Chartered Governance Institute of Southern Africa

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Press Release

CGISA expresses concern over poor governance at COJ.

We note with disappointment the contents of a letter, dated 30 January 2023 circulated by the Acting City Manager to, amongst others, the company secretaries of the 13 entities under the City of Johannesburg. “As the professional body of company secretaries, this letter has placed company secretaries, as the gatekeepers of good corporate governance in an invidious position,” according to Stephen Sadie, CEO of The Chartered Governance Institute of Southern Africa. A company secretary must act in accordance with the prescripts of the Companies Act, the MFMA and the King IV report whilst simultaneously trying to implement the dictates of this letter. This role is being frustrated by the actions demanded in this letter.

We find it surprising that the Acting City Manager, Bryne Maduka who holds an LLB LLM (Company Law) and was a former company secretary for one year at Johannesburg City Parks and Zoo in 2010, seems not to understand basic corporate governance. His misunderstanding of key legal and governance principles exhibited in the letter is concerning. A copy of his letter was published by News24 on 02 February by Azarrah Karrim, and is attached for ease of reference.

All State-owned companies must have a company secretary in terms of the Companies Act and fall under both the Companies Act and the MFMA. This means that the COJ and its entities must duly abide by the prescripts of the governing framework of legislation that sets out the prescribed requirements and duties for effective governance.

S88 of the Companies Act outlines the duties of the company secretary and expressly holds the company secretary accountable to the Board. This has created a worrying tension for the company secretary as the letter’s instruction places the company secretary in direct conflict with the statutorily prescribed duty of accountability. In addition, a further duty of the company secretary is that they must “report to the company’s board any failure on the part of the company or a director to comply with the Memorandum of Incorporation or rules of the company.” If this letter’s instructions are complied with, how is the company secretary meant to report to the Board that the company and/or a director has failed in its duties, if the Board itself is unable to dictate the terms of its own agenda or the frequency of its meetings. This letter seeks to undermine, according to Stephen Sadie, CEO of CGISA “the statutory power that a company secretary holds in this regard, and furthermore, seeks to subvert the exercise of good governance that is the fiduciary duty of all Boards, which is greatly distressing”.

Principle 6 of King IV holds that the Board is the custodian of corporate governance in the organization and one of its primary roles is to be satisfied that it has fulfilled its responsibilities for the reporting period. The instruction in the letter to hold board meetings “in abeyance” severely prejudices the role of the Board. Principle 7 of King IV states that the Board should be independent so that it may discharge its governance roles objectively and effectively. This, too, is clearly not possible in terms of the demands of this letter.
In particular, the contents of the letter imply the following:

1. Paragraph 1 appears to conflate strategic sessions with Board and committee meetings by calling for “an abeyance” of both. Whilst it often happens that strategic sessions may be postponed for various reasons, such as financial difficulties, board and committee meetings are not in the same category. Board and committee meetings are routine meetings that occur in terms of the MOI and cannot be held in abeyance indefinitely. Further this appears to be an attempt to curtail the discussions that may or may not occur in a board meeting which directly impacts on the fiduciary duties of a director.

2. Paragraph 2 appears to indicate that all “critical reports” by the Board and the committees should still continue BUT only after a request for a meeting has been granted to the relevant Chair by the Acting City Manager. This leaves room for interpretation on what is deemed to be critical to the dictates of the Acting City Manager alone.
3. Paragraph 3 calls for an “abeyance” on all strategic decisions involving executive and senior members pending the shareholder’s advice. This paralyses the function of the Board which cannot duly exercise its fiduciary duty in terms of the Companies Act and the MFMA.
4. Paragraph 4 instructs that the implementation of all board meeting and committee meetings decisions to date from September will be postponed, including those related to paragraph 3 above, which shall remain postponed. This is extremely worrying and a cause for concern since valuable investigative work on corruption has been underway in entities under these Boards.
5. Paragraph 5 is a glaring disregard for the independence of a chair of a Board who will have to pass his agenda through the Acting City Manager for approval before requesting a meeting. This is a clear disregard for the independence of the Chair because it reduces them to schoolchildren who need permission from the school principal to run a meeting.

Lest we forget, the shareholder in this instance is the elected Municipality and is the recipient of taxpayer money. The immediate tension that is created in this letter is the flagrant blurring of the lines of accountability and effective management of an entity in terms of good governance principles originating from the interests of the shareholder. When a shareholder is able to dictate the terms and frequency of when board meetings may occur and under what circumstances, it sets a dangerous precedent for principles of transparency and accountability. This action by the Acting City Manager acting for the shareholder serves to upend the values of good governance and goes against the legislated mandate that Boards possess to call meetings at any time and exercise all the powers and functions that they are duly compelled to do.

Furthermore, this letter, has a chilling effect on the investigative and operational work currently underway at these entities. We note with concern that the Acting City Manager does not appear to understand the roles and function of company secretaries, boards and their committees since the letter serves to obfuscate company law and governance principles.
The Institute believes that this letter is ill-timed and should be immediately retracted if the City of Johannesburg wants to be known as an entity of good governance.
We echo the sentiments expressed by the IoDSA in their press release which calls into question the governance of the Acting City Manager.

This is a twin attack against the values and spirit of the legislated governance framework which applies to both SOCs and to public companies in South Africa. Good governance values, principles and statutory requirements should be upheld ubiquitously through all business enterprises in South Africa and cannot be cherry-picked at the behest of a shareholder.

ENDS
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