THE USE OF ARTIFICIAL INTELLIGENCE IN SOUTH AFRICAN BOARDROOMS: COMPANY LAW IMPLICATIONS AND CHALLENGES

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I. INTRODUCTION

Artificial intelligence (AI) is heralded as driving the Fourth Industrial Revolution.[1] It is used in a wide range of industries, including healthcare, consultancy in the financial and medical sectors, consumer services, energy production and distribution, and policing and justice administration, to mention just a few.[2] AI is also gradually becoming more prevalent in companies, where it is increasingly playing a crucial role in how boards of directors manage companies and make decisions within companies.

Despite its beneficial uses, AI may also be misused, and may endanger public interests, in job displacement, privacy infringement, ethical dilemmas, the increase of malicious cyber activity, the amplification of disinformation, and online manipulation of the public through producing and disseminating convincing disinformation.[3] AI use must therefore be regulated.

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1 F. Mertens, 'The Use of Artificial Intelligence in Corporate Decision-Making at Board Level: A Preliminary Legal Analysis' (Financial Law Institute Working Paper Series, 2023-01), at 2, available at <http://dx.doi.org/10.2139/ssrn.4339413> (accessed 4 July 2025).

2 A. Bertolini, 'Artificial Intelligence and Civil Liability' (Study requested by European Parliament's Committee on Legal Affairs, 2020), at 9, available at <https://www.europarl.europa.eu/RegData/etudes/STUD/2020/621926/IPOL_STU(2020)621926_EN.pdf> (accessed 4 July 2025).

3 Department of Communications & Digital Technologies, 'South Africa National Artificial Intelligence Policy Framework' (25 October 2024), at 3, available at <https://www.dcdt.gov.za/sa-national-ai-policy-framework/file/338-sa-national-ai-policy-framework.html> (accessed 10 July 2025); OECD, 'Assessing Potential Future Artificial Intelligence Risks, Benefits and Policy Imperatives' (OECD Artificial Intelligence Papers No 27 November 2024), at 19, available at <https://www.oecd.org/content/dam/oecd/en/publications/reports/2024/11/assessing-potential-future-artificial-intelligence-risks-benefits-and-policy-imperatives_8a491447/3f4e3dfb-en.pdf> (accessed 10 July 2025).

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The AI market in South Africa is growing rapidly as South Africa increasingly adopts digital technologies.[4] A 2023 study indicated that 46% of South African companies are piloting the use of AI technologies, while 50% have incorporated AI technologies into their routine business operations plans.[5] In October 2024, the Department of Communications and Digital Technologies (DCDT) published South Africa's National Artificial Intelligence Policy Framework (SA's AI Policy Framework), which aims to promote the integration of AI technologies to drive economic growth, enhance the well-being of society and position South Africa as a leader in AI on the African continent and a significant player on the global stage.[6] This framework is intended to provide the basis for creating AI regulations and potentially an AI statute to regulate AI use in South Africa.[7]

Several countries are ahead of South Africa in passing legislation regulating AI. For example, in April 2021, the European Commission proposed the first European Union (EU) regulatory framework for AI, which culminated in the adoption of the Artificial Intelligence Act,[8] which the EU Council approved on 21 May 2024 (the EU AI Act).[9] The European AI Office plays a key role in implementing the EU AI Act.[10] Another example is that the United Kingdom (UK) introduced the Artificial Intelligence (Regulation) Bill [HL] (the UK AI Bill) in November 2023. It aims to regulate the use of AI, and introduce an AI Authority to oversee AI development and ensure an aligned approach to AI across relevant regulators.[11] Also in November 2023, the United States of America (US) introduced its proposed Artificial Intelligence Research, Innovation and

4 Statista, 'Artificial Intelligence–South Africa', available at <http://www.statista.com/outlook/tmo/artificial-intelligence/south-africa#annual-ai-publications> (accessed 10 July 2025).

5 A.N. Moloto, J.H. Mokwena and M. Mammo, 'Utilisation of Artificial Intelligence in South African Business Enterprises and Corporations', 44(6) *Tuijin Jishu/Journal of Propulsion Technology* (2023) 4794–4812, at 4795.

6 SA's AI Policy Framework, *supra* note 3, at 1.

7 *Ibid*., at 3.

8 See European Parliament legislative resolution of 13 March 2024 on the proposal for a regulation of the European Parliament and of the Council on laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union Legislative Acts (COM(2021)0206 – C9-0146/2021–2021/0106 (COD)). The first provisions of the EU AI Act came into force in February 2025, while the remaining provisions are coming into effect in stages, with the complete statute expected to be in force by 2 August 2027.

9 Council of the European Union, 'Artificial Intelligence (AI) Act: Council Gives Final Green Light to the First Worldwide Rules on AI' (21 May 2024), available at <https://www.consilium.europa.eu/en/press/press-releases/2024/05/21/artificial-intelligence-ai-act-council-gives-final-green-light-to-the-first-worldwide-rules-on-ai/> (accessed 30 June 2025). The EU AI Act aims to establish a uniform legal framework for the use of AI systems in the EU to support innovation; promote the uptake of human-centric and trustworthy AI while ensuring a high level of protection of health, safety and fundamental rights; and protect against the harmful effects of AI systems in the EU (para 1 of the preamble to the EU AI Act and art 1(1)). It establishes harmonised rules for the use of AI systems in the EU, prohibits certain AI practices and establishes specific requirements for high-risk AI systems and transparency rules for certain AI systems (art 1(2) of the EU AI Act).

10 European Commission, 'Commission Establishes AI Office to Strengthen EU Leadership and Safe and Trustworthy Artificial Intelligence' (29 May 2024), available at <https://ec.europa.eu/commission/presscorner/detail/en/ip_24_2982> (accessed 17 July 2025).

11 See cl 1 of the UK AI Bill for the proposed functions of the AI Authority.

Accountability Act of 2024 (the US AI Research, Innovation and Accountability Act).[12] If South Africa aims to position itself as a leader in AI innovation, it must not be left behind in the AI global race to pass legislation regulating AI use locally.

This article begins by examining the meaning of AI for legal purposes, and the current regulation of AI in South Africa. It then considers potential uses of AI by boards of directors, and outlines some of the limitations associated with its use in South African boardrooms. This is followed by an examination of four key company law challenges raised by AI use: (i) whether by consulting AI the board of directors will be regarded as having complied with its fiduciary duties; (ii) whether directors may rely on the business judgement rule under the Companies Act 71 of 2008 (the Companies Act) when AI-assisted decisions result in negative consequences for the company; (iii) whether, under the Companies Act, directors may lawfully delegate their functions to AI systems, and rely on AI-generated advice without incurring liability for incorrect decisions made by those systems; and (iv) whether any person is liable when AI errors cause harm to third parties. This article concludes with recommendations to amend the Companies Act to regulate AI integration in South African boardrooms.

II. THE MEANING OF AI FOR LEGAL PURPOSES

At the outset it is important to understand the meaning of 'artificial intelligence' for legal purposes. AI covers a vast, mixed and constantly evolving series of applications.[13] Since AI evolves so rapidly and is a moving target, what was once regarded as an AI application may no longer be considered as such when technology advances.[14] Thus any precise definition of AI runs the risk that the definition may become obsolete as technology advances.[15]

The leading definition of an 'AI system' is that adopted by the Organisation for Economic Co-operation and Development (OECD), which reads:

> An AI system is a machine-based system that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments. Different AI systems vary in their levels of autonomy and adaptiveness after deployment.[16]

12 US Congress Senate Bill 3312, available at <https://www.congress.gov/bill/118th-congress/senate-bill/3312/text> (accessed 17 July 2025). This statute was introduced in the US Senate on 15 November 2023 but has not yet been passed.

13 Bertolini, 'Artificial Intelligence and Civil Liability', *supra* note 2, at 15.

14 *Ibid*. For example, handwriting recognition and voice recognition were once considered AI but are no longer regarded as such (A. Rao, 'AI: Everywhere and Nowhere (Part 1)' (2 June 2016)), available at <https://www.insurancethoughtleadership.com/ai-machine-learning/ai-everywhere-and-nowhere-part-1> (accessed 2 July 2025).

15 Bertolini, 'Artificial Intelligence and Civil Liability', *supra* note 2, at 15.

16 See the preamble to the OECD, 'Revised Recommendation of the Council on Artificial Intelligence' (adopted by the Council at Ministerial level on 3 May 2024) C/MIN (2024)16/FINAL, available at <https://one.oecd.org/document/C/MIN(2024)16/FINAL/en/pdf> (accessed 8 July 2025).

The King IV Report on Corporate Governance for South Africa 2016[17] (King IV Report) does not define the term 'AI', but the King V Code on Corporate Governance for South Africa (King V Code)[18] defines 'AI' as the technology that enables computational systems to execute functions normally associated with human intelligence, such as learning, reasoning, problem solving, decision making and creativity.[19] The EU AI Act also adopts a definition of an AI system that aligns with the one adopted by the OECD,[20] as does the US AI Research, Innovation and Accountability Act.[21] The UK AI Bill defines 'AI' to mean:

> technology enabling the programming of training of a device or software to—
>
> (a) perceive environments through the use of data;
> (b) interpret data using automated processing designed to approximate cognitive abilities; and
> (c) make recommendations, predictions or decisions; with a view to achieving a specific objective.[22]

The OECD definition of 'AI' aims to be flexible by reflecting a broad understanding of AI.[23] According to the OECD definition, the 'outputs' generated by an AI system relate to the broad categories of recommendations, predictions and decisions, with 'decisions' being the most autonomous type of output and 'predictions' the least autonomous.[24] The reference to 'autonomy' in the OECD definition acknowledges that an AI system can learn or act without human involvement following the delegation of autonomy and process automation by humans.[25] The reference to the 'adaptiveness' of the different AI systems acknowledges that AI systems based on machine learning can continue to evolve after initial development.[26] AI systems may be trained just once or periodically or continually, and through this training some AI systems may develop the ability to perform new forms of inference not initially envisioned by their programmers.[27]

17 Institute of Directors South Africa, 'King IV Report on Corporate Governance for South Africa 2016' (2016), available at <https://www.iodsa.co.za/page/king-iv> (accessed 12 July 2025).
18 Institute of Directors South Africa, 'King V Code on Corporate Governance for South Africa' (2025), available at <https://www.iodsa.co.za/page/iodsa-kingv> (accessed 12 July 2025).
19 See the definition of 'AI' in the Glossary of the King V Code.
20 Article 3(1) of the EU AI Act.
21 Section 201 of the US AI Research, Innovation and Accountability Act.
22 Clause 7 of the UK AI Bill.
23 OECD, 'Explanatory Memorandum on the Updated OECD Definition of an AI System' (OECD Artificial Intelligence Papers No 8, March 2024), at 6, available at <https://www.oecd.org/en/publications/explanatory-memorandum-on-the-updated-oecd-definition-of-an-ai-system_623da898-en.html> (accessed 12 July 2025).
24 *Ibid*., at 9.
25 *Ibid*., at 6.
26 *Ibid*.
27 *Ibid*.

A. The Regulation of AI in South Africa

The Companies Act does not regulate AI use in South African companies. The King IV Report acknowledges that cognisance must be taken of the advances in technology that are revolutionising businesses and societies,[28] but it does not address AI directly. Principle 12 of the King IV Report recommends that the board should govern technology[29] and information[30] in a way that supports the company setting and achieving its strategic objectives. Thus the responsibility of governing technology and information is placed on the board of directors,[31] which should lead the adoption of AI technologies and provide guidance on how the company should do this. The King IV Report makes the following recommendations regarding the governance of technology and information, which would include the governance of AI:

(i) The board should exercise ongoing oversight of technology and information management;[32]
(ii) The board should ensure that there is an ethical and responsible use of technology and information in the company, and compliance with relevant laws;[33]
(iii) The board should consider the need to receive periodic independent assurance on the effectiveness of the company's technology and information arrangements, including outsourced services;[34] and
(iv) The board should disclose the actions it takes to monitor the effectiveness of technology and information management.[35]

The King V Code laudably deals directly with the governance of AI in companies. It recommends that, with respect to AI, the board should ensure that there is adherence to the values of ethics, human centricity, accountability, transparency, explainability, security, privacy, fairness and trustworthiness.[36] It

28 King IV Report, at 30. The legal status of the King IV Report, as is the case with the King V Code, is that of a set of voluntary principles and practices. The principles and recommendations are persuasive and not binding on boards of directors, save for listed companies (see paras 7.F.8 and 3.84 of the Listings Requirements of the Johannesburg Stock Exchange which requires an applicant issuer to implement the King Code through the application of the King Code disclosure and application regime). The application regime for the King IV Report is that of 'apply and explain'. The King V Code maintains the approach adopted in the King IV Report of 'apply and explain' but enhances transparency and accountability (see King V Code, at 3).

29 'Technology' comprises the infrastructure, devices, systems, and software that generate, use, or carry information and enable transactions (King IV Report, at 18).

30 'Information' includes all data, records, and knowledge in an electronic or any other format, which form part of the intellectual capital used, transformed, or produced by the company (King IV Report, at 13).

31 King IV Report, principle 12, recommended practice 10.

32 *Ibid*., recommended practice 13.

33 *Ibid*., recommended practices 13h and 13i.

34 *Ibid*., recommended practice 16.

35 *Ibid*., recommended practice 17c.

36 King V Code, principle 10, recommended practice 109c(i).

also recommends that the board should oversee that there is clear accountability for decisions, actions, outputs and outcomes.[37] This oversight process includes subjecting the processes, data, models, algorithms, resources and tools used in the development, implementation, monitoring and management of automated technologies to human oversight and override mechanisms that are commensurate with the level of risk to the company and its stakeholders.[38]

Even though South Africa has yet to enact any laws directly regulating AI, it inevitably will soon have to do so.[39] Nonetheless it has made progress towards this goal. The Presidential Commission on the Fourth Industrial Revolution was established in 2019, and is tasked with identifying policies, strategies and plans needed to position South Africa as a leading country in the evolution and development of the Fourth Industrial Revolution.[40] The Artificial Intelligence Institute of South Africa and AI hubs were launched by the DCDT in 2022 to advance the take up of AI.[41] South Africa's AI Planning Discussion Document was launched by the Minister of the DCDT in 2024, with the aim of being a pre-policy process to obtain and collate inputs to be incorporated into a draft plan.[42] SA's AI Policy Framework was subsequently released in October 2024, with the intention of providing a basis for crafting an AI statute to regulate AI use in South Africa.[43] The SA's AI Policy Framework is of particular significance as it establishes the foundation for drafting legislation regulating AI and steering the direction of the drafting of this legislation. It is noteworthy that the SA's AI Policy Framework aims to guide the development of regulatory mechanisms to ensure that AI applications are safe, ethical and aligned with the public interest so as to protect citizens from potential harms, build trust in AI technologies and encourage their adoption.[44] A key tenet of this framework is to maintain human oversight over AI and to ensure that AI applications augment rather than replace human decision-making.[45]

37 *Ibid*., recommended practice 109c(ii).

38 *Ibid*.

39 Although there are currently no specific laws in South Africa directly regulating AI, there are some statutes that may affect the development and use of AI in South Africa. For example, the Copyright Act 98 of 1978 and the Patents Act 57 of 1998 apply to AI-generated works. In a recent controversial decision, a South African patent invented by an AI system called DABUS involving interlocking food containers that are easy for robots to grasp and stack was approved in South Africa, despite being rejected by patent offices in the US and Europe (IP Watchdog 'DABUS Gets its First Patent in South Africa under Formalities Examination' (29 July 2021), available at <https://ipwatchdog.com/2021/07/29/dabus-gets-first-patent-south-africa-formalities-examination/id=136116/> (accessed 10 July 2025). Another example is the Protection of Personal Information Act 4 of 2013 (POPIA or the POPI Act), which applies to the automated processing of personal information (ss 3 and 71).

40 Department of Telecommunications and Postal Services Notice 209 of 2019 Government Gazette No 42388 of 9 April 2019 para 2.1.

41 See DCDT, 'AI National Government Summit Discussion Document' (October 2023), at 10, available at <https://www.dcdt.gov.za/images/phocadownload/AI_Government_Summit/National_AI_Government_Summit_Discussion_Document.pdf> (accessed 10 July 2025).

42 *Ibid*.

43 SA's AI Policy Framework, *supra* note 3, at 3.

44 *Ibid*.

45 *Ibid*., at 1 and 11.

III. POTENTIAL USES OF AI BY BOARDS OF DIRECTORS

There are three types of AI: assisted, augmented and autonomous. With assisted intelligence, the AI system assists humans to do the same tasks faster or better, but the decision rights remain solely with the humans.[46] In this form, AI has a low level of autonomy or no autonomy at all and does not make any decisions itself.[47] Assisted AI could be used by boards of directors for practical tasks, such as compiling agendas for meetings, calling a shareholders' meeting, preparing reports, recording discussions at board meetings (in contrast to traditional short minutes) and assuming administrative duties.[48]

Augmented (or advisory) AI involves using algorithms and entails humans and the AI sharing decision-making.[49] It has a heightened level of autonomy, but does not deprive humans of power since they retain the decision-making rights, or are at most shared with the machine.[50] The AI provides information or advice that would otherwise be unavailable or more difficult and time-consuming to obtain.[51] It could be used by boards of directors to provide support in complex decision-making situations by building scenarios and simulations to design and test scenarios.[52] This assistance enables board decisions to be based on an objective analysis of corporate patterns and industry trends instead of 'gut feelings', as is often the case with complex decisions involving large amounts of data.[53] Furthermore, augmented AI's forecasting capabilities may change the nature of directors' control over the company from predominantly past-oriented to future-oriented.[54] For example, for a decision whether a merger or investment should proceed, based on predictive analysis, augmented AI could instantly analyse a bundle of data, create new information and suggest the optimal decision.[55] Augmented AI's speed and ability to apply computational analytic techniques to big data[56]

46 Rao, 'AI: Everywhere and Nowhere', *supra* note 14. An example of assisted AI is Apple's Siri.

47 M. Petrin, 'Corporate Management in the Age of AI', 3 *Columbia Business Law Review* (2019) 965–1030, at 981.

48 *Ibid*.; European Commission 'Study on the Relevance and Impact of Artificial Intelligence for Company Law and Corporate Governance' (report prepared by EY for the European Commission, DG Justice and Consumers, June 2021), at 31, available at <https://data.europa.eu/doi/10.2838/790784> (accessed 24 July 2025); F. Hamadziripi and H. Chitimira, 'The Integration and Reliance on Technology to Enhance the Independence and Accountability of Company Directors in South Africa', 24 *PER/PELJ* (2021) 1–32, at 6; J. Zhao, 'Artificial Intelligence and Corporate Decisions: Fantasy, Reality or Destiny', 7(14) *Catholic University Law Review* (2022) 663–698, at 677.

49 Rao, 'AI: Everywhere and Nowhere', *supra* note 14.

50 Petrin, 'Corporate Management in the Age of AI', *supra* note 47, at 982; M. Hilb, 'Toward Artificial Governance? The Role of Artificial Intelligence in Shaping the Future of Corporate Governance', 24 *Journal of Management and Governance* (2020) 851–870, at 863.

51 Petrin, 'Corporate Management in the Age of AI', *supra* note 47, at 982.

52 Hilb, 'Toward Artificial Governance?', *supra* note 50, at 863.

53 Mertens, 'The Use of Artificial Intelligence in Corporate Decision-Making', *supra* note 1, at 9.

54 Hilb, 'Toward Artificial Governance?', *supra* note 50, at 863.

55 I. Kindylidi, 'Smart Companies: Company & Board Members Liability in the Age of AI' 6(1) *UNIO-EU Law Journal* (2020) 115–141, at 117; Mertens, 'The Use of Artificial Intelligence in Corporate Decision-Making', *supra* note 1, at 12.

56 The term 'big data' (sometimes called 'business analytics') is in general used to describe the collection, processing, and analysis of very large and complex datasets which are challenging to

are significant advantages that the board may use to improve the efficacy and quality of its decision-making processes.[57] Although the board may rely on the suggestions made by the AI and may perform decision-making tasks jointly with the AI system, the board is the one that makes the final decision.[58]

Autonomous intelligence, the most advanced role of AI, entails bestowing decision rights on the AI system.[59] On this level, AI is able to operate within a predefined range without constant decision inputs and make decisions independently.[60] Autonomous intelligence involves algorithms assuming human responsibilities and does not require human intervention.[61] Autonomous AI could be used by boards of directors to perform tasks such as autonomous robotic trading of securities and handling loan applications.[62] It can also be used as part of a company's compliance procedures, such as reviewing compliance with laws, company codes of conduct or due diligence processes, while also identifying any breaches of the rules.[63] A South African insurance company reportedly uses its own AI-powered system for autonomous quoting and onboarding and even adjudicating claims.[64] Using autonomous AI in regulatory compliance could eventually remove the need for human involvement in these tasks.[65]

capture, store, manage and analyse effectively using current database management concepts and software since these datasets are produced in great volumes and in a wide variety and require analysis at a high velocity. Big data analytics are a collection of analytic techniques designed to analyse big data to inform decision-making (M. Ridge, K.A. Johnston and B. O'Donovan, 'The Use of Big Data Analytics in the Retail Industries in South Africa' 9(19) *African Journal of Business Management* (2015) 688–703, at 688; H.E. Pence, 'What is Big Data and Why is it Important?' 43(2) *Journal of Educational Technology Systems* (2014–2015) 159–171, at 160; J. Mneney and J. van Belle, 'Big Data Capabilities and Readings of South African Retail Organisations' (paper presented at IEEE 6th International Conference–Cloud System and Big Data Engineering 14–15 January 2016, Noida, India), at 279).

57 Zhao, 'Artificial Intelligence and Corporate Decisions', *supra* note 48, at 673; Hamadziripi and Chitimira, 'The Integration and Reliance on Technology', *supra* note 48, at 7.

58 Kindylidi, 'Smart Companies', *supra* note 55, at 117.

59 Rao, 'AI: Everywhere and Nowhere', *supra* note 14. An example of autonomous AI is a fully autonomous vehicle.

60 Hilb, 'Toward Artificial Governance?', *supra* note 50, at 861.

61 Kindylidi, 'Smart Companies', *supra* note 55, at 118.

62 V. Kolbjørnsrud, R. Amico and R.J. Thomas, 'The Promise of Artificial Intelligence: Refining Management in the Workforce of the Future', *Accenture Institute for High Performance* (2016) 1–23, at 17, available at <https://www.slideshare.net/slideshow/the-promise-of-artificial-intelligence-redefining-management-in-the-workforce-of-the-future/62065237> (accessed 24 July 2025).

63 N. Joshi, 'Why Regulatory Compliance Can Be Complicated and How AI Can Simplify It' (22 July 2019), available at <https://www.forbes.com/sites/cognitiveworld/2019/07/22/why-regulatory-compliance-can-be-complicated-and-how-ai-can-simplify-it/#7f90fcad377e (accessed 24 July 2025); European Commission, 'Study on the Relevance and Impact of Artificial Intelligence for Company Law and Corporate Governance', *supra* note 48, at 33.

64 H. Labuschagne, 'Naked Raises R700 Million – And Plans to Crush Claim Waiting Times with AI' (21 January 2025), available at <https://mybroadband.co.za/news/business/579020-naked-raises-r700-million-and-plans-to-crush-claim-waiting-times-with-ai.html> (accessed 7 August 2025).

65 Joshi, 'Why Regulatory Compliance Can Be Complicated', *supra* note 63.

IV. LIMITATIONS ASSOCIATED WITH AI USE IN SOUTH AFRICAN BOARDROOMS

Although SA's AI Policy Framework aspires to position South Africa as a leader in AI innovation on the African continent and a significant player on the global stage,[66] South Africa faces limitations in achieving this goal. One is South Africa's historical socio-economic disparities rooted in historical injustices, which could slow the adoption of AI technologies.[67] Related to this history is the digital divide whereby there is an unequal access to technology in South Africa.[68] Research shows that the use of AI technologies in urban-based companies is much more advanced compared to its use in rural-based companies, which suffer from a lack of digital infrastructure and a lack of support from national and local governments regarding the purchase of digital equipment, training and securing a steady supply of electricity.[69]

Another limitation is algorithmic bias: the data given to AI may be biased if it was based on previous, or even faulty decisions made by the board of directors, and this bias could affect the decisions made by AI.[70] The problem of algorithmic bias is enhanced in South Africa, which faces unique challenges stemming from historical biases, as stereotypes and social injustices may be perpetuated. For example, a study has found that AI systems in the South African banking sector might perpetuate racial biases.[71] This perpetuation could unfairly influence autonomous decisions in the financial sector and disadvantage certain demographics.[72] Without careful ethical checks, these systems risk repeating and even worsening existing racial inequalities.[73] A further concern is that if directors were to rely on biased AI recommendations, this reliance could compromise their independence.[74]

The UK AI Bill requires the Secretary of State to draft regulations requiring any business which develops, deploys or uses AI to have a designated AI officer tasked with ensuring the safe, ethical, unbiased and non-discriminatory use of AI by the business, and to ensure, as far as reasonably practicable, that data used by the business in any AI technology is unbiased.[75] It is submitted that the Companies

66 SA's AI Policy Framework, *supra* note 3, at 1.

67 *Ibid*., at 6.

68 *Ibid*.

69 Moloto, 'Utilisation of Artificial Intelligence', *supra* note 5, at 4796.

70 Kindylidi, 'Smart Companies', *supra* note 55, at 120–121; European Commission, 'Study on the Relevance and Impact of Artificial Intelligence for Company Law and Corporate Governance', *supra* note 48, at 27; Zhao, 'Artificial Intelligence and Corporate Decisions', *supra* note 48, at 689.

71 M. Brits, K. Pillay, M. Maharaj, B. Watson and A. Mahlaba, 'Ethical Dimensions of Artificial Intelligence in the South African Banking Sector' (Centre of Excellence in Financial Services Working paper series/WP/2024/01, 2024), at 9, available at <https://www.academia.edu/127477031/Ethical_dimensions_of_artificial_intelligence_in_the_South_African_banking_sector> (accessed 24 July 2025).

72 *Ibid*.

73 *Ibid*.

74 Hamadziripi and Chitimira, 'The Integration and Reliance on Technology', *supra* note 48, at 11.

75 Clause 4(1) of the UK AI Bill.

Act should impose a similar requirement on South African companies that develop, deploy or use AI so as to curtail any unethical, biased or discriminatory use of AI.

A further limitation, although not limited to using AI systems in South Africa, is that the broad standards of conduct that directors should adhere to when fulfilling their fiduciary duties[76] cannot be coded into the AI algorithm, as they are subject to interpretation and shaped by case law.[77] Added to this reality is that AI systems are unable to grasp complex ethical dilemmas or moral considerations, and lack essential human qualities such as empathy, intuition and emotional intelligence – traits crucial to effective leadership by the board of directors.[78] It may also be challenging to understand how AI formed its decisions and to verify whether it is functioning correctly.[79] It is difficult to detect and correct possible errors of the AI system when the AI malfunctions,[80] particularly when the AI system is not explainable but works as a 'black box'.[81]

V. COMPANY LAW CHALLENGES IN USING AI IN SOUTH AFRICAN BOARDROOMS

Three key company law challenges in using AI in South African boardrooms are discussed below.

A. Consulting AI on Board Functions

Section 66(1) of the Companies Act confers on directors an original power to manage the company's business and affairs. It reads:

> The business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the

76 See s 76(3) of the Companies Act, which partially codifies directors' standards of conduct, such as the duty to act in good faith and for a proper purpose, and the duty to act in the best interests of the company.

77 Mertens, 'The Use of Artificial Intelligence in Corporate Decision-Making', *supra* note 1, at 15.

78 O. Colić, 'Embracing the AI Revolution: Can AI Govern Companies?' (6 July 2023), available at <https://www.geciclaw.com/ai-technology-reshapes-corporate-governance-structures/> (accessed 26 July 2025).

79 Kindylidi, 'Smart Companies', *supra* note 55, at 121.

80 *Ibid*.

81 European Commission, 'Study on the Relevance and Impact of Artificial Intelligence for Company Law and Corporate Governance', *supra* note 48, at 26. The 'black box' effect is a situation where AI systems are capable of producing results but the process by which these results are produced and the reasons why the AI system makes specific decisions are not understood fully by humans (European Parliamentary Research Service, 'EU Guidelines on Ethics in Artificial Intelligence: Context and Implementation' (2019)), at 5, available at <https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/640163/EPRS_BRI(2019)640163_EN.pdf> (accessed 22 July 2025). A detailed discussion of the limitations of AI systems is beyond the scope of this article but for such a discussion see further European Commission Independent High-Level Expert Group on Artificial Intelligence 'Ethics Guidelines for Trustworthy AI' (2019), available at <https://digital-strategy.ec.europa.eu/en/library/ethics-guidelines-trustworthy-ai> (accessed 22 July 2025).

> powers and perform any of the functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise.

The board's power to act no longer needs to be delegated to the directors by the shareholders through the company's Memorandum of Incorporation (the company's constitution).[82] Thus the ultimate power in a company lies with the board, not the shareholders, unless otherwise provided in the Companies Act or the company's Memorandum of Incorporation, which may limit the powers given to directors.[83] Since it is the board, and not the shareholders or other stakeholders, who manages the business and affairs of a company and exercises principal authority over the company's affairs, AI appears most likely to play a significant role in boardroom decisions.[84] Given the potential uses of AI by boards of directors, as discussed above, the question arises whether, by consulting AI on its functions, the board will be regarded as having complied with its fiduciary duties under the Companies Act and the common law.

1. Compliance with fiduciary duties

Section 76(3) of the Companies Act sets out the standards of directors' conduct. It requires the directors of a company, when acting in that capacity, to exercise the powers and perform the functions of a director:

- in good faith and for a proper purpose;
- in the best interests of the company; and
- with the degree of care, skill and diligence that may reasonably be expected of a person—

  (i) carrying out the same functions in relation to the company as those carried out by that director; and
  (ii) having the general knowledge, skill and experience of that director.

The duty of directors to exercise their powers in good faith and in the best interests of the company as embodied in section 76(3)(a) and (b) of the Companies Act is the overarching and paramount fiduciary duty of directors from which all the other fiduciary duties flow.[85] The duty of good faith is subjective;[86] even so, there

82 *Pretorius v PB Meat (Pty) Ltd* (1057/2013) [2013] ZAWCHC 89, at [25]; *Navigator Property Investments (Pty) Ltd v Silver Lakes Crossing Shopping Centre (Pty) Ltd and Others* 2014 JDR 1378 (WCC), at [31]; *Kaimowitz v Delahunt and Others* 2017 (3) SA 201 (WCC), at [12].

83 *Pretorius v PB Meat (Pty) Ltd*, *supra* note 82, at [25].

84 F. Möslein, 'Robots in the Boardroom: Artificial Intelligence and Corporate Law' in W. Barfield and U. Pagallo (eds), *Research Handbook on the Law of Artificial Intelligence*, Edward Elgar Publishing (2018) 649–669, at 656.

85 *Da Silva and Others v CH Chemicals (Pty) Ltd* 2008 (6) SA 620 (SCA), at [18]; *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC), at [80]; *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Others* 2018 (3) SA 157 (GJ), at [47]; *Modise and Another v Tladi Holdings (Pty) Ltd* [2020] 4 All SA 670 (SCA), at [35].

86 *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd*, *supra* note 85, at [74].

must still be reasonable grounds for the directors' belief that they were acting in the best interests of the company.[87] Directors must also exercise their powers and perform their functions for a proper purpose, as embodied in section 76(3)(a) of the Companies Act. This duty means that they must exercise their powers for the objective purpose for which they were given the power and not for a collateral or ulterior purpose.[88] Under the common law, directors have a fiduciary duty to exercise an independent judgement.[89] This duty entails that directors have a duty to consider the affairs of the company in an unbiased and objective manner, and to exercise an independent and unfettered discretion.[90] Directors also have the duty embodied in section 76(3)(c) of the Companies Act to act with reasonable care, skill and diligence. Under this duty they must exercise the reasonable care, skill and diligence that would be exercised by a person carrying out the same functions as those carried out by the director and with the same general knowledge, skill and diligence of that director.[91] This essentially amounts to the duty to manage the company's affairs in the same manner as would be done by a reasonably prudent person of business.[92]

To comply with their fiduciary duties, directors consulting AI on their functions must do so in good faith and in the best interests of the company. There must be reasonable grounds for their belief that consulting AI would be in the best interests of the company. Directors must also consult AI for a proper purpose and not for a collateral or ulterior purpose. Importantly, directors must exercise an independent judgement when consulting AI and exercise an unfettered discretion when considering its recommendations, predictions and decisions. They must also exercise reasonable care, skill and diligence when consulting AI on their functions.

87 *Ibid*.

88 *Ibid*., at [80]; *Companies and Intellectual Property Commission v Tshelane and Others* (99920/2015) [2017] ZAGPPHC 720 (13 November 2017), at [67] and [69]; *CDH Invest NV v Petrotank South Africa (Pty) Ltd*, *supra* note 85, at [67].

89 *Fisheries Development Corporation of SA Ltd v Jorgensen and Another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd and Others* 1980 (4) SA 156 (W) 163. Section 76 of the Companies Act partially codifies the fiduciary duties of directors but does not exclude the common law. Thus the common law fiduciary duties of directors that are not expressly amended by s 76 of the Companies Act or those that are not in conflict with s 76 of the Companies Act still apply (*Mthimunye-Bakoro v Petroleum Oil and Gas Corporation of South Africa (SOC) Ltd and Another* 2015 (6) SA 338 (WCC), at [61]; *Omar v Inhouse Venue Technical Management (Pty) Ltd and Others* 2015 (3) SA 146 (WCC), at [61]).

90 *Fisheries Development Corporation of SA Ltd v Jorgensen; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd*, *supra* note 89, at 163.

91 For a detailed discussion of the fiduciary duties of directors and the duty of care, skill and diligence under the Companies Act and the common law, see F.H.I. Cassim, 'The duties and the liability of directors' in F.H.I. Cassim (ed) *Contemporary Company Law* (3rd ed, 2021, Juta) 681, at 683–763.

92 *Mthimunye-Bakoro v Petroleum and Oil Corporation of South Africa (SOC) Ltd*, *supra* note 89, at [1].

2. Reliance on the business judgement rule

May directors rely on the business judgement rule under the Companies Act when AI-assisted decisions result in negative consequences for the company? Directors will be deemed to have satisfied their obligation to act in the best interests of the company under section 76(3)(b) of the Companies Act and with reasonable care, skill and diligence under section 76(3)(c) of the Companies Act if they satisfy the requirements of the business judgement rule set out in section 76(4)(a) of the Companies Act.[93] The business judgement rule provides safe harbour for directors and prevents a court from interfering, with the benefit of hindsight, with the honest and reasonable business decisions of directors.[94] It shields directors from personal liability when they make decisions that harm the company. When the requirements of the rule are satisfied, courts will generally defer to the judgements of the directors even if their judgements or decisions lead to negative outcomes for the company, and the directors will thus not be held liable for poor decisions or bad judgements.[95] The rule also encourages innovation and risk-taking by directors by protecting certain of their acts and business decisions.[96]

According to section 76(4)(a) of the Companies Act, in respect of any particular matter arising in the exercise of the powers or the performance of the functions of director, a particular director is deemed or presumed to have exercised his or her powers or performed his or her functions in the best interests of the company and with reasonable care, skill and diligence if:

- the director took reasonably diligent steps to become informed about the matter;
- the director had no material personal financial interest in the subject matter of the decision and no reasonable basis to know that any related person had such an interest, or the director disclosed his or her interest; and
- the director made a decision, or supported the decision of a committee or the board, with regard to that matter, and had a rational basis for believing, and did believe, that the decision was in the company's best interests.

As for the first requirement of the business judgement rule, by consulting AI on a particular board matter arising in the exercise of the powers or the performance of the functions of a director, will a director be regarded as having taken reasonably diligent steps to become informed about the matter? Acting on an informed

93 The business judgement is a long-standing rule in US case law. While there have not yet been any South African cases on this rule, *Smith v Van Gorkom* 488 A.2d 858 (Del. 1985) is regarded as the leading case on the business judgement rule from the Delaware Supreme Court.

94 Cassim in Cassim (ed) *Contemporary Company Law*, *supra* note 91, at 759; M. Havenga, 'The Business Judgment Rule–Should We Follow the Australian Example?' 12(1) *South African Mercantile Law Journal* (2000) 25–37, at 28.

95 Cassim in Cassim (ed) *Contemporary Company Law, supra* note 91 at 759; Havenga, 'The Business Judgment Rule', *supra* note 94, at 28.

96 *Ibid*.

basis means that directors should gather relevant information, consider various alternatives and make informed decisions based on the available facts.[97] While there may not have been any South African judicial decisions on this issue, arguably if the AI system had superior processing and analytical capabilities compared to the director, the director would have satisfied this first requirement since consulting the AI system may enable the director to make a better-informed decision. As discussed earlier, augmented AI's speed and ability to analyse large amounts of data could help directors make better and faster decisions, as well as analyse complex business problems. Thus, if a director were to consult AI in making decisions, as long as the data were relevant, it is arguable that the director took reasonably diligent steps to become informed about the matter.

To satisfy the second requirement of the business judgement rule, the director must not be self-dealing and must not have a material personal financial interest in the subject matter of the decision on which the director consults the AI system, or must disclose this interest under section 75 of the Companies Act. Section 75 of the Companies Act requires directors to disclose their personal financial interests on matters to be considered by the board and sets out the steps that a director must take to do so.[98]

To comply with the third requirement of the business judgement rule, the director must have a rational basis for believing, and must have believed, that the decision he or she made by consulting the AI system was in the company's best interests. The test for rationality is objective, and the decision must be reasonable.[99] It is submitted that, to satisfy this requirement, the director must have some understanding of how the AI system came to its decision. If the director had no understanding of how the AI arrived at its decision, it would be difficult to maintain that he or she had a rational basis for believing that the decision was in the company's best interests. To the extent that directors are able to satisfy all three requirements of the business judgement rule, they would arguably be able to rely on the rule if AI-assisted decisions resulted in negative consequences for the company.

Given AI's superior capabilities for certain tasks and its superior processing capabilities, the question arises, or may well arise in the future in South Africa, whether directors have a duty to consult AI in order to satisfy the requirement of taking reasonably diligent steps to become informed about the matter. It is arguable that as long as the use of the AI is not widespread with respect to the particular business decision, directors who do not consult AI systems would not be acting unreasonably and would not be regarded as having failed to consult all

97 G. Helleringer and F. Möslein, 'AI and the Business Judgment Rule: Heightened Information Duty' *University of Chicago Law Review Online* (2025) 1–11, at 2, available at <https://lawreview.uchicago.edu/online-archive/ai-business-judgment-rule-heightened-information-duty> (accessed 4 August 2025).

98 For a discussion of the requirements under s 75 of the Companies Act, see *Omar v Inhouse Venue Technical Management (Pty) Ltd*, *supra* note 89, at [58]–[68]; *Atlas Park Holdings (Pty) Ltd v Tailifts South Africa (Pty) Ltd* 2022 (5) SA 127 (GJ); and *Dimension Data Facilities (Pty) Ltd and Others v Identity Property Co (Pty) Ltd and Others* 2025 (2) SA 459 (GJ), at [385]–[421].

99 Cassim in Cassim (ed) *Contemporary Company Law, supra* note 91, at 760.

available sources of information when making business decisions.[100] If directors have a good reason to assume that they are acting on adequate information when making a decision for the benefit of company, they would not breach their duties to act in the best interests of the company and with due care, skill and diligence.[101] But the more AI becomes widespread in corporate boardrooms in the future, and the more accurate and affordable it becomes, the more its use may develop into a widely accepted standard for director behaviour.[102] Directors could then be expected to resort to AI if it promised better results than persons with limited rationality.[103] It is therefore possible that in due course in South Africa, directors who did not consult AI could be regarded as having failed to take reasonably diligent steps to become informed about the matter.

3. AI literacy

Understanding how the AI system reached its decision would entail the director having some knowledge, at a reasonable level, of the operating principles and basic algorithmic logic of the AI system. While AI in an assistant role is easy to understand, augmented AI is more complicated and difficult to comprehend.[104] At times, AI's contribution to the decision-making process is not traceable or ascertainable.[105] It is arguable that if directors were to accept results from AI without any understanding of its reasoning and how it reached its decisions, they would breach their duties, particularly the fiduciary duties to act in good faith and in the best interests of the company in section 76(3)(a) and (b) of the Companies Act, the common-law fiduciary duty to exercise an independent judgement, and the duty of care, skill and diligence required by section 76(3)(c) of the Companies Act.

Notably, the EU AI Act requires providers[106] and deployers[107] of AI systems to take measures to ensure, to their best extent, a sufficient level of 'AI literacy' of their staff and other persons dealing with the operation and use of AI systems on their behalf, taking into account their technical knowledge, experience, education and training and the context in which the AI systems are to be used, and

100 See Möslein, 'Robots in the Boardroom', *supra* note 84, at 662; European Commission, 'Study on the Relevance and Impact of Artificial Intelligence for Company Law and Corporate Governance', *supra* note 48, at 29.

101 European Commission, 'Study on the Relevance and Impact of Artificial Intelligence for Company Law and Corporate Governance', *supra* note 48, at 49.

102 *Ibid*., at 26; Helleringer and Möslein, 'AI and the Business Judgment Rule', *supra* note 97, at 6.

103 Hilb, 'Toward Artificial Governance?', *supra* note 50, at 859.

104 Kolbjørnsrud, Amico and Thomas, 'The Promise of Artificial Intelligence', *supra* note 62, at 17.

105 Mertens, 'The Use of Artificial Intelligence in Corporate Decision-Making', *supra* note 1, at 22.

106 A 'provider' is defined in art 1(3) of the EU AI Act as a natural or legal person, public authority, agency or other body that develops an AI system or a general-purpose AI model or that has an AI system or a general-purpose AI model developed and places it on the market or puts the AI-system into service under its own name or trademark, whether for payment or free of charge.

107 A 'deployer' means a natural or legal person, public authority, agency or other body using an AI system under its authority except where the AI system is used in the course of a personal non-professional activity (art 1(4) of the EU AI Act).

considering the persons on whom the AI systems are to be used.[108] 'AI literacy' is defined by the EU AI Act as the skills, knowledge and understanding that allow providers, deployers and affected persons to make an informed deployment of AI systems, as well as to gain awareness of the opportunities and risks of AI and the possible harm it can cause.[109]

Significantly, one of the strategic pillars of SA's AI Policy Framework is that of promoting the development of AI systems that provide clear, understandable outputs.[110] As the policy emphasises, explainability enables developers and organisations to be accountable for the actions and outcomes of AI systems.[111] Cognisance must also be taken of the OECD recommendations which call on AI actors[112] to commit to transparency and responsible disclosure regarding AI systems.[113] The OECD requires AI actors to provide plain and easy-to-understand information on the sources of data, input, processes and logic that led to the prediction, content, recommendation or decision where this is feasible and useful, so as to enable those affected by an AI system to understand the output.[114] The OECD also calls on AI actors to be accountable for the proper functioning of AI systems and to ensure traceability, including in relation to datasets, processes and decisions made during the AI system lifecycle, to enable an analysis of the AI system's outputs and responses to inquiries.[115]

It is submitted that these requirements should be embodied in the Companies Act so that directors must be required to have a sufficient level of AI literacy. Companies should promote and strive to enhance the AI literacy of the directors on their boards, and directors should be assisted to become skilled in AI technology. Even if directors lack detailed understanding of the coding used in AI tools, they should at least be able to understand the technical guidelines that drive the function of the AI tools and the reasoning behind the decision made by the AI system.[116] In other words, AI should be explainable and not be a 'black box' to directors.[117]

It would also be advisable for boards of South African companies to appoint at least one board member with expertise in AI and a strong background in technology, who could guide and advise the board on using AI to manage the

108 Article 4 of the EU AI Act.

109 See para 56 of the preamble to the EU AI Act.

110 SA's AI Policy Framework, *supra* note 3, at 10.

111 *Ibid*. 'Explainability' is the concept that a machine learning model and its output can be explained in a manner that makes sense to a human being at an acceptable level (C3 AI 'What is Explainable AI?', available at <https://c3.ai/glossary/machine-learning/explainability/> (accessed 7 August 2025)).

112 'AI actors' are defined as 'those who play an active role in the AI system lifecycle, including organisations and individuals that deploy or operate AI' (preamble to the OECD, 'Revised Recommendation of the Council on Artificial Intelligence', *supra* note 16).

113 *Ibid*., principle 1.3.

114 *Ibid*., principle 1.3(iii).

115 *Ibid*., principle 1.5(a) and (b).

116 European Commission, 'Study on the Relevance and Impact of Artificial Intelligence for Company Law and Corporate Governance', *supra* note 48, at 60.

117 *Ibid*.

company.[118] Such a board member could educate the board about AI-related matters, elevate the board's understanding and knowledge of the operating principles and basic algorithm logic of AI systems, enhance the board's ability to make informed decisions on AI-related matters, and help the board stay abreast of AI-related developments.

VI. Delegating Board Functions to AI and Relying on AI

Under the Companies Act, may directors lawfully delegate their functions to AI systems, and rely on AI-generated advice without incurring liability for incorrect decisions made by the AI system?

The Companies Act is silent on whether directors may delegate their functions to AI, and South African case law has yet to deal with this question. The Companies Act does not explicitly empower directors to delegate their functions to other parties, but this possibility is implied in section 66(1) stating that the company's business and affairs of a company must be 'managed by or under the direction of its board'.[119] Even though directors are empowered to delegate their functions, the core tasks of a director, that is, the direction and control of a company, may not be delegated.[120] Directors may delegate their functions but may not abdicate or relinquish their responsibilities, that is, they may not avoid accountability simply by delegating authority to some other person.[121] This principle is encapsulated in *Barlows Manufacturing Co Ltd and Others v RN Barrie (Pty) Ltd and Others*,[122] where the court held:

> A director owes a fiduciary duty to his company. He cannot, while he is a director, divest himself of that duty. It is something which is inextricably tied to the office. In the exercise of this duty the director may delegate some or even all of his powers of controlling the company but he cannot, without violating what I regard as a fundamental principle of company law, delegate his duty and hence his power to control the controller. He may delegate but he may not abdicate. The board must retain ultimate control.

Accordingly, any delegation by a director remains subject to the board's overriding authority and control, and its ultimate supervision and responsibility, or else the

118 See Spencer Stuart, 'Technology in the Boardroom: Five Things Directors Should Be Thinking About' (2016), available at <https://www.spencerstuart.com/-/media/pdf-files/research-and-insight-pdfs/technology-in-the-boardroom-five-things-directors-should-be-thinking-about.pdf> (accessed 6 August 2025); M.-O. Blydell, 'You Need Technology Expertise in the Boardroom' (22 February 2024), available at <https://www.odgersberndtson.com/en-us/insights/you-need-technology-expertise-in-the-boardroom/> (accessed 6 August 2025).

119 Notably, the King IV Report (principle 8) and King V Code (principle 6) explicitly provide that the board may delegate its authority or duty to perform its functions.

120 Hilb, 'Toward Artificial Governance?', *supra* note 50, at 859.

121 Cassim in Cassim (ed) *Contemporary Company Law*, *supra* note 91, at 756.

122 1990 (4) SA 608 (C), at 610–611.

delegation risks being declared void.[123] Directors must exercise some independent judgement and consideration. The King IV Report fortifies this principle by stating that the board should ensure that its delegation arrangements within its own structures promote independent judgement[124] and that any delegation of the board's responsibilities will not 'by or of itself constitute a discharge' of the board's accountability.[125]

As for relying on advice generated by AI, section 76(4)(b) of the Companies Act permits a director to rely on:

- the persons to whom the board may reasonably have delegated, formally or informally by course of conduct, the authority or duty to perform one or more of the board's functions that are delegable under applicable law;[126]
- the persons referred to in section 76(5) of the Companies Act,[127] being employees of the company, legal counsel, accountants or other professional persons retained by the company, and board committees of which the director is not a member; and
- any information, opinions, recommendations, reports or statements, including financial statements and other financial data, prepared or presented by any of the persons referred to in section 76(5).[128]

A director will not incur liability for the actions of persons on whom the director is entitled to rely, as set out above in section 76(4)(b) of the Companies Act. The reliance principles are grounded in sound decision-making practices.[129] Directors are not expected to possess all the knowledge and expertise required to manage a company without seeking advice from third parties.[130] It would be unreasonable and impractical to expect directors to perform every task independently without delegating responsibilities. In practice, directors must rely on advice and information from both internal and external sources.[131] However, directors are not permitted to follow this advice blindly.[132] As the court explained

123 R.K. Goel, 'Delegation of Directors' Powers and Duties – A Comparative Analysis' 18(1) *International and Comparative Law Quarterly* (1969) 152–177, at 171; G. Golding, 'Tightening the Screws on Directors: Care, Delegation and Reliance' *University of New South Wales Law Journal* 35(1) (2012) 266–290, at 277.

124 King IV Report, principle 8.

125 *Ibid*., recommended practice 49. See also the King V Code, principle 6, recommended practice 55.

126 Section 76(4)(b)(i)(bb) of the Companies Act.

127 *Ibid*., s 76(4)(b)(i)(aa).

128 *Ibid*., s 76(4)(b)(ii).

129 A.N. Rokas, 'Reliance on Experts From a Corporate Law Perspective', 2(2) *American University Business Law Review* (2013) 323–351, at 328.

130 *Ibid*., at 329.

131 M. Byrne, 'Do Directors Need Better Statutory Protection When Acting on the Advice of Others?' 21(3) *Australian Journal of Corporate Law* (2008) 238–257, at 238.

132 *Fisheries Development Corporation of SA Ltd v Jorgensen; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd*, *supra* note 89, at 166; *Howard v Herrigel and Another NNO* 1991 (2) SA 660 (A), at 674; *Cooper and Another NNO v Myburgh and Others* [2021] 2 All SA 114 (WCC), at [15].

in *Fisheries Development Corporation of SA Ltd v Jorgensen and Another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd and Others*:[133]

> Obviously, a director exercising reasonable care would not accept information and advice blindly. He would accept it, and he would be entitled to rely on it, but he would give it due consideration and exercise his own judgment in the light thereof … a director may not be indifferent or a mere dummy. Nor may he shelter behind culpable ignorance or failure to understand the company's affairs.

This dictum was later endorsed by the Appellate Division (now the Supreme Court of Appeal) in *Howard v Herrigel and Another NNO*,[134] where the court added that directors have an affirmative duty to safeguard and protect the company's affairs. In *Cooper and Another NNO v Myburgh and Others*,[135] the court emphasised that a director may properly act on advice in discharging directors' duties but may not follow it blindly.

It follows that directors may delegate their functions to AI systems, provided that they do not abdicate or relinquish their responsibilities. Since the delegation by a director is still subject to the board's ultimate supervision, this step entails that directors must supervise the AI system.[136] As AI systems become more prevalent in the decision-making processes of boards of directors in South African companies, it is imperative that directors do not delegate their core management functions or rely solely on AI when making decisions for the company. Thus directors may not delegate their functions to autonomous AI, because the machine takes over all decision rights and so this initiative would entail directors' abdicating or relinquishing their responsibilities. At most, directors may delegate their functions to assisted AI, as this more limited step would entail that decision rights remain solely with the directors. They may perhaps also delegate their functions to augmented AI, where they share decision rights with the machine, as long as they exercise an independent judgement and retain ultimate control.

The directors' failure to implement sufficient human involvement to supervise the decisions of the AI could be regarded as a breach of their duty of care, skill and diligence.[137] The supervision of the AI system may entail that directors have a basic understanding of how the AI system operates.[138] Even though directors may not understand the coding in detail, they ought to have some AI literacy and should be able to understand the basic technical guidelines that drive the AI system in order to supervise the delegation of their functions to AI.[139]

133 *Supra* note 89, at 166.

134 *Supra* note 132, at 674.

135 *Supra* note 132, at [15].

136 Möslein, 'Robots in the Boardroom', *supra* note 84, at 660; Mertens, 'The Use of Artificial Intelligence in Corporate Decision-Making', *supra* note 1, at 23.

137 European Commission, 'Study on the Relevance and Impact of Artificial Intelligence for Company Law and Corporate Governance', *supra* note 48, at 29.

138 Möslein, 'Robots in the Boardroom', *supra* note 84, at 660.

139 *Ibid*.

While the South African legal provisions on delegation stated above allow some leeway for directors to delegate their functions to AI, it is doubtful whether directors may in law rely on AI for tasks delegated to AI without incurring liability for incorrect decisions made by the AI system. The persons mentioned in section 76(4)(b) of the Companies Act on whom directors may rely on are natural persons, not juristic or artificial persons. On a literal interpretation of section 76(4)(b) of the Companies Act, AI would not fall within the group of persons set out in section 76(4)(b) of the Companies Act.

Allowing and enabling directors to rely on AI for tasks delegated to it would require an amendment to section 76(4)(b) of the Companies Act to include artificial persons. Arguably, with the increasing use of AI by boards of directors, the provision restricting reliance on third parties who are natural persons may be too restrictive. It is submitted that, given the rapid development and use of AI in South African companies, the Companies Act should be amended to make provision for directors to rely on assisted and augmented AI, but not autonomous AI, under section 76(4)(b) of the Companies Act. This reliance should be subject to the directors supervising the AI, having a sufficient level of AI literacy to enable them to properly supervise the delegation of their functions, and exercising an independent judgement. This approach would align with the approach of the SA AI Framework and the King V Code of adopting a human-centric approach, maintaining human oversight over AI, and ensuring that AI applications augment but do not replace human decision-making.[140]

A. The Liability for Errors Made by AI

As AI evolves from its 'experience', it may transcend the original scope of contemplation set by its creators or operators.[141] If an error in an AI algorithm led to wrong decisions that harmed third parties or caused financial loss, who would be liable for this error: the AI system, the directors (the users of the algorithm), the developer of the AI, or the company?[142] This critical issue has not yet been tested in South African courts.

In current South African company law, AI cannot be held liable for errors in its decisions because it does not have legal capacity, rights or obligations, and cannot pay damages.[143] Under the Companies Act, AI cannot be appointed a member of the board of directors, as section 69(7)(a) of the Companies Act provides that a person is ineligible to be a director of a company if the person is a juristic person. It follows that since only natural persons may be appointed as directors, AI may not be appointed a board member of a South African company.

140 SA's AI Policy Framework, *supra* note 3, at 1 and 11; King V Code, principle 10, recommended practice 109c(i).

141 C. Davies, 'Legal Liability for the Actions of Chatbots', 27(3) *Communications Law* (2022) 125–131, at 126.

142 Hilb, 'Toward Artificial Governance?', *supra* note 50, at 859.

143 See Kindylidi, 'Smart Companies', *supra* note 55, at 131 and Mertens, 'The Use of Artificial Intelligence in Corporate Decision-Making', *supra* note 1, at 23.

It may be possible to hold the company liable for the wrong decision made by the AI system that harmed third parties, but as AI lacks separate legal personality, it is arguable that the company could not be said to be vicariously liable for the AI system in the same way that it is vicariously liable for the conduct of its employees.[144] If the AI system were to be considered an agent of the company, its conduct would then be attributable to the company, and hence the company would be liable for the error.[145] This argument would hold water only if the AI system were granted legal personality.[146] It is arguable that the developer of the AI system should be held liable for its algorithmic failure.[147] But even if that developer were held liable for the error made by the AI system, this outcome should not exclude from liability the directors who contributed to the failure of the AI system also being held personally liable for failing to supervise the AI system.[148]

Arguments that AI should have some form of legal personality have been gaining credence as AI systems are becoming more sophisticated, because this development would help define and limit the legal obligations of its creators, programmers and users, similar to how companies are treated as legal entities and act as respondents in legal matters.[149] In this vein, the European Parliament has suggested that a form of 'electronic personality' for AI should be considered so that at least the most sophisticated autonomous robots could be established as having the status of 'electronic persons' responsible for making good any damage they may cause, and possibly applying electronic personality to instances where AI makes autonomous decisions or otherwise interacts with third parties independently.[150] But some experts criticised this proposal as inappropriate from an ethical and legal perspective.[151]

In 2014, a Hong Kong-based venture capital company, Deep Knowledge Ventures, appointed an algorithm named 'Vital' (Validating Investment Tool for Advancing Sciences) to its board of directors.[152] Vital could make investment recommendations by scanning prospective companies' financing, clinical trials and intellectual property.[153] It was given the right to vote on whether the

144 Davies, 'Legal Liability for the Actions of Chatbots', *supra* note 141, at 127.

145 Mertens, 'The Use of Artificial Intelligence in Corporate Decision-Making', *supra* note 1, at 24.

146 Zhao, 'Artificial Intelligence and Corporate Decisions', *supra* note 48, at 674.

147 Mertens, 'The Use of Artificial Intelligence in Corporate Decision-Making', *supra* note 1, at 24.

148 *Ibid*.

149 S. Chesterman, 'Artificial Intelligence and the Limits of Legal Personality' 69(4) *International & Comparative Law Quarterly* (2020) 819–844, at 822; Zhao, 'Artificial Intelligence and Corporate Decisions', *supra* note 48, at 680.

150 European Parliament, Report with Recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL)) s 59(f), available at <https://www.europarl.europa.eu/doceo/document/A-8-2017-0005_EN.html#_section3> (accessed 11 August 2025).

151 Open Letter to the European Commission Artificial Intelligence and Robotics (2018), available at <https://robotics-openletter.eu/> (accessed 11 August 2025).

152 R. Wile, 'A Venture Capital Firm Just Named an Algorithm to its Board of Directors – Here's What it Actually Does' (13 May 2014) *Business Insider*, available at <https://www.businessinsider.com/vital-named-to-board-2014-5?international=true&r=US&IR=T> (accessed 11 August 2025).

153 *Ibid*.

company should make an investment in a specific company,[154] and was widely acknowledged as the first robot-director.[155] Despite this acknowledgement, from a legal perspective Vital did not satisfy the legal requirement to be a director since the Hong Kong Companies Ordinance permits only natural persons to be appointed as directors of companies.[156] For this reason, Vital was treated as a board member with 'observer status'.[157] It was not, for example, given an equal vote on all financial decisions made by the company.[158]

Owing to Vital's success in board decision-making, other companies implemented AI systems to help them make management decisions. For example, in 2016 the Finnish IT company Tieto appointed an AI system called Alicia T as a fully-fledged member of its management team with the capacity to cast votes, assist the management team to become data-driven and seek innovative ways to pursue data-driven opportunities.[159] Alicia T's role is to support data-driven decision-making using machine intelligence and advanced data analytics, and its potential uses include supporting due diligence processes, compliance tasks and mergers and acquisitions decisions.[160] Nonetheless, Alicia T is to be regarded as no more than an AI tool to support the management team in decision-making, as it does not make decisions autonomously or execute strategies.[161]

It remains to be seen whether the law accords legal personality to AI in the future, but under the current South African company law framework, AI lacks legal personality and therefore cannot legally be held liable for any errors it may make. The South African policy as articulated in SA's AI Policy Framework is to have a human-centric approach,[162] so conferring electronic personality on AI when it acts on the autonomous end may not be an immediate focus. In any event, even if AI were to be accorded legal status, it would be challenging for it to respond to an allegation of wrongdoing or to have the capacity to pay damages.[163] Payment

154 *Ibid*.

155 E. Zolfagharifard, 'Would You Take Orders from a ROBOT? An Artificial Intelligence Becomes the World's First Company Director' (19 May 2014) *Daily Mail*, available at <https://www.dailymail.co.uk/sciencetech/article-2632920/Would-orders-ROBOT-Artificial-intelligence-world-s-company-director-Japan.html> (accessed 11 August 2025).

156 Section 456(2) read with s 456(1) of the Hong Kong Companies Ordinance provides that a body corporate may not be appointed as a director of a public company, a private company that is a member of a group of companies of which a listed company is a member, and a company limited by guarantee.

157 Zhao, 'Artificial Intelligence and Corporate Decisions', *supra* note 48, at 679.

158 European Commission, 'Study on the Relevance and Impact of Artificial Intelligence for Company Law and Corporate Governance', *supra* note 48, at 19.

159 A. Peyton, 'Alicia Key to Tieto's AI Leadership Team' (19 October 2016) *Fintech Futures*, available at <https://www.fintechfutures.com/ai-in-fintech/alicia-key-to-tieto-s-ai-leadership-team> (accessed 12 August 2025); K. Foote, 'Tieto Appoints AI to Leadership Team' (20 October 2016) *Dataversity*, available at <https://www.dataversity.net/tieto-appoints-ai-leadership-team/> (accessed 12 August 2025).

160 European Commission, 'Study on the Relevance and Impact of Artificial Intelligence for Company Law and Corporate Governance', *supra* note 48, at 17.

161 *Ibid*.

162 SA's AI Policy Framework, *supra* note 3, at 1 and 11.

163 Davies, 'Legal Liability for the Actions of Chatbots', *supra* note 141, at 127.

of damages could be made from a central fund, which would be more akin to an obligatory insurance scheme.[164]

In this vein, the European Parliament has suggested that a possible solution to the complexity of allocating responsibility for damage caused by AI could be a compulsory insurance scheme covering damage potentially caused by AI.[165] Until legal rules on the liability of AI are formulated under the auspices of SA's AI Policy Framework, it is submitted that South African companies using AI in the boardroom should obtain insurance cover for potential liabilities caused by AI-generated decisions. This coverage should include a minimum insured amount, provided that such coverage is offered by the insurer.[166] To avoid stifling the company's incentive to innovate and to alleviate fears of the company's lacking sufficient funds to compensate injured parties, a liability cap could be introduced.[167]

VII. CONCLUSION

If South Africa is going to keep pace with global technological advancements and stay competitive, it must address its socio-economic disparities by adopting inclusive policies to ensure broad and equitable access to AI benefits.[168] It must also create frameworks to reduce bias in AI algorithms by ensuring that the data used to train AI systems is representative and inclusive of South Africa's diverse demographics.[169] It is crucial for boards of directors of South African companies to monitor carefully the AI systems they use, otherwise they may unintentionally perpetuate the biases embedded in AI algorithms.

It is submitted that directors will be regarded as having complied with their fiduciary duties under the Companies Act and the common law if they consult AI on their functions, provided that they do so in good faith, in the best interests of the company, and for a proper purpose, and exercise an independent judgement when considering the recommendations, predictions and decisions of AI. They must also exercise reasonable care, skill and diligence when consulting AI on their functions. If a decision made by consulting AI results in negative consequences for the company, it is submitted that directors may rely on the business judgement rule under the Companies Act, provided that they satisfy the three requirements of the rule. To do so, they must have some understanding of how the AI came to its decision. It is further submitted that directors may lawfully delegate their functions to assisted and augmented AI systems, but not autonomous AI, provided

164 Chesterman, 'Artificial Intelligence and the Limits of Legal Personality', *supra* note 149, at 825.

165 European Parliament, Report with Recommendations to the Commission on Civil Law Rules on Robotics, *supra* note 150.

166 See Kindylidi, 'Smart Companies', *supra* note 55, at 133.

167 Mertens, 'The Use of Artificial Intelligence in Corporate Decision-Making', *supra* note 1, at 26.

168 SA's AI Policy Framework, *supra* note 3, at 6.

169 Brits, Pillay, Maharaj, Watson and Mahlaba, 'Ethical Dimensions of Artificial Intelligence', *supra* note 71, at 24.

that they do not abdicate or relinquish their responsibilities, and monitor the AI, exercise an independent judgement and retain ultimate control. But directors may not rely on AI-generated advice without incurring liability for incorrect decisions made by the AI system, because section 76(4)(b) of the Companies Act does not apply to artificial persons. AI cannot be held liable for its errors under the current South African company law, as it lacks legal capacity, rights and obligations since it is not a legal person and does not have separate legal personality. Yet it is submitted that directors could be held liable for errors made by the AI system if they failed to supervise the AI system properly.

While there are many advantages to the board of directors using AI in making decisions and the innovation in this field should be supported, its use must be regulated. It is submitted that the Companies Act has failed to keep pace with technological advancements to reflect the role of AI in the management of companies by boards of directors, and that it should be reviewed to regulate the use of AI by boards of directors. The following series of recommendations are made to support this necessary legislative reform:

(i) The Companies Act should require directors to supervise or oversee decisions made by the AI system. Ultimate human control of the AI system should be legally required;
(ii) The Companies Act should require directors to have a sufficient level of AI literacy;
(iii) Section 76(4)(b) of the Companies Act should be amended to make provision for directors to rely on assisted and augmented AI, but not autonomous AI, subject to the directors supervising the AI, having a sufficient level of AI literacy to enable them to properly supervise the delegation of their functions, and exercising an independent judgement;
(iv) The Companies Act should require companies using AI in the boardroom to have insurance against potential liabilities caused by AI-generated decisions;
(v) The Companies Act should require boards of directors to appoint at least one board member with expertise in technology and AI; and
(vi) The Companies Act should require companies which develop, deploy or use AI to have a designated AI officer tasked with ensuring the safe, ethical and unbiased use of AI by the business, and to ensure, as far as reasonably practicable, that data used by the business in any AI technology is unbiased.

In the meantime, South African companies should draw up codes of conduct concerning the board's use of AI systems. It was said in 2017 that over the next decade, AI will not replace managers, but managers who use AI will replace those

who do not use it.[170] It remains to be seen whether AI will replace directors in the future, but for now it is imperative for South African policymakers to adapt company law to accommodate the speed at which AI is progressing and its increasing use in company boardrooms by boards of directors, in order to avoid a legal vacuum being created in the near future in South African boardrooms.

170 E. Brynjolfsson and A. McAfee, 'The Business of Artificial Intelligence: What it Can – and Cannot – Do for Your Organization' (18 July 2017) *Harvard Business Review*, available at <https://hbr.org/2017/07/the-business-of-artificial-intelligence> (accessed 12 August 2025).