



The Guardrisk Update

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Incorporating Life Update

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MERVYN King, author of the King 2 report has lambasted the tick-box approach of some directors and says boards need to be asking substantive questions like “how much will the chief executive be paid” before good governance practices could be implemented (*Business Report*, 8 Nov). “Intellectual naiveté and the courage to ask ‘dumb’ questions were useful tools.”

THE high cost of Hurricane Katrina will push the price of reinsurance for catastrophes higher in SA when rates are renewed in January (*Business Day*, 29 Nov). The estimated insured nonlife losses of the hurricane could reach \$30bn-\$40bn.. Combined with two other hurricanes this year – Rita and Wilma – gross claims could total \$80bn.

THE conclusion of the financial sector charter in October 2003 led to the sale of more than R30 billion worth of shares to black investors (*Business Report*, 5 Nov). This is more than half the black economic empowerment deals worth R50 billion involving banks and insurance companies since 1996.

OPONENTS of the controversial Road Accident Fund Amendment Bill, including legal firms, law associations, personal injury lawyers and the Coalition on the Road Accident Fund, which represent groups ranging from the disabled to hospital companies, are preparing for a constitutional challenge to the bill (*Business Day*, 3 Nov).

SA companies should brace themselves for mounting claims for health-care compensation, as existing legislation becomes more aligned to international trends and the South African Constitution (*Business Day*, 17 Nov). Two years ago Cape plc, a multinational, was ordered to pay compensation in excess of £7,5m for asbestos poisoning. Local companies face the possibility of being exposed to similar claims and levels of compensation.

A new era dawns in brand protection

Companies spend millions of Rands establishing and protecting their trademarks, which ultimately become one of their most valuable assets. In the past, the protection of trademarks and brands took precedence over public interest. Thus protection of these assets was relatively simple.

However, a Constitutional Court judgement earlier this year heralds a new approach by the courts to the protection of trademarks. South Africa's constitution now puts public and individual rights first; indeed public and individual rights may actually overwrite commercial interests.

South African corporates should take cognisance of new threats facing their brands, figuring into the equation the knowledge that protection provided by the Trade Marks Act could inevitably be overridden by freedom of speech rights (within reasonable limits) guaranteed in the Constitution.

In a landmark case – which could impact significantly on brand and trademark protection – the Constitutional Court recently ruled that the general lampooning of a trademark does not effect its economic value.

The well-publicized case centred on T-shirts sold by a promotions company featuring SAB Miller's Black Label brand with the words “Black Label, Carling Beer” substituted with “Black Labour, White Guilt”. The T-shirt manufacturer argued – and the Constitutional Court agreed – that parodying the SAB's brand is defensible if the Trademarks Act is read with section 16(1) of the constitution, which guarantees the right to freedom of expression. Essentially the court found that there were no ill effects to the brand from the parody and ruled in favour of the defendant. This after first the Supreme Court and later the Appeal Court had ruled that parodying the brand was in fact illegal.

In the light of this ruling, companies exposed to criticism and lampooning in future will not necessary have any right of redress, unless there is economic damage. And therein lies the rub! Economic damage has to be unequivocally proved and, within the somewhat intangible domain of brands and trademarks, it is not always possible to provide objective, hard and fast proof of economic damage.



Hans Muhlberg of Muhlberg Attorneys says on *Marketingweb* that “the Constitutional Court has now made it clear, brand owners must grow up and learn to accept a bit of satire and criticism”. But he also cautions that “the court's reasoning may, unwittingly perhaps, seriously dilute dilution protection”. Dilution occurs when the unauthorised use of a mark identical or similar to a well-known, registered trade mark takes unfair advantage of or is detrimental to the distinctive character or reputation of the registered trade mark. Muhlberg says that it “may become very difficult to ever prove dilution in future.”

Brand and trademark protection falls squarely within the ambit of the board's corporate governance duties. It seems that, in future, attacks on trademarks and brands will have to be carefully assessed before action is taken. In the words of country singer, Kenny Rogers, boards will have to “know when to hold 'em, know when to fold 'em, know when to walk away and know when to run.”

Risk Barometer

A UK study for an insurance company found that one in five male drivers were so diverted by billboards with scantily clad models that they have veered dangerously out of their lane (*Sunday Times*, 27 Nov). Conversely, only one in 10 female motorists were so distracted by the sight of semi-dressed male models that they temporarily lost control of their cars.

INSURERS may need to hold more capital next year to maintain current ratings from Standard & Poor's (*Insurance Day*, 6 Dec). The rating agency is planning to change how it calculates capital requirements for insurers from the start of 2006 to bring them in line with the reinsurance sector. It will now assess capital adequacy based on net exposure to losses, rather than the current method of analysing catastrophe premiums.

UNCERTAINTY is the prevailing opinion among reinsurance executives as to how the January renewals will shape up (*Business Insurance*, 7 Nov). While property catastrophe rates for insurers hit by the hurricanes clearly will increase, few are willing to guess by how much. Also unclear is the outlook for property cat rates for accounts unaffected by the storms, as well as the direction casualty rates may take.

A leading catastrophe-modelling firm has hit back at criticism from insurers about modelled loss estimates from this year's hurricanes by saying insurers are providing inaccurate and incomplete loss data (*Insurance Day*, 16 Nov). Modelling firms have received severe criticism from insurers and reinsurers following accusations that loss estimates provided by the models for this year's storms were inaccurate.

IN the wake of two consecutive, destructive and costly hurricane seasons catastrophe bonds are becoming an increasingly popular instrument with which insurers spread the risk of huge claims to financial markets (*Insurance Day*, 25 Nov).

A UK marketing study showed that less than a third of companies believe their external values are matched by its internal values (*Workplace*, 9 Nov). This is creating a massive threat to their brands and customer loyalty.

Life Update

Life Barometer

TRUSTEES of retirement funds should consider the potential risk factors associated with investing in a policy of insurance (*Business Day*, 30 Nov). In this case the pension fund pays contributions to the insurer and in return receives an investment policy contract from the insurer. The insurer invests the contributions in assets in the name of the insurer, and these assets form the security backing the contract issued to the pension fund. In effect, the fund has concentrated its credit risk into a claim against the insurer. The trustees should understand the effects of this credit-risk concentration, for instance the implications should the insurance company become insolvent for any reason.

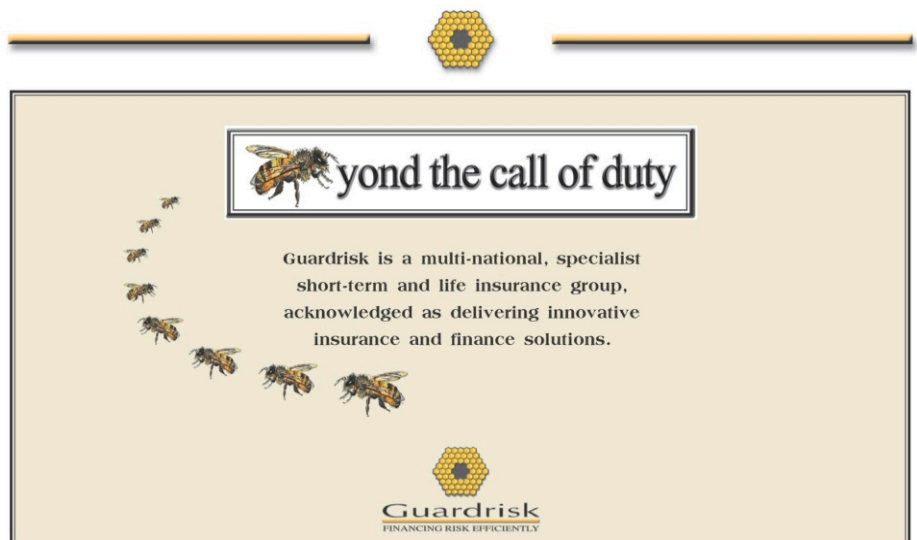
FOR 2006, investments in shares in SA's banks and life assurance companies look sound (*Business Day*, 30 Nov). Expectations are that earnings for the financial sector should continue to grow strongly because the local environment has been positive for both banks and insurers.

POLICYHOLDERS are losing premiums of more than R2 billion a year because of policy terminations, says the Financial Services Board (*Business Report*, 5 Dec). Four out of 10 policies sold in South Africa are either surrendered or allowed to lapse. The high number of surrenders and providing affordable insurance to lower-income groups are the two things most likely to keep insurance bosses up at night. The surrender and lapse rates are expected to rise as low-income earners are brought in.

THE insurance industry aims to double the number of policies held by South Africans by increasing the number of low-income earners on its books by 180 percent within the next nine years (*Business Report*, 28 Nov). There are currently 1.9 million policies on the books of the country's life insurers but the big players will have to secure another 1.7 million to reach the financial sector target of a 10% increase in low-income market penetration by 2014.

US life insurers are increasingly using more robust methods to measure their investment risks (*Business Insurance*, 21 Nov). 70% of life insurance CFOs recently surveyed use stochastic modeling techniques to model investment and other risks for many lines of business. The new approaches offer a greater depth of information than do traditional methods, allowing companies to better explore product design alternatives and evaluate more options as they seek to mitigate exposures.

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