

# REGULATION OF THE LEGAL PRACTITIONERS' FIDELITY FUND INVESTMENTS IN NAMIBIA

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## SUMMARY

In the Namibian context, the Legal Practitioners' Fidelity Fund is created by statute, and is administered by a board of control known as the Legal Practitioners' Fidelity Fund Board of Control.<sup>1</sup> In terms of the law, the Board of Control (the Board) has the mandate to invest moneys of the fund from time to time if, in the opinion of the Board, such funds are not immediately required for other purposes.<sup>2</sup> Market failures are continuously experienced globally, and may lead to failed investments. This reality requires investors to take proper steps to ensure that their investments are sound. The soundness of an investment rests in the possibility of increasing investment returns and reducing possible risk of investment failure. The Legal Practitioners Act does not provide any steps to follow to guard against the failure of fidelity fund investments. The Act also fails to indicate the extent to which the Board or any other person may be held accountable for failed investments. The Rules of the Law Society of Namibia are equally silent on this matter. This article seeks to investigate the extent to which the Board may be held liable for any failed investments. The article also attempts to establish various steps that should be followed by the Board to prevent or avoid the failure of fidelity fund investments.

## 1 INTRODUCTION

The legal profession is a noble profession, and is guided by principles, rules, regulations and laws. In the Namibian context, the Legal Practitioners Act (LPA)<sup>3</sup> is the principal legislation setting out a framework to guide legal practitioners' conduct. Furthermore, the Rules of the Law Society of Namibia amplify the provisions of the Act on the operation of legal practitioners' trust and business accounts, as well as on issues relating to the Fidelity Fund. In terms of the law, all legal practitioners in private practice are required to have a fidelity fund certificate and to contribute to the Fidelity Fund.<sup>4</sup> All legal professionals are subject to certain legal requirements. The provisions of the LPA and the Rules of the Law Society of Namibia must all be carefully

<sup>1</sup> S 55 of the Legal Practitioners Act 15 of 1995 (LPA).

<sup>2</sup> S 64(2) of the LPA.

<sup>3</sup> 15 of 1995.

<sup>4</sup> S 20 of the LPA.

followed by a legal practitioner, especially when it comes to client funds that are entrusted to their care and control.<sup>5</sup> Failure to follow the provisions of the statute and the Rules of the Law Society may expose a legal practitioner to legal consequences. A legal practitioner who contravenes or fails to comply with any of the provisions of section 25(1) or section 26(1), (2)(b), (3) or (4) is guilty of an offence and liable on conviction to a fine not exceeding N\$200 000 or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment.

Trust funds are not included in a legal practitioner's assets.<sup>6</sup> The lack of risk and the confidence it fosters are what make trust funds what they are. The improper administration of trust funds is wholly unacceptable; it not only violates the law's criteria for handling trust funds, but also calls into question the idea that money held in a trust account by a lawyer acting on behalf of a client is absolutely secure.<sup>7</sup>

In terms of the governing legislation, the Fidelity Fund Control Board (whose primary role is to administer the money of the Fidelity Fund) has the power from time to time to invest moneys of the fund that are not immediately required for the purposes mentioned in the Act.<sup>8</sup> The crux of this article is to examine the powers and the liability of the Fidelity Fund Control Board and the consequences of a failed investment. It is noteworthy that this article concerns aspects of both finance and law as it pertains to the issues under discussion.

This article thus seeks to provide a critical review of the Board's function and liability. In doing so, the article provides some definitions of the key terms used in the article; discusses the powers of the Board, investment risk, liability for failed investments, consequences for the lack of accountability and investment steps; and makes concluding remarks.

## 2 DEFINITIONS

Although written from a legal perspective, the article covers aspects of finance and economics. For a proper understanding of the concepts and analysis contained in the article, it is essential to provide a few definitions of the concepts that are used throughout the article.

### 2.1 Fidelity fund

There is no concise legislative definition of a fidelity fund – at least from the legal profession's point of view. However, elements in section 54 of the Act may be used to create a definition. Section 54 of the Act sets out the purpose of the Act, stating:

“Subject to the provisions of this Act, the fund shall be applied for the purpose of reimbursing persons who may suffer pecuniary loss as a result of – (a) theft

<sup>5</sup> See *South African Legal Practice Council v Joynt* [2021] ZAGPPHC 471.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> S 64(2) of the LPA.

committed by a legal practitioner or a candidate legal practitioner attached to, or a person employed by such a legal practitioner, of any money or other property entrusted by or on behalf of such persons to the legal practitioner or to such a candidate legal practitioner or a person employed in the course of the legal practitioner's practice or while acting as executor or administrator in the estate of a deceased person or as a trustee in an insolvent estate or in any other similar capacity."<sup>9</sup>

Using the above definition, we can thus define a fidelity fund as [the] funds used as an insurance to compensate a [legal practitioner's] client for any financial loss they have suffered as a result of the conduct of the legal practitioner, candidate legal practitioner or an employee of such legal practitioner in the handling of the funds entrusted to the legal practitioner. Such conduct may relate, but not be limited, to fraud, theft and/or embezzlement. In the South African case of *Industrial and Commercial Factors (Pty) Ltd v Attorneys Fidelity Fund Board of Control*,<sup>10</sup> the court set out the requirements that need to be met to succeed on a claim of theft of trust money entrusted to a legal practitioner's practice. First, the applicant must prove that they suffered a pecuniary loss. Secondly, the pecuniary loss must be as a result of theft by the practising attorney to whom the money was entrusted. Thirdly, the money must be entrusted by the applicant or on their behalf to the attorney, and finally, the money must be entrusted in the ordinary course of their practice. Trust money is to be dealt with in an agreed or legally allowed manner. In the case of *Leysath v Legal Practitioners Fidelity Fund Board of Control*,<sup>11</sup> the court cited with approval the words of Nicholas J, where he stated:

“[T]o entrust' comprises two elements: (a) to place in the possession of something, (b) subject to a trust. As to the latter element, this connotes that the person entrusted is bound to deal with the property or money concerned for the benefit of others.”<sup>12</sup>

If money is entrusted to another person for the purposes of using such money in an agreed or legally allowed manner, such money should be

<sup>9</sup> See also Vercuil “The KwaZulu-Natal Reform Audit Support System (RASS) Pilot Project” 2005 446 *De Rebus* 22. In the South African case of *King v The Attorneys Fidelity Fund Board of Control* 2010 (4) SA 185 (SCA), the Supreme Court of Appeal reiterated the purpose of the fidelity fund and stated that “the fund shall be applied for the purpose of reimbursing persons who may suffer pecuniary loss as a result of— (a) theft committed by a practising practitioner, his candidate attorney or his employee, of any money or other property entrusted by or on behalf of such persons to him or to his candidate attorney or employee in the course of his practice or while acting as executor or administrator in the estate of a deceased person or as a trustee in an insolvent estate or in any other similar capacity”.

<sup>10</sup> [1996] ZASCA 84; 1997 (1) SA 136 (A). In the case of *Yeats NO v Attorneys Fidelity Fund Board of Control* [2003] ZAWCHC 90, the plaintiffs' claim failed for the reason that they could not prove that the money was entrusted to the attorney in the course of his practice as an attorney. Alternatively, if it had been so entrusted, the attorney was instructed to invest the money on behalf of the trust (of which the plaintiffs were trustees) in an account contemplated in s 78(2A) of the Act.

<sup>11</sup> [2021] ZAGPPHC 7.

<sup>12</sup> *Provident Fund for the Clothing Industry v Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund* 1981 (3) SA 539 (W) 543E–F.

protected at all costs and misuse of any such funds must call for consequences. The safeguarding of trust money encourages clients and members of the general public to have confidence in the services provided by legal practitioners, so that they may without hesitation entrust their funds to legal practitioners should the need arise.

The idea of a fund to safeguard the public from the loss of money entrusted to attorneys is not a novel one, nor is it limited to lawyers. The majority of professions hold client money in trust function with so-called fidelity funds; estate agents are an excellent example.

## 2 2 Financial markets

In general, there is no specific location or site to denote a financial market. The centres and arrangements that make it possible to purchase and sell financial assets, claims and services are referred to as financial markets.<sup>13</sup> Thus, when we speak about financial markets, we are referring to stock exchanges and commodity exchanges.<sup>14</sup> In general, there is no specific location or site to denote a financial market. Therefore, the term "financial market" generically refers to any setting where securities are traded.<sup>15</sup>

In our economic system, financial markets play a critical role in facilitating seamless, uninterrupted global trade while minimising price shocks.<sup>16</sup> Open and regulated financial markets offer a means for businesses to raise sizeable amounts of capital. The stock and bond markets play a role in this process. Through access to commodities, foreign exchange futures and other derivative markets, markets also enable firms to mitigate risk.<sup>17</sup>

Financial market activity directly influences investments and how businesses act.

## 2 3 Financial risk management

The approach used to address market uncertainty is known as financial risk management.<sup>18</sup> The process of detecting investment risk and selecting the most effective response to that risk is known as risk management.<sup>19</sup> A risk management strategy aims to limit prospective losses to an acceptable

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<sup>13</sup> Gordon and Natajara *Financial Markets* (2010) 10.

<sup>14</sup> Market Business News (MBN) "What Is a Financial Market? Definition and Examples" (undated) <https://marketbusinessnews.com/financial-glossary/financial-market/> (accessed 2022-10-12).

<sup>15</sup> Hayne "Financial Markets: Role in the Economy, Importance, Types, and Examples" (24 October 2023) <https://www.investopedia.com/terms/f/financial-market.asp> (accessed 2022-10-12).

<sup>16</sup> Weller "What Is the Role of Financial Markets?" (6 February 2024) <https://www.forex.com/en/market-analysis/latest-research/what-is-the-role-of-financial-markets/> (accessed 2022-10-12).

<sup>17</sup> *Ibid.*

<sup>18</sup> Horcher *Essentials of Financial Risk Management* (2011) 15.

<sup>19</sup> Hartill "What Is Financial Risk Management?" (11 November 2021) <http://www.thebalance.com/what-is-financial-risk-management-5189898> (accessed 2022-11-19).

range based on one's risk tolerance.<sup>20</sup> It entails determining management plans that are in line with organisational priorities and policies, and assessing the financial risks that an organisation faces. An organisation may gain a competitive edge by proactively managing financial risk. In addition, it ensures that the management, operational staff, stakeholders, and the board of directors concur on critical risk-related problems.<sup>21</sup>

## 2 4 Market failure

According to Samuelson and Nordhaus, a market failure is defined as "an imperfection in a price system that prevents an efficient allocation of resources".<sup>22</sup> Therefore, addressing market failure entails making markets operate more effectively or efficiently in terms of the decisions made regarding the allocation of resources and the creation of goods and services.<sup>23</sup>

## 2 5 Legal practitioner

A legal practitioner is a person who is admitted to the legal profession and as such has "licence" to practise law in the lower and superior courts. In the Namibian context, there are certain statutory requirements that a person must fulfil to be able to practise law. These requirements are outlined in the LPA. The Act classifies these requirements into two categories: academic and professional qualifications. In order to meet the academic qualification, a person must hold a law degree from the University of Namibia or an equivalent qualification in law from a university or a comparable educational institution situated outside Namibia that has been prescribed by the Minister in terms of the law.<sup>24</sup> In addition to the academic qualification, a person must satisfactorily undergo practical legal training; and must pass the Legal Practitioners' Qualifying Examination (also referred to as the Board Examination). There is often confusion between a legal practitioner and a lawyer. A lawyer is someone who has studied the law, whereas a legal practitioner, in addition to studying the law, has undergone professional training and has subsequently qualified for admission to the practice of law.

Only persons who are admitted as legal practitioners and who own and manage a law firm are required by law to pay money to the Law Society Fidelity Fund. In other words, practising legal practitioners who receive and hold trust money are required to pay over funds to the Fidelity Fund. One of the circumstances in which a legal practitioner may have to pay over money to the Fidelity Fund is when they have earned interest on an investment

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<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> Samuelson and Nordhaus *Economics* (1985) 25.

<sup>23</sup> Cunningham *Understanding Market Failures in an Economic Development Context* (2011) 13.

<sup>24</sup> S 5 of the LPA.

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made on behalf of a client.<sup>25</sup> It is this money that the Fidelity Fund Control Board administers and invests in accordance with the provisions of the law.

### **3 THE POWERS OF THE LEGAL PRACTITIONERS' FIDELITY FUND CONTROL BOARD**

The Law Society of Namibia (LSN)'s Chairperson of Council and three other lawyers appointed by Council make up the Board of Control of the Legal Practitioners' Fidelity Fund. Of these lawyers, at least two must not be members of the Council and at least two must have been in private practice for at least five years. Since the Law Society Council appoints three lawyers and of these two should not be council members, the correct interpretation means that one of the lawyers appointed by council could be a member of council. The Council may also designate an alternate member to take the chairperson's place when that individual is unavailable or unable to serve on the Board of Control.<sup>26</sup> Although the rationale for the eligibility requirements is not clear, one can assume that the functions of the Board require someone with experience to deal with complex issues facing the Board – hence a need for a person with private practice experience (that is, five years' experience) and a person who serves on Council. The Council of the Law Society is equivalent to the board of a company, and normally comprises persons with expertise to deal with complex matters. However, as far as requirements for Board membership are concerned, the law fails dismally to require investment and financial literacy. Trained legal practitioners who possess some form of financial and or investment knowledge could be of benefit to the Board in discharging its functions adequately. This is because such persons not only understand the workings of the law, but have a sound understanding of financial markets, finance and investments. Accordingly, there is a need to revisit the eligibility requirements for appointment to the Board.

The Fidelity Fund is administered by the Legal Practitioners' Fidelity Fund Board of Control.<sup>27</sup> This board is vested with the powers to invest, from time to time, moneys of the fund that are not immediately required for the purposes set out in the Act.<sup>28</sup>

Apart from mentioning that the money shall be deposited into the Legal Practitioners' Fidelity Fund Account and authorising the Board to invest money not immediately required, the Act is silent on all other administrative issues regarding such investments. This is similar to the South African position.<sup>29</sup> The investment process does not simply involve taking money

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<sup>25</sup> S 26(2) of the LPA.

<sup>26</sup> The Board of Control of the Legal Practitioners' Fidelity Fund <https://lawsocietynamibia.org/1224/> (accessed 2022-11-12).

<sup>27</sup> S 55(1) of the LPA.

<sup>28</sup> S 64(2) of the LPA.

<sup>29</sup> S 58(2) of the LPA merely indicates that the Board has the power to invest moneys deposited in the bank account of the Fidelity Fund that is not immediately required for any of the purposes mentioned in the Act. No guidelines are provided as to how the Board must go about investing the funds.

and putting it away in some account with the aim of getting good returns at the end of the investment period. The investment process is a complex matter comprising various aspects such as determining investment objectives, developing an investment plan, evaluating and selecting investment alternatives, constructing a portfolio, and evaluating and revisiting the portfolio. Understanding these aspects and ensuring that they are followed first requires someone with sound knowledge regarding investments. Secondly, there is a need for detailed guidelines on the investment process to ensure that the invested funds yield desired results.

In a system of corporate governance, a board of directors is responsible for supervising a corporation's operations, including its management, as a large number of dispersed stockholders cannot efficiently carry out that function on their own.<sup>30</sup> Ordinarily, the directors of any given company have several common-law duties – namely, the duty of care and loyalty, the duty of disclosure and the duty to act in good faith.<sup>31</sup>

Broadly speaking, the members of the Legal Practitioners' Fidelity Fund Control Board are bound by the common-law duties of directors and are therefore required to uphold these duties. This is despite the fact that the Act fails to make express mention of these duties.

Similar to the Namibian position, the South African Legal Practice Act 28 of 2014 establishes the Legal Practitioners' Fidelity Fund Board to manage and administer its fidelity fund.<sup>32</sup> The South African Act further sets out the composition of the Board stating that the Board is to comprise five legal practitioners, one of whom must be an advocate referred to in section 34(2)(b), elected in accordance with a procedure determined in the rules by the Council in consultation with the Board.<sup>33</sup> The Board must, furthermore, comprise two persons designated by the Council whose names, by virtue of their qualifications, expertise and experience in the field of finance, are submitted by the Independent Regulatory Board of Auditors or its successor.<sup>34</sup> Lastly, the Board must consist of two fit and proper persons designated by the Minister.<sup>35</sup>

The South African approach (as reflected above) is the more desirable one in ensuring that the Board discharges its duties efficiently. The Board composition in South Africa, unlike in Namibia, requires persons with some form of expertise and experience in the field of finance, in addition to persons with expertise in law. This approach is desirable, as persons with

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<sup>30</sup> Amakobe "Duties of Company Directors" (2015) [http://www.researchgate.net/publication/286918957\\_Duties\\_of\\_Company\\_Directors](http://www.researchgate.net/publication/286918957_Duties_of_Company_Directors) (accessed 2022-11-15).

<sup>31</sup> *Ibid.*

<sup>32</sup> S 60(1) of the South African Act.

<sup>33</sup> S 62(a) of the South African Act. Furthermore, Rule 46 of the South African Legal Practice Council Rules succinctly sets out the approach to be followed in appointing legal practitioners to the Board. Among other rules, it is required that legal practitioners be in good standing with reference to their principal place of business and that legal practitioner(s) must be nominated by practising legal practitioners. This approach is appropriate, as it sets a clear process to be followed in appointing legal practitioners to the Board; secondly, it promotes transparency.

<sup>34</sup> S 62(b) of the South African Act.

<sup>35</sup> S 62(c) of the South African Act.

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expertise in finance are more likely to possess sound knowledge in financial investments. The South African legislative position on the Legal Practitioners' Fidelity Fund Board composition reflects the importance of having both financial and legal expertise on the Board. This can be achieved in one of two ways. The first involves appointing persons with both legal and financial expertise. It is possible to have a trained lawyer who, because of their educational background or work experience, has been exposed to issues of finance and investment. Such lawyers should thus be considered for appointment to the Legal Practitioners' Fidelity Fund Board. Alternatively, the appointments should include two different categories of person – that is, lawyers, and those with financial expertise, as contemplated in the South African legislation. It is imperative that both disciplines and expertise – namely, law and finance – are represented on the Fidelity Fund Board, regardless of the approach followed in appointing the members to such a board. The South African legislature has taken an approach to limit the risks of possible losses in fidelity fund investments, as both legal and financial aspects receive attention when dealing with the investments.

#### **4 RISKS ASSOCIATED WITH FINANCIAL INVESTMENTS**

Numerous financial operations, including sales and purchases, investments and loans, and several other company activities, are accompanied by financial risk.<sup>36</sup> This may result from business transactions, new initiatives, mergers and acquisitions, debt financing, the cost of energy, or the acts of management, stakeholders, rivals, foreign governments, or the environment.<sup>37</sup>

Market risk is the risk that an investor experiences of a possible decline in the market value of a financial product that results from variables that have an impact on the entire market and are not specific to one type of economic good.

Interest rate risk is the risk that arises for bond owners from fluctuating interest rates. In other words, interest rate risk is related to the returns that the investor will receive from the investment. Higher interest rates could mean a better return for the investor, whereas a lower interest rate could mean that the investor will not make good returns from the investment.

Business activities can be significantly disrupted by changes in government or regulation, social unrest, war, terrorism, unemployment, natural disasters, or governments taking over publicly traded companies and nationalising them. Such events can hamper the ability of companies to make a profit and pay dividends. This is referred to as socio-political risk.

Credit risks are business risks related to the inability of borrowers to meet or honour their obligations to pay the principal amount of a debt and interest thereon when they become due and payable. The purpose of any

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<sup>36</sup> Horcher *Essentials of Financial Risk Management* 25.

<sup>37</sup> *Ibid.*



investment is to receive good returns. No investor wants to run the risk of poor investment returns. However, if care is not taken, credit risk may become a reality.

Credit risk arises when the borrower in a loan contract makes a mistake or postpones paying back the obligation in full or in part.<sup>38</sup> Inability or unwillingness of a borrower to make repurchases (that is, to return credit provided to them) could result in losses on outstanding credit, and is referred to as credit risk.<sup>39</sup> Thus, credit risk is defined as the likelihood that a legally binding contract may be rendered worthless (or at least significantly diminished in value) owing to the counterparty defaulting and going out of business.<sup>40</sup> The risk that committed cash flows from securities and loans held by financial institutions may not be fully paid is what this means. Thus, default by debt issuers and counterparties in derivatives transactions gives rise to credit risk.<sup>41</sup>

Credit risk is the possibility of financial loss owing to a party's failure to fulfil its contractual obligations, and which results in financial loss for the creditor's shareholders.<sup>42</sup> These responsibilities are a result of a company's lending, trading, and investing activities, as well as the payment and settlement of its own securities trading and foreign account.<sup>43</sup> There may be instances where a counterparty breaches an agreement and fails timeously or fully to refund the principal debt and interest that is due. Most balance sheet assets and off-balance sheet transactions series contain credit risk.<sup>44</sup> Credit risk for derivatives comprises default risk, guarantor risk, and counterparty risk. It is important to assess credit risk. The measurement of credit risk is done in order to estimate prospective losses from credit operations. Since the quantity of losses is never known with confidence, an estimate is required.<sup>45</sup>

Economic risk emanates from national or global economic events, such as economic booms and downturns, which can affect the overall financial market irrespective of the type of investment. Economic risks can thus be classified into two broad categories – namely, business risks and institutional risks.<sup>46</sup> Commercial risks, also known as business risks, are dangers resulting from various market developments that could have an impact on a project while it is in operation.<sup>47</sup> Examples of these risks include changes in the cost of goods and producer prices, fluctuations in demand, and

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<sup>38</sup> Zamore and Alon "Credit Risk Research: Review and Agenda" 2018 54(4) *Emerging Markets Finance and Trade* 812.

<sup>39</sup> IMF Financial Operations "Financial Risk Management" (30 November 2014) <https://www.imf.org/external/pubs/ft/finop/2014/pdf/ch6.pdf> (accessed 2022-11-18).

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> Spuchl'áková, Valašková and Adamkoc "The Credit Risk and Its Measurement, Hedging and Monitoring" 2015 24 *Procedia Economics and Finance* 676.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

<sup>46</sup> Latona, Fronea and Constantinescu "Financial and Economic Risks to Public Projects" 2014 8 *Procedia Economics and Finance* 205.

<sup>47</sup> *Ibid.*

technological failures and performance.<sup>48</sup> The risk of financial or personal loss for a business resulting from non-market factors such as macroeconomic and social policies (fiscal, monetary, trade, investment, industry, income, employment, and development), as well as the institutional-legal frameworks of those policies, can be referred to as institutional risk.<sup>49</sup>

There are certain elements of risk management, and, generally speaking, if these elements are not properly adopted into an organisation and meticulously adhered to, it will be impossible to monitor and limit any type of risk. One such element is good corporate governance. The success of an organisation's risk management depends on its corporate governance.<sup>50</sup> Corporate governance facilitates an organisation's overall behaviour.<sup>51</sup> No matter how effective the risk management, an organisation cannot succeed without sufficient sound corporate governance; risks will otherwise slip through the gaps.<sup>52</sup> Therefore, it is crucial to strengthen governance gradually over time. Another equally important element of risk management is risk culture. Culture is something that passes down from one generation to the next without being overtly transmitted or recorded.<sup>53</sup> In a risk culture, the entire organisation is not only risk-focused but also business-focused.<sup>54</sup> Values, beliefs, knowledge, attitudes and an understanding of risk all play a role in risk culture.<sup>55</sup> This helps to reduce unpleasant surprises and raise shareholder value. Personal risk perception is the primary component of risk culture, which is then followed by ethical behaviour, and good corporate culture.<sup>56</sup>

It is difficult to invest in financial markets. Beginners in stock investing lack knowledge and experience, and the majority of them lose money after making direct investments in the stock market.<sup>57</sup> This is frequently where investing through an investment trust offers advantages. The advantages of investing in mutual funds are numerous. The fact that mutual funds offer a variety of schemes means that there is something for everyone, which is the main and most important benefit of mutual funds. Fund managers are knowledgeable about the securities market and are familiar with equities investments.<sup>58</sup> When retail investors try to invest in stocks themselves, many see their capital swept away. This occurs frequently because the market is unpredictable, and it requires extensive knowledge to choose stocks,

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<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> Kumar "Essential Elements of Risk Management" (1 February 2022) <https://corp-story.com/essential-elements-of-risk-management/> (accessed 2022-12-19).

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> Rakibe *Benefits of Investing on Mutual Fund* International Interdisciplinary Conference on the Role of Economy and Ecology on Sustainable Development, Phondaghat, Dist-Sindhudurg, Maharashtra, India, (2020) 490.

<sup>58</sup> *Ibid.*

monitor them, and determine when to exit a deal.<sup>59</sup> It therefore goes without saying that whoever is appointed and is responsible for dealing with fidelity fund investments must have a sound knowledge and understanding regarding investments and taking investment decisions. Any lack of sound understanding may result in failed investments.

## 5 LIABILITY FOR FAILED INVESTMENTS

Certain pieces of legislation in the Namibian context prescribe penalties and/or liability for negligent conduct. Those that stand and act in a fiduciary capacity may thus be held accountable for their actions, especially where these result in financial losses.

The Companies Act,<sup>60</sup> for example, sets out circumstances under which a director may be held liable. Section 92 of the said Act is one such example: directors may be held liable, jointly and severally, if in violation of section 90 they permit the company to purchase any share issued by it, to return to the company any cash so paid and not otherwise recovered by the business.<sup>61</sup> Another example is found in section 430 of the same Act, which provides for directors' liability for fraudulent business conduct. Section 430(1) in particular provides that a court, whether in a winding-up, judicial management, or otherwise, upon application from the Master, the liquidator, the judicial manager, any creditor, member, or contributory of the company, may declare any person who was knowingly a party to the carrying on of any business of the company recklessly or with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, to be personally responsible for all or any of the debts or other liabilities of the company. In section 430(2), the Act gives the court the power to make the liability declared under section 430(1) a charge on any debt due by the company to a director who acted improperly. Finally, under section 430(4), the court has the power to impose a fine of N\$8 000 on any director who commits an offence in carrying on the business in such improper manner, and such a fine may be payable in addition to imprisonment. In terms of section 256, in legal proceedings against a director for acting negligently, a court may relieve the director from liability, if it is found that they acted honestly and reasonably in the circumstances, regardless of the outcome of their actions.

The Trust Monies Protection Act<sup>62</sup> sets out the liability for any trustee who fails to comply with the provisions of the said Act. A trustee is someone who has the power to deal with the funds of another. Put differently, a trustee is entrusted to deal with funds for the benefit of another. It is therefore crucial

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<sup>59</sup> *Ibid.*

<sup>60</sup> 28 of 2004.

<sup>61</sup> S 90 of the Namibian Companies Act provides that a company is prohibited from paying anything, regardless of the form, to purchase any of the company's shares if there are good reasons to believe that (a) the company is unable to pay its debts as they become due in the normal course of business, or would be unable to do so after the payment; or (b) the company's consolidated assets, correctly valued, would be less after the payment than its consolidated liabilities.

<sup>62</sup> 34 of 1934.

that a trustee should act in a proper manner and should incur liability where they act in an improper manner, especially where such conduct may result in a loss of money and where negligence is proved.

The aforementioned two statutes are examples of how liability can be imposed on persons who stand in a fiduciary capacity and who administer affairs on behalf of others. However, the LPA, and the Rules of the Law Society of Namibia, are silent on any possible liability for members of the Board in dealing with fidelity fund investments. In other words, the LPA does not make provision for holding any person or body accountable for a failed investment. As far as imposing liability is concerned, the Namibian position is not very different from the South African approach. The (South African) Legal Practice Act and the Rules for the Attorneys' Profession of South Africa also do not expressly contain any provisions relating to the liability of the Board for failed investments. The legislative framework of both jurisdictions refers only to the auditing function that needs to be performed.<sup>63</sup> This auditing function requires the drawing up of financial statements such as the balance sheet to indicate the status quo regarding the funds of the Board. However, no reference is made to what happens when investments fail or if there is any negligence committed by the Board in handling the investment of the funds. Does this mean that members of the Board can never be held liable for failed investments? If they can never be held liable, will the funds be dealt with properly? There is a clear need to relook at the law and provide mechanisms in the Act or the Rules with regard to liability for failed investments owing to negligent conduct of Board members.

It is not enough for the LPA to authorise the investment of fidelity fund moneys without prescribing the manner in which the funds are to be invested. Such prescription would ensure that board members follow proper steps in investing the funds, eliminate negligent conduct and limit the possibilities of failed investments.

## **6 CONSEQUENCES FOR LACK OF LIABILITY**

There are various consequences for lack of liability. The first is to encourage carelessness or negligent conduct. If the law fails to set out consequences or liability for the negligent conduct of Board members, such persons or bodies may not exercise reasonable care and diligence when administering the fidelity fund. People are prone to act in a proper manner only when they know that they may run the risk of being held accountable for any negligent conduct, and when there is an express law prescribing liability.

Secondly, lack of liability may result in poor investment decisions. Unless the responsible persons or bodies understand that they act in a fiduciary capacity, they will constantly make poor investment decisions. A cautious person is more likely to avoid making bad investment decisions, and one can only be cautious if there is a likelihood of the imposition of liability for failure to act cautiously.

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<sup>63</sup> S 65 of the LPA and s 75 of the Legal Practice Act.

Thirdly, a lack of liability may result in failed investments. The final result of a lack of liability is failed investment. A seemingly innocent negligent act may have negative consequences on one's investments. Thus, there is a chain starting with carelessness or negligent conduct, followed by bad investment decisions, and ending with failed investments.

## **7 THE WAY FORWARD**

The following steps must be followed in aiming to limit possible investment failure of fidelity fund investments:

1. Clarify that members of the Legal Practitioners' Fidelity Fund act in a fiduciary capacity and should act in the best interests of the Fund when performing any related duties (as in the Companies Act).
2. Set out the procedure to be followed for investing money from the fund. This must be done either through a legislative amendment and/or amending the Rules of the Law Society of Namibia. A set procedure will provide proper guidance with regard to handling fidelity fund investments. This will limit the possibility of failed investments.
3. Clearly define consequences for fidelity fund investment failures. Currently, neither the LPA nor the Rules of the Law Society set out any consequences for failed investments or negligence in dealing with fidelity fund investments. Thus, there is a need to amend the law and or the Rules to make provision for possible liability for Board members for negligent and/or careless conduct in dealing with fidelity fund investments. Only when there are prescribed consequences for negligent dealings will those vested with the power to make fidelity fund investments act in a responsible and proper manner.
4. Amend legislation and/or the rules to ensure that requirements for eligibility for serving on the Legal Practitioners' Fidelity Fund Board of Control are clearly spelled out. One such requirement must be a sound background in finance and the operation of financial markets law. South Africa's approach is worth emulating. It is crucial that members of the Board have a sound understanding of financial risk management. This will limit the risk of failed investments and ensure that the fidelity fund investments yield favourable results.
5. Ensure that amendments to the existing law (the Act and the Rules) are in line with company law and financial markets law to safeguard investments and ensure that careless dealings are punishable in terms of the law.

## **8 CONCLUSION**

It is not debatable that Namibian legislation (the LPA) makes provision for investments by the Fidelity Fund. The provisions of this Act were properly canvassed, and it was found that the law does not set out any procedure to be followed for making fidelity fund investments. It was also found that the

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legislation does not provide for members of the Board to be held liable for failed investments.

A thorough understanding of potential opportunities is necessary for an investor to make a successful investment selection, and hasty decisions should not be made. A poor investment choice could potentially result in a fund's collapse.<sup>64</sup> To optimise the appraisal of opportunities, the fundamental concepts behind investment decisions should be understood. When evaluating an investment, the indicators should be picked taking into consideration the project's unique characteristics and the decision-maker's knowledge.<sup>65</sup> Understanding investment language and dealing with funds in an honest and meticulous manner is more likely to guarantee good investment returns. Thus, whoever is serving as a member of the Board must have a good understanding of the principles of investments, and the law must expressly set out liability for careless or otherwise negligent conduct that may lead to failed investments.

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<sup>64</sup> Virlicsa "Investment Decision Making and Risk" 2013 6 *Procedia Economics and Finance* 170.

<sup>65</sup> *Ibid.*