

Corporate & Commercial

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SOUTH AFRICA

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MOI trumps shareholder arrangements

Being a shareholder in a private company tends to mean that you will interact with your fellow shareholders, and that you can collectively govern the affairs of the company in question as shareholders. However, that ability to govern the company is, of course, always subject to the parameters that the law sets.

One of the foundational principles of the Companies Act 71 of 2008 (Companies Act) (and one which is frequently missed or misunderstood by shareholders) is set out in section 15(7) – a provision of a shareholders' agreement that is inconsistent with the memorandum of incorporation (MOI) is void to the extent of such inconsistency.

A recent judgment of the *Western Cape High Court* (*South African Renewable Green Energy (Pty) Ltd and Others v Coria (PKF) Investments 28 (RF) (Pty) Ltd and Others* (6020/2023; 16391/2023) [2025] ZAWCHC 458 (9 October 2025)) affirms this principle and addresses the interplay between a company's MOI, shareholders' agreements, and related voting rights arrangements. The case provides important guidance on the enforceability of shareholders' agreements that conflict with a company's MOI, the enforceability of agreements to make future amendments to constitutional documents, and the limits of retrospective validation.

Facts

The dispute followed a complicated restructure of a private company operating in the renewable energy market and its shareholding. The transaction was implemented through a suite of agreements, including a shareholders' agreement and a voting rights agreement providing for directors to have weighted voting rights. That is, the shareholders agreed that the directors should not have one vote on each matter, but rather each director would have a number of votes determined by reference to the shareholding of the shareholder who nominated that director. Not all of the shareholders were party to the voting rights agreement.

The agreements sought to allocate board representation and voting rights among the various stakeholders, with particular focus on the control of the company through a family-held entity, accommodating board representation for funders, and aligning with Department of Energy and lender requirements. Crucially, however, the MOI had not been updated to reflect the weighted voting rights which the agreements purported to confer on the directors (for commercial and timing reasons).

The agreements included a commonly used provision to the effect that the shareholders are obliged to amend their agreement in the event that there is an inconsistency with the MOI to remove that inconsistency – a fallback position designed to attempt to give effect to the agreed intent of the shareholders if an inconsistency did arise.

MOI trumps shareholder arrangements

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For our purposes, the core issues before the court were:

- whether the conflicting provisions regarding directors' voting rights in the agreements and the MOI rendered the relevant provisions void under section 15(7) of the Companies Act;
- whether the fact that the relevant agreement was between some, but not all, shareholders affected the interpretation;
- whether a subsequent amendment of the MOI to align with a previously conflicting provision could retrospectively validate that provision; and
- the extent to which an agreement obliging the shareholders to amend the MOI to align it with the shareholders' agreement would be enforceable.

The court held that, in terms of section 15(7) of the Companies Act, the provision which sought to weight the directors' voting rights in conflict with the provisions of the MOI was void and unenforceable. The court rejected arguments that such a provision could be retrospectively validated by a later amendment to the MOI, emphasising that a void provision cannot be revived *ex post facto*.

The court also noted that even if an agreement is between some, and not all, shareholders, its provisions should still comply with the Companies Act and are therefore required to be consistent with the MOI.

The court declined to order the parties to take steps to amend the MOI to reflect the weighted voting regime, noting that such an amendment would require consequential amendments and a comprehensive alignment of the MOI with the shareholders' agreement, as well as the consent of third parties. The court emphasised that piecemeal amendment would not resolve the broader governance issues and that further negotiation among the parties was required. A guiding principle of South African contractual law remains that a court will not make an agreement for the parties.

Practical considerations

It should be borne in mind that section 15(7) should be interpreted narrowly, and only in situations where there is direct and irreconcilable conflict between the MOI and a shareholders' agreement (*Gihwala and Others v Grancy Property Ltd and Others* 2017 (2) SA 337 (SCA)). However, the Coria case illustrates the risks where a conflict arises. The primacy of the MOI in our companies law means that shareholders need to be cognizant that, however clearly they agree amongst themselves on provisions, the act may override that agreement. Ultimately, shareholders' agreements (however framed) and the MOI need to be negotiated and agreed as a single consistent package.

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It is also not enough to rely on a fallback undertaking to amend a way out of the problem: where there is a conflict between the MOI and a shareholders' agreement, courts (as in this case) may well be reluctant to order amendments to the MOI, given the complexities surrounding such variations. A practical fallback that might be considered could be the incorporation of a deadlock mechanism whereby the MOI or shareholders' agreement stipulates that an independent third-party expert be appointed to resolve any such inconsistencies, with that expert's determination then being binding on the parties.

In conclusion, this judgment underscores the dominance of the MOI in corporate governance and the limitations on the enforceability of shareholder agreements that conflict with it. The case highlights the importance of ensuring alignment with constitutional documents and the need for comprehensive, rather than piecemeal, amendments when resolving governance or commercial difficulties that arise. Parties to complex funding and shareholder arrangements should take care to ensure that all agreements are consistent with the MOI and the Companies Act to avoid similar disputes.

David Pinnock, Ismail Makda and Ridwaan Hassan

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Land Bank decisions clarify insurers' governance obligations and powers of the Prudential Authority

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Two recent decisions – a Financial Services Tribunal (Tribunal) ruling and a Gauteng High Court judgment – have clarified the Prudential Authority's (PA) powers under the Financial Sector Regulation Act 9 of 2017 (FSRA), the transitional application of section 23(1)(a) of the Short-term Insurance Act 53 of 1998 (STIA), and governance obligations under the Insurance Act 18 of 2017 (Insurance Act). These cases arose from administrative penalties imposed on Land Bank Insurance Company SOC Limited (LBIC) and Land Bank Life Insurance Company SOC Limited (LBLIC) and provide important lessons for insurers on compliance and enforcement risk.

Background

The PA imposed penalties on LBIC and LBLIC for alleged governance breaches. The PA alleged that the LBIC amended its memorandum of incorporation (MOI) without prior approval, in contravention of section 23(1)(a) of the STIA; that both the LBIC and LBLIC appointed directors without prior regulatory approval, as required by section 14(1) of the Insurance Act; and they failed to notify the PA of director terminations within the prescribed period under section 16(1) of the Insurance Act. The penalties were significant: the LBIC was fined R5 million (R3 million suspended), and the LBLIC was fined R2,064 million (R1.376 million suspended).

The LBIC and LBLIC argued before the Tribunal that they had not breached section 14 of the Insurance Act because director appointments were made subject to PA approval and the PA had been informed thereof. They contended that the Insurance Act does not require PA approval before the appointment of select key persons (such as directors). Regarding section 16 of the Insurance Act, the LBIC and LBLIC admitted their late notifications but maintained that no prejudice was caused to any stakeholders as a result thereof. On penalties, they argued that the amounts imposed were disproportionate and that the PA had not acted within the FSRA's prescribed timeframe for enforcement.

The statutory framework

Section 23(1)(a) of the STIA provided that "a short-term insurer shall not amend its memorandum or articles of association without the prior approval of the Registrar". This provision was repealed when the Insurance Act came into force.

Under the Insurance Act, section 14(1) states that: "The appointment of any of the following key persons must be approved by the Prudential Authority and takes effect only if the Prudential Authority approves the appointment."

In terms of section 14(1)(a) of the Insurance Act a director is deemed to be a key person.

Section 16(1) of the Insurance Act requires that: "An insurer ... must notify the Prudential Authority of the termination of the appointment of a key person within 30 days of the termination of such a person."

Land Bank decisions clarify insurers' governance obligations and powers of the Prudential Authority

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Tribunal's findings

The LBIC and LBLIC applied for reconsideration of the PA's findings and penalties under section 230(1) of the FSRA.

The Tribunal held that the PA's reliance on section 23(1)(a) of the STIA when having imposed the penalty on the LBIC was unlawful because:

"Schedule 3 of Item 5 of the Insurance Act permits the taking of regulatory action under the repealed STIA. However, the STIA contained no provision for the imposition of an administrative penalty for a contravention of section 23 ... As a result, no administrative penalty could competently have been imposed by the PA on the insurance company for a contravention of section 23 of STIA."

On section 14 of the Insurance Act, the Tribunal found that the PA's willingness to have granted retrospective approval of the directors' appointment undermined its contention that its approval must be granted prior to appointment and supported the insurers' arguments on this issue. In circumstances where the PA grants retrospective approval of inter alia director appointments, the Tribunal held, such approval has the result that the appointments and the approvals coincide.

Regarding section 16 of the Insurance Act, the Tribunal acknowledged that the insurers' notifications of director terminations were late but emphasised the absence of harm. The Tribunal held:

"There is no indication that the PA, the company, its shareholder or policy holders were in any way affected by the breach. It is apparent that the PA was more concerned about the general problems with the administration of the applicants than with the seriousness of the particular contravention."

On penalties imposed by the PA, the Tribunal stressed the importance of proportionality and held, in relation to the amount of the penalty imposed: *"taken in isolation it is excessive"*.

As a result, the penalties imposed by the PA were reduced to R250,000, half of which was suspended on the same conditions as per the initial PA ruling.

High Court review

The PA sought judicial review of the Tribunal's ruling in the High Court under the Promotion of Administrative Justice Act 3 of 2000, arguing that the Tribunal acted irrationally and exceeded its powers. The High Court dismissed the application with costs.

On section 14 of the Insurance Act, the court agreed with the Tribunal's interpretation and further held that: *"section 14, on no interpretation, reads that there must be approval of directors by the PA before appointment ... logically and practically, there cannot be approval before appointment"*.

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On section 16 of the Insurance Act, the court endorsed the Tribunal's approach:

"The external effect is a factor to consider and the PA could not refer to a single negative external impact of this contravention two years after section 16 was contravened ... There is however no evidence that stakeholders herein were not protected ... With the PA not setting out ... what factors were considered, the FST acted within its powers to substitute the amount of the penalty and acted rationally ... The PA should have placed facts before the FST as to how the penalty was determined."

Finally, on section 23(1)(a) of the STIA, the court confirmed that: *"It is undeniable that the FSR Act cannot be applied retrospectively ... the FST was correct in finding the PA acted ultra vires when it imposed the penalty for the contravention of section 23."*

What these decisions mean for insurers

These rulings confirm that although the PA could rely on section 23(1)(a) of the (now repealed) STIA to the extent, and during such time periods, as provided for in superseding legislation, the transitional provisions of the superseding legislation did not authorise the PA to impose penalties for contraventions that occurred under the STIA after its repeal, and the STIA itself did not make provision for administrative penalties to be imposed on short-term insurers for amending their MOI without prior regulatory approval.

In relation to section 14 of the Insurance Act, the judgments clarify that regulatory approval is required for the appointment of select key persons but not necessarily before the appointment is made; to the extent that relevant key persons are appointed subject to regulatory approval, such appointments do not amount to a breach of the Insurance Act.

Section 16 of the Insurance Act remains important, as insurers must notify the PA within 30 days of termination of the appointment of key persons, however, penalties imposed by the regulator for non-compliance with these statutory timelines should reflect actual harm caused rather than technical non-compliance.

For insurers, these decisions highlight the importance of:

- Understanding the Insurance Act's transitional provisions and prescribed time limits for regulatory.
- Ensuring that key person appointments are made conditional on PA approval and that record thereof is properly documented.
- Maintaining timely notifications under section 16 of the Insurance Act and, in case of non-compliance, keeping clear records evidencing that such late notifications caused no harm or prejudice to relevant stakeholders.

Eben Smit

High Court clarifies insurer liability in *Biovac v Guardrisk*

The recent judgment in the Johannesburg High Court involving the Biologicals and Vaccines Institute of Southern Africa (Pty) Limited (Biovac) and Guardrisk Insurance Company Limited (Guardrisk) has provided important guidance for non-life insurers on the limits of policy repudiation, especially where regulatory non-compliance and alleged misrepresentation are at issue. The case arose after a fire at Biovac's Cape Town facility, where losses were split between two insurers. While Allianz (having insured half of Biovac's facility) settled its portion of the claim, Guardrisk repudiated Biovac's claim, prompting Biovac to initiate legal proceedings.

The court was asked to determine three main points:

- whether Biovac had made material misrepresentations to Guardrisk regarding electrical compliance certificates;
- whether Biovac's failure to possess such certificates amounted to a breach of the policy's reasonable precautions clause; and
- whether Biovac's claim was time-barred due to procedural amendments.

Facts and points in contention

At the heart of the dispute was Guardrisk's assertion that Biovac had misrepresented its compliance with electrical certification requirements during a pre-insurance survey. Guardrisk further argued that Biovac's failure to possess up-to-date electrical compliance certificates breached a key policy condition requiring compliance with statutory obligations. Finally, Guardrisk contended that Biovac's claim was time-barred, citing the timing and amendment of legal pleadings.

The court, however, focused on the substance of these three issues, setting aside procedural matters such as condonation.

Why the court ruled in favour of Biovac

The court found that Guardrisk failed to prove that Biovac had made any material misrepresentation. The evidence presented by Guardrisk did not support the claim that Biovac's representative had assured it (Guardrisk) of full compliance with electrical certification requirements. Judge S.D.J Wilson noted inconsistencies in Guardrisk's own inspection survey documents and highlighted that the burden of proof rested squarely on Guardrisk. In the absence of clear, reliable evidence, the court concluded that no misrepresentation had been made.

High Court clarifies insurer liability in *Biovac v Guardrisk*

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Turning to the question of regulatory non-compliance, the court emphasised that the policy in question was an “all-risks” policy, which by its nature insures the policyholder against its own negligence. Judge Wilson made a critical distinction between “negligence” and “recklessness”, holding that only the latter could justify repudiation under the “reasonable precautions” policy condition. The court further held that there was no evidence that Biovac had acted recklessly or with conscious disregard for the risk; on the contrary, Biovac’s facility was described by multiple witnesses as well-maintained and professionally managed.

The court’s reasoning on this point is particularly significant for non-life insurers, as it sets a high bar for avoiding liability on the basis of regulatory breaches – noting that the existence of mere negligence is insufficient to justify repudiation.

On the third point, the court dismissed Guardrisk’s time-bar argument as technical and without substance. Judge Wilson found that Biovac had brought its claim within the required period and that amendments to its pleadings did not amount to the introduction of a new claim.

The recklessness principle and lessons for insurers

The most consequential aspect of this judgment lies in the court’s treatment of the “reasonable precautions” policy condition. Judge Wilson explained that, under South African law, recklessness involves a conscious acceptance of a known and serious risk, whereas negligence is simply a failure to take reasonable care.

The court held that:

“The essence of recklessness is that a known and serious risk is accepted as the likely consequence of a given course of action. A reckless person knows that damage is likely to follow from particular conduct but carries on nonetheless. A negligent person merely proceeds without taking reasonable measures to mitigate foreseeable risk.”

In this case, there was no evidence that Biovac knew it lacked the required compliance certificates or that it consciously disregarded the associated risk. Expert testimony described Biovac’s operations as exemplary, further undermining any suggestion of recklessness.

The court’s approach in this regard underscores that, for non-life insurers, policy exclusions based on regulatory non-compliance will only succeed where there is clear proof of reckless conduct, not mere oversight or administrative error.

Conclusion

This judgment serves as a reminder that insurers must meet a high evidentiary threshold when seeking to avoid liability for misrepresentation or regulatory non-compliance. The distinction between negligence and recklessness is now firmly underscored in South African insurance law, and non-life insurers should review their policy wording and claims processes accordingly.

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