermore, it was held that the infringement of the duty or the rule itself is not wrongful, but it is the infringement of the "… interest of the plaintiff in a legally reprehensible manner" that is wrongful.[66]

This principle is illustrated by code 3(1)(a) of the General Code of Conduct,[67] which states that when a financial service is rendered, "… representations made and information given to a client by the provider must be factually correct".[68] It follows that if a provider or its representative makes a factually inaccurate representation to a client, he or she infringes on the right to receive factually correct information about the product or the service as provided for in the FAIS Act. Such conduct by the provider or the representative is wrongful and constitutes a delict, should the client prove that the former acted with fault.[69] Another possibility is that non-compliance with the Code constitutes a breach of contract, leading to a contractual action against the provider or its representative.[70]

All the role players in the financial industry should maintain a compliance checklist to guide them through the process. This ensures that insurers and intermediaries comply with the Act and that all role players observe a minimum standard of care and skill. It has been submitted that these standards enforce the consumer's rights and attach consequences to non-compliance.[71]

[64] Hatting Millard 82.
[65] Neething *et al Law of Delict* (2010) 76.
[66] *Ibid*
[67] See Section 16 of Act 37 of 2002 below.
[68] General Code of Conduct for Authorised Financial Services Provider and Representatives, 2003.
[69] Hatting Millard 82
[70] Hatting Millard 83.
[71] *Ibid*.

3.3.4. Rights and duties of the parties to the relationship

The rights and duties found under common law have been incorporated into legislation that seeks to protect the consumers. Sections 15 and 16 of Chapter IV of the FAIS Act serve as the most important sources of information on the rights and duties of providers and clients and, among other things, make provision for a code of conduct.[72] Section 16 of the Act stipulates as follows:

"(1) A code of conduct must be drafted in such a manner as to ensure that the clients being rendered financial services will be able to make informed financial decisions, that their reasonable financial needs regarding financial products will be appropriately and suitably satisfied and that for those purposes authorized financial service providers, and their representatives are obliged by the provisions of such code to-

(a) Act honestly and fairly, and with due skill, care and diligence, in the interest of clients and the integrity of the financial services industry;

(b) Have and employ effectively the resources, procedures and appropriate technological system for the proper performance of professional activities;

(c) Seek from clients appropriate and available information regarding their financial situations, financial product experience and objectives in connection with the financial service required;

(d) Act with circumspection and treat clients fairly in a situation of conflicting interest; and

(e) Comply with all applicable statutory or common law requirements applicable to the conduct of business.

(2) A code of conduct must in particular contain provisions relating to-

(a) The making of adequate disclosures of relevant material information, including disclosures of actual or potential own interests, in relation to dealings with clients;

(b) Adequate and appropriate record-keeping;

[72] Hatting Millard 85.

(c) Avoidance of fraudulent and misleading advertising, canvassing and marketing;

(d) Proper safe-keeping, separation and protection of funds and transaction documentation of clients;

(e) Where appropriate, suitable guarantees or professional indemnity or fidelity insurance cover, and mechanisms for adjustments of such guarantees or cover by the registrar in any particular case;

(eA) The control or prohibition of incentives given or accepted by a provider; and

(f) Any other matter which is necessary or expedient to be regulated in such code for the better achievement of the objects of this Act."

There is an overlap between the wording of section 16 and the PPRs as discussed in the previous section. Rules regarding disclosure of material information seem to be included in the rules that regulate the relationship between the provider and the client. This indicates the intention of the legislature to protect the policyholder who is not familiar with the terminology used in the specific industry in the financial sector, such as the insurance industry. This section assigns several duties to providers and their representatives. For each duty placed on a provider, the client has a corresponding right.[73]

The duties assigned by the FAIS Act to Financial Services Providers (FSPs) include displaying a certified copy of the licence on all premises of their business.[74] This makes it easier for the client to know that the FSP is registered to conduct business in, for instance, the insurance sector. This licence should also be available to any other person requesting it, and the FSP must be able to produce it within a reasonable time to prove its licensed status.[75] This provision is in line with the objectives of the Act and the need to improve the financial sector and instil consumer confidence.

[73] Hatting Millard 86.
[74] S8(8)(a) of Act 37 of 2002.
[75] S8(8)(c) of Act 37 of 2002.

3.4 Codes of conduct in terms of the FAIS Act[76]

Provision is made for five different codes of conduct in terms of the FAIS Act. Their purpose is to ensure that the clients of the FSPs will be able to make informed decisions and that their reasonable financial needs will be met suitably and appropriately.[77] These five codes of conduct are as follows:

- The General Code of Conduct (GCC) applies to all FSPs, excluding banks as far as they are rendering financial services relating to short-term deposits.[78]
- Code of Conduct for Authorised Financial Services Providers and Representatives conducting Short-term Deposit Business (Short-term Deposit Code) for those banks that render financial services relating to short-term deposits.[79]
- Code of Conduct for Administrative Financial Services, known as the "Administrative Code".[80]
- Code of Conduct for Discretionary Financial Services Providers, also known as discretionary code.[81]
- Code of Conduct for Forex Investment Business Financial Services Providers. (Forex Code.[82]

These codes are the main pillars of the regulations on market conduct. However, only the General Code of Conduct (GCC) will be discussed.

[76] S15 of Act 37 of 2002.
[77] Hatting Millard (2010) 86.
[78] Published under BN 80 of 2003 "General Code of Conduct for Authorised Financial Services Providers and Representatives" of 8 August 2003.
[79] Published under BN 102 of 2004 "Specific Code of Conduct for Authorised Financial Services Providers and Representatives conducting Short-term Deposit Business" of 29 September 2004.
[80] Published under BN 79 of 2003 "Notice on Codes of Conduct for Administrative and Discretionary Financial Services Providers" of 8 August 2003.
[81] Published under BN 79 of 2003 "Notice on Codes of Conduct for Administrative and Discretionary Financial Services Providers" of 8 August 2003.
[82] Published under BN 39 of 2004 "Code of Conduct for Authorised Financial Services Providers and Representatives Involved in Forex Investment Business" of 30 March 2004.

3.4.1 General Code of Conduct

The GCC was introduced as part of the legislature's plan to regulate the financial industry, especially the market conduct in the industry. Market conduct regulation specifically refers to the mandatory practice of the client being treated fairly by a functionary who acts with due skill, care and diligence and in the client's interests.[83] In a brokerage agreement, the duty to act with reasonable care and skill is a critical broker's duty.[84] This duty is implied by law and, as ruled by the Court in *Stander v Raubenheimer,*[85] it is, therefore, a *naturale* of the agreement.[86] It follows that when an FSP or its representative performs a financial service, that service must be factually accurate,[87] avoid confusion or uncertainty and should not be misleading.[88] The service must be provided in plain language[89] and, if in writing, must be in clear and readable print size, spacing and format.[90] It must be adequate and appropriate in the circumstances,[91] and this should be rendered timeously so as to afford the client a reasonable time to make an informed decision".[92] Services should be rendered in terms of the contract as well as reasonable requests from or instructions by the client.[93] These common-law measures overlap with those found in the PPRs, and emphasise the importance of the duty of care and skill when conducting brokerage business. Another vital measure found in the GCC is confidentiality.[94] Information that was gathered from the client by the FSP must always be kept confidential. This protects the client against other parties accessing his or her sensitive information.

[83] Hatting Millard 116.
[84] Havenga 21.
[85] OPD, 11 November 1993, case no 1611/91. (Unreported).
[86] See *David Trust and Others v Aegis Insurance Co Ltd and Others* 2000 3 SA 289 (SCA) at 298G-299B; *Gordon v AA Mutual Insurance Association Ltd* 1988 1 SA 398 (W) at 404C-D; *Stander v Raubenheimer* 1996 2 SA 670 (O) at 675B-D.
[87] Cl 3 (1) (a) (i) of the GCC.
[88] Cl 3 (1) (a) (ii) of the GCC.
[89] Cl 3 (1) (a) (ii) of the GCC.
[90] Cl 3 (1) (a) (iv) of the GCC.
[91] Cl 3 (1) (a) (iii) of the GCC.
[92] Cl 3 (1) (a) (iv) of the GCC.
[93] Cl 3 (1) (d) of the GCC.
[94] Cl 3 (3) of the GCC.

When rendering advice, specific steps must be taken to determine a client's financial situation, financial product knowledge and experience, and financial objectives.[95] Products that are suitable to meet the client's risk profile and financial needs must be identified.[96] Disclosure of all the relevant information to the client is also considered to be a fundamental duty.[97] It has been stated that full and frank disclosure to clients is an essential aspect of market conduct regulation.[98] This provides clients with all the facts they need about products to make an informed decision.

It is submitted that FSPs must be cautioned against using standard "disclosure documents" as this can result in non-compliance if the document is not tailor-made to suit a specific transaction or client.[99] Whenever such documents are used, they need to be reviewed regularly by the FSPs and updated if there are any changes in their licensing conditions, exemptions and restrictions relating to the licence, contact details, changes in agreements with product suppliers, or changes of staff in the compliance department.[100]

Another critical measure concerning the FSP's representatives is that they must issue the clients with written certification that indicates the contractual relationship with the FSP. That gives the clients the right to hold the FSP responsible for the activities of the representative in terms of the contract or mandate.[101] This provision avoids a situation where any person can fraudulently act on behalf of the FSP. The name and contact details of the representative must be provided to the client and include the type of financial services and products the representative

[95] Cl 8 (1) (a) of the GCC
[96] Cl 8 (1) (b) of the GCC
[97] Cl 7 (1) (c) of the GCC
[98] Hatting Millard 121.
[99] *Ibid.*
[100] *Ibid*.
[101] S13 of Act 37 of 2002.

offers on the FSP's behalf.[102] One can therefore ask what happens when any of these measures are contravened. Put differently, what avenues can the prejudiced client exhaust when there is no adherence to the FAIS Act?

3.4.2 FAIS Ombud

The FAIS Ombud is a statutory body established in terms of Section 20 of the FAIS Act.[103] It derives its power to hear matters from the FAIS Act and, more specifically, from the Rules on Proceedings of the Office of the Ombud for Financial Services Providers, enacted by section 26 of the FAIS Act.[104] The Ombud should be a person with a legal qualification that the FSB appoints in terms of section 21 of the Act. This person must also possess sufficient knowledge of the rendering of financial services to be able to resolve disputes.[105] It must be borne in mind that even though the Ombud serves as an adjudicator in disputes resolution, the complaints against FSPs are not initiated by the Office of the Ombud. The dispute resolution process is initiated with the FSPs, and when the process has started, the FSPs should comply with their duties as determined by part XI of the GCC.[106] The prejudiced client must exhaust all the internal complaint resolution systems and procedures.[107] Internal dispute resolution procedures should be based on fairness to ensure that such a process is fair for clients, the service provider, and its staff.[108] A statutory body that will adjudicate disputes is vital to address unfairness in the financial sector.

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[102] S13(1) (b) (i) of Act 37 of 2002

[103] "This section provides that: there is an office known as the office of the Ombud for Financial Service Providers. The function of this office is done by the Ombud for Financial Service Providers. The objective of the Ombud is to consider and dispose of complaints in a procedurally fair, informal, economical and expeditious manner, with due regard to the contractual arrangement or other legal relationship between the complainant and any other person to the complaint and the provisions of the Act. Ombud must is independent and must be impartial when dealing with complaints in terms of sections 27 and 28"

[104] Millard 2016 PER/PELJ 8.

[105] Hatting Millard 159.

[106] *Ibid.*

[107] Millard 2016 PER/PELJ 8.

[108] S17(d) of Part XI of the GCC.

The Ombud is mandated to settle disputes between the FSP and/or its representatives and clients. Section 27(5) of the FAIS Act stipulates that the Ombud:

"(a) May follow and implement any procedure including mediation which the Ombud deems appropriate when investigating or determining an officially received complaint, and may allow any party the right of legal representation;

(b) Must, in the first instance, explore any reasonable prospect of resolving a complaint by a conciliated settlement acceptable to all parties

(c) May, in order to resolve a matter/complaint speedily by conciliation, make a recommendation to the parties, asking them to confirm whether or not they accept the recommendation and, where the recommendation is not accepted by a party, requiring that party to state reasons for not accepting the recommendation: Provided that where the parties accept the recommendation has the effect of a final determination by the Ombud as set out in Section 28(1)

(d) May, in a manner that the Ombud deems appropriate, delineate the functions of investigation and determination between various functionaries of the office, and

(e) May, on terms specified by the Ombud, mandate any person or tribunal to perform any of the functions referred to in paragraph (d)."

It should be mentioned that the rulings of the Ombud constitute precedents. However, it is submitted that the doctrine of precedence is suitable in cases where the Ombud is required to make a determination in issues that concern a matter of law. It then follows that the doctrine is not well suited to matters where a determination that has to be issued is fair to both parties, i.e. the insurer and insured.[109]

3.5 Conclusion

Based on the discussion of the FAIS Act, one can agree with Millard in saying that this Act brought a true revolution in market conduct regulation.[110] The Act led to

[109] Millard 2016 PER/PELJ 9.
[110] Millard 2018 THRHR 377

the significant effort to train people in the insurance industry not to make mistakes.[111] It has contributed a great deal to effective consumer protection measures in the financial sector.

The following section compares the measures employed by other countries against the South African measures related to consumer protection. As mentioned previously, the South African insurance industry has always been influenced by and is at par with international trends.[112]

[111] *Ibid.*
[112] Millard 2016 PER/PELJ 1.

SECTION 4

Comparison of SA insurance law to UK insurance law

Introduction

The previous sections have examined our legislature's journey in developing efficient and effective consumer protection measures in the financial sector, including the insurance industry. Having discussed these measures in terms of South African legislation, it is essential to examine other countries' legislation to determine how far they have gone to protect the consumers of the financial products. In this regard, UK insurance law will be reviewed.

4.1 United Kingdom insurance law

Insurance law in the United Kingdom (UK) has recently undergone significant reform.[113] In August 2016, the most important changes to UK insurance law in over a hundred years were effected.[114] The Insurance Act of 2015 (UK Insurance Act) brought about some significant changes to the UK insurance industry.[115] The UK Insurance Act introduced key changes to the duty of disclosure in commercial insurance contracts, the consequences for good faith breaches, and insurers' remedies for fraudulent claims.[116] The history of UK insurance law shows that consumer protection was not considered when the original legislation was drafted. An example can be found in section 18 of the Marine Insurance Act (MIA) of 1906, which regulated the insurance industry in the UK.[117] This section provided as follows:

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113 Law Commission and the Scottish Law Commission "Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims and Late Payment" (July 2014) https://www.scotlawcom.gov.uk/files/2814/0603/4624/Report_on_Insurance_ Contract_Law.pdf

114 Soyer "Insurance Act 2015 Coming into Force: Overhauling Commercial Insurance Law in the UK" 2016 22(4) Journal of International Maritime Law 253.

115 Huneberg "English Insurance Law Reforms: Lessons for South Africa" 2019 OBITER 19.

116 Soyer 2016 Journal of International Maritime Law 253.

117 *Ibid.*

> "The assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract."[118]

What is noteworthy about section 18 is that it placed a difficult task on the policyholder to disclose to the insurer "every material circumstance" that the policyholder "knows or ought to know" before entering into a contract.[119] Section 18(2) defined the phrase 'material circumstance' as "every circumstance which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk."[120]

This section implied that the insurer played a passive role; it did not need to ask any questions or indicate what it needed to know.[121] This placed a heavy duty on the insured while the insurer had a relatively straightforward role to fulfil in the conclusion and execution of the insurance contract. Reform was required in order to place the parties on a more equal footing. Another provision of the Act that was cumbersome to policyholders is to be found in section 20, which provided that:

> "Every material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true. If it be untrue, the insurer may avoid the contract."[122]

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[118] See Section 18 of the UK Insurance Act.
[119] Huneberg 2019 OBITER 20.
[120] See *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 Appeal Cases 501 where the House of Lords held that "a material circumstance is one that would have an actual effect on the decision of the prudent insurer in assessing the risk."
[121] Huneberg 2019 OBITER 20.
[122]The material representation must influence the judgement of a prudent insurer in fixing the premium or deciding whether to take the risk.

In the case of non-disclosures and misrepresentations, an insurer had only one remedy: avoidance of the contract.[123] Put differently, the contract was treated as if it had never come into existence, and all claims made under it were rejected.[124] The extensive duty placed on the insured burdened the insured and created a situation where the insured had to disclose "every material circumstance" that might have been relevant to the insurer.[125] This constituted an unfair practice that placed the already vulnerable policyholder in a disadvantageous position.[126] These problems were exacerbated by the fact that the only remedy for non-disclosure was avoidance of the contract.[127] This signalled the urgent need to introduce consumer protection measures in the UK as reform was necessary.

4.1.1 Legislative reform

As mentioned above, the UK insurance industry was regulated by a statute dating back more than a hundred years, and reform was imperative. It has been submitted that UK insurance law has experienced significant reforms by promulgating reformative statutes and case law.[128] In 2006, the Law Commission was requested to consider the existing insurance law regime in the UK to determine whether it was still fit for purpose in the modern insurance market.[129] The Commission found that the current law was outdated and out of touch with the realities of twenty-first-century commercial practice.[130] Following this, three Acts of Parliament were promulgated, namely the Third Parties (Rights against Insurers) Act 2010, the Consumer Insurance (Disclosure and Representation) Act 2012, and the UK Insurance Act of 2015.[131] The UK Insurance Act effected amendments to certain key sections of the Marine Insurance Act, even though the 1906 Act has not been

[123] Huneberg 2019 OBITER 21.
[124] S17 of the *Marine Insurance Act* 1906.
[125] Huneberg 2019 OBITER 21.
[126] Tyldesley "Insurance Law: Unfair, Unclear, Archaic and Inaccessible?"2006 64 *Amicus Curiae* 1.
[127] Huneberg 2019 OBITER 21.
[128] Tyldesley 2006 64 Amicus Curiae 1.
[129] *Ibid.*
[130] Huneberg 2019 OBITER 22.
[131] Tyldesley (2006)1.

fully repealed.[132] This paper discusses how the Insurance Act of 2015 has changed the previous legal position under the Marine Insurance Act.[133]

4.1.2 The UK Insurance Act of 2015 (The UK Insurance Act)

The UK Insurance Act was enacted to create a more equitable balance between policyholders and insurers.[134] The UK Insurance Act creates new duties for both the insurer and policyholders. It provides for the duty of disclosure before a contract comes into being and if the terms of the contract are amended.[135]

The following section provides an analysis of the provisions that have undergone reform in the UK Insurance Act.

4.1.2.1 *The Duty of Fair Disclosure*

Section 2 of the UK Insurance Act provides for the application and interpretation of the new duty of fair presentation.[136] Section 3 explains what is meant by the duty of fair presentation, namely that before a contract of insurance comes into being, the policyholder must make a fair presentation of the risk to the insurer.[137] A fair presentation of the risk is explained in subsection (3) as one that meets the requirements of full disclosure as set out in subsection (4).[138] It follows that the representation or the disclosure must be made in a way that would be reasonably clear and accessible to a prudent insurer, and "in which every material

[132] Huneberg 2019 OBITER 22.
[133] *Ibid.*
[134] Merkin Gurses "The Insurance Act 2015: Rebalancing the Interests of the Insurer and the Assured" 2015 78(6) Modern LR 1008.
[135] Hertzell Burgoyne "The Law Commissions and Insurance Contract Law Reform: An Update" 2013 2 Journal of International Maritime Law 110-111.
[136] Huneberg, 2019 OBITER 23.
[137] Ss (1) of 2015 Act.
[138] Ss (4) of 2015 Act stipulates: "The disclosure required is as follows, except as provided in subsection (5) – (a) disclosure of every material circumstance which the insured knows or ought to know, or (b) failing that, disclosure which gives the insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing those material circumstances."

representation as to a matter of fact is substantially correct, and every material representation as to a matter of expectation or belief is made in good faith."[139]

Section 4 of the UK Insurance Act describes what constitutes knowledge of the policyholder and states that a policyholder is an individual who knows only what is actually known to him or her or what is known to one or more people who are responsible for the policyholder's insurance.[140] What is noteworthy about this provision is that disclosure of knowledge under the MIA was a duty given only to the potential policyholder.[141] The significant shift that occurred to a shared responsibility for disclosure between policyholders and insurers is clear from section 5, which explains what is meant by the insurer's knowledge, namely:

> "(1) For the purposes of section 3(5)(*b*), an insurer knows something only if it is known to one or more of the individuals who participate on behalf of the insurer in the decision whether to take the risk, and if so on what terms (whether the individual does so as the insurer's employee or agent, as an employee of the insurer's agent or in any other capacity).
>
> (2) For the purposes of section 3(5)(*c*), an insurer ought to know something only if −
>
> (a) an employee or agent of the insurer knows it, and ought reasonably to have passed on the relevant information to an individual mentioned in subsection (1), or
>
> (b) the relevant information is held by the insurer and is readily available to an individual mentioned in subsection (1).
>
> (3) For the purposes of section 3(5)(*d*), an insurer is presumed to know −
>
> (a) things which are common knowledge, and section 5, which explains what is meant by the knowledge of the insurer:
>
> (b) things which an insurer offering insurance of the class in question to insureds in the field of activity in question would reasonably be expected to know in the ordinary course of business."

[139] S3(3)(*b*) −(*c*) of 2015 Act
[140] S4(2) of 2015 Act
[141] Huneberg 2019 OBITER 24.

Section 6 of the UK Insurance Act provides a general meaning for the concept of knowledge:[142]

> "(1) For the purposes of sections 3 to 5, references to an individual's knowledge include not only actual knowledge, but also matters which the individual suspected, and of which the individual would have had knowledge but for deliberately refraining from confirming them or enquiring about them.
>
> (2) Nothing in this Part affects the operation of any rule of law according to which knowledge of a *fraud* perpetrated by an individual ("F") either on the insured or on the insurer is not to be attributed to the insured or to the insurer (respectively), where −
>
> (a) if the *fraud* is on the insured, F is any of the individuals mentioned in section 4(2)(*b*) or (3), or
>
> (b) if the *fraud* is on the insurer, F is any of the individuals mentioned in section 5(1)."

Having discussed these provisions, it is clear that the prospective policyholder is now under a duty to disclose everything that he/she knows or which he/she should know that will affect the insurer's decisions, specifically, whether to accept the risk and the appropriate cover to be provided.[143] However, the policyholder is not obliged to disclose information already known to the insurer, while insurers are required to mention from the onset which information is needed to accept the insurance.[144]

The UK Insurance Act represents a major reform, as the previous legislation required the prospective policyholders to predict, without much assistance from the insurer, what information a hypothetical insurer would be influenced by.[145] This

[142] Huneberg 2019 OBITER25.
[143] *Ibid.*
[144] Huneberg 2019 OBITER 26.
[145] Birds *et al MacGillivray on Insurance Law* (1997) 575.

was burdensome to the potential policyholder. This new UK Insurance Act has created a "duty of fair presentation", which encourages a more active and not a passive role by insurers and has also specified and clarified what is regarded as "known" or "presumed-to-be-known matters".[146]

Section 8 of the new Act stipulates the remedies available for the insurer in circumstances of a breach of contract. This section provides that if the potential policyholder breaches the duty of fair presentation, either deliberately or recklessly, the insurer is entitled to avoid the policy and retain all premiums paid. In circumstances where a policyholder's breach is not deliberate or reckless, the prejudiced insurer can avoid the policy and return all premiums paid. However, the insurer should prove that it would not have entered into the policy at all.[147] If the insurer would have entered into the policy, but not on the same terms as the initial policy, the policy will be treated as if it included those terms. Lastly, if the insurer would have entered into the contract, but would have charged a higher premium, the insurer may proportionately reduce the amount that had to be paid on a claim to reflect that premium adjustment.[148] This was a much-needed change, as the insurer was previously able to refuse all claims under an insurance contract if the duty of disclosure at pre-contract was breached, even if a broker committed the breach.[149]

The UK Insurance Act provides a range of remedies depending on the type of breach committed. It is necessary to mention that these remedies are much fairer to the potential policyholder as the insurer is no longer allowed to avoid the contract in its entirety.[150] This is to give effect to the balance of rights intended by the new

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[146] The potential policyholder before entering into a contract of insurance, will be required to disclose either: every matter which they know, or ought to know, that would influence an insurer's judgment in deciding whether to insure the risk and on what terms or adequate information to put an insurer on notice that it needs to make further enquiries about prospective material circumstances."
[147] Huneberg 2019 OBITER 27.
[148] *Ibid.*
[149] Birds *et al* 588–589.
[150] Huneberg 2019 OBITER 27.

Act. The practical implication of section 8 is that in order to bring an action for relief for non-disclosure, insurers now have a duty to prove that they would have acted differently if the breach had not occurred.[151]

4.1.2.2 *Fraudulent claims*

Fraudulent claims by the insured party are dealt with in part 4 of the UK Insurance Act. Section 12 of the UK Insurance Act provides for the remedies for fraudulent claims and states as follows:

> "(1) If the insured makes a fraudulent claim under a contract of insurance −
> (a) the insurer is not liable to pay the claim;
> (b) the insurer may recover from the insured any sums paid by the insurer to the insured in respect of the claim; and
> (c) in addition, the insurer may by notice to the insured treat the contract as having been terminated with effect from the time of the fraudulent act.
>
> (2) If the insurer does treat the contract as having been terminated −
> (a) it may refuse all liability to the insured under the contract in respect of a relevant event occurring after the time of the fraudulent act, and
> (b) it needs not return any of the premiums paid under the contract."

Previously, in cases of fraud by a policyholder, the policyholder would forfeit the whole claim and insurers were entitled to avoid the entire contract.[152] Part 4 of the UK Insurance Act clearly sets out the provisions regarding the insurer's remedies in the cases of fraudulent claims brought by policyholders. The UK Insurance Act stipulates that insurers will not be liable to pay a fraudulent claim; they can also recover any monies paid to the policyholder in relation to the fraudulent claim and may also, by notice to the policyholder, treat the insurance policy as terminated as

[151] Birds *et al* 589.
[152] McGee *The Modern Law of Insurance* (2011) 274-275.

from the date of the fraudulent act and keep all premiums paid.[153] It follows that any previous valid claims remain unaffected.[154]

4.1.2.3 *Provisions on late payment of insurance claims*

The UK Insurance Act also comes with laws on late payments of insurance claims. Previously, the insurers had no legal duty to pay valid claims within a reasonable time.[155] The Enterprise Act 2016 has recently amended the UK Insurance Act with effect from 4 May 2017, to entitle policyholders to claim damages suffered due to insurers' unjustified 'late' payment of a claim.[156] A policyholder can therefore sue an insurer to recover a valid claim.[157] Provisions on the late payments of insurance claims were included in the Enterprise Act 2016, which inserted additional provisions into the UK Insurance Act by introducing an implied term into every insurance policy that insurers have to pay claims within a "reasonable time".[158] Section 13A stipulates for the implied term in relation to the payment of claims and provides as follows:

> "(1) It is an implied term of every contract of insurance that if the insured makes a claim under the contract, the insurer must pay any sums due in respect of the claim within a reasonable time.
>
> (2) A reasonable time includes a reasonable time to investigate and assess the claim.
>
> (3) What is reasonable will depend on all the relevant circumstances, but the following are examples of things which may need to be taken into account –
>
> (a) the type of insurance,
>
> (b) the size and complexity of the claim

[153] S12 of 2015 Act.
[154] *Ibid.*
[155] Arnold-Dwyer "Insurance Law Reform by Degrees: Late Payment and Insurable Interest" 2017 80(3) Modern LR 489-491.
[156] Huneberg, 2019 OBITER29.
[157] Huneberg, 2019 OBITER 29.
[158] *Ibid.*

(c) compliance with any relevant statutory or regulatory rules or guidance,

(d) factors outside the insurer's control.

(4) If the insurer shows that there were reasonable grounds for disputing the claim (whether as to the amount of any sum payable, or as to whether anything at all is payable) −

(a) the insurer does not breach the term implied by subsection (1) merely by failing to pay the claim (or the affected part of it) while the dispute is continuing, but

(b) the conduct of the insurer in handling the claim may be a relevant factor in deciding whether that term was breached and, if so, when.

(5) Remedies (for example, damages) available for breach of the term implied by subsection (1) are in addition to and distinct from −

(a) any right to enforce payment of the sums due, and

(b) any right to interest on those sums (whether under the contract, under another enactment, at the court's discretion or otherwise)."

These provisions represent a shift in emphasis: The insurer is no longer a passive player – the insurer will have to act pro-actively. A balance of rights between both parties to an insurance contract has been created.

4.1.2.4 *Good faith*

The UK Insurance Act also introduced provisions on good faith. Previously, in terms of section 17 of the Marine Insurance Act, insurance contracts were concluded in line with the principle of *utmost* good faith, and if the policyholder breached this duty, the insurer could avoid the contract in its entirety.[159] This position was changed by section 14 of the UK Insurance Act, which states that "no party may now avoid the contract based on the ground that the duty of utmost good

[159] Huneberg 2019 OBITER 30.

faith has been breached".[160] Section 14 does not repeal section 17 of the MIA in its entirety. It repeals only the part that states that the insurer may avoid the contract in its entirety if the duty of utmost good faith has not been adhered to.[161] The implication is that insurance contracts still have utmost good faith as a basis and that the concept still plays a vital role in an insurance contract. It should also be mentioned that this duty is similar to the duty of fair presentation in that that section requires policyholders not to make any misrepresentations to the insurer. It goes hand in hand with the duty to act in good faith.[162] The UK Insurance Act has done away with avoidance of contract as a remedy for breach of the duty of good faith and has repealed the parts of legislation making provision for this as a remedy.[163]

4.2 Comparing UK insurance law to South African insurance law

The recent changes in English insurance law are vital as they have had a significant impact on policyholders. It is clear from the above discussion that the new UK laws are by and large aimed at policyholder protection. They aim to create a fairer balance between parties to the insurance contract, i.e. the insurer and the policyholder. This is in line with the strong policyholder protection laws that the UK has adopted in recent years.[164]

South African insurance law is still strongly based on the SA common law,[165] and there have not been any significant reforms in our insurance law regime regarding the underlying concepts of the law of insurance related to the duty of good faith,[166]

[160] See S14 of 2015 Act.
[161] *Ibid.*
[162] Huneberg 2019 OBITER 31.
[163] *Ibid.*
[164] Huneberg 2019 OBITER32.
[165] Common law of South Africa is Roman-Dutch Law.
[166] In *Beadica* v *Trustees for the time being of Oragon Trust* 2020 5 SA 247 (CC) it was held that fairness, reasonableness and good faith are not self-standing grounds upon which a court may refuse to enforce a contractual term on the basis of public policy. This should be considered a significant reform of these terms; See also *Brisley* v *Drotsky* 2002 4 SA 1 (SCA).

misrepresentations, disclosures and fraudulent conduct.[167] Therefore, these concepts are still regulated based on common law.[168]

The Policyholder Protection Rules (PPRs) ensure a fairer balance of rights and obligations between insurers and policyholders.[169] The PPRs were discussed in section 2 above. It must be noted that every amendment of the PPRs since the original PPRs were published provided for more significant consumer protection measures. The following section will discuss the recent amendments to PPRs to assess how policyholders are currently protected.

In South Africa, insurance contracts are contracts of good faith. Traditionally South Africa does not recognise a duty of "utmost good faith" as in England.[170] The duty of good faith in insurance contracts relates mainly to the right of the insurer to receive correct and comprehensive information about facts relevant to its evaluation of the risk.[171] This means that the potential policyholder has to refrain from providing false information. Potential policyholders have to volunteer such information as they may possess if it is material to the risk and cover.[172] The remedy for a breach of the duty of disclosure is avoidance of the policy at the instance of the insurer.[173] If the insurer wants to avoid the policy, it must do so within a reasonable time and, unless fraud is proven, the insurer must return the premium paid to the policyholder.[174] Such an action aims to treat the insurance policy as if it was never concluded. This is the same as the English position in terms of the MIA. South Africa should shift away from the rescission of the entire contract, as is the case in the UK Insurance Act.[175]

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[167] Huneberg 2019 OBITER 33.
[168] Huneberg 2019 OBIITER 31.
[169] Huneberg 2019 31 OBITER (footnote 89).
[170] Huneberg 2019 OBITER 32.
[171] Reinecke *et al South African Insurance Law* (2013) 142.
[172] Reinecke *et al* 143.
[173] Reinecke *et al* 174.
[174] *Ibid*.
[175] Huneberg 2019 OBITER 32.

As mentioned above, the duty of disclosure means that insurers need to play a more active role in the pre-contractual stages of an insurance contract. South Africa is also moving in the right direction by introducing this concept to our law through the PPRs.[176] The General Code of Conduct (GCC) in terms of the FAIS Act, as discussed in the previous section, provides comprehensive rules on the pre-contractual duties of insurers when selling products. These rules are supplemented by the 2018 PPRs,[177] which will be discussed in the next section.

As earlier mentioned, the acknowledgement should be made of how PPRs and case law demand that insurers play a more active role in the pre-contractual stage.[178] There is a growing need in both England and South Africa to force insurers to take a more active part in determining the risk and assist potential policyholders in disclosing the correct information. South Africa does not seem to be too far behind England, although further reform is still required.[179]

Another difference between the two countries' insurance laws is their approach to dealing with fraudulent claims, especially in the absence of express provisions regulating this in the insurance contract.[180] In terms of English common law, the insured loses his or her claim in its entirety if he submits any fraudulent claim, be it fabricated or exaggerated.[181] In South African common law, an overstated claim does not entitle the insurer to cancel the contract. The insurer is still liable for the insured's actual loss but not for the overstated part.[182]

When it comes to misrepresentations and valid claims by fraudulent means, legislation stipulates that the insurer's obligations shall not be excluded or limited unless the representation is likely to have materially affected the risk assessment

[176] Huneberg 2019 OBITER 33.
[177] Rule 11.3.4 of both set of 2018 PPRs.
[178] Huneberg 2019 OBITER 33.
[179] *Ibid.*
[180] Reinecke *et al* 375.
[181] Reinecke *et al* 377.
[182] Reinecke *et al* 378.

under the policy.[183] It was recommended by Didcott J in *Pillay v South African Life Assurance Co Ltd*[184] that insurance legislation should be amended to provide that the insurer could cancel the policy on the grounds of misrepresentation only if it would not have entered into the contract had it not been misled by the insured. However, if the insurer would have entered into the contract on different terms, the contract should not be rescinded - other remedies should be available to the insurer.[185] This is what is called the Didcott Principle. English law amendments have finally given certainty as to how an insurer may deal with fraudulent claims, and it has been suggested that it would be helpful for South Africa to have the same laws on our statutes in order to create certainty in this regard.[186]

4.3 Conclusion

Looking at South African insurance law, it appears that we are not that far from our UK counterpart in moving to a more equitable balance between the rights and obligations of insurers and policyholders. However, South Africa could do more.[187] With regard to the duty of good faith and disclosure, South Africa should look at adopting more appropriate remedies for the insured taking into account the type of breach (or factor influencing consensus) that has taken place. The fact that South Africa recognises a more active role for insurers in disclosure is laudable.[188] It is further submitted that South Africa needs to actively move away from insurers' previous passive role and the somewhat onerous expectations placed on policyholders. The most critical lesson South Africa can learn from the current reforms in English law is probably with regard to fraudulent claims.[189] South Africa needs to adopt clear and concise laws on how insurers should handle fraudulent

[183] See S53 of Act 53 of 1998 and S59 of Act 52 of 1998.
[184] *Pillay v South African Life Assurance Co Ltd* 1991 1 SA 363 (D).
[185] Reinecke "Remedies for misrepresentation inducing a long-term insurance contract: the Didcott principle" 2009 South African Mercantile Law Journal 1.
[186] Huneberg 2019 OBITER 33.
[187] Huneberg 2019 OBITER 34.
[188] *Ibid*.
[189] *Ibid.*

claims.[190] UK has also shown the way by introducing sections 12 and 13 of the UK Insurance Act.[191]

South African insurance law is primarily based on SA common law. Even though it is not outdated, it is necessary to bring some of our insurance laws and practices in line with modern consumer protection approaches, as happened in the UK.[192] The following section discusses the current reform of the insurance industry as far as consumer protection is concerned. The laws and proposed laws will be examined to determine whether our legislature is doing enough to protect the consumers of the insurance products.

190 See the Didcott principle in *Pillay v South African Life Assurance* Co Ltd 1991 1 SA 363 (D).
191 Huneberg 2019 OBITER 34.
192 Huneberg 2019 OBITER 35.

SECTION 5

The recent developments in consumer protection law in SA

Introduction

The previous sections have elaborated on the development path of our insurance industry regulation, more specifically, the development of targeted consumer protection provisions. Section 4 above dealt with the consumer protection measures that have been put into place by the UK. The said section clearly demonstrates that South Africa should guard against being left behind. SA regulators must ensure that they take the lead from other countries concerning the steps taken by these jurisdictions in developing their consumer protection laws.

This section focuses on the recent South African financial services sector developments, including the insurance industry. This paper seeks to investigate those regulations that deal with market conduct, specifically consumer protection measures.[193] It includes a discussion of the 2018 PPRs, the Treat Customers Fairly (TCF) principles and the Conduct of Financial Institutions Bill (CoFi Bill).

5.1 2018 PPRs

Section 2 of this research paper discusses the implementation of PPRs under both the LTIA and the STIA. The PPRs were promulgated in terms of sections 62 and 55 of these Acts, respectively. It should be noted that section 2 above discussed the original PPRs as first introduced in 2001. As is commonly the case with laws and regulations, these rules have since been amended. This section will discuss the most recent iteration of these rules, namely the 2018 PPRs. Since their first publication, the PPRs' objective has always been to provide consumer protection

[193] Provisions that deal with prudential matters fall outside the ambit of this study.

measures.[194] From the first iteration of the PPRs, the legislature intended to incorporate TCF principles into our South African legislation.[195] The TCF principles will be discussed separately later in this section. Regarding the development of rules that seek to protect policyholders, a discussion on the introduction of Rule 2A under both sets of PPRs is of fundamental importance. Rule 2A makes provision for microinsurance product standards.

5.1.1 Microinsurance

Microinsurance in South Africa has finally been recognised as a formal insurance product under the recent promulgation of the Insurance Act and the introduction of microinsurance-specific policyholder protection rules.[196] Proper consumer protection begins with those rules that regulate the pre and post-contractual relationship between the parties. It addresses skewed power relationships.[197] There is a clear need for consumer protection, especially as far as low-income and indigent consumers are concerned.[198] This investigation will only focus on those microinsurance provisions that deal with consumer protection. The relevant measures in the STIA PPRs are provided in Rule 2A and are referred to as 'Microinsurance Product Standards'. Rule 2A measures in the LTIA PPRs are referred to as 'Microinsurance and Funeral Policy Product Standards'.[199] Due to the complexity of these rules, non-life insurance and life insurance will be discussed separately.

5.1.1.1 *Non-life Microinsurance*

[194] Millard (2018) THEHR 380.
[195] *Ibid.*
[196] Millard "The devil is not in the detail: On Microinsurance, Policyholder Protection and Financial Inclusion" 2019 *THRHR* 585.
[197] *Ibid.*
[198] Roux Including the excluded: The Potential of microinsurance to provide low-income earners with access to financial products (LLM dissertation UJ 2016) 47.
[199] Millard 2019 THRHR 585

Rule 2A provides for the structure of a microinsurance policy. Cognisance should be taken of Rule 2A.4.4, which stipulates that a microinsurance policy may not provide that a policy benefit is subject to the average principle. An 'average clause' in an insurance policy provides that an insured bears a proportion of any loss if the assets of such insured were insured for less than their actual or total replacement value.[200]Such clauses are typical of many insurance contracts.[201] Average clauses are unfamiliar to the general public. Many policyholders only become aware of this clause at the claims stage. A problem regarding such clauses is that a layperson is often unable to provide an accurate valuation of household contents, leading to underinsurance.[202] Therefore, it is evident that clauses relating to average are onerous for policyholders to understand, and since benefits are capped, insurance companies' risks associated with underinsurance are low.[203] By stipulating that average clauses may not be included in policies relating to microinsurance products, there is no doubt that this proscription will render such policies less problematic.[204] This state of affairs does not imply that underinsurance is impossible in a microinsurance policy. However, it does mean that the principle of average does not apply and that insurers are now required to employ different techniques to ensure that prospective policyholders place a more accurate value on insurable objects.[205] Therefore, it may be argued that the rule against average clauses affords some protection to the holders of microinsurance policies, as this prevents protracted issues arising around the *quantum* of claims.[206]

Concerning the variation and renewal of microinsurance policies, Rule 2A.5.1 provides that the terms, conditions or provisions of a microinsurance policy may not be varied or changed in the first 12 months after the coming into being of the policy. This is subject to an exception where a micro-insurer can show that there

[200] Reinecke et al 510.
[201] *Ibid.*
[202] Van Niekerk "Under-insurance and average" 1981 *MBL* 128.
[203] Millard 2019 THRHR 590.
[204] *Ibid.*
[205] *Ibid.*
[206] *Ibid*.

are reasonable actuarial grounds to change or vary the terms, provisions or conditions of the microinsurance policy or that the variation will be to the benefit of the policyholder concerned. Rule 2A.5.3 stipulates that where a microinsurance policy is underwritten on a group basis, the micro-insurer may not selectively cancel or selectively refuse to renew individual policies that form part of the group of people who are underwritten on a group basis. These rules are predicated on the principle of fairness, and in this regard, it is clear that all participants in a group scheme should be treated equally and fairly.[207] Another important rule regarding policies that should be noted is the rule regarding undisclosed information. It is stipulated that a micro-insurer may not repudiate a claim in a microinsurance policy because the policyholder did not disclose the necessary information if the micro-insurer did not specifically request the policyholder to disclose such information before the coming into being of the policy.[208] This rule represents an effective way to instil consumer confidence and to protect consumers. To this end, insurers and micro-insurers should specify which information they deem relevant to the risk. They should ask their questions so there could be no doubt about what is required in terms of the answers.[209]

Another consumer protection measure can be found in the rule providing for the reinstatement of a policy. In this regard, Rule 2A.10.1 states that if a microinsurance policy has lapsed owing to non-payment of premium by the policyholder and the micro-insurer reinstates such policy, the micro-insurer must do so on at least the same terms as the lapsed policy, and may not impose another waiting period under the reinstated policy. This provision constitutes an important contribution in the ongoing endeavour to balance insurers and policyholders' interests. This also demonstrates that the South African insurance law regime is taking a step in the right direction regarding consumer protection. The focus now shifts to the life insurance provisions in terms of the 2018 LTIA PPRs.

[207] Millard 2019 THRHR 591.
[208] Rule 2A.9.3 of STIA 2018 PPRs. A similar rule is found in LTA PPRs (Rule 2A.8.3)
[209] See National Treasury Policy Document (July 2011) 55.

5.1.1.2 *Life microinsurance*

A "life microinsurance policy" means a life insurance policy underwritten by a micro-insurer.[210] The important difference between the rules relating to non-life microinsurance policies and life microinsurance policies is that the rules for the latter form of insurance also set funeral policy product standards.[211]

One of the rules worth noting is the rule on the structure of a life policy, specifically an assisted life policy. Rule 2A.4.4 provides that despite the terms of an assistance policy entered into before 1 June 2009, the policyholder is entitled to demand that a policy benefit not expressed as a sum of money must be provided as a sum of money if the insured requests it.[212] In such a case, the sum of money must be equal to the value of the policy benefit in kind that the insurer would have provided. Also relevant is Rule 2A.4.5, which governs assistance policies entered on or after 1 June 2009, that provides for a policy benefit expressed otherwise than as a sum of money. The rule specifies that such a policy must stipulate that the policyholder or member is entitled to demand that the policy benefit be provided as a sum of money in lieu of the benefit[213] and, subject to rule 2A.4.6, must state the amount of the policy benefit that is to be provided as a sum of money, which amount must equal the value of the policy benefit expressed otherwise than as a sum of money.[214] Rule 2A.4.6(a) stipulates that where due to the nature of the policy benefits, the requirements in rule 2A.4.5(b) cannot reasonably be met, the policy must state the reason why this is the case.[215] It is submitted that these rules were introduced to ensure that policyholders receive value for their money, and it is only possible to establish whether something is, in fact, value for money if some

[210] Rule 2A.1 of LTIA 2018 PPRs.
[211] Millard 2019 THRHR 597.
[212] An example of this is where a policy provides for funeral expenses benefit. Rule 2A.4.4 gives the policyholder an option to claim the sum of money equivalent to such expenses.
[213] Rule 2A.4.5 (a) of LTIA 2018 PPRs.
[214] Rule 2A.4.5 (b) of LTIA 2018 PPRs.
[215] Millard 2019 THRHR) 598.

quantification is possible. This means that despite monetary benefits not being provided, it must still be possible to place a monetary value on the benefits in question.[216] These rules afford vastly improved consumer protection to policyholders.

The implications of the 'waiting period rules' are that no waiting period may be imposed if the policyholder confirms that he had a previous policy with a different insurer, provided that:

(a) such policy existed at least 31 days before entering into a new policy;[217]
(b) the previous policy provided cover in respect of similar risks relating to the same lives insured as those covered under the new microinsurance policy or funeral policy;[218] and
(c) the policyholder had completed the waiting period in respect of that previous policy.[219]

This particular rule aims to ensure that only first-time policyholders are subjected to waiting periods. Rule 2A.6.7 clearly states that an insurer must establish if a potential policyholder had a previous policy and completed a waiting period under that policy.[220] As already mentioned, the rule offers protection to policyholders as it ensures that multiple waiting periods are not applied in succession, with the effect that insurers' contingent liabilities are suspended under the policies.[221]

An issue that often causes disgruntlement at the claims stage and consequently merits discussion is the matter of insurers taking their time to settle claims. Policyholders are often disadvantaged in circumstances where insurers do not communicate a final decision clearly and timeously.[222] An apposite rule that aims

[216] *Ibid.*
[217] Rule 2A.6.5 (a) of LTIA 2018 PPRs.
[218] Rule 2A.6. 5(b) of LTIA 2018 PPRs.
[219] Rule 2A.6.5(c) of LTIA 2018 PPRs.
[220] Rule 2A.6.7 of LTIA 2018 PPRs.
[221] Millard 2019 THRHR 601.
[222] Millard 2019 THRHR 602.

to instil consumer confidence regarding the timeous settlement of claims is Rule 2A.8.1. This rule states that subject to Rule 2A.8.2**,** an insurer must, within two business days of all required documents in respect of a claim under a microinsurance policy or a funeral policy being received, assess and make a decision whether or not the claim submitted is valid, and furthermore authorise payment of the claim,[223] repudiate the claim,[224] or dispute the claim and notify the claimant of the dispute.[225] It follows that if the insurer disputes a claim, the insurer must take action within 14 business days after the expiry of the initial two-day period. Such action would entail further investigation,[226] deciding whether the claim submitted is valid,[227] and paying or repudiating the claim.[228] The implementation of this rule will inspire confidence in consumers of insurance products.[229]

The incorporation of provisions regulating microinsurance into our insurance law regime serves the purpose of ensuring protection for the previously excluded low-income earners and ensures their participation in financial services products. The rules discussed above show that there is a high level of protection offered by these rules.

Consumer protection forms an integral part of market-conduct regulation. Rules aimed at levelling the playing field between contractual parties must constantly be scrutinised to assess whether that objective is indeed achieved.[230] The legislature has drawn the line when creating strict rules on the contractual aspects of microinsurance, and to this end, has resolved that well-known insurance clauses *(incidentalia)* such as average and clauses dealing with a misrepresentation of the risk will not form part of microinsurance contracts. This means that these policies

[223] Rule 2A.8.1 (a) (i) of LTIA 2018 PPRs.
[224] Rule 2A.8.1 (a) (ii) of LTIA 2018 PPRs.
[225] Rule 2A.8.1 (a)(iii) of LTIA 2018 PPRs.
[226] Rule 2A.8.3 (a) of LTIA 2018 PPRs.
[227] Rule 2A.8.3 (b) of LTIA 2018 PPRs.
[228] Rule 2A.8.3(c) of LTIA 2018 PPRs
[229] Millard 2019 THRHR 602
[230] Millard 2019 THRHR 603.

are getting closer to *pro forma,* standardised contracts where insurance companies do not have much 'room to manoeuvre' and thereby gain an undue competitive edge.[231] These are significant new rules in the financial services sector. Millard argues that the South African microinsurance framework is the first of its kind in the world. As such, it stands as an example of innovation in the financial services industry.[232] The new financial sector regulatory framework offers many new and innovative rules to ensure that consumers are protected. What remains to be discussed is the 'Treat Customers Fairly' principles, to assess their contribution as far as consumer protection is concerned.

5.2 Treat Customers Fairly (TCF) principles

The TCF principles are embedded in the PPRs. The market conduct of financial services providers will be measured against TCF principles.[233] The publication of the first iteration of the PPRs clearly indicated the legislature and the regulators' views on the role of the TCF principles. The aim was to incorporate the TCF principles into the PPRs formally.[234] In this regard, Rule 1.3 of both sets of PPRs (in their first iteration) formally included the TCF principles in the legal framework. The rule made it incumbent on an insurer to have clear policies and procedures that seek to achieve the fair treatment of policyholders. It further required that policies and procedures achieve the following six outcomes, namely:

"(a) policyholders are confident that they are dealing with an insurer where the fair treatment of policyholders is central to the insurer's culture;

(b) products are designed to meet the needs of identified customer groups and are targeted accordingly;

[231] Millard 2019 THRHR 603.

[232] *Ibid;* This is also spreading in other African Countries. An example is aYo products that are offered in Uganda, Zambia and Ghana. MMI Holdings and MTN have teamed up to offer aYo products where you get ambulance expenses covered and a life cover by using your cell phone. A cover increases every time your load MTN airtime and claims can be made using a cell phone. These products are easily accessible even to lower income earners.

[233] Millard 2016 PER/PELJ 5.

[234] Millard 2018 THRHR 381.

(c) policyholders are given clear information and are kept appropriately informed before, during and after the time of entering into the policy;

(d) where policyholders receive advice, the advice is sound and takes account of their circumstances;

(e) policyholders are provided with products that perform as insurers have led them to expect, and the associated service is both of an acceptable standard and what they have been led to expect; [and]

(f) policyholders do not face unreasonable post-sale barriers to change or replace a policy, submit a claim or make a complaint."[235]

It is submitted that the inclusion of these six outcomes of TCF does not explicitly incorporate fairness. The best examples of the incorporation of fairness as the basis of market conduct are found in the provisions on advertising, data management, ongoing review of the product line performance, conflict of interest, time-bar clauses, complaints management and cooling-off rights for all kinds of policies.[236] These provisions will be briefly discussed.

5.2.1 Advertising

Insurance product advertising forms part of the second phase of the product life cycle.[237] Provisions regarding advertising are found in Rule 10.4 of both sets of PPRs. This rule stipulates that advertising must be factually correct (excluding aspects of an advertisement constituting puffery), it must provide a balanced presentation of key information, and it must not be misleading.[238] If statistics, performance data, achievements or awards are referenced in an advertisement, the source and the date thereof must be disclosed.[239] Rule 10.4.3 stipulates that an advertisement that refers to a premium must, in the case where the premium

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[235] Millard 2018 THRHR 382.
[236] Millard 2018 THRHR 383.
[237] Millard 2018 THRHR 384; Product lifecycle has 6 phases which are: Product and Service Design; Promotion and Marketing; Advice; Point of Sale; Information after Point Sale and Complaints and Claims Handling.
[238] Rule 10.4.1 of both sets of 2018 PPRs; See also Proposed Advertisement Guidelines at: https://www.moonstone.co.za/proposed-advertisement-guidelines/
[239] Rule 10.4.2 of both set of 2018 PPRs.

will increase automatically, indicate the increment rate or basis; and, where the premium changes, indicate the period for which the premium is guaranteed. These provisions are aimed at ensuring that members of the community are not misled. This is a crucial consumer protection innovation in a country with a low level of financial literacy.[240] Complaints concerning advertising will be judged based on the reasonableness and fairness of the insurer's conduct in the circumstances.[241] Millard laments that there is not enough evidence from the FAIS Ombud decisions and court cases to show that more legislation regulating advertising is needed as this will stifle creativity in advertising.[242]

5.2.2 Data management

Data management is an aspect that must be addressed in all consumer-specific legislation, as the processing of personal information is now governed by the Protection of Personal Information Act.[243] Insurers must have an appropriate data management framework, and such data must be managed effectively.[244] This rule aims to protect the personal information of policyholders.

5.2.3 Ongoing review of product performance.

The ongoing review of product performance was also addressed in the 2018 PPRs. Product performance review entails evaluating a product from time to time to establish whether the product, including its disclosure documents, is still consistent with the needs of targeted policyholders and still contributes towards fair outcomes for policyholders.[245]

[240] Millard 2018 THRHR 386.
[241] See *The Registrar of Short-term Insurance* v *Discovery Insurance Limited* nr 27/2015. In this case the Enforcement Committee fined Discovery for an advertisement that lured consumers into obtaining their short-term insurance policies.
[242] Millard 2018 THRHR 386.
[243] Protection of Personal Information Act 4 of 2013.
[244] Rule 13 of both set of 2018 PPRs.
[245] Rule 15.1(a) and (b) of STIA 2018 PPRs and rule 17.1(a) and (b) of LTIA 2018 PPRs.

5.2.4 Conflicts of interest

Provisions regarding conflicts of interest are meant to ensure that a prospective policyholder is well aware of any interest an advisor or intermediary may have in selling a product.[246] As an overall objective, these rules are aimed at eliminating, as much as possible, any form of conflict of interest that may adversely affect policyholders.[247] The importance attached to avoiding conflicts between the interests of financial services providers and consumers is primarily fuelled by the need to ensure fairness in the dealings and relationships between such parties. Products must meet the needs of consumers instead of serving the interests of the financial services providers.[248] Since the legislature intends to repeal the FAIS Act moving forward, it has been contended that retaining these rules is of paramount importance, as they address the significant matter of market conduct regulation.[249] One could indeed argue that the rules in question are indispensable in the context of consumer protection.[250]

5.2.5 Time-bar clauses

The first Draft of the 2018 PPRs, which was published on the 2nd of March 2018, contained detailed provisions on time-bar clauses, leading to a fairer dispensation for policyholders.[251] One of these is the obligation of an insurer to either accept, repudiate or reject a claim or the claimed amount within a reasonable time. Other duties of insurers include explaining the client’s rights to a client when the insurer repudiates a claim. In addition, insurers must indicate to aggrieved policyholders how to escalate a matter to the relevant ombud in terms of the Financial Services

[246] Millard 2018 THRHR 387.
[247] *Ibid*.
[248] *Ibid*.
[249] This contention is in line with Millard’s view that the FAIS Act brought the true revolution to financial conduct.
[250] Millard 2018 THRHR 387.
[251] Proposed Rule 19.6 of the 1st Draft of the long-term PPRs and 17.6 of the 1st Draft of the short-term PPRs.

Ombud Schemes Act.[252] The wording of the rules on time-bar clauses in the second draft of both sets of PPRs may be different, but the essence remains the same.

5.2.6 Complaints management

The applicable rule in the PPRs that deal with complaints management is Rule 18.2, which stipulates that an insurer is expected to have a proper complaints management structure. Rule 18.10.1 provides for engagement with the ombud, and it specifies that an insurer must have appropriate processes in place for engagement with any relevant ombud concerning complaints.[253] An insurer is required to communicate clearly and transparently the contact details of the relevant ombud service. This includes complaints at:

(a) the point of sale;

(b) in any communication; and

(c) when a complaint is rejected, or a claim is repudiated.[254]

The insurer must also display and/or make available information regarding the availability and contact details of the relevant ombud services at the premises and/or on the insurer's website.[255] These rules are essential, as they provide policyholders with other options to voice their concerns about an insurer's conduct. Another provision that warrants discussion is Rule 18.10.2(a), which stipulates that an insurer must maintain open and honest communication and cooperation between itself and any ombud with whom it deals. Moreover, an insurer must endeavour to resolve a complaint before a final ruling or determination is made by any ombud, or through its internal escalation process, without unduly delaying or impeding a complainant’s access to an ombud.[256] It is submitted that insurers will

[252] Ombud Schemes Act 37 of 2004.
[253] Rule 18.10.1 (a) of both set of 2018 PPRs.
[254] Rule 18.10.1 (b) of both set of 2018 PPRs.
[255] Rule 18.10.1 (c) of both set of 2018 PPRs.
[256] Rule 18.10.2 (b) of both set of 2018 PPRs.

be obligated to be transparent in their communications in relation to the details of the relevant ombuds.[257]

5.2.7 Cooling-off rights

Provisions on cooling-off rights allow policyholders to cancel policies if no claims have been made or benefit paid. This should be done within 14 days "after the date of receipt of the policy contract."[258]

The incorporation of TCF principles in the PPRs is arguably the most helpful reform of the financial services regulations. Lawmakers are determined to ensure the protection of the consumers of financial products. It is further submitted that the explicit introduction of these principles infuses the principle of fairness into problematic insurance contracts.[259] This dissertation has covered numerous aspects of current consumer protection legislation. Accordingly, it is essential to focus on the future and consider what it may hold regarding financial sector regulations.

5.3 Conduct of Financial Institutions (CoFI) Bill/Act

The CoFi Act is a much-awaited statute, as it will complete the second leg of the Twin Peaks model. The second draft of the CoFi Bill was published in September 2020. The CoFI Bill is currently a "paper tiger" which will only "gain teeth" when it comes into effect. Millard refers to it as an 'empty vessel' that, once enacted, is expected to be the final milestone on the road to Twin Peaks.[260] It will then build on current market conduct regulation as per the FAIS Act and the two sets of PPRs. When it becomes law, the CoFI Act will replace the GCC in terms of the FAIS Act

[257] Millard 2018 THRHR 390.
[258] Rule 5.1 of the 1st Draft PPRs for long-term insurance and rule 4.1 of the 1st Draft PPRs for short-term insurance.
[259] Millard 2018 THRHR 391.
[260] Millard 2018 THRHR 390.

and consolidate all the overlapping market conduct regulations. Since it has been established that the Insurance Act repeals provisions that regulate prudential matters in terms of both the LTIA and STIA, the CoFI Act will repeal the two sets of PPRs in terms of the LTIA and STIA, as they also regulate market conduct[261]

5.4 Conclusion

This section has evaluated the current consumer protection measures. As is clear from the discussion, the relevant regulatory framework is in a state of development. An intention to protect consumers can be gleaned from lawmakers' actions. Once the Twin Peaks model is fully operational, the way forward will likely be much more apparent – to the benefit of the insurance industry and the consumers.

[261] See the media statement issued by the National Treasury on the 26th of June 2018. https://www.masthead.co.za/wp-content/uploads/2018/07/2018062601-Media-Statement-Commencement-date-for-the-Insurance-Act-no.-18-of-2017.pdf.

SECTION 6

Research findings

Section 1 of this paper contains a research question, asking if the current and proposed legislative dispensation will do enough to protect consumers in the insurance industry. This research paper investigated the previous and current laws governing the insurance industry and assessed its impact from a consumer protection viewpoint.

In terms of the National Treasury discussion paper (December 2014), there has been a public outcry about the conduct of financial services providers, as the industry, by and large, has failed to protect financial consumers adequately. The insurance industry is perceived to be one-sided. Insurers, as the underwriters of policies, are generally in a more favourable position to protect their interest than is the case with consumers. Insurance policies generally are slanted in favour of the insurer and not the policyholder.[262] The introduction of the laws that seek to protect the consumers of financial products was necessary to place both parties on an equal footing.

The introduction of the PPRs under insurance legislation was a vital step in developing a fair insurance regime. These are critical rules which protect policyholders from being subjected to unfair practices. Rules on disclosures are fundamental, as previously, it was unclear what consumers were required to disclose. This uncertainty was unfortunately exploited by some insurers who refused claims based on non-disclosures. The PPRs have changed that. The PPRs also provide important provisions on penalties, which as an overall objective, aim to ensure that unfair conduct by insurers does not go unsanctioned.

[262] Huneberg 2019 OBITER 170.

This research paper also analysed the FAIS Act, which introduced significant provisions regarding advisors and intermediaries in the financial sector. Millard argued that the FAIS Act brought about the true revolution in market conduct regulation.[263] Incorporating General Codes of Conduct (GCC) under the FAIS Act is worth mentioning, as the GCC provides strict rules for advisors and intermediaries in the financial sector. Such advisors and intermediaries are expected to act with reasonable skill, care, diligence, and good faith when dealing with clients. Moreover, these functionaries are required to be registered as such in order to give financial advice to consumers or offer their services. This prevents a situation where anyone can provide financial advice to unsuspecting consumers. There are overlaps between the GCC and the PPRs, especially regarding rules on disclosures and the advertising of products.

The road to the Twin Peaks model saw the introduction of the Insurance Act, which formally introduced microinsurance to our insurance landscape. Microinsurance provisions protect previously excluded low-income earners in a specific class of financial services and products. Microinsurance provisions offer comprehensive consumer protection measures. The PPRs provide detailed rules on product standards. It also contains provisions on how insurers must engage with policyholders.[264]

Other consumer protection measures are found in the TCF principles. These principles require fairness in the manner in which insurers conduct their business when dealing with policyholders. As discussed in section 5, the six outcomes are critical, as they set out the standards for insurers on how to treat their customers fairly. The rules on advertising, data management, conflicts of interest, time-bar clauses and cooling-off rights are an indication that our legislature is trying to cover all relevant aspects of the insurer/insured relationship during the typical life-cycle of a policy.

[263] Millard 2018 THRHR 377.
[264] Millard 2018 THRHR 384.

This research has shown that there has been a significant improvement in our law in relation to the protection of consumers. Evidently, our lawmakers are not yet done with their endeavours in this regard, as there is another law in the pipeline, the CoFI Bill, which is expected to offer enhanced protection to consumers. The enactment of the CoFI Act will complete the final leg of the Twin Peaks model.

The South African financial consumer protection laws are still in a transitional phase. More statutory interventions are expected.[265] It bears noting that the legal reform process has already seen the introduction of significant consumer protection measures in our insurance industry. This represents significant progress compared to a few years ago when the South African insurance law did not provide sufficient protection for consumers. It has also been illustrated that our insurance laws are not far behind UK insurance law regarding consumer protection measures.[266] This augurs well as far as our competitiveness in Africa is concerned. However, it has been suggested that South Africa should improve its rules relating to fraudulent claims in order to align it with the corresponding English legal position.[267]

South Africa is taking significant steps in regulating the financial services industry fairly and comprehensively. Hopefully, the much-awaited CoFI Act will introduce even more reform and provide more protection for consumers in an effort to level the proverbial "playing field". There is real hope that a fully operational Twin Peaks model will see the insurance industry embracing the values of integrity, fairness, transparency and effective disclosure. These values are at the core of what consumer protection is all about.

[265] Millard 2018 THRHR 383.
[266] Huneberg 2019 OBITER 35.
[267] *Ibid*.

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