

**REQUIREMENTS TO BE APPOINTED AS A DIRECTOR OF
AN INSURANCE COMPANY IN SOUTH AFRICAN LAW**

by

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CONTENTS

ACKNOWLEDGEMENTS.....	II
ABBREVIATIONS.....	VII
CHAPTER 1 INTRODUCTION.....	1
1.1 Background.....	2
1.1.1 History of governance breakdowns in South Africa	3
1.1.2 Challenges in the insurance industry.....	7
1.2 Purpose of the study	9
1.3 Problem statement.....	9
1.4 Research question.....	10
1.5 Methodology	10
1.5.1 Qualitative research.....	11
1.5.2 Constitutional method.....	11
1.5.3 Comparative law.....	11
1.6 Breakdown of chapters	11
CHAPTER 2: CURRENT FRAGMENTED LEGAL ENVIRONMENT: GENERAL..	12
2.1 General	13
2.1.1 The two components of conduct risk.....	13
2.1.3 Government's solution.....	15
2.2 Conduct of the Financial Institution Bill and Twin Peaks	16
2.2.1 Regulatory framework applicable to the insurance industry	16
2.2.2 Conduct of Financial Institutions Bill.....	17
2.2.3 Intention of the Conduct of Financial Institutions Bill	17
2.3 Legislation currently applicable to institutions	26
2.3.1 Background in terms of the Companies Act 2008	26
2.3.2 Memorandum of incorporation.....	28

2.3.3	JSE listing requirements and King IV Report.....	29
2.3.4	Board of directors	29
2.3.5	Management	30
2.3.6	Directors	31
2.4	Legislation currently applicable to individuals	37
2.4.1	Companies Act 71 of 2008	37
2.4.2	Good corporate governance – <i>King IV Report</i>	46
2.4.3	Insurance legislation specifically applicable to key persons	49
2.5	Consequences as a result of failure to comply with fit-and-proper requirements	65
2.6	Case law on the fit-and-proper requirement in the South African insurance industry.....	66
2.7	Supervision mainly by an administrative authority	68
2.8	Interpretation of legislation in case of conflict between the Companies Act, Insurance Act, COFI Bill, and Prudential Standards	69
2.8.1	General background and interpretation	69
2.8.2	Interpretation in terms of the Companies Act	70
2.8.3	Interpretation in terms of the Insurance Act 18 of 2017	71
2.8.4	Resolving an apparent conflict between the Insurance Act and Companies Act	72
2.9	The harmonisation of conflicting provisions	75
2.10	The liability of key individuals in terms of the Companies Act as opposed to the liability in terms of the Insurance Act	76
2.10.1	Liability of directors in terms of the Companies Act	76
2.10.2	Liability of directors in terms of the Insurance Act	79
2.11	Regulatory liability for approving the wrong fit-and-proper individuals... 80	
2.12	Elections.....	81

CHAPTER 3: PROBLEMATIC ASPECTS.....	82
3.1 Problematic aspects	83
3.1.1 Legal certainty	83
3.1.2 Regulators	83
3.1.3 <i>Quis custodiet ipsos custodiet?</i>	84
3.1.4 Overboardedness	85
3.1.5 Fit and proper	85
3.1.6 Investor nomination	86
3.1.7 Culture of the organisation	86
3.1.8 Short-term versus long-term decisions	86
3.1.9 Conclusion.....	87
CHAPTER 4: PROPOSED SOLUTIONS ELSEWHERE	89
4.1 Comparative jurisdictions and best practices on the appointment of directors in the insurance industry in England.....	90
4.1.1 Legislation in United Kingdom	90
4.1.2 Case law in the United Kingdom.....	98
4.1.3 Liability of the Regulator in the United Kingdom	103
4.2 The applicability of the fitness and propriety requirement in other professions	103
4.3 Case law applicable to fit-and-proper requirements in the professions .	108
4.4 Non-law solutions – additional criteria and factors to consider when appointing directors based on the future of the insurance industry worldwide	114
4.4.1 Background	114
4.4.2 The South African insurance industry.....	115
4.4.3 Current training for key persons in South Africa	116
4.4.4 Technology and the insurance industry	117
4.4.5 Client centricity	121

4.4.6	Data management.....	121
4.4.7	Products for the poor	123
4.4.8	Changing risks.....	124
4.4.9	The personal characteristics of an effective director.....	124
4.4.10	Best practice in terms of recruiting, selection and appointment of directors according to the Institute of Directors of South Africa.....	126
4.4.11	Overboardedness.....	128
4.4.12	Best practice for board effectiveness.....	129
4.4.13	Possible liability of the Regulators	131
4.4.14	Conclusion.....	132
CHAPTER 5: PROPOSED SOLUTIONS AND CONCLUSION		133
5.1	Possible solutions to improve the appointment process	134
5.2	Proposed legislative amendments	134
5.3	Conclusion and risks.....	136
BIBLIOGRAPHY.....		138

ABBREVIATIONS

AVBOB Act	AVBOB Mutual Assurance Society Incorporation (Private) Act 7 of 1951
BCCI	Bank of Credit and Commerce International
CEO	Chief Executive Officer
COFI	Conduct of Financial Institutions
Companies Act	Companies Act 71 of 2008
Constitution	Constitution of the Republic of South Africa, 1996
Covid-19	Coronavirus Disease 2019
FAIS	Financial Advisory and Intermediary Services
FCA	Financial Conduct Authority
FMA	Financial Markets Act 19 of 2012
FSCA	Financial Sector Conduct Authority
FSMA	Financial Services and Markets Act 2000
FSR	Financial Sector Regulation 9 of 2017
FSRA	Financial Sector Regulation Act
G20	Group of Twenty
GOI	Governance and Operational Standards for Insurers
IAIS	International Association of Insurance Supervisors
IFRS	International Financial Reporting Standards
Insurance Act	Insurance Act 18 of 2017
IoDSA	Institute of Directors of South Africa
JSE	Johannesburg Stock Exchange
LTIA	Long-term Insurance Act 52 of 1998
Prasa	Passenger Rail Agency of South Africa
SAA	South African Airways

SABC	South African Broadcasting Corporation
SAQA	South African Qualifications Authority
SARB	South African Reserve Bank
Sasria	South African Special Risks Insurance Association
SMBIA	Social, Management, Business and Innovation in Applied Sciences
STIA	Short-term Insurance Act 53 of 1998
UK	United Kingdom

CHAPTER 1

INTRODUCTION

1.1 Background

Worldwide, boards experience challenges with appointing the most appropriate candidates for the position of director. It goes without saying: The most suitable, experienced and competent candidate should be appointed to ensure long-term sustainability and value growth for all stakeholders. There are numerous examples of directors' misconduct across South African industries and state-owned entities. The insurance industry does not differ from other industries/professions, where incompetent directors/individuals can harm and bring their industry/profession into disrepute.

A person must not only be “fit and proper” but also be properly fit for his/her position. It is, therefore, understandable that the Parliament of South Africa and professions use appropriate legislative measures as a gatekeeping mechanism to protect both (1) the interest of the public and (2) the integrity and status of a specific industry/profession. By doing so, they prevent people who are deemed to be not fit and proper from entering (or re-entering) a particular industry/profession. When incompetent or dishonest individuals are excluded, the possibility of future harm to people, commercial entities, and professions is averted.

The question can be asked whether it is possible to mitigate the risk of mediocre appointments on a director level through well-designed recruitment processes. This study investigates whether it is possible and the criteria that should be used in the insurance industry to recruit the most appropriate candidates. This is not only in the insurance industry's interest but also in consumers' interest.

One of the critical issues that directors must address is the risk of unfair consumer outcomes. Conduct risk is broadly defined as “any action of a financial institution or individual that leads to customer detriment or has an adverse effect on market stability or effective competition”.¹ In order to regulate conduct risk, legislation worldwide focuses on the supervision of institutions and individuals.

¹ KPMG “Conduct risk” Aug 2021 <https://assets.kpmg/content/dam/kpmg/ie/pdf/2021/09/ie-conduct-risk-2.pdf>. (2022-09-01).

1.1.1 History of governance breakdowns in South Africa

South Africa has an unfortunate history of misconduct of directors, failed state-owned entities, and failure to adhere to sound governance principles despite some of the most progressive legislation in the world. There are numerous examples of governance issues pertaining to directors that led to the downfall of state-owned entities² and private companies alike. The examples below highlight the financial harm not only to shareholders but also to the public at large.

Proceedings of the Zondo Commission investigations into state capture, corruption and fraud in the public sector reported on the troubled South African Airways (SAA) airline under the stewardship of the former SAA chair, Ms Dudu Myeni.³ This saga puts the spotlight on the role of directors⁴ and although the matter is not insurance related it highlights consequences of failure to adhere to sound governance principles. The Organisation Undoing Tax Abuse (OUTA) and the South African Pilots' Association succeeded in a High Court application to declare Ms Myeni a delinquent director for life in terms of section 162(5) of the Companies Act 71 of 2008 ("Companies Act"). The court granted the application after it had been proved that she and other government employees put SAA into a dire financial state. As a result, SAA ended up in business rescue.⁵ It was due to the gross incompetence and corruption that took place since her appointment as a non-executive director in 2009 until 2017.⁶

² Mbambo, LM. "An analysis of Corporate Governance in State-Owned Enterprises (SOE's) in compliance with the King Code Principles of Good Corporate Governance" Nov 2017, <https://scholar.ufs.ac.za/bitstream/handle/11660/9723/MbamboLE.pdf?sequence=1&isAllowed=y> (2022-12-15).

³ All Africa "Directors beware court declares Dudu Myeni former SAA chair delinquent director" <https://africanlii.org/article/20200703/directors-beware%21-court-declares-dudu-myeni-%28former-saa-chair%29-delinquent-director> (2022-06-20).

⁴ Cassim, MF "South African Airways saga puts spotlight on role of directors" *The Conversation* 10 Dec 2019 <https://theconversation.com/south-african-airways-saga-puts-spotlight-on-role-of-directors-128470>. (2022-06-20).

⁵ *Organisation Undoing Tax Abuse and Another v Myeni and Others* (15996/2017) [2020] ZAGPPHC 169.

⁶ Smith, C "Update: Myeni will take delinquent director case to Supreme Court of Appeal, say lawyers" *News24*, 22 Dec 2020, <https://www.news24.com/fin24/companies/triple-blow-to-former-saa-chair-myeni-in-delinquent-director-case-20201222>. *Organisation Undoing Tax Abuse and Another v Myeni and Others* (15996/2017) [2020] ZAGPPHC 169.

In the inquiry into the South African Broadcasting Corporation (SABC),⁷ it came to light that the minister could remove non-executive directors. The chief operating officer was appointed irregularly outside normal employment processes despite adverse findings against him by the Public Protector.⁸ The board and its subcommittees failed to exercise effective oversight relating to human resource management and finance-related matters.^{9, 10}

During the inquiry into Eskom's governance, procurement and financial sustainability, the Parliamentary Portfolio Committee on Public Enterprises found that directors failed to maintain clear lines of responsibility and accountability by interfering in the operational aspects of the business. By doing so, they undermined the principles of good corporate governance as established through the Public Finance Management Act 1 of 1999, the Companies Act and the King IV Report. Directors failed to report fraud, bribery, corruption and theft despite their obligations under the Prevention and Combating of Corrupt Activities Act 12 of 2004.¹¹

In March 2021, Zolani Matthews, aged 64, was hired to be the first group CEO in nearly six years at the Passenger Rail Agency of South Africa (Prasa), despite having no rail experience. He was suspended by the board eight months later because he failed to

⁶ Smith, C "Update: Myeni will take delinquent director case to Supreme Court of Appeal, say lawyers" *News24* 22 Dec 2020 <https://www.news24.com/fin24/companies/triple-blow-to-former-saa-chair-myeni-in-delinquent-director-case-20201222>.

⁷ Parliamentary Monitoring Group, "ATC 170224: Final Report of the Ad Hoc Committee on the SABC Board Inquiry into the fitness of the SABC Board" 2017-02-24, <https://pmg.org.za/taled-committee-report/2898/> (2022-06-20).

⁸ Parliament of South Africa "Final Report on SABC inquiry" 27 Feb 2017 https://www.slideshare.net/sabcnews/final-report-on-sabc-inquiry?qid=d8da3245-af4c-4a6e-823f-a7eca5c9f36e&v=&b=&from_search=5 (2022-12-22).

⁹ Thloloe, J "Report of Commission of Inquiry into interference in the decision-making in the newsroom of the South African Broadcasting Corporation" *SABC* <https://www.sabc.co.za/sabc/report-of-commission-of-inquiry/>. <https://pmg.org.za/taled-committee-report/2898> (2022-06-20); par 23.2.1.

¹⁰ *Ad Hoc Committee on SABC Board Inquiry* "ATC170224: Final Report of the Ad Hoc Committee on the SABC Board Inquiry into the fitness of the SABC Board" <https://pmg.org.za/taled-committee-report/2898> (2022-06-20); par 23.2.1.

¹¹ The Portfolio Committee on Public Enterprises "Report of the Portfolio Committee on Public Enterprises on the inquiry into governance, procurement and the financial sustainability of Eskom, dated 28 November 2018" <https://www.parliament.gov.za/storage/app/media/Links/2018/November%202018/28-11-2018/Final%20Report%20-%20Eskom%20Inquiry%2028%20NOV.pdf>. (2022-06-20).

declare his British citizenship and for an “alleged ... security breach and [breach] of ... contractual obligations”.¹² Sfiso Buthelezi, a current Member of Parliament, former deputy minister of finance and first board chairperson of Prasa, is also implicated in the collapse of the state-owned entity.¹³

The Management of Denel was unable to implement turnaround plans, to sell non-core assets, cut costs and attract private investors. The entity reported a financial loss of R1.9 billion for the year ending February 2020. Since 2019, several directors resigned, and Denel has had three CEOs as National Treasury failed to provide any additional funding in the 2021 Budget Review.¹⁴

The Steinhoff saga, possibly the most significant corporate fraud case in South African business history, has dominated financial and general news since the company’s share price collapsed on 5 December 2017.¹⁵ It seemed that Steinhoff adhered to all legal and Johannesburg Stock Exchange (JSE) listing requirements, which gave shareholders and investors a false sense of security.¹⁶ The University of Stellenbosch Business School attributed the fall of Steinhoff to several factors, including a lack of independence of the chair of the board,¹⁷ three directors who served more than nine

¹² Stent, J “Suspension of Prasa CEO Zolani Matthews: An appointment permeated with an international legacy of scandal” Daily Maverick, (2021-11- 23) <https://www.dailymaverick.co.za/article/2021-11-23-suspension-of-prasa-ceo-zolani-matthews-an-appointment-permeated-with-an-international-legacy-of-scandal/>.(2023-01-24)

¹³ Nowicki, L “Sfiso Buthelezi, the MP who derailed Prasa” Daily Maverick (2021-11-10) <https://www.dailymaverick.co.za/article/2021-11-10-sfiso-buthelezi-the-mp-who-derailed-prasa/>.

¹⁴ Mahlaka, R “R500m owed to staff: Denel veers closer to collapse as key business unit fails to pay full salaries”, Daily Maverick (2021-05- 31) <https://www.dailymaverick.co.za/article/2021-05-31-r500m-owed-to-staff-denel-veers-closer-to-collapse-as-key-business-unit-fails-to-pay-full-salaries/>.

¹⁵ Stellenbosch Business School “The Steinhoff Saga/University of Stellenbosch Business School” June 2018 https://www.usb.ac.za/usb_reports/steinhoff-saga/ (2022-12-22).

¹⁶ Naude, P. et al “Business perspectives on the Steinhoff Saga Special Report” 2018. *ResearchGate* https://www.researchgate.net/publication/337740231_BUSINESS_PERSPECTIVES_ON_THE_STEINHOFF_SAGA_SPECIAL_REPORT_JUNE_2018 (2022-08-09) p.13

¹⁷ *Ibid* p.15.

years on the board, a dual board structure, an arrogant and corrupt CEO, and a mismatch between content of reports and actual performance.¹⁸

The financial sector did not escape this unfortunate trend. VBS Mutual Bank was placed under liquidation on 13 November 2018 after it came to light that Management inflated the financial statements signed off by the board.¹⁹ The board approved the annual financial statements for the year ending 31 March 2017 despite a deficit of more than two billion rand (R2 296 599 008). Criminal and civil proceedings followed.²⁰

On 30 May 2022, the Financial Sector Conduct Authority (FSCA)²¹ released a media statement in which they reported that administrative penalties of R10 million had been imposed on Brite Advisors South Africa (Pty) Ltd (FSP No 23719) (“Brite”).²² The FSCA fined a previous director Mr Nigel James Green (“Mr Green”), R2, 5 million. Brite was previously known as deVere Investment South Africa (Pty) Limited²³ and deVere SA Acuma (Pty) Ltd. The company contravened numerous sectorial laws between February 2010 and August 2015. Mr Green, while acting as a director of Brite from 2008 until 2015, caused and permitted various contraventions that resulted in the withdrawal of Brite’s FSP licence. Mr Green’s failure to comply with the different financial sector laws impacted on his fitness and propriety.²⁴ As a result, the FSCA debarred Mr Green for a period of five years in terms of section 153 of the FSR Act from rendering financial services (also section 14A of the FAIS Act).²⁵

¹⁸ *Ibid* p.22.

¹⁹ South African Reserve Bank, Prudential Authority “Press statement on VBS Mutual Bank banking licence” (2020-07-31) <https://www.resbank.co.za/sarb/media-releases> (2020-08-09).

²⁰ *VBS Mutual Bank (in liquidation) v Madzonga* (25057/2018) [2019] ZAGP JHC 273 (23 August 2019) <https://www.gov.za/speeches/joint-statement-mpa-and-hawks-progress-investigation-venda-building-society-mutual-bank-17>.

²¹ South African Reserve Bank “Financial Sector Conduct Authority” <https://www.resbank.co.za/> (2022-12-22).

²² FSCA Press Release “FSCA imposes administrative penalties on Brite Advisors South Africa (Pty) Ltd and Mr Nigel Green (2022-05-30) <http://www.fsca.co.za/News%20Documents/> (2022-06-20).

²³ *Ibid*.

²⁴ *Ibid*.

²⁵ *Ibid*.

1.1.2 Challenges in the insurance industry

The insurance industry performs a dynamic and essential role in the South African financial services sector, economy and broader community. By covering risks, the industry enables individuals and businesses to mitigate the impact of the many adverse events they are exposed to.²⁶ Technology changed the role of business forever. In order to compete in a global market, businesses must operate 24 hours a day – the need for rapid decisions affects management and directors alike.

Recently, directors in the insurance industry had to oversee and make quick, accurate decisions in unknown territory. Worldwide, the insurance sector is under considerable pressure due to many claims (mainly from the hospitality and tourism industry) that have been lodged arising from the effects of lockdowns and quarantines imposed due to the coronavirus disease 2019 (Covid-19). Claimants rely on contagious disease extensions in their business interruption policies.²⁷ In South Africa, there are additional challenges, such as civil unrest claims due to the events in KZN in July 2021 and potential lawsuits due to ongoing load shedding and its effect on business continuity.²⁸ On the life side, actuarial projections have been proven wrong by the unforeseen deaths resulting from the pandemic. Both life and non-life claims will significantly impact the solvency and liquidity of insurance companies worldwide.

Insurance companies must adhere to several legislative provisions to keep their licences. Therefore, directors need more than general business acumen – they need industry-specific knowledge, skills and experience. They need to innovate to stay abreast of competitors, have communication skills to keep stakeholders informed, and implement “treating-customers-fairly” principles while acting ethically, transparently, and in an accountable manner. In the process, they must mitigate risks such as climate

²⁶ South African Reserve Bank Prudential Authority “Framework for governance and operational standards for insurers” <https://www.masthead.co.za/wp-content/uploads/2019/01/Prudential-Standard-GOI-1-Framework-for-Governance-and-Operational-Standards-for-insurers.pdf>.

²⁷ *Santam Limited v Ma-Afrika Hotels (Pty) Ltd & Another* (255/2021) [2021] ZASCA 141 (7 October 2021).

²⁸ Adams & Adams “Loadshedding likely to trigger business insurance litigation” 10 Dec 2021 <https://www.adams.africa/insurance-law/loadshedding-likely-to-trigger-business-insurance-litigation/>.

change, cyber-attacks, and solvency and liquidity challenges. Additionally, social media necessitates quick, correct decision-making to avoid reputational risks.

A Directive issued by the Financial Service Board in 2004 in terms of the Long-term Insurance Act 52 of 1998 (“LTIA”) and the Short-term Insurance Act 53 of 1998 (“STIA”) determined that the Registrar may not issue an insurance company a licence if a director or the managing executive of the applicant is not fit and proper to hold office.²⁹ The question can be asked how successful the requirement has been in appointing the most suitable candidates for ensuring accountability, competence and integrity. The gatekeeping mechanism, as set out above, applies in different guises to basically all professions, *inter alia*, attorneys, advocates, auditors, doctors, nurses, and directors of companies.

There is no standardised psychological test for determining whether an individual qualifies as fit and proper. This is understandable. On the one hand, the requirement deals with the skill set of the individual and, on the other hand, with his/her track record. As a general guideline, past behaviour is the best predictor of future behaviour. Fortunately or unfortunately (depending on the specific situation), this is not always the case. Thus, it is impossible to provide a conclusive test that will guarantee in all circumstances that a person (1) has integrity, (2) will always act honestly, (3) will be reliable, and (4) will act ethically in future.

In the judgment of the *General Council of the Bar of South Africa and Jiba and Others* [2016] 4 All SA 443 (GP)³⁰ it was emphasised that the minimum qualities that a lawyer should possess to be fit and proper for the legal profession were:³¹ “integrity, dignity, the possession of knowledge and technical skills, a capacity for hard work, respect for legal order and a sense of fairness”.³²

²⁹ Ref: Directive 101.A.i (LT&ST).

³⁰ Cliff Dekker Hofmeyr “What is meant by ‘fit and proper?’” the Australian Federal Court sheds some light (2018-11-30) <https://www.cliffedekkerhofmeyr.com/en/news/publications/2018/2022-12-20>.

³¹ *Ibid.*

³² *Ibid.*

In general, the term “fit” relates to “having the requisite qualities or skills to undertake something competently,”³³ while the word “proper” refers to “right, appropriate or correct: according to the rules”. An objective test determines “fit” (the formal ability to fulfil your duties). More subjective criteria are used to determine “proper” (the individual’s integrity and suitability). The “fit” criteria as it relates to expertise can be determined by proof of qualifications and experience although it is unfortunately not a fool proof predictor of future success.

1.2 Purpose of the study

The study aims to determine whether the existing criteria used to recruit directors in the insurance industry suffice to appoint the most suitable candidates to ensure a board's optimal functioning in the long term.

1.3 Problem statement

Given the background set out above, the study will focus on the recruitment and appointment of directors in the insurance industry. It will also investigate whether the existing fragmented legislation serves to set applicable criteria and mitigate conduct risk.

The study will exclude a discussion of the following: (1) performance against predetermined key performance indicators after appointment, (2) director incompetence and misconduct after appointment, (3) the resignation of a director to avoid consequence management and accountability and (4) a detailed discussion on the disqualification criteria for the appointment of management (key persons)³⁴

³³ LEXICO, UK Dictionary <https://www.lexico.com/definition/fit> (2022-07-20).

³⁴ These topics were excluded in order to meet the word limitations as set out in the requirements for the LLM dissertation

The study will:

- (1) Determine whether the existing fragmented legislation assists in appointing suitable candidates as directors of insurance companies to mitigate risk and to ensure the said companies' long-term sustainability.³⁵
- (2) To investigate the possible conflict in existing legislation between the Companies Act 2008, the Insurance Act 18 of 2017 (“Insurance Act”), the Governance and Operational Standards for Insurers, the Conduct of Financial Institutions (“COFI”) Bill and the Competition Act.
- (3) To determine whether the new COFI Bill will mitigate conduct risk and whether other non-legal solutions should be considered to supplement the current fit-and-proper requirement, given the developmental trajectory of the insurance industry.

1.4 Research question

The research question is whether the existing criteria used for appointing directors in the insurance industry are sufficient to ensure that the best people are appointed to ensure long-term sustainability (considering the interests of all stakeholders). In addition, the question is whether the existing fragmented legislation can be supplemented with non-legislative criteria based on where the insurance industry is heading.

1.5 Methodology

In answering the research question, this dissertation will use a doctrinal approach.³⁶ The starting point will be an overview of South African law. To place the study in perspective, a comparative review will be undertaken to establish how other jurisdictions deal with fit-and-proper or similar requirements.

³⁵ South African Reserve Bank Prudential Authority “Framework for governance and operational standards for insurers” <https://www.masthead.co.za/wp-content/uploads/2019/01/Prudential-Standard-GOI-1-Framework-for-Governance-and-Operational-Standards-for-insurers.pdf>.

³⁶ Hutchinson, T and Duncan, NJ “Defining and describing what we do: Doctrinal legal research” 2012 (17) 1 *Deakin Law Review* https://www.researchgate.net/publication/304034393_Defining_and_Describing_What_We_Do_Doctrinal_Legal_Research. (2022-07-21).

1.5.1 Qualitative research

The study will entail desktop research as opposed to quantitative research.

1.5.2 Constitutional method

All criteria, including the fit-and-proper requirement, will be investigated to determine whether the said criteria promote the spirit and objectives of the Bill of Rights.

1.5.3 Comparative law

South African law, as a hybrid law system, will be the main focus of the study. Since English law has significantly influenced South African insurance law, comparing SA insurance law with modern developments in English law will be beneficial. South African courts still regularly refer to English Insurance law.

1.6 Breakdown of chapters

The dissertation consists of the following chapters:

Chapter 1 introduces the study and describes the purpose, problem statement, research question and methodology.

Chapter 2 discusses current legislation and regulations applicable to companies and directors. The chapter will further recommend a proposed simplification of the legislation as per the COFI Bill.

Chapter 3 investigates the problematic aspects of the current legislative environment.

Chapter 4 investigates “fit and proper” requirements in other professions, case law, solutions in other jurisdictions and possible non-law solutions based on the developmental trajectory of the insurance industry.

Chapter 5 proposes, in conclusion, non-legislative solutions and amendments to current legislation.

CHAPTER 2:
CURRENT FRAGMENTED LEGAL ENVIRONMENT:
GENERAL

2.1 General

2.1.1 The two components of conduct risk

Although the South African insurance industry operates within a strictly regulated environment,³⁷ the current legal framework for the industry is complex, fragmented and in a state of transition³⁸ due to the introduction of new legislation and the repeal of certain sections of older legislation.³⁹ As a result, the framework is intricate to navigate.⁴⁰

Current legislation tries to mitigate unfair consumer outcomes by regulating key individuals, representatives and directors on the one hand and the institutions, including significant owners, on the other. The regulators used the fit-and-proper criteria to determine whether individuals are fit for their positions, have the required knowledge to make informed decisions and have been attending continuous development courses to stay abreast of developments in the industry.

Directors must be aware of the industry's compliance and regulatory requirements. Previously, the industry has mainly been regulated by the Long-term Insurance Act 52 of 1998 ("LTIA"), the Short-term Insurance Act 53 of 1998 ("STIA"), and the Financial Advisory and Intermediary Services Act 37 of 2002 ("FAIS"). The FAIS Act aimed to regulate the rendering of financial advisory and intermediary services.⁴¹ Companies must be licensed to sell insurance products, and staff and agents must be knowledgeable about the company's products and services. A significant corpus of subordinate legislation is also issued in terms of FAIS.⁴²

³⁷ Millard, D. *Modern Insurance Law in South Africa* (2013) p. 7.

³⁸ Huneberg, S "Consumer protection measures in non-life insurance contracts: A South African and Australasian trend?" 2019 (40) 3 *Obiter* <https://journals.co.za/doi/pdf/10.10520/EJC-1b912c1445>.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ "Transparency in Insurance Regulation and Supervisory Law", Springer Science and Business Media LLC, 2021, <https://www.springerprofessional.de/en/transparency-in-insurance-regulation-and-supervisory-law/19021056> (2022-12-20).

⁴² Financial Advisory and Intermediary Services Act 37 of 2002.

2.1.2 Background – International developments on legislation in the insurance industry and the Government’s response

Most of the recent international legislative reform in the financial sector was initiated after the worldwide economic crisis of 2008 by the Group of Twenty (G20), an international forum established on 26 September 1999 by governments from nineteen of the world’s most significant economies and the European Union. South Africa also played its role in ensuring international financial stability.⁴³

Since the African National Congress won the elections in 1995, numerous pieces of legislation have been introduced to bring about social change. This also affected the insurance industry, which forms part of the financial services sector. The sector had to comply with legislation dealing with employment equity, black economic empowerment, and social investment requirements. Although transformation and diversity are encouraged in the insurance industry, progress is slow *inter alia* due to the complexity of industry laws that act (inadvertently) as a barrier to entry.⁴⁴

In 2011, National Treasury introduced a new framework for the financial sector in South Africa in a policy document titled “A Safer Financial Sector to Serve South Africa Better”.⁴⁵ The government’s vision was one of sustained economic growth underpinned by financial stability, consumer protection and fair market conduct, financial inclusion, and combating financial crime.⁴⁶ This was also in line with the “insurance core principles” issued by the international standard-setting body of insurers, namely the International Association of Insurance Supervisors (IAIS). The

⁴³ South African Reserve Bank, Prudential Authority “Consultation Paper on Fit and proper standard for significant owners” 05 Oct 2018 <https://www.resbank.co.za/en/home/publications/publication-detail-pages/prudential-authority/PA-financial-sector-regulation/sector-regulation-joint-standards/2018/8824>. (2022-07-22).

⁴⁴ Hargarter, Antje, & van Vuuren, Gary. (2017). Assembly of a conduct risk regulatory model for developing market banks. *South African Journal of Economic and Management Sciences*, 20(1), 1-11. <https://dx.doi.org/10.4102/sajems.v20i1.1462>

⁴⁵ National Treasury Policy Document “A Safer Financial Sector to Serve South Africa Better”. (2011-02-23), <https://www.treasury.gov.za/documents/national%20budget/2011/a%20safer%20financial%20sector%20to%20serve%20south%20africa%20better.pdf> (2022-07-22).

⁴⁶ *Ibid* p. 4.

IAIS represents over 200 jurisdictions constituting 97% of the world's insurance premiums.⁴⁷

2.1.3 Government's solution

The government's solution was to promulgate an enabling statute, the Financial Sector Regulation Act 9 of 2017 ("FSRA"), and to implement the Twin Peaks architecture and regulatory model in South Africa.⁴⁸

The act provided for three critical changes to the then-regulatory approach. Firstly it provided the South African Reserve Bank (SARB) with the mandate to ensure financial stability. Secondly, the Prudential Authority was established within the SARB to regulate banks, insurers, co-operative financial institutions, financial conglomerates and specific market infrastructures. Lastly, it established a public entity to regulate market conduct, namely the Financial Sector Conduct Authority. Most sections of the act were implemented on 1 April 2018.⁴⁹ The Minister was empowered by regulations published in the Government Gazette on 29 March 2018 to enable the two regulatory bodies⁵⁰ of the Twin Peaks model, namely, firstly, the Prudential Authority, which is, in essence, the SARB that monitors compliance with the Insurance Act and secondly, the FSCA which is responsible for monitoring market compliance of the STIA, LTIA and the Pensions Fund Act 24 of 1956. Collectively, these two bodies are referred to as the financial sector regulators. Each regulator could publish directives and guidelines.

The first peak of the Twin Peaks model is the Prudential Authority under the auspices of the SARB. The Prudential Authority mainly consists of two principal departments,

⁴⁷ International Association of Insurance Supervisors <https://www.iaisweb.org/about-the-iais/what-we-do/> (2022-07-22).

⁴⁸ Deloitte "Latest regulatory update in the insurance industry" 2018 <https://www2.deloitte.com/content/dam/Deloitte/za/Documents/audit/Deloitte-AIS-Latest-Regulatory-Update-July-2018.pdf> <https://www2.deloitte.com/content/dam/Deloitte/za/Documents/audit/Deloitte-AIS-Latest-Regulatory-Update-July-2018.pdf>.

⁴⁹ Bracher, P "Financial Institutions Legal Snapshot," Norton, Rose Fulbright 3 April 2018 <https://www.financialinstitutionslegalsnapshot.com/2018/04/financial-sector-regulations-act-in-force-from-1-april-2018> (2022-08-30).

⁵⁰ Notice 169 of 2018 Government Gazette 41549 of 29 March 2018; Regulation Gazette R405 of 29 March 2018.

namely (1) the Banking, Insurance and Financial Market Infrastructure and Supervision Department and (2) the Policy, Statistics and Industry Support Department. The Prudential Authority has the specific mandate of granting licences, setting standards, conducting inspections and investigations, and taking enforcement actions.⁵¹ In terms of the FSRA, the Reserve bank must publish a three-year prudential regulatory strategy. In the strategy for 2021-2023, they intend (1) to strengthen and enhance the regulatory frameworks for insurers and significant owners, (2) to develop sector regulatory instruments, (3) to transform the sector and (4) to support financial innovation and to develop regulatory approaches towards climate change.⁵² The Prudential Authority must also consider the conversion of licences and approve the directors and auditors of insurers as fit and proper.

The second peak of the Twin peaks system is the FSCA which oversees market conduct. The Financial Services Board previously performed this function. The minister of finance was designated to approve new financial projects and services not regulated under existing financial sector laws. Both regulators have scope of jurisdiction over all financial institutions.

2.2 Conduct of the Financial Institution Bill and Twin Peaks

2.2.1 Regulatory framework applicable to the insurance industry

Currently, the FSRA, Insurance Act, STIA and LTIA regulate all insurers, reinsurers, branches of foreign reinsurers, micro-insurers and Lloyd's. The legislation is thus applicable indirectly to directors who oversee these companies.

⁵¹ South African Reserve Bank, Prudential Authority "*Functions of the Prudential Authority*" <https://www.resbank.co.za/en/home/what-we-do/Prudentialregulation/functions-of-the-prudential-authority> (2022-07-22).

⁵² South African Reserve Bank, "*Prudential Authority Regulatory strategy*" 2021-2024 <https://www.resbank.co.za/content/dam/sarb/what-we-do/prudential-regulation/PA%20Regulatory%20and%20Supervisory%20Strategy%202021.pdf>. (2022-07-22).

2.2.2 Conduct of Financial Institutions Bill

At a policy level, the intention of the Twin Peaks model (adopted on 1 April 2018)⁵³ was to harvest the benefits of an integrated regulatory model.⁵⁴ The COFI Bill and FSRA intend a more robust market conduct policy framework.⁵⁵ The FSRA provides for a separate regulator, namely the Financial Services Conduct Regulator, which will cooperate with the National Credit Regulator.

The regulatory strategy for the insurance market up to 2021 was wide-ranging: to promote the insurance market's efficiency, fair customer treatment and customer education.⁵⁶ Market conduct focuses on good value, well-regulated products, and services that are accessible to historically marginalised people. This will lead to better customer outcomes and institutions that treat customers more fairly.⁵⁷ The reform aims to build integrity and confidence in the financial system.⁵⁸

2.2.3 Intention of the Conduct of Financial Institutions Bill

- (1) The COFI Bill, which will apply to all financial institutions in the financial services sector, will eventually replace the FAIS Act. In this context, the COFI Bill will regulate market conduct through (1) market conduct regulations, including treating-customers-fairly guidelines, (2) Policyholder Protection Rules, and (3) mechanisms for alternative dispute resolution.

⁵³ Deloitte “Latest regulatory update in the insurance industry Actuarial & Insurance Solutions” July 2018 <https://www2.deloitte.com/content/dam/Deloitte/za/Documents/audit/Deloitte-AIS-Latest-Regulatory-Update-July-2018.pdf> (2022-07-22).

⁵⁴ National Treasury *Explanatory Policy Paper Accompanying the Conduct of Financial Institutions Bill* Dec 2018 <http://www.treasury.gov.za/twinpeaks/CoFI%20Bill%20policy%20paper.pdf>. (2022-08-08).

⁵⁵ *Ibid.*

⁵⁶ Bracher, P “Insurance and reinsurance in South Africa: Overview” *Thomson Reuters Practical Law* 1 Oct 2020 [https://uk.practicallaw.Thomsonreuters.com/1-505-2026?TransitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.Thomsonreuters.com/1-505-2026?TransitionType=Default&contextData=(sc.Default)&firstPage=true). (2022-07-20).

⁵⁷ National Treasury “*Conduct of Financial Institutions Bill: Public Workshop*” 22 Feb 2019 <http://www.treasury.gov.za/twinpeaks/2019022201%20COFI%20Bill%20Public%20Workshop%202019%20Presentation.pdf>.

⁵⁸ National Treasury *Explanatory Policy Paper Accompanying the Conduct of Financial Institutions Bill* Dec 2018 <http://www.treasury.gov.za/twinpeaks/CoFI%20Bill%20policy%20paper.pdf>. (2022-08-08).

Market conduct further refers to “the investigation by insurance regulators to determine whether an insurer has followed [the] law ... relating to the distribution of products to consumers and the settlement of claims”.⁵⁹ Thus, compliance involves the prohibition of unlawful behaviour that prevents transparency and adversely affects trading. Market conduct further includes the following: “the review of rating, tier classification, underwriting, policyholder service, claims, marketing and sales, producer licensing, compliant handling practices ... [and] compliance procedures and policies”.⁶⁰

National Treasury published a discussion document in December 2014 titled *National Treasury: “Treating Customers Fairly in the Financial Sector: A Draft Market Conduct Policy Framework for South Africa”*.⁶¹ The document intended to identify the gaps and problems in the current regulatory framework. It also envisages a more effective overarching regulatory framework. The problem is formulated in the document as follows: ⁶²

*“The legislative framework is fragmented and institutionally focused, allowing for inconsistent application of standards and presenting opportunities for regulatory arbitrage.”*⁶³

(2) In the short title of the COFI Bill, the objective is to “establish a consolidated, comprehensive and consistent regulatory framework for the conduct of financial institutions” with several aims.⁶⁴ One of the aims is to “significantly streamline

⁵⁹ IRMI Insurance Glossary Definition, “Market Conduct” <https://www.irmi.com/term/insurance-definitions/market-conduct> (2022-08-09).

⁶⁰ Law Insider, Dictionary, *Market Conduct Examination Definition*, <https://www.lawinsider.com/dictionary/market-conduct-examination> (2022-09-08).

⁶¹ National Treasury *Explanatory Policy Paper Accompanying the Conduct of Financial Institutions Bill* Dec 2018 <http://www.treasury.gov.za/twinpeaks/CoFI%20Bill%20policy%20paper.pdf>. (2022-08-08).

⁶² *Ibid.*

⁶³ *Ibid.* p.10.

⁶⁴ Conduct of Financial Institutions Bill Sep 2020 <http://www.treasury.gov.za/public%20comments/CoFI%20Bill.pdf> (2022-08-08) Sec 3(1) p. 20.

the legal landscape for conduct regulation in the financial sector”⁶⁵ by having a single comprehensive market conduct law”.⁶⁶

(3) The following underlying policy principles proposed in the 2014 discussion document (referred to above) have been considered in developing new market conduct law.⁶⁷ As a result, the legislature decided on the following approach:

(a) Activity-based

The first policy shift proposed by the COFI Bill is a move away from a sectorial or institutionally focused way of supervision and regulation to an activity-based approach. Currently, thirteen different sectorial laws regulate financial institutions. Every institution within the financial sector is regulated by its separate laws based on an institutional definition.⁶⁸ These laws are not integrated but institutionally focused and implemented in a silo manner. The COFI Bill will define activities in order to regulate and supervise similar activities. Previously, if a service was not defined, it was not regulated.⁶⁹

(b) Principle-based

Currently, there are prescriptive *rule-based* requirements. These rules are used to assess the market conduct compliance of an organisation. Although the legislator wanted to move away from a prescriptive rules-based approach, the latter brings certainty, while a *principle and outcomes-based* approach sacrifices some certainty given that individuals will operationalize the requirements differently.

To prevent a tick-box approach, the COFI Bill (once enacted) will require (1) technical compliance with the law as well as (2) the spirit of the law.⁷⁰ In its

⁶⁵ *Ibid* p. 4.

⁶⁶ *Ibid* p. 2.

⁶⁷ National Treasury, “*Treating Customers Fairly in the Financial Sector – A draft Market Conduct Policy Framework for South Africa*” Discussion Document, Dec 2014 <http://www.treasury.gov.za/public%20comments/fsr2014/Treating%20Customers%20Fairly%20in%20the%20Financial%20Sector%20Draft%20MCP%20Framework%20Amended%20Jan2015%20WithAp6.pdf> 2014-12-11. (2023-01-25).

⁶⁸ *Ibid*.

⁶⁹ *Ibid*.

⁷⁰ *Ibid*.

explanatory policy paper that accompanied the first draft of the Bill, National Treasury explained it as follows:

“A narrow focus on rigid rules and compliance reporting has often led to the letter of the law being followed while the spirit of the law is missed. A principle-based approach seeks to set principles that specify the intention of regulation, rather than set rules detailing requirements of a financial institution.”⁷¹

Conradie underlines some of the challenges as follows: (1) “Principles can lead to an inconsistent approach to implementation”;⁷² (2) “... uncertainty about how the regulator will view conduct, measures and controls;⁷³ (3) ongoing justification and recording the reasoning behind conduct or measures”;⁷⁴ (4) “... requires more skills to develop measures that will meet the outcome or principle” and (5) “principles may be too broad”.⁷⁵

Such a framework will have its own challenges as it mainly revolves around “self-regulation”. This might lead to inconsistencies in the approach to implementation. Institutions will require additional skills to be able to develop measures to be able to meet the principles or outcomes.⁷⁶

A question arises as to which criteria the regulators will use to gauge the market conduct of an institution. Previously, the compliance officer of each institution had to report on compliance against prescribed rules. In future, compliance officers will make a subjective judgment call on whether institutions adhere to the defined principles. It could be considered that current legislation be amended to include regulator’s liability as a result of damages caused due to the wrongful application of subjective discretion.

⁷¹ Conradie, L “Conduct of Financial Institutions Bill” (2019-02-06) <https://www.etude.co.za/article.php?article=29> (2022-12-22).

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ Conradie, L (2019) “Rules-based approach vs. principle-based approach to regulation in the financial industry” *Etude* 19 Mar 2019 <https://www.etude.co.za/article.php?article=32> (2021-12-22).

⁷⁶ *Ibid.*

(c) Outcomes-focused

Another critical policy shift is moving from a strict compliance-based framework to a proportionate and risk-based one. The Regulator will be able to identify the most significant conduct risks and will be able to mitigate those risks. Financial institutions will be classified into different categories depending on their size, and institutions will be steered accordingly. Different sizes of institutions pose different risks.⁷⁷ The risk-based and proportional supervisory approach is integral in supporting innovation and the development of the financial sector.

On the one hand, the outcome-based and supervisory approach⁷⁸ will ensure that regulated financial institutions deliver specific, clearly set out fairness outcomes for customers throughout the customer journey – “from ensuring that the appropriate culture is embedded within organisations, to the product design, sales and disclosure process; and the claims and complaints experience”.⁷⁹ On the other hand, implementation might be applied inconsistently. This might result in discrepancies and lead to future claims. The question arises again as to who will be liable if that happens.

(d) Treating customers fairly⁸⁰

The FAIS Act brought about a revolution in terms of market conduct.⁸¹ The Code of Conduct issued in terms of the FAIS Act introduced minimum standards that advisors and intermediaries should adhere to.⁸² Currently, market conduct is also regulated in terms of insurance regulations and the

⁷⁷ *Ibid.*

⁷⁸ Mhango, M “Approach with care when considering Twin Peaks” *IOL* (2014-03-06) <https://www.iol.co.za/business-report/opinion/approach-with-care-when-considering-twin-peaks-1656994> (2022-12-20).

⁷⁹ Stokes, G “New regulation allows you to insure with confidence” *IOL* 27 Aug 2019 <https://www.iol.co.za/personal-finance/new-regulation-allows-you-to-insure-with-confidence-31159515>.

⁸⁰ *Ibid.*

⁸¹ Millard, D “CoFI and (TC) F: “Further along the road to Twin Peaks and a Fair Insurance Industry”, *Tydskrif vir Hedendaagse Romeins–Hollandse Reg (THRHR)* 2018 (81) 3742 p. 377 (2022-11-28).

⁸² *Ibid.* p. 377.

Policy Protection Rules.⁸³ Policy Protection Rules are issued in terms of Section 62 of the LTIA, and Section 55 of the STIA and the rules give specific guidance on how an insurer should treat policyholders.⁸⁴ The Policy Protection Rules in Rule 12.2 set out an advisor's or broker's oversight responsibilities.

The Treating-customer-fairly (TCF) principles (similar to what is applicable in the United Kingdom) were introduced as part of the 2018 Policy Protection Rules and were the most significant contribution to the current legal framework.⁸⁵ There are six treating-customers-fairly outcomes. These outcomes ensure that customers are treated fairly throughout the product life cycle – from product design and promotion, advice and servicing, to complaints and claims handling.⁸⁶

The COFI Bill was built on the market conduct framework contained in the FAIS Act and the two sets of PPRs.⁸⁷ Once enacted, the bill will ensure that treating-customers-fairly principles are legally binding and enforced on all financial institutions.⁸⁸ Both the board and management must develop customer-centred strategies and be cognisant of the latest development in market conduct law. Market regulation complements financial solvency regulation.⁸⁹

(4) Second draft of the Conduct of Financial Institutions Bill

The second draft of the COFI Bill was published in October 2020. The COFI Bill specifically stipulates that persons in control of a financial institution can

⁸³ Bracher, P “Insurance and reinsurance in South Africa: Overview” *Thomson Reuters Practical Law* 1 Oct 2020 [https://uk.practicallaw.Thomsonreuters.com/1-505-2026? TransitionType=Default&contextData=\(sc.Default\) &firstPage=true](https://uk.practicallaw.Thomsonreuters.com/1-505-2026? TransitionType=Default&contextData=(sc.Default) &firstPage=true). (2022-07-20).

⁸⁴ Millard pp. 80-81.

⁸⁵ Millard, D “CoFI and (TC) F: “Further along the road to Twin Peaks and a Fair Insurance Industry”, *Tydskrif vir Hedendaagse Romeins–Hollandse Reg (THRHR)* 2018 (81) 3742 p. 392 (2022-11-28).

⁸⁶ IOL “*New approach required to treat you fairly*” (2010-03-22) <https://www.iol.co.za/business-report/companies/new-approach-required-to-treat-you-fairly-998405> (2022-12-22).

⁸⁷ *Ibid* p. 390.

⁸⁸ <https://www.sanews.gov.za/south-africa/public-comment-sought-drafft-cofi-bill>.

⁸⁹ [Content.naic.org/cipr-topics/topic.market.conduct.regulation.htm](https://content.naic.org/cipr-topics/topic.market.conduct.regulation.htm).

influence the governance and risk profile of the institution. Based on that, Part 5 of the COFI Bill sets the fit-and-proper requirements for key persons.⁹⁰ The Policy Protection Rules provide that the parties can agree to alternative dispute resolutions, including conciliation, mediation and arbitration. Policies can, however, not exclude any other manner of protection.⁹¹

The following fundamental changes were incorporated in the second draft of the Bill:

- (i) The Bill addresses inconsistencies and ambiguities with existing laws.
 - (ii) The Bill strengthens the provisions of the FSRA by allowing the FSCA and other regulators with jurisdiction in the financial sector to exercise their powers effectively in terms of the FSRA.
 - (iii) To avoid duplication and contradictions in governance requirements, the Prudential Authority and FSCA are allowed to set joint governance requirements. Small enterprises would be included in the COFI Bill.
 - (iv) The amendment allows the FSRA to provide for a licensing framework, while an entity will require a licence issued under the COFI Bill.
 - (v) The Bill strengthens the transformation in the financial sector by focusing on tangible targets.
 - (vi) The Bill includes the application of conduct requirements to medical schemes sector in order to streamline the COFI Bill. With the new Financial Markets Act 19 of 2012 (“FMA”), the licensing schedule was revised to address the review of specific activities through the FMA.
 - (vii) The Bill includes a new licence activity (called “lending”) to capture the provisions of non-retail credit that are not regulated in terms of the National Credit Act 34 of 2005.
- (5) The impact of the COFI Bill on current legislation pertaining to the insurance industry:

⁹⁰ S.24. & S.25.

⁹¹ Policy Protection Rules 8.1 (d).

(a) Long-term Insurance Act⁹²

Once enacted, the COFI Bill will repeal the current LTIA. The current Policy Protection Rules are still regulated in terms of the LTIA, and the proposal is that new regulations be issued as standards under the COFI Bill as they contain crucial market conduct standards.

(b) Short-term Insurance Act⁹³

The STIA, as amended by the Insurance Act 18 of 2017 and its regulations, still regulate the conduct of the short-term (non-life) insurance industry. It is foreseen that it be repealed and absorbed into the COFI Bill.

(c) Financial Advisory and Intermediary Services Act⁹⁴

In 2002 already, the legislator acknowledged the need for regulating market conduct in the financial industry by regulating key individuals, representatives and intermediaries. Key individuals were defined as a corporate or unincorporated body, a trust or a partnership managing or overseeing the activities of the body, and if there was only one natural person, it related to that person.⁹⁵ Any key individual had to embody the personal character qualities of honesty and integrity. Such individuals must also meet all the Competency and Operational Ability requirements.⁹⁶ The draft bill envisages the FAIS act being absorbed into the COFI Bill. COFI will apply to all financial institutions, including the banking sector (save Part 1 of Chapter VI).

The essence of the FAIS Act is contained in section 7(1), which provides that no one may act or offer to act as a financial services provider unless he/she has been issued a licence to do so under the act.

Section 8A of the FAIS Act requires that an authorised financial service provider, key individual, representative of the provider, and key individual of

⁹² 52 of 1998.

⁹³ 53 of 1998.

⁹⁴ 37 of 2002.

⁹⁵ S 1 (1).

⁹⁶ S 8 (1) (c).

the representative must comply with fit-and-proper requirements. If a financial service provider, representative or key person appointed after 1 October 2004 did not meet the fit-and-proper requirements, the person had to comply within three years from the date of first appointment. In terms of section 8(2) of the FAIS Act,

“The Authority may–

- a) Require an applicant to furnish such additional information, or require such information to be verified, as the Authority may deem necessary: and
- b) Take into consideration any other information regarding the applicant or proposed key individual of the applicant, derived from whatever source including the Ombud and any other regulatory or supervisory authority, if such information is disclosed to the applicant and the latter is given a reasonable opportunity to respond thereto.”⁹⁷

From 1 June 2022, all directors (applicants) must submit themselves to criminal background checks through, among other things, fingerprint capturing. The FSCA will do all the bookings and administration of the fingerprint capturing through Managed Integrity Evaluations at no cost to the applicants.

To assist key individuals with their compliance duties, the act already at this stage stipulated in section 17(1) that an authorised service provider with more than one key individual or more than one representative had to appoint compliance officers to monitor adherence to the act. The compliance officer also had to adhere to the fit-and-proper requirement.

(d) Insurance Act⁹⁸

The Insurance Act that came into effect on 1 July 2018 is primarily focused on prudential matters rather than business conduct. It repealed all the provisions of the LTIA and the STIA relating to prudential supervision. It

⁹⁷ Legal Practitioners Fidelity Fund “www.fidfund.co.za (2022-12-22).

⁹⁸ Act 18 of 2017.

introduced Rule 2A of the Policy Protection Rules relating to the composition and sale of funeral and micro-insurance products.

(6) Perceived impact of the COFI Bill according to research

In the *South African Insurance Industry Survey of 2020*, KPMG underlines that⁹⁹ the primary objectives of the new conduct regulatory framework are the protection and fair treatment of financial institution customers. The survey results acknowledge that insurers, in particular, have an odious reputation. Most participants in the survey felt that although customers might be aware of the new legislation, its benefits are perceived to be minimal. Most participants have designated conduct risk as a separate principal risk and have not integrated it as part of the business and other risks. Although most participants have indicated that they use data and analytics to measure market conduct, they have also stated that they could be making more efficient and effective use of data to enhance the quality and usability of the available conduct data.¹⁰⁰

2.3 Legislation currently applicable to institutions

2.3.1 Background in terms of the Companies Act 2008

In the early stages of the evolution of company law, directors were often appointed for their stature and position in society and not for the benefits they could bring to the company. The accepted norm for director qualifications of companies was that no special skills were required (*Fisheries Development Corporation of SA Ltd v Jorgensen Lt and Others* 1980 (4) SA 150 (W) at 165-166). This has changed significantly over time – not only due to the requirements of particular acts but also due to the development of the common law upon which the superstructure of company law was built. This indirectly impacted general trading companies. They followed

⁹⁹ KPMG, “*Resilience, The South African Insurance Industry Survey 2020*” <https://home.kpmg/za/en/home/campaigns/2020/05/the-south-african-insurance-survey-2020.html>. <https://assets.kpmg/content/dam/kpmg/za/pdf/pdf2020/south-african-insurance-survey-2020.pdf> (2022-12-22).

¹⁰⁰ Dubois, M and Simpson, B “Market conduct in the insurance industry” 2020 *The South African Insurance Industry Survey* <https://assets.kpmg/content/dam/kpmg/za/pdf/pdf2020/market-conduct-in-the-insurance-industry.pdf>.

“industry best practices” (not peremptory legislative provisions) regarding directors' skills and level of education.

Directors of companies operating in specialised environments require enhanced skills and targeted education outcomes. Specialised environments entail targeted fiduciary responsibilities and, by implication, enhanced duties of care and skill. A particular act usually regulates these specialised companies. Conversely, shareholders and investors were increasingly targeting directors to keep them responsible and accountable for perceived missteps relating to their oversight role regarding issues that would have surprised any director in previous decades.

Internationally, cases such as the demise of Enron in 2002¹⁰¹ in the United States of America and the Parmalat case in Italy¹⁰² led to the amendment of company legislation in the United States and Europe. The downfall of Enron, a prominent international energy company situated in Houston, Texas, was mainly due to the unethical behaviour of its senior officials. It included the abuse of power, excessive privilege, deceit, misplaced and broken loyalties and irresponsible behaviour. This happened notwithstanding Enron's extensive corporate governance systems.¹⁰³

The CEO and chair of the board of Parmalat in Italy collaborated to misrepresent financial statements of loss to deceive shareholders and investors, causing what the United States Security Exchange Commission described as one of the largest and most brazen corporate financial frauds in history. The Enron pattern was repeated in that there was a lack of independence of non-executive directors; the positions of the chair and CEO roles were not separated; there was a disregard for Italy's corporate governance code; and there was a failure to implement an adequate and effective

¹⁰¹ Hosseini, SB & Mahesh, R International Journal of Current Research Volume. 8, Issue 08, pp. 37451-37460 August 2016 “*The lesson from Enron Case – Moral and managerial responsibilities*” file:///C:/Users/User/Downloads/168792.pdf https://www.researchgate.net/publication/306091392_The_Lesson_from_Enron_Case_-_Moral_and_Management_Responsibilities. (2022-09-07).

¹⁰² Ogutu, EO “Corporate failure and the role of governance: The Parmalat scandal” 2016 (11) 3 *International Journal of Management & Information Technology* <https://doi.org/10.24297/ijmit.v11i3.5111>. (2023-01-25).

¹⁰³ https://www.researchgate.net/publication/306091392_The_Lesson_from_Enron_Case_-_Moral_and_Management_Responsibilities.

monitoring system.¹⁰⁴ The news of Enron’s accounting failures negatively influenced companies’ stock prices in the energy and natural gas sectors, regardless of any connection with Enron – as they say, an outgoing tide affects all ships.¹⁰⁵

Locally, the legislator replaced the Companies Act 61 of 1973 with the new Companies Act 71 of 2008 that came into effect on 1 May 2011.¹⁰⁶ With the introduction of the new act, the legislator aimed to bring South African companies’ legislation in line with international standards, promote compliance with the Bill of Rights as provided in the Constitution of the Republic of South Africa, 1996 (“the Constitution”)¹⁰⁷ and promote the development of the South African economy.¹⁰⁸ The Companies Act distinguishes the roles and responsibilities of business owners (shareholders) and investors on the one hand and balances these with the duties of directors and management on the other.

2.3.2 Memorandum of incorporation

Except for the Companies Act, the sole document governing a company’s affairs is the memorandum of incorporation (MOI). The act specifies core requirements which are known as “unalterable provisions” as opposed to “alterable provisions”.¹⁰⁹ The Companies Act determines who can be appointed as a director. Additional requirements can be added to the MOI. Shareholders can curtail the board’s powers by limiting the powers in the alterable provisions of the MOI. A company’s MOI may provide for the direct appointment and removal of any directors by any person who is named in the MOI, *ex officio* directors and the appointment of alternate directors. Non-listed companies are also allowed to make necessary or incidental rules not covered in the Act, MOI and not contrary to it.¹¹⁰ These rules and the MOI are binding between

¹⁰⁴ Ogutu, EO “Corporate failure and the role of governance: The Parmalat scandal” 2016 (11) 3 *International Journal of Management & Information Technology* <https://doi.org/10.24297/ijmit.v11i3.5111>. (2023-01-25).

¹⁰⁵ Akhigbe et al “Accounting contagion: The case of Enron” 2005 (29) 187 – 202 *Journal of Economics and Finance* 29.187-202 DOI: 10.1007/BF02761553.

¹⁰⁶ <https://www.iodsa.co.za/page/Companiesact>.

¹⁰⁷ Constitution of the Republic of South Africa, 1996.

¹⁰⁸ S 7.

¹⁰⁹ S 15(2) (d) Companies Act 71 of 2008.

¹¹⁰ S 15(3) Companies Act 71 of 2008.

the company and each shareholder, between the shareholders and the company and each director and prescribed officer of the company, or other persons as members of the audit committee or a committee of the board.

2.3.3 JSE listing requirements and King IV Report

The JSE listing requirements and the King IV Report on corporate governance were published in addition to the Companies Act. The purpose was to improve board oversight by adhering to sound corporate governance principles to ensure shareholder value and financial and social sustainability. It is paramount that directors implement the principles of responsibility, accountability, fairness and transparency on behalf of the board.¹¹¹

2.3.4 Board of directors

A company cannot function as a separate legal entity without human agency (a board of directors).¹¹²

Section 66 of the Companies Act deals with the powers of the board, directors and prescribed officers. It grants directors the legal authority to run companies as they deem fit, provided that they act within the legislative framework.¹¹³ This power is now original and no longer a delegated power.¹¹⁴ This provision is significant in that it assigns the legal duty and responsibility of managing the affairs of a company to the directors. In the previous act, this obligation had to be delegated to the directors at a general meeting or by the company's constitution.¹¹⁵ Business affairs must be managed by and under the board's direction, except to the extent that the act or the company's MOI provides otherwise.¹¹⁶ Collectively, the board of directors must promote the business' success and, by doing so, ensure that shareholders' value increases – the so-called “enlightened shareholder value approach”.¹¹⁷ The directors

¹¹¹ Institute of Directors in South Africa *King Report on Governance for South Africa* (2016).

¹¹² Henochsberg, Vol. 1 p. 263 [Issue 25].

¹¹³ Davis, D *Companies and other Business Structures in South Africa* p. 21.

¹¹⁴ Shareholder Protection Philosophy and the Companies Act 71 of 2008, p. 9.

¹¹⁵ Cassim, FHI p. 403.

¹¹⁶ S 66(1).

¹¹⁷ Shareholder protection philosophy and the Companies Act 71 of 2008, p 17.

must consider all the stakeholders' legal interests, including suppliers, service providers and the general public.

The Companies Act further focuses on the principles of solvency and liquidity. Sanctions imposed under the act are decriminalised wherever possible. The act prohibits reckless, grossly negligent and fraudulent trading.

Both the Companies Act and the company's MOI can curtail the powers of the board of directors. The MOI can stipulate that directors need a specific mandate to act and can include the referral of certain matters to shareholders for consideration and approval.¹¹⁸

The following provisions apply and hold both directors and prescribed officers accountable:¹¹⁹

- Section 69: Ineligibility and disqualification of persons to be directors or prescribed officers.
- Section 75: Directors' personal financial interest.
- Section 76: Standards of directors' conduct.
- Section 77: Liability of directors and prescribed officers.
- Section 78: Indemnification and directors' insurance.
- Section 30(4) and section 30(5): Disclosure of remuneration.

2.3.5 Management

The new Companies Act introduced the "prescribed officer" concept on the management side. This entails any position that can control and influence decision-making. These criteria can be used to determine a company's prescribed officers, as the act does not define "prescribed officer". It is uncertain to what extent management functions can be excluded in the MOI or transferred to the shareholders to perform.¹²⁰

¹¹⁸ Davis, D. p. 111.

¹¹⁹ Myburgh, E "Holding delinquent directors personally liable" *De Rebus* 2017-07-01 <https://www.derebus.org.za/holding-delinquent-directors-personally-liaible/Gerardcambon.net>. (2022-12-22).

¹²⁰ Shareholder Protection Philosophy and the Companies Act 2008, footnote 14, p. 4.

2.3.6 Directors

a) *Types of directors as contemplated in section 66*

The Act provides for four types of directors: A director appointed in terms of the MOI,¹²¹ an *ex officio* director,¹²² an alternate director¹²³ and a director elected by shareholders.¹²⁴ A person can also be appointed or elected by the shareholders as a director. Shareholders must elect at least 50% of the directors in a for-profit company that is not a state-owned entity. Shareholders can also agree to appoint directors,¹²⁵ although this will still be regarded as an election as other shareholders failed to agree.¹²⁶ The votes can, however, be weighted/loaded.¹²⁷ Each director has only one vote unless the MOI is amended to increase the votes.¹²⁸ The weighted votes might influence the control that the directors have over the appointment of a director.¹²⁹

The Companies Act defines a “director”¹³⁰ as a board member as contemplated in section 66 or as an alternate director. This includes any person occupying the director or alternate director position by whatever name designated. Section 66 recognises different types of directors, including an *ex officio* director, an MOI-appointed director, an alternate director, an elected director,¹³¹ and a temporary director.¹³² The act defines an *ex officio* director as “a person who holds office as a director of a particular company solely as a consequence of that person holding some other office, title, designation or similar status specified in the company’s memorandum of

¹²¹ S 66(4)(a)(i).

¹²² S 66(4)(a)(iii).

¹²³ S 66(4)(a)(iii).

¹²⁴ SS 66(4)(a)(iv) and 68(1).

¹²⁵ Gohlke & Schneider v Westies Minerale (Edms) Bpk 1970 (2) SA 685 (A) at 689.

¹²⁶ *Henochsberg*, Vol.1 p. 259 [Issue 24].

¹²⁷ *Henochsberg*, Vol.1 p. 258(1) [Issue 21].

¹²⁸ S 73(5)(a).

¹²⁹ Shareholder Protection Philosophy and the Companies Act 2008, p. 13.

¹³⁰ S 1.

¹³¹ S 66(4).

¹³² S 68(3).

incorporation”.¹³³ An *ex officio* director’s powers can be restricted in the MOI. If not, the director will have the same powers, functions and duties as any other director.¹³⁴ A *de facto* director occupies a director’s position without being appointed. An alternate director attends meetings on behalf of an absent director. In the case of for-profit companies, at least 50% of alternate directors must be elected by the shareholders.¹³⁵

b) *Additional types of directors recognised in the South African Law*

(i) *De jure* directors, *de facto* directors and shadow directors

In addition, South African law also recognises the following types of directors identified in the United Kingdom: In *Re Hydrodam (Corby) Ltd [1994] BCC 161*, the liquidator of an insolvent estate sought orders to keep directors liable for wrongful trading in terms of the Insolvency Act 1986. The court held that there were three kinds of directors: (a) *de jure* directors that had been appointed to the office; (b) *de facto* directors that were not appointed but acted as directors, and (c) shadow directors who acted following the instructions of the duly appointed directors.¹³⁶ A person will, however, not be regarded as a shadow director if the board of directors acts merely on his/her advice.¹³⁷ The court held that all three categories of directors could be held responsible for wrongful trading. However, in this specific case, the liquidator failed to prove that the defendants were directors at any material time.

(ii) Temporary directors, nominee directors, puppet directors

A director might be appointed temporarily by the Board if he/she meets the requirements for a director unless the MOI of a for-profit company prohibits it.¹³⁸ A significant shareholder, such as a bank or a financier, usually

¹³³ S 1.

¹³⁴ S 66(5).

¹³⁵ *Henochsberg*, Vol. 1, p. 258(1) [Issue 21].

¹³⁶ S 251(1) of the UK Companies Act 2006.

¹³⁷ S 251(2) of the UK Companies Act 2006.

¹³⁸ *S v Shaban* 1965 (4) SA 646 (W) 651.

nominates a director to control sufficient voting power in the company to represent their interests.¹³⁹ A puppet director blindly follows the instructions of his/her “handler”.¹⁴⁰

(iii) Executive, non-executive and independent directors

The Companies Act does not define executive and non-executive directors, except by implication: executive directors form part of the management team, and non-executive directors do not.

Nevertheless, the court distinguished between executive and non-executive directors as follows in the *Fisheries Development Corporation* case:¹⁴¹

*“The duties of non-executive directors are those that are of an intermittent nature which are performed at board meetings. The non-executive director is not involved in the day-to-day management of the company and does not have to have any special business acumen or even business knowledge of the specific business of which he is a director.”*¹⁴²¹⁴³

The proposed test is to determine whether the duties and responsibilities are “non-existent [done by no one]” if the person vacates or is dismissed from the position of (executive) director.¹⁴⁴

Non-executive directors may delegate and rely on the judgment of others in management. However, they still have to exercise their own judgment on a matter and cannot blindly follow advice.¹⁴⁵ Executive directors are involved in the day-to-day running of the business of the company. However, the

¹³⁹ *Ibid.*

¹⁴⁰ *S v Shaban* 1965 (4) SA646 (W) 652-3.

¹⁴¹ *Fisheries Development Corporation of SA Ltd v Jorgensen Lt and Others* 1980 (4) SA 150 (W) at 165-166.

¹⁴² 165H–166B.

¹⁴³ Stevens, R “The Legal Nature of the Duty of Care and Skill: Contract or Delict?” PER/PELJ 2017(20) DOI <http://dx.doi.org/10.17159/1727-3781/2017/v20n0a1202> (2022-12-22).

¹⁴⁴ *Henochsberg*, Vol. 1 p. 264 (2A) [Issue 27].

¹⁴⁵ *Fisheries Development Corporation of SA Ltd v Jorgensen Lt and Others* 1980 (4) SA 150 (W) at 166E.

court did not determine whether the same duty of care and skill would apply to executive and non-executive directors.¹⁴⁶

The JSE listing requirements define executive directors as “directors that are involved in the day-to-day management of the company and/or full-time salaried employment of the company and/or any of its subsidiaries”.¹⁴⁷ Non-executive directors are defined as “not involved in the day-to-day management of the company and not full-time salaried employees of the company and/or its subsidiaries”.¹⁴⁸ Independent directors should be determined holistically and on a “substance over form” basis in accordance with the indicators provided in sections 94(4)(a) and (b) of the Companies Act and the King Code.¹⁴⁹

c) Number of directors required to be appointed

The type of company (as registered) determines the number of appointments of directors that a company is required to make. The Companies Act provides for four types of for-profit companies, namely public, state-owned, personal liability, and private companies.¹⁵⁰ The board of a public company must consist of at least three directors, while non-profit companies, private companies and personal liability companies must have at least one director¹⁵¹ that had been nominated or appointed.¹⁵² This would be in addition to the number of directors required where a company needs to establish an audit committee and/or a social and ethics committee. The company’s MOI may make provision for a higher number of directors. The board’s

¹⁴⁶ 164H–166B.

¹⁴⁷ <https://www.jse.co.za/sites/default/files/media/documents/2019-04/JSE%20Listings%20Requirements.pdf>. p. 56 Sec 3.83 (i).

¹⁴⁸ Sec 3.83 (ii) p. 56.

¹⁴⁹ S 3.83 (iii) p. 56.

¹⁵⁰ S 1.

¹⁵¹ S 66(2).

¹⁵² S 66(4) and (5).

decisions when the required number of directors is not met will not limit or negate the decisions.¹⁵³

Where a profit company (other than a state-owned company) only has one director, that director can fulfil all the functions of the board at any time, without compliance with formalities unless otherwise stipulated in the MOI.^{154 155}

Insurance companies operate as for-profit companies. An insurer or reinsurer (other than a micro-insurer) must be a public company, a state-owned entity or a co-operative incorporated in South Africa. A micro-insurer may be a profit, non-profit private or public company or a co-operative incorporated in South Africa. A reinsurer may be a branch of a foreign reinsurer.¹⁵⁶

d) *Vacancies*

(i) *First Directors*

Each company's incorporator is also the company's first director and serves as a director until the requirements to elect or appoint a director have been met as stipulated in the Act or the MOI.¹⁵⁷ The Board must call a shareholders' meeting within 40 days after incorporation to fill the vacancies if the number of directors (including the *ex officio* directors) is not met.¹⁵⁸

(ii) *Other circumstances*

The act stipulates specific circumstances in which a person ceases to be a director and a vacancy arises.¹⁵⁹ A vacancy arises: Where the MOI provides

¹⁵³ S 66(11).

¹⁵⁴ S 57(3)(a).

¹⁵⁵ Kudumane Investment Holdings Ltd v Northern Cape Manganese Company (Pty) Ltd [2012] 4 All SA 203 (GSJ) paras 36-39.

¹⁵⁶ Bracher, P "Insurance and reinsurance in South Africa: Overview" *Thomson Reuters Practical Law* 1 Oct 2020 [https://uk.practicallaw.Thomsonreuters.com/1-505-2026? TransitionType=Default&contextData=\(sc.Default\) &firstPage=true](https://uk.practicallaw.Thomsonreuters.com/1-505-2026? TransitionType=Default&contextData=(sc.Default) &firstPage=true). (2022-07-20).

¹⁵⁷ S 67(1).

¹⁵⁸ S 67(2).

¹⁵⁹ S 70(1).

for a first term and the term expired; the director resigns or dies; when an *ex officio* director ceases to hold the qualification, office, title designation or similar status; when the director resides outside the Republic at the time when there are no other directors of the company resident within the Republic; the director has have financial interest or conflicts of interests; or the director becomes incapacitated to such an extent that he/she is unable to perform the functions of a director and is unlikely to regain that capacity within a reasonable time, subject to section 71(3); or is declared delinquent by a court, or placed on probation under conditions that are inconsistent with continuing to be a director of the company, in terms of section 162 or becomes ineligible or disqualified in terms of section 69, subject to section 71(3) or is removed by resolution of the shareholders in terms of section 71(1); by resolution of the board in terms of section 71(3); or by order of the court in terms of section 71(5) or (6).¹⁶⁰

An existing board must first be removed before a new board can be appointed.¹⁶¹ A “substitution” of a board was allowed in *Harri v Silonque Landowner’s Association* 2019 [DR 0285 (LP)] par 25.

e) Appointment as director

The Companies Amendment Act, No 3 of 2011, in Section 44(b), introduced the label “entitled to serve as a director”. This implies that a director first becomes entitled to serve as a director and after that becomes a director.¹⁶² The intention might have been that written consent must be received before the appointment or election.¹⁶³

The company must inform the Companies Commission within ten business days after a person ceases to be a company director.¹⁶⁴ As insurance companies are public companies, they are required to hold annual general meetings. The act stipulates that

¹⁶⁰ S 70(1).

¹⁶¹ *Henochsberg*, Vol. 1 General Note on S 71.

¹⁶² *Henochsberg*, Vol. 1, p. 260 [Issue 24].

¹⁶³ *Henochsberg*, Vol. 1, p. 259 [Issue 24].

¹⁶⁴ S 70(3).

an election be conducted at the next annual general meeting of the company.¹⁶⁵ A temporary director can be appointed until the vacancy has been filled by election at the annual general meeting.¹⁶⁶

A person becomes a director if he/she is appointed or elected and has in writing agreed to be appointed as a director.¹⁶⁷ In *Entrepreneurial Business School (Pty) Ltd and Others v Africa Creed Investment (Pty) Ltd*,¹⁶⁸ the written acceptance of the director was not required as the general acceptance of the appointment of the shareholders was sufficient (paras 40 and 41). Failure to submit the filing of the CoR 39 does not determine the efficacy of the appointment or resignation.¹⁶⁹

2.4 Legislation currently applicable to individuals

2.4.1 Companies Act 71 of 2008

2.4.1.1 *Fit and proper*

a) *Fit*

Concerning the requirement that a person must be fit to act as a director (i.e. in respect of skills, qualifications or minimum standards), section 76(3) of the Companies Act provides that a director of a company, when acting in that capacity, must exercise the powers and perform the functions of a director—

(1) “With the degree of care and skill and diligence that may reasonably be expected of a person—

(i) Carrying out the same functions in relation to the company as those carried out by that director; and

(ii) Having the general knowledge, skill and experience of that director.”

A director will have satisfied these requirements if, in terms of section 76(4):

¹⁶⁵ *Ibid.*

¹⁶⁶ S 68(3).

¹⁶⁷ S 66(7).

¹⁶⁸ *Henochsberg*, Vol. 1 p. 260 [Issue 24].

¹⁶⁹ CIPC Notice to Customers Practice Note 3 of 2016. https://www.cipc.co.za/wp-content/uploads/2022/09/Practice_Note_3_of_2016.pdf (2022-11-25).

- (i) The director has taken reasonably diligent steps to become informed about the matter:
- (ii) Either –
 - (aa) the director has no material personal financial interest in the subject matter of the decision and had no reasonable basis to know that a related person had a personal financial interest in the matter: or
 - (bb) the director complied with the requirements of section 75 with respect to any interest contemplated in subparagraph (aa); and
- (iii) The director made a decision, or supported the decision of a committee or the board, with regard to that matter, and the director had a rational basis for believing, and did believe, that the decision was in the best interest of the company.”

In fulfilling the above requirements, an inclusive approach must be followed in that directors must consider the interest of the various stakeholders, but according to the shareholder value approach, it must also be to the benefit of the shareholders in the long run.¹⁷⁰ The underlying principle is that a good corporate reputation is an asset that will benefit the company and, indirectly, the shareholders.¹⁷¹ Thus, fit and skill are determined by both an objective and a subjective test.¹⁷² It is objective in the sense that skill and diligence are that which may be reasonably required from a person but subjective in the sense that it measures the general knowledge, skill and experience of that particular director. Therefore, if the director is a lawyer and is a director of an insurance company, the level required from that person is what could reasonably be expected from a lawyer, not from an insurance specialist.

Regarding the standard of a director’s conduct, an objective test can be applied additionally to the specialised knowledge and skill that is reasonably required and expected from a director carrying out the same functions in the same company. The objective test refers to the level of care, skill and diligence required specifically for that

¹⁷⁰ Shareholder Protection Philosophy and the Companies Act 2008, p 18.

¹⁷¹ Cassim p. 20.

¹⁷² Kanamugire, J & Chimuka, TV “The director’s duty to exercise Care & Skill in Contemporary South African Company Law and the Business Judgement Rule” *Mediterranean Journal of Social Sciences* 5(20) (2022-11-07).

position. The court noted in *Master of the High Court, Western Cape Division, Cape Town v Van Zyl* [2019] JOL 41274 (WCC) para 108 with reference to *Bristol and West Building Society v Mothew (t/a Stapley & Co)* [1996] 4 All ER 698 CA at p 712 that:

“The various obligations of a fiduciary merely reflect different aspects of his core duties of loyalty and fidelity. Breach of fiduciary obligation, therefore, connotes disloyalty or infidelity. Mere incompetence is not enough. A servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty.”

Therefore, the minimum standard is the subjective/objective test (skill of that person), but if the objective test result is higher than that of the subjective/objective test, the higher level is required. The elements in respect of the requirements for “skill” are, with reference to fitness, actually a test that applies in the case of existing actions, and there is no requirement as to this skill before a director is appointed.

b) Properness

The Companies Act contains requirements for fit and proper, although they are not called as such. Section 69 deals with the ineligibility and disqualification of persons to be directors or prescribed officers. “Properness” is determined in terms of section 69(7) of the Companies Act, which provides that certain persons are ineligible to become directors, or prescribed officers, as defined in section 66(10) of the Companies Act. A person is ineligible to be a director of a company if the person—

- (a) Is a juristic person;
- (b) Is an un-emancipated minor, or is under a similar legal disability; or
- (c) Does not satisfy any qualification in the company’s MOI.¹⁷³

It is clear that ineligibility can be due to statutory provisions or indirect through those provisions set out in the MOI. A person who is ineligible in terms of this section of the

¹⁷³ S 69 of the act.

Companies Act is “absolutely” ineligible – meaning that this person can under no circumstances be a director.¹⁷⁴

However, a person may be eligible but disqualified. Sections 69(8) (a) and (b) provide that a person is disqualified if:

- (a) “a court has prohibited a person from being a director or declared the person to be delinquent in terms of section 162, or in terms of section 47 of the Close Corporations Act, 1984 (Act no. 69 of 1984); or
- (b) subject to subsections (9) to (12), the person—
 - (i) is an un-rehabilitated insolvent;
 - (ii) is prohibited in terms of public regulation to be a director of the company;
 - (iii) has been removed from an office of trust, on the grounds of conduct involving dishonesty;¹⁷⁵ or
 - (iv) has been convicted, in the Republic or elsewhere, and imprisoned without the option of a fine or fined more than the prescribed amount (R1000) in terms of regulation 39(4)) ¹⁷⁶for theft, fraud, forgery, perjury, or an offence—
 - (aa) involving fraud, misrepresentation or dishonesty;¹⁷⁷
 - (bb) in connection with the promotion, formation or management of a company, or in connection with any act contemplated in subsection (2) or (5);¹⁷⁸
 - (cc) under this Act, the Insolvency Act, 1936 (Act No 24 of 1936), the Close Corporation Act, 1984, the Competition Act, the Financial Intelligence Centre Act, 2001 (Act No 38 of 2001), the Financial Markets Act, 2012;¹⁷⁹ the Securities Services Act 36 of 2004 or

¹⁷⁴ Delport, P et al. *The New Companies Act Manual*, p. 81.

¹⁷⁵ S 69(9)(a)f.

¹⁷⁶ http://www.saflii.org/za/legis/consol_act/ca2008107/ (2022-12-27).

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*

Chapter 2 of the Prevention and Combating of Corruption Activities Act, 2004 (Act 12 of 2004).¹⁸⁰

The court may exempt a person who falls within the category of disqualification¹⁸¹ by either extending the disqualification for no longer than a period of five years at a time or exempt any person from the disqualification as set out above. The appointment of an ineligible or disqualified person as a director is null and void.

Section 69(3) provides that a company must not knowingly permit an ineligible or disqualified person to serve or act as a director. In terms of section 69(4), when a person becomes ineligible or disqualified while serving as a director of a company, he/she ceases to be entitled to act as a director immediately, subject to section 70(2).

In terms of section 71, shareholders may at any time remove a director through an ordinary resolution.¹⁸² Under certain circumstances, the board of directors¹⁸³ and Companies Tribunal can also remove a director¹⁸⁴ following the procedures in terms of section 71(2). The rights provided for in section 71 overrides any provision in the MOI or agreement between shareholders and directors.¹⁸⁵

If the board has removed a director, a vacancy on the board does not arise until¹⁸⁶ the expiry of the time for reviewing the decision in terms of section 71(5) or the granting of a court order.

Section 71(3) states that if a company has more than two directors, and a shareholder or director has alleged that the director of the company has become ineligible or disqualified or incapacitated to the extent that the director is not able to perform his duties and is unlikely to do so within a reasonable time in the near future or has been

¹⁸⁰ S 69(8).

¹⁸¹ S 69(11).

¹⁸² S 65(7).

¹⁸³ S 71(6).

¹⁸⁴ S 76(8).

¹⁸⁵ S 71(1).

¹⁸⁶ S 70(2).

neglected or derelict in performance then it must be determined by resolution to remove that director. A vacancy will then arise that must be filled.

2.4.1.2 Duties of directors

The Companies Act 61 of 1973 did not codify all the duties of directors. Common law stipulates a fiduciary duty and a duty of care and skill, which apply equally to all directors. Some fiduciary duties of directors have been partly codified in the Companies Act 2008.¹⁸⁷ The purpose of the partial codification was to ensure that the directors are aware of their responsibilities. Unfortunately, it seems that the contrary has been achieved, given the many disputes (and case law) on the subject.¹⁸⁸

In *Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd and Others* 1980 (4) All SA 525 (W) at 165, the question was raised as to what is expected of the different types of directors regarding their duties. The test is applied differently to different kinds of directors. The court concluded that the nature of the business influences the extent of a director's duty of care and skill:

“Reliance may, however, be placed on the performance of or information provided by certain parties like employees, accountants or legal counsel or a committee of the board (unless the actions of the committee do not merit confidence) or the performance (not information) by the persons to whom the board has delegated the authority or duty to perform one of the delegable functions of the board, but only in respect of the exercise of their powers and the performance of their functions as directors as directed in terms of s76(3).”

By accepting an appointment as a director, the directors tacitly indicate that they have the ability and skills to perform their duties to a certain standard. It is a reasonable assumption for shareholders, who usually elect a director, that every director will apply his/her skills, experience and knowledge to the company's best interest.

Directors of an insurance company are required to craft a strategy and oversee operations by evaluating data, overseeing investments and approving annual financial

¹⁸⁷ Davis, D p. 115.

¹⁸⁸ Cassim, FHI p 19-20.

statements. Other issues to be considered are the oversight of the management of risk and technology and information to achieve strategic objectives, compliance,¹⁸⁹ and fair remuneration,¹⁹⁰ establishing an effective control environment¹⁹¹ and adopting an inclusive stakeholder approach.¹⁹² Given the above, the question could be asked as to what set of skills will then be required if a director would not need these specific skills to approve submitted documentation and reports.

In sections 76(2) and 76(3)(a) and (b), the standard of a director's conduct of his/her fiduciary duties is discussed as the Companies Act stipulates how a director must exercise the powers and perform the functions of a director. In summary, in terms of the Companies Act,¹⁹³ directors must exercise their duties and perform their functions in good faith and for a proper purpose in the best interests of the company; and with the degree of care, skill and diligence that may reasonably be expected of a person in that position and with that experience.¹⁹⁴ All the requirements mentioned above apply to directors of insurance companies. The questions to be answered relate to how these sections in the Companies Act link with the fit-and-proper requirement and the exercising of sound judgment in short- and long-term decision-making within insurance companies.

Regarding any personal gain or conflict that an appointed director might have, the Companies Act stipulates that a director must disclose a conflict of interest with his/her own personal financial interests.¹⁹⁵ Section 76 of the Companies Act 2008 introduces new statutory law entitled "Standards of Director's Conduct". A director must not use the company's position or information to gain an advantage or cause harm and must communicate at the earliest practical opportunity any information to the board unless—

- (i) it is immaterial to the company;

¹⁸⁹ Principle 13.

¹⁹⁰ Principle 14.

¹⁹¹ Principle 15.

¹⁹² Principle 16.

¹⁹³ S 76(5).

¹⁹⁴ Fisheries Development Corporation.

¹⁹⁵ S 75 of the Companies Act 2008.

- (ii) generally available to the public; or
- (iii) known to the other directors; or
- (iv) where a legal obligation of confidentiality prevents him/her from disclosing the information.¹⁹⁶

A question arises whether the earliest practical opportunity to declare a conflict of interest would be before appointment or after appointment. Most CVs will not declare ownership of shares in companies, subsidiaries or service providers. The fact that the director was doing business with the company and has knowledge of competitors might also not be declared at that early stage. On the one hand, stating specific familiarity with, for example, competitors might influence decision-making favourably, but on the other hand, it might affect his position regarding restrictions in the Competition Act.

2.4.1.3 Role of board committees

a) Role of the nomination committee

The *King IV Report* proposes that the board can establish various board committees to give attention to critical areas. The board can mandate and delegate their responsibility to these committees using charters that are annually approved by the board. *King IV* recommends that only non-executive members be appointed, with the majority being independent.

The nomination committee is responsible for recruiting, electing and appointing the appropriate candidate based on the required skills, experience and knowledge for the position. The code also recommends that the committee take responsibility for succession planning and evaluating the governing body's performance. The responsibilities of the nomination committee are specified - ¹⁹⁷

- (a) To assist the board in the formal and transparent procedures leading to board appointments;

¹⁹⁶ S 76(2)(b).

¹⁹⁷ Davis, D. p. 144.

- (b) To assist the board in the formal and transparent procedures leading to the appointment of the company secretary;
- (c) To review and evaluate the board's mix of skills and experience;
- (d) To review and assess other qualities of the board, such as its demographics and diversity; and
- (e) To review and evaluate all committees and the contribution of each director.

Ideally, the committee should have obtained the results of a skills audit to identify gaps in the current board composition. The *curriculum vitae* ("course of life") of each candidate should be considered to determine the "perfect fit", taking cognisance of the type of business and skills needed. The committee must not only evaluate competence factors but also ensure that any director to be appointed fits within the organisation. The nomination committee chair will ideally chair the interviews and make recommendations to the board based on the outcome.¹⁹⁸ Afterwards, the board will vote on the most suitable candidate before the appointment. As previously indicated, the most suitable candidate in the insurance industry will need to meet fit-and-proper requirements in addition to the skills, competence and culture fit criteria.

b) The role of the Human Capital Committee

The Human Capital committee must recommend specific remuneration packages for each executive director and fees payable to non-executive directors. The proposals must be presented to the shareholders at an annual general meeting and approved by the meeting before being implemented. A director is not entitled to be remunerated simply based on his/her appointment.¹⁹⁹ The MOI can include a clause prohibiting directors from being paid for their services. The Act does not define remuneration except in section 30(6), which states what must be disclosed in the annual financial statements.

The committee can further be involved in evaluating the performance of key individuals contributing to the success of the company and the achievement of results. The human

¹⁹⁸ The Co-operative Bank "*Matters reserve for the Board*" <https://www.co-operativebank.co.uk/about-us/our-business/matters-reserved-for-the-board/> (2022-12-27).

¹⁹⁹ Shareholder Protection Philosophy and the Companies Act 2008, p. 23.

resource function should, where applicable, attend to best practices, including security, selective hiring, and self-management, fair and performance-based compensation, training in relevant skills, creating a flat and egalitarian organisation, and making information easily accessible to those who need it.²⁰⁰

In insurance companies, this committee will ensure that a fit-and-proper policy is adopted and reviewed annually. Furthermore, this policy needs to be submitted to the audit and risk committee for recommendation to the board for adoption.

c) *Audit and risk committee*

The composition of the audit and risk committee must comply with section 94(4) of the Companies Act. A public company, a state-owned company, and a company that is required by its MOI to have an audit committee as stipulated in sections 34(2) and 84 (1)(c)(ii) must elect an audit committee at its annual general meeting.

The audit committee must comprise at least three members unless the audit committee of the holding company performs this function on behalf of the subsidiary. An independent director must chair the committee and oversee the internal audit function, which ensures compliance with the fit-and-proper policy in terms of the requirements set out in the Insurance Act 18 of 2017.

2.4.2 Good corporate governance – *King IV Report*

A director's appointment and duties should align with best practices and international standards. To ensure adherence to this, the *King IV Report on Corporate Governance for South Africa 2016* became effective on 1 April 2017.²⁰¹ The concepts that form the cornerstones of this report are “ethical leadership, the organization in society, corporate citizenship, sustainable development, stakeholder inclusivity and integrated

²⁰⁰ Van Vulpen, E “7 Human Resources Best Practices, Academy to innovate H”
<https://www.aihr.com/blog/human-resource-best-practices/#:~:text=7%20Human%20Resource%20Best,by%20Erik%20van%20Vulpen> (2022-08-08)

²⁰¹ King IV Report on Corporate Governance for South Africa 2016-11-1 Institute of Directors South Africa https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/684B68A7-B768-465C-8214-E3A007F15A5A/loDSA_King_IV_Report_-_WebVersion.pdf (2022-08-08) (2022-08-08).

reporting”.²⁰² The code is a set of seventeen voluntary principles and leading practices. The main aim of sixteen of the principles is to assist the governing body in attaining its good corporate citizen status and governance outcomes. The seventeenth principle applies to investors only. King IV follows an “apply and explain” approach²⁰³ unless otherwise required by law or the JSE listing requirements.

The King IV Report reiterates a similar viewpoint as the Companies Act regarding recruiting and appointing directors. Individual members and the rest of the board should cultivate and exhibit ethical and effective leadership.²⁰⁴ Ethical leadership is defined as “exemplified by integrity, competence, responsibility, accountability, fairness, and transparency,”²⁰⁵ while effective leadership is results driven.²⁰⁶ The person’s ethical behaviour should be considered, including his/her social media profile.²⁰⁷ The individual should be evaluated to ensure that he/she appreciates that the organisation’s core purpose, risk, opportunities, strategy, business model, performance and sustainable development are all inseparable elements of the value-creation process.²⁰⁸

Although the director should be conscious of all stakeholders to ensure that the Board make informed assessments of the organisation’s performance and its short-, medium- and long-term prospects.²⁰⁹ However, the directors “owe their duties to the company and the company alone as a company is a separate legal entity from the moment it is registered until it is deregistered”.²¹⁰ Each director should be aware of and implement the principles set out in *King IV*.²¹¹

²⁰² P. 8. The three shifts in the corporate world.

²⁰³ Foreword p. 11.

²⁰⁴ Fundamental concepts p. 24.

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.*

²⁰⁷ Principle 2 of *King IV Report*.

²⁰⁸ Principle 4 of *King IV Report*.

²⁰⁹ Principle 5 of *King IV Report*.

²¹⁰ Fundamental Concepts, p.30.

²¹¹ Principle 6 of *King IV Report*.

The overriding concern is whether the candidate fits into the governing body and whether the board is knowledgeable, skilled, experienced, diverse and independent enough to fully discharge its governance role and responsibilities.^{212, 213} The majority of members should be independent and able to exercise their judgment objective and unfettered.²¹⁴ Organisations, therefore, need to look at the independence of the governing body from a holistic perspective considering, amongst others, the total skills, experience and diversity required of the governing body to make it optimal. According to *King IV*, the board should consider a mix of executive, non-executive and independent non-executive members; sufficiency in terms of the number of members who qualify to serve on its committees; and quorums when considering the composition of the board. The board should further evaluate the performance of its individual committees, the chair, and its members and link that to the improvement of its performance²¹⁵ and effectiveness.²¹⁶ There should be representation in terms of race and gender. Regulatory requirements and diversity targets should also be considered. The board should use a skills matrix to determine which candidate meets the appropriate fit-and-proper criteria. The nomination, election and appointment process should be formal and transparent. Ideally, the appointment should align with a previously drafted succession plan.

The existing members' responsibilities, performance and record of attendance at meetings should be considered before re-election. A background check should be conducted independently to establish the candidate's background and experience and to verify his/her qualifications. This profile should be included in the notice of the annual general meeting.

Directly after appointment, a formal letter of appointment should be drafted and signed. The company secretary must ensure that new directors are trained and inducted within a reasonable time to understand the business fully. The company secretary must

²¹² Practice Notes 20 July 2017 Independence of the Governing Body members.

²¹³ Principle 7 of *King IV Report*.

²¹⁴ IoDSA Practice Notes Independence of Governing Body Members.

²¹⁵ Principle 9 of *King IV Report*.

²¹⁶ Fundamental Concepts, Objectives of King IV p. 26.

further determine whether they need specific training or ongoing professional development programmes.

In conclusion, fit-and-proper requirements determine what a director must be or must have been, while the fiduciary duties described in the Companies Act and *King IV* determine how directors must act or exercise their powers. If the right person is appointed, the board can achieve the four governance outcomes of ethical culture, good performance, effective control, and legitimacy. This will enable a dedicated focus on the four responsibilities of governing bodies, namely strategic direction, policy and planning, accountability and oversight and monitoring.²¹⁷

The Companies Act and the King IV Report provide the structure and procedure that must be followed and the end result that should be achieved. However, there is no specific provision for objective criteria that will ensure or predict 100% whether a director will be successful.

2.4.3 Insurance legislation specifically applicable to key persons

a) *Insurance Act 18 of 2017*

As part of the insurance industry reform, the Insurance Bill was signed into law in January 2018 and became the new Insurance Act 18 of 2017 from 1 July 2018. The main aim of this legislation is to provide 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. It has to promote a fair, safe and stable insurance market to introduce a legal framework for micro-insurance and has to promote financial inclusion. The act applies to all classes of insurance and replaces parts of the LTIA and the STIA, and provides for matters connected therewith.²¹⁸ The Insurance Act sets out the licensing requirements, operating structures, prudential

²¹⁷ Meyer, M “The 4 Kings of King IV: a new era of corporate governance” *TalentsTalks* <https://talentsTalks.net/4-kings-king-iv-new-era-corporate-governance/>.(2022-09-07)

²¹⁸ Insurance Act.

standards for insurers, insurance groups, key and significant owners, financial soundness reporting, public disclosures, and significant transactions.²¹⁹

The Insurance Act 18 of 2017 defines the fit-and-proper concept as follows:

“(a) in relation to a key person, personal character qualities of honesty, integrity, and competence, including experience, qualifications and knowledge as may be prescribed; and (b) in relation to a significant owner, qualities of honesty and integrity and financial standing as may be prescribed”.²²⁰

A “key person” includes a director along with a senior manager, a head of the control function; an auditor referred to in section 32; a trustee of a trust referred to in section 41, and a representative and a deputy representative of Lloyd’s or a branch of a foreign reinsurer referred to in section 34.²²¹

The fitness and propriety of significant owners and key persons reside primarily with the board of directors of an insurer under Chapter 3 of the Act. The Prudential Authority may prescribe fit-and-proper requirements for key and significant owners of the insurer of a controlling company. The insurer must seek the Prudential Authority’s approval for individuals or firms before they become significant owners, directors, or auditors. The Prudential Authority must be notified in writing within 30 days when a director is appointed using a prescribed form.

Section 12 of the requirements states that a key individual must be fit and proper at all times. To continuously evaluate and review compliance with section 12, section 13 determines that a financial service provider must have adequate policies, internal systems, and control and monitoring mechanisms. The provider must keep records demonstrating compliance with sections 12 and 13, including a competence register required by section 13(5). A licence will not be granted if directors do not meet the fit-

²¹⁹ Stokes, G. “New regulation allows you to insure with confidence” IOL, 27 Aug 2019 <https://www.iol.co.za> (2022-01-26)

²²⁰ Chapter 1 Interpretation and objectives of the act. S 1(1).

²²¹ S 1(1).

and-proper requirement directive.²²² To determine whether a candidate complies with the fit-and-proper requirement, the Prudential Authority is mandated to request²²³ the verification of information or may verify information at the Prudential Authority's disposal by making enquiries to any organ of state, credit bureau or another source of relevant information concerning the key person or significant owner.²²⁴ A director will only be appointed when approved by the Prudential Authority and when they are satisfied that the director of an insurer or controlling company²²⁵ meets the requirements.²²⁶ After that, the company will receive confirmation whether the appointed person meets the requirements (approval or rejection of the designated person).²²⁷ They must comply with the prescribed requirements at all times.²²⁸

If there is any change in circumstances that may adversely affect the fit-and-proper status of a candidate,²²⁹ the insurer, controlling company, a representative of a branch of a foreign reinsurer²³⁰, and Lloyd's must notify the Prudential Authority within 30 days of becoming aware of the fact.²³¹ The same is also required when an insurer terminates the appointment of a key person. The act prescribes that an insurer (other than a branch of a foreign reinsurer, Lloyd's underwriter or Lloyd's)²³² and a controlling company must notify the Prudential Authority of the termination of the appointment of a key person within 30 days of such termination.²³³ The Prudential Authority will only

²²² S 1.1.

²²³ Parliamentary Monitoring Group, "Insurance Bill 2016" https://static.pmg.org.za/Insurance_Bill_2016.pdf (2022-12-27).

²²⁴ S 20.

²²⁵ Parliamentary Monitoring Group, "Insurance Bill 2016" https://static.pmg.org.za/Insurance_Bill_2016.pdf (2022-12-27).

²²⁶ S 14.

²²⁷ S 13–15.

²²⁸ Insurance Act S 13 & 14.

²²⁹ Parliamentary Monitoring Group, "Insurance Bill 2016" https://static.pmg.org.za/Insurance_Bill_2016.pdf (2022-12-27).

²³⁰ *Ibid.*

²³¹ S 15(3).

²³² Parliamentary Monitoring Group, "Insurance Bill 2016" https://static.pmg.org.za/Insurance_Bill_2016.pdf (2022-12-27).

²³³ S 16(1).

approve changes in the insurer or controlling company if satisfied that the key persons are fit and proper.²³⁴

Part 4 of the Act specifies that the Prudential Authority can request the insurer to take action if the Prudential Authority believes that a key person²³⁵ no longer meets the fit-and-proper requirements. The arrangements may include further education, additional resources, outsourcing functions and duties of the key person,²³⁶ or suspending or removing the person.²³⁷ If the insurer fails to comply, the Prudential Authority may impose additional reporting requirements, vary the licence of the insurer or controlling company,²³⁸ or take any actions referred to in section 17(4).

In terms of section 69(3), a key person whose contract is terminated or who resigned and fails to declare information that he became aware of while performing his/her duty that could prejudice the insurer or controlling company to comply commits an offence and is on conviction liable to a fine not exceeding R10 million if that person contravenes or fails to comply with the provisions of section 16(4).²³⁹

Additional to the requirement of termination of a key person as stated in the Insurance Act, it is also required that the insurer inform the Regulator regarding the reasons for the termination.²⁴⁰ The director must notify the Regulator of any issues affecting the insurer's ability to adhere to the LTIA and STIA. The directive determines that it must be a unitary board structure with at least four directors. At least one of the directors must be a non-executive independent director.²⁴¹ The Registrar may, on the insurer's

²³⁴ S 17(3)(a).

²³⁵ Parliamentary Monitoring Group, "Insurance Bill 2016" https://static.pmg.org.za/Insurance_Bill_2016.pdf (2022-12-27).

²³⁶ Parliamentary Monitoring Group, "Insurance Bill 2016" https://static.pmg.org.za/Insurance_Bill_2016.pdf (2022-12-27).

²³⁷ S 19(1)(a).

²³⁸ S 17(3).

²³⁹ Parliamentary Monitoring Group, "Insurance Bill 2016" https://static.pmg.org.za/Insurance_Bill_2016.pdf (2022-12-27).

²⁴⁰ S 1.2(a).

²⁴¹ S 2.1.

request, relax these requirements for the duration and under the conditions that may be required.²⁴²

The directive provides an appeal mechanism to the director who wants to object to his/her removal as director in terms of section 26 of the Financial Service Board Act 97 of 1990, and the person also has the right to appeal against the decision of that board as if it was a judgment of a lower court.²⁴³

Non-executive members should at least constitute 50% of an insurance board.²⁴⁴ The chairperson must reside in South Africa, and all the directors must meet the fit-and-proper requirements, complete the personal questionnaire form, and submit a *curriculum vitae*.²⁴⁵ The quorum of a meeting must be at least 50% plus one.²⁴⁶ An independent non-executive director is defined as a person who -²⁴⁷

- is not a representative of a shareholder who has the ability to control or significantly influence management;
- has not been employed in an executive capacity by the insurance company or the group of which it currently forms part;
- is not a member of the immediate family of an individual who is, or has been in any of the past three financial years, employed by the insurance company or the group in an executive capacity;
- is not a professional advisor to the company or the group, other than in a director capacity;
- is not a material policyholder of the insurance company or significant supplier to the insurance company or group, or customer of the group;

²⁴² S 2.1(b).

²⁴³ S 1.3(c).

²⁴⁴ S 2.1(c).

²⁴⁵ S 2.1(g).

²⁴⁶ S 2.1(h).

²⁴⁷ S 2.1(h).

²⁴⁷ Financial Stability Board, "Thematic Review on Risk Governance 2016"
https://www.fsb.org/wp-content/uploads/r_130212.pdf (2022-12-27)

- has no significant contractual relationship with the insurance company or group; and
- is free from business or other relationships that could interfere materially with the individual's capacity to act independently.²⁴⁸

b) Current legislation applicable in addition to the Insurance Act

The STIA, which regulates non-life insurance, still regulates market conduct requirements and asset, accident, and health and liability insurance. The LTIA regulated market conduct pertaining to life insurance, insurers, reinsurance, and investment products.

Moreover, there are currently numerous other acts applicable to the insurance industry in South Africa, for example:

- Compensation for Occupational Injury and Diseases Act 130 of 1993 provides compensation for disablement and diseases contracted by employees during employment or death resulting from it.
- Friendly Societies Act 25 of 1956 provides for the registration, incorporation, regulation and dissolution of friendly societies.
- Medical Schemes Act 131 of 1998 regulates medical schemes.
- Pension Funds Act 24 of 1956 regulates pension funds and matters incidental thereto.
- Road Accident Fund 56 of 1996 regulates the Road Accident Fund that pays compensation for loss or damage wrongfully caused by the driving of motor vehicles and matters related therewith.
- Unemployment Insurance Act 63 of 2001 assists employees when they become unemployed.

c) Licensing requirements

The Financial Services Regulation Act (FSRA) stipulates that to do business as a financial service provider, the business must be licensed in terms of sections 111(1) (b) and (2) or section 162 of the FSRA. The significant owner, key individuals and

²⁴⁸ S 2.1(b).

representatives meeting the fit-and-proper requirements will be considered before a licence is granted. Financial service providers must at all times ensure that their key individuals and representatives meet the fit-and-proper requirements.

Since most of the prudential and licensing requirements contained in the LTIA and STIA had been replaced and repealed in the Insurance Act 18 of 2017, Board Notice 194 of 2017 was issued to update terminology and the classes of business related to the fit-and-proper requirements.^{249, 250 251} Financial Service Providers had to meet the licence requirements set in the act in order to operate.

No new fit-and-proper requirements were created. Before the Prudential Authority grants a licence, it requires proof that the key persons are fit and proper.²⁵² This requirement also applies to controlling and holding companies.²⁵³ A licence may be suspended if this requirement is not adhered to.²⁵⁴ In terms of section 4(1), fit-and-proper requirements ²⁵⁵ were set out for each category of financial service providers, key individuals and representatives and ongoing compliance with fit-and-proper requirements. In order to qualify for licensing as a controlling company, a holding company or another juristic person that controls an insurance group must provide proof that the key persons of that company meet the fit-and-proper requirements.²⁵⁶

²⁴⁹ Board Notice 194 of 2017.

²⁵⁰ Momentum “Determination of fit and proper requirements for financial services providers” https://eb.momentum.co.za/webDocumentLibrary/LegalUpdates/2018/Legal_Update_5-2018_Determination_of_Fit_and_Proper_Requirements_January2018.pdf.

²⁵¹ FSCA “Commission of inquiry into allegations of impropriety regarding the Public Investment Corporation” 22 June 2018, <https://www.justice.gov.za/commissions/pic/st/PIC-20190318-FSCAletter.pdf> (2022-12-27).

²⁵² S 22(1)(c).

²⁵³ S 22(2)(a).

²⁵⁴ S 27(1)(e).

²⁵⁵ FSCA “Commission of inquiry into allegations of impropriety regarding the Public Investment Corporation” 22 June 2018, <https://www.justice.gov.za/commissions/pic/st/PIC-20190318-FSCAletter.pdf> (2022-12-27).

²⁵⁶ S 22(2)(a).

d) *Fit-and-proper provisions*

- (i) The issuing of Board Notices in terms of the FAIS.²⁵⁷

Board Notice 158 of 2014 dealt with the Governance and Risk Management Framework for Insurers and Fit and Proper requirements of Directors, while Board Notice 158 of 2015 provided for the Fit-and-Proper Requirements for Key persons, including directors, in terms of the LTIA and STIA.

Honesty, Integrity²⁵⁸ and good standing

The Board Notice 158 of 2015 sets specific criteria that can serve as *prima facie* evidence that a person is deemed not to have integrity under certain conditions.²⁵⁹ The clauses deal with criminal convictions or pending proceedings and offences, civil liability,²⁶⁰ breaches of fiduciary duties, conflict of interests, and the failure to manage financial obligations properly.²⁶¹ Denial of registration of membership of a professional body is mentioned. A person who provides false and misleading information is considered dishonest and unfit for a position.

Competency²⁶²

As early as 2008, Board Notice 106 of 2008 had been issued to regulate the fit and proper requirements²⁶³ in order to ensure compliance with the competency requirement. It determines the qualifying criteria and qualifications and introduces a compulsory regulatory examination for representatives, key individuals and sole proprietors. Representatives, personal assistants, and administrative staff who perform intermediary

²⁵⁷ Financial Advisory and Intermediary Services Act, 37 of 2002.

²⁵⁸ S 4 of BN 158 of 2015.

²⁵⁹ S 4(2) of BN 158 of 2015.

²⁶⁰ S 4 (2) (c) of BN 158 of 2015.

²⁶¹ S 4 (2) of BN 158 of 2015.

²⁶² S 1 of BN 194 of 2017.

²⁶³ FSCA “Commission of inquiry into allegations of impropriety regarding the Public Investment Corporation” 22 June 2018, <https://www.justice.gov.za/commissions/pic/st/PIC-20190318-FSCAletter.pdf> (2022-12-27).

services on behalf of a representative are regulated. They must undergo further professional development if they give advice, provide intermediary services or both. They must meet the fit-and-proper requirements. Financial products and services were categorised to facilitate competency.

Board Notice 158 of GG 38357 of 2014 prescribes the risk and management framework for insurers. It also prescribes the composition and the governance of the board. Section 5 explicitly discusses the duties of each director. Section 5(a) specifies that each director of an insurer, in addition to the requirements of the Companies Act, must—

- (a) at all times, comply with the fit-and-proper policy of the insurer;
- (b) act in the best interest of the insurer and policyholders, putting the interest of the insurer and policyholders ahead of his/her own interest; and
- (c) Exercise independent judgment and objectivity in its decision-making, considering the interests of the insurer and the policyholder.

Board Notice 158 GG 39095 of 2015 deals with the fit-and-proper requirements for a director, managing executive, public officer, auditor, statutory actuary and significant owners.²⁶⁴ The purpose of the regulation is (1) to professionalise the financial sector industry, (2) to set a higher level for compliance and (3) to increase competence with a focus on honesty and integrity.²⁶⁵ The Board Notice refers to matters that must be considered by the Registrar (in Part 3 of the document) when deciding whether the requirements are met. Part 4 deals exclusively with significant owners.²⁶⁶ The Registrar must consider the seriousness and surrounding circumstances resulting in a person not being fit and proper, the relevance of the failure in relation to the responsibilities, and the lapse of time since the failure.²⁶⁷ It prescribes that a director must have “satisfactorily qualifications, experience

²⁶⁴ S 2(1) of BN 158 of 2015.

²⁶⁵ Masthead “*Make sure your FSP is fit and proper*” 2017, <https://www.masthead.co.za/compliance/fit-and-proper/> (2022-09-10).

²⁶⁶ S 2(2) of BN 158 of 2015.

²⁶⁷ S 2(3) of BN 158 of 2015.

and expertise and relevant skills and knowledge in respect of the duties that must be performed".²⁶⁸

Operational ability

A key individual must ensure that the operations of the business are well managed in such a manner as to ensure financial stability.²⁶⁹ There are specific operational requirements²⁷⁰ and governance requirements²⁷¹ that must be met. The roles requiring specific skills are measured against compliance to ensure suitable candidates are recruited and selected. This refers to the skills and capacity to perform specific duties and includes automated advice, data management, and the appointment of representatives and the outsourcing of functions.²⁷²

Financial soundness

When appointing a key person, including a director, that person must be financially sound. The logic being that if a key individual cannot manage his/her own finance, he/she cannot manage the financial resources of a company or a policyholder's money. When a financial service provider appoints a natural person, it must ensure that the person has not been insolvent or is provisionally insolvent. The same applies to juristic representatives: it must be ensured that the entity is not in financial difficulty, under liquidation, provisional liquidation, or business rescue. The adherence to the fit-and-proper requirements should be monitored on an ongoing basis.

Board Notice 158 of 2015 also provides for the refusal of appointment because the director could not consistently manage his or her financial obligations (including debt).²⁷³ If a person previously acted as a director or managing executive of a business that was placed under business rescue

²⁶⁸ S 3 of BN 158 of 2015.

²⁶⁹ S 42 of BN 194 of 2017.

²⁷⁰ S 36 of BN 194 of 2017.

²⁷¹ S 37 of BN 194 of 2017.

²⁷² S 38–S41 of BN 194 of 2017.

²⁷³ S 4(2)(h).

within a year of the said person leaving the business, such a person does not qualify as being fit and proper.²⁷⁴

Key Individuals

For directors (“key persons”) to oversee the management of an insurance company, they should also be aware of the fit and proper requirements.²⁷⁵

The current Board Notice that regulates the Fit and Proper requirements for Financial Service Providers, 2017 (Board Notice 194 of 2017) replaced the (1) Determination of Fit-and-proper Requirements as published in Board Notice 106 of 2008 and (2) the Determination of Qualifying Criteria and Qualifications for Financial Services Providers published in Board Notice 105 of 2008.

As the new Insurance Act introduced new classes and subclasses of insurance business, the fit and proper requirements were adjusted to ensure alignment between the subcategories of financial products in the fit-and-proper requirements and the new classes of Insurance in terms of the Insurance Act.

Competence is defined as “having the skills, knowledge and expertise needed for the proper discharge of a person’s responsibilities in the performance of his or her functions”.²⁷⁶ It introduced the concept of “good standing,”²⁷⁷ in which juristic persons must demonstrate their good standing as separate legal entities through corporate conduct and the conduct of their representatives. Although the board notice does not define “good standing”, 23 questions are used to assess candidates. The representatives must also comply with requirements in terms of minimum experience, minimum qualifications, regulatory examinations and class of business and product-specific training.

²⁷⁴ S 4(2)(p) of BN 158 of 2015.

²⁷⁵ S 1 of BN 194 of 2017.

²⁷⁶ S 1 of BN 194 of 2017.

²⁷⁷ Chapter 2 of BN 194 of 2017.

It also introduced continuous development training²⁷⁸ that must be recorded in a competence register within 30 days after the end of the cycle. The notice determines that a CPD cycle is a 12-month cycle that commences on the 1 June each year and ends on the 31 May the following year.²⁷⁹ The purpose of continuous professional development training is remediating competence gaps that have been identified. The CPD activity must be accredited by a professional body, must be done by an accredited service provider and must be allocated an hour value. The training excludes training done that contributes towards a qualification and product. The FSP must notify the FSCA if any key individual or representative no longer meets the requirements. The minimum CPD hours for training are also specified.

Two years ago, it came to light that certain financial service providers were not authorised to render services on reclassified product subcategories. Key individuals, therefore, failed to meet the competence and fit-and-proper requirements. This mainly dealt with credit life products and funeral cover. The determination of the fit-and-proper requirements has been amended. It came into operation on the date of publication (26 June 2020). As a result of the above-mentioned, the FSCA proposed general exemptions to financial service providers, key individuals, and representatives subject to certain conditions. The exemptions had a retrospective effect as of 1 July 2020.²⁸⁰

(ii) The issuing of Prudential Standards in terms of FSRA²⁸¹

The FSRA mandates the Prudential Authority to issue standards in respect of financial institutions and the key persons of such financial institutions.²⁸²

²⁷⁸ S 31 of BN 194 of 2017.

²⁷⁹ S 1 of BN 194 of 2017.

²⁸⁰ FSCA Communication 3 of 2021 2021.

²⁸¹ https://discover.sabinet.co.za/webx/access/netlaw/9_7_financial_sector_regulation_act_9_of_2017.htm. <https://discover.sabinet.co.za/document/400155> (2023-01-09).

²⁸² S 105.

The prudential standard introduces financial soundness requirements on a regulatory instrument in terms of a specific financial sector law.²⁸³

(iii) The issuing of Governance Operating Standards in terms of the Insurance Act

The legal prudential framework introduced by the Insurance Act²⁸⁴ regulates the Prudential Regulations, Prudential Standards: Governance of Insurers (GOIs) and Joint Standards where applicable. GOI 1 introduces the Framework for GOI Standards that apply to all Insurers licensed under the Insurance Act of 2017. However, it excludes micro-insurers, Lloyds, branches of foreign reinsurers and groups insurers declared in terms of section 10 of the Insurance Act.²⁸⁵ This implies that the GOIs applicable to insurers will apply to management and the board of directors. The board of directors is ultimately responsible for ensuring that the company meets its governance and operational requirements as stated in the GOIs on a continuous basis.²⁸⁶

The main areas addressed in the GOIs deal with governance, risk and internal controls, fit and proper requirements of key persons and significant owners, outsourcing oversight, controls around the transfer of business and other miscellaneous regulations.²⁸⁷ The financial service providers must implement a practical, effective insurance framework in order to provide oversight of the services provided by the FSP.²⁸⁸ This will further relate to how the organisation deals with conduct risk, policies, processes and systems, the approval of a business plan, and internal controls. Management must ensure that customers are treated fairly, that they address governance issues,²⁸⁹ manage risk and have the necessary controls in place.²⁹⁰

283 *Ibid.*

284 Insurance Act 18 of 2017.

285 GOI 1 (1.1).

286 GOI 1.

287 GOI 1 (4.5).

288 GOI 1.

289 GOI 2.

290 GOI 3.

The GOI Framework refers to the Fitness-and-Propriety requirement.²⁹¹ The GOI recognises the importance of appointing suitable individuals with the appropriate skills, experience and knowledge.²⁹² The Prudential Authority takes a broad view of suitability but underlines that competence and integrity are necessary to reflect the desired culture of the insurer.²⁹³ The GOI recognises that key persons responsible for key decisions must comply with the fit and proper requirements.²⁹⁴ This is also applicable to significant owners.²⁹⁵ The Board is primarily responsible for the approval of individuals or firms before they become significant owners, directors and auditors.²⁹⁶ The board must approve a fit-and-proper policy, setting minimum requirements and procedures.²⁹⁷ In addition, the Prudential Authority must approve these appointments.²⁹⁸ In order to implement the governance framework, the board of directors should take the lead in establishing an ethical corporate culture.²⁹⁹

GOI 2 determines the minimum requirements for good governance for insurers by regulating the board's composition.³⁰⁰ It requires enough independent directors to ensure objectivity in decision-making.³⁰¹ Directors with the right mix of skills, competence and experience must be appointed to be able to service the requirements of the business, taking into account its scale and complexity.³⁰² A company must inform the Prudential Authority if they intend to deviate from these requirements. The standard further contains provisions on audit, risk and remuneration committees, duties and responsibilities of directors

291 GOI 1 (7).
292 GOI 1 (7.1).
293 GOI 1 (7.2).
294 GOI 1 (7.3).
295 GOI 1 (7.4).
296 Chapter 3 Insurance Act 18 of 2017.
297 GOI 1 (7.5).
298 GOI 1 (7.6).
299 Guidance Note GOI GN 2.1: Corporate Culture.
300 GOI 2(5).
301 GOI 2 (5)1(a).
302 GOI 2 (5) 1(b).

and senior management, the delegation of these roles, succession planning, board evaluation and ongoing operational requirements.

The roles and responsibilities of directors are set out, including but not limited to overseeing the implementation of business plans and strategies, instilling values, promoting an accountable environment, overseeing and implementing risk management, overseeing the governance framework and communicating with the Prudential Authority.³⁰³ The board of directors must consider specific issues while overseeing the work of Management.³⁰⁴ The duties of individual directors are similar to those set out in the Companies Act. Directors must act in good faith with honesty, exercise due care and diligence in performing their duties, at all times comply with the fit and proper policy of the insurer, act in the best interest of the company and policyholders, and must exercise their independent judgment.³⁰⁵

GOI 2 determines the minimum requirements for good governance for insurers by, among other things regulating the board's composition.³⁰⁶ It requires that enough independent directors be appointed to ensure objectivity in decision-making.³⁰⁷ The right mix of skills, competence, and experience must be appointed, considering the requirements of a business scale and complexity.³⁰⁸ A company must inform the Prudential Authority if they intend to deviate from these requirements. The standard further contains provisions on audit, risk and remuneration committees, duties and responsibilities of directors and senior management, the delegation of these roles, succession planning, board evaluation and ongoing operational requirements.

³⁰³ GOI 2 (8.1).

³⁰⁴ GOI 2 (8.2).

³⁰⁵ GOI 2 (10.1).

³⁰⁶ GOI 2(5).

³⁰⁷ GOI 2 (5)1(a).

³⁰⁸ GOI 2 (5) 1(b).

GOI 4 deals with the fit and propriety requirements for Key Persons³⁰⁹ and Outsourcing.³¹⁰ There is an over-arching standard that regulates an insurance group,³¹¹ and Lloyds of London operating in South Africa.³¹²

In terms of GOI 4, the board of directors is ultimately responsible for ensuring that new directors comply with the fitness and propriety principles set out in the standard. The onus is on key persons, significant owners, directors and auditors to disclose any relevant information to the financial service provider and to demonstrate that they comply with the fit-and-proper requirements. These include an approved fit-and-proper policy, recruitment and selection policies that are aligned with GOI 4, as well as an annual declaration disclosing certain minimum prescribed information.

The question can be raised as to whether additional requirements must be set for managing a group of companies and, if so, whether GOI 4 should be amended to provide for this scenario. Furthermore, no particular GOI deals with the appointment of non-executive directors, although they oversee all the governance issues and risks within the organisation.

The regulators determine the suitability of the leadership and ownership of entities by using the fit-and-proper requirement to approve significant owners and the key individuals who make critical business decisions on behalf of the insurer. The concept of fitness and propriety is defined broadly to determine suitability. The regulators require the insurance industry to focus on ways the leadership of companies can promote ethical conduct, an ethical organisational culture, and prevent risky behaviour. The conduct regulations shifted ethics-related focus from policies, compliance and prudential controls to less tangible but more critical controls, namely character, culture and behaviour. Although competence, including formal qualifications, skills and practical experience, is vital, so is integrity. Without integrity, business decisions may fail to reflect the

309 GOI 4.

310 GOI 5.

311 Governance and Operational Standards for an Insurance Group (GOG).

312 Governance and Operational Standards for Lloyds (GOL).

desired culture of the insurer and fail to meet the minimum standards set by the Prudential Authority.

In terms of section 10 of the Insurance Act, a holding company and its subsidiaries can be classified as a group. In this case, the holding company's directors must adhere to the fit-and-proper requirements even if only the subsidiaries are doing business as insurance companies. The Prudential Authority must approve the appointment of key persons of the insurer or controlling company, a director or auditor, or a branch of foreign reinsurers.³¹³

(iv) Regulation of individual directors

The provisions of the GOIs are very similar to the requirements of the Companies Act 2008 in that the individual directors are required to act in good faith with honesty and must exercise due care and diligence in performing their duties. Directors must at all times comply with the fit and proper policy of the insurer, act in the best interest of the company and policyholders and must exercise their independent judgment.³¹⁴

2.5 Consequences as a result of failure to comply with fit-and-proper requirements

Financial service providers must align their business processes to fit-and-proper requirements. Failure to do so implies that the financial service provider is non-compliant. This could result in it not being allowed to trade or penalties for non-compliance.

In an article on the debarment of key individuals, Mr Paul Kruger³¹⁵ shows that there is a substantial amount of information available on the debarment and reinstatement of representatives but not on the process regarding the reinstatement of key individuals. This also applies to key persons and, as a result, their re-appointment.

³¹³ Insurance Act, S 10.

³¹⁴ GOI 2 (10.1).

³¹⁵ There is a substantial amount of information available on debarment and reinstatement of representatives, but I am unable to find something significant on the process regarding reinstatement of key individuals.

Guidance Note 1 of 2019, issued by the FSCA, underlines that the financial service provider has the administrative power in terms of section 14 of the FAIS Act to debar a representative or key individual. The Guidance Note mainly deals with the process that a financial service provider must follow to debar a person who is in non-compliance and no longer fit and proper or who fails or contravenes to comply with the provisions of the FAIS Act in a material manner. The Guidance Note provides the procedure that must be followed and obliges them to inform the Regulator accordingly. In terms of section 14(3) of the FAIS Act, the financial service provider must stipulate the debarment process in writing. The Guidance Note does not address what should be done if the nominations committee identifies a transgression before appointing a candidate to a director's position. For example: If being fit and proper is in dispute, could the candidate attempt to obtain relief from the Tribunal in the form of an order for specific performance?

2.6 Case law on the fit-and-proper requirement in the South African insurance industry

In the matter of *Financial Service Board v Barthram* (20207/2014) [2015] ZASCA 96 (1 June 2015), Discovery FSP employed Mr Barthram as a full-time employee. Mr Barthman acknowledged that Discovery could terminate his contract if he no longer met the prescribed qualifications and requirements. Mr Barthman terminated his contract with 24 hours' notice. After that, he accepted a position at Old Mutual. Forensic employees of Discovery misled him when confiscating his files. Discovery notified the Registrar that Mr Barthram did not comply with regulatory requirements. The court quoted section 7 of the FAIS Act, stating that "a person may not act or offer to act as a financial service provider unless such a person has been issued a licence". In this instance, the court distinguished between section 14 and section 14A. Section 14 allows a financial services provider to remove a representative from the statutory register, implying that the said individual could no longer represent that financial services provider. Section 14A, on the other hand, permits the debarment of an individual. The implications are that the said individual cannot render financial services for a specified period. The court further considered the fit-and-proper requirements in respect of Mr Barthram's personal attributes: his character, honesty and integrity,

operational ability, and financial soundness. The appeal by Mr Barthram was upheld with costs.

In the matter of *Michelle Hollenbach v FSCA*,³¹⁶ Ms Hollenbach was a key individual and head of compliance for Mirabilis, which is an underwriter for Santam construction and engineering non-life products. Before she left their employment, she copied confidential information worth approximately R550 million in premiums per year. Ms Hollenbach was debarred and appealed against the debarment. The appeal was dismissed because she failed to satisfy the authorities of her honesty and integrity.

In the matter of *Robert Baichan Financial Services CC*,³¹⁷ the applicant applied for an exemption to comply with the requirement of financial soundness in terms of section 45(2) of Board Notice 194 of 2017 (Determination of Fit and Proper Requirements for Financial Service Providers). The Tribunal dismissed the application. The applicant had to prove that his situation would not result in financial hardships, prejudice to clients, or affect the public interest at large. Furthermore, the applicant had a statutory duty to ensure that the financial service provider's assets exceeded its liabilities. The application was dismissed.

*Fit-and-proper requirements – Tribunal confirms FSCA's decision*³¹⁸

In the matter of *Ernest Lebelo Broker versus FSCA*³¹⁹ held on 31 August 2021, the applicant, Mr Ernest Lebelo, requested that the FSCA reconsiders a suspension of his

³¹⁶ Financial Sector Conduct Authority, The Financial Services Tribunal, Case No: A7/2020, *Michelle Hollenbach v FSCA*, <https://www.fsca.co.za/Enforcement-Matters/Publications%20and%20Documents/Decision%20-%20M%20Hollenbach%20and%20FSCA.pdf>. (2022-12-22).

³¹⁷ Financial Sector Conduct Authority, The Financial Services Tribunal, Case No: A22/2021, *Robert Baichan Financial Services CC v Liberty Group Ltd and FSCA*, <https://www.fsca.co.za/Enforcement-Matters/Publications%20and%20Documents/Decision%20-%20Robert%20Baichan%20Financial%20Services%20CC%20and%20FSCA.pdf>. (2022-12-22).

³¹⁸ Geldenhuys, J *"Fit and proper qualifications requirements – Tribunal confirms FSCA decision"* 13 Feb 2020 <https://www.moonstone.co.za/fit-and-proper-qualification-requirements-tribunal-confirms-fsca-decision/> (2022-09-10).

³¹⁹ Financial Sector Authority, The Financial Services Tribunal, Case No: A4/2021, *Ernest Lebelo Brokers v FSCA*, <https://www.fsca.co.za/Enforcement-Matters/Publications%20and%20Documents/Decision%20-%20Ernest%20Lebelo%20Brokers%20v%20FSCA.pdf#search=Fit%20and%20Proper%20%2B%20directors>. (2022-12-22).

licence to practise as a representative as he did not meet the minimum qualifications in the required time. There was no dispute whether he met the fit-and-proper requirements in section 8A (a), but he stated that he was not medically fit and that an infection affected his mental health. The Tribunal held that they could not permit a person who admitted that he has a mental health problem to continue providing financial advice to members of the public. The application failed.

In *Sipho Mahlangu v OUTsurance*,³²⁰ a representative activated a policy contrary to a client's direct instructions. The Tribunal dismissed the application against the debarment because the representative no longer met the fit-and-proper requirements.

2.7 Supervision mainly by an administrative authority

The FSRA provides that both regulators can use corrective and punitive enforcement tools. The Prudential Authority is a division of the SARB, which is the oldest central bank in Africa. It was established in 1921 due to the unusual financial and monetary conditions stemming from World War 1 (1914–1918). The SARB is regulated by the South African Reserve Bank Act 90 of 1989. It has been privately owned since its inception and has more than 800 shareholders. The objective of SARB is to protect the rand's value in the interest of balanced and sustainable economic growth. In addition, the SARB is responsible for regulating and supervising financial institutions. In pursuit of its primary objective, the bank must perform its functions “independently and without fear, favour or prejudice, but there must be regular consultation between the bank and the cabinet member responsible for national financial matters”.³²¹ The SARB emphasises that the Prudential Authority makes every effort to ensure that all actions are lawful, reasonable and procedurally fair.³²²

³²⁰ *The Financial Services Tribunal, FSP68/2020, Sipho Mahlangu and OUTsurance Insurance Company Limited* 28 Sep 2021 <https://www.fsca.co.za/Enforcement-Matters/Publications%20and%20Documents/Decision%20-%20Sipho%20Mahlangu%20v%20OUTsurance%20Insurance%20Company%20Limited.pdf> (2022-09-10)

³²¹ S 224 of the Constitution, 1996.

³²² <https://www.resbank.co.za/en/home/what-we-do/Prudentialregulation/functions-of-the-prudential-authority>.

The FSCA is mandated to enforce undertakings, issue directives and impose a penalty or a fine if an offence is committed. The new COFI Bill further provides for remedial actions in Chapter 11. The FSCA can issue directives requiring institutions to redress consumers when necessary.

Section 218 of the FSRA defines what decisions made by decision-makers can be reconsidered, while section 219 established the independent Financial Services Tribunal that replaced the Financial Services Appeal Board. It came into effect on 1 April 2018.³²³ An aggrieved director who has not been appointed as a director due to the Prudential Authority finding that he/she is not fit or proper can apply to the Financial Services Tribunal to reconsider that decision. The Tribunal has the right to dismiss the application, set aside the decision, remit it to the Prudential Authority for further consideration, or set aside and substitute the decision with that of the Tribunal. The Tribunal must, however, specifically suspend the Prudential Authority's decision. The other alternative is for the aggrieved party to approach the High Court of South Africa to adjudicate the dispute.

2.8 Interpretation of legislation in case of conflict between the Companies Act, Insurance Act, COFI Bill, and Prudential Standards

2.8.1 General background and interpretation

Where the intention was that the Interpretation Act of 33 of 1957 should consolidate all the laws relating to the interpretation and the shortening of the language of statutes, the Interpretation Amendment Act 45 of 1961 stated that it applies to the interpretation of every law in South Africa.³²⁴ All statute law enacted since 1994 had to be compatible with the Constitution of 1996 to be valid.³²⁵ The Constitutional Consequential Amendment Act of 1993 was enacted to provide for that. When the Constitution came into effect on 27 April 1994, parliamentary sovereignty³²⁶ was replaced by

³²³ <https://www.fsca.co.za/Enforcement-Matters/Pages/Financial-Service-Tribunal-Decisions.aspx>.

³²⁴ S 1.

³²⁵ Constitution, 1996 S 2.

³²⁶ Botha, C Statutory Interpretation p.13.

constitutional sovereignty.³²⁷ From this follows that all legislation is subordinate to the Constitution.³²⁸ The legislator may confer delegated legislative powers to a statutory body to make regulations.³²⁹

2.8.2 Interpretation in terms of the Companies Act

2.8.2.1 *Companies Act 61 of 1973*³³⁰

Regarding the interpretation in case of inconsistency between the Insurance Act and the Companies Act, the legislature aligned the Insurance Law Amendment Act 27 of 2008 with the previous Companies Act 61 of 1973. The Companies Act, 61 of 1973, stipulates in section 2 that the act applies to every external and existing company except to the extent a specific provision provides to the contrary.

Chapter 1, section 3 of the previous Companies Act deals with the restricted application of the act in the case of banking and insurance companies and specific other associations. Section 3(1) (b) provides that the provisions thereof shall not apply to any company subject to the provisions of any law relating to insurance companies or societies in so far as those provisions are inconsistent with the requirements of the Companies Act. Given this provision, insurers have complied with the provisions of the Insurance Act in instances of irreconcilable differences.³³¹

2.8.2.2 *Interpretation in terms of the Companies Act 71 of 2008*

Section 5(4) of the new Companies Act 71 of 2008 specifies that if there is an inconsistency between any provision of the Companies Act and a provision of any other national legislation, (1) the provisions of both acts apply concurrently to the extent that it is possible to apply and comply with one of the inconsistent provision without contravening the second, and (2) if impossible, it specifies which act should

³²⁷ *Ibid* p.13.

³²⁸ Department of Justice “*The basic provisions of the constitution of the Republic of South Africa made easy for learners*” (2021-09-17).
<https://www.justice.gov.za/legislation/constitution/basicprov.html> (2022-11-07).

³²⁹ Botha, C Statutory Interpretation p. 43.

³³⁰ Companies Act 61 of 1973.

³³¹ <https://cover.co.za/the-new-companies-act-2008-versus-the-insurance-act-potential-challenges-for-insurers/>.

prevail. *The Companies Act under section 5(4) (b) excludes the Insurance Act from the list of the acts that prevail where there are inconsistencies, which means that the Companies Act prevails.*

2.8.3 Interpretation in terms of the Insurance Act 18 of 2017

The Insurance Act 18 of 2017 specifies that³³² if there is an inconsistency between any provisions of an act, other than a Prudential Standard or Regulation or provision³³³ of any other legislation³³⁴ that provides for the regulation of insurance business³³⁵ or has an affect or impedes on the appropriateness of the operation or implementation of such a provision, the provision of the Insurance Act prevails,³³⁶ unless that other legislation by explicit reference, and not merely by reference to other legislation in general, provides that the other legislation applies in the event of a conflict.³³⁷ Therefore, the provisions of the S 5(4) of the Companies Act will not apply under these circumstances.³³⁸ The act applies concurrently with the Companies Act and the Cooperatives Act³³⁹ unless this act specifically provides to the contrary.³⁴⁰ The FSRA and the Financial Intelligence Centre Act 38 of 2001 are expressly excluded.³⁴¹

The Prudential Authority must be consulted if any other law or legislation confers a power or a duty upon another organ of state.³⁴² Although the Insurance Act is excluded from the provisions under Section 5(4)(b) of the Companies Act, Section 2(6)(a) of the Insurance Act provides that “the Companies Act applies to any insurer (other than a

³³² Parliamentary Monitoring Group, “Insurance Bill 2016” https://static.pmg.org.za/Insurance_Bill_2016.pdf (2022-12-27).

³³³ *Ibid.*

³³⁴ S 2(3)(a).

³³⁵ S 2(3)(a)(i).

³³⁶ Parliamentary Monitoring Group, “Insurance Bill 2016” https://static.pmg.org.za/Insurance_Bill_2016.pdf (2022-12-27).

³³⁷ S 2(3)(a)(ii).

³³⁸ Henochsberg on the Companies Act, 71 of 2008, [Issue 28] p.38 Vol.1.

³³⁹ Parliamentary Monitoring Group, “Insurance Bill 2016” https://static.pmg.org.za/Insurance_Bill_2016.pdf (2022-12-27).

³⁴⁰ S 2(3)(b).

³⁴¹ S 2(3)(c).

³⁴² S 2(4)(b)

branch of a foreign reinsurer, Lloyd’s underwriter or Lloyd’s) or a controlling company that is not a public company to the extent that the Companies Act can apply to it and to the extent that it applies to a public company (but excluding submission of information to the Companies and Intellectual Property Commission in terms of the Companies Act.”

The Financial Sector Regulations Act No 9 of 2017 provides that the provisions of the FSRA take priority if there are any inconsistencies between the FSRA and any other “financial sector law” as listed in Schedule 1 of the FSRA.³⁴³ The Governance and Operational Standards that the Prudential Authority issues in Section 105 of the FSRA are considered legislation, and non-compliance results in penalties.

2.8.4 Resolving an apparent conflict between the Insurance Act and Companies Act

Both the Insurance Act and the Companies Act apply to directors. The legislator did not specify which of the two statutes would be the prevailing law in case of conflict. It determines that the Insurance Act will apply subject to several caveats in case of inconsistencies between any provisions of the act and any (1) other legislation that provides for the regulation of insurance business or (2) affects or impedes the operation or implementation of the Insurance Act, 2017.

The ideal will be to read the two acts together using harmonious or schematic interpretation.³⁴⁴ If that is not possible, the legislature must address the interpretive conflict specifying which act will prevail in case of conflict or repealing or amending the conflicting sections. The provisions in both acts as they currently stand can create significant interpretive problems.

Sections 9(3)(a)(i) and (ii) of the LTIA provide that in an application for registration as a long-term insurer, the applicant must either be a public company that has the carrying on of long-term insurance business as its primary object; or it must be incorporated without share capital under a law providing specifically for the constitution of a person to carry on long-term insurance business as its primary object (such as

³⁴³ S 9 FSRA.

³⁴⁴ Independent Institute of Education (Pty) Ltd v Kwazulu-Natal Law Society 2020(4) BCLR 495(CC) par 38.

AVBOB in terms of the AVBOB Mutual Assurance Society Incorporation (Private) Act 7 of 1951 (“AVBOB Act”).

From this, we can deduce that the Companies Act also applies as a long-term insurer must be registered as a public company. Regarding AVBOB, section 19 of the AVBOB Act provides that the provisions of the Insurance Act shall apply as if the company and the society were the same person. “Company” in this section refers to “Die Afrikaanse Verbond Begrafnis Onderneming Beperk”, which is the company that was converted into the society in terms of the AVBOB Act.³⁴⁵

Specific acts regulate state-owned insurance companies. For example, the South African Risks Insurance Association is regulated by the South African Special Risks Insurance Association (Sasria) Act 134 of 1998, which converted the company into a public company with a share capital held by the state.³⁴⁶ The act's purpose is to provide insurance against damage caused by political actions. The Land and Agricultural Development Bank Act, 15 of 2002, enables the establishment of an insurance company to fulfil one of the objectives of the Land Bank,³⁴⁷ namely, to provide insurance products for the agricultural sector. The State is the sole shareholder of the said company. A director in the company will thus be appointed in terms of and subject to the Companies Act. The Insurance Act will, in addition, apply to that director. The issue here may be the interaction between the Insurance Act and the Companies Act and which act will apply if there is a conflict.

Insurance regulators issue guidance and communication notices on the interpretation and enforcement of the Insurance Act.³⁴⁸ When interpreting any legislation in South Africa and developing common or customary law, every court, tribunal or forum must consider and promote the spirit, purport and objects of the Bill of Rights.³⁴⁹ The

³⁴⁵ *Ibid.*

³⁴⁶ <https://www.gov.za/documents/conversion-sasria-act>.

³⁴⁷ <http://www.treasury.gov.za/legislation/acts/2002/a15-02.pdf>.

³⁴⁸ Bracher, P “Insurance and reinsurance in South Africa: Overview” *Thomson Reuters Practical Law* 1 Oct 2020 [https://uk.practicallaw.Thomsonreuters.com/1-505-2026? TransitionType=Default&contextData=\(sc.Default\) &firstPage=true](https://uk.practicallaw.Thomsonreuters.com/1-505-2026? TransitionType=Default&contextData=(sc.Default) &firstPage=true). (2022-07-20).

³⁴⁹ S 39(2) of the Constitution.

common law rule is that a later statute always prevails over an older statute.³⁵⁰ If this is correct, the Insurance Act of 2017 must prevail, given that the Companies Act is a 2008 act and given the fact that the Companies Act is general in nature. The Insurance Act is specific in nature (it applies to insurance companies only). In the past, the Insurance Act has prevailed over the 1973 Companies Act as it was both the more recent and the more specific act. The court will consider the following when interpreting a law: the legislature's intention,³⁵¹ the text-in-context approach, the teleological or value coherent, and the new constitutional order.³⁵² The courts may still rely on common law maxims in interpreting the law as they do not conflict with the Constitution.³⁵³

The common law provides that the starting point in reconciling two pieces of legislation is to avoid conflict where possible through systematic interpretation. Two maxims find application in this regard:³⁵⁴

- *Lex posterior derogat priori*: A maxim meaning “³⁵⁵a later law repeals an earlier (law)”.³⁵⁶
- *Generalia specialibus non derogant*: In terms of this maxim, later general law does not amend or repeal an earlier specific law³⁵⁷ except to the extent that such conflict or inconsistency allows for the earlier special law to operate as an exception to the later general law.³⁵⁸

³⁵⁰ Nguyen, NH “Essential 25000 English Law dictionary” 2018 13545 (2022-11-29).

³⁵¹ Botha, C. Statutory Interpretation p. 10.

³⁵² *Ibid* p. 44.

³⁵³ *Ibid* p. 44.

³⁵⁴ Parliamentary Monitoring Group, “ATC 170224: Final Report of the Ad Hoc Committee on the SABC Board Inquiry into the fitness of the SABC Board” 2017-02-24, <https://pmg.org.za/taled-committee-report/2898/> (2022-06-20).

³⁵⁵ *Ibid*.

³⁵⁶ Nguyen, NH “Essential 25000 English Law dictionary” 2018 13545 (2022-11-29).

³⁵⁷ Parliamentary Monitoring Group, “ATC 170224: Final Report of the Ad Hoc Committee on the SABC Board Inquiry into the fitness of the SABC Board” 2017-02-24, <https://pmg.org.za/taled-committee-report/2898/> (2022-06-20).

³⁵⁸ *Ibid* 10221.

If there is an uncertainty as to which act applies and whether Section 5(4) (b) of the Companies Act is applicable, then the courts may revert to the common law rules as discussed. The Insurance Act is a specific law. Given that it is a specific law and given the date of its promulgation, it will take precedence over the general law being the Companies Act. This is supported by the fact that the Insurance Act on the question of the fit-and-proper requirement for key persons is more concrete and takes better account of the context in which it is to be applied than the Companies Act.

Nonetheless, applying the special law does not extinguish the relevant general law.³⁵⁹ The general law will remain valid and applicable and will, in accordance with the principle of harmonisation, continue to give direction for interpreting and applying the relevant special law. It will fully apply in situations not provided for by the latter. As none of the acts specifies that the act will take priority above all other legislation, the two maxims mentioned above apply to the Insurance Act being a specific law over the Companies Act, which is a general law.

A question arises whether Guidance Note 1 of 2019, issued by the FSCA to address recourse in terms of the debarment of representatives, will be applicable for a key individual who is not appointed because the person is found not to be fit and proper. Subsequent to that, can the question be asked as to whether a key individual who was not appointed has recourse to the courts, and if so, would it be in terms of the Companies Act, the Insurance Act or any applicable GOI? The Insurance Act is silent on when a director can appeal if he/she is found not fit and proper. Both the procedure and the merit of appeal need to be addressed.

2.9 The harmonisation of conflicting provisions

One of the proposed amendments to the second draft of the COFI Bill was to amend the FSRA to align it with the new COFI Bill. It will add certainty if a legislative provision is introduced to explicitly determine priority where the Insurance Act, the Companies Act and COFI apply.

³⁵⁹ Parliamentary Monitoring Group, <https://pmg.org.za/> (2022-12-27).

Parliament should consider amendments to the Insurance Act and possibly the Companies Act to clarify the prevailing law regarding a conflict on the appointment and dismissals of key persons.

2.10 The liability of key individuals in terms of the Companies Act as opposed to the liability in terms of the Insurance Act

2.10.1 Liability of directors in terms of the Companies Act

The fiduciary duties and the duty of care, skill and diligence are owed to the company and not to the shareholders.³⁶⁰ In certain circumstances, a company may therefore recover losses, damages or costs from a director or a prescribed officer.³⁶¹ This may include the breach of a fiduciary duty, including damages caused by personal financial interests and the misusing of confidential information.³⁶² The director will be jointly and severally liable with any other person who was or may be held liable.³⁶³

A company shareholder also has a claim for damages against a person who intentionally, fraudulently, or due to gross negligence causes the company to act inconsistently with the Act, MOI or powers bestowed on them unless ratified by special resolution.³⁶⁴ An illegal act cannot be ratified.³⁶⁵ Any person who contravenes any provision of this act is liable to any other person for any loss or damage suffered by that person due to that contravention.³⁶⁶

A company is entitled to take out indemnity insurance to protect a director against certain liabilities or expenses, but this does not include a breach of a fiduciary duty or certain other breaches.³⁶⁷

³⁶⁰ Cassim, p. 584.

³⁶¹ S 77(1) – S 77(10).

³⁶² Cassim, p. 583.

³⁶³ S 77.

³⁶⁴ S 20(6).

³⁶⁵ S 20(3).

³⁶⁶ S 218(2).

³⁶⁷ S 78.

The Companies Act provides directors with a statutory defence, namely *the business judgment test*. This rule protects directors who make informed decisions pertaining to the business, although the decisions might not have had the best outcome for the company. The directors must prove that they had taken reasonably diligent steps to become informed about a particular matter;³⁶⁸ that they had no material personal financial interest in the subject matter of the decision;³⁶⁹ or that they disclosed the conflict of interest as required by section 75 of the act;³⁷⁰ and that they had a rational basis for believing and did believe that the decision was in the best interest of the company.³⁷¹

Directors may rely on advice received from employees, legal counsel, accountants and a committee of which they are not members.³⁷²

“Individual directors and the board as a whole, both executive and non-executive, carry full fiduciary responsibility in terms of sections 77, 214 and 215 of the Companies Act.”³⁷³

In *Companies Tribunal of the Republic of South Africa v Steven Allen Lowery*³⁷⁴ CT012 SEP 2016, the applicant, who was a non-executive director and 25% shareholder, requested the removal of the first respondent, who was a 75% shareholder. The request was made on the grounds that the first respondent failed to act in good faith and for a proper purpose, and in the best interest of the company. The test applied was that the Companies Act requested the degree of care, skill and diligence that may reasonably be expected of a director with that director's knowledge, skill and experience. These criteria are set out in sections 76(3) and (4).

³⁶⁸ S 76(4)(a)(i).

³⁶⁹ S 76(4)(a)(ii)(aa).

³⁷⁰ S 76(4)(a)(ii)(bb).

³⁷¹ S 76(4)(a)(iii).

³⁷² S 77, S 214 & S 215.

³⁷³ S 77, S 214 & S 215.

³⁷⁴ <http://www.saflii.org/za/cases/COMPTRI/2017/16.pdf>. *Companies Tribunal of the Republic of South Africa v Steven Allen Lowery*³⁷⁴ CT012SEP 2016
<https://www.companiestribunal.org.za/decisions-orders/>.

The first respondent signed a two-year lease agreement on behalf of the company for R11 400, while the going rate was R35 000. A forensic report showed that tax returns had not been submitted, financial records were not in line with accounting standards, and provisional tax had not been paid. Trading under these circumstances amounted to technical insolvency. Moreover, there must be reasonableness and sufficiency in the allegations to require that a director be removed. The criteria used in our law to determine whether a person has acted carelessly and/or negligently is the objective standard of a reasonable person. In addition to the above, the court considered the duty to act in a *bona fide* manner and the director's duty to act in the company's best interest. According to the enlightened shareholder approach, a shareholder should further maximise a company's profit for the benefit of all the stakeholders.

The Tribunal held that the respondent did not act in good faith, for a proper purpose, and in the company's best interest, or with the necessary care, skill and duty because he in person benefited from the lease in his capacity as director and shareholder. He failed to fulfil his statutory obligations. Therefore, the application was granted, and the first respondent was removed as a director.

The matter of *Lumia Investment Holdings (RF) Ltd and Another v Kirkinis and Others* (1423/20180[2020] ZASCA 83 (3 July 2020) [2020 JDR 1284 (SCA)]), which dealt with liability for non-compliance with section 76(3) of the Companies Act, was a groundbreaking judgment. In this case, two shareholders in African Bank used section 218(2) to sue the individual directors of African Bank and the auditors Deloitte jointly and severally for damages. The damages resulted from the plaintiffs' diminution in the value of their shares in African Bank Investments Limited because of the directors' alleged misconduct.

The High Court concluded that the shareholders could not rely on section 218(2) of the act for their respective losses, and the action was dismissed. The Supreme Court of Appeal upheld the decision of the High Court. The Supreme Court of Appeal accepted that there was a diminution in the value of the shares and that the losses were caused due to the misconduct of the directors. The company itself has a right to recover damages for its loss.

2.10.2 Liability of directors in terms of the Insurance Act

In the definition section of the Insurance Act, “board of directors” means the board of directors of (a) a company registered under the Companies Act, (b) under the Co-operatives Act, (c) or the governing body of a person other than a company or co-operative.

A director, on the other hand, is defined as a member of a board of directors and any alternate of such a member. The responsibility of the board of directors of a controlling company is to adhere to the requirements imposed on a controlling company and an insurance group as provided for in the Insurance Act.³⁷⁵ This responsibility includes reporting any change in the risk profile of the insurance group designated under section 1.³⁷⁶

Although the Insurance Act provides for outsourcing and delegation of responsibilities, it stipulates in section 30(3) (a) that the board of directors of an insurer is responsible for meeting the requirements imposed on it under the act. The Prudential Authority may prescribe additional governance principles and requirements to the insurer and controlling company. These include requirements on the composition, independence, roles and responsibilities (in addition to the requirements prescribed in the Companies Act); risk management; internal control; control functions; and outsourcing by an insurer or a controlling company. If an insurer, controlling company, board of directors, or other key persons employed by the insurer fail to maintain the governance framework, the Prudential Authority may direct an insurer, controlling company, board of directors, or other key persons of the insurer of the controlling company to strengthen or effect improvements to the controlling company’s governance framework or a part thereof.³⁷⁷

³⁷⁵ S 11 of the Insurance Act.

³⁷⁶ *Ibid.*

³⁷⁷ S 31.

It is further stipulated that the Prudential Authority must approve a transaction for loans or other financial assistance to directors in terms of section 45 of the Companies Act.³⁷⁸

Regarding the management of the financial soundness of an insurer, the Prudential Authority is mandated to—

“direct an insurer, a controlling company, or the board of directors or other key persons of the insurer or controlling company, to change, amend, strengthen or effect improvements to any principle, method, assumption, technique, adjustment, calibration, parameter, calculation or model of an insurer or controlling company used or applied in respect of its financial soundness.”³⁷⁹

The Insurance Act provides in the classes and subclasses of insurance business of non-life insurance for the cover of directors and officers. Under the Compensation for Occupational Injuries and Diseases Act, any insurance taken out by the company on behalf of directors is taken out to protect the personal assets of the directors and key individuals or officers, as well as the company itself. Insurance usually pays the legal costs when judgment is held against a director based on a valid claim. The MOI may or may not indemnify its directors and officers. The defence costs and damages may exceed the assets of a company in the case of a legitimate claim.³⁸⁰ Subsidiaries, as well as derivative actions and class actions, are covered.³⁸¹ A derivative action refers to shareholders suing a third party, including a director, on behalf of a company. Some of the main exclusions of the directors’ and officers’ policies are dishonesty, fraud, copyright infringements, illegal profits, corruption, deliberate acts, damage to property, and bodily injury.

2.11 Regulatory liability for approving the wrong fit-and-proper individuals

Current legislation does not make provision for the liability of state entities if a company should incur damages due to an erroneous finding on fit and proper or an undue delay

³⁷⁸ S 38.

³⁷⁹ S 36(5).

³⁸⁰ Institute of Directors South Africa “Directors & Officers Liability frequently asked questions” <https://www.iodsa.co.za/page/Camargue>. (2022-11-30).

³⁸¹ S 157 of the Companies Act.

in making a decision. South African law does not provide for the law of tort as in English law, but rather for the law of delict. That implies that an aggrieved party can claim damages from another for harm suffered. Current legislation does not specify who is responsible for evaluating fit and proper criteria at the Regulator. In practice, this could be done by an employee of the Regulator or a committee delegated to perform such a duty. If a committee decides, it is usually done via a majority or a special vote. A question can be raised as to when the decision is considered to be taken. Is it when the minutes are adopted at the next meeting or when the company that wants to appoint the director responds that they have received the feedback on the decision? Although the Regulator can be sued based on delict, the aggrieved person must prove that there was an unlawful act while the employee operated in the scope of his/her duty and that this caused a detriment to the third party involved. The third party could be the company, the director, or the shareholders. Including a duty of supervision of the Regulator specifying the potential issues discussed above should be considered.

2.12 Elections

The Companies Act determines that in the case of a profit company, the MOI must provide for the election by shareholders of at least 50% of the directors and 50% of any alternate directors.

If the MOI provides for an election, investors could be allowed to nominate a director. In the ordinary sense of business, this could be a director who is not necessarily fit and proper or suitable for the position. Luckily in the insurance industry, the Prudential Authority will still apply the fit-and-proper requirement test before the nominee is appointed.

CHAPTER 3: PROBLEMATIC ASPECTS

3.1 Problematic aspects

3.1.1 Legal certainty

Legal certainty is generally accepted as a central requirement for the rule of law. The courts apply the law through judicial precedent to ensure certainty and uniformity.³⁸² The application of the system of judicial precedent ensures that there is consistency in the way that legal disputes are settled.³⁸³ Legal systems should proactively indicate the institutional reaction to types of human behaviour to prevent arbitrary use of state power. The *ratio decidendi*, or the reason for the decision, must be followed by another court in a subsequent, similar court.³⁸⁴ The *obiter dictum* or remark in passing has persuasive value.³⁸⁵ The effectiveness and trustworthiness of a country's justice system depend on legal certainty.³⁸⁶

The “four new principles” outlined in the COFI Bill will introduce value judgments in the governance process. Although integration and harmonisation of current legislation are definitely necessary, it is still to be seen if all activities undertaken by all financial institutions have been defined sufficiently to be dealt with in “a one size fits all” manner under a single licensing framework. It is undoubtedly easier to judge a case and to ensure legal certainty by interpreting a set of rules rather than judging whether actions conform to a set of idealistic principles. Only time will tell whether different risks posed by different entities could be evaluated based on outcomes instead of the certainty of a strict compliance framework.

3.1.2 Regulators

The current supervision and governance structure for insurance in South Africa under the Twin Peaks system provides the FSCA and the Prudential Authority with enormous powers, although they are not classified as judicial entities. Erroneous decisions can

³⁸² Fouche, MA *Legal Principles and Contracts and Commercial Law* (2015) 8th ed. p. 8.

³⁸³ *Ibid* p. 9.

³⁸⁴ *Ibid* p. 9.

³⁸⁵ *Ibid* p. 9.

³⁸⁶ Lifante-Vidal, I “*Is legal certainty a formal value?*” 2020(11)3 456-467 *Jurisprudence* [www.https://doi:10.1080/20403313.2020.1778289](https://doi.org/10.1080/20403313.2020.1778289).

substantially impact the share prices of financial institutions. However, current legislation does not provide for the liability of regulators under these circumstances.

Mr Pityana, a previous independent lead director and chair of the remuneration committee of Absa Bank, took the SARB's Prudential Authority to court after Absa's board resolved that he had to be removed as director of the board with immediate effect.³⁸⁷ He alleged that the Prudential Authority acted unfairly by unlawfully blocking his appointment as chair of Absa by conducting an "informal process" instead of the process required by the Banks Act 94 of 1990. According to the Banks Act, the Prudential Authority must approve any board nominations and key individuals to determine whether they are fit and proper for their positions.³⁸⁸ The Prudential Authority failed to follow the prescribed process and opted for an informal approach, with the result that Absa rescinded its decision to nominate Mr Pityana as chair.³⁸⁹ The following question arises: If Mr Pityana could prove his case, could he claim compensation from the Regulator?

3.1.3 *Quis custodiet ipsos custodiet?*

The Latin phrase *quis custodiet ipsos custodiet* can be translated as "who will guard the guards themselves". Questions arise on whether the Regulator should be regulated or whether self-regulation suffices.

The Prudential Authority prescribes the documentation that needs to be submitted for approval of a fit-and-proper candidate. Currently, the timelines in which the Prudential Authority provide feedback to the financial institution on their findings of fit and proper are not determined. Not providing timely feedback could negatively affect the financial service provider or insurance company. A director can only attend a board meeting after recruitment but before an appointment as an observer. The question arises as to what would be the consequences if a board fails to make an important decision due to a lack of timely feedback from the Regulator. However, it is doubtful that the

³⁸⁷ *Sipho Mila Pityana v the Prudential Authority, ABSA Group, ABSA Bank Limited* Court Case 53829, High Court of South Africa Gauteng division 22 Nov 2021.

³⁸⁸ ABSA Medial, "ABSA Group Removes Mr Sipho Pityana from Boards 24 Nov 2021 <https://www.absa.africa/media-centre/media-statements/2021/absa-group-removes-mr-sipho-pityana-from-boards/> (2022-11-12).

³⁸⁹ *Ibid.*

Regulator will ever consider retrospectively appointing a director who attended a meeting and provided his/her input on which specific decisions were made.

The South African insurance industry is soundly regulated as far as the fit-and-proper requirement for significant owners, representatives and the management of financial services providers are concerned. Nonetheless, it is suggested that there are still regulatory gaps in terms of the criteria used to appoint directors. The current “fit” requirements relating to competence and skills” are better suited for representatives than directors and key individuals. There is currently no skill matrix applicable to an insurance board that can be used to assess skill gaps and potential skills needed. Significant owners are primarily evaluated on financial soundness.

3.1.4 Overboardedness

Currently, the available pool of experienced, competent directors is limited, and directors serve on more than one board. This can lead to a conflict of interest and overboardedness.

3.1.5 Fit and proper

Future directors must manage processes, technology and people; maintain a balance between the organisational and individual needs; be comfortable in a virtual environment; have broad experience and be fully informed about market, economic and regulatory changes.³⁹⁰

Regarding the “proper” requirement, the value judgment will probably stay the same since a person who has integrity and honesty will always be an asset to any board given accountability, responsibility and transparency. Integrity usually equals strong moral principles. Is there any way it can be tested, as the lack of integrity is easier to determine than to define it? The lack thereof relates more to not discharging duties, criminal offences, civil liability or the lack of compliance with legislation, including conflict of interest and fiduciary duties. A company could determine a person’s values

³⁹⁰ Stuart, D “*Five skills for Insurance Leaders of the future*” 10 Oct 2021
<https://anziif.com/professional-development/the-journal/volume-44/issue-3/five-skills-for-insurance-leaders-of-the-future> (2022-11-08).

through testing and interviewing, but values might change over time. The real impact of decision-making can only be determined after the implementation phase and possibly longer than the director's tenure, as in the case of Eskom South Africa.

3.1.6 Investor nomination

A question can be raised as to whether any board will question the appropriateness of a candidate on whether he/she is a fit-and-proper person if an investor nominates the candidate and the company urgently needs funding.

3.1.7 Culture of the organisation

The board determines the culture of the organisation. The fit-and-proper test will not determine in advance whether a person will fit into an organisation's culture. Although a person's values can be determined beforehand and match with an organisation's culture, no director's appointment letter provides a probation period in which the director could be requested to resign if he/she does not adhere to the organisation's culture.

3.1.8 Short-term versus long-term decisions

The fit-and-proper test does not ensure long-term sustainable decisions, as most directors are appointed on a short-term basis. Appointing directors on a short-term basis often leads to a quick-win mentality which can be detrimental to the company's long-term sustainability.

In case of a conflict in legislation between the Companies Act, the Insurance Act and GOIs when appointing a director, there is currently no specific stipulation in an act as to which act should get priority. Therefore, legislation or regulation needs to be amended to stipulate exactly whether the Insurance Act or the Companies Act would prevail in case of a conflict between the two. Although the Prudential Authority will probably insist that the GOIs be prioritised in the case of the applicability of the fit-and-proper requirement for directors of insurance companies, the GOIs are still subordinate legislation.

A draft joint standard on outsourcing by insurers was released on 8 September 2021 for public consultation. This draft joint standard is intended to repeal and replace the current GOI 5 on outsourcing. The following is proposed in section 8 of the document:

“An insurer may not enter into or maintain an outsourcing arrangement relating to a material function unless – (a) the service provider has appropriate governance, risk management, internal controls and the ability to comply with applicable laws; Joint Standard [] of 2021 Outsourcing by Insurers 6 (b) the service provider has adequate operational capability and financial resources to ensure the ongoing performance of the outsourced material function; (c) the service provider has appropriate contingency plans; and (d) the key persons of the service provider meet the fit-and-proper requirements relating competence and integrity, as provided for in Prudential Standard GOI 4 (Fitness and Propriety of Key Persons of Insurers). It is further proposed that the insurer must comply with the Draft Joint Standards within 6 months from the commencement date.”*

The document fails to stipulate whether insurance companies will be required to assess the directors and key persons of the companies for compliance with the fit and proper requirements. If it is expected that the insurance companies do due diligence on the directors and key persons and they find that they fail to meet the criteria, will the directors be expected to comply with the requirements within a six-month period? If the assessment is to be a continuous process, how often will directors be assessed?

3.1.9 Conclusion

As Thomas Jefferson said: “Hindsight is an exact science.” Although a gap analysis can determine a candidate's suitability, it is only in hindsight that companies can conclusively determine whether a director was indeed suitable for the position.

To complement the current legislative environment, all interested parties, including decision makers (governments and regulators), insurance companies, reinsurers, actuaries, and auditors, should stay abreast of relevant research and developments in the insurance industry in order to propose fit-for-purpose amendments to existing legislation if and when necessary.

In the search to determine if the *status quo* suffices, it is concluded that the fit-and-proper requirement is a dynamic concept. Additional knowledge and skills will be needed to satisfy the needs of a new generation of tech-savvy customers. In addition,

the explosion in data, data management and data mining in the twenty-first century will require new skills and abilities to ensure a company's sustainability in a dynamic future-driven insurance industry.

The question is whether one act (COFI) on fit and proper can be promulgated to ensure consistency of outcomes across all industries. Should there not be a regulation stipulating that directors must have the skills and know-how needed to drive the financial sector and, specifically, the insurance industry into the Fourth Industrial Revolution?

The regulatory environment within the industry has closely tracked advances in leading insurance markets, as evidenced by the transition to a risk-based solvency model. This model is similar to the European Solvency II and the global trend of consumer protection initiatives, such as treating customers fairly and the retail distribution review.³⁹¹ Should these levels of innovation not apply to insurance companies as well?

³⁹¹ Molloy, L and Ronnie, LC “Mind-set shifts for the Fourth Industrial Revolution: Insights from the life insurance sector” 2021 (19) *South African Journal of Human Resource Management* <https://sajhrm.co.za/index.php/sajhrm/article/view/1543/2572#37>. (2022-09-12).

CHAPTER 4: PROPOSED SOLUTIONS ELSEWHERE

4.1 Comparative jurisdictions and best practices on the appointment of directors in the insurance industry in England

4.1.1 Legislation in United Kingdom

South African insurance law has been influenced significantly by English law. This section will evaluate the fit-and-proper requirement in English law to determine current best practices in this jurisdiction.

The Companies Act 2006³⁹² is the primary legislation regulating UK companies. Part 10A of the act deals with company directors. The act stipulates in section 155 that at least one director must be a natural person. It further determines in section 157(1) that a director must be at least 16 years of age and that a contravention of the section is void. In the case of a public company, two or more directors cannot be voted in with a single resolution.³⁹³ Chapter 5 deals with the service contract concluded with directors.³⁹⁴

The general duties of directors are contained in Chapter 2 of the Act and deal with the obligation to: act within powers;³⁹⁵ promote the success of the company;³⁹⁶ exercise independent judgment;³⁹⁷ exercise care, skill and diligence;³⁹⁸ avoid conflicts of interest;³⁹⁹ not to take benefits from third parties,⁴⁰⁰ and to avoid conflict of interest.⁴⁰¹ The duty to declare a conflict of interest and not to accept benefits from third parties applies to current and former directors.⁴⁰²

³⁹² Companies Act, 2006.

³⁹³ A 160.

³⁹⁴ S 227–S 230.

³⁹⁵ S 171.

³⁹⁶ S 172.

³⁹⁷ S 173.

³⁹⁸ S 174.

³⁹⁹ S 175.

⁴⁰⁰ S 176.

⁴⁰¹ S 176.

⁴⁰² S 170.

In Schedule 10, the act refers to the fact that an auditor must be a fit-and-proper person, but there is no specific mention that a director must be a fit-and-proper person except for an implied requirement as per the care, skill and diligence requirements.

According to the London-based Institute of Directors, the board of directors must provide leadership and direction and ensure long-term prosperity while protecting assets and its reputation. The Board must consider how decisions relate to the regulatory framework and influence stakeholders. The directors act as shareholders' fiduciaries and are accountable to them. Directors play a key role in determining the values and ethical position of the company and are responsible for the company's administration.⁴⁰³

The disqualification of directors is regulated by a separate law in the UK, namely the Company Directors Disqualification Act 1986.⁴⁰⁴ The act applies to current directors, directors who acted without being appointed formally, and shadow directors or applicants who want to become directors. A court can disqualify a director,⁴⁰⁵ or a director may voluntarily sign an undertaking to be disqualified.⁴⁰⁶

The Act stipulates three categories of conduct that may lead to disqualification by a court. Regarding general misconduct,⁴⁰⁷ there must either be a transgression committed in connection with the promotion, formation, management or liquidation of a company's property that may lead to disqualification of up to 15 years.^{408 409 410}

Another category of disqualification is a disqualification for unfitness.⁴¹¹ The court can declare a director unfit,⁴¹² or the director can be declared unfit after an investigation of

⁴⁰³ www.iod.com/guidance/briefings/cgbis-differences-between-directors-and-managers.

⁴⁰⁴ <https://www.legislation.gov.uk/ukpga/1986/46/contents/england>.

⁴⁰⁵ S 1 CDDA, 1986.

⁴⁰⁶ S 1A CDDA, 1986.

⁴⁰⁷ S 2 – S5A CDDA, 1986.

⁴⁰⁸ S 2 CDDA, 1986.

⁴⁰⁹ S 3 CDDA, 1986.

⁴¹⁰ S 4 CDDA, 1986.

⁴¹¹ S 6-8 CDDA, 1986.

⁴¹² S 6 CDDA, 1986.

the company.⁴¹³ The courts held that ordinary commercial misjudgement would not be grounds for a director's disqualification, but gross negligence and total incompetence would be grounds for disqualification.⁴¹⁴ The reason for disqualification was to protect the public.⁴¹⁵ In *Re Sevenoaks Stationers Ltd*, the Court of Appeal considered that the director was a director of five companies, of which all five became insolvent. The director was disqualified by the court to act as a director for a period of 7 years. In the judgement, the court held that the director was not dishonest but incompetent and negligent to such a degree that it was enough to render him unfit. The court provided guidelines on implementing the 15-year disqualification as provided for in the Company Directors Disqualification Act 1986.⁴¹⁶ The most serious misconduct qualified for ten years disqualification, between six and ten years for serious misconduct but not as serious as in category one, and the minimum punishment of two to five years should be used in cases that are not that serious. Given the above, the disqualification had been reduced to five years.⁴¹⁷

Other cases for disqualification were participating in fraudulent or wrongful trading under the Insolvency act,⁴¹⁸ being an un-rehabilitated insolvent⁴¹⁹ and failing to pay in terms of an administration order.⁴²⁰ A disqualified director may apply to a court to act again as a director in a company's formation, promotion or management and may only proceed if an order to that effect is granted.⁴²¹

The appointment of directors in the insurance industry is also regulated by other legislation in addition to the Companies Act, 2006 and the Company Directors Disqualification Act, 1986.

⁴¹³ S 8 CDDA, 1986.

⁴¹⁴ Re Lo-Line Electric Motors [1988] BCLC 698.

⁴¹⁵ Re Stanford Services [1987] BCLC 607.

⁴¹⁶ S 5.

⁴¹⁷ *Ibid.*

⁴¹⁸ S 10 CDDA, 1986.

⁴¹⁹ S 10 CDDA, 1986.

⁴²⁰ S 12 CDDA, 1986.

⁴²¹ S 17 CDDA, 1986.

The insurance industry is a very old industry in England, with the Marine Insurance Act dating back to 1906. Although the Financial Services and Markets Act 2000 (“FSMA”) provided a regulatory framework for insurers, the legislator identified and addressed problems after the 2008 worldwide financial crisis by focusing on market conduct from boardroom decisions to the point of sale and beyond.⁴²²

The reform of the industry gained momentum with the promulgation of the Financial Services Act 2012. This act introduced three new bodies: the Financial Policy Committee, the Prudential Regulatory Authority,⁴²³ and the Financial Sector Conduct Authority (“FCA”).⁴²⁴ The UK Financial Services Authority was replaced with the Financial Conduct Authority and the Prudential Regulatory Authority. According to this act, the FCA and Prudential Regulatory Authority must approve persons who perform one or more “controlled functions” on behalf of an approved company. These functions include directors and significant management functions, including the chief risk officer.⁴²⁵ The regulators further take additional caution when approving the appointment of individuals with “significant influence functions”, such as directors. All directors, including non-executive directors, are approved persons. Insurers are further regulated by the PRA Rulebook⁴²⁶ and the FCA Handbook.⁴²⁷ Senior Management is regulated and needs to adhere to the fit and proper requirement as part of the Senior Managers and Certification Regime;⁴²⁸ to hold them personally

⁴²² Harvard Law School Forum on Corporate Governance “*Financial Services Act 2012: A new UK Financial Regulatory Framework*” 24 March 2013
<https://corpgov.law.harvard.edu/2013/03/24/financial-services-act-2012-a-new-uk-financial-regulatory-framework/> (2022-09-13)

⁴²³ Association of British Insurers, “*How our industry is regulated*” 2022,
<https://www.abi.org.uk/data-and-resources/tools-and-resources/regulation/> (2022-11-12).

⁴²⁴ *Ibid.*

⁴²⁵ Peel, G et al “Directors: Are you fit and proper? Trends in fit and proper person requirements and testing” *Thomson Reuters Practical Law* 01 May 2015
[https://uk.practicallaw.thomsonreuters.com/2-611-8747?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/2-611-8747?transitionType=Default&contextData=(sc.Default)&firstPage=true).

⁴²⁶ FSC “*Handbook of rules and guidance*” 20 July 2022 <https://www.fca.org.uk/about/how-we-regulate/handbook> (2022-11-12).

⁴²⁷ *Ibid.*

⁴²⁸ Association of British Insurers, “*How our industry is regulated*” 2022,
<https://www.abi.org.uk/data-and-resources/tools-and-resources/regulation/> (2022-11-12).

accountable when they fail to fulfil their duties. This implies that specific individuals in management positions require approval of the FCA and/or the PRA.

When investigating the applicability of the fit-and-proper test in the insurance industry in the UK, reference to it cannot be found in the Insurance Act 2015, although this act brought about the most significant insurance reform in a century. The Act commenced on 12 Aug 2016 and applies to policies concluded or amended after that date.⁴²⁹

The FCA published a guideline on fit and proper, stating that it is not a tick-box exercise that must be completed before a person is approved, but rather a questionnaire that must be completed honestly. The applicant must disclose all relevant information. The FCA considers the same factors as the South African Regulator: honesty (including openness with self-disclosures, integrity and reputation), competence and capability and financial soundness.⁴³⁰ The test/assessment is contained in a regulatory guide⁴³¹ and available on the FCA website.⁴³²

a) *Honesty, integrity and reputation*⁴³³

Honesty, integrity and reputation relate to (1) criminal offences, (2) adverse findings or settlements, (3) disciplinary or criminal proceedings, (4) contravention of the UK regulatory system, (5) business insolvency, (6) or having gone into liquidation or administration while the person was a director, partner or in management.⁴³⁴

⁴²⁹ March, "Insurance Act, 2015 – Frequently asked questions" 2016
file:///C:/Users/User/Downloads/Insurance%20Act%202015%20Frequently%20Asked%20Questions%20(FAQs).pdf. (2022-11-14).

⁴³⁰ FSC "Handbook of rules and guidance" 20 July 2022 <https://www.fca.org.uk/about/how-we-regulate/handbook> (2022-11-12) Fit 1.3.1B. ⁴³⁰

⁴³¹ Finance Conduct Authority, "Fitness and Propriety" 2022-05-25 <https://www.fca.org.uk/firms/approved-persons/fitness-proprity> (2022-11-14).

⁴³² Finance Conduct Authority, "Fitness and Propriety" 2015-05-12 updated 2022-05-25, <https://www.fca.org.uk/firms/approved-persons/fitness-proprity#webform-submission-page-feedback-form-node-7661-add-form> (2022-11-19).

⁴³³ FSC "Handbook of rules and guidance" 20 July 2022 <https://www.fca.org.uk/about/how-we-regulate/handbook> (2022-11-12) Fit 2.

⁴³⁴ *Ibid* Fit 2.1 (9).

b) *Competence and credibility*⁴³⁵

Regarding meeting the competence requirement, the Regulator requires proof of experience and skill and wants to know whether the director has enough time to perform his/her duties.⁴³⁶

c) *Financial soundness*

The Regulator will consider the following: whether a person had a judgment of debt or award against him/her that was not paid within a reasonable period; made arrangements with his/her creditors; filed for bankruptcy; had a petition served on him/her; had been adjudged bankrupt; had been subject to a bankruptcy restriction order or undertakings; had assets sequestrated, or related proceedings.⁴³⁷

Post-appointment, directors must keep complying with the Regulator's fit and the statements of principle and code of practice for approved persons. If anything affects compliance and directors no longer meet these requirements, they have to report it to the Regulator.⁴³⁸ The FCA and Prudential Authority keep a register of misconduct of approved persons.

It is proposed that recruitment agencies of key financial sector members undertake checks early in the process. Companies should include in their processes and policies how they will apply the fit-and-proper test and how they will document the process.

When testing a person as being fit and proper, the company needs to consult the Companies House to determine disqualification and insolvency.⁴³⁹ Criminal record checks are done through the Disclosure and Barring Service for England and Wales.⁴⁴⁰

⁴³⁵ *Ibid* Fit 2.2.

⁴³⁶ *Ibid* Fit 2.2.1.

⁴³⁷ *Ibid* Fit 2.3.

⁴³⁸ <https://www.gov.uk/search-the-register-of-disqualified-company-directors>.

⁴³⁹ <https://www.gov.uk/government/organisations/disclosure-and-barring-service>.

⁴⁴⁰ <https://www.gov.uk/government/organisations/disclosure-and-barring-service/about>.

The FCA mentions that it is not only what is disclosed that matters but also what should have been disclosed and had not been disclosed. They provide a list that, although not comprehensive, is quite helpful in assisting with the due diligence assessments. The due diligence assessments include “regulatory references, qualification certificates, credit checks, criminal record checks and directorship checks”.⁴⁴¹ As directors who failed to meet the requirement tend to change tack and render services as advisors, it had been advised that the regulatory requirements should include information on complaints and outstanding payments by directors.⁴⁴²

The Financial Conduct Authority published additional guidelines on the role and responsibilities of non-executive directors in an Annexure to the Handbook⁴⁴³

The FCA recommends that firms should request feedback from previous employers or previous firms where the person acted as a non-executive director. This is in line with the *Fair and Effective Markets Review* that stipulates that all information going back six years must be provided on a standardised template. It includes disciplinary hearings, judgments against the person and any finding that the person previously was not declared as a fit-and-proper person. The question that arises is why the term is six years? Is there not a responsibility to disclose relevant historical information going back more than six years that might influence the decision to approve a person? Some questions asked by the FCA have an indicative “never” answer, implying that certain information is more critical than others. The FCA underlines that there needs to be a relationship of trust between the Regulator and the applicant.

Newly appointed directors must take note of the revised UK Corporate Governance Code published by the Financial Reporting Council and took effect on 1 January

⁴⁴¹ Marriner, K “Sharks and phoenixes: How the FCA fails to sort bad advisers from good” 6 July 2016 <https://www.moneymarketing.co.uk/news/sharks-phoenixes-fca-fails-sort-bad-advisers-good/> (2022-11-19).

⁴⁴² *Ibid.*

⁴⁴³ Financial Conduct Authority, “COCON 1 Annex 1 Guidance on the role and responsibilities of NED’s for relevant authorized persons”, <https://www.handbook.fca.org.uk/handbook/COCON/1/Annex1.html>. (2022-11-19).

2019.⁴⁴⁴ The new code focuses mainly on best practices for listed companies, shareholder relationships⁴⁴⁵ audit, risk and internal control.⁴⁴⁶ As with the King IV Report in South Africa, it retains the “comply or explain” approach and emphasises high-quality reporting. Companies must avoid a tick-box approach. Reportable breaches could have arisen anywhere – not necessarily in the UK. The Regulator has discretion in considering the seriousness of the conduct, relevance and evidence of rehabilitation when making a decision.⁴⁴⁷

Regarding the applicability of fit-and-proper requirement in the health sector, “A Review of the Fit and Proper Person Test”, as commissioned by the Minister of State for Health, proposed the following recommendations on directors in November 2018: All directors (executive, non-executive and interim) must meet the competency standards to be appointed on the board of a health-providing organisation. Furthermore, a central director's database should be created with relevant information on qualifications and history. An executive director must provide mandatory employment references. Directors should be debarred in case of serious misconduct.⁴⁴⁸ Based on the review, Regulation 5 has been issued to ensure that providers meet the existing requirements of the *Health and Social Care Act 2008*. The regulation stipulates that individuals who have authority in organisations that deliver care are responsible for that care's overall quality and safety. Therefore, board directors, board members or individuals who perform functions equivalent to a board

⁴⁴⁴ Financial Reporting Council, “The UK Corporate Governance Code” July 2018, <https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.pdf> (2022-11-23).

⁴⁴⁵ Principle D, p. 7.

⁴⁴⁶ Chapter 4, p. 10.

⁴⁴⁷ Financial Conduct Authority, “Handbook FSC” <https://www.handbook.fca.org.uk/handbook/SUP/15/11.html> (2022-11-23).

⁴⁴⁸ Kark, T & Russel, J “A review of the fit and proper person test” https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/787955/kark-review-on-the-fit-and-proper-persons-test.pdf. (2022-08-31).

director or member should be fit and proper. They should further ensure that providers meet the existing requirements.⁴⁴⁹

4.1.2 Case law in the United Kingdom

In a recent case in the UK⁴⁵⁰ before the *Upper Tribunal (Tax and Chancery Chamber)*, the FCA issued a decision note dated 17 September 2021 (JJH00031) against Jon Frensham, a financial advisor who groomed under aged teenage girls for sexual activities. Based on his misconduct, he was found not to be a fit-and-proper person for his profession. Mr Frensham was found guilty of the criminal offence and sentenced to 22 months imprisonment suspended for 18 months. He is to report his transgression to the Regulator. A complaint was filed against him at the FCA, who banned him from performing his job. The Tribunal stated that he lacked the necessary integrity and reputation. The FCA considered all relevant matters, including the seriousness of the offence, surrounding circumstances and evidence of his rehabilitation. Based on that, the FCA withdrew his authorisation to perform senior management functions.⁴⁵¹ In an article relating to the case, the author concluded that criminal offences are not the main reason that will preclude someone from being approved to practise by the UK FCA, but transparency and honesty towards the FCA in reporting a criminal offence or other misconduct is what might determine permission. The Tribunal further concluded that regulatory action for misconduct could be engaged only where failure to act without integrity in one's personal life is of qualitative relevance to how the individual is required to conduct himself in his/her professional life.⁴⁵²

⁴⁴⁹ Care Quality Commission "Fit and proper persons: directors" <https://www.cqc.org.uk/guidance-providers/regulations-enforcement/fit-proper-persons-directors>. (2022-09-13).

⁴⁵⁰ FCA "Decision Notice JJH00031" <https://www.fca.org.uk/publication/decision-notices/jon-frensham-2020.pdf>.

⁴⁵¹ FCA "Final Notice JJH00031" <https://www.fca.org.uk/publication/final-notices/jon-frensham-formerly-known-jonathan-james-hunt-2021.pdf>.

⁴⁵² Austin, S "Individuals regulated by the UK Financial Conduct Authority: Where is the Boundary between Private Misdeeds and Regulatory Censure?" 20 Oct 2021 <https://www.lexology.com/library/detail.aspx?g=2bf6edca-de4b-4fb0-b988-cd814148ed55>. (2022-11-14).

In the matter of *Beckwith*⁴⁵³ v *Solicitors Regulation Authority* [2020] EWHC 3231 (Admin) (27 November 2020),⁴⁵⁴ on 30 January 2020,⁴⁵⁵ the Solicitors Tribunal issued judgment regarding the misconduct against the applicant based on a complaint of sexual harassment of an ex-colleague who resigned. She was intoxicated at her farewell party, and he allegedly took advantage of her. The Tribunal held that he was in a position of seniority and that he misused his position. He should have known that his conduct was not invited as she was heavily intoxicated. It was held that he acted without integrity, compromised his own profession, and breached his profession's principles. His conduct had fallen below what was expected of him⁴⁵⁶ and his profession.⁴⁵⁷

In *Stuart Malcolm Forsyth v (1) The Financial Conduct Authority and (2) Prudential Regulations Authority* [2021] UKUT 0162 (TCC), the chief executive of a regulated insurance firm (Scottish Boat owners Mutual Insurance Association) demonstrated a lack of integrity according to the FCA and Prudential Regulatory Authority. The FCA made an order in terms of section 56 of the Financial Services and Markets Act 2000 ("FSMA") prohibiting him from practising as an FCA-authorized person.⁴⁵⁸ They imposed a penalty of £78,318 in terms of section 66 of the FSMA.

Forsyth employed his wife and channelled part of his salary to his wife between 2010 and 2016. He concealed this fact from the Social, Management, Business and Innovation in Applied Sciences' (SMBIA) Board and Remuneration Committee. It was

⁴⁵³ *Beckwith v Solicitors Regulation Authority* [2020] EWHC 3231 (Admin) (27 November 2020), [https://www.bailii.org/cgibin/format.cgi?doc=/ew/cases/EWHC/Admin/2020/3231.html&query=\(Beckwith\)+\(2022-12-20\)](https://www.bailii.org/cgibin/format.cgi?doc=/ew/cases/EWHC/Admin/2020/3231.html&query=(Beckwith)+(2022-12-20)).

⁴⁵⁴ *Beckwith v Solicitors Regulation Authority* [2020] EWHC 3231 (Admin) (27 November 2020) [https://www.bailii.org/ew/cases/EWHC/Admin/2020/3231.html#:~:text=Between%3A-Ryan%20Beckwith,Solicitors%20Regulation%20Authority,-Respondent.\(2022-11-14\)](https://www.bailii.org/ew/cases/EWHC/Admin/2020/3231.html#:~:text=Between%3A-Ryan%20Beckwith,Solicitors%20Regulation%20Authority,-Respondent.(2022-11-14))

⁴⁵⁵ *Ibid.*

⁴⁵⁶ *Ibid.*

⁴⁵⁷ [https://www.bailii.org/ew/cases/EWHC/Admin/2020/3231.html#:~:text=On%2030%20January%202020%20the%20Solicitors%20Disciplinary%20Tribunal%20\(%22the%20Tribunal%22\)%20issued%20its%20judgment%20on%20complaints%20of%20misconduct%20brought%20by%20the%20Solicitors%20Regulatory%20Authority%20\(%22the%20SRA%22\)%20against%20Ryan%20Beckwith%20\(%22the%20Appellant%22\).\(P.25.191\).\(2022-11-14\)](https://www.bailii.org/ew/cases/EWHC/Admin/2020/3231.html#:~:text=On%2030%20January%202020%20the%20Solicitors%20Disciplinary%20Tribunal%20(%22the%20Tribunal%22)%20issued%20its%20judgment%20on%20complaints%20of%20misconduct%20brought%20by%20the%20Solicitors%20Regulatory%20Authority%20(%22the%20SRA%22)%20against%20Ryan%20Beckwith%20(%22the%20Appellant%22).(P.25.191).(2022-11-14)).

⁴⁵⁸ [https://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKUT/TCC/2021/162.html&query=\(Stuart\)+\(AND\)+\(Malcolm\)+\(AND\)+\(Forsyth\)+\(2022-12-20\)](https://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKUT/TCC/2021/162.html&query=(Stuart)+(AND)+(Malcolm)+(AND)+(Forsyth)+(2022-12-20)).

alleged that he transgressed a serious lack of integrity⁴⁵⁹ in breach of Statement Principle 1 (Principle for Approved Persons) and Rule 1 (Integrity) of the FCA's Individual Conduct Standard 1 of the Prudential Regulatory Authority's Insurance Conduct Standards.⁴⁶⁰ The regulators argued that he made the payments to his wife in order to reduce his tax liabilities. He, therefore, failed to act with integrity.⁴⁶¹ He also interfered with an auditor's investigation and falsified board minutes. The question was whether a financial penalty was appropriate or whether he should be barred. The Upper Tribunal (Tax and Chancery Chamber) published a judgment on 6 July 2021 in which they overruled the decision.⁴⁶² The judges referred to the FCA's Handbook entitled "The Fit and Proper Test for Employees and Senior Personnel".⁴⁶³ They stated in paragraph 17 that the criteria are not only relevant for assessing the fitness and propriety of a candidate for a controlled function but also for assessing the continuing fitness and propriety of an approved person. The most important considerations when assessing a person will be the person's "honesty, integrity and reputation, competence and capability and financial soundness".⁴⁶⁴

Section 56 of the FSMA provides the FCA with the power to issue a prohibition order against an individual⁴⁶⁵ and bar that person from performing a specific activity if that person is no longer fit-and-proper. The gist of the order will depend on the functions performed, the reasons for no longer being fit and proper, and the severity of risk the person poses to consumers or the market generally.⁴⁶⁶ The Tribunal also had to consider whether there was a transgression not to comply with the principles. They considered the content of the fit-and-proper policy. The evidence proved that his wife

⁴⁵⁹ *Ibid.*

⁴⁶⁰ *Ibid.*

⁴⁶¹ Baird, G "A question of integrity: Forsyth v The FCA and PRA" *Farrer & Co* 13 Aug 2021 <https://www.farrer.co.uk/news-and-insights/a-question-of-integrity-forsyth--v-the-fca-and-pra/>.

⁴⁶² *Stuart Malcolm Forsyth v (1) The Financial Conduct Authority and (2) Prudential Regulations Authority [2021] UKUT 0162 (TCC)* https://assets.publishing.service.gov.uk/media/60e45bea8fa8f50c6f050b27/Forsyth_decision_for_release.pdf (2022-07-07).

⁴⁶³ [\(https://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKUT/TCC/2021/162.html&query=\(Stuart\)+AND+\(Malcolm\)+AND+\(Forsyth\)\)](https://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKUT/TCC/2021/162.html&query=(Stuart)+AND+(Malcolm)+AND+(Forsyth)) (2022-12-20).

⁴⁶⁴ FSC "Handbook of rules and guidance" 20 July 2022 <https://www.fca.org.uk/about/how-we-regulate/handbook> (2022-11-12) Fit 2.

⁴⁶⁵ *Ibid.* [\(https://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKUT/TCC/2021/162.html&query=\(Stuart\)+AND+\(Malcolm\)+AND+\(Forsyth\)\)](https://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKUT/TCC/2021/162.html&query=(Stuart)+AND+(Malcolm)+AND+(Forsyth)) (2022-12-20).

⁴⁶⁶ Par 23 of the judgment.

assisted him in implementing the requirements set by Solvency II. She worked long hours. The Regulator admitted that they failed to comply with their duty to disclose under the Tribunal's procedure rules. The Upper Tribunal held that there was no support for any findings of lack of integrity.

In *OWD Ltd (t/a Birmingham cash and Carry) & Another v Revenue and Customs* [2019] UKSC 30 (19 June 2019), the court had to decide whether a person seeking to carry on the activities to supply duty paid alcohol in terms of the Finance Act 2015 is fit and proper to do so. The wholesalers needed the approval to continue to trade as they were trading before the act's implementation. Her Majesty's Revenue and Customs Commissioners refused the approval because the wholesalers were not fit and proper. They were also not permitted to trade pending a judicial review. The court held that the Court of Appeal was correct to conclude that considerations of hardship were not material in evaluating whether a person was fit and proper.⁴⁶⁷

In conclusion, it can be noted that the fit-and-proper test in the UK is well established and applied more onerously than in South Africa. The question to be asked is whether this results in the appointment of skilful and qualified persons or are the requirements so onerous that only people with a risk-averse history need to operate in an entrepreneurial world.⁴⁶⁸

In a decision note issued by the FCA in 2018 against a director, Mr Darren Lee Newton of First Step, a debt-managing company, the FCA concluded that Mr Newton was no longer a fit-and-proper person as defined by the act. First Step provided a solution to debtors to pay and arrange for full and final settlement of their debts. Mr Newton used a client's money to pay for the business' shares – money he owed to the previous sole director and shareholder. This led to a shortfall of £6 million in the client's money in October 2013. Mr Newton knew at the time that he was using the client's money for personal purposes. He also knew that it led to a significant shortfall in the client's money. The FCA ordered a prohibition order as a result of his dishonesty. The decision

⁴⁶⁷ *OWD Ltd (t/a Birmingham cash and Carry) & another v Revenue and Customs* [2019] UKSC 30 (19 June 2019) <https://www.supremecourt.uk/cases/uksc-2017-0156.html> (2022-11-25).

⁴⁶⁸ Peel, G et al.

note was made under section 57 of the FSMA and in accordance with section 388 of the FSMA.⁴⁶⁹

The Upper Tribunal issued a final decision notice dated 5 October 2017 against Mr Clive John Rosier. He was the sole director and only approved person at Bayliss, a small financial advising services firm based in Oxfordshire. The Tribunal held that he failed to act with care, skill and diligence as he failed to record customer information, ensuring suitable advice. He failed to treat complainants fairly, and it posed a risk that he was the only advisor at the firm. The authority imposed a penalty of £10,000 and withdrew the permission that he could perform significant influence functions.⁴⁷⁰

In *Burns v Financial Conduct Authority* [2017] EWCA Civ 214, the responsibilities of individuals to act with care, skill and diligence were underlined. Ms Angela Burns acted as a non-executive director for many years. She had extensive financial experience and was appointed as a non-executive director of two mutual societies. It came to her knowledge that the said societies had a vacancy for an investment manager to invest their funds. She was previously employed as a consultant for Vanguard and introduced the two mutual societies to Vanguard. Ms Burns stated to Vanguard in writing that she could ensure their appointment to oversee investments of £350 million. This she could do based on her position as a non-executive director. She required that they pay her a fee of one basis point of all new monies, amounting to £130,000 per annum.

The FCA investigated allegations based on the email and concluded that she lacked integrity, and they issued a penalty of £20,000. The FCA issued a prohibition order stating that she needed to be removed as a director as she was no longer fit and proper to perform her duties. She decided to appeal to the Court of Appeal. Initially, she stated that there was no conflict of interest as she had not received any remuneration from Vanguard. As they had not yet been appointed, their role was remote at that time, and their appointment was speculative. The Court of Appeal held that the possibility of interest was enough and that although there was no actual

⁴⁶⁹ *Financial Conduct Authority v Darren Lee Newton* 20 Dec 2018 <https://www.fca.org.uk/publication/final-notices/darren-lee-newton.pdf> (2022-11-25).

⁴⁷⁰ *Financial Conduct Authority v Clive John Rosier* 2017 CJR00017 <https://www.fca.org.uk/publication/decision-notices/clive-john-rosier.pdf> (2022-11-25).

conflict, the possibility sufficed. Ms Burns failed to disclose that she was involved in a court battle with a previous employer, which she lost. The Court of Appeal dismissed her appeal on the ground that she should have declared the adverse situation with her previous employer. The fact that she failed to disclose it compromised her honesty. In conclusion, the Court of Appeal dismissed the FCA's appeal that the director's request for payment via email amounted to a corrupt payment.⁴⁷¹

4.1.3 Liability of the Regulator in the United Kingdom

The seminal case on this topic in the UK is *Three Rivers District Council v Governor & Company of the Bank of England*. [2001] UKHL 16; [2002]2 ALL ER 513 (22 March 2001).⁴⁷² In summary, the depositors in the UK branch of the Bank of Credit and Commerce International (BCCI) sought damages from the Bank of England for failing its supervisory duties. The bank had granted BCCI authorisation in a manner that breached the First Bank Directive 77. The government argued that the directive was not intended to give rights to individual depositors. The majority in the Court of Appeal dismissed the appeal.

In English law, it is impossible for the regulatory authority to be held liable for negligence in exercising its supervisory functions. Thus, the depositors had to base their claim on the intentional tort of misfeasance in public office – in other words, wrongful or unlawful intentional conduct by officials or public employees. Malfeasance is more serious than the failure to act, where there is a duty to act or conduct that is lawful but inappropriate.

4.2 The applicability of the fitness and propriety requirement in other professions

There seem to be numerous similarities between how the fit-and-proper requirements are applied in the United Kingdom and South Africa. The applicability of the fit-and-proper requirement in other professions in South Africa is examined to investigate

⁴⁷¹ Upper Tribunal Tax and Chancery Chamber “Appeal number: FS/2016/0012” https://assets.publishing.service.gov.uk/media/5c4f2a46e5274a494e0b84d1/Alistair_Burns_v_FCA_costs_decision.pdf.

⁴⁷² *Three Rivers District Council v Governor & Company of the Bank of England* [2001] UKHL16; [2001]2 All ER 513 (22nd March, 2001) <https://www.bailii.org/uk/cases/UKHL/2001/16.html> (2022-07-07).

further proposed solutions. The fit-and-proper requirement is usually neither defined nor described in legislation, even though it is specifically stated as a requirement in various acts. The following serve as examples:

The Constitution of the Republic of South Africa 1996 declares that it is the supreme law of the Republic and all law or conduct inconsistent with the Constitution is invalid. Chapter 8 of the Constitution⁴⁷³ sets out the provisions dealing with the Judicial Service Commission and the process for appointing judges and magistrates. The Judicial Service Commission must use the following criteria in section 174(10) to nominate a person: the person must be appropriately qualified and have a fit-and-proper persona. The committee must also consider the need for the judiciary to reflect the racial and gender composition of South Africa broadly. No other legal requirements are stated. The following criteria are, however, used to determine whether a potential candidate is fit and proper:

- A commitment to the constitutional values of human dignity, freedom and equality.
- Independence of mind, which links with the courage to speak up.
- The disposition to act fairly, impartially and without fear, favour or prejudice.
- High standards of ethics and honesty.
- A judicial temperament. This will include qualities such as humility, open-mindedness, courtesy, patience, thoroughness, decisiveness and industriousness.

Furthermore, the candidate must be appropriately qualified. This includes formal education, experience and potential.⁴⁷⁴

The late Justice Ismail Mohammed introduced additional guidelines to the original three criteria for recruiting and selecting candidates: integrity, energy and motivation, competency, experience, appropriate potential, and whether the appointment would send the right message to the community. In 2010, Advocate Milton Seligson, SC, also

⁴⁷³ S. 173 of the Constitution, 1996.

⁴⁷⁴ Judges Matter, “*Process and criteria issues to watch out for in the Judicial Service Commission (JSC’s) – April 2021 sitting*” 9 April 2021, <https://www.judgesmatter.co.za/opinions/process-and-criteria-issues-to-watch-out-for-in-the-jscs-april-2021-sitting/> (2022-11-19).

underlined the importance that the candidate must have previously acted as a judge and drafted judgments to the satisfaction of the permanent judges.

Regarding the appointment of the Chief Justice, the following criteria were used to determine the suitability of candidates to be recommended for nomination by the President for filling a vacancy, namely:

The person must:

- (1) Be fit and proper and possess the qualification, skill, knowledge and expertise reasonably expected of an incumbent in the position of Chief Justice;
- (2) meet the constitutional requirements for appointment, including requirements concerning citizenship and mandatory age for discharge from active service;
- (3) uphold the Constitution; create a conducive environment for the independence of the judiciary and respect for the separation of powers;
- (4) advance social justice and access to social justice and access to justice;
- (5) promote an ethical work culture;
- (6) have unblemished integrity;
- (7) possess judicial competence;
- (8) and be objective towards all groups in society.⁴⁷⁵

The Public Protector Act 23 of 1994 requires the Public Protector to be a South African citizen who is a fit-and-proper person to hold the office and who has obtained specific

⁴⁷⁵ Judges Matter, “*Criteria for the appointment of the next chief justice*” 18 Oct 2021. <https://www.judgesmatter.co.za/opinions/criteria-for-the-appointment-of-the-next-chief-justice/> (2022-08-31).

legal qualifications and experience, has specified skills and is of unblemished character.⁴⁷⁶

The Legal Practice Act 28 of 2014 and the Rules stipulate that a person may only practise as a legal practitioner (attorney or advocate) if he/she is admitted in terms of the act.⁴⁷⁷ In section 24, a person may only practise as a legal practitioner if he/she is admitted and enrolled to practise as such. The High Court must admit an individual to practise and authorise the said individual to be registered as a legal practitioner, conveyancer or notary. Any person can successfully apply who can satisfy the court that he/she – (a) is duly qualified as set out in section 26; (b) is an (i) South African citizen or (ii) permanent resident in the Republic; (c) is a fit-and-proper person to be admitted; and (d) has served a copy of the application on the Council.

In 2016, the Law Society of South Africa stated that regarding personal fitness, the Law Society and the High Court must determine whether a person is a fit-and-proper person before he/she can be admitted as an attorney.

“This requirement refers mainly to the moral integrity of a person, his characteristics and particularly honesty, which is considered to be an important prerequisite for practising as an attorney. Further, apart from general characteristics such as ambition, dedication and a disciplined approach, the lawyer also needs to possess special characteristics such as being impeccably honest, decisive, objective in a matter, confident and able to solve problems. He must also be able to work under stress and pressure, resolve any crisis, elicit the utmost trust and respect from his clients and colleagues and have exceptional communication skills.”⁴⁷⁸

If these criteria are assessed, they are very similar to what is expected from a director in the insurance industry as the said directors must also be honest, be dedicated problem solvers who can operate under stress, and have exceptional communication skills.

⁴⁷⁶ Public Protector Act 23 of 1994 <https://www.justice.gov.za/legislation/acts/1994-023.pdf>.

⁴⁷⁷ Legal Practice Act 28 of 2014 <https://www.gov.za/documents/legal-practice-act>.

⁴⁷⁸ Law Society of South Africa, *“Career guide to the Legal Profession”* 2016, https://www.justice.gov.za/juscol/docs/2016-LSSA-Career_Guide_to_the_Legal_profession.pdf (2022-08-31).

For a medical practitioner to be registered as a member of the Health Professions Council of South Africa as a medical practitioner, medical specialist or dentist, the practitioner must prove that he/she is a fit-and-proper person in terms of Form 176, which was updated in July 2019. To meet the requirements to be allowed to practise as a medical specialist in public service, an original certificate of good standing not older than six months must be handed in at the Health Professions Council of South Africa.⁴⁷⁹

As far as auditors are concerned: Independent Regulatory Board is responsible for ensuring that applicants who want to enter the profession meet the specified requirements. In terms of the Auditing Profession Act 26 of 2005,⁴⁸⁰ the applicant must apply on the prescribed application form and must satisfy the board that he or she has complied with the prescribed education, training and competency requirements for a registered auditor; has arranged for his/her continuing professional development if the applicant is not a member of an accredited professional body; is a resident within the Republic; is a fit-and-proper person to practise the profession; has met any additional requirements for registration as prescribed under section 6.⁴⁸¹

The FMA stipulates that the directors and senior management ⁴⁸² must meet the fit and proper requirements specified by the regulator to obtain an exchange licence and a licensed exchange,⁴⁸³ central securities depository, trade repository,⁴⁸⁴ or clearing house licence.⁴⁸⁵ The members of the controlling body must also adhere to the fit-and-proper requirement.⁴⁸⁶ If the Registrar (the executive officer of Securities Services), in an on-site visit or inspection, finds that a director, managing executive or

⁴⁷⁹ HPCSA, "Application for registration Medical and Professional Board" Form 11 B https://www.hpcsa.co.za/Uploads/MDB/Form_176%20MP%20_final_version_published_%20July%202019.pdf. (2022-11-25).

⁴⁸⁰ S 37(1) and (2).

⁴⁸¹ Auditing Profession Act 26 of 2005. <https://www.gov.za/documents/auditing-profession-act>.

⁴⁸² S 28 (1)(c).

⁴⁸³ S 8(1)(c).

⁴⁸⁴ S 55 (1)(c).

⁴⁸⁵ S 48 (1)(c).

⁴⁸⁶ S 66(1)(c).

employee is not adhering to the fit and proper requirements, he might prohibit or restrict a specific act.⁴⁸⁷

In an article that addresses the application of the fit-and-proper requirement in the law profession, it was contested that a fifteen-minute interview was enough to establish whether a candidate attorney was suitable to join the legal profession. The rationale for the test is to protect the public, but the question was raised as to whether the screening process was effective.⁴⁸⁸

4.3 Case law applicable to fit-and-proper requirements in the professions

Traditionally, the burden of proof that a person is fit and proper is vested in the applicant. The courts have held that the fit-and-proper person standard is a value judgment. The courts' have formulated principles which mainly deal with the legal profession.

In *Ex Parte Caminsky* 1958 (3) SA 249 (NPD) 252 B–D, the judge stated, “in my opinion, there is no reason why the applicant should not be fit and proper to practise as an advocate as he has been permanently released from liquor and therefore reformation has been established”. As a result, the court held that he was a fit-and-proper person.

*Prokureursorde van Transvaal v Kleynhans*⁴⁸⁹ challenged the constitutionality of a court's statutory power to remove an unfit and improper person from the roll of attorneys⁴⁹⁰ as it violated section 26(1) of the Interim Constitution dealing with the right

⁴⁸⁷ S 96(d).

⁴⁸⁸ Sibanyoni, N “*When may a candidate attorney be considered fit and proper?*” 4 Dec 2019 <https://www.lindsaykeller.com/when-may-a-candidate-attorney-be-considered-a-fit-and-proper-person/> (2022-11-25).

⁴⁸⁹ *Prokureursorde van Transvaal v Kleynhans* 1995 1 SA 839 (T).

⁴⁹⁰ Slabbert, M. “The requirement of being a ‘fit and proper’ person for the legal profession”. *Potchefstroom Electronic Law Journal*, 2011, 14(4) 209-231. http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812011000400008&lng=en&nrm=iso (2021-10-17).

to free economic activity. The court held that the right to economic freedom⁴⁹¹ is not an unlimited right.⁴⁹²

In *Vassen v Law Society of Cape of Good Hope* (468/96) [1998] ZASCA 47, 1998 (4) SA532 (SCA) [1998]3 SA 358 (A) (28 May 1998),⁴⁹³ the court held that a human rights lawyer who served the community was struck off the roll because he abused his executorship and used trust money for his personal commitments. Acting Judge Eksteen stated that the requirements of honesty, reliability and integrity could not be disregarded.

In *Ex Parte Re Ngwenya v Society of Advocates, Pretoria and Another* 2006 2 SA 87 (W), it was held that the applicant could not be admitted as an advocate as, on the one hand, he pleaded that he was wrongfully convicted of a crime and, on the other hand, that he had since reformed.⁴⁹⁴ These two arguments were irreconcilable.

In *Democratic Alliance v President of South Africa* 2012 ZACC 24, the Supreme Court of Appeal ruled that the President's decision to appoint a National Director of Public Prosecutions was irrational as the incumbent must be a fit-and-proper person and, therefore, constituted a jurisdictional fact capable of objective ascertainment.

In *Law Society of Transvaal v Machaka* 1998 4 413 (T), the court held that the character screening for attorneys prevented the profession from being abused by criminally minded attorneys.⁴⁹⁵ They rejected the applicant's claim that the requirement violated the right to dignity, equality, and the freedom not to be subjected

⁴⁹¹ S 26(1) of the Interim Constitution.

⁴⁹² *Prokureursorde van Transvaal v Kleynhans* 1995 1 SA 839 (T) 850H.

⁴⁹³ *Vassen v Law Society of Cape of Good Hope* (468/96) [1998] ZASCA 47, 1998 (4) SA532 (SCA) [1998]3 SA 358 (A) (28 May 1998) <http://www.saflii.org/za/cases/ZASCA/1998/47.html>.

⁴⁹⁴ Slabbert, M. "The requirement of being a 'fit and proper' person for the legal profession". *Potchefstroom Electronic Law Journal*, 2011, 14(4) 209-231. http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812011000400008&lng=en&nrm=iso (2021-10-17).

⁴⁹⁵ Slabbert, M. "The requirement of being a 'fit and proper' person for the legal profession". *Potchefstroom Electronic Law Journal*, 2011, 14(4) 209-231. http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812011000400008&lng=en&nrm=iso (2021-10-17).

to cruel, inhuman and degrading treatment and the right to choose one's trade, occupation, and profession.⁴⁹⁶

In *KwaZulu-Natal Law Society v Moodley and Another* (7037/2014) [2016] ZAKZPHC 25 (26 February 2016) 2014 JDR 1041 (KZP)⁴⁹⁷, the applicant applied to the court to strike the attorney from the roll of attorneys on the ground that he was not a fit-and-proper person. The attorney failed to provide the inspectors of the applicant with records, borrowed money from a client, paid business debts from the trust account, and charged excessive contingency fees. The court commented on the respondent's lack of competence, lack of judgment, integrity and insight. Judge Vahed explained that "a high degree of honesty and integrity is expected from attorneys. The interests of the public are paramount"⁴⁹⁸. The application was granted.

In *Law Society of Northern Provinces v Maputana Jacob Mametsa* 69558/2014, the Gauteng division stated that the fact that a person is no longer fit and proper to practice is derived from section 22(1) (d) of the Attorneys Act 53 of 1979 and is dependent upon the factual findings, but lies in the discretion of this court. Therefore, the court's discretion must be exercised considering the facts before it, which must be proven on a balance of probabilities. The court held that the respondent contravened the rules of the Law Society and the provisions of the Attorneys Act by taking trust money. It was concluded that his conduct was dishonourable, unprofessional and unworthy of a practitioner. His conduct constituted a material deviation from the standards of professional conduct expected of a practitioner.

Mphatswe v Law Society of Free State 4835/2015 [2017] ZAFHC208 (20 September 2017) confirmed that the term fit and proper is not defined in the Legal Practice Act 28 of 2014 or the Admission of Advocates Act 74 of 1964. "The fundamental question to be answered is whether there has been a genuine, complete and permanent reformation" and "whether the defect of character or attitude which led to him being adjudged not fit and proper no longer exists".

⁴⁹⁶ *Ibid.*

⁴⁹⁷ [www. saflii.org](http://www.saflii.org).

⁴⁹⁸ www. saflii.org.

In the matter of *Swartzberg v Law Society, Northern Provinces* [2008] ZASCA36, 2008 5 SA 322(SCA), the applicant was an attorney who was struck off the roll after a plea of guilty and a conviction of theft. The theft charge was instituted after a complaint was made that he failed to keep proper books of account. He deceived his auditor, who certified that the accounts were appropriately maintained on the strength of Swartzberg's deception. As a result of the deceit, a fidelity certificate was issued. In an application to the Supreme Court for re-admittance to the profession, the court held that the applicant had to prove on a balance of probabilities,

*“that there has been a genuine, complete and permanent reformation on his part: that the defect of character or attitude which led to his being adjudged not fit and proper no longer exists, and that, if he was readmitted he will in future conduct himself as an honourable member of the profession he failed to prove that he confirmed that the burden of proof is on the applicant to prove that he is fit and proper and that he will in future conduct himself as an honourable member of his profession.”*⁴⁹⁹

In this case, the court decided not to readmit the applicant due to the conviction based on dishonesty and the fact that the applicant could not prove his permanent reform.

The case of *General Council of the Bar of South Africa v Geach and others, Pillay and Others v Pretoria Society of Advocates and Another, Bezuidenhout v Pretoria Society of Advocates* (277/12,273/12,275/12,278/12,280/12,281/12) [2012] ZASCA 175, [2013] 1 All SA 393 (SCA), 2013 (2) SA 52 (SCA) (29 November 2012)⁵⁰⁰ dealt with twelve advocates of the Pretoria Society of Advocates who were found guilty by the General Council of Bar after admitting to unprofessional conduct. The misconduct was related to the double briefing of Road Accident Fund (RAF) cases and overreaching as the advocate charged fees for trials that never occurred.

The General Council of Bar (GCB) requested that the North Gauteng High Court noted the disciplinary action taken and sought an order to strike the advocates from the role.

⁴⁹⁹ *Swartzberg v Law Society of the Northern Provinces* (83/07) [2008] ZASCA 36; [2008] 3 All SA 438 (SCA) 2008 (5) SA 322 (SCA) (28 March 2008) 14.

⁵⁰⁰ *General Council of the Bar of South Africa v Geach and others, Pillay and Others v Pretoria Society of Advocates and Another, Bezuidenhout v Pretoria Society of Advocates* (277/12,273/12,275/12,278/12,280/12,281/12) [2012] ZASCA 175, [2013] 1 All SA 393 (SCA), 2013 (2) SA 52 (SCA) (29 November 2012).

In terms of S7(i)(d) of the Admission of Advocates Act 74 of 1964,⁵⁰¹ a court may suspend or order that his/her name be struck off the roll of advocates as he/she is not a fit-and-proper person to continue to practise as an advocate. The High Court had to establish misconduct on a preponderance of probabilities, establish whether the individual was fit and proper to continue to practice and whether the individual was to be suspended or removed from the roll (Paragraph [50] at 68D–H.) The court held that 13 of the advocates be struck off the roll and that further sanctions apply to the remaining seven. The court also ordered the advocates to repay various amounts to RAF. The GCB appealed and contended that the advocates that had not been struck from the roll ought to have been struck from the roll.

The Supreme Court of Appeal had to establish whether the court *a quo* correctly exercised its discretion to remove and suspend the advocates and whether the advocates that had been struck from the roll must repay the various amounts to RAF. The appeals were dismissed, and it was held that regarding the repayment, the GCB's disciplinary powers were exhausted once the court had struck the advocates from the roll. This order was therefore set aside.

In *Thukwane v Law Society Northern Provinces* 2014 5 SA 513 (GP), the court had to consider whether a person still serving a sentence under parole could be admitted or readmitted as a legal practitioner. Thus, is a parolee a fit-and-proper person for the legal profession? The applicant alleged that he had been rehabilitated. The court concluded that the admission or readmission must not damage the integrity and standing of the profession, the judicial system or the administration of justice or be contrary to the public interest.⁵⁰² Paragraphs 50–57 confirmed that the fit-and-proper requirement involves a value judgment. It was also noted that the ability to practise law is not a right but a privilege. There needs to be proof of rehabilitation.

In the case of *Heppell v The Law Society of Northern Provinces* (1096/16) [2017] ZASCA119 (22 September 2017), the court *a quo* held that the applicant was not a fit-

⁵⁰¹ S 7(1)(d).

⁵⁰² Maloka, TC, "Protecting the foundation and magnificent edifice of the legal profession: Reflections on *Thukwane v Law Society of Northern Provinces*" 2014 5 SA 513 (GP) and *Mtshabe v Law Society of the Cape of Good Hope* 2014 5 SA 376 (ECM) "PER" <http://dx.doi.org/10.4314/pej.v18i7.07> (2022-11-25).

and-proper person to practise as an attorney because he failed to disclose that he was a practising attorney when he applied for voluntary surrender. He also did not disclose his financial status, surety ships and current liabilities. The Appeal Court had to determine whether to uphold the High Court's decision to suspend the attorney or permit him to practise as a fit-and-proper person. The court upheld the court's decision based on legislation, the rules of the Law Society and case law.

In *South African Legal Practice Council v Louw* (58534/2019) [2020] ZAGPPHC (17 November 2020),⁵⁰³ the hearing was an enquiry by the South African Legal Practice Council into an attorney's fitness to remain on the roll of attorneys as he did not obtain a fidelity trust fund certificate before starting to practise. He has since then not rectified the position. The Law Society received complaints and requested feedback but has received no explanations. The court held that he was not to be a fit-and-proper person based on a value judgment made by the court. The law requires the highest possible degree of good faith as an attorney acts as an agent for others. The court held that he was dishonest and failed to meet the requirements set by his profession.

Slabbert noted that in respect of the requirement of being a fit-and-proper person for the legal profession, value judgments had been politically influenced in the past.⁵⁰⁴ Slabbert examined whether a criminal record is an insurmountable obstacle to succeeding in an admission application to be readmitted as an attorney or advocate.⁵⁰⁵ The article concludes that an applicant that committed a crime with a "principled" motive (for example, civil disobedience) can convince the court that he/she is a fit-and-proper person to be readmitted to the legal profession. Where the motive was dishonourable and sordid, the applicant will not be able to discharge his/her onus easily due to the nature of the crime involved. It also depends on whether the applicant

⁵⁰³ <http://www.saflii.org/za/cases/ZAGPPHC/2020/708.html>.

⁵⁰⁴ Potchefstroom Electronic Law Journal ⁵⁰⁴14, pp. 209-231 (2011).

⁵⁰⁵ Slabbert, M & Boome, DJ "Reformation from criminal to lawyer: Is such redemption possible?" 2014 (17) 4 *Potchefstroom Electronic Law Journal* <https://doi:10.4314/pej.v17i4.09>.

has fully disclosed all relevant facts and has undergone complete and permanent reform. The court will, however, consider each case on merit.⁵⁰⁶

4.4 Non-law solutions – additional criteria and factors to consider when appointing directors based on the future of the insurance industry worldwide

4.4.1 Background

The foreword to the King IV Report emphasised that boards should concentrate on value creation that is accomplished sustainably in a changing world.⁵⁰⁷ Organisations have to change their operations, stakeholder and technology management and strategy in order to deal with three connected paradigm shifts in the corporate world, namely from financial capitalism to inclusive capitalism,⁵⁰⁸ from short-term capital markets to long-term sustainable capital markets,⁵⁰⁹ and from a silo reporting system to an integrated reporting system.⁵¹⁰ The challenges that directors will face in future are summarised as follows:

“New global realities are testing the leadership of organisations on issues such as inequity, globalised trade, social tensions, climate change, population growth, ecological overshoot, geopolitical tensions, radical transparency and rapid technological and scientific advancement.”⁵¹¹

When assessing whether the current legislation suffices, the *status quo* and where the insurance industry is heading should be considered. Given the overview above and the King IV Report, there will be a need for integrated thinking, new skills and competencies going forward.

⁵⁰⁶ *Ibid.*

⁵⁰⁷ King IV Report on Corporate Governance in South Africa, 2016, p. 3.

⁵⁰⁸ *Ibid.* p. 4.

⁵⁰⁹ *Ibid.* p. 4

⁵¹⁰ *Ibid.* p. 5

⁵¹¹ King IV “Report on Corporate Governance in South Africa”, 2016, p. 3.
<https://www.adams.africa/wp-content/uploads/2016/11/King-IV-Report.pdf> (2022-11-10).

4.4.2 The South African insurance industry

A PwC study on the *South African Insurance Sentiment Survey Index 2021*⁵¹² reported that operational challenges were the primary concern during the Covid-19 pandemic, given remote working. The 2022 survey indicates that COVID and the resulting lockdown are still shaping the industry, but a positive shift is evident.⁵¹³ This index tracked over 470 000 online posts from 1 April 2021 till 31 March 2022. The Net Sentiment score increased from -04% in 2021 to a Net Sentiment score of 6, 8% in 2022.

In 2021 the insurance industry was forced to work differently and to adjust its operational systems accordingly.⁵¹⁴ Regarding product analysis, car insurance was the most discussed topic on social media, while funeral cover the most negative issue. The biggest complaint is that the consumers do not receive funds in time for the funerals.⁵¹⁵ The complaint process remains a concern.⁵¹⁶ Clients still complained about the speed of digital processes.

Regarding market conduct research, 75, 4% of the complaints were linked to treating customers-fairly matters.⁵¹⁷ The study concluded that insurers should develop innovative consumer strategies and products. A holistic approach should be followed to manage regulatory pressure and reputational risk.

A customer-centric TCF strategy is required to meet the expectations of consumers and those set out by the legislature and the regulators.⁵¹⁸

⁵¹² PwC “South African Insurance Sentiment Index 2021” <https://www.pwc.co.za/en/assets/pdf/pwc-south-african-insurance-sentiment.pdf>.

⁵¹³ PwC “South African Insurance Sentiment Index 2022” <https://www.pwc.co.za/en/publications/south-african-insurance-sentiment-index.html>.

⁵¹⁴ *Ibid*, Industry Overview, p. 6.

⁵¹⁵ P. 11. Product Analysis.

⁵¹⁶ P. 14 Operational Analysis.

⁵¹⁷ P. 32 Market Conduct.

⁵¹⁸ P. 36. Conclusion.

A KPMG survey done in 2022 on the insurance industry in South Africa reported a better-than-expected past year.⁵¹⁹ KPMG highlighted the following risks that the sector faces looking forward. It includes economic volatility, climate change, a focus on Environmental, Social and Governance Reporting and how to deal with South Africa's social challenges.⁵²⁰

Deloitte's *Insurance Outlook* for 2021 mirrored the same sentiment as the others in the industry, namely that Covid-19 affected all aspects of the insurance industry. There were also technology and other regulatory changes, including *International Financial Reporting Standard (IFRS) 17* and conduct risk. The importance of capital management has been highlighted during the pandemic. Artificial intelligence affects the industry. *IFRS 17* as an accounting reporting standard will become mandatory on 1 January 2023. The aggregated equity decreased by R15, 6 billion or 6% in 2020. Values dropped significantly in March 2020, but the market recovered for the rest of the year. Despite this, insurance companies still reported a healthy solvency cover ratio. Momentum Metropolitan Holdings noted in their interim results announcement: "Mortality data from the South African Medical Research Council indicates that recorded Covid-19 deaths are understating the full mortality impact of the pandemic".⁵²¹

4.4.3 Current training for key persons in South Africa

The Insurance Institute of South Africa (IISA), in partnership with the Insurance Sector Education and Training Authority, launched a director's accredited training course in 2019. Several accredited service providers offer continuous professional training that includes relevant topics such as IFRS 17; solvency assessment and quantitative reporting; updates on developments in life and non-life insurance; training on reinsurance; technology and innovation training; training on tax and VAT, as well as

⁵¹⁹ KPMG "South African Insurance Industry Survey 2022" <https://home.kpmg/za/en/home/media/press-releases/2022/09/kpmg-insurance-industry-survey-2022.html>.

⁵²⁰ *Ibid* – Press release.

⁵²¹ Deloitte "SA-Insurance-Outlook 2021" <https://www2.deloitte.com/za/en/pages/financial-services/articles/south-africa-insurance-outlook.html>.

updates for non-executive directors;⁵²² class of business training;⁵²³ treating-customers-fairly; success in challenging times and professional skills;⁵²⁴ training on the Financial Intelligence Services Act 38 of 2001; refresher courses; economic and investment courses; and ethics and code of conduct courses.⁵²⁵

4.4.4 Technology and the insurance industry

4.4.4.1 *Technology breakthroughs*

The arrival of the twenty-first century brought about the advent of cyber-physical systems.⁵²⁶ The convergence of advanced technologies is embedded within all aspects of society following technology breakthroughs in several fields, including robotics, artificial intelligence, biotechnology, three-dimensional printing, advanced materials such as graphene, the internet of things, and block chain technology.⁵²⁷ Block chain or distributed ledger technology is a protocol for exchanging values or data over the internet, which does not require an intermediary. It creates a shared encrypted database of transactions and information. Block chain is decentralised yet coordinated.⁵²⁸ Using the technology can increase transparency, ensuring trust in the insurance industry.⁵²⁹ The ledgers are time-stamped and cannot easily be corrupted or manipulated, ensuring that the information is kept confidential.⁵³⁰ This could lead to better customer care, decreased time for finalising claims, eliminating administrative

⁵²² KPMG, “Insurance Industry training brochure 2022” <https://home.kpmg/za/en/home/insights/2022/02/insurance-training-2022.html>.

⁵²³ <https://www.masthead.co.za/continuous-professional-development/>. (2022-11-08).

⁵²⁴ <https://www.masthead.co.za/class-of-business-training> (2022-11-08).

⁵²⁵ <https://www.cpdsouthafrica.co.za/providers/moonstone-business-school-of-excellence/online-course-treating-customers-fairly-tcf-overview/>.

⁵²⁶ https://link.springer.com/chapter/10.1007/978-3-030-42962-1_1#citeas.

⁵²⁷ *Ibid.*

⁵²⁸ OECD “*Technology and innovation in the insurance sector*” 2017 <https://www.oecd.org/pensions/Technology-and-innovation-in-the-insurance-sector.pdf> p. 14.

⁵²⁹ Shetty, A., Shetty, A. D., Pai, R. Y., Rao, R. R., Bhandary, R., Shetty, J., Nayak, S., Keerthi Dinesh, T., & Dsouza, K. J. (2022). *Block Chain Application in Insurance Services: A Systematic Review of the Evidence*. SAGE *Open*, 12(1) <https://doi.org/10.1177/21582440221079877> (2022-11-19).

⁵³⁰ *Ibid.*

overload, automation of payment, avoidance or quick settlement of disputes and above all, the improvement of fraud management.⁵³¹

Machine learning is the statistical approach for making intelligent machines;⁵³² therefore, artificial intelligence can be used as a prediction tool⁵³³ and will redefine certain critical economic and financial theories.⁵³⁴ Algorithms will create risk profiles. As a result, pre-contract disclosures will rely less and less on disclosures made by the prospective insured as data will be sourced from multiple sources. The time needed to sign up for an insurance product will be reduced to minutes or seconds.⁵³⁵

Innovative technologies for automation and digitisation will become investment priorities for the insurance industry, while alternative risk retention and financing strategies will become more prevalent.⁵³⁶

4.4.4.2 *Impact of technology on human resources in the insurance industry*

When reviewing strategy, the board of directors must consider the inevitability that algorithms and machines will perform increasingly complex tasks better than humans. Leaders need a more proactive and continuous learning mind-set.⁵³⁷

In a widely referenced study published by researchers at Oxford University in 2013, included in the top 30 positions with a 98% to 99% chance of being automated are insurer underwriters, data entry keyers, insurance claims and policy processing clerks,

⁵³¹ *Ibid.*

⁵³² https://link.springer.com/chapter/10.1007/978-3-030-42962-1_1#citeas.

⁵³³ http://doi.org/10.1007/987-3-030-42962-1_/.

⁵³⁴ Moloi, T & Marwana, T “Introduction to Artificial Intelligence in Economics and Finance Theories” https://link.springer.com/chapter/10.1007/978-3-030-42962-1_1 https://doi.org/10.1007/978-3-030-42962-1_1.

⁵³⁵ Balasubramanian, R et al “Insurance 2030: the impact of AI on the future of insurance” *McKinsey & Company* 12 Mar 2021 <https://www.mckinsey.com/industries/financial-services/our-insights/insurance-2030-the-impact-of-ai-on-the-future-of-insurance>. (2022-11-23).

⁵³⁶ AON South Africa “*State of the Market 2021*” (2021) <https://aon.co.za/media/8d91ac9c209910e/state-of-the-market-2021-v6-13052021.pdf> (2022-11-19).

⁵³⁷ Molloy, L and Ronnie, LC “Mind-set shifts for the Fourth Industrial Revolution: Insights from the life insurance sector” 2021 (19) *South African Journal of Human Resource Management* <https://sajhrm.co.za/index.php/sajhrm/article/view/1543/2572#37>. (2022-09-12).

brokerage clerks, insurance appraisers, auto damage claims adjusters, and insurance claims investigators and examiners.⁵³⁸ The impact on the short-term insurance industry has been described as follows:

*“Risk has evolved beyond the traditional loss or theft of property, equipment and other assets, to weather catastrophes, pandemic, cyber hacks, riots, personal liability, fraud, organized crime and class action lawsuits”.*⁵³⁹

4.4.4.3 Impact of technology on product development

Insurtech is the term that describes the new technologies in the insurance sector.⁵⁴⁰ Insurers are embracing the benefits as the improved customer experience has already attracted users/policyholders.⁵⁴¹ Insurtech products and suppliers assist insurance companies in providing cutting-edge solutions at lower costs and improved service levels.⁵⁴²

4.4.4.4 Impact of future on life insurance

Furthermore, although the South African life insurance market is considered mature and has the world’s third-highest life insurance penetration rate, it has challenges typical of an emerging market economy. The market needs to consider the inequality in the market that creates demands for new innovative, affordable products. Technology leg transformation can present a major opportunity for increasing access

⁵³⁸ Frey, CB & MA Osborne “The future of employment: How susceptible are jobs to computerisation” 17 Sep 2013 Oxford Martin, <https://www.oxfordmartin.ox.ac.uk/downloads/academic/future-of-employment.pdf>. (2022-11-20).

⁵³⁹ Williams, T “2020 State of the Insurance Market” *FANews* 18 Nov 2020, <https://www.fanews.co.za/article/short-term-insurance/15/general/2017/2020-state-of-the-insurance-market/30714>. (2022-11-19).

⁵⁴⁰ OECD p. 2.

⁵⁴¹ OECD p. 42.

⁵⁴² KPMG 2021.

and penetration within less developed markets.⁵⁴³ The conclusion being that directors need analytical skills as well as innovative mind-sets.

It is necessary to understand the full health impact of the Covid-19 pandemic in order to evaluate policy responses,⁵⁴⁴ as Covid-19 has a long-term impact on insurers' profitability and solvency, policyholder outcomes, and broader financial stability. In order to understand the mortality impact of the pandemic, the numbers had been calculated of the life years lost across 81 countries, covering over 1 279 866 deaths.⁵⁴⁵ As of 6 January 2021, the years of life lost in heavily affected countries were two to nine times the average of seasonal influenza.⁵⁴⁶ Three-quarters of life years lost resulted from deaths in ages below 75. Almost a third of the deaths are individuals younger than 55. Men have lost 45% more life years than women.⁵⁴⁷ While the majority of deaths occur at ages above 75, thereby justifying policy responses aimed at protecting these vulnerable groups. Holding the current age distribution of fatalities constant and eliminating the gender differential in years of life lost would require an average 34% reduction in male death counts. This suggests that gender-specific policies might be equally well justified as those based on age.⁵⁴⁸

In lessons learnt from the COVID-19 pandemic, the Institute and Faculty of Actuaries⁵⁴⁹ concluded that underwriting activities were disrupted due to economies being disrupted. Policies failed to provide for business interruptions. Event cancellations have not been adequately priced. There was a limited ability to capitalise on pandemic insurance due to a lack of government support. Organisations could work

⁵⁴³ Molloy, L and Ronnie, LC "Mind-set shifts for the Fourth Industrial Revolution: Insights from the life insurance sector" 2021 (19) *South African Journal of Human Resource Management* <https://sajhrm.co.za/index.php/sajhrm/article/view/1543/2572#37>.

⁵⁴⁴ Arolas, HP et al "Years of life lost to COVID-19 in 81 countries" 2021(11) *Scientific Reports* 3504 <https://doi.org/10.1038/s41598-021-83040-3>. <https://www.nature.com/articles/s41598-021-83040-3> (2022-11-19).

⁵⁴⁵ *Ibid.*

⁵⁴⁶ *Ibid.*

⁵⁴⁷ *Ibid.*

⁵⁴⁸ *Ibid.*

⁵⁴⁹ Institute and Faculty of Actuaries, "COVID-19 Lessons learnt and going forward" 15 Oct 2021 [https://www.actuaries.org/IAA/Documents/SECTIONS/Sections%20Colloquium%202021/IAA PresentationCOVID-19LessonsLearntGoingForwardOct2021_DarshanPurmessur.pdf](https://www.actuaries.org/IAA/Documents/SECTIONS/Sections%20Colloquium%202021/IAA%20PresentationCOVID-19LessonsLearntGoingForwardOct2021_DarshanPurmessur.pdf) (2022-11-19).

remotely if they have the infrastructure to do so. There was a lack of scenario planning for pandemics.⁵⁵⁰

4.4.5 Client centricity

Although the South African Regulator prioritised the needs and protection of clients with the drafting of new legislation,⁵⁵¹ including the establishment of the Financial Services Conduct Authority, the COFI Bill and the development of the principle of TCF,⁵⁵² the way in which companies will interact with clients will change in future. The new consumer grew up with the internet and smartphones, demanding improved ease and speed of transactions.⁵⁵³ As digitisation will affect consumers, a legal framework is necessary to support digital consumer protection. Such a law is unlikely to impede innovation in the digital consumer market if carefully designed and applied.⁵⁵⁴

4.4.6 Data management

4.4.6.1 *In preparation for the data explosion*

All indications are that the world is facing an explosion of data from connective devices and an increase in the use of robotic devices. Data will become more available and open-sourced, and there will be a need for more continuous learning. Insurers can prepare for the future by doing the following:

- Familiarise staff with artificial intelligence-related technologies and trends.
- Develop and implement a coherent strategic plan.
- Create a data strategy plan.

⁵⁵⁰ Institute and Faculty of Actuaries, “*COVID-19 Lessons learnt and going forward*” 15 Oct 2021 https://www.actuaries.org/IAA/Documents/SECTIONS/Sections%20Colloquium%202021/IAA PresentationCOVID-19LessonsLearntGoingForwardOct2021_DarshanPurmessur.pdf (2022-11-19).

⁵⁵¹ Bezuidenhout, J. “*Towards an understanding of how optimal distinctiveness contributes to the achievement of superior performance*” 2019 (Doctoral dissertation) University of Pretoria. <http://hdl.handle.net/2263/73932> <https://repository.up.ac.za/handle/2263/73932> (2022-11-25).

⁵⁵² *Ibid.*

⁵⁵⁴ Howells, G. “*Protecting Consumer values in the Fourth Industrial Revolution*” *Journal of Consumer Policy* 43 145-175 (2020) <https://doi.org/10.1007/s10603-019-9430-3> <https://linkspringer.com/article/10.1007/s10603-019-09430-3#citeas> (2023-01-26).

- Source knowledgeable and skilled talent and technology infrastructure that is fit for purpose.⁵⁵⁵

Boards need to enable cloud-based insurance platforms. They should provide for speed of innovation and operations in their strategy. This will allow the rapid development of innovative new products, services, and channels that can be scaled to meet consumers' demands. "Insurtech's customer-first" is a winning strategy. There is a need to align the insurance companies' expectations with the client's expectations.⁵⁵⁶ Smart technology will produce data and analyse it in real time. Insurers will need to adapt, survive, and retain customers' trust. Future insurers must focus on data privacy, cyber and information technology solutions, accelerated digitisation, and private/public solutions.⁵⁵⁷

4.4.6.2 Key future trends

Aon South Africa reported in their 2021 market report that risk readiness is falling while volatility is growing.⁵⁵⁸ Reinsurers increased their prices due to the Covid-19 pandemic.⁵⁵⁹ Insurers withdraw from underperforming product classes, including directors and officer's liability, professional liability, cyber security, climate change and certain classes of business interruption insurance.⁵⁶⁰ There is an increased need for director and officer liability insurance to deal with the risk of major company failures, data breaches and subsequent class actions. Although political risks are a global challenge, remote working and reliance on digital systems increase cyber risk.

⁵⁵⁵ Balasubramanian, R et al "Insurance 2030: the impact of AI on the future of insurance" *McKinsey & Company* 12 Mar 2021 <https://www.mckinsey.com/industries/financial-services/our-insights/insurance-2030-the-impact-of-ai-on-the-future-of-insurance>. (2022-11-23).

⁵⁵⁶ Businesswire, "New Research reveals which Insurance Industry Players are best positioned to be Leaders in the future of Insurance" 24 July 2019 <https://www.businesswire.com/news/home/20190724005479/en/New-Research-Reveals-Which-Insurance-Industry-Players-are-Best-Positioned-to-be-Leaders-in-the-Future-of-Insurance>.(2022-11-25).

⁵⁵⁷ Woods, D & A. Simpson (2017) "Policy measures and cyber insurance: a framework", 3 Aug 2017, *Journal of Cyber Policy*, 2:2, 209-226, DOI: 10.1080/23738871.2017.1360927 <https://www.tandfonline.com/doi/full/10.1080/23738871.2017.1360927>. (2022-11-25).

⁵⁵⁸ AON South Africa "State of the Market 2021" (2021) <https://aon.co.za/media/8d91ac9c209910e/state-of-the-market-2021-v6-13052021.pdf> (2022-11-19) p. 6.

⁵⁵⁹ *Ibid.*

⁵⁶⁰ *Ibid.*

Business interruption risks increase as supply chains become global and companies become increasingly interdependent. Compliance costs will negatively affect operational costs – costs expended to comply with laws and regulations.⁵⁶¹

According to research done by the Genric Insurance Company, the key trends that will reshape the insurance sector over the next decade will be:⁵⁶²

- “Customer-centric approach. The client will take centre stage to ensure satisfaction. Mapping, sensor and telematics technology will ensure that underwriting is based on unique behavioural data; online claims management and product development; more individual risks profiles; and cost streamlining.
- Technology will open new emerging markets.
- The optimisation of digitisation and the adoption of digital strategies. Claims will be atomised, and processes need to be streamlined.
- Artificial intelligence will be used to streamline processes.
- Existing data will be utilized more effectively.
- Digital events will be recorded by Block chain, including fraud, third-party payment, customer services and security.⁵⁶³

4.4.7 Products for the poor

A 2016 report ⁵⁶⁴ on the South African insurance industry highlighted that the industry is sophisticated and well-regulated, with a premium income to gross domestic product ratio, which is the highest in the world. However, there are still problems with financial inclusivity in the country, given that many citizens are uninsured or underinsured. The FinMark (2016) survey revealed that only 22% of adult South Africans had insurance

⁵⁶¹ *Ibid.*

⁵⁶² Genric Insurance “Top trends that will shape the insurance sector in the next decade” 11 Feb 2020 <https://www.genric.co.za/top-trends-that-will-shape-the-insurance-sector-in-the-next-decade/m> (2022-11-29).

⁵⁶³ Genric Insurance “Top trends that will shape the insurance sector in the next decade” 11 Feb 2020 <https://www.genric.co.za/top-trends-that-will-shape-the-insurance-sector-in-the-next-decade/m> (2022-11-29).

⁵⁶⁴ Finmark, “Consumer Survey South Africa 2016” 2016, https://finmark.org.za/system/documents/files/000/000/502/original/FinScope_Consumer-survey-South-Africa-2016.pdf?1623398293 (2022-11-30).

other than funeral cover.⁵⁶⁵ Insurance models were created for society's middle and upper classes, which cannot be replicated in low-income communities.

4.4.8 Changing risks

Technology will, in future, be used to steer the business within the companies' risk appetite framework. The risk function will be required to keep pace with block chain that facilitates unsupervised transactions and decisions. The ability to specifically track exposures on a highly accurate and timely basis can transform the design of reinsurance products and their pricing.⁵⁶⁶ There is a giant global protection gap regarding cyber risk.⁵⁶⁷

4.4.9 The personal characteristics of an effective director

According to a study conducted by Deloitte and Touché, the following characteristics need to be considered when appointing a director.⁵⁶⁸

- Strong interpersonal communication will assist directors in interacting with management, stakeholders and third parties.
- Energy as directors' levels of dynamism is challenged constantly.
- Independence of mind as directors need to take a stand for what they believe in.
- Strategic thinking skills to ensure the long-term sustainability of the company.
- Analytical thinking skills to evaluate data and potential solutions and determine the most appropriate response.
- International exposure. That includes the ability to apply global benchmarks and to compete in a global market.
- Industry-specific experience to evaluate issues and make decisions.

⁵⁶⁵ South African Insurance Association "*The importance of developing insurance for the poor*" South African Insurance Association Bulletin April 2017 <https://www.saia.co.za/index.php?id=1846> (2022-08-31).

⁵⁶⁶ PWC "The fourth industrial revolution brings new data, insights and risks to insurance" <https://www.pwc.com/us/en/library/4ir-ready/fourth-industrial-revolution-insurance-risk.html>. (2022-11-29).

⁵⁶⁷ <https://www.insurancejournal.com/news/2021/02/17/>.

⁵⁶⁸ Deloitte and Touché "Duties of directors" (2017) <https://www2.deloitte.com/za/en/pages/governance-risk-and-compliance/articles/duties-of-directors.html>.

- Financial knowledge to evaluate the financial implications of any decision or strategy.

An article titled “Crucial Skills and Qualities of a Director”, published by the Australian Institute of Directors on 19 September 2019, states that director skills could be split into job-specific skills and knowledge and personal attributes. According to Elizabeth Jameson, Fellow of the Australian Institute of Company Directors and author of “Developing your Director Career”, the three vital skills for a director are curiosity, emotional intelligence and formal skills (including the capacity and willingness for continuous professional development). Although key skills are essential, success lies in the way that the skills are applied.⁵⁶⁹

An Institute of Directors’ article identifies five essential skills that a director needs: strategic thinking in that he/she needs to review strategies to identify possible vulnerabilities, identify concerns as well as analyse the market and the ability to make quick and correct decisions; to communicate effectively; to make decisions on important issues including the future strategy, structure and the protection of assets and the reputation; have leadership; and be able to analyse, interpret and use detailed and relevant information from different sources.⁵⁷⁰

In the UK, the 1992 Cadbury Report⁵⁷¹ indicated that non-executive directors “should bring an independent judgment to bear on issues of strategy, performance and resources including key appointments and standards of conduct”. Non-executive directors have the same legal responsibilities as executives but cannot give their continuous attention to the company. To overcome this challenge, they must put aside sufficient time to comply with their duties. Their specialist knowledge should be applied from a broader perspective. There must be enough non-executive directors to ensure independent decision-making. The benefits that non-executive directors bring to the

⁵⁶⁹ Australian Institute of Company Directors “*Crucial skills and qualities of a director*” 19 Sept 2019 <https://www.aicd.com.au/board-of-directors/career/how-to-get-on/crucial-skills-and-qualities-of-a-director.html> (2022-03-23).

⁵⁷⁰ Institute of Directors, “*Five essential skills for a director*” 23 Aug 2018, <https://www.iod.com/resources/blog/company-structure/five-essential-skills-for-a-director/> (2022-08-31).

⁵⁷¹ Cadbury, A (1992) “Report of the Committee on the Financial Aspects of Corporate Governance” London: Gee & Co. Ltd. (2023-01-25).

board include independence, impartiality, comprehensive experience, special knowledge, and personal qualities. These qualities are needed to provide strategic direction to the company and to monitor the performance of the company and the management.⁵⁷²

4.4.9.1 *Insurer of the future*⁵⁷³

Insurers of the future need the following strategies:

- innovation,
- agility,
- digital culture,
- customer activation,
- cyber security and risk,
- experience in design,
- data and analytics,
- digital architecture, and
- digital governance.⁵⁷⁴

4.4.10 Best practice in terms of recruiting, selection and appointment of directors according to the Institute of Directors of South Africa

Regarding insights into the recruitment, selection and appointment process of non-executive directors, the IoDSA conducted a study in response to concerns expressed by members about the perceived barriers to appointment.⁵⁷⁵ Nomination committee chairs of public and private companies, trusts, non-

⁵⁷² Institute of Directors, “*What is the role of the Non-Executive Director*” 21 Nov 2018 <https://www.iod.com/resources/factsheets/company-structure/what-is-the-role-of-the-non-executive-director/> (2022-08-31).

⁵⁷³ Ernst & Young Global Ltd. “How to build the insurer of the future” 26 April 2019 https://www.ey.com/en_gl/insurance/how-to-build-the-insurer-of-the-future (2022-11-29).

⁵⁷⁴ *Ibid.*

⁵⁷⁵ Institute of Directors SA “*NED Nomination Process Research Report*” June 2020 https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/92123510-2266-46A2-A110-69226C49D98/NED_Nominations_Process_Research_Report_June_2020.pdf (2021-01-05).

governmental organisations, other institutions and executive placement companies took part in the study. The findings can be summarised as follows:

(1) Before the interview:

Companies indicated that the top three reasons why they are searching for new non-executive directors are: To fill the identified skills gaps,⁵⁷⁶ to fill the position of a retired member or an existing member that rotates and to improve board diversity (specifically race and/or gender). Companies use the Companies Act and King IV Report as the primary governance reference documents for defining candidate criteria.⁵⁷⁷ Most companies use their current board network to identify potential non-executive directors⁵⁷⁸ and use the potential candidate's reputation and potential conflict of interest as screening criteria.⁵⁷⁹

(2) During the interview:

The members of the nomination committee or external independent interview panellists are used as panel members.⁵⁸⁰ Companies' top three candidate attributes most sought after are independence, board cultural fit, and critical thinking.⁵⁸¹ Most companies (77%) actively try to assess an individual's reason for applying for the non-executive director position.⁵⁸² In 80% of the cases and as required by the King IV Principle 7 Practice Recommendation 7, a full board approves the appointment.⁵⁸³

(3) After the interview:

Companies usually take newly appointed non-executive directors through a formal structured induction process (89%).⁵⁸⁴ The key strategy for retaining non-

⁵⁷⁶ P. 5.

⁵⁷⁷ P. 6.

⁵⁷⁸ P. 7.

⁵⁷⁹ P. 9.

⁵⁸⁰ P. 12.

⁵⁸¹ P. 15.

⁵⁸² P. 15.

⁵⁸³ P. 17.

⁵⁸⁴ P. 18.

executive directors is cited as a board culture of inclusivity, tolerance and respect (70%).⁵⁸⁵

In conclusion, it was underlined that boards look for relevant experience, value add, skill set, industry knowledge, and ethical behaviour when appointing a non-executive director.⁵⁸⁶ The nomination committee should also scrutinise a candidate's social media profile and activities.⁵⁸⁷

4.4.11 Overboardedness

In a specific industry, such as the insurance industry, there is a limited number of directors in the pool a company can choose from. Previously, a concern about directors serving simultaneously on multiple boards had been raised. During semi-structured interviews with ten experienced directors, interviewers identified three reasons for overboardedness in the local context: the limited talent pool of eligible board candidates, board transformation, and financial rewards. On the one hand, this could lead to poor meeting attendance, but on the positive side, such a director could offer invaluable access to social networks. Director “busyness” should be considered on a case-by-case basis.⁵⁸⁸

In a study on the lessons learnt from Enron, the author concluded that the number of independent director appointments must be reduced to focus more effectively on fewer companies.⁵⁸⁹

Researchers used publicly available data and a Tobit regression model to examine board members' multiple directorships' impact on the effectiveness of corporate governance within an industry. The results demonstrate a definite correlation between

⁵⁸⁵ P. 18.

⁵⁸⁶ P. 19.

⁵⁸⁷ P. 21.

⁵⁸⁸ Mans-Kemp, N “Exploring the causes and consequences of director overboardedness in an emerging market” *International Journal of Disclosure Governance* 2018 15(4) 210-220 <https://doi.org/10.1057/s41310-018-0048-9>. (2022-09-20)

⁵⁸⁹ Tan, P and Yeo G “Accounting scandals and implications for directors: lessons from Enron” In Lee CF, Lee AC (eds) *Encyclopaedia of Finance* (2006) https://doi.org/10.1007/978-0-387-26336-6_65. (2023-01-25).

the industry-relatedness of a director's multiple directorships and corporate governance effectiveness.⁵⁹⁰ It was found that the industry-related effect is stronger for directors of small companies than for large companies. The article documented a significant adverse impact on the governance effectiveness of small firms whose directors increase their board service on non-industry-related boards.⁵⁹¹ It was further confirmed that an increase in overboardedness decreases the likelihood of a director serving on compensation and audit committees.⁵⁹²

4.4.12 Best practice for board effectiveness

A Harvard University study on the structure of boards and its impact on business performance, which is approximated by the economic profitability and the Tobin's Q Ratio, stated that age and nationality influence the knowledge, experience and skills of a board.

In an article on what constitutes an effective board of directors in South Africa, Munya Gwanzura concluded that the criteria for determining what constitutes an effective board, however, are generally the same for all companies. Those criteria ensure that the board comprises ethical, competent and appropriately qualified people; all members are capable and *au fait* with their duties and obligations, which they fulfil in the company's best interest.⁵⁹³

In a study on board effectiveness at INSEAD in France, the researchers underlined that the recruitment and nomination of new board members should adhere to robust processes, including asking questions such as: When are openings posted? Who reviews/targets potential candidates? How are candidate criteria determined? Is there

⁵⁹⁰ Curtis, C et al "Multiple directorships, industry relatedness and corporate governance effectiveness" 5 Oct 2015. Emerald Insight Journal. Volume 15 Issue 5, ISSN: 1472-0701. <https://www.emerald.com/insight/content/doi/10.1108/CG-05-2014-0060/full/html> <https://doi/10.1108/CG-05-2014-0060/full/html>. (2022-11-27).

⁵⁹¹ *Ibid.*

⁵⁹² Pornsit, J et Al "Ineffective corporate governance: Director busyness and board committee memberships", Journal of Banking & Finance, Volume 33, Issue 5, 2009, pp. 819–828, ISSN 0378-<https://doi.org/10.1016/j.jbankfin.2008.09.020.4266>, <https://www.sciencedirect.com/science/article/pii/S037842660800215X> (2022-11-23).

⁵⁹³ Gwanzura, M "What constitutes an effective board of directors in South Africa" 7 March 2019 SA. Financial Regulation Journal <https://financialregulationjournal.co.za/2019/03/07/what-constitutes-an-effective-board-of-directors-in-south-africa/>. (2022-11-29).

a transparent on boarding process in place that is regularly revisited? The researchers concluded that all directors must be passionate to see the company's strategy succeed regardless of the sector.⁵⁹⁴

Board performance can be measured. An Australian study with online data⁵⁹⁵ collected from 1,546 board members analysed eleven reliable factors, including the effectiveness of:⁵⁹⁶

- Internal communication and teamwork.
- Leadership by the chair.
- Committee leadership and management.
- Management and recordkeeping.
- Information management.
- Self-assessment board functioning.
- Internal performance management of board members.
- Clarification of board members' roles and responsibilities.
- Risk and compliance management.
- Oversight of strategic direction.
- Remuneration management.

These eleven dimensions correspond with those previously identified by academics and professional bodies. However, valid and reliable measures still need to be developed.⁵⁹⁷

⁵⁹⁴ Kleiterp, N.A “12 Questions to determine Board Effectiveness”, IDP-C/23 May 2017; https://knowledge.insead.edu/blog/insead-blog/12-questions-to-determine-board-effectiveness-6166?eloqua_id=3896&eloqua_id=3896&eloqua_id=3896&eloqua_id=3896 (2022-07-07).

⁵⁹⁵ Asahak et al “Board of Directors: Assessing Their Functioning and Validation of a Multi-Dimensional Measure” 2018 (9) 2425 *Frontiers in Psychology* <https://www.frontiersin.org/articles/10.3389/fpsyg.2018.02425/full> (2022-07-07).

⁵⁹⁶ *Ibid.*

⁵⁹⁷ *Ibid.*

4.4.13 Possible liability of the Regulators

A question can be posed as to whether any director or company that suffered a loss due to a director not being appointed or being appointed as fit-and-proper and failed to be so can sue the Regulator for their failure in discretion.

Historically the supervisory liability was limited in terms of section 23 of the Financial Services Board Act 97 of 1990:

“No person shall be liable for any loss sustained by, or damage caused to any other person as a result of anything done or omitted by that person in the bona fide, but not grossly negligent, [the] exercise of any power or the carrying out of any duty or the performance of any function under or in terms of this Act.”

(The Acts referred to in the definition of “financial Institution” - the Inspection of Financial Institutions Act, 1998 or the Financial Institutions Act, 2001.)

Governmental supervisors can act *bona fide* and with the best intentions while performing their duties, but due to limited qualifications and skillset, they may be unsuitable for the task.⁵⁹⁸ Although the general principle that a supervisor can be sued on delictual grounds seems to be true, it seems as if the immunity provision limiting the supervisor’s liability only to cases in which the employee acted in *bad faith* was inserted to prevent claims from being instituted.⁵⁹⁹

Liability for pure economic loss is currently an accepted principle in South Africa. To sue a supervisor on these grounds, one must establish the existence of a legal duty owed by the supervisor to the party who suffered a loss. Such a legal duty is a matter of judicial determination⁶⁰⁰[unless there is a statutory duty] according to public and legal policy criteria consistent with constitutional norms. The supervisor’s actions or inactions will place the burden on taxpayers, who will indirectly be liable in the end.⁶⁰¹

⁵⁹⁸ Schlemmer, E.C., “The liability of financial Supervisors in the dock” 25 June 2022, TSAR, <https://doi-org.uplib.idm.oclc.org/10.47348/TSAR/2022/i2a8> (2022-11-29).

⁵⁹⁹ *Ibid.* p.8.

⁶⁰⁰ *Ibid.* p.7.

⁶⁰¹ *Ibid.* p.8.

4.4.14 Conclusion

It is reported that 52 per cent of Fortune 500 companies have disappeared since 2000 - due to digital disruption, bankruptcy, being acquired or ceasing to exist.⁶⁰² Any organisation (including insurers), no matter its size, the industry it operates in or how qualified its management is, needs three strong pillars to survive: (1) an effective governance structure and processes; (2) an ethical organisational climate; and (3) effective internal control system built upon a sound control environment.⁶⁰³

⁶⁰² Harvard Business Review, “*Digital Transformation is Racing ahead and No Industry is immune*” 19 July 2017 <https://hbr.org/sponsored/2017/07/digital-transformation-is-racing-ahead-and-no-industry-is-immune-2> (2022-11-09).

⁶⁰³ Ogutu, EO “Corporate failure and the role of governance: The Parmalat scandal” 2016 (11) 3 *International Journal of Management & Information Technology* <https://doi.org/10.24297/ijmit.v11i3.5111>. (2023-01-25).

CHAPTER 5:

PROPOSED SOLUTIONS AND CONCLUSION

5.1 Possible solutions to improve the appointment process

In conclusion, it is proposed that IoDSA, in co-operation with IAIS, with which all jurisdictions of insurers must comply, draft a desired international skills matrix applicable to all insurance companies. This matrix should refer to the above-mentioned non-legal requirements and worldwide best practices. Before recruiting candidates, all boards should do a gap analysis. A board should create a “current board skills matrix” and measure it against an “ideal board skills matrix” to identify the individual characteristics that will enhance the board’s skills and competencies as a collective.

In South Africa, key individuals, including the head of control functions, undergo psychometric tests before being appointed. This is done to determine the candidate's suitability for the position - although candidates may refuse to undergo psychometric tests. This practice is currently not applicable to directors.

The requirement for continuous professional development only applies to key individuals and not key persons. At this stage, the Prudential Authority determines whether they will refer a key person for further training. This is done on an individual basis and linked to the size and products of the insurer. The question could be asked why key individuals (management) are required to subject themselves to psychometric testing while directors who oversee their input are not required to do so.

5.2 Proposed legislative amendments

The fit-and-proper requirements for key individuals, including directors, are well defined. However, much can be learnt from how the courts apply the fit-and-proper requirement to other professions.

It is proposed that the timelines in which the Prudential Authority approves appointments must be formally regulated. Any undue delay can have negative consequences – *inter alia*, the company's ability to comply with quorum requirements as set out in board committee charters. In the introductory chapter, it was emphasised that directors serving in the insurance industry are required to make quick and accurate decisions. A delay in decision-making by the Prudential Authority as to

whether a candidate is fit and proper will negatively affect the combined skills and competency of an already understaffed board.

It is further proposed that legislation be amended to provide for the inclusion of a duty of supervision by the Regulator. This should make provision for the following: (1) The person or entity responsible for the final resolution on the approval of the fit-and-proper requirement, (2) whether only objective criteria will apply or does this determination involve discretion, (3) at what stage the resolution becomes valid.

It is proposed that the legislator stipulates a reasonable time for approval. If the legislator decides not to include a duty of supervision, the legal principles of delict will still be applicable. The aggrieved party will still be able to claim compensation based on damages suffered due to an erroneous finding of fit and proper (or not) or a delay in finding fit and proper. As insurers are most concerned with their ability to evidence a culture of fairness within their firms,⁶⁰⁴ the legislator can consider incorporating a “conduct matrix” as a key performance indicator to evaluate directors' performance annually. Since the fair treatment of customers by third parties is not under an insurer's control, it can be legislated that key conduct service levels should form part of the agreements concluded with brokers and intermediaries.⁶⁰⁵

The existing fragmented legislation that currently regulates the appointment of directors does not suffice to appoint the correct persons for the position. The Companies Act and Insurance Act have equal standing. The legislator should simplify the process of interpreting these acts by improving the alignment between these acts. It seems as if the basic requirements should be included in the Companies Act, while the Insurance Act should specify additional industry-specific requirements. Although the GOIs are classified as sub-legislation, the Prudential Authority will definitely enforce the standards where there is a lack of specific legislation, for example, fit-and-proper requirements.

⁶⁰⁴ KPMG, Dubois, M & Simpson, B “*The South African Insurance Industry Survey 2020, Market Conduct in the insurance Industry*” (2020) <https://assets.kpmg/content/dam/kpmg/za/pdf/pdf2020/market-conduct-in-the-insurance-industry.pdf> p. 39. (2022-05-01).

⁶⁰⁵ *Ibid.*

Time will tell whether the COFI Act, when promulgated, will be the solution for the government's quest to mitigate conduct risk. In the future, there might still be a need to regulate specific financial institutions in the sector by adding an addendum to the COFI Act.

Inconsistency in inter alia compliance officers' approach might increase the Prudential Authority's workload as compliance officers will look for legal certainty or provide too much or too little information based on self-regulation. The fact that the COFI Bill introduces a shift from a strict compliance-based framework to a proportionate and risk-based framework may lead to the subjective implementation of supervisory requirements by the Regulator. In translating what proportionate means, certain smaller entities might be excluded from many of the act's provisions.

5.3 Conclusion and risks

The recruitment and appointment of suitable candidates remain daunting.

Whether insurers include conduct risk as a principal risk or as a subcategory of another risk, it must be measured and monitored regularly. The business of insurers is built on a relationship of trust with clients. The KPMG survey acknowledged that the insurance sector should take proactive steps to improve customer trust. Culture is globally recognised as the root cause of continued misconduct.⁶⁰⁶ The human element contributes to unforeseen surprises, such as a cultural misfit, even though all the correct boxes have been ticked.

Therefore, it is concluded that the current fit-and-proper requirement suffices as criteria to appoint directors in the insurance industry. Currently, the criteria are used case-by-case to assess candidates rather than stipulating definite exclusions. The legislation could be amended to ensure that a panel rather than individual assess the suitability of the candidate based on the fit-and-proper requirement. It is also proposed

⁶⁰⁶ KPMG, Dubois, M & Simpson, B *"The South African Insurance Industry Survey 2020, Market Conduct in the insurance Industry"* (2020).
<https://assets.kpmg/content/dam/kpmg/za/pdf/pdf2020/market-conduct-in-the-insurance-industry.pdf> (2022-05-01).

that the Regulator keep a register of all fit and proper decisions to ensure consistency in decision-making.

A question that still needs to be answered is whether the Regulator can deny an application of fit-and-proper based on overboardedness and if so, will the criteria be objective or subjective? This links up with the liability of Regulators for the wrongful actions of governmental supervisors in their employment. It is recommended that the legislator consider the liability of governmental supervisors acting on behalf of the Regulator.

The legislator should also consider specifying whether the Companies Act 2008 and the Insurance Act 2017 should take precedence in case of conflict.

Additional criteria should be incorporated based on where the insurance industry is heading worldwide. This should further be supplemented by amendments to the current legislation as proposed.

To complement the current legislative environment, all interested parties, including decision makers (governments and regulators), insurance companies, reinsurers, actuaries, and auditors, should stay abreast of relevant research and developments in the insurance industry in order to propose fit-for-purpose amendments to existing legislation if and when necessary.

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