



The Future of Reputation

By LexisNexis and Michael Laws

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A portrait of Michael Laws, a man with dark curly hair, glasses, and a beard, wearing a dark suit jacket over a white shirt. He is smiling and looking towards the camera. The background is a blurred office setting.

Foreword by Michael Laws

Project Sivyl: An Experiment in Law & Policy Forecasting

Trend forecasting has become big business. In an age where major industry incumbents are being disrupted by emerging technologies and trends to the point of crisis, there is a heightened demand both in the private and public sector for expert insight as to where the future may take us.

If one looks at the field of forecasting however, while one notices an abundance of economists, technologists and scientists, there is almost a complete absence of legal practitioners and policy experts. This is strange given that law and policy have an enormous impact on how technologies and trends develop. If history has shown us anything, advances in laboratories and events in the marketplace are frequently shaped by the contours of judicial decisions, legislative enactments and changes in public policy.

It was on the back of this observation that I thought that it would be interesting to experiment with a project which would aim to step into this gap and explore the feasibility of law and policy forecasting.

As luck would have it, I had just finished working with LexisNexis' resident human-law-library and law report maestro, Louis Podbielski and pitched the idea to him. Louis' eyes lit up and a couple of months later (after expert managing and herding by Neliswa Mncube - GM: Corporate Communications and Brand), we were sitting in a boardroom with his team of researchers, bouncing hypotheticals and arguing about the

future of defamation law in 2050.

Out of this workshop grew a process of working in dialogue with a team of young researchers (deftly lead by Asanda Namba) who would not only dive deep into the law to explore where it may possibly evolve but would creatively imagine what the future may hold in store for us.

As social values and technology have evolved, so has our understanding and experience of "reputation". From the recent introduction of "social credit systems" in China through to the rise of professional social media influencers who rely on their "clout" to make money, our understanding of what "reputation" is becoming and what role it may play in our lives is radically changing.

Which raises interesting questions: how will the law respond? What future regulatory or legislative policy choices may be adopted? And how will this affect individuals and businesses?

These are the questions we look to answer in this report. While the writers of the various pieces do not profess to predict the actual future, their pieces raise important issues and provoke fascinating ideas which are highly valuable in thinking about how we should plan for the future.

Ultimately, I hope that this experiment finds an audience which shares our interest in the law's future and that this report may be the first of many.

The Future of Reputation

Consumer Reputation Scores

Introduction

LEXISNEXIS – LEGAL FUTURES

Technology, innovation, cyber security, business information, analytics, governance and corporate responsibility and more - over the last 25 years LexisNexis has undergone a massively successful digital transformation, as has legal and compliance software. It could even be argued that technological innovation and particularly legal technology will dictate the future of legal practice more so than in the past.

The Internet, YouTube, FaceBook and video conferencing have become commonplace technology. Now it's the turn of digitisation, artificial intelligence, blockchain, advanced data processing, contract analysis and more. We might not end up being regulated by robots, but in continuing to develop radical ways of delivering legal services LexisNexis remains at the forefront of crafting the law firm of the future.

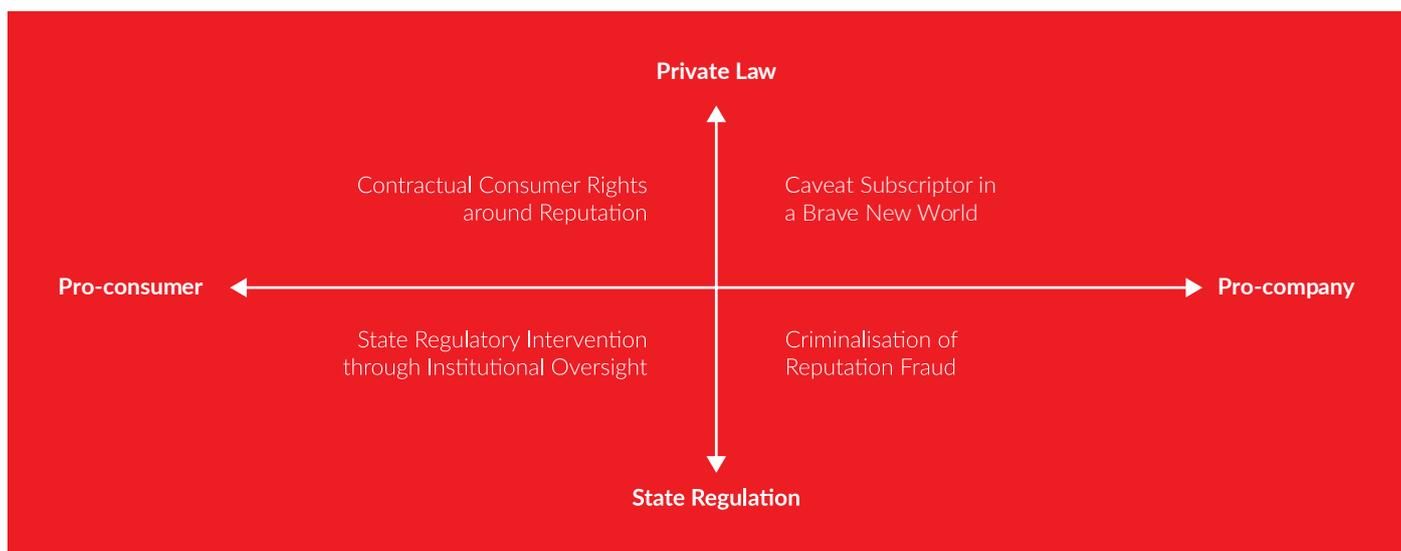
The Future of Reputation:

An initial analysis in our workshop of “The Future of Reputation: Consumer Reputation Scores”, prompted by the above scenario, considered reputation from the perspective of consumers and their interactions with the internal scoring systems of the various institutions with which they engage. This type of reputation is not so much a classic aspect of personality (that is *dignitas*), but is something emerging from the contractual/consumer relationship between service providers/business and customers/consumers.

This yields two broad variables:

1. The degree to which a future market may be either pro-consumer or pro-business; and
2. The extent to which a future government would be willing to intervene in the market and to regulate relationships and activities between service providers and customers.

Which gives a framework that allows us to explore law and policy from the perspective of the following four futures and four papers discussing the law and policy framework aspects and implications of their respective quadrants:



EXECUTIVE SUMMARY

Private Law Remedy - Contractual Consumer Rights around Reputation

In this future, a person's reputation has become a commodity and their reputational scores determine their value in society and what access to employment and services they could have. This leaves them vulnerable to having their rights infringed when their reputations are compromised by companies consolidating their personal data, unfairly penalising them, or by consumer profiling them without their consent.

Here the legislature has declined to become involved in regulating the market, but consumers are able to find a high degree of protection for their reputations under s 10 of the Constitution, which recognises a wider concept of a right to dignity; and through the courts (as per *Barkhuizen v Napier*) in striking down contracts which are regarded as contrary to public policy because they conflict with the Bill of Rights.

This means that the principles of freedom and sanctity of contract will be restricted by the courts if they deem the provisions to be unreasonable, oppressive or unconscionable. In the illustrative scenarios, excessively one-sided standard form contracts which none of the consumer parties could opt out of; or which failed to take reasonable account of their interests or circumstances; are discussed in the context of loyalty point systems and their potentially negative effect on consumers' reputations. Against this backdrop, the inherent power of the courts to refashion and develop the common law in order to reflect the changing social, moral and economic make-up of society, in protecting the right to reputation of consumers, is discussed.

Caveat Subscriptor in a Brave New World

In this scenario, we imagine a future where the state has decided not to intervene legislatively in protecting the rights of individuals when contracting with business, allowing business to dictate and to enforce largely one sided standard form contracts. This evolution is a direct result of the huge commercial and societal value massed, shared reputational scores give to service providers and companies; parallel to the accompanying social, health, employment, and other benefits consumers derive, based on their rankings.

Companies enforce a strict non-tolerance policy when consumers misrepresent their facts either intentionally or negligently, resulting in them suffering a substantial loss of reputation and liability for pure economic loss. As a result, lawyers have turned to the Law of Delict to find a solution. They base their arguments on the right to equality as entrenched in section 8 of the Consumer Protection Act, and discriminatory differential treatment flowing from not giving consumers an opportunity to rehabilitate their scores/reputations. A further point of argument is the contravention by service providers of the Protection of Personal Information Act, No. 4 of 2013 regarding issues of privacy, freedom of choice and the nature of the personal information which they hold and how they process it.

In this scenario consumers therefore have to be very careful about whom they contract with, what they disclose, on what terms, and how they behave thereafter, under threat of losing their reputations and the benefits they derive therefrom.

Criminalisation of Reputation Fraud

In this scenario, the state has decided that because reputation fraud presents such a grim harm to society, it will intervene on behalf of companies by criminalising reputation fraud and dedicating resources to investigating and prosecuting the problem.

Reputation fraud is defined as: "*The intentional use, insertion, provision, communication and/or generation of materially false data, information and/or misrepresentations to manipulate one's reputation status with third party service providers, which they rely on, harming them financially.*"

The main driver for criminalising reputation fraud is the need for market integrity to be maintained. It is an idea that the market needs to have certain conditions in place such as good regulatory policy, commercial laws enforcing agreements, and the prevention of misuse of services to reduce the cost/risk of conducting business to companies. It has found expression in the The National Credit Act, No. 34 of 2005, the case of *Kubiyana v Standard Bank of South Africa Ltd*, and the protection of intellectual property rights in some jurisdictions.

In the scenario outlined, it is suggested that those found guilty of reputation fraud could have their names and crimes placed on registers – naming and shaming; and even face penalties ranging from fines to imprisonment or both. Mechanisms for correcting false information are also considered, and the question of people actually forfeiting their reputations raised.

State Regulatory Intervention through Institutional Oversight

In this scenario we imagine a future where reputation is commodified. One in which regulatory bodies have a big role and influence in allowing consumers access to goods and services because of direct and extensive state regulation in the market to protect consumers. Here the state acts as a statutory watchdog, overseeing the use of reputation systems, and we speculate about the nature and powers such institutions would have.

Examples of the necessity of using state intervention institutions to regulate the balance between consumers and service providers in the interests of sustainable economic growth, peace and stability are taken from developing states like Brazil and India. In South Africa, the potentially unequal relationship between credit providers and consumers and the adverse effect this could have on the reputation of consumers is discussed, and an argument made for amending the Consumer Protection Act by imposing stricter liability on suppliers of goods and an ability for easier redress, thereby protecting reputational damage to consumers. The idea of having an ombudsman to protect consumer reputations is also looked at, however their effectiveness and the current ability of existing institutions to enforce compliance is questioned when it comes to reputational damage.

Contractual Consumer Rights around Reputation

Asanda Nonzwakazi Namba

FORECASTING THE FUTURE FOR CONSUMERS

Today's world is rapidly changing and with the takeover of the internet followed by the rise of social media, the world has become a global village. Popularity and relevance are associated with how many likes you get or how many people follow you. The more followers you have, the more interesting or important you are; and social media influencers have proven that investing in and increasing your reputation, means better access. So, it is no surprise that reputation is becoming more than just a personality right in the field of defamation law, as it is today.

Reputation is fast becoming not only a commodity to businesses but also a currency to the world. Whether we are aware of it or not, we are actively participating in a reputation economy. We have already grown accustomed to scoring our interactions with businesses every day with apps such as Mr Delivery and Uber, therefore it's only a matter of time before the world adapts to social scoring as seen in the Black Mirror episode, Nosedive. The future lies in the reputation economy, where a person's reputational score determines their value in society, access to services and employment. It takes a lot of work and effort to keep your score up but the downside is that it is incredibly easy for your score to drop. The problem arises when a consumer's reputational score, without their consent, is affected by consolidated personal data or consumer profiling.

THREE FUTURE SCENARIOS – THANDI, JOHN AND JANE

Imagine a scenario where a service provider called Encounter Health becomes a full-stack services firm providing healthcare, security, and legal services all under one roof to their clients. Encounter becomes well-known for their Vivacity™ point system where clients can earn points for their healthy and risk-averse lifestyle and use such points for rewards, discounts and access to exclusive services. Thandi has low Vivacity points with Encounter because she does not exercise and does not follow a healthy diet, but on the other hand, she has been awarded "Platinum Status" with her bank, Udumo, on their internal credit scoring system which affords her access to cheaper credit, better customer service and automated place-and-pay services which handle her groceries and mortgage. In 2030, Encounter Health is finally given the go-ahead by the Competition Commission to acquire Udumo Bank and to integrate their assets and services into their own system. They also combine their consumer data in order to form records of their consumers' personal reputation.

Thandi is devastated because the premium-grade score she had with Udumo Bank has been wiped and replaced with Encounter's own Vivacity score. As a result, her credit score drops significantly thus increasing her monthly bond payments and the groceries plan she was once entitled to is downgraded, removing her access to fresh fruit and vegetables (which only Premium Members are entitled to enjoy). Worse still, with her credit score being lowered significantly in such a short period, an automatic warning was sent to her employer notifying them that she might have been going through a difficult time and as a result, she is placed by default on performance review and oversight. She must now attend mandatory counselling instead of the free yoga class that helps her manage stress. Thandi can do nothing, as there is no opt-out provision in her contract about having her personal data consolidated. She was also not given a notification of the merger and its consequences, nor the choice whether or not to consent to continue with Encounter's services.

Now imagine a second scenario with an individual named John who eats healthily, buys healthy food, exercises regularly, and has a middle-class job that causes him to travel twice a month. John has a watch that tracks his health and exercise levels which is linked to Encounter, as are his Woolworths account and his bank. He gets eBucks and other rewards from Woolworths for spending and points for exercising. Because of his healthy and active lifestyle, his bank has made him a black card member which gives him free access to the slow lounge at the airport which he enjoys since he is a frequent flyer and his employers cannot afford to pay for the slow lounge experience. John unfortunately incurs a serious injury that renders him unable to do intense exercises except for walking. As a result his Vivacity score begins to drop drastically and the fact that he still buys healthy food is not enough on its own to maintain his high Vivacity points. Because of this, his points drop and his bank sends him a notice that he has lost his black card membership until he can regain his high Vivacity points. This means that John now has to sit on the hard, uncomfortable airport chairs for hours in long distance travels when taking a connecting flight in another airport before even reaching his destination and then endures the same thing upon his return. This starts to inflame his injury and slows down his recovery to the point where his doctor warns him not to travel for a while until his injury has fully healed. The challenge is that if John does not recover soon, he cannot increase his Vivacity points and if he stops travelling then his employment is affected.

The third and final scenario involves a woman named Jane who is an ex-smoker. A year ago, Jane decided to quit smoking so that she could live longer to enjoy her family life. As a result of her healthier lifestyle, she earned higher Vivacity points with Encounter which meant that she got rewards and discounts at certain stores and on select flights. Encounter also notified her employer of her improved health over the year which automatically qualified her for a long-term managerial position. However, Jane starts having marital problems and finds herself under a lot of stress. One evening, her husband announces that he is divorcing her and as the wealthier parent, he threatens to take full custody of their children. In a state of shock, panic and emotional vulnerability, Jane drives out to clear her mind and ends up buying a pack of cigarettes. Without even thinking, she smokes the whole pack overnight.

The next day she is due for a routine monthly health check-up at work and the nicotine is picked up in her system after a year of being clean. Encounter is notified immediately of her relapse and the points that Jane had accumulated in the past year are erased taking her back to her previous low Vivacity score from a year ago before she quit smoking. Encounter then notifies her employer of her relapse and possible health risk, forcing her employer to disqualify her for a promotion. Jane, who is undergoing a divorce, desperately needed the promotion in order to pay for the expenses of her divorce, contesting custody and buying a new home for herself and her children. Unfortunately, her contract with Encounter does not allow for relapses which means that the only way she can regain her high Vivacity points is for her to start over and earn her points again.

In each of these three future scenarios, the legislature has declined to become involved in the market, leaving consumers to find protection through the intervention of the courts. But how would the judiciary protect contractual consumer rights around reputation?

THE RIGHT TO REPUTATION

In our pre-Constitutional dispensation, the concept of dignity did not exist in a general sense, but it was limited to the *actio iniuriarum*, a delictual action recognised in our law where a defendant had wrongfully and intentionally injured the bodily integrity (*corpus*), dignity (*dignitas*) or reputation (*fama*) of the plaintiff. However, this threefold distinction of the different forms of *iniuria* is no longer used to highlight the different interests at stake because in practice they often overlap. This means that although assault is a wrongdoing that infringes a victim's bodily integrity, it will also infringe the victim's dignity; and although defamation mainly infringes a person's reputation, it also indirectly affects their sense of dignity. This paradigm shift was largely influenced by the Constitution, as expressed in the dictum in *Khumalo v Holomisa 2002 (5) SA 401 (CC)* at para 27:

"In the context of the *actio iniuriarum*, our common law has separated the causes of action for claims for injuries to reputation (*fama*) and *dignitas*. *Dignitas* concerns the individual's own sense of worth, but included in the concept are a variety of personal rights including, for example, privacy. In our new constitutional order, no sharp line can be drawn between these injuries to personality rights. The value of human dignity in our Constitution is not only concerned with an individual's sense of self-worth...It includes the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his or her own individual achievements."

Therefore, post Constitution and in line with this interpretation, a person's reputation can be protected under the s 10 Constitutional right of dignity. Thus, the right to dignity under the Constitution is universal and no longer restricts the injury of a person's reputation in the context of defamation or *crimen iniuria* but can also extend to private law. The Bill of Rights (BOR) establishes the personality right to human dignity as a fundamental right, and the BOR is applicable to all law, which includes the common law rules that regulate contractual relationships between service providers and consumers.¹ It is clear that the advancement of the internet, social media and even artificial intelligence, greatly increase the ways in which the reputation of individuals may be infringed.

In the case of *NM & Others v Smith & Others [2008] JOL 19615 (CC)*, the applicants sought to vindicate their constitutional rights to privacy, dignity and psychological integrity; however, the court said that since their claim was based on the *actio iniuriarum*, therefore it had to be determined in terms of the *actio iniuriarum*. But then the court went on to say that if a case raises a constitutional matter, the assessment of whether the case should be heard by the Constitutional Court rests on the requirement that access to the Court must be in the interests of justice, irrespective of whether it is based on the constitutional law or the common law. The Constitutional Court distinguished the concept of dignity under the Constitution and its common law construct in the case of *Le Roux & Others v Dey [2011] JOL 27031 (CC)*, in the following manner:

"In terms of our Constitution, the concept of dignity has a wide meaning which covers a number of different values. So, for example, it protects both the individual's right to reputation and his or her right to a sense of self-worth. But under our common law "dignity" has a narrower meaning. It is confined to the person's feeling of self-worth. While reputation concerns itself with the respect of others enjoyed by an individual, dignity relates to the individual's self-respect."

The court went on to say that where a plaintiff's claim is based on the common law, the right to dignity "is therefore used to the exclusion and in fact, in contradistinction to reputation, which is protected by the law of defamation."

¹ J Neethling, *LAWSA, Personality Infringement (Volume 20(1) – 2 ed)* at p 396.

PUBLIC POLICY

Under the new constitutional dispensation our courts have come a long way in developing the concept of public policy. Pre-1994, in the case of *Sasfin (Pty) Ltd. v Beukes 1989 1 SA 1 (A)*, the court extended the common law principle of public policy (the legal convictions of the community) to contracts. This concept means that an agreement that is contrary to public policy is illegal and therefore it cannot be enforced. The court stated that although courts shouldn't rashly declare contracts void, they equally have a duty not to allow offending contracts to stay in place. The court made a list of considerations to be taken into account:

- is the contract clearly unfavourable to the interests of the community?
- does the contract conflict with law or morality?
- is the contract contrary to social or economic experience?

Post the constitutional era, the courts, however, took a step backwards in *Brisley v Drotsky 2002 (4) SA 1 (SCA)*, where Cameron J stated:

"[N]either the Constitution nor the value system it embodies give the courts a general jurisdiction to invalidate contracts on the basis of judicially perceived notions of unjustness... On the contrary, the Constitution's values of dignity and equality and freedom require that the courts approach their task of striking down contracts or declining to enforce them with perspective restraint."

Then in the case of *Barkhuizen v Napier 2007 (7) BCLR 691 (CC)*, Ngcobo J set out the correct approach that the courts should follow when considering public policy:

"In my view, the proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights. This approach leaves space for the doctrine of *pacta sunt servanda* [agreements must be kept] to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them." ²

The court in *Bredenkamp and Others v Standard Bank of SA Ltd [2010] 4 All SA 113 (SCA)* reiterated what was said in *Sasfin* and then continued to say that the courts are always prepared to reassess public policy and declare contracts invalid on that ground, and that determining whether or not an agreement was contrary to public policy requires a balancing of competing values as found in the Constitution. These cases create a sense that a contract is unenforceable if it is contrary to public policy in a general sense, and almost always public policy will be informed by the Constitution. When a contract between private individuals infringes on a right outlined in the BOR that alone is a ground to strike it down on the basis of public policy. The Constitutional Court endorsed this approach in *Barkhuizen v Napier*, and accordingly, a contract that is in conflict with the values enshrined in the BOR will be regarded as contrary to public policy and consequently unenforceable.

² At para 30.

Section 48 of the Consumer Protection Act 68 of 2008 (CPA) prohibits unfair, unjust or unreasonable contractual terms. A transaction or agreement, a term or condition of a transaction or agreement, or a notice to which a term or condition is allegedly subject, will be considered unfair, unreasonable or unjust if:

- it is excessively one-sided in favour of any person other than the consumer;
- the terms of the transaction or agreement are so adverse to the consumer as to be inequitable; or
- the transaction or agreement was subject to a term or condition, or a notice to the consumer that is unfair, unreasonable, unjust or unconscionable or the fact, nature and effect of that term, condition was not drawn to the attention of the consumer.³

Section 48(2), however, doesn't define what would amount to "unjust, unfair or unreasonable", and s 48 (2) specifically states that it does not limit s 48(1). Consequently, until the courts give clarity, suppliers can adhere to the standard of fairness or public policy. Section 40(2) of the CPA also states that it is unconscionable for a supplier *knowingly to take advantage* of the fact that a consumer was substantially unable to protect their own interests because of physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement, or *any other similar factor*.

HOW THE LAW WOULD APPLY TO A RANGE OF FUTURE SCENARIOS

In the future, reputation will be an extremely determinative feature in people's lives and they will enter into these contracts with service providers to the detriment of their reputation or social score. One of the functions of law is dispute resolution, and in this future our courts will have intervened to allow a degree of autonomy, freedom and equity for people who find themselves in unfair or unjust positions with their reputation. Considering the above cases of *Bredenkamp* and *Barkhuizen*, we know that the court will not be willing to enforce contractual provisions if it thinks that a right in the BOR is at stake. And so in the cases of Thandi, John and Jane highlighted above, the courts will use public policy as the gateway for importing constitutional values into the law of contract. In each of their cases, these future consumers can argue that the relevant contractual provisions infringe their constitutional right to dignity by virtue of an impaired reputation or credit score, and could seek to avoid such provisions on the grounds that their dignity was impaired when:

- Thandi's Vivacity score was drastically reduced when her personal data was consolidated without her consent which resulted in her loss of reputation;
- John was unfairly disadvantaged when his Vivacity score was erased because he was unable to maintain it due to his physical injury which resulted in the unjust loss of his reputation; and
- Jane was also unfairly disadvantaged when her Vivacity score was erased without exception when she relapsed after a year of good behaviour and consistently accumulating her Vivacity score.

The Court in *Barkhuizen v Napier*, stated that a "strong case can be made out for the proposition that clauses in a standard form contract that are unreasonable, oppressive or unconscionable are in general inconsistent with the values of an open and democratic society that promotes human dignity". The Court noted that our democratic society may be concerned with the consequences of standard form contracts, whoever the parties are and whatever the subject-matter of the arrangement, in that they tend to undermine rather than support the integrity of what was actually concluded between the parties when they unilaterally introduce elements that were never in reality bargained for, and that had nothing to do with the actual bargain. In reality, such contracts do not factor in the will of the consumers.

³ Section 48(2) of the CPA.

Thandi, John and Jane could alternatively argue in terms of s 48, read together with s 40(2) of the CPA, that their contracts are unfair or unconscionable, as Encounter knowingly took advantage of the fact that as consumers they were substantially unable to protect their own interests. Therefore, these contracts are inconsistent with the constitutional value of dignity and should be rendered as unfair, unreasonable or unjust based on the following:

- In Thandi's case, the contract did not provide an opt-out provision in the case of a merger so that her personal data would not be consolidated or give her an option to terminate their contract should she no longer wish to continue with their current services in light of the company changes. Furthermore, no notice was given of the conglomerate acquisition, nor were the conditions or effects of such a merger drawn to her attention.
- In John's case, the contract did not make provision for the possibility of incurring a serious injury and thus it was not fair for his Vivacity score to be erased without exception. His score should remain unaffected until he fully recovers given that such an event was outside of his control, and that he continues to try to maintain a healthy lifestyle but is unable to match the level of intensity in exercise before he was injured.
- In Jane's case, her contract did not make room for a relapse which in her circumstances was reasonable in that it only occurred once, and at the time she was undergoing a lot of stress which triggered the relapse. It did not however warrant having her accumulated Vivacity score erased without exception, no probationary or grace period to prove herself, or even an investigation as to what caused the relapse and whether it was of such a serious nature as to warrant the loss of her reputation.
- The unequal bargaining power in all three cases renders the contracts excessively one-sided and in favour of any person other than the consumer, in that all of them had no say in their contracts and thus could not protect their own interests and Encounter knowingly took advantage of this.

THE FUTURE FOR THE LAW OF CONTRACT AND THE LIMITATIONS OF THE COURTS

The South African law of contract is based on the principles of freedom and sanctity of contract and these principles are firmly embedded in our legal system. The Constitution entrenches the judiciary's role as the branch of government that interprets the law, this means that judges have the power to develop the law by bringing it in line with the rights and values of the Constitution. In *S v Thebus*⁴, the Constitutional Court reiterated the fact that "Superior Courts have always had an inherent power to refashion and develop the common law in order to reflect the changing social, moral and economic make-up of society." It went on further to say that whenever the Court is required to deal with a constitutional challenge to a rule of the common law, "the Court is again required to do a threshold analysis, being whether the rule limits an entrenched right", and that "[i]f the limitation is not reasonable and justifiable, the Court itself is obliged to adapt, or develop the common law in order to harmonise it with the constitutional norm."⁵

Section 2 of the Constitution provides:

"This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

⁴ 2003 (6) SA 505 (CC).

⁵ *Ibid* at para 32.

What this means is that, as the law stands, any rule of contract law including the rule of sanctity of contract, can no longer be valid if it is in conflict with the Constitution. In the case of *Dickinson Holdings Group (Pty) Ltd and Others v Du Plessis and Another* which dealt with a restraint of trade, the High Court stated that:

“[T]he approach to assessing the validity or otherwise of the restraint of trade is not only restricted to whether it is reasonable and in consonant with public policy but whether such reasonableness and consonance with public policy is the one expected of a free, open and democratic society envisaged in the Constitution. Irrespective of the fact that the parties freely contracted to certain terms, if the product thereof is inconsistent with the supreme law of the country the sanctity of the contract should give way to the dictates of the Constitution. In fact, if the contract offends the aims and objectives of the Constitution, one wonders whether that casts such turpitude on the covenant that it would still be appropriate of speaking of sanctity at all.”⁶

In *Barkhuizen v Napier* the Constitutional Court mentioned that the essence and the reach of the notion of sanctity of contract have become restricted over the years in democratic societies, largely due to effects of consumer protection struggles and creative judicial reasoning, and that this is the backdrop with which public policy should be viewed against.⁷ The Court questioned whether “public policy, propelled by the letter and spirit of our Constitution, regards the notion of sanctity of contract to be inviolate and unchanging”⁸, and it specifically distinguished contracts surrounding provisions that were never discussed or agreed upon but were superimposed and favouring one side. It held that such contracts do not promote the spirit of openness central to our new constitutional order and to “treat mass-produced script as sanctified legal Scripture is to perpetuate something hollow and to dishonour the moral and philosophical foundation of contract law”.⁹

It is clear from the South African jurisprudence that there is room in the future for the courts to extend the common law rule of sanctity of contract in order to entitle parties to escape the consequences of their bargain on the basis of an infringement of their reputation, informed by their constitutional right to dignity. As seen in *Barkhuizen*, the notion of the sanctity of contract is not unchanging. The problem, however, is that judges may vary in their interpretations of the law and thus always arrive at different conclusions when resorting to constitutional values. As Harms DP expressed in *Bredenkamp and Others v Standard Bank of SA Ltd*, that “making rules of law discretionary or subject to value judgments may be destructive of the rule of law”. The challenge for future consumers is that when the courts embark on balancing the constitutional values of freedom of contract and the right to dignity, it is not certain what a particular judge will regard as fair and equitable on the facts of each case. This means that there will be a period of uncertainty for future consumers and an increase in litigation and unnecessary appeals.

⁶ 2007 (6) BCLR 671 (D) at p 682.

⁷ *Supra* at para 141.

⁸ *Ibid* at para 150.

⁹ *Ibid* at para 156.

Asanda Nonzwakazi Namba

Biography



Asanda Nonzwakazi Namba grew up and lived in Johannesburg until her family relocated to Durban in 2006 where she currently lives in La Lucia. She is a legal content editor for LexisNexis South Africa and heads up the new LexisNexis SA Forecasting Think Tank project group. She is a youth leader at her church and is currently completing her LLB degree. Law was not her initial choice but after a long and crazy ride she developed an appreciation for the law in general, the role of the courts in our democracy, a passion for justice and an interest in certain areas of the law.

She is driven by the need to learn new things, being an active member in her community, excelling in a successful career that fulfils her, and inspires or challenges her to grow; and lastly, the opportunity to contribute towards something that makes a lasting difference in society. Her long-term goal is to become a respected advocate, but her short-term plan is to secure articles or pupillage. An interesting fact about her is that she comes from a musical family, and as such loves to sing at her local church. She also writes songs and books, and hopes to publish her first book in 2020.

Caveat Subscriptor in a Brave New World

Lungelo Gwala

A BRIEF HISTORY

Reputation is a multifaceted concept having its origin in early Roman law and consists of two aspects, one being an individual's right to *fama* and the other a company's right to goodwill. In early Roman law, protection of personality had its origin in the Twelve Tables and was directed mainly at the physical person, in other words, bodily integrity as an interest of personality. Over the course of time, the protection of personality was extended considerably by Praetorian reforms to include non-physical interests such as good name, dignity, feelings of chastity and privacy.¹⁰

For the purposes of this topic however, we will deal with reputation not as an aspect of personality but rather as a type of contractual right.

FORECASTING THE FUTURE

Let us imagine it is the year 2045. Reputation as you know it has evolved so much that it has re-written the rules of business and economics. Reputation now exists as a commodity that can be traded on the stock market. Further, reputation with regard to consumers now exists as a fully-fledged social credit system. Consumers are ranked according to their reputational scores and these scores are shared amongst all service providers in the reputation economy. The higher they rank, the more benefits consumers enjoy and the lower they rank, the less access they have to social services, participating in the economy, employment, health services, education etc.

With regard to businesses, the more reputationally high-ranking customers they have, the more tax benefits they get; the less red tape they face; the greater lobbying power they have to influence policies regulating the market; and the more preference they enjoy for doing business with government.

Problems arise for business when a consumer does not meet his/her minimum reputation ranking thereby failing to fulfil his/her contractual obligation. In forfeiting his/her reputation he/she tarnishes the businesses' ranking, value in the stock market, lobbying power, tax incentives, and ease of doing business. It then raises the following questions: What recourse will business have against consumers who default, and how will consumers defend their existing rights in this future reputation economy?

¹⁰ Neethling J, Potgieter JM, Visser PJ *Law of Delict 3ed (1999) Butterworths, Durban* at pp 13-14.

A FUTURE SCENARIO – KATE

Breakthrough is a full stack services firm and provides healthcare, security and legal services all under one roof to their clients. Breakthrough is well-known for their Vivacity™ point system where clients can earn points for their healthy and risk-averse lifestyle and use such points for rewards, discounts and access to exclusive services.

Breakthrough prides itself on its game changing Vivacity points system which has set the benchmark for incentivizing healthy living. Vivacity has become an instant hit with the global community and as such has achieved global status, having successfully made inroads into the major economies of the globe. Breakthrough is a listed company on the stock exchanges of these major markets and its reputation is rated in the top five of the most valuable companies.

Breakthrough has always been able to attract the best consumer, someone who is compatible with their product, and their internal and sophisticated recruiting systems have always made sure that no loopholes exist for consumers to exploit. This has been a major contributor to its reputation ranking. Breakthrough ranks its members according to reputation and its packages are tailor made to achieve same.

Kate is triathlon athlete who has won two Olympic gold medals, she also participates in annual iron woman and canoe marathons and when not competing professionally she finds time to also participate in many charity sporting events. She, outside of her professional career, lives a modest life, is married and a mother of two, a non-smoker, exercises daily, eats organic food grown from her own vegetable garden, and occasionally indulges in some wine.

Aside from both her professional and personal life, Kate appears to be a model citizen. She runs a foundation supplying water purifiers to rural areas in her native Kenya and remote communities on the African continent in general.

Owing to her reputation ranking, Kate has been successfully operating under Breakthrough's premium package which is specifically designed for elite athletes like herself. As you would expect of an elite athlete her Vivacity score ranks higher than most and is unrivaled.

A recent exposé in a national newspaper has lifted the veil on the use of illegal performance enhancing substances by elite triathletes. A list has been published of all athletes and their healthcare providers involved in this doping scandal. Kate's name and Breakthrough are on the list. Shocked by this turn of events, Breakthrough decides to conduct their own investigation into Kate's professional career prior to her joining Breakthrough.

What Breakthrough discovers is that Kate was previously suspended for three years by the World Doping Agency for using banned substances and that she did not declare this in her contractual undertaking with Breakthrough. She had hired lawyers and publicists to make sure that her past disappeared from the public space. Breakthrough also uncovers the fact that Kate has been using illegal performance enhancing substances to boost her Vivacity points.

Breakthrough's premium package for elite athletes brings in billions in revenue and a number of elite athletes in major sporting codes have started to come on board by endorsing Breakthrough as their main sponsor.

Breakthrough's reputation ranking in the stock exchange starts to take a heavy beating due to this doping exposé which has tarnished its image as a premium healthcare provider. This has had a ripple effect on its security and legal services.

Breakthrough has a strict non-tolerance policy regarding individuals who misrepresent facts either intentionally or negligently. Incorporated into her contractual agreement is a clause stating that should Kate misrepresent her true state of affairs she would automatically forfeit her reputation and in addition, an action would be instituted against her for pure economic loss.

Now imagine this scenario is playing out in a future where the state has decided not to intervene legislatively and the market has naturally evolved to benefit business at the expense of consumers, in other words, the law has become pro-business and hostile to consumers. Contract law as we know it is no longer available for both business and consumers to institute action or enforce an agreement and as an alternative, another branch of private law, namely the law of delict, is explored by lawyers and courts in an attempt to find solutions.

THE LAW OF DELICT

Professional liability

The general rule is that a person who engages in a profession, trade, calling, or any other activity that demands special knowledge and skill must not only exercise reasonable care, but must also measure up to the standard of competence that is reasonable for a person professing such knowledge and skill. Therefore, the general test for negligence is adapted to accommodate situations in which special knowledge or skill is required.¹¹

The relationship between a professional person and his/her client is primarily a contractual one, which gives rise to potential liability for breach of contract. Where the performance of professional services constitutes either a breach of contract or a delict, the plaintiff can choose whether to proceed either in delict or in contract against the same defendant.¹²

The relationship between a professional person and a client can also give rise to an exclusively delictual action, for example, where one party in the pre-contractual phase negligently or intentionally misrepresented facts to the other, to induce entry into the contract.¹³

¹¹ Loubser et al *The Law of Delict in South Africa 2ed* (2012) Oxford University Press, Cape Town at p 270.

¹² *Ibid.*

¹³ *Ibid.*

EXISTING CONSUMER RIGHTS

The Consumer Protection Act, No 68 of 2008 (CPA) entrenches certain consumer rights which are tantamount to entrenching a “quasi-Bill of Rights” for the consumer.

Right to equality in the consumer market

This right is entrenched in sections 8 to 10 of the Act and is a right afforded to consumers, including natural persons and juristic persons. Section 8 provides that a supplier of goods or services must not unfairly:-

- (a) Exclude any person from accessing goods or services;
- (b) Grant any person exclusive access to goods or services;
- (c) Assign priority for the supply of any goods or services to any person;
- (d) Supply different quality goods or services to any person;
- (e) Charge different prices for goods or services;
- (f) Give exclusive priority or preferential supply of goods or services to particular communities, districts, populations or market segments;
- (g) Refuse to supply goods or services to particular communities, districts, populations or market segments.¹⁴

Enforcement of the right to equality in the consumer market

There is an evidentiary presumption that any differential treatment of consumers is deemed to be unfair discrimination. Therefore, there shall be an onus on the supplier to prove that any differential treatment of consumers is based on discrimination that is fair.¹⁵

What the right to equality in the consumer market means to the consumer

The consumer has the right to:

- Free and unlimited access to goods and services;
- High quality goods and services;
- Fair pricing of goods and services;
- Lodge complaints with the Equality Court where this right has alleged been contravened.¹⁶

Protection of Personal Information (POPI)

The Protection of Personal Information Act, No. 4 of 2013 (POPI) restricts how information can be collected and used and as such has far reaching implications for individuals and businesses. It sets out eight principles, but for the purposes of this discussion, I will focus on two, namely: processing limitation and data subject participation.

Processing limitation - this requires that processing be done lawfully and in a manner that does not infringe on the privacy of the individual.

Data subject participation – requires that the data subject can request whether an organisation holds their private information, and what information is held. They may also request the correction or deletion of information which is inaccurate, irrelevant, excessive, out of date, incomplete, misleading or obtained unlawfully.¹⁷

¹⁴ Campbell N and Logan S *The Consumer Protection Guide for Lawyers - Law Society of South Africa* at p 30.

¹⁵ *Ibid* at p 31.

¹⁶ *Ibid*.

¹⁷ *How do POPI and the Consumer Protection Act impact on my customer database. Accessed at:*

<https://www.entrepreneurmag.co.za/ask-entrepreneur/marketing-ask-entrepreneur/how-do-popi-and-the-consumer-protection-act-impact-on-my-customer-database/> (Accessed on 13/04/2019)

HOW COULD THE LAW EVOLVE TO DEAL WITH THE PROBLEM ARISING IN THE ABOVEMENTIONED SCENARIO?

The approach of business

It is worth repeating that in this future reputation economy the law favours business, so with regard to the general principles of professional liability a further category of relationship would be included, that of the professional person (Kate) and his or her service provider (Breakthrough). So Breakthrough's argument in this regard would be that Kate, prior to entering into the contractual agreement, intentionally misrepresented facts (by not declaring her previous doping suspension) to induce entry into the contract. Thereby causing Breakthrough's reputation to suffer loss. This, they will further allege, gives rise to an exclusive delictual action and as such, the court must consider the appropriate delictual remedies.

Business could make an argument that reputation systems are good for society because they encourage and incentivise good behaviour. This would ease the burden on our courts of having to adjudicate on the many disputes that arise through human interactions. Since the government cannot be trusted to run anything successfully, as seen by the worsening condition of parastatals, privatisation of the system would be the only plausible solution.

How lawyers could stretch existing law to protect their clients

Lawyers could argue that when their clients' reputation is forfeited it would signal an end for them to earn a living in the reputation economy. This they can allege on the basis that a social credit system in the future reputation economy would be incompatible with existing consumer statutory rights based on the following:

- When service providers choose not to provide their services to an individual who has a low score or has completely forfeited their reputation, they would be doing so in conflict with the right of equality entrenched in the Consumer Protection Act (CPA)¹⁸. In particular section 8 which states that a supplier of goods or services must not unfairly exclude any person from accessing goods or services. And further provides for a consumer's right to free and unlimited goods and services.
- An imminent forfeiture of a consumer's reputation without him/her being given an opportunity to rehabilitate their score or being given an option for credit rescue constitutes differential treatment that is unfair. The CPA placing an onus on the service provider to prove that such treatment is based on discrimination that was fair.
- Finally, they could argue that when private tech service providers without prior consent from consumers, share and hold consumers' private information affecting their reputational scores, they are doing so in contravention of POPI and thereby infringing the consumer's right to privacy and freedom of choice as to what information about them is held.

WHAT COULD THE ADVANTAGES OF LITTLE TO NO RED TAPE MEAN FOR BOTH THE MARKET AND CONSUMERS IN THE FUTURE REPUTATION ECONOMY?

A consensus exists that to boost South Africa's economy and to create more jobs, entrepreneurs need to be at the forefront of the nation's productivity. One aspect that has been consistently identified as a stumbling block by entrepreneurs and business in general is the amount of red tape they face.

A pro-business reputation economy could move from the premise that government lacks the entrepreneurial skills, personnel, creativity and economic forecast to be able to govern in the reputation economy and should therefore play a minimal role. As such, business would formulate policies that would make it easier for new entrants to participate in the market with lowered regulatory barriers.

¹⁸ Campbell N and Logan S The Consumer Protection Guide for Lawyers - Law Society of South Africa at p 30.

Notwithstanding the above, while it may be easier for new entrants to participate in the reputation economy there is no guarantee that they will be able to successfully establish and maintain their reputation. Because by virtue of being new players in the market they will not attract as high a number of reputationally high ranking consumers as major players in the economy, and instead attract lower ranking customers who will have less benefits and incentives. Furthermore, with virtually no watchdog in the market, there is also no guarantee that major players in the economy would not engage in unconscionable conduct to abuse market dominance, thereby eliminating competition.

So, although consumers who have earned their rewards through healthier lifestyles and being model citizens in general would be able to access better services, there is no certainty that all businesses would share such scores, thereby creating greater competitiveness in the market, because there would be no independent body to make them do so and hence no repercussions for failing to do so.

Lungelo Gwala

Biography



Lungelo Gwala grew up in Clermont, Durban and is currently employed as a legal content editor for LexisNexis South Africa.

His passion for law started when he was in high school and he received positive feedback on his oratory skills and articulation. His hunger for knowledge and desire to make sense of the environment he lives in and the world in general led him to pursue law.

At the moment, he plans to do his articles of clerkship and to be admitted as an attorney, before experiencing what the world of practice has to offer.

He is always willing to learn, grow and inspire others, and to make a difference to those less fortunate. His interests include reading, particularly on the history, culture and traditional practices of the peoples of the world. He also enjoys road running and is an avid follower of football.

Criminalisation of Reputation Fraud

Ivana Surian

INTRODUCTION

Technology has developed at such a rapid pace that the provision of goods and services is now being linked directly to consumers' reputation scores. Companies like Discovery give you points which can be 'spent' at their partnered stores when you reach your weekly health goals. However, what are the implications for these big companies? What happens when consumers are not given the opportunity to modify or challenge their reputation scores **or resort to artificially manipulating their credit scores thereby committing reputation fraud?** Now, imagine that this happens in a future in which the government decides that reputation fraud committed by consumers presents such a damage to society that it is worth dedicating resources towards investigating and prosecuting incidents of reputation fraud. This paper aims to look into why reputation fraud might emerge in a society if consumers are not able to access legitimate ways to alter or rectify their reputation scores, or commit reputation fraud and the legal consequences following from it in a criminal framework.

WHAT IS REPUTATION FRAUD?

Reputation fraud arises where a consumer tries to artificially manipulate his/her reputation scores. Looking at fraud generally, one can break it down into the following five elements:

1. A false statement of material fact;
2. Knowledge on the part of the defendant that the statement is untrue;
3. Intention to deceive;
4. A justifiable reliance by another party on the statement; and
5. Injury caused to the party relying on the statement.

The best way to define reputation fraud, therefore, would be:

"The intentional use, insertion, provision, communication and/or generation of materially false data, information and/or misrepresentations to manipulate one's reputation status with third party service providers, which they rely on, causing them loss."

To accommodate the criminalisation of reputation fraud in making it an offence, specific law and policies would need to be put in place to govern them. This would be in line with the general idea on protecting market integrity, as to do so would mean that certain conditions be put in place (such as a good regulatory policy, commercial laws that allow for the enforcement of agreements and prevent the misuse of service, etc.). The cost/risk of doing business would become lower and companies would then be more likely to want to do business.

WHY COULD REPUTATION FRAUD BE A PROBLEM?

Reputation fraud could become a big problem, as reputational scores are highly determinative of access to goods and services. Discovery, for example, offers health insurance to consumers at a range of premium rates, which can change depending on consumers' reputation scores. Should a consumer artificially manipulate their credit scores, they will be getting the same benefit at a low premium but to the detriment of the provider.

Where a consumer actively manipulates their credit scores in order to gain the same benefits, the company will be harmed financially as they will now be providing low premiums to people who are in reality unhealthy people (in the case of Discovery). Should this become a frequent occurrence amongst consumers, this will result in companies being unable or unwilling to extend their goods and services to anyone because of the prevalence of reputation fraud.

WHY WOULD STATE INTERVENTION BE NECESSARY FOR CASES OF REPUTATION FRAUD?

The State has a general interest in market integrity. Market integrity is the idea that in order for companies to be able to do business the market must have certain conditions in place as previously stipulated. If those conditions are not present, then the cost/risk of doing business becomes greater and companies are less likely to want to do business unless the State intervenes or other methods of enforcement are found.

THE NATIONAL CREDIT ACT AND THE NEED TO PROTECT MARKET INTEGRITY

The provision of credit is considered to be one of the cornerstones of modern capitalism, one which keeps the economy growing and promotes commercial activity. However, this often leads to a situation where people are spending more money than they have or spending more money than they can earn, and this bad use of credit and poor financial management skills results in over-indebtedness where they are unable to pay back the money owed on these credit agreements.

The National Credit Act 34 of 2005 (NCA) was created to address this issue. The purpose of the NCA is "to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect Consumers."

The case¹⁹ of *Kubyana v Standard Bank of South Africa Ltd*²⁰ expresses the need for not only protecting consumer rights but for protecting market integrity too. The court states "[i]t is imperative for purposes of certainty and the proper functioning of the marketplace that we identify the rights and obligations of both credit providers and consumers under the Act..."²¹

The judgement later goes on to add "[c]redit is an invaluable tool in our economy. It must, however, be used **wisely, ethically and responsibly**. Just as these obligations of ethical and responsible behaviour apply to providers of credit, so too to consumers."²²

¹⁹ Other cases that can be considered (to a lesser degree): *Firststrand Bank Limited v Nkata* [2015] JOL 33049 (SCA) and *Amardien and others v Registrar of Deeds and others (Women's Legal Centre Trust Amicus Curiae)* [2018] JOL 40619 (CC).²⁰ *Ibid* at p 31.

²⁰ *Kubyana v Standard Bank of South Africa Ltd (Socio-Economic Rights Institute of South Africa as amicus curiae)* 2014 (4) BCLR 400 (CC).

²¹ *Ibid*, para [17]

²² *Ibid*, para [38]

THE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS

In certain jurisdictions (especially in the European Union), the state actively polices intellectual property infringement, forgeries and counterfeit goods through the framework of criminal law. Even though the "victims" of these crimes are almost always quite powerful corporates, the state recognises that intellectual property crimes and counterfeit goods represent a major threat to market health and so the framing of it within criminal law is seen as justified. Italy, for example, has a combination of specialist intellectual property courts and the introduction of the Industrial Property Code which has improved the efficiency of its intellectual property regime and judicial system.

Vietnam, on the other hand, has four possible legal options to penalise intellectual property infringements, these being: administrative procedures; civil procedures; criminal charges; and customs seizures. With particular focus on the criminal aspect, Vietnam has its Criminal Code of the Socialist Republic of Vietnam (the Criminal Code) which "allows for criminal proceedings to be taken against infringers who violate trademarks, geographical indications, copyright and related rights. The courts are more likely to impose sanctions in cases involving counterfeit goods comprising food or medicine; entailing a large quantity of goods; and where the counterfeit operation is well organised or repetitive.

The severity of sanctions also depends on the seriousness of the case, the consequences of the violation and whether the offences are repeated. "Pursuant to the amended Criminal Code 2015, sanctions for individuals may include loss of certain civil rights, monetary fines upwards of 1 billion dong and imprisonment for up to 20 years and even capital punishment; whereas, sanctions for legal entities may include loss of certain civil rights, fines of between 1 billion and 15 billion dong, business suspension for up to three years and even permanent suspension."²³

Reputation Fraud could be policed by the state in the same way that intellectual property infringement has been policed in the European Union through criminal law (and not just through private law), as in the above circumstances the market's integrity relies on accurate reputation scoring.

WHAT COULD CRIMINALITY LOOK LIKE FOR A CITIZEN COMMITTING REPUTATION FRAUD AND HOW WOULD PUNISHMENT WORK?

Companies that have been implicated by reputation fraud could have a system in place that deals with the offenders, commencing from an investigation into the wrongdoings of the offender and going all the way up to the penalisation stages and court processes that will take place once the matter gets handed over to the State for prosecution. In this scenario, it is likely that Companies would find a way to set up internal proactive systems designed to prevent reputational fraud from occurring and then once such an offence has been committed by an offending consumer, the matter could then be passed on to the State to appropriately prosecute the offender.

The Southern African Fraud Prevention Service (SAFPS) is an example of such an initiative. One that is aimed at combating fraud across the financial services industry by providing a shared database of persons involved in fraudulent activities in the workplace to member organisations and the public as a means of protecting themselves against impersonation and identity theft. When applicants are caught making fraudulent job applications, their details are kept on the system for three years. During this time, potential employers searching against the database can discover the applicant's fraud. As has been the case recently, these incidents have become public knowledge, compounded by social media and seriously affecting the reputation of the perpetrators.

Currently, very few of the types of fraud which are listed on the SAFPS database are prosecuted criminally as their incidence is too common, and the processes too burdensome for affected companies to pursue.

²³ <https://thelawreviews.co.uk/edition/the-intellectual-property-review-edition-6/1144678/vietnam>

However, it is hoped that when the National Qualifications Framework (NQF) Amendment Bill [B 20- 2018] becomes law it will provide a mechanism for the South African Qualifications Association (SAQA) and relevant Quality Councils to punish employees and institutions for fraudulently misrepresenting their certifications and qualifications. Misrepresented or fraudulent qualifications and part-qualifications will be placed in their respective registers – naming and shaming; and SAQA will have the right to impose penalties ranging from fines to imprisonment or both.

Current remedies: If somebody believes that false information has been listed about them on the SAFPS database, and they have proof that it is false and they have not been able to resolve their dispute with SAFPS, relevant credit provider or company that listed the information, they can complain to the National Credit Regulator.

Now, consider the following future scenario.

A FUTURE SCENARIO – EMMA

Emma is a young professional who stays in a fashionable area of Cape Town and drives a sporty car. She also likes fine dining at chic restaurants, dresses well and has frequent hair treatments and pedicures. This means that she barely balances her income and expenses each month and often uses her credit card in the last week before payday.

To maintain her lifestyle, Emma has substantially reduced her expenses by having her property insurance, long-term insurance, health cover, pension and all her banking and financial services with Encounter Life. She secured low interest rates and premiums as well as discounts at affiliated stores by cleverly filling out the application forms to give favourable results.

On the question of how many alcoholic drinks she has a day, she ticked the box for one, when she actually drinks three to five (and on weekends a whole lot more). Further, on the questions of pre-existing medical or psychological conditions, she ticked “no” to all. She actually has a serious condition, but it has been under control for two years and she is pretty sure she won’t relapse so why compromise her score? It is all in the past, and she was treated in the UK so no one will ever know.

At a nightclub one weekend, she has a few drinks too many, and her condition flares up and she is hospitalised. Encounter Life discovers her condition on the medical bills. The policy wording is clear and it is not inconceivable that the following could happen.

Encounter would lay charges of reputation fraud, as they do in such cases, because the facts are clear and they need to do so to protect the low premiums of their honest customers. Based on Emma’s signed application forms and her hospital records, she has no defence, is convicted of reputation fraud and given a high fine and community service. Her fraud is also recorded on a state-run Fraud Database, where it will be red flagged. Whenever she tries to access property insurance, long-term insurance, health cover, pension, banking, financial services or any instance of background screening, her fraud will be noted, adversely affecting her profile and preventing her from enjoying preferential treatment. Over and above this, she now owes the company a fearsome amount for the discounts to which she was not due.

WOULD CITIZENS HAVE TO FORFEIT THEIR REPUTATION?

When looking at the punishment for committing a crime of reputation fraud, an interesting perspective is that the citizen committing the reputation fraud would have to forfeit their reputation. This could cause some serious consequences for their reputation status and many questions arise as to the form of protection consumers may have in a situation where they have to give up their reputation scores as punishment for reputation fraud.

There is already the policy idea within our legal jurisprudence that the state's interest in maintaining the health of the market might in some cases outweigh equitable/dignity considerations in a specific case. This could be applicable here, too, where citizens may be asked to forfeit their reputation where they have committed reputation fraud.

Ivana Surian

Biography



Ivana Surian grew up in Durban, has an LLB from UKZN, and is currently completing her LLM in Maritime Law at Howard College. She is a legal content editor for LexisNexis South Africa and chose a career in law because she has an immense passion for it.

Her plan for the next five years is to complete her articles and to start practising in the field of maritime law. Making a contribution to the future of maritime law is what drives her every day. She spends her spare time as a Durban based photographer specialising in Corporate, Event, Family and Portrait photography. She also has a great passion for learning languages.

State Regulatory Intervention through Institutional Oversight

Preneshan Pillay

THE ROLE OF STATE REGULATORY SYSTEMS

State regulatory systems play a vital role in a country's economic and infrastructural growth and development. Existing regulatory institutions such as the National Credit Act 34 of 2005 (NCA) and the Consumer Protection Act 68 of 2008 (CPA) serve as state watchdogs overseeing the protection of consumers in the marketplace as they attempt to create equilibrium between consumer limitations and consumer rights. This article aims at forecasting what a future could look like, where reputation is commodified; the possible role regulatory bodies would play, and the influence they could have in allowing consumers access to goods and services. Reputation can therefore be affected by such regulatory systems based on the effectiveness or ineffectiveness of their implementation.

REWARDING GOOD REPUTATION

In an ever growing and changing society, reputational measures have crept their way into affecting the lives of citizens in some or other way. Social media plays an important role for those who seek comfort in the safety of the technological world, one that has begun to dictate the importance of standards of reputation and how they will directly affect the future economy. Today we see how insurance companies use reputation to influence their customers to live a healthier lifestyle, thus earning them a discounted rate on their premiums. An example of this would be Momentum Multiply, which is a wellness and reward programme, which encourages people to live better and to make healthier lifestyle choices. In return they are rewarded with discounted rates and cashback rewards from any one of Momentum's various partners including Mango Airlines, Pick 'n Pay, Dischem and Nu Metro. With their discounted membership fee to partners Virgin Active, points can be earned through exercising, eating and living a healthy lifestyle. Their goal is to improve the health, finances, safety and overall fitness of members. However, while many strive to keep up with these ever changing times and policies, what about those of us who choose to live a simpler, less complex lifestyle? In the real world, we face everyday problems which could affect the way we live, and which do not always allow us the opportunity to live the way we would need to, in order to meet the requirements of these programmes.

A FUTURE SCENARIO – SAM

Let us imagine a future where the market is regulated by state intervention via institutional oversight in order to protect the consumer. It is the year 2030 and reputation is given great importance as it affects the economy directly. This would influence and affect the way in which people live and the choices they would have to make. Take Sam for example. She is a part time student who recently completed her degree, which she paid for by working a job in sales while she studied. Sam grew up in the suburbs but has always dreamed of living in the city. She is a firm believer in a cash is king policy and is against the usage and spending of 'plastic money' which is why she has no credit history or accounts of any sort that would link her to credit. As far as credit scores go, Sam is virtually non-existent in the reputation economy. She is also a first-time parent, which has required her to start thinking ahead financially.

Sam recently got a call up from one of the biggest accounting firms in the country. They need someone to fill a position with immediate effect, but there are certain requirements she is obliged to meet. This being Sam's dream job, she does not hesitate to quit her job in sales and agree to meet the company's requirements. She is required to move to the city, which is in another province, get her own place and have her own vehicle, all of which need to be done as soon as possible and are accounted for as part of her salary. Sam applied to the local bank for a bond in order to seek permanent accommodation, but her reputational credit scores were too low and she is given an 'at-risk status'. Anyone found to be at risk results in an automatic decline of their applications. She applied at a car dealership for in house finance because she needs to buy a vehicle. Here too she was met with a dead end, as she is found ineligible due to her poor reputation scores. They advise her to increase these scores and to try again after a minimum 90-day waiting period. Having not fulfilled the company's requirements of urgency, residency or vehicle ownership, Sam was subsequently notified that the job had been given, almost immediately, to someone more capable and who had met with all of the requirements.

It may be argued that she could find work elsewhere after increasing her reputational value, but the company's withdrawal of their offer has left a corporate scar on her reputation. In an economy in which reputation is commodified, her record will show the company's decline of her application, after the job had been offered. This means other companies too will be reluctant to employ her, having a further detrimental effect on her already tarnished reputation in the industry. From having been her dream job, she now has little hope of employment at that or similar companies in the future.

What form of redress, if any, will Sam have available to her? How will the state regulatory bodies play a role in protecting the consumer against such outcomes? We are likely to face these and similar questions in the near future given the current growth rate in the role and importance of reputation in the economy.

SOCIAL ISSUES IN RELATION TO REPUTATION THROUGH STATE REGULATORY BODIES

One of the social issues this future would face is not so different from the current reputation challenges and the way in which legislation is implemented through regulatory bodies. The effectiveness of state regulatory systems such as the NCA can affect reputation positively if they are strictly followed in practice. However, in its current form the NCA has a lack of potency in implementing measures to protect reputation. The main debt relief mechanism established by the ²⁴National Credit Act is debt counselling, under section 86. Unfortunately, this form of relief tarnishes the reputation of the consumer instead of affording protection against credit abuse. In a world where reputation measurements are very important, this limitation would be a substantial disadvantage, as consumers would not feel safe enough to engage with service providers who simply don't protect them enough. Consumers' reputations therefore need to take precedence over the limited protection state governed institutions offer, to avoid putting their reputations at risk. Institutions will be faced with legal challenges and will have to be made aware of the nature and extensive scope of consumers rights, in order to protect their reputations properly. However, this will enhance their reputations, as it will show that their priority lies with consumer rights and protection. This is essentially the 'safe zone' that consumers who are entering into a contractual agreement with service providers look for.

²⁴ Debt Counselling – Principles & Guidelines and Section 86 of the NCA

AN EXAMPLE OF THE ROLE OF STATE INTERVENTION

To have an idea of the role state intervention institutions could play in South Africa's economy, democratic developing states like India and Brazil are a good starting point, as they have shown the essential influence state financial institutions play in dramatically improving their economies. ²⁵The Brazilian Government authorised state-owned banks to take equity stakes in private banks and to buy loan portfolios from financial institutions that have liquidity problems, or are owed money by companies in financial difficulty. This system reduced the effects of the financial crisis that loomed and helped stabilise the reputation economy.

Several economically strong and socially equitable states and regulatory state systems have acted as catalysts for accelerated industrialisation, economic growth and human resource development. ²⁶The India-Brazil-South Africa (IBSA) forum was created in June 2003 with the intention of strengthening sustainable development, in a quest for the security and well-being of their peoples and the developing world. The ideologies, norms and values supporting the IBSA Dialogue Forum are participatory democracy and respect for human rights and the Rule of Law. The strength of IBSA comes from the shared vision of the three democratic and developing countries in mutually strengthening sustainable peace and stability.

One of the crucial roles state bodies undertake is the strengthening of a country's economy. Our economy is weakened by high consumer credit rates, and the limitations imposed on consumers make it difficult for economic and financial progress, which are key to reputation. South Africa urgently needs to fast-track its industrial development and economic growth rates as well as increase its human resource competencies. Statistical reports have concluded that South African state regulatory institutions have yet to realise their full development potential. Economic stability will be reached when state interventions seek to protect consumer rights and implement strategic structured legislation. If said legislation is not adhered to by the state regulated bodies, strict liability clauses must be implemented against service providers who use those regulatory systems to underpin their contractual agreements. In essence, a stronger relationship between legislation and the bodies that enforce that legislation is required in order to ensure balance and equality between the consumer and service provider. Current legislation and institutions do not fully protect the consumer and in fact leave them vulnerable to financial instability through their contractual clauses and high interest rates. If the state regulated bodies do succeed in meeting such requirements, then the reputation economy is set to improve significantly.

THE RELATIONSHIP BETWEEN CONSUMER AND SERVICE PROVIDER IN RELATION TO REPUTATION

Reputation will play a direct role in the type of relationship/contractual agreements consumers enter into with service providers. Currently there is a clear imbalance of power between consumers and credit providers; a lack of information provided to consumers; a lack of awareness by consumers of their rights, with a corresponding lack of enforcement of rights; and consumers are tied to unfair and burdensome credit contracts. On the other hand, this points to the broader socio-economic impact of credit agreements, like financial hardship and loss of wealth and savings, as well as psychological and social suffering being another issue. This affects reputation negatively and reiterates the impotency of legislative implementation. Responsible lending practices cover a wide array of measures, such as consumer education and the promotion of financial literacy, responsible marketing, the provision of information, explanations and advice to consumers before the conclusion of the contract, the regulation of the cost of credit, the prohibition of certain lending practices, and the pre-agreement screening of consumers to determine their ability to repay the debt as per the terms and conditions of the agreement (credit worthiness or affordability); all of which can be used to extend existing legislation.

www.ncr.org.za/pdfs/Guidelines/Principles%20&%20Guidelines/DEBT%20COUNSELLING%20%20%20PRINCIPLES%20GUIDELINES%20%20-%20BASA%20training%202008.pdf

²⁵ **State Financial Institutions** <http://siteresources.worldbank.org/EXTFINANCIALSECTOR/Resources/282884-1303327122200/Note12.pdf>

²⁶ **The India-Brazil-South Africa Dialogue Forum** <http://www.ibsa-trilateral.org/>

These existing regulatory financial institutions were critically influential to South Africa's financial crisis which led to us having to borrow money from other countries. A way in which the government could in future correct this issue is by amending existing legislative bodies to include and offer a wider scope of protection as well as enforcement of said accords mentioned in The CPA. This will also strengthen the economy and protect consumers against prejudice from regulatory systems through harsh clauses and limitations. The Act aims to protect the interests of consumers, ensure accessible, transparent and efficient redress for consumers who are at risk of being exploited and/or abused in the marketplace as well as to giving effect to consumer rights.²⁷The CPA defines a consumer as any person to whom goods and services are marketed, who is a user of the supplier's goods, and who enters into a transaction with the supplier or service provider of any services and products. Examples of such exploitative behaviour are found in the NCA where consumers are blacklisted for exceeding their credit limits; blacklisted consumers are denied access to certain privileges and services; and the fines and penalties imposed on consumers who have outstanding debt are legally binding. Blacklisting is the process whereby regulatory financial systems compile a list of people whose credit records are such that they are denied from accessing further credit facilities. The relevance of dealing with this issue is that as it stands, being blacklisted significantly damages a consumer's reputation, making it difficult to access goods and services. In a future that is dependent on a strong reputation for such access, this poses a problem.

WHY HAVE SUCH SOCIAL ISSUES EMERGED IN THIS FUTURE?

The point of interest here is the importance reputation plays in a future that is dependent on strong reputations necessary to allow one to access goods and services. Previous dispositions in legislation allowed prejudice in which one party is protected at the expense of another party. The problem that arises in such situations is the inequality of who gets exposure and access to goods and services because of their current reputational standards. In ²⁸*SA Taxi Securitisation (Pty) Ltd & others v Mbatha*, the court remarked that, while one purpose of the National Credit Act is to discourage reckless credit, the Act is also designed to facilitate access to credit by borrowers who were previously denied such access. Consequently, an over-critical armchair approach was taken by the court towards credit providers when evaluating reckless credit especially to the less affluent members of society. This brings us back to the point of reputation and the social and legal standpoints of how consumers' rights are being abused.

ADAPTING METHODS OF REDRESS FOR A STRONGER REPUTATION ECONOMY

In order for economic expansion, current legislation should be amended to suit the diverse nature of consumers. This legislation will have precedent over existing legislation in order to combat and overcome any loopholes currently suffered by consumers in the marketplace. The NCA allows consumers freedom to spend more than they can afford. For instance, consumers are given credit of R10 000 upon opening a clothing account regardless of their financial stability at the time and university students are given the opportunity to obtain credit cards without being employed. These are classic examples of marketing strategies that can lead to a consumer being pulled into a world of 'plastic money' without always having the requisite knowledge that is required before they enter into these contractual agreements.²⁹The CPA protects consumers against hazardous transactions and unfair trade practices. It affords consumers the ability to seek redress through the National Consumer Commission and the National Consumer Tribunal on credit and transaction issues instead of having to carry the burden of court fees. One of the cons of the CPA is that while it affords protection to the consumer, it does not impose any strict liability on those who supply the goods. Another weakness under the CPA is that the consumer can only seek redress if he or she has suffered loss or damage due to unfair trade practice as opposed to suffering a lesser damage, for instance deficiency in service. The purpose of these adaptive methods is to ensure consistency in the protection of consumer rights which in effect protect the reputation of both the consumer and service provider.

²⁷ **The South African Consumer Protection Act 68 of 2008** <https://www.saconsumercomplaints.co.za/your-rights/>

²⁸ <http://www.saflii.org/za/cases/ZAGPJHC/2010/24.html>

²⁹ <https://www.banking.org.za/consumer-information/legislation/consumer-protection-act>

More protection should be afforded to consumers by giving more room for redress through unbiased conditions over and above having the right to redress an issue only after suffering loss or damage. Lesser penalties should be imposed, consumers should not feel like prisoners in the sense that they are tied down to these creditors for long periods of time which in turn leads to their financial situation deteriorating. Credit payments are also one of the key ways in which credit scores are calculated, which directly translates to consumers only being allowed certain purchases on credit like cellphone contracts and car purchases through finance, if their credit scores are sufficient and up to market regulation standards. This requires the consumer to have an existing credit payment history in which payments have been made timeously and for a certain period. Unfortunately, this limitation not only forces the consumer into a prolonged financial commitment with the debtor, but also limits a consumer who has no credit history or has not been a credit consumer for the requisite period. Consumers should have the right to choose how they want to spend their money without being burdened with the unreasonable nature of getting certain services. This new legislation can implement a strategy to overcome such grievances by introducing different quartiles of risk and creditworthiness rating in order to determine who should and who should not be given credit.

AN OMBUDSMAN

Industry regulation in the form of an ombudsman also plays an important role in the protection and limitation of consumer abuse. An ombudsman is an independent, impartial official appointed with authority to receive, address and investigate complaints about government actions, a company or public authorities. The role of the ombudsman is to assist consumers with conflict resolution by assistance and mediation and to follow up with appropriate actions. "They provide a free service to consumers who cannot get a satisfactory remedy from the company or service provider concerned. They look at both sides of the story and obtain redress for a consumer where they are of the view that the company or provider has not acted correctly".³⁰ The future could have this role becoming more interactive and aggressive in order to ensure a sustainable environment for the expansion of legislative law. Accessibility, fairness, public accountability, effectiveness and impartiality form part of the criteria which makes an ombudsman effective and independent from those who they have the power to investigate. There are however, downsides to the current powers which they have. The complainant has no control over the investigation as the ombudsman does not act specifically for the complainant and may reject certain matters. Certain types of ombudsman (commonwealth ombudsman) may only be able to offer investigative action and no conciliation. Complex issues take a while to be resolved.

The nature and scope of the new ombudsman's powers can be increased to include recommendations made by the ombudsman, to improve services and the overall experience of individuals, by changing policies and procedures that currently pose issues in the system. The scope and purpose of the ombudsman must be the sole protection of consumer rights and all current shortcomings need to be addressed in order to promote legislation that is clear and unprejudiced. In keeping with the policy of consumer rights protection, legislation will be improved to include further protection through more room for redress and reduced penalties. Once these changes are facilitated, the protection of reputation will be strengthened through the state regulated bodies which empower the ombudsman, giving him the requisite powers that make it possible to ensure unbiased and fair representation of the consumer in any eventuality.

CURRENT LAW AND STATE BODY INSTITUTIONS PLAYING A ROLE IN THE MARKET

There are existing state bodies that influence the market which in turn affects reputation standards. One of The Competition Commission Act's (CCA)³¹ aim, as mentioned in Chapter 1, Section 2, is to promote efficiency, adaptability and development of the economy. In practice however, there is underwhelming evidence to suggest this is the case. The economy is further weakened by the methods of implementation which don't allow these state regulated bodies to ensure these aims are being met. Non-compliance on the part of the service provider, with regards to legislation, dampens their reputation as a trustworthy party to enter into contractual agreements with. The CCA affords further protection to the consumer through exemption in terms of Section 10 (1) to (3) of the Act. This allows the consumer to be freed from an obligation under the said sections, under circumstances that meet the Competition Commission's requirements.

³⁰ <https://www.yambu.co.za/ombudsman/>

³¹ The Competition Commission <http://www.compcom.co.za/who-are-we/>

CONCLUSION

The current standing of law offers limited protection to reputation. The state can intervene to amend this through institutional oversight. One solution is to rely on the market. The concept is that reputation and sales of businesses will be significantly damaged if they upset customers' desires about privacy protection. An opposite institutional approach would depend on government enforcement. The basic idea is that the administration of compulsory legal rules would discourage companies from abusing people's privacy. In short, state regulatory bodies could afford requisite protection to the consumer if they are adapted to suit consumer needs and to regulate the effects which play a role in the reputational standards of consumers.

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Preneshan Pillay

Biography



Preneshan Pillay grew up in Durban and is currently a legal content editor, employed by LexisNexis South Africa, and is completing his BA degree in legal studies and criminology. His plan for the next five years includes completing his current degree as well as obtaining an LLB after which he plans to practise in the field of criminal law.

He chose law because not only is it a vast field with interesting insights but it is also intellectually stimulating and offers a range of diverse opportunities. He believes that he is an individual who is always up for a contest insofar as a debatable argument is concerned. His passion for interacting with people also swayed him in his choice to study Law.

His hobbies revolve around the world of sport. He plays (non-competitive) indoor soccer once a week and coaches his nephews' little league team.