



Chartered
Governance
Institute of
Southern Africa

CGISA Best Practice Guide

September 2021

*THE ROLE OF THE COMPANY SECRETARY IN STATE CAPTURE AND CORRUPTION: **RED FLAGS AND LESSONS LEARNED***

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VISION, MISSION AND VALUES

Vision

Our vision is to be the leader in the practice of governance in Southern Africa.

Mission

Our mission is to become the shining beacon in governance. We will be the best explainers, the best advocates, the best educators and the most active organisation in the promotion of good governance in Southern Africa.

Values

- **Stand up:** Challenging. Proud to take a position. Never afraid to do so.
- **Listen well:** Totally aware. Understanding what's going on in the world. Always mindful of change.
- **Move forward:** Forever looking at the path ahead. Remembering where we've been.
- **Stay balanced:** A source of ethical conscience. Never shaken. Standing firm.
- **Be totally up-to-date:** In tune with the global trends in governance.
- **Inspire:** Leading the way so others will follow.

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FOREWORD

The Zondo Commission has been one of the most defining features of our country for the past two years. State capture and corruption have become parts of our everyday conversation. We listened to witnesses giving testimony in excruciating detail on how money was stolen to line the pockets of rent seekers. This all happened while the majority of people in our country continue to live in conditions of abject poverty. Money that was meant to provide services to our people was siphoned off, institutions were hollowed out and corporate governance went out of the window.

While we all know that the Zondo Commission is a vast undertaking, this best practice guide homes in on only one aspect – the role of the company secretary. If you have ever entertained notions that this was an unimportant position, you may need to re-evaluate your perspective. Company secretaries are where the action is. They serve on the board and board committees where most of these activities surface in some form or other. In the context of state capture and corruption, enormous pressure is brought to bear on company secretaries to not get in the way of those with devious intentions.

This best practice guide deals with only one profession – the company secretary. It would be interesting to see if other professions examine their roles. It is widely accepted that state capture was aided and abetted by professionals from various disciplines. Quite a lot has been written about the role of auditors. But what about other professions such as chartered accountants, lawyers, internal auditors, bankers, engineers, risk managers, compliance officers, non-executive directors and many other professions? We need to learn from these experiences. They must never happen again. If professional bodies are to retain any semblance of credibility, they need to weed out those that bring their profession into disrepute.

CGISA is indeed fortunate in that of the 11 company secretaries mentioned in this guide, only two are members of our Institute. One of them, Karen Mills FCG, former company secretary of the Johannesburg Roads Agency ("JRA"), conducted herself in an exemplary manner. The other is Ruth Kibuuka, FCG, of SAA. We have made a submission to the department of trade and industry ("dti") in December 2018 to make it compulsory for company secretaries to belong to the CGISA, but this has not happened. Similarly, we have also made a submission to the JSE Ltd in October 2018 to require that listed company secretaries belong to the CGISA but there has been no progress on this. We continue to recommend that company secretaries should belong to CGISA as the professional body for company secretaries. However, we call on all companies to ensure that their company secretary becomes a member of the CGISA. Although this provides no

guarantee that their company secretary won't be found wanting, it does move the odds along that their company secretary would at least have gained an international qualification in corporate governance and will be required to do ongoing professional development to keep their knowledge current and to abide by a code of professional conduct. It will also provide a network of company secretaries who can support each other in what is sometimes described as a lonely job. It may in the end give them the strength of character to make the right decisions in the heat of the moment.

Of course, this guide could not possibly cover each and every instance of company secretaries involved in state capture and corruption, however it does provide a window with which to view what was happening. It goes without saying that the majority of company secretaries continue to conduct themselves in a professional and ethical manner.

I would like to thank Sabrina Paxton and Khathutshelo Nethavhani, FCG, as co-authors of this guide and also Katleho Serobe (Temporary Technical Adviser) who spent hours editing it. I hope that you will find this a useful guide.

Stephen Sadie
(MBA, M. Ed)
Chief Executive Officer

1 September 2021



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1 INTRODUCTION

CGISA has published best practice guides over many years. Although this publication forms part of the best practice guide series, it is ironic calling it a “best” practice guide. The subject matter illustrates very poor practice in that it examines the role of company secretaries in state capture and corruption. It is hoped that by drawing attention to poor examples of corporate governance, we will learn from their mistakes and that we will give greater support to the vast majority of our company secretaries who uphold the values and ideals of our profession on a daily basis.

The Zondo Commission has brought to light serious allegations of corruption and unethical conduct within state-owned entities (“SOEs”), government departments and the private sector. The Commission further revealed the insidiously corrupt and symbiotic relationship that exists between high-profile players in the private and public sectors. Generally, the Commission has heard evidence implicating high-profile individuals in both sectors, and consequently, trust in corporate institutions has been compromised within society. It has become evident that good governance within these entities has been crippled, making way for grand scale corruption. It is trite legal principle that in every case of corruption there must be a “corrupter” and a “corruptee”, as evidenced by the seminal EOH Holdings Limited (“EOH”) case, discussed in detail herein. This case study, amongst the others detailed in this guide evidence that the private sector is not an innocent by-stander of public sector corruption. In fact, in most instances, the genesis of public sector corruption is the private sector. With company secretaries being trusted advisors and custodians of good governance, the question that arises is what the role of the company secretary in these entities has been under the weight of what has come to be known as state capture. This question becomes more pertinent in view of the observations made by the court in *Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd (1971) 2 QB 711 (CA)* that –

“ ... Our courts have held that the Company Secretary is an officer of the company with extensive duties and responsibilities. Far from being a mere scribe, he regularly makes representations and enters contracts on behalf of the company. Company Secretaries are an integral part of an organisation’s management structure and play a pivotal role in the proper governance of the company. The Company Secretary, in effect, acts as the company’s Chief Governance Officer.¹ ”

King IV explicitly states that the board of a company should ensure that it has access to professional and independent guidance on corporate governance and that where a company secretary is appointed, he or she should provide such professional corporate governance services to the governing body. In addition to the governance role, the company secretary is under a statutory mandate under section 88 of the Companies Act 71 of 2008 (“Companies Act” or “the Act”) to provide the directors of the company collectively and individually, with guidance as to their duties, responsibilities, and powers, making the directors aware of any law relevant to or affecting the company and reporting to the board any failure on the part of the company or a director to comply with the memorandum of incorporation or the Companies Act.

Considering the above, the role of the company secretary in governance collapses of both private and public entities needs to be assessed with reference to legal and ethical responsibilities. This guide will provide an overview of the Zondo commission as well as look at other examples of corruption that have plagued South Africa in the recent years. Specific state-owned entities implicated will be discussed with reference to the role of the company secretary. The guide will also discuss the role of company secretaries who by omission or commission have impacted governance collapses, which have opened the door for acts of criminality in both sectors. Red flags and lessons learned will then be highlighted, considering the role of the company secretary in all the entities accused of corrupt behaviour, with the aim of preventing future governance collapses and providing the company secretary with proactive steps to ensure fulfilment of his or her legal and ethical mandate.

¹ Johnston A “Company secretaries: gatekeepers or doormen?” *Without Prejudice* (February 2018) <https://www.withoutprejudice.co.za/free/article/5913/view>

2.1 Brief background

The Zondo commission was set up by President Zuma following the implementation of the recommendations made by Advocate Thuli Madonsela. In 2016, Madonsela launched an investigation into state capture. This report was the result of the investigation into the Gupta's influence over organs of state. In her report, she recommended that the president assemble a commission of inquiry into state capture.² The Zondo commission is headed by Deputy Chief Justice Raymond Zondo. The commission aims to uncover the extent to which tools and organs of government have been misused to unduly enrich private citizens, by virtue of them enjoying closeness to political power.³

The commission is constituted in terms of the Commissions Act 8 of 1947 and may summon any individuals to testify. Any matter before the commission may be referred to the relevant authorities for further investigation or prosecution. Assisting Zondo are, former auditor-general Terence Nombembe and advocate Paul Pretorius SC, amongst other legal counsel. The terms of reference of the commission state, amongst other things, that it must investigate the nature and extent of corruption, in the awarding of contracts and tenders to companies, business entities or organisations by government departments, agencies and entities.

In a nutshell, the commission has been established to investigate state capture within the following broad areas:⁴

- The control of SOEs and the weakening of their governance and operational structures.
- The control over the public service.
- The prioritisation of job creation for a particular company or group.
- The control over South Africa's fiscal sovereignty.
- The control of procurement processes.
- The control of SOE boards through appointments and removals of key individuals.

Zuma appoints commission of inquiry into state capture (Extract, 9 January 2018)

President Jacob Zuma announced the appointment of a commission of inquiry into state capture.

"The allegations that the state has been wrestled out of the hands of its real owners, the people of South Africa, is of paramount importance and are therefore deserving of finality and certainty," Zuma said in a statement issued by the Presidency.

"It is of such serious public concern that any further delay will make the public doubt government's determination to dismantle all forms of corruption, and entrench the public perception that the state has been captured by private interests for nefarious and self-enrichment purposes."

Zuma said he made this decision after the investigation and remedial action of the Public Protector and the order by the North Gauteng High Court in Pretoria on December 14 last year.

The court ordered Zuma to appoint a commission within 30 days that must be selected by Chief Justice Mogoeng Mogoeng. He selected Deputy Chief Justice Raymond Zondo to lead the commission.

"I would like to emphasise that I have faith in all the judges and their ability to execute their tasks with the requisite levels of fairness, impartiality and independence."

Zuma said extra resources would be made available to the commission of inquiry.

"By making more resources available, it is my sincere hope that the commission, will be able to reach many of those areas of concern that may not have been reached by the Public Protector's investigation, but form part of what she might have investigated, had she had sufficient resources to do so."



Source: <https://www.timeslive.co.za/politics/2018-01-09-zuma-appoints-commission-of-inquiryinto-state-capture/>

² "State of Capture – A report of the Public Protector" (14 October 2016) <https://www.sahistory.org.za/archive/state-capture-report-public-protector-14-october-2016>

³ "The Zondo Commission from a Corrupt Watch point of view" Corruption Watch (21 August 2018) https://www.corruptionwatch.org.za/wp-content/uploads/2018/08/Zondo-Commission-overview-and-context-for-Corruption_Watch.pdf

⁴ Swilling M et al "Betrayal of the Promise: How South Africa is being stolen" (May 2017) 23/05/2017 State Capture Report.indd (pari.org.za).

2. ZONDO COMMISSION OVERVIEW *(continued)*

At the centre of the state capture inquiry is the Gupta family and their alleged close ties to former president, Jacob Zuma and the Zuma administration. This close relationship has formed the cornerstone of the allegations into state capture. It has been alleged that the Gupta family has benefited through decisions and activities undertaken under the Zuma administration. It is alleged that the Guptas had influence over the hiring of ministers and the firing of ministers, who may have been in the way of their business interests.

It has also been alleged that the Guptas yielded influence over the appointment of board members at SOEs. The effective and transparent governing of SOEs is critical to the survival of the economy. The appointment of competent and independent board members to an SOE is essential to ensure adequate accountability and good governance practices. The Public Finance Management Act ("PFMA") places the power to appoint board members in the relevant minister. However, it does not provide any procedures or standards for the appointment or dismissal of SOE board members.⁵ The Companies Act applies to all SOEs that are registered as companies and states that directors are appointed by the shareholders at the annual general meeting. With the state usually being the sole shareholder in state-owned companies ("SOCs"), the relevant minister will appoint the directors.

Though the Companies Act provides for persons who are ineligible to serve as directors, there are no specific criteria for the selection of members to the SOE board. This leaves room open to appoint persons who may not necessarily embody the characteristics that ought to be present in all board members. It also leaves room for the process to be tainted through biased or influenced appointments. The induction process would form a critical process in this regard and company secretaries would need to ensure that all new directors are fully aware of what is expected of them legally, and ethically.

State capture: Did the Guptas offer Treasury's top job to Deputy Minister Mcebisi Jonas? (Extract, 10 March 2016)

A report on Wednesday in the globally influential the Financial Times makes the startling allegation that two weeks before President Zuma fired Finance Minister Nhlanhla Nene in December, the Gupta family met with Deputy Finance Minister, Mcebisi Jonas, at the family's home in Saxonwold, to ask whether he was interested in the job. If true, it presents another piece in a disturbing puzzle of an attempt at state capture.

Just as Finance Minister Pravin Gordhan touched down in London this week on the first leg of his investment roadshow to foreign investors and credit agencies, the influential publication the Financial Times dropped a bombshell of a story highlighting the extent of Gupta family's influence and control of President Jacob Zuma's government.

The story, by Andrew England, makes the startling claim that two weeks before President Jacob Zuma fired Finance Minister Nhlanhla Nene, replacing him with backbencher David van Rooyen, the family had themselves met with Deputy Minister of Finance, Mcebisi Jonas, and had asked if he was "interested in the Treasury's top post".

It is unlikely that a newspaper of standing, like the FT, would risk publishing the serious allegation if it were not sure of its sources. It would also indicate that the Gupta family has intimate knowledge of the comings and goings of Ministers as well as believing it has the power to choose these Ministers. If true, these serious claims would amount to a scandal which should warrant a demand for the stepping down of President Jacob Zuma who enjoys a perilously close (for South Africa) relationship with the Gupta family.



Source: <https://www.dailymaverick.co.za/article/2016-03-10-state-capture-did-the-guptas-offertreasurys-top-job-to-deputy-minister-mcebisi-jonas/>

⁵ De Visser J & Waterhouse S "SOE Boards and Democracy" Dullah Omar Institute for Constitutional Law, Governance and Human Rights, University of the Western Cape (2020) <https://dullahomarinstitute.org.za/women-and-democracy/boardmembers-of-state-owned-enterprises-towards-transparent-appointments/reports/soe-boards-and-democracy-final-pdfversion-12-feb-2020.pdf>

2. ZONDO COMMISSION OVERVIEW *(continued)*



“The Cabinet approved the proposed list of Board Members, the SIU said.”

SIU flags Gupta involvement in appointment of Denel board (Extract, 8 March 2021)

The Special Investigating Unit (“SIU”) has reported that the appointment of the 2015 Denel board deviated from the normal process and was influenced by the Gupta family.

The SIU on 3 March gave a presentation to the Standing Committee on Public Accounts (“SCOPA”) on its investigation into Denel, which covered numerous irregular contracts and dealings. The SIU’s Zodwa Xesibe said the investigation emanated from a complaint received by the SIU in October 2018, and in July 2019 the SIU was authorised to investigate certain allegations against Denel. The SIU subsequently primarily investigated serious malpractices or maladministration between January 2015 and November 2019. Much of Denel’s woes started when the board was captured in 2015 and the Group Chief Executive Office and Group Chief Financial Officer were removed.

The SIU found that when former Department of Public Enterprises Minister Lynne Brown appointed the new board in 2015, “the appointment deviated from the normal process that is followed when appointing Board members for SOEs (“State-owned Enterprises”) including Denel. A list of what seemed to be proposed new Denel Board members was submitted by a certain Gupta associate to the Minister’s office. The proposed names differed from list already submitted through the normal governance process and it was the same list of names that was later presented to cabinet for approval. The Cabinet approved the proposed list of Board Members,” the SIU said.



Source: <https://www.defenceweb.co.za/industry/industry-industry/siu-flags-gupta-involvement-inappointment-of-denel-board/>

2. ZONDO COMMISSION OVERVIEW *(continued)*

2.2 Current status

The High Court has granted the commission an extension due to delays experienced as a result of Covid-19. The commission was previously set to complete its work by 30 June 2021 which has subsequently been extended. The commission will produce its final report by the end of September 2021. Up to the end of August 2021 there have been approximately 429 hearings and 421 affidavits submitted to date.⁶ President Cyril Ramaphosa has given evidence on numerous occasions at the commission. In his opening statement, Ramaphosa said the establishment of the commission was heavily contested in the ANC before the party decided to confront corruption in its ranks.⁷ After what had been a “standoff” between the former president Jacob Zuma and the rule of law triggered by his refusal to appear before Judge Zondo, the Constitutional Court eventually sentenced him to a 15-month unsuspended imprisonment term resulting from his contempt of court case in June 2021.



“(Zuma) decided to comply with the incarceration order.”

Jacob Zuma begins jail sentence for contempt of court (Extract, 8 July 2021)

South Africa's former president Jacob Zuma has been taken into custody to begin a jail term for contempt of the country's highest court, ending a stand-off that challenged the rule of law in Africa's most industrialised nation.

Zuma was taken to jail late on Wednesday with just minutes to spare before a midnight deadline to arrest him, South Africa's police ministry said.

South Africa's constitutional court sentenced Zuma to 15 months last week for defying its order to attend a judicial inquiry into allegations he aided systematic corruption during his presidency, which ended in 2018.

The judgment was hailed as a victory for South Africa's post-apartheid constitution but it became a test for the status of the rule of law under the governing African National Congress after Zuma continued to ignore the judges and allies threatened violent resistance to the order.

Zuma missed a Sunday deadline to turn himself in, which obliged the police to follow a court order to arrest him by the end of Wednesday, despite last-minute legal attempts by the former president to seek a reprieve.

His foundation on Wednesday said he “decided to comply with the incarceration order” and was “on his way to hand himself into a correctional services facility” in KwaZulu-Natal, his home province.



Source: <https://www.ft.com/content/288027a1-0194-4a47-a21a-45182d61471a>

Before looking at specific entities that have been implicated in state capture and the role of the company secretary, it is important to understand the legal and ethical duties that are required and expected of company secretaries.

⁶ Commission of Inquiry into State Capture <https://www.statecapture.org.za/site/information/stats> (Date accessed: 30 August 2021)

⁷ Bhengu C “It's a good day for accountability: SA reacts as Cyril Ramaphosa appears before Zondo Commission” Times Live (28 April 2021) <https://www.timeslive.co.za/news/south-africa/2021-04-28-its-a-good-day-for-accountability-sa-reacts-as-cyril-ramaphosa-appears-before-zondo-commission/>

3.1 Legal duties

The Companies Act makes provision for certain statutory duties for company secretaries. Section 88 of the Act lists duties of company secretaries, which are not exhaustive. For purposes of this paper, the following statutory duties are relevant:

- (a) Providing guidance to the directors regarding their duties, responsibilities and powers.
- (b) Making the directors aware of any laws relevant to or affecting the company.
- (c) Reporting to the board any failures by the company or its directors relating to compliance with the Act, the Mol or rules of the company.

The duties above bestow a pivotal role on the company secretary to ensure that directors fulfil their fiduciary duties to the company. Where the company secretary becomes aware of illegal dealings by the company, he or she has a duty to report such breaches and needs to maintain an arms-length relationship with the board and maintain his or her independence. In practice, this is easier said than done, especially if the company secretary is a full-time employee. This is explored further in section 6 below. In addition, the company secretary needs to ensure that all decisions taken by the company are done in accordance with the correct procedure prescribed by the Act and the Mol of the company, and that all required resolutions are legitimately passed.

Any person, including a company secretary, can attract liability under section 214 and 218 of the Act. Section 214 provides that if a person was knowingly a party to false statements, reckless conduct, and non-compliance with the Act, a fine or imprisonment not exceeding 10 years, in terms of section 216, may be imposed. Section 218(2) creates potential civil liability for any person found to be in contravention of the Act, for any loss suffered by another person because of that contravention.

The question as to whether the company secretary is a prescribed officer will depend on each individual case, having regard to the functions of the person within the company read and weighed up against the criteria as set out in regulation 38 of the Act. The duties of a prescribed officer include the following:

- (a) a duty of disclosure;
- (b) a duty to act in good faith and for a proper purpose and in the best interests of the company;
- (c) a duty to avoid conflict of interest; and
- (d) a duty of care, skill, and diligence.

Where the company secretary is deemed a prescribed officer in any given case, he or she may attract liability under section 77 of the Act. The type of liability that can be attracted is as follows:⁸

(a) **Jointly and severally liable**

The liability is joint and several with any other person who is or may be held liable for the same act.

(b) **General liability**

For any loss, damages or costs sustained by the company as a direct or indirect consequence of the breach of the fiduciary trust, duty of care, skill and diligence or any other provision of the Act or the Mol.

(c) **Specific liability**

For loss, damage or costs sustained by the company as a result of any of the following:

- Knowingly acting without authority
- Fraudulent and reckless conduct
- Authorising the publication of false or misleading financial statements or any other information
- Being present at a meeting or participating in the making of a decision and failing to vote against certain actions that they know to be unlawful.

Section 76(4) affords prescribed officers with a defence in terms of the business judgment rule. Under this section, where a prescribed officer has taken reasonable steps to be informed of a matter, has no personal financial interest (or has disclosed such financial interest) and has a rational basis for believing that the decision was in the best interests of the company, then in those circumstances he or she should not be liable for a breach of duty, unless they acted in bad faith.

A public company or SOC must, in terms of the Act, appoint a company secretary as provided in section 86(1). In terms of section 86(2), the company secretary must have the requisite knowledge of or experience in relevant laws and be a permanent resident of the Republic and remain so while serving in that capacity.

It is important to note at this point that the law contains a set maxim that provides that *ignorance of the law is no excuse*. As such, a company secretary would not be able to contend that he or she was unaware of his or her statutory duties.

⁸ "Prescribed Officers" Resolve Corporate Services (December 2021) <https://www.rslv.co.za/newsletters/2020/prescribed-officers/>

3. THE COMPANY SECRETARY *(continued)*

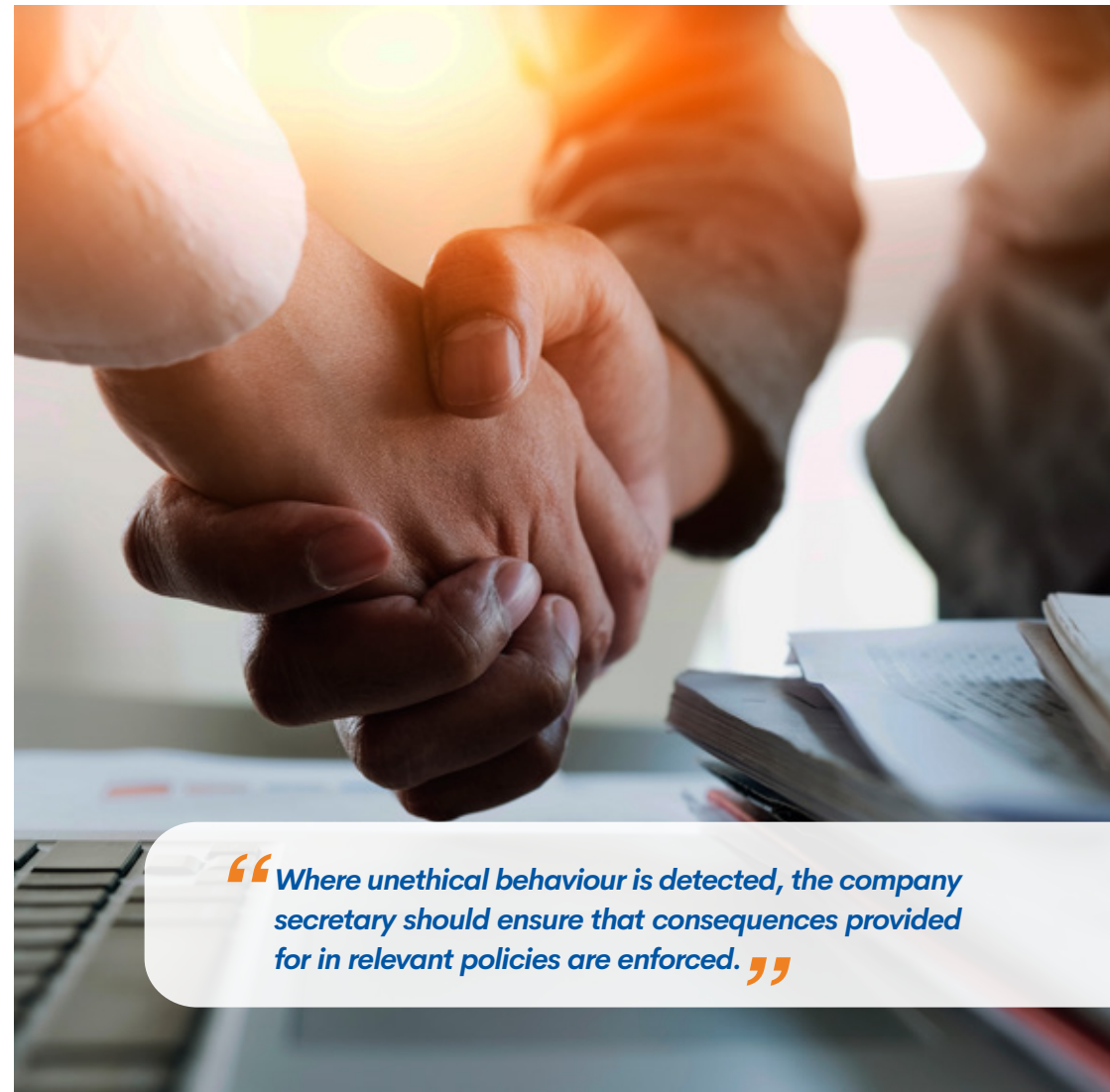
3.2 Ethical responsibilities

The company secretary, as the trusted advisor, needs to champion the cause of good corporate governance. Adherence to ethical conduct and good corporate governance go hand-in-hand. King IV provides for ethical leadership as one of its outcomes. In the normal course of events, an ethical culture generally means ensuring that all the governance processes are in place and are complied with, and entails acting ethically beyond mere legal compliance. The action items from an independent board evaluation process are often a good source of information to understand what issues require the board's attention and are an opportunity to improve the ethical climate of the board and the company, and to ensure transparency within the company.⁹

Where unethical behaviour is detected, the company secretary should ensure that consequences provided for in relevant policies are enforced. The company secretary should also have appropriate mechanisms to manage unethical behaviour i.e., is it clear where the matter should be reported, whether the conduct constitutes unethical conduct, what the potential ramifications are, etc.? A failure to do this creates a culture of tolerance and defeats the objectives of good governance. As the custodian of corporate governance, the company secretary needs to demonstrate courage when it appears that the board or a board member wants to do something unethical.

At this point, it is important to note that by belonging to a professional body such as The Chartered Governance Institute of Southern Africa ("The Institute" or "CGISA"), company secretaries are exposed to the highest standard of ethical conduct and need to adhere to the Institute's code of conduct. Where members fall short of what is required of them, the Institute has the necessary disciplinary processes in place to investigate and sanction members, where necessary.

Conflicts of interest are another key aspect of ethics. This is a key area for the company secretary to monitor and advise the board on how to address conflicts of interest, when such matters arise. In terms of the Act, directors are obliged to provide the company secretary with a completed and signed declaration of interest form at least annually or whenever there are significant changes. They need to declare all financial, economic, and other interests held by related parties. Where the company secretary fails to manage this adequately, the inherent risk of biased decisions at board level and a lack of independence would lend itself to governance failures within the company.



“Where unethical behaviour is detected, the company secretary should ensure that consequences provided for in relevant policies are enforced.”

⁹ Sadie S, Matisonn J & Paxton S (2018) "The challenges facing company secretaries in South Africa today" in *The Corporate Report* Vol 8, Issue 3 (Juta) https://www.chartsec.co.za/documents/latestNews/Sadie-Matisonn-Paxton_Challenges-facing-companysecretaries.pdf

3. THE COMPANY SECRETARY (*continued*)

3.3 Whistleblowing

Although we have whistleblowing legislation in place and the company secretary should follow the company's whistleblowing policy applicable to all employees, the actual implementation does not encourage whistleblowers to speak up. The protection offered under the Protected Disclosures Act 26 of 2000 ("PDA") only applies where, it is determined that a disclosure was made and, that the disclosure is classified as a "protected disclosure".

The section of the Companies Act applicable to whistleblowing is section 159, which protects a whistleblower in certain instances against any civil, criminal or administrative liability for a disclosure made in terms of the Act. Section 159 of the Act provides that disclosures of illegal activity can be made to a broader category of people and entities than those listed under the PDA, being: the Companies and Intellectual Property Commission, the Companies Tribunal, the Takeover Regulation Panel, a regulatory authority, an exchange, a legal adviser, a director, prescribed officer, company secretary, auditor, board or committee of the company concerned. Noting that the company secretary may be the recipient of a disclosure in the above list, it is important for the company secretary to support the whistleblower.

The nature of the company secretary's job may result in the company secretary being the only person who becomes privy to information that indicates possible fraud or unethical behaviour, particularly if the culprit is a board member. Whether the company secretary decides to speak out or not, is a decision that he or she will have to live with for the rest of his or her life.¹⁰

Unfortunately, it has become evident that the authorities have provided little to no protection to whistleblowers who have suffered unemployment, depression, inability to get another job and sometimes divorce. The bravery of whistleblowers such as Themba Maseko who refused to hand over the GCIS's advertising budget to the Guptas has been instrumental in preventing what would have been even more devastating consequences for South Africa.¹¹ Mosilo Mothepu lifted the lid on Trillian as a senior person in the company. She provided reams of evidence on the extensive involvement of Trillian in state capture.¹² The recent killing of the acting Chief Financial Officer of the Gauteng Health Department, Babita Deokaran, through what is alleged to be a targeted hit in connection with PPE tender whistleblowing has

illustrated that the authorities need to dramatically improve their protection of key witnesses. She was a key witness in the SIU's probe into the fraudulent PPE tenders and contracts.¹³

Mandy Weiner provides the most comprehensive review of a number of leading whistleblowers and the impact it had on their lives. She emphasises that in almost all of these cases, there was no protection provided by the PDA, the state or companies themselves.¹⁴ The country owes a huge debt of gratitude to all whistleblowers who have risked so much to prevent the country from going over the precipice.



“The nature of the company secretary's job may result in the company secretary being the only person who becomes privy to information that indicates possible fraud or unethical behaviour.”

¹⁰ Ibid.

¹¹ Maseko T (2021) *For my Country: Why I blew the whistle on Zuma and the Guptas* Jonathan Ball Publishers

¹² Mothepu M (2021) *Uncaptured: The true account of the Nenegate/Trillian whistleblower* Penguin Random House, South Africa

¹³ Cruywagen V & Heywood M "Murder of Gauteng health official Babita Deokaran: Investigators probe link to her PPE whistle-blowing" *Daily Maverick* (24 August 2021) <https://www.dailymaverick.co.za/article/2021-08-24-murder-of-gauteng-health-official-babita-deokaran-investigators-probe-link-to-her-ppe-whistle-blowing/>

¹⁴ Weiner M (2020) *The Whistleblowers* Macmillan, South Africa

THE ROLE OF THE COMPANY SECRETARY IN STATE CAPTURE AND CORRUPTION IN THE PUBLIC SECTOR

State capture and corruption have had a drastic effect of eroding the public's trust in state entities and has led to a collapse of governance within many SOEs. Without governance, accountability and transparency are diminished and the door is left open for individuals and companies to benefit from biased and conflicted decision-making at board level. In the context of the legal and ethical duties required and expected of company secretaries, it is important to look at the role they have played in state capture. Witness testimonies have shone a light on incorrect processes followed at board level and have named company secretaries in certain cases as being implicated in the unethical and/or illegal dealings by the company. In other cases, company secretaries have played a positive role in opposing poor governance.

We will now turn to look at some of the SOEs implicated in state capture and corruption and the role of the company secretary, where applicable. In some instances, the company secretary has been implicated in wrongdoing and in others, the company secretary has opposed corruption and poor governance.

For purposes of this paper, an in-depth analysis of all evidence presented at the commission will not be included. Important to note is that evidence presented in this paper is based on that which is in the public domain. The Institute does not purport to make any findings of its own and any opinions expressed do not constitute legal advice/findings.

4.1 South African Broadcasting Corporation SOC Ltd (SABC)

The report by Madonsela noted that the lack of corporate governance at the SABC was a matter conceded by virtually all key role players, including the board and the senior managers that were interviewed.¹⁵ The report further found, among others, that the executive directors (principally the "GCEO", "COO" and "CFO") failed to provide the necessary support, information, and guidance to help the board discharge its fiduciary responsibilities effectively.¹⁶

In April 2018 SABC executives refused to appear before the parliamentary portfolio committee even though they spent R680 000 on travel and hotel expenses for the trip to Cape Town. The SABC delegation walked out en masse of a parliamentary ad hoc enquiry on 7 December 2016. When proceedings resumed, the committee queried why Theresa Geldenhuys, the company secretary, had participated in a walkout. Geldenhuys replied that she was supporting the chairperson. The ad hoc committee queried why at the request of minister Faith Muthambi, she wrote a report on the behaviour of board members including Krish Naidoo. The committee accused her of bypassing the board in terms of the Act and reporting directly to the minister.¹⁷

The collapse of governance systems was at the centre of the evidence presented at the Zondo commission regarding the SABC. The Parliamentary ad hoc committee 2017 report found that the SABC board had failed to ensure that the remedial actions of Madonsela's report were fully implemented.¹⁸

A careful perusal of Madonsela's report and the ad hoc committee report makes it clear that there was deliberate effort not to get governance at the SABC right. In this regard the ad hoc committee report observed, inter alia, the following regarding the company secretary:

“Despite the Company Secretary having served in the position for a long period of time, and despite her having been highly experienced and highly qualified, the evidence suggested that she failed to provide adequate guidance to the Board. Former Board members gave evidence of an unusually large number of special meetings convened at short notice and without proper notification or adequate documentation, and frequent round-robin decision-making, albeit – according to the SABC – ratified at the next quorate meeting. This modus operandi appears to point to deliberate attempts to stifle Board discussion and to manipulate the Board's decision-making, particularly in matters on which Board members may have had divergent views.”¹⁹

¹⁵ Public Protector South Africa Report 23 of 2013/2014 https://static.pmg.org.za/140827sabc_final_report_17_february_2014.pdf

¹⁶ Ibid.

¹⁷ Sadie S, Matisonn J & Paxton S (2018) "The challenges facing company secretaries in South Africa today" in *The Corporate Report* Vol 8, Issue 3 (Juta) https://www.chartsec.co.za/documents/latestNews/Sadie-Matisonn-Paxton_Challenges-facing-company-secretaries.pdf

¹⁸ Parliamentary Monitoring Group "Final Report of the Ad Hoc Committee on the SABC Board Inquiry into the fitness of the SABC Board" (24 February 2017) <https://pmg.org.za/taled-committee-report/2898/>

¹⁹ Ibid.

4. THE ROLE OF THE COMPANY SECRETARY IN STATE CAPTURE AND CORRUPTION IN THE PUBLIC SECTOR *(continued)*

Gloves off as former company secretary testifies at SABC inquiry (Extract, 13 December 2016)

Former South African Broadcasting Corporation ("SABC") company secretary Theresa Geldenhuys was in the hot seat on Tuesday as MPs grilled her, questioning her about her integrity and her role in the collapse of governance at the public broadcaster.

Before she could even get into her testimony before the parliamentary inquiry into the affairs of the SABC, she was asked to explain why she was part of chairman Mbulaheni Maguvhe's delegation of SABC staffers who staged a walkout of the inquiry on its first day last week.

While she conceded being aware the process followed by the board at its board meeting on July 7, 2014, which approved the appointment of the ever-controversial Hlaudi Motsoeneng as permanent chief operating officer was not done properly, she said she did not raise the matter with the board. She denied she was part of any wrongdoing.

"I did not play any role in terms of the flouting of policies..."

She could not confirm previous testimony from former board members and executive managers that staff had been purged following Motsoeneng's appointment.

"I did not participate in purging of any of these staff members," Geldenhuys told MPs.

She admitted the board, prior to the mass resignations which left Maguvhe as the sole non-executive director, was at war with itself.

In similar vein to Maguvhe, Geldenhuys claimed she was being "bullied" and prevented from speaking in board meetings. Asked who bullied her, and whether Motsoeneng was one of her bullies, she replied: "I wouldn't say that he ever bullied me. It was non-executive directors who would bully me."

MPs continued to push her, asking her to which faction she belonged on the board – the one who supported Motsoeneng or the other side. "I do not belong to any faction. My role is to remain completely independent... I do not take sides. I do my job independently and with integrity," she insisted.



Source: <https://www.iol.co.za/news/gloves-off-as-former-company-secretary-testifies-at-sabc-inquiry-7172560>



4. THE ROLE OF THE COMPANY SECRETARY IN STATE CAPTURE AND CORRUPTION IN THE PUBLIC SECTOR *(continued)*

4.2 Denel SOC Ltd (Denel)

According to Zondo commission's Denel exhibit W8, a statement by Nonyameko Mandindi, a former non-executive board member, the board, which was appointed in May 2015 hastily moved to suspend the erstwhile company secretary together with the chief executive officer and the chief financial officer ("the executives") without having fully evaluated the facts relating to their allegations.²⁰ While the board was still contemplating the removal of the company secretary, the board nominated a non-executive director who was also a member of the audit and risk committee to serve as acting company secretary.²¹

Madonsela's report noted the media reports, which held that while the executives were on suspension, Denel entered into suspicious transactions.²² The report further noted the reports to the effect that the executives were removed to give way for such transactions. The details of the said transactions and the removal of the executives were the subject of interrogation at the commission.

Denel CEO Riaz Saloojee, CFO Fikile Mhlontlo, and company secretary Elizabeth Africa were suspended by the Denel board on charges of misconduct in September 2015.²³ The fact that Denel levelled some allegations against the company secretary and then entered into a settlement agreement in which it paid her a package equivalent to her twelve months salary, coupled with the kind of nomination that the board made for the acting company secretary, seem to lend credence to the view that there was a deliberate effort to take charge of the office of the company secretary. Justice Zondo supported Saloojee's testimony that he and the other two executives were suspended "not because of proper grounds, but because of some other agenda".²⁴ Zondo noted that the evidence before the commission was that in December 2015, three months after their suspension, Denel offered to resolve the matter by paying them money. This offer was rejected, with a renewed insistence on a disciplinary taking place so they could prove their innocence.²⁵

As we await the commission's report to fully outline what the basis for the removal of the company secretary and other executives was, it is already a matter of public record that their removal was followed by an area of collapse in corporate governance and suspicious transactions, which led to the demise of Denel. It can also be an example of how company secretaries can be placed in the firing line and victimised for possibly maintaining their ethical and legal duties. Elizabeth Africa displays an example of a company secretary that attempted to place good corporate governance at the forefront. Instead of enquiring into the reasons contracts were awarded to certain entities, and place transparency and ethical responsibility first the audit and risk committee chose to place the executives including the company secretary in the firing line.²⁶



²⁰ Commission of Inquiry into State Capture exhibit W 8: Nonyameko Mandindi [https://www.statecapture.org.za/site/files/documents/397/Day_291_-_W8._Mandindi,_N_\(26.10.2020\).pdf](https://www.statecapture.org.za/site/files/documents/397/Day_291_-_W8._Mandindi,_N_(26.10.2020).pdf)

²¹ Ibid.

²² A Report of the Public Protector Report No: 6 of 2016/17 <http://www.saflii.org/images/329756472-State-of-Capture.pdf>

²³ Kretzmann S "Vague reasoning given to state capture commission on lack of disciplinary hearing for suspending Denel executives" Daily Maverick <https://www.dailymaverick.co.za/article/2021-03-26-vague-reasoning-given-to-state-capture-commission-on-lack-of-disciplinary-hearing-for-suspended-denel-executives/>

²⁴ Ibid.

²⁵ Ibid.

²⁶ Maune B "How Denel was served to Guptas on a platter after axing of three executives #Zondo" Biz News (27 October 2020) <https://www.biznews.com/sa-investing/2020/10/27/denel-state-capture-enquiry>

4. THE ROLE OF THE COMPANY SECRETARY IN STATE CAPTURE AND CORRUPTION IN THE PUBLIC SECTOR *(continued)*

How Denel was served to Guptas on a platter after axing of three executives #Zondo (Extract, 27 Oct 2020)

In September 2015, the CEO, CFO and company secretary of Denel were suspended. The three executives never saw it coming; it was a quick axing which was painfully executed by a board which was hasty to begin its mandate.

According to the Zondo commission, that mandate was to prepare for the Gupta brothers to spectacularly take over major deals which would see them pocket millions.

Nonyameko Mandindi was the first to testify on Monday at the state enquiry about Denel. According to her, she became concerned when a special board meeting was held in July to discuss the conduct of CEO Riaz Saloojee, CFO Fikile Mhlontlo and company secretary Elizabeth Africa.

The meeting was supposed to look at details around Land Systems South Africa ("LSSA") and a contract awarded to them, but the board members did not even discuss it. Instead, a charge sheet was drawn up by the audit and risk committee and served to the executives.

"I was greatly troubled and concerned when the events unfolded in the meeting the way they did. I felt that suspending or releasing senior members in the organisation has had to have serious allegations levelled against them.

"These things are very disruptive to entities and I just felt that we didn't even have something...a report that is written as a board that we could apply our minds to. It just happened too fast from July to September, it was a bit too much.

"I wanted to objectively evaluate if it was a wise decision or not. It was communicated to the board at the meeting and LSSA deal was not discussed," said Mandindi.

"Disciplinary process was not yet finalised. There was an urgency to get them to leave. Without a thought for the running and governance of the entity. The recommendation for Tau Mahumapelo to act was bad judgement, he was part of audit and risk and his acting role as company secretary was a conflict of interest," explained Mandindi.



Source: <https://www.ft.com/content/288027a1-0194-4a47-a21a-45182d61471a>



4. THE ROLE OF THE COMPANY SECRETARY IN STATE CAPTURE AND CORRUPTION IN THE PUBLIC SECTOR *(continued)*

4.3 South African Airways SOC Ltd (SAA)

At the helm of state capture at SAA appears to be tender corruption. In 2017, it was reported that more than R1.8 billion was lost in tender irregularities at SAA.²⁷ Evidence emerging from the commission indicates that the office of the company secretary and the legal department were understaffed. A staff member from the office of the auditor-general told the commission that contracts awarding tenders were unsigned and that the legal division and office of the company secretary were "severely incapacitated".²⁸

It is evident that the SAA board was led by a dominant chairperson, Dudu Myeni, who used her power to influence board decisions. A dominant chairperson poses a great challenge to the company secretary, and it appears that in this case, the chairperson facilitated unethical decisions that went against good governance. Ruth Kibuuka, FCG, was group company secretary at SAA from 2009 to the present. Kibuuka has not resigned nor has she been dismissed by the current leadership. This may be indicative of the trust that the new board has in her.

In a letter written to Gigaba, it was stated by board members that Myeni had a leadership style that would expose the board to liabilities and that they were being managed with fear and intimidation.²⁹ It also emerged that Gigaba honoured the board with a meeting to discuss Myeni's leadership, but Myeni did not attend this meeting and tried to place a moratorium on further meetings by forcing the CEO and group secretary to do so.³⁰

In 2017, the Organisation Undoing Tax Abuse ("OUTA") successfully took Myeni to court to have her declared a delinquent director, with the high court declaring Myeni a delinquent director for life.³¹ On 12 April 2021, the Supreme Court of Appeal dismissed Myeni's appeal.³² This clearly shows that the board's collective responsibility does not exclude the individual responsibility and liability of each of the directors. Where the company performs poorly due to the dishonesty, recklessness or gross negligence of the board, the individual directors may

be held jointly and severally liable for breaching their fiduciary duties as contemplated in the Act.

The OUTA case also revealed the role of the company secretary in the said governance failures, particularly in relation to the Swap Transaction. On 29 September 2015, Myeni sent a letter to the President and CEO of Airbus, Fabrice Bregier, seeking unilaterally to change the agreed Swap Transaction.³³ Though Myeni took ownership of the letter on the basis that she signed the letter, in an apparent attempt to shift the blame for misrepresentations contained therein, Myeni claimed in evidence that her letter of 29 September 2015 was prepared by the company secretary.³⁴ No evidence was led to corroborate or rebut Myeni's claims that the fraudulent letter was prepared by the company secretary. However, the court concluded that Myeni "signed off" the said fraudulent letter and, therefore, imputed liability on herself on that basis.³⁵ The linguistic effect of the foregoing words expressed by the court is that the court accepted that the letter was not drafted by Myeni, she "signed off" a letter prepared by the company secretary.

On 3 November 2015, Mabana Makhakhe, the deputy company secretary, emailed a copy of the draft minutes to board members seeking their approval.³⁶ These draft minutes stated that "It was agreed that the response to the Minister should state that the structure of the A320 transaction was being reviewed by the Board and it was observed that the local aircraft leasing company was a better option for SAA."³⁷ It is interesting to note that the draft minutes were emailed by the deputy company secretary to the board and not by the company secretary herself.

All the witnesses in the OUTA case were consistent in the view that the board did not reach any such agreement, nor was there a resolution to that effect.³⁸ Considering that, the question is whether the cited passage of the draft minutes was just a material capturing error of what transpired in the meeting by the deputy company secretary or a deliberate act to aid the agenda of Myeni to unilaterally change the agreed Swap Transaction.

²⁷ Mabena S "More than R1.8bn lost in tender irregularities at SAA: SA Cabin Crew Association" Times Live <https://www.timeslive.co.za/politics/2017-06-27-more-than-r18bn-lost-in-tender-irregularities-at-saa-sa-cabin-crew-association/>

²⁸ Maphanga C "State capture inquiry: SAA awarded tenders without signed contracts, witness says" News 24 <https://www.news24.com/news24/SouthAfrica/News/state-capture-inquiry-saa-awarded-tenders-without-signed-contracts-witness-says-20200221>

²⁹ Maune B "#DuduMyeni says she reported corruption at SAA, but govt ministers didn't listen - #Zondo" BizNews <https://www.biznews.com/thought-leaders/2020/11/06/saa-board-myeni>

³⁰ Ibid.

³¹ Smit S "Myeni chooses silence on SAA capture" Mail & Guardian <https://mg.co.za/business/2020-11-04-myeni-chooses-silence-on-saa-capture/>

³² Myeni v Organisation Undoing Tax Abuse and Another (15996/2017) [2021] ZAGPPHC 56 (15 February 2021) <http://www.saflii.org/za/cases/ZAGPPHC/2021/56.html>

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid.

4. THE ROLE OF THE COMPANY SECRETARY IN STATE CAPTURE AND CORRUPTION IN THE PUBLIC SECTOR *(continued)*

Dudu Myeni "failed abysmally", declared delinquent director for life (Extract, 27 May 2020)

Former SAA chair Dudu Myeni has been declared a delinquent director, the Organisation Undoing Tax Abuse ("OUTA") said on Wednesday. The ruling effectively means that Myeni will not be able to be a director at any entity.

It comes after an application, launched in 2017 by Outa and the SAA Pilots' Association ("SAAPA"), to declare Myeni a delinquent director in terms of the Companies Act, based on her actions while she was chairperson of the SAA board.

Outa chief executive Wayne Duvenage told TimesLIVE that the judgment was received shortly after 3pm on Wednesday.

"It's good news," he said. "It's been a long case – three years in the making, and a lot of hard work and a lot of money. It's good for society."

Judge Ronel Tolmay slammed Myeni's handling of the embattled airline, saying that had she not acted the way she did, SAA would be in a better financial position.

"Although SAA's woes can certainly not be attributed to her alone, she surely contributed significantly to the position SAA and the economy finds itself in today. SAA would in all probability have been in a much better position, if not profitable, were it not for Ms Myeni's actions," she said.

"Ms Myeni's actions as chairperson of the board caused SAA immense harm. She was a director gone rogue – she did not have the slightest consideration for her fiduciary duty to SAA. She was not a credible witness ... she changed her versions, contradicted herself, blamed others and played the victim. Her actions did not constitute mere negligence but were reckless and wilful."

Outa and SAAPA had argued that the period of delinquency – which is set as a minimum of seven years under the act – for Myeni should be for life. Tolmay agreed.

"This court cannot but find that she failed abysmally in executing her fiduciary duty. In my view, a lifelong delinquency order is appropriate. Ms Myeni is not a fit and proper person to be appointed as a director of any company, let alone a SOE," she said.

"The evidence in this case conclusively demonstrated that Ms Myeni's conduct was delinquent as envisaged in the ... Companies Act. Accordingly, this court must declare Ms Myeni a delinquent director."



Source: <https://www.timeslive.co.za/news/south-africa/2020-05-27-dudu-myeni-declared-delinquentdirector-outa/>



4. THE ROLE OF THE COMPANY SECRETARY IN STATE CAPTURE AND CORRUPTION IN THE PUBLIC SECTOR *(continued)*

4.4 Eskom Holdings SOC Ltd (Eskom)

Much of the evidence presented at the commission has revolved around the alleged corruption that took place at Eskom. On 3 August 2020, Eskom and the Special Investigation Unit ("SIU") issued summons against several defendants to recover approximately R3.8 billion in funds, mainly former Eskom executives including Suzanne Daniels.³⁹ Daniels held the position of senior general manager: company secretariat at Eskom from 2016 to 31 July 2017 and later transferred to the position of Eskom senior general manager: legal and compliance. The allegations against Daniels mainly relate to leaking of Eskom internal information to Gupta associates. Eskom and the SIU have alleged that the funds were lost in a concerted effort to corruptly divert financial resources from the power utility to improperly and illegally benefit the Gupta family and entities controlled by the family during their acquisition of Optimum Coal Holdings.⁴⁰

It was found by Eskom's internal disciplinary hearing that Daniels had committed serious misconduct and had also breached her duty of good faith and a duty of trust and confidence to Eskom and recommended a summary dismissal.⁴¹ Daniels was facing four charges of misconduct, namely distribution of confidential Eskom proprietary interest to a third party; her involvement in the McKinsey and Trillian transactions; her involvement in the Tegeta transaction and her mandating a firm of attorneys and approving payment to the firm of attorneys for legal services rendered to former SABC board chairperson in the SABC Parliamentary Inquiry, which had absolutely nothing to do with Eskom.⁴² Daniels denied the charges and added that Eskom had consistently denied her whistleblower status.⁴³ The chairperson of the disciplinary hearing found against Daniels on all four charges.⁴⁴

The Gupta email leaks have implicated Daniels in several instances. The following are a few of the allegations raised:⁴⁵

1. *The leaking of confidential Eskom documents to Essa, a Gupta associate and an outsider to Eskom.*⁴⁶

It is alleged that over the period July 2015 to June 2016, Ngubane, Daniels and Koko leaked confidential Eskom documents to Essa and allowed Essa secretly to influence Eskom board decisions.⁴⁷

2. *Tegeta and the purchase of Optimum Coal Holdings – unauthorised guarantee.*⁴⁸

It is alleged that on 10 December 2015, Essa forwarded to Koko, who, in turn, forwarded to Daniels, an outline of a short agreement to be concluded between Eskom and Tegeta for the pre-purchase of coal for R1.68 billion.⁴⁹ It is further alleged that on 10 December 2015, Daniels forwarded to Singh unsigned drafts of the ABSA demand guarantee; an ABSA performance guarantee and a letter agreement between Eskom and Tegeta providing for Eskom to pre-purchase coal from Tegeta for R1.68 billion and to issue a bank guarantee to Tegeta in this regard for an amount of R1.68 billion.⁵⁰

3. *Tegeta and the purchase of Optimum Coal Holdings – settlement of outstanding penalties.*⁵¹

On or around 13 March 2017, Daniels submitted a memorandum recommending that the outstanding penalties on the Hendrina CSA in respect of the period 2012 to 2015 (which had been claimed from OCM under Glencore control in the amount of R2 176 530 611.99) be settled for an amount of R577 million. Singh endorsed Daniels' recommendation on 14 March 2017 and Koko approved the recommendation on 14 March 2017.⁵²

³⁹ Omarjee L "SIU files court papers to recover R3.8bn from Molefe, Koko, Guptas and others at Eskom" (3 August 2020) <https://www.news24.com/fin24/economy/breaking-siu-files-court-papers-to-recover-r38bn-from-molefe-koko-guptas-and-others-at-eskom-20200803>

⁴⁰ Mabuza E "Gupta brothers contest damages claim by SIU, Eskom to recoup R3.8bn" (6 October 2020) <https://www.timeslive.co.za/news/south-africa/2020-10-06-gupta-brothers-contest-damages-claim-by-siu-eskom-to-recoup-r38bn/>

⁴¹ Disciplinary hearing against Eskom's head of legal recommends a summary dismissal.

⁴² Ibid.

⁴³ Cowan K "Eskom whistleblower case: Daniels fights back" (8 June 2018) <https://www.news24.com/fin24/Economy/eskoms-whistleblower-case-daniels-fights-back-20180608>

⁴⁴ Eskom "Disciplinary hearing against Eskom's head of legal recommends a summary dismissal" (20 July 2018) <https://www.eskom.co.za/news/Pages/2018Jul20B.aspx>.

⁴⁵ Eskom Holdings SOC Limited and Another v Molefe and Others (summons and particulars of claim) case number 35689/20 of 3 August 2020 https://amabhungane.org/wp-content/uploads/2020/08/Eskom_Summons-and-POC-.pdf

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid.

4. THE ROLE OF THE COMPANY SECRETARY IN STATE CAPTURE AND CORRUPTION IN THE PUBLIC SECTOR *(continued)*

Daniels has presented evidence at the commission as a whistleblower, and has spoken out about corruption and how the Guptas used Eskom executives to do their bidding, but there are also reservations.⁵³ In terms of admissions of wrongdoing, Daniels has been quoted as stating:

“(M)y admissions are marked against my name ... there are people with greater power than me who benefited from their actions and these are the same people who use my name as a scapegoat for their wrongdoing. I have nothing. I've lost everything. I may not be able to work in my profession again.”⁵⁴



At the press conference following the Eskom AGM in June 2017, Minister of Public Enterprise Lynn Brown was fielding questions about Eskom's energy issues. Sikonathi Mantshantsha, of the Financial Mail, asked a question about the Optimum mine deal. Brown deflected the question to Daniels. This put Daniels under immense pressure. The Guptaleaks had broken a few weeks before. It was the straw that broke the camel's back, she knew she was being thrown under the bus by Brown. The next day she went to Mantshantsha's Financial Mail office and became a whistleblower.⁵⁵ Unfortunately, it may have been too little, too late for Daniels.

It is pertinent to mention what was stated by Advocate Cassim SC, namely:

“Eskom must evaluate the role of service providers, namely lawyers, accountants and other professionals in the transactions dealt with in these charges to understand culpability on the part of such professionals (if any). This is important because it sends a message that professionals owe a duty to the client, namely Eskom, and not to senior officials in control of Eskom. It will also ensure a consciousness and sensitise professionals to uphold ethical standards as opposed to pursuing monetary gains only. Eskom must pursue civil proceedings against all those implicated in wrongdoing.”⁵⁶



⁵³ Maune B “Who is Suzanne Daniels, the woman exposing the Gupta, Zuma empire” (21 September 2020) <https://www.biznews.com/thought-leaders/2020/09/21/suzanne-daniels-guptas>

⁵⁴ Sifile L “Eskom whistleblower has ‘lost everything’, including daughter” (8 December 2020) <https://www.dispatchlive.co.za/news/2020-12-08-eskom-whistleblower-has-lost-everything-including-daughter/>

⁵⁵ Weiner M (2020) *The Whistleblowers* Macmillan, South Africa.

⁵⁶ Eskom “Disciplinary hearing against Eskom’s head of legal recommends a summary dismissal” (20 July 2018) <https://www.eskom.co.za/news/Pages/2018Jul20B.aspx>

4. THE ROLE OF THE COMPANY SECRETARY IN STATE CAPTURE AND CORRUPTION IN THE PUBLIC SECTOR *(continued)*

Zondo not convinced by whistle-blower's testimony on Eskom's Optimum coal (Extract, 24 March 2021)

Former Eskom head of legal and compliance, Suzanne Daniels, faced questioning on why she was surprised that acting CEO Matshela Koko wanted Eskom to settle its claim against its coal supplier Optimum for about R500 million instead of the original R2.1 billion. Daniels was testifying at the state capture commission on Wednesday that when Koko took over as acting Eskom CEO in December 2016, he had told Daniels that he would be happy if Eskom settled with Optimum for under R500 million.

Eskom had initially put the say against Optimum at R2.1 billion. But a number of legal opinions obtained by Eskom in 2013 and 2015 from law firm Cliffe Dekker Hofmeyr ("CDH") showed that Eskom could not claim the amount because of a number of failures by Eskom to sustain the say that Optimum supplied poor-quality coal to Eskom. Eskom had failed to notify Optimum that the quality of coal was inferior within the timelines specified in the coal supply contracts. As a result, Eskom would then be deemed to have accepted that coal that was delivered was of acceptable quality. Testifying on Wednesday evening, Daniels said she questioned Koko's move from R2.1 billion to R500 million.

"I was making that statement not understanding the full import of what had gone before, but from a perspective ... we had gone to the media and had said R2.1 billion was what was owed to Eskom and we had made such an issue of it that we could not just walk away," she said.

However, state capture commission chair, deputy chief justice Raymond Zondo, questioned Daniels' statement. He said Daniels knew before December 2016 that, based on the legal opinions received by the power utility, that more than 50% of this claim would be defeated by

the fact that Eskom had not issued notices to Optimum.

Zondo asked Daniels whether she was aware, when she had the conversation with Koko, of the previous opinions supplied by CDH. Daniels said she was not, and said these opinions were attached to the December 2016 assessment that she received after taking over in September that year.

"I would have thought that your predecessor made sure such important opinions were made available when you got in," Zondo said. Daniels said this was not the case, and it was only in December that she read those opinions. "But I thought you said you were present at a meeting involving somebody from CDH where (former Eskom "CEO") Mr (Brian) Molefe was present and where he was cautioned about talking about a claim for R2.1 billion because there was a problem with the fact that Eskom had not given notice?" Zondo asked.

"It means you became aware that the R2.1 billion claim was problematic. You were there when he was cautioned. That would have been before Mr Koko took over," Zondo asked.

"I always knew there was an issue. I did not know the exact ambit of the issue. That is why I asked for an assessment (from "CDH")."



Source: <https://www.timeslive.co.za/politics/2021-03-24-zondo-not-convinced-by-whistle-blowers-testimony-on-eskoms-optimum-coal-penalties/>



4. THE ROLE OF THE COMPANY SECRETARY IN STATE CAPTURE AND CORRUPTION IN THE PUBLIC SECTOR *(continued)*

4.5 Passenger Rail Agency of South Africa SOC Ltd (PRASA)

The commission has heard evidence of corruption at PRASA. Former PRASA board chairperson, Popo Molefe testified that the ANC allegedly received a portion of the multi-billion rand Swifambo deal while government and law enforcement simply failed to stem the looting.⁵⁷ In the case of Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd, the Judge found that the entire contract was irregular and found clear evidence of corruption, collusion or fraud in this tender process.⁵⁸ It was also found that documents had been concealed, spirited away or destroyed, and that employees who did not follow the then GCEO, Lucky Montana, were victimised or unfairly dismissed.⁵⁹

Molefe detailed laying countless criminal cases with the Hawks, asking it to investigate alleged corruption at the rail agency.⁶⁰ Former Transport Minister Dipuo Peters said that she did not remember if she gave Parliament reasons why she wanted to fire the PRASA board.⁶¹

Lindikhaya Zide, PRASA's company secretary was appointed by the board to be acting GCEO in March 2017.⁶² When asked how a company secretary could be appointed as an acting GCEO, Peters told the commission she had been concerned by Zide's appointment. Peters, who was appointed in 2013, is alleged to have blocked further investigations into corruption commissioned by the Molefe board. Molefe and four other board members were fired unexpectedly by Peters in early 2017.⁶³ Molefe successfully took the minister's decision to court and the board was reinstated to finish its term. The High Court lambasted the minister, finding that Peters' decision was "so unreasonable and disproportionate as to be arbitrary and irrational".⁶⁴ Molefe played a major role in trying to stop state capture and corruption in PRASA. He reported numerous cases to the Hawks who were paralysed.

Montana was CEO from 2009 to 2015 and was said to have led PRASA with an iron fist, firing anyone who stood in his way.⁶⁵ Deloitte made the following observation in their general findings:

“There is no evidence to suggest that the PRASA board questioned any of the deviations. There is no evidence that the board intervened at any stage to question the procurement procedures followed. The board did not act with the necessary fidelity, honesty and integrity in the best interests of PRASA in managing its financial affairs as the PFMA requires of an accounting authority and in fact appears not to have played any role in relation to exercising care to protect the assets and records of PRASA. This warrants further investigation by the SAPS for possible contraventions of sections 50 and 51 of the PFMA read with sections 49, 83 and 86.”⁶⁶

PRASA company secretary Lindikhaya Zide has been dismissed after an internal probe found him guilty of maladministration and contravention of company policy.⁶⁷ The auditor-general stated that Zide had benefited from undue overpayments, and further stated that Zide should repay just over R420 000 he received between November 2015 and December 2016 but to which he was not entitled.⁶⁸

The auditor-general has also been quoted as stating that "PRASA did not maintain complete governance records, including minutes of meetings of the board, sub-committees and executive committee. This has had a negative impact across the audit as resolutions and other decisions taken could not be confirmed, including those taken subsequent to year-end."⁶⁹ At Parliament's Standing Committee on Public Accounts ("SCOPA"), the PRASA board indicated that former company secretary Zide, who at one point was acting CEO, was found to be manipulating the minutes of board meetings.⁷⁰

⁵⁷ "PRASA looting laid bare a state capture inquiry" ENCA (1 July 2020) <https://www.enca.com/news/prasa-looting-laid-bare-state-capture-inquiry>

⁵⁸ "Rig, Conceal, Destroy and Falsify: How State Capture Happened at PRASA" (December 2017) <https://unitebehind.org.za/wp-content/uploads/summary-of-prasaleaks.pdf>

⁵⁹ Ibid.

⁶⁰ "PRASA looting laid bare a state capture inquiry" ENCA (1 July 2020) <https://www.enca.com/news/prasa-looting-laid-bare-state-capture-inquiry>

⁶¹ Ngatane N "Peter's can't recall giving reasons for wanting to fire PRASA board, Zondo hears EWN <https://ewn.co.za/2021/03/17/peters-can-t-remember-giving-parly-reasons-for-wanting-to-fire-prasa-board-zondo-hears>

⁶² Payne S "No one at the PRASA helm: Dipuo Peters and Popo Molefe point fingers at each other" Daily Maverick (23 February 2021) No one at the PRASA helm: Dipuo Peters and Popo Molefe... (dailymaverick.co.za)

⁶³ "How PRASA was looted and left for scrap" Daily Maverick (13 April 2021) How PRASA was looted and left for scrap (dailymaverick.co.za)

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ "Rig, Conceal, Destroy and Falsify: How State Capture Happened at PRASA" (December 2017) <https://unitebehind.org.za/wp-content/uploads/summary-of-prasaleaks.pdf>

⁶⁷ Hendricks A "PRASA executive fired after internal probe" Ground Up (2 July 2019) <https://www.groundup.org.za/article/prasa-executive-dismissed-after-internal-probe/>

⁶⁸ Kgosana C "Pay it back, AG tells PRASA's 350% boss" Sunday Times (24 June 2018) <https://www.timeslive.co.za/sunday-times/news/2018-06-23-pay--it-back-ag-tells-prasas-350-boss/>

⁶⁹ Payne S "'You are in a mess – total mess,' Scopa chair tells PRASA board" Daily Maverick (21 November 2019) <https://www.dailymaverick.co.za/article/2019-11-21-you-are-in-a-mess-a-total-mess-scopa-chair-tells-prasa-board/>

⁷⁰ Ibid.

4. THE ROLE OF THE COMPANY SECRETARY IN STATE CAPTURE AND CORRUPTION IN THE PUBLIC SECTOR *(continued)*

Management told PRASA legal team to stay out of Siyaya dispute, says witness (Extract, 13 August 2020)

An attorney told Deputy Chief Justice Raymond Zondo he did not think it strange that the legal team at PRASA was kept off the Siyaya litigation case, but what was odd was that he was told to communicate only with the company secretary, Lindikaye Zide.

The legal team of the Passenger Rail Agency of South Africa ("PRASA") was kept off a multimillion-rand settlement deal involving the Siyaya matter, the Zondo Commission of Inquiry into Allegations of State Capture heard on Wednesday, 12 August.

An attorney in one of the matters for PRASA, Madimpe Mogashoa, testified before the commission where he relayed information on the settling of the Siyaya deal.

Mogashoa's testimony focused on litigation PRASA had undertaken and the claim made by the agency's head of Legal, Risk and Compliance, Martha Ngoye, that PRASA's legal team was excluded from the Siyaya litigation.

According to Mogashoa, his law firm, Diale Mogashoa Attorneys, had been the attorney on record for PRASA in various matters. One of them was the Siyaya dispute. When Mogashoa appeared before the commission on Wednesday, he said he was called to attend a meeting by the acting GCEO at the time, Lindikaye Zide, about developments in the Siyaya litigation. This took place in November 2017. The new chairperson of the interim board, Tintswalo Annah Nana Makhubele was also at the meeting.

At the meeting, Mogashoa said, Makhubele wanted the PRASA legal team off the litigation proceedings with Siyaya. When asked by the commission chair, Deputy Chief Justice Raymond

Zondo, if there was an explanation for this, Mogashoa said, "Nothing was explained to me."

Mogashoa said that on 14 December he was asked to attend another meeting the next day. Present at this meeting were Mogashoa, another member of his law firm, Zide and Makhubele – and still no legal team.

When asked by Zondo about his views on the lack of a legal team, Mogashoa said this was not unusual, as he had experience with CEOs who had taken responsibilities away from legal teams "who were under investigation".

Mogashoa said instructions were made clear: he could only communicate with Zide, and that Dingiswayo was "quite taken aback" by this, when the two of them discussed the issue.

Mogashoa said he was then called to a meeting on 8 March 2018, at the instruction of new acting CEO Cromet Molepo, to discuss the Siyaya deal. Present at this meeting were Ngoye, Dingiswayo, Molepo, Zide and Makhubele. Mogashoa said he was under the impression that Zide was speaking as acting GCEO and not as company secretary. Zide has taken various roles at the entity, including company secretary and was dismissed by the rail agency in July 2019 following an internal probe.



Source: <https://www.dailymaverick.co.za/article/2020-08-13-management-told-prasa-legal-team-to-stay-out-of-siyaya-dispute-says-witness/>



prasa
PASSENGER RAIL AGENCY
OF SOUTH AFRICA

4. THE ROLE OF THE COMPANY SECRETARY IN STATE CAPTURE AND CORRUPTION IN THE PUBLIC SECTOR *(continued)*

4.6 The Johannesburg Roads Agency (JRA)

The DA ran the City of Johannesburg ("COJ") in coalition with the EFF and the IFP in 2016. The new Johannesburg Roads Agency ("JRA") board was appointed by IFP members of the mayoral committee for transport. Of his ten-member local cabinet, Herman Mashaba had allocated three portfolios to the IFP, of the three, Nhlanhla Makhuba the former IFP MP was to head the transport portfolio while Siphso Tshabalala owner of the Vilakazi street restaurant was appointed chairperson.

In 2017 the JRA suspended their company secretary Karen Mills after she had made a protected disclosure. Mills had been the company secretary as well as the delegated ethics officer during this time. In the disclosure Mill's had stated that "the trust had been broken between the board and the company secretary".⁷¹ She had disclosed to the head of the City's group forensic investigations unit, Major-General Shadrack Sibiya and Group Governance that she had concerns regarding the chairperson's conduct. In a board meeting that took place on 2 August 2017, Mills was prohibited from "communicating any issues directly to any party, including Group Governance and the independent audit committee members" and told that all issues had to be communicated through the chairperson of the Audit and Finance Committee.

Siphso Tshabalala had taken irregular steps when it came to his conduct which included the establishment of a project management unit ("PMU"). The effect of the PMU would have had the result of placing the control of tenders and their awards to private contractors.⁷² Dr Sean Phillips, who was the Managing Director and Mpho Kau who was the head of Infrastructure Development were also in opposition to the decisions that the chairperson took in relation to the establishment of the PMU. In her act of whistleblowing, Mills stated that the PMU was set up for the purpose of being involved in the awarding of tenders.⁷³

Whistleblowing is an important function of accountability and uncovering irregular conduct. It is covered under both the Protected Disclosure Act ("PDA") and under King IV. The protections that are put in place are so that those who disclose maladministration of this sort, as they should, do not get sidelined or ousted, which is what took place at the JRA. This again

demonstrates how those who may have been committed to their duties and responsibilities who were not in line with the chairperson, were victimized and unfairly booted out. Furthermore, it was alleged by Mills that the protected disclosure she had made that resulted in her suspension was attained by improper means.

The JRA case demonstrates how mandatory the role of the company secretary is in bolstering good governance. It further evidences how corrupt structures may target company secretaries that are considered a potential threat to the ultimate corrupt agendas.

Mills, is a long-standing member of the Institute, and it is commendable that even in the face of adversity, she opted to stand by her professional duties and ethics. Mills has since emigrated to the United Kingdom and is another unnecessary loss to South Africa of a skilled and ethical professional.

The above six examples illustrate how state capture and corruption relate to the public sector. We now turn our attention to the private sector.



⁷¹ Mathope G "JRA whistle-blower paints damning picture of agency's chairman" *The Citizen* (28 August 2017) <https://citizen.co.za/news/south-africa/1627299/jra-board-chairperson-tried-to-extort-a-bribe-according-to-protected-disclosure-info/>

⁷² Reddy M "Mashaba fiddles as roads agency burns" *AmaBhungane* (20 April 2018) <https://amabhungane.org/stories/mashaba-fiddles-as-roads-agency-burns/>

⁷³ Mathope G "JRA whistle-blower paints damning picture of agency's chairman" *The Citizen* (24 August 2017) <https://citizen.co.za/news/south-africa/1627299/jra-board-chairperson-tried-to-extort-a-bribe-according-to-protected-disclosure-info/>

4. THE ROLE OF THE COMPANY SECRETARY IN STATE CAPTURE AND CORRUPTION IN THE PUBLIC SECTOR *(continued)*

Upheaval at Joburg roads agency as second manager quits (Extract, 15 August 2017)

The Johannesburg Roads Agency ("JRA") is in turmoil after the resignation of another top official on Monday and the suspension of the company secretary who alerted the board to governance problems in the organisation.

Company secretary Karen Mills was marched out of the building on Thursday along with former MD Sean Phillips after she made a protected disclosure to Maj-Gen Shadrack Sibiyi, who heads the city's group forensic investigations unit.

Mpho Kau, head of infrastructure development, resigned on Monday.

Kau, a former acting MD, did not want to elaborate on the reasons for his resignation. Phillips tendered his resignation last Tuesday.

It is understood that the reasons for Mills's suspension were the last straw for Phillips before he resigned. Building township roads and fixing potholes are critical elements of Johannesburg mayor Herman Mashaba's delivery plan. These have to be implemented by the JRA.

The JRA has a new board, appointed in March by the IFP member of the mayoral committee for transport, Nonhlanhla Makhuba. Sipho Tshabalala, a Soweto businessman who owns the Vilakazi Restaurant and has a passion for youth development, is the chairman.

Not long afterwards, Mills raised concerns about governance in the JRA with the city's group governance function as well as with the independent member of the road agency's audit committee.

Mills said the board had then ordered her to speak only to the chairman of the audit committee in future.

She was told not to speak to the JRA's sole shareholder, the City of Johannesburg, or to the independent member on the audit committee.

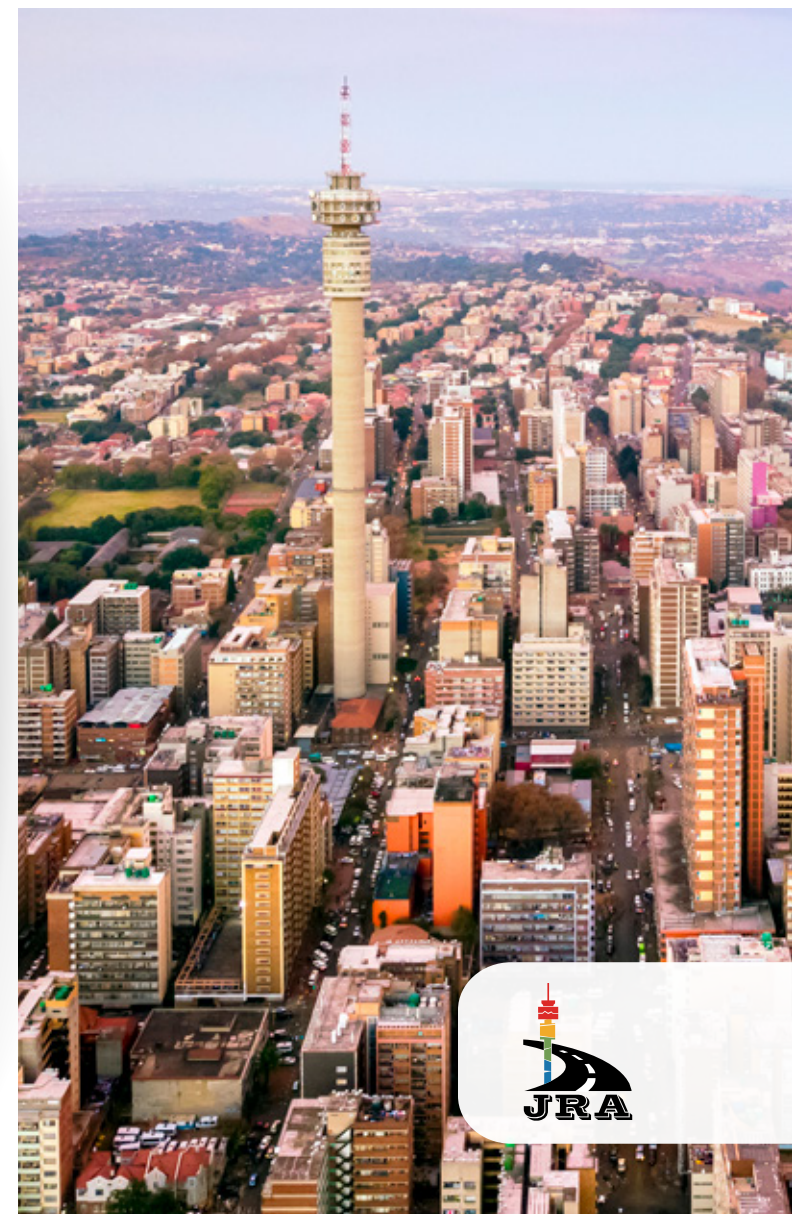
However, Mills approached Sibiyi to make a disclosure under the Protected Disclosures Act, which provides for employees to report unlawful or irregular conduct.

On Monday, the board issued Mills with a letter of intention to suspend her, which took place on Thursday. Phillips's resignation was also effective from Thursday, and his offer to serve out his notice was declined. Tshabalala denied the incidents were related, saying Phillips had resigned before Mills' suspension. Mills on Monday confirmed her suspension.

She faces four charges: two relate to her conduct as company secretary; the third charge is gross insubordination, which she says is based on her disclosure; and the fourth is that the relationship between her and Tshabalala has broken down. This is the only charge she agrees with.



Source: <https://www.businesslive.co.za/bd/national/2017-08-15-upheaval-at-joburg-roads-agency-as-second-manager-quits/>



5 THE ROLE OF THE COMPANY SECRETARY IN STATE CAPTURE AND CORRUPTION IN THE PRIVATE SECTOR

Although there are various definitions of corporate governance, the widely accepted one was provided by Sir Adrian Cadbury who defined corporate governance as the system by which companies are directed and controlled. Notably, the definition has two distinct aspects, namely “directed” and “controlled”. The two aspects foreground the need to drive the enterprise forward while keeping it under prudent control. The King Code embraces this view by specifying ethical culture, good performance, effective control and legitimacy as governance outcomes.⁷⁴ It is also notable that ethics or integrity is the foundation of, and reason for, corporate governance.⁷⁵ It is therefore the function of corporate governance to combat all forms of corporate malfeasance such as corruption, while pursuing the best results for the enterprise.

The International Chamber of Commerce (“ICC”) Rules on Combating Corruption provides that “Fighting corruption, which is at the core of corporate responsibility and good corporate governance, is never finished. Sustained efforts will continue to be necessary in the future. A better awareness is necessary among public officials, in board rooms and in all layers of the corporate world”.⁷⁶ Regrettably, this clarion call by the world business organization does not seem to enjoy universal resonance with the corporate world.

In light of the inherent responsibilities of the company secretary discussed herein above, the company secretary must be at the forefront of the drive to preserve good corporate governance and the prevention of corruption.



5.1 VBS Mutual Bank (VBS)

Philip Nicolaas Truter joined VBS in 2005 as Financial Manager and was appointed as Chief Financial Officer (“CFO”) in 2014. At the time of the VBS collapse, he was the longest serving executive member. The 2016 VBS Annual Report describes him as someone with extensive experience in the Regulatory Reporting, Financial Reporting, Compliance, Governance and Secretarial fields.⁷⁷ This may have been the reason for his appointment in 2014 to take the position of a company secretary, the position he simultaneously occupied with the position of CFO.

There is a dispute as to whether Truter also served as a company secretary of Vele Holdings, the majority shareholder of VBS, while also the CFO and company secretary of VBS. He was paid a sum of R250,000 in “secretarial fees” to his private Investec account on 7 August 2017. According to Tshifhiwa Matodzi, the former chairperson of Vele, the payment was for secretarial services that Truter provided at Vele. Truter, on the other hand, claims that he never acted as a company secretary, or did any secretarial services for the Vele Group. He claims that he understood the said payment to be a gratification for executing, as the CFO of VBS, certain transactions as part of the VBS fraudulent scheme.⁷⁸ Depending on whose version is accurate, Truter may have held three positions at the same time.

Truter’s dual appointment to the position of CFO and company secretary had three main implications for VBS governance. Firstly, Truter’s focus on his CFO role dwarfed his attention to his role of company secretary. Consequently, the gate to malfeasance was left wide open as the gatekeeper of good governance was kept busy by other commitments. Secondly, it eliminated the required checks and balances between the company secretary and the CFO. Truter was part of all the board committees of VBS. It is not clear which ones he was part of as the CFO and which ones he attended only as a company secretary.⁷⁹ In this regard, it is conceivable that had the two positions been held by two different individuals, the criminality that took place at VBS may have been detected at an earlier stage. Thirdly and related to the second point, there were sometimes tensions between Truter’s roles as a CFO and company secretary. This was mainly because, on one hand, he was a director while, on the other hand, he had a duty to guide directors regarding governance.

⁷⁴ “King Report on Governance for South Africa” Institute of Directors South Africa (2016).

⁷⁵ Ibid.

⁷⁶ The International Chamber of Commerce (ICC) Rules on Combating Corruption (2011) <https://iccwbo.org/content/uploads/sites/3/2011/10/ICC-Rules-on-Combating-Corruption-2011.pdf>

⁷⁷ VBS Mutual Bank Annual Report 2016 <https://www.vbsmutualbank.co.za/documents/VBS-2016-Annual-Report.pdf>

⁷⁸ Van Wyk P “Philip Truter, The sentinel who failed to raise the alarm at VBS” (13 May 2020) <https://www.dailymaverick.co.za/article/2020-05-13-philip-truter-the-sentinel-who-failed-to-raise-the-alarm-at-vbs/>

⁷⁹ VBS Mutual Bank Annual Report 2016 <https://www.vbsmutualbank.co.za/documents/VBS-2016-Annual-Report.pdf>

5. THE ROLE OF THE COMPANY SECRETARY IN STATE CAPTURE AND CORRUPTION IN THE PRIVATE SECTOR *(continued)*

The cumulative effect of the dual appointment was neglect of good governance, which in turn made it easier for the VBS heist to happen.

The dual appointment materially offended King Code of Governance Principles for South Africa 2009 ("King III"), in the same way that it would have offended King IV had it happened under the King IV regime. The reason for that is that the two versions of the King Code set the same standards regarding the matters under consideration.


King III, which was in effect when the dual appointment happened, required the chairperson to meet with the CEO or the CFO or the Company Secretary or all three before a board meeting to discuss important issues and agree on the agenda. This principle was embraced, at least on paper, by VBS's own governance framework.⁸⁰ Though the principle allows the chairperson to meet with either the CEO, the CFO or the company secretary, the option of meeting all three should be the most preferred as it allows for plurality of voices and transparency. By resorting to a dual appointment, VBS robbed itself of what is clearly the soundest option in this regard.

The dual appointment also contravened King III recommendations regarding the role and the positioning of the company secretary. King III asserted the principle that the company secretary must maintain, as far as reasonably possible, an arms-length relationship with the board and its directors as the company secretary is a gatekeeper of good governance. The dual appointment further offended the King III recommendation that the company secretary should not be a director of the company.

The said contraventions clearly contributed to the collapse of good governance which ultimately paved way to the fraudulent and criminal conduct of VBS's business. It is estimated that over R2.2 billion was looted, largely, by VBS former directors and senior managers. Truter had a fiduciary duty to report all irregularities he had suspicion or evidence of to the authorities. Instead, he served as a cog in the heist.⁸¹ He confessed that he was an essential participant in the manipulation of VBS's banking systems, the fraudulent misrepresentations contained in the 2017 annual financial statements and the submission of fraudulent DI returns.⁸² For his role, Truter was handsomely rewarded with about R5.8 million of the looted money.⁸³

In joining the cohort which collaborated to destroy the bank, Truter showed no regard for King IV which enjoined him as a company secretary to assist the directors and executives to comply with their duties and also assess the specific training needs of directors and executive management in their fiduciary and other governance responsibilities.

Truter is currently serving seven years imprisonment after he pleaded guilty to charges of fraud, corruption, money laundering and racketeering in relation to his role in the VBS heist. As part of the plea bargain that saw three years of his ten years imprisonment sentence being suspended, he has undertaken to cooperate with the state's case against other errant former directors and executive managers of the VBS.⁸⁴ Regrettably Truter is one of the few fraudsters to be in orange overalls. It is an indictment on the authorities that there have been so few arrests given the widespread public knowledge of state capture and corruption.



“The cumulative effect of the dual appointment was neglect of good governance, which in turn made it easier for the VBS heist to happen.”

⁸⁰ Ibid.

⁸¹ Van Rensburg D (2020) VBS: A Dream Defrauded, Penguin Random House, South Africa

⁸² Motau T SC "The Great Bank Heist: Investigators Report to the Prudential Authority" <https://uncensoredopinion.co.za/wp-content/uploads/2018/10/VBS-Mutual-Bank-The-Great-Bank-Heist.pdf> (10 September 2018)

⁸³ Ibid.

⁸⁴ "National Prosecuting Authority on Philip Truter's fraud and corruption conviction" (7 October 2020) <https://www.gov.za/speeches/first-vbs-conviction-former-vbs-cfo-goes-jail-7-oct-2020-0000>

5. THE ROLE OF THE COMPANY SECRETARY IN STATE CAPTURE AND CORRUPTION IN THE PRIVATE SECTOR *(continued)*

Phillip Truter, the sentinel who failed to raise the alarm at VBS (Extract, 13 May 2020)

A collection payment of R15 for the NG Kerk in Louis Trichardt, Limpopo, was one of the first payments recorded on Truter's VBS bank card stuffed with stolen money. The payment is labelled "NG Kerk Offergawe", dated 5 May 2015.

Between this date and 1 June 2018, Truter received at least R5.8 million in cash, bonds and vehicle finance from VBS bank.

Philip Truter received R5.8 million in illicit money from VBS Mutual Bank.

He used the cash to buy R10 868.60 in food from fast food stores like Wimpy, Steers, Burger King, KFC, Spur and Panarottis. He spent R2 265.10 on liquor, mostly from Spar Tops, and he bought groceries and goods for R7 479.28 from Spar, Checkers, Clicks and Pick 'n Pay.

Legally, the most problematic for Truter will most likely be the R2 million in bribe money Matodzi and Mukhodobwane ordered to be paid into a company solely owned by Truter.

He also received R250 000 in "secretarial fees" paid to his private Investec account on 7 August 2017.

"I did not do anything to deserve it... It wasn't a bona fide bonus," Truter said about the R250 000 in May 2018, testifying before Motau.

These three payments were paid from Vele Investments, a company used by Matodzi to illegally move money around, including to pay bribes. There are no invoices for these payments, Truter delivered no service to justify these payments and it was not linked to his performance at VBS. The origin of these was simply because Mukhodobwane wanted Truter inside the robbers' circle of trust rather than outside of it with a view looking in.

Truter testified about the payments, saying: "According to the WhatsApps that I exchanged with Mr. Matodzi, it was for my secretarial services at Vele. But I did not ever act as a company secretary, or do any secretarial services for the Vele Group."

Truter continued, saying "I understood it to be payment from Vele because I cooperated in this whole scheme, to make it work and execute a lot of... because in my capacity as CFO and Director of the bank there was a lot of risk that I placed myself under in doing certain transactions, and my understanding was that it was some kind of compensation for risks that I took... essentially gratification for executing certain transactions...".

Defining the payment, evidence leader in the Motau investigation Advocate Ross Hutton SC stated: "Yes. It was a bribe. It was the payment of a bribe or a reward for bending and breaking the rules for Vele; for facilitating Vele's acts of dishonesty, fraud and theft. Correct?"

Truter answered: "That's correct, yes."



Source: <https://www.dailymaverick.co.za/article/2020-05-13-philip-truter-the-sentinel-who-failed-to-raise-the-alarm-at-vbs/>



5. THE ROLE OF THE COMPANY SECRETARY IN STATE CAPTURE AND CORRUPTION IN THE PRIVATE SECTOR *(continued)*

5.1 Steinhoff International Holdings (Steinhoff)

Owing to the centrality of his position in the governance framework of Steinhoff, it is compelling to start off by looking at the role and history of Stephanus (Stehan) Johannes Grobler at Steinhoff. Grobler has BCom (Hons in Economics) and LLB degrees. He is also an admitted attorney, Conveyancer and Notary Public.⁸⁵

Grobler was appointed company secretary of Steinhoff in December of 1999. He became an alternative director in 2005 and director in May 2009. When the scandal came out in the open, Grobler was an Executive Director of, and headed, the Group Treasury and Financing Activities, as well as the Governance and Secretarial departments, for the Steinhoff group.⁸⁶ He was also a member of the Governance and Sustainability Committee, a voluntary committee of the Supervisory Board responsible for assisting the Supervisory Board with the oversight of social and ethics matters relating to the Company and the Group.⁸⁷

During the period that the alleged fraud happened, the Company Secretarial Services were being provided by a juristic person, Steinhoff Secretarial Services Proprietary Limited, a South African registered company within the Steinhoff N.V. group of companies. It is notable that Grobler was a director of Steinhoff Secretarial Services Proprietary Limited and played no insignificant role in this regard.⁸⁸ He, for instance, attended all the Supervisory Board meetings on behalf of the Company Secretary.⁸⁹ Therefore, while Grobler was Group Treasury and Financing Activities, he was at both the commanding heights and operations of governance machinery of Steinhoff.

Further, he was also a partner at Hoffman Inc., a legal firm which provided legal services to Steinhoff group. In this regard, for the financial year 2017, he was reimbursed handsomely for expenses to the amount of approximately €2 million (30 September 2016: €1 million). The proximity of Hoffman Inc. to Steinhoff was deeper than that of a legal firm providing legal services to the client. A loan of approximately €4 million was granted to Hoffman Inc. for the subscription of KAP shares. During the process where the shares were sold in the open market, the proceeds were transferred to the Group; resulting in the loan fluctuating between a loan

payable and a loan receivable until the transaction was finally settled. €26 000 of the proceeds on the sale of the shares were shared with Hoffman Inc. Interest was received on the loan receivable. Hoffman Inc. also rented office space from the Group for an annual amount of approximately €37 000 (2016: €40 000).⁹⁰

In 2017 Steinhoff acknowledged what it described as “accounting irregularities” and commissioned investigation by PricewaterhouseCoopers Advisory Service Proprietary Limited (“PwC”). Steinhoff further cast doubt over the reliability of its 2015 and 2016 financial statements. That was followed by the immediate resignation of Markus Jooste, the then CEO. Grobler and Ben la Grange, the former CFO, were suspended eight months later as part of the investigation by PwC.

On 15 March 2019 Steinhoff published an Overview of the PwC forensic investigation. Notwithstanding the fact that Steinhoff did not publish the full report citing confidentiality, legal privilege and other restrictions, the published Overview records serious governance contraventions.⁹¹

The Overview records that it was found that a small group of Steinhoff Group former executives and other non-Steinhoff executives, led by a senior management executive, structured and implemented various transactions over a number of years which had the result of: substantially inflating the profit and asset values of the Steinhoff Group over an extended period; a pattern of communication which shows the senior management executive instructing a small number of other Steinhoff executives to execute those instructions, often with the assistance of a small number of persons not employed by the Steinhoff Group; fictitious and/or irregular transactions were entered into with parties said to be, and made to appear to be, third party entities independent of the Steinhoff Group and its executives but which now appear to be closely related to and/or have strong indications of control by the same small group of people; and fictitious and/or irregular income, in many cases, created at an intermediary Steinhoff Group holding company level and then allocated to underperforming Steinhoff operating entities as so called “contributions” that took many different forms and either increased income or reduced expenses in those operating entities.⁹²

⁸⁵ Steinhoff International Holdings – Annual Report (2016) http://www.sharedata.co.za/data/016290/pdfs/STEINHOFF%20N.V._ar_sep16.pdf

⁸⁶ Securities and Exchange Commission Washington, D.C 20549 (6 August 2016) https://www.sec.gov/Archives/edgar/data/1419852/000110465916140088/a16-16840_1sc13d.htm

⁸⁷ Steinhoff International Holdings N.V Audited Results for the year ended 30 September 2017 <https://www.steinhoffinternational.com/downloads/2019/latest-results/STEINHOFF-ANNUAL-REPORT-2017.pdf>

⁸⁸ Steinhoff International Holdings N.V – Annual Report (2016) http://www.sharedata.co.za/data/016290/pdfs/STEINHOFF%20N.V._ar_sep16.pdf

⁸⁹ Steinhoff International Holdings N.V – Audited Results for the year ended 30 September 2017 <https://www.steinhoffinternational.com/downloads/2019/latest-results/STEINHOFF-ANNUAL-REPORT-2017.pdf>

⁹⁰ Ibid.

⁹¹ Overview of Forensic Investigation (15 March 2019) <https://www.corruptionwatch.org.za/wp-content/uploads/2020/08/overview-of-forensic-investigation.pdf>

⁹² Ibid.

5. THE ROLE OF THE COMPANY SECRETARY IN STATE CAPTURE AND CORRUPTION IN THE PRIVATE SECTOR *(continued)*

The Overview further recorded that in most cases, the operating entities received cash for the contributions from another Steinhoff Group or from non-Steinhoff companies (funded by Steinhoff), resulting in intercompany loans and receivables. The transactions identified as being irregular are complex, involved many entities over a number of years and were supported by documents including legal documents and other professional opinions that, in many instances, were created after the fact and backdated.

Despite its commitment in that Report that its governance structures were in line with King III and the Companies Act, Steinhoff breached the fundamentals of good governance. For starters, while the King Code recommends that the company secretary must maintain, as far as reasonably possible, an arms-length relationship with the board and its directors as the company secretary is a gatekeeper of good governance, Steinhoff appointed the company in which Grobler was a director as a company secretary. Further, though Steinhoff Secretarial Services Proprietary Limited is a juristic person, the appointment contravened the spirit and purpose of the King recommendation that the company secretary should ideally not be a director of the company. This is because the purpose of the recommendation is to ensure an arms-length relationship between the directors and the company secretary.

Having weakened the governance machinery due to the positioning of the company secretary, Steinhoff proceeded to disregard other good governance principles. The board of Steinhoff did not over the years comprise of a consistent balance of power, with a majority of the directors being non-executive directors as required. Steinhoff used a flawed criteria of determining the independence of directors resulting in directors who were not actually independent, being regarded as independent.⁹³ The fact that the majority of non-executive directors were in fact not independent as required by the King Code, led to the lack of independence of the board.

Jooste and Grobler had a long-standing relationship sustained over three decades. Grobler was one of Jooste's close friends who worked with him at Steinhoff over many years and did numerous interrelated deals.⁹⁴

It is therefore probable that these historical relations and loyalties adversely influenced the governance of Steinhoff. In particular, it appears to account for a small group of Steinhoff

Group former executives and other non-Steinhoff executives implementing various fraudulent transactions over several years and covering up for one another.

As exemplified by his conduct in the Klüh investment deal, Grobler seems to have turned a blind eye to Jooste's related parties' dealings. Though he asserted that the parties claimed to be independent and Steinhoff independently checked that, it is difficult to accept that Grobler did not know of Jooste's related parties' dealings considering Grobler's proximity to the events.⁹⁵



⁹³ "Inside the Steinhoff saga, one of the biggest cases of corporate fraud in South African business history" (28 June 2018) CNBC Africa <https://www.cnbc.com/2018/steinhoff-rise-fall/>

⁹⁴ Bonochris R, "News Analysis: Who is Stehan Grobler, Steinhoff's man behind the scenes" (29 August 2018) <https://www.businesslive.co.za/bd/companies/retail-and-consumer/2018-08-29-news-analysis-who-is-sthan-grobler-steinhoffs-man-behind-the-scenes/>

⁹⁵ Rose R (2018) Steinhoff Tafelberg Publishers Ltd, South Africa

5. THE ROLE OF THE COMPANY SECRETARY IN STATE CAPTURE AND CORRUPTION IN THE PRIVATE SECTOR *(continued)*

5.3 EOH Holdings Limited (EOH)

Adri Els, CA(SA), took up the position of company secretary of EOH in 2006 and resigned in 2019, a period of 13 years, when the winds of change were about to sweep through EOH.⁹⁶ Notably, Els was suitably qualified, competent and experienced to provide guidance and support to the directors and chairperson. As it should be, she had direct access to and ongoing communication with the chairperson.⁹⁷

Whilst being the company secretary of EOH, Els was also company secretary of the three other companies which had links to EOH and were controlled by Keith Keating who is engrossed in problems as a supplier to Sita and the SAPS.⁹⁸ She was EOH's company secretary when the malfeasance, which informed adverse media reports related to, inter alia, corporate governance and probity concerns in EOH were at their peak.

The EOH's governance challenges that the current board and Group CEO, Stephen van Coller, inherited were laid bare in the affidavit of the latter to the Zondo Commission.⁹⁹ Among other things, the affidavit recorded that the board was not compliant with the King Code in that there were four executive directors, three non-executive directors who had been on the board for longer than 10 years and a fourth non-executive director who was previously an executive and had not had the required three-year cooling off period. Further and more concerning, it recorded that the investigation commissioned by the current board revealed multiple points of failure in governance and oversight mechanisms, inadequate and ineffective controls and inadequate systems thus creating an enabling environment for wrongdoing. These included: opaque Delegation of Authority ("DOA") with significant responsibilities granted to a few executives; artificial/inflated software licence sales; potential tender irregularities; use of politically connected middlemen that are suspected to have been used as introducers and sales agents; payments being made to subcontractors in circumstances where there is no evidence that work was done by the said subcontractors; and suspected inappropriate gifting, sponsorships and donations.

The inescapable question is, given Els's long tenure of 13 years, what role did she play or not play when governance collapsed?

The effort of the new leadership of EOH in trying to establish corporate governance has been widely covered by media reports. EOH has retained the services of the University of Stellenbosch's Centre for Corporate Governance in Africa to support the implementation of a new risk governance framework to ensure an effective basis for the company to move forward. EOH has also been trying to pursue civil claims against the former heavy hitters who allegedly landed the group in trouble, including its former CEO, Asher Bohbot, former chief financial officer John King, former public sector head Jehan Mackay and former head of EOH International Ebrahim Laher. EOH is also cooperating with the law enforcement agencies regarding criminal investigations.¹⁰⁰ CEO Stephen Coller has embraced transparency and made impressive strides in ridding the company of its rotten apples. To this end, he was awarded the 2020 Business Newsmaker.



⁹⁶ "EOH – EOH Holdings Limited – Resignation of company secretary" (15 May 2019) <https://www.eoh.co.za/sens/eoh-eoh-holdings-limited-resignation-of-company-secretary/>

⁹⁷ EOH Holdings Limited Annual Integrated Report (2017) <https://www.eoh.co.za/wp-content/uploads/2019/09/EOH-Annual-Integrated-Report-31-July-2017.pdf>

⁹⁸ Van Zyl G "EOH mess: CFO John King, Asher Bohbot were directors of dodgy Keating firms" (10 December 2017) <https://www.biznews.com/undictated/2017/12/10/eoh-cfo-john-king-asher-bohbot-were-directors-of-keating-firms>

⁹⁹ Van Coller, S. Affidavit. 23 November 2020 <https://www.eoh.co.za/wp-content/uploads/2020/11/Group-CEO-Stephen-van-Coller-Zondo-Commission-Affidavit-23Nov2020.pdf>

¹⁰⁰ "EOH sues founder Asher Bohbot for R1.7-billion" (29 June 2021) <https://www.eoh.co.za/press-releases/eoh-sues-founder-asher-bohbot-for-r1-7-billion/>

5. THE ROLE OF THE COMPANY SECRETARY IN STATE CAPTURE AND CORRUPTION IN THE PRIVATE SECTOR (*continued*)

5.4 Cricket South Africa (CSA)

Cricket South Africa's ("CSA") company secretary Welsh Gwaza was suspended and described as "as a sort of puppet master at CSA" clearly indicating a lack of independence.¹⁰¹ In the Fundudzi report, one charge leveled against Gwaza is that he did not provide a due diligence report regarding Global Sports Commerce, a company with which CSA signed a commercial and broadcast deal for the Mzansi Super League.¹⁰²

Gwaza had a significant influence on the organisation, as he was a permanent invitee to most, if not all of the CSA committees, ranging from finance to the social and ethics committee and the cricket pipeline committees. This had the effect of over-stepping boundaries and creating conflicts in his position as company secretary.¹⁰³

Gwaza was then dismissed as the company secretary with immediate effect, one of the reasons for this dismissal included gross insubordination, breach of the Companies Act and a failure to disclose relevant information. The dismissal came after a highly contested suspension on 30 November 2020 after findings of the chairperson evidenced that the employment relationship between CSA and Gwaza had irretrievably broken down because of his various misconducts.¹⁰⁴

Gwaza had also authorised a company called People Link (Pty) Ltd for unauthorised Human Resources services as well as PR Worx CC, a public relations company irregularly, which contracts were also terminated by the board along with Gwaza's suspension. The board stated that they were acting under the developments uncovered in the Fundudzi report which evidenced poor corporate governance and maladministration in CSA.

The governance breaches that took place in CSA saw the resignation of the entire board, one of the members of the board being Shirley Zinn who stated that her resignation was due to the "poor corporate governance" that she had witnessed in her time on the board. One of the greatest forms of such was the actions of the then CEO Thabang Moroe. It was found that Moroe had committed acts of serious misconduct and failure of controls in the organisation. Zinn was quoted saying "There's a lot of issues, some of them are being fixed, but one of them

is the relationship with the South African Cricketer's Association, the accreditation of journalists being withdrawn, which is something that I thought was an appalling approach in terms of dealing with journalists." She further stated that she was shocked to see how some of the processes that took place were authorised from a governance perspective.

The maladministration that took place is part of the reason for Zinn's resignation as she said she could not "stand by and look the other way" and that the board needed to be properly constituted and that too many people were in acting positions,¹⁰⁵ which she found contributed to the governance failures which she was making efforts to try and improve. She further mentioned that she lives by "the values, principles, practices and processes around good corporate governance" a practice all the governance structures ought to have lived by in order to keep them accountable and within their duties. Her resignation, she said, was the loudest and most clear way that she could send out the message that change was required and that corporate governance ought to have been respected.¹⁰⁶

Gwaza, the COO Nassei Appiah and Moroe also failed to compile a Due Diligence which they had stated had been completed. Gwaza as the company secretary had not provided the board and failed to furnish them with proper required information.



¹⁰¹ Hess S "Cricket SA interim board suspend company secretary Welsh Gwaza" IOL (1 December 2020) <https://www.iol.co.za/sport/cricket/proteas/cricket-sa-interim->

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Mjikeliso S "Cricket SA dismisses company secretary Welsh Gwaza 'with immediate effect'" (11 June 2021) News 24 <https://www.news24.com/sport/cricket/proteas/cricket-sa-dismisses-company-secretary-welsh-gwaza-with-immediate-effect-20210611>

¹⁰⁵ Tshwaku K "Independent board member Shirley Zinn quits as chaos deepens at Cricket SA" (3 December 2019) Times Live <https://www.timeslive.co.za/sport/soccer/2019-12-03-resignation-cricket-sa-continues-to-unravel/>

¹⁰⁶ Ray C "Shirley Zinn resigns over poor CSA corporate governance" (4 December 2019) Daily Maverick <https://www.dailymaverick.co.za/article/2019-12-04-shirley-zinn-resigns-over-poor-csa-corporate-governance/>

5. THE ROLE OF THE COMPANY SECRETARY IN STATE CAPTURE AND CORRUPTION IN THE PRIVATE SECTOR *(continued)*

Full Fundudzi report reveals CSA's catastrophic management failures (Extract, 25 November 2020)

It did not take the unredacted publication of the 456-page Fundudzi report to confirm what years of actions have shown – that Cricket South Africa's ("CSAs") leadership was overwhelmingly self-serving and incompetent – but it has added detail to the rot.

But others have also been exposed as unfit for office. The former chief operating officer ("COO") Naasei Appiah is central to many bad decisions, and present company secretary Welsh Gwaza will no doubt come under more scrutiny for his role in several events. Minutes of Exco meetings were not always kept and on several occasions the board was misled by executives.

Paul Manning of IMG, a leading expert in broadcast rights deals, wrote an email to CSA agreeing that the potential income was attractive, but that there were concerns.

"We noted from a review of the minutes that Gwaza reassured the Board that three lawyers had been working on the agreement and all risks identified had been covered. Gwaza further indicated that management had gone to great extent to cover issues of reputational risk and the guarantee for the R500 million. "It should be noted that at the time that the Board considered GSC's proposal, Appiah, Moroe and Gwaza were aware that there was no due diligence conducted on GSC.

"Appiah and Moroe failed to ensure that due diligence was conducted on GSC and provide the said due diligence to FinCom and the board despite numerous requests to do so. Appiah and Moroe further failed to inform FinCom and the board that due diligence was not conducted on GSC. On 21 July 2019, Gwaza advised Management not to share IMG's opinion with FinCom and the board until management had a position on the matter."



Source: <https://www.dailymaverick.co.za/article/2020-11-25-full-fundudzi-report-reveals-csas-catastrophic-management-failures/>



5. THE ROLE OF THE COMPANY SECRETARY IN STATE CAPTURE AND CORRUPTION IN THE PRIVATE SECTOR *(continued)*

5.5 Tongaat Hulett (Tonga)

In regard to the Tongaat Hulett accounting scandal, questions were raised on what the role of management was during the period when executives acted illegally.¹⁰⁷ The company's board said one of the failures in governance identified was a culture of deference and lack of challenge that led to employees following instructions without questioning the basis of the accounting practices.¹⁰⁸

The Johannesburg Stock Exchange ("JSE") fined Tongaat Hulett R7.5 million for incorrect information on its financial statements with the hopes that it will foster accountability and place better accounting practices in governance of the company and the accounting profession. The accounting irregularities shown on the financial statements resulted in Tongaat Hulett's shares plummeting which had them suspended from the JSE for breaching its Listings Requirements. This fine was further hailed and accepted by SAICA which stated that the fine "demonstrates accountability in the scandal-rocked profession".¹¹⁰

The irregularities and material errors in the financial statements as well as the financial impact it created saw the JSE stating that they intended to institute civil claims against the former top executives including the former CEO Peter Staude. The CEO of SAICA, Freeman Nomvalo was quoted saying that "when this kind abuse happens it not only harms investors, it diminishes faith in the integrity of reporting and trust in companies and markets – and this affects everyone".¹¹¹ It is important for the regulatory body to uphold the profession to the highest standards, especially in times such as these.

Following the scandal, the board enlisted the services of PwC to conduct investigations. The key findings of PwC investigation were published on 29 November 2019. Among the key findings was that there were several governance failures pursuant to which internal policies, guidelines and frameworks were not followed, creating an environment in which senior executives could initiate or participate in the financial reporting misstatements.¹¹²

Contrary to the company's claim that all the directors had access to relevant information and to the advice and services of the company secretary, Maditshaba Mahlari, who holds BA and LLB qualifications, and has over 10 years' experience as a company secretary, the board seems not to have been aware of the senior executives' dealings.¹¹³

In light of the foregoing, the inescapable questions are where was Mahlari when Tongaat's governance was collapsing? Did she do enough while the fraud was happening or was she also cowered by dominant personality of CEO Piet Staude? Having served as the company secretary from December 2009 for ten years, Mahlari tendered her resignation on 15 November 2019.¹¹⁴



“... failures in governance identified was a culture of deference and lack of challenge that led to employees following instructions without questioning the basis of the accounting practices.”

¹⁰⁷ Mahlakoana T "Tonga Accounting Scandal: Questions raised over role of management" (2019) EWN <https://ewn.co.za/2019/11/29/tonga-hulett-accounting-scandal-questions-raised-over-role-of-management>

¹⁰⁸ Ibid.

¹⁰⁹ Khumalo S "'Push the accountability button': SAICA chief hails Tongaat Hulett fine" (5 July 2020) News24 <https://www.news24.com/fin24/companies/push-the-accountability-button-saica-chief-hails-tonga-hulett-fine-20200705>

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Tongaat Hulett Limited "Key findings of PwC Investigation (29 November 2019) <https://www.tonga.com/wp-content/uploads/2019/11/Key-findings-of-PwC-Investigations-29-Nov-2019.pdf>

¹¹³ Ibid.

¹¹⁴ "Renewal of Cautionary and Further Update on Group Processes" 18 November 2019 Moneyweb https://www.moneyweb.co.za/wp-content/uploads/ftp/senspdfs/SENS_20191118_S423259.pdf

5. THE ROLE OF THE COMPANY SECRETARY IN STATE CAPTURE AND CORRUPTION IN THE PRIVATE SECTOR *(continued)*

Tongaat Hulett scandal raises more red flags about governance in corporate South Africa (Extract, 4 June 2019)

Investors must be furious. Business Day quoted Chris Logan of Opportune Investment as saying that past executive bonuses should be repaid if it transpires they were the product of inflated – in other words, fraudulent – profits. A reckoning of some sort seems to be looming.

This latest accounting scandal is clearly a black eye for South Africa's corporate sector, which likes to portray itself as doing things by the book rather than cooking the books. It comes in the wake of the Steinhoff debacle, which is on a far more massive scale, and KPMG's woes in the sordid State Capture saga.

Public sector corruption is widely seen as a major drain on Africa's most advanced economy, which is why the country ranks 73 out of 180 on Transparency International's Corruption Perceptions Index. But for a long time, investors who sank money into publicly listed companies on the JSE generally had confidence that the performance of their investments was reflected accurately in financial statements and results.

So the accounting scandals point to wider problems with South African corporate governance.

The silver lining here is that accounting or reporting irregularities are being spotted, even if it is after the fact, and corrective action is being taken. Corporate South Africa has to hope that the rot from a few bad apples does not spread. But it may need to take some tough measures itself if it wants to maintain its reputation for transparency, good governance and keep one of the key competitive advantages it has long enjoyed over developing economy peers.



Source: <https://www.dailymaverick.co.za/article/2019-06-04-tongaathulett-scandal-raises-more-red-flags-about-governance-in-corporate-south-africa/>

We have analysed state capture and corruption in the private entities in addition to the previous section on the public sector. Let us turn to the red flags and lessons learned.




TongaatHulett

Following the above cases, where the company secretary has either been implicated or victimised, we can identify the following red flags and associated lessons learned. It is important to mention again that the company secretary has both legal and ethical duties and that where found to be a prescribed officer, may face personal liability for contravening their legal duties. It is also important to reiterate that by belonging to a professional body such as CGISA, the risk of unethical and/or illegal conduct on the part of the company secretary is reduced as a result of heightened monitoring. By belonging to CGISA, there is enhanced responsibility on the company secretary, in addition to their duties, as prescribed by legislation and codes of good practice, they are also held to account by CGISA as a member and could face disciplinary action.

6.1 Dominant chairperson/CEO

A dominant chairperson or CEO poses a challenge to the company secretary and to the board as a whole. Where a dominant chairperson or CEO takes charge, the door is left open for victimisation and biased and/or irregular decision-making. Effective board performance can only be realised through ethical and effective leadership. Where a dominant chairperson has their own agenda, it can become difficult for the company secretary to advise the board and to ensure that directors adhere to their fiduciary duties.

The company secretary should motivate for the appointment of a lead independent director to mitigate the possible risk of a dominant chairperson. It has been said that the lead independent director would not only serve to assist where the chairperson is conflicted but would also strengthen the role of the chairperson and serve as a sounding board for other directors in regard to matters concerning the chairperson.¹¹⁵ In addition, the appointment of a lead independent director would serve to achieve a balance of power and to improve accountability.¹¹⁶

Regular board evaluations conducted independently are another tool the company secretary can use to bolster good governance practices within the boardroom. Evaluations assist in identifying any gaps in skills required; can improve decision-making processes and improve governance structures. Evaluations will also assist in ensuring that directors understand their fiduciary duties, which can contribute to directors challenging a dominant chairperson's

behaviour by realising that all board members will be held liable for illegal and/or unethical decisions taken. An effective evaluation requires tact, transparency, and engagement from all members of the board.¹¹⁷ The productivity and ease of the process will hinge on having a method of evaluation that will engage directors, committees, and the board in productive and honest conversation.¹¹⁸

Where these measures do not deter the behaviour of a dominant chairperson or CEO, the company secretary will need to stand their ground and have the courage to always act in accordance with legal and ethical duties required. The company secretary may look to follow whistleblowing processes in place, and as a last resort, should victimisation persist, resign from the company. There is no justification for the company secretary supporting any illegal and/or unethical instructions from the chairperson or CEO and the company secretary needs to always follow lawful process and good governance practices.

Dominant CEOs such as Markus Jooste, Piet Staude and Lucky Montana clearly illustrate the damage that dominant CEOs can create. In a similar vein, dominant chairpersons such as Dudu Myeni and Asher Bohbot can also cause havoc.



¹¹⁵ "The role of the chair and lead independent" Practice Note (22 September 2017) Institute of Directors Southern Africa https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/562ED5CF-02E8-4957-97C8-D3F0C66A7245/King_IV_Practice_Note_on_Role_of_Chair_and_LID.pdf

¹¹⁶ *Ibid.*

¹¹⁷ Foster J "What good can a board evaluation do" Corporate Board Member <https://boardmember.com/what-good-board-assessment/>

¹¹⁸ *Ibid.*

6. RED FLAGS AND LESSONS LEARNED *(continued)*

6.2 Maintaining independence

The company secretary needs to maintain their independence at all times. Failure to maintain independence will lead to biased behaviour and actions fuelled by personal gain, which go against good governance and will lead to a collapse of governance systems and processes. It is important for the company secretary to remember that personal liability may ensue when unlawful actions taken are deemed to be those carried out by a prescribed officer.

The company secretary, as the trusted advisor and advocate for good governance needs to advise the board independently without fear or favour on their respective duties and responsibilities. In addition, the company secretary needs to speak up when proper process is not being followed or where decisions taken are not in accordance with the law and/or good governance standards. The company secretary is likely to face dominant personalities and egos in the boardroom but needs to exercise their judgment and carry out their role independently. This is where emotional intelligence and one's own ethics and values come into play.

Though the company secretary needs to build a strong relationship with both the chairperson and the CEO, care must be taken to not become biased to either one and must always act in the best interests of the company. Impartiality is key and company secretaries must remain objective in their role.

It is important for company secretaries to form a network of support with other company secretaries as the role may become challenging and as humans, company secretaries would also need emotional motivation and support, without breaching confidentiality. It has also been said that maintaining independence allows company secretaries to support the independence of the non-executive directors, including the chairperson.¹¹⁹

The company secretary needs to demonstrate their professionalism and moral stance from the outset. Where the company secretary is asked to perform an illegal or unethical act such as manipulating minutes or board resolutions, courage needs to come to the fore and the company secretary needs to say no. Where it becomes impossible for the company secretary to fulfil the profession's requirements and obligations, the company secretary would need to step aside as there needs to be mutual respect between the board and the role of the company secretary. As an employee of the company, the company secretary may be suspended and face dismissal for any misconduct.

If in doubt, the company secretary should seek guidance from the lead independent director or obtain external legal advice. It greatly assists company secretaries to be part of a body such as CGISA. This enables greater accountability and skills. CGISA provides a plethora of information and guidance to companies' governing structures. CGISA takes a stand against corruption and maladministration and is committed to good governance.

6.3 Managing conflicts of interest

The company secretary needs to ensure that he or she has adequate knowledge on what conflicts of interest are in the context of the Act, King IV, the JSE listings requirements, and the processes to be followed where conflicts of interest exist. Apart from the legal requirements, there is an ethical duty in respect of conflicts of interest management, which the company secretary should guide the board on, irrespective of the pressures the company secretary may face from within and outside the boardroom.

It is incumbent on the company secretary to insist on the background checks as to previous board appointments or current board appointments of the director concerned. In addition, checks should be done on shareholdings of that director and any associations he or she may be part of. This may provide insight into any conflicts or potential conflicts of interest before such director is appointed to the board. It would be good practice for directors to sign off against their CIPC listings or disclosures of directorships, at least annually.

Provisions relating to conflicts of interest need to be contained in either the board charter or in a conflicts of interest policy. If contained in the board charter, the company secretary needs to ensure that there is information on ethical behaviour and on how declarations of interest are to be managed, with detail as to the process to be followed. Also, to be included in the board charter is a clause around the scenario where a director wishes to take up another directorship. In this scenario, the director concerned ought to be required to advise the chairperson as a courtesy and to inform the chairperson of the proposed appointment – where it would not amount to a cross-directorship or a conflict of interest and does not impact on the director's ability to dedicate commitment to the company, the appointment would most probably be allowed. The best case would be if the director could inform the chair prior to the appointment, together with providing an indication that there are no foreseeable actual or perceived conflicts, which could ensue as a result of the appointment.

¹¹⁹ "Standing apart as a company secretary" Chartered Governance Institute UK & Ireland <https://www.icsa.org.uk/features/standing-apart-as-a-company-secretary>

6. RED FLAGS AND LESSONS LEARNED *(continued)*

As the trusted advisor to the board, the company secretary needs to play a proactive role and assist board members with the submission of their annual declarations and should even draw up a template for directors to use. Where the declarations are not forthcoming, the company secretary ought to follow up with the director/s concerned and if still not forthcoming, approach the chairperson for assistance. Declarations of interest should be a standing item on the board agenda and should be at the top of the agenda. The company secretary needs to remind the chairperson at the board meeting, to reflect on the agenda and enquire if any director present has a conflict or potential conflict, which then needs to be noted by the company secretary in the minutes. This item on the agenda must be given adequate attention and must not be brushed over as a mere tick-box item. Under this agenda item, the chairperson should specifically ask "Does anyone present have any declarations of interest in respect of matters for this meeting". This should be recorded in the minutes as such. All directors need to be reminded of their duties and any questions or concerns must be handled and addressed in sufficient detail.

Under the JSE debt listings requirements, issuers are required to have a conflicts policy, which must be published on issuers' (with debt programmes) websites, together with their conflicts registers.

It has been said that EOH's governance failures started with its board.¹²⁰ EOH CEO Stephen van Coller stated at the commission that King IV states there should be a cooling-off period before an executive joining the board can be considered for the role of board chair, to ensure they can act as an independent director. He further stated that this did not happen with Asher Bohbot, the founder and former CEO who became chair soon after leaving the CEO job. Bohbot was one of four "non-independent" directors on the board as he, along with the other three, had served on it for over 10 years.¹²¹ Van Coller is also quoted as saying: "if you have not done your anti-bribery and corruption attestations, you have not done your compliance training and/or you have not done your conflicts of interest disclosure, you are gonged out for any bonus for that year."¹²²

6.4 Accuracy of records

Section 88 of the Companies Act lists "ensuring that the minutes of all shareholders meetings, board meetings and the meetings of any committees of the directors are properly recorded" as a duty to be undertaken by the company secretary. The Act regulates board meetings in section 73. The section stipulates *inter alia* that minutes must include declarations of personal financial interests and resolutions adopted, as well as that minutes are evidence of the proceedings at the meeting. It is important that the minutes of board meetings are drafted in such a way as to demonstrate that the board members have observed their responsibilities to the company and complied with their legal and regulatory duties.

The purpose of minutes is to provide an accurate record of the decisions made (including resolutions passed and actions decided on) at the meeting with sufficient context on key discussion points to demonstrate that the directors discharged their duty of due care, skill and diligence to enjoy protection of the business judgement rule. Minutes should also record dissenting views. Minutes provide evidence that directors met their statutory and regulatory duties, as well as the responsibilities set out in the board and committee charters. Minutes should provide sufficient context to enable the person reading the minute to understand key discussion points between participants in arriving at the conclusion.

Minutes may be used as evidence in court proceedings, and it is of vital importance that they reflect decisions taken accurately and show that directors applied their mind to such decisions. Well drafted board minutes and directors' resolutions serve as a record of corporate decisions and reflect director dissent where this should arise.¹²³ A court will refer to the minutes of board meetings to establish the business judgment rule as to whether a director has acted in the best interests of the company; and with the degree of care, skill and diligence that may reasonably be expected.¹²⁴ In van Coller's testimony for EOH at the commission, he stated that no minutes of executive committee meetings – the next oversight level down from the board – were kept.¹²⁵

¹²⁰ Claasen L "How corruption flourished at EOH" Tech Central (25 November 2020) <https://techcentral.co.za/how-corruption-flourished-at-eoh/103247/>

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/6AFA1967-5252-4F2C-A3B1-08DFA678F43B/Minutes_of_Board_Meetings_FAQs.pdf

¹²⁴ *Ibid.*

¹²⁵ Claasen L "How corruption flourished at EOH" Tech Central (25 November 2020) <https://techcentral.co.za/how-corruption-flourished-at-eoh/103247/>

6. RED FLAGS AND LESSONS LEARNED *(continued)*

The Act requires all companies to keep accurate and complete accounting records, which must be kept and be accessible at the company's registered office. A company must at all times have a copy of its Mol and any amendments or alterations to it, as well as any rules that apply to the company in terms of its Mol. The company is also required to keep a register of its shares and its company secretary and auditor, to the extent that the company is required to make such appointments.¹²⁶ During the Steinhoff saga, CIPC issued a compliance notice against Steinhoff in January 2018, under section 214 of the Companies Act. The notice related to the falsification of accounting records, following allegations of accounting irregularities.

Non-compliance with accurate record keeping could lead to criminal offences that may subject an organisation to severe fines and directors and officers to possible imprisonment.¹²⁷ Where the company secretary manipulates resolutions or entertains such conduct, they will be subject to liability.

Any person who is party to the falsification of any accounting records of a company is guilty of an offence. Similarly, any person who is party to the preparation, approval, dissemination or publication of a prospectus or statement that contains a statement that is misleading in the form and context in which it is made, is guilty of a criminal offence.¹²⁸ If any person provides false or misleading information in satisfying an obligation to provide information or give notice in terms of the Act, he commits an offence.



6.5 Board induction and training

Induction plays a vital role in assisting new directors to understand their fiduciary duties and responsibilities. Where directors understand from the onset the liability and consequences that may ensue for failing to adhere to their fiduciary duties, the risk for non-compliance might be reduced. The induction process enables both the company as well as the director to highlight systems and processes that mitigate risk.¹²⁹ A well-developed and delivered board induction process can strongly influence a new board member's experience and involvement in discussion and decision-making.¹³⁰

The company secretary needs to ensure that the induction pack contains adequate and detailed information on company policies, all statutes and codes. The induction process should also highlight the ethical culture of the organisation and draw directors' attention to the code of ethical conduct as well as related policies. In addition, a detailed explanation of what is required needs to be given to the new directors and the company secretary thus needs to ensure that they understand the content extensively to be able to discuss this with the new directors confidently and thoroughly.

The company secretary can ensure that ethical awareness remains at the forefront of the board's consciousness, through regular training on ethics, corporate governance and director duties. Board behaviour and culture can be significantly enhanced by providing appropriate training and support for directors.¹³¹ The legal, regulatory and governance landscape is constantly evolving and as part of the company secretary's legal duty to advise the board on legal developments, training should be regularly organised for the board by the company secretary. The company secretary should provide the board with regular updates on changes and should consider how they affect the organisation and what actions are needed.

Proper board induction and training seem to have been largely absent in the above examples.

¹²⁶ Compliance and Intellectual Property Commission Compliance Obligations <http://www.cipc.co.za/index.php/manage-your-business/manage-your-company/public-company/compliance-obligations/>

¹²⁷ Mullon P "Record-keeping laws provide for harsh penalties" (9 November 2005) <https://www.itweb.co.za/content/Gb3Bw7WN2jiv2k6V> ¹²⁸ The Companies Act 71 of 2008 section 214(1)(d)

¹²⁸ The Companies Act 71 of 2008 section 214(1)(d)

¹²⁹ Dadarkar J "Rules of offside for directors: The importance of induction" CEO Today (27 October 2017) <https://www.ceotodaymagazine.com/2017/10/rules-of-offside-for-directors-the-importance-of-induction/>

¹³⁰ "Good Governance #3: Board Induction" Vicsport <https://vicsport.com.au/3-board-induction>

¹³¹ "All Aboard: Why Board Inductions are Vital" <https://youngleaderonboards.com.au/wp-content/uploads/2019/05/All-Aboard-Why-Board-Inductions-are-Vital.pptx.pdf>

The company secretary needs to be proactive in championing good governance and cannot take a backseat in the boardroom. Where any red flags arise, the company secretary needs to ensure that they remain independent and continue to serve the company with the highest level of ethical values. The legal duties bestowed on the company secretary need to be adhered to, failing which possible personal liability may ensue. It is important that the company secretary possesses emotional intelligence that proves useful, particularly in the case of dominant personalities that may be present in the boardroom. Above all, the company secretary needs to ensure that they are not part of any illegal, unethical or corrupt activity so as to remain the trusted advisor.

Although the company secretary reports to the chairperson of the board, in many cases they report in a dualistic fashion to the CEO or CFO. If the CEO or CFO are the subject of questionable conduct, the company secretary should seek advice from appropriate sources including the board chairperson, lead independent director or external legal advice.

The role of the company secretary in state capture and corruption has been extensively examined in both the public and private sectors. These are case studies, which highlight the actual role that company secretaries played. We need to learn from these experiences and ensure that they never happen again.

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