

**THE EVOLVING ROLE OF THE COMPANY SECRETARY AND ITS
IMPACT ON CORPORATE GOVERNANCE**

**RESEARCH PAPER SUBMITTED IN PARTIAL FULFILMENT OF THE
REQUIREMENTS OF THE LL.M DEGREE IN MERCANTILE LAW**

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DECLARATION

I, Michelle Paulette Adams, declare that **The Evolving Role of the Company Secretary and its Impact on Corporate Governance** is my own work, that it has not been submitted for any degree or examination at any other university, and that all the sources that I have used have been indicated and acknowledged by complete references.

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ACKNOWLEDGEMENTS

All glory goes to God, for enabling me to successfully complete my LLM degree. *'I can do all things through Christ who strengthens me'* (Philippians 4:13).

My sincere thanks and appreciation to my supervisor, Professor Wandrag, for her advice and guidance while writing each chapter of this research paper.

A special thanks to my husband and precious daughters, for their patience, love and support while completing this degree.

Thank you to my parents for their love and the sacrifices they have made and for their faith in me.



KEYWORDS

Board of directors

Companies Act

Company secretary

Corporate culture

Corporate governance

Corporate scandals

Evolving role

Governance failures

Governing body

King IV



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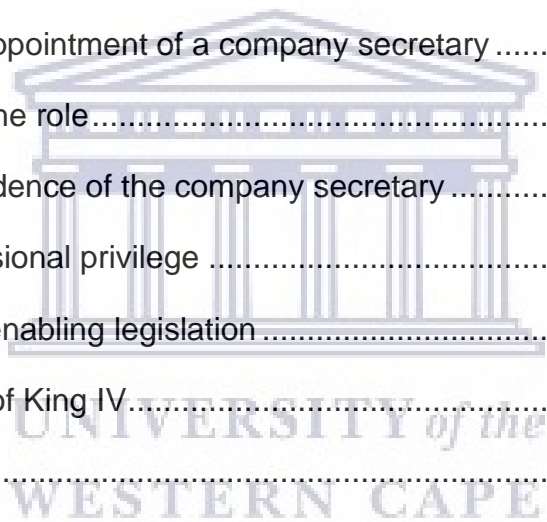
TABLE OF CONTENTS

DECLARATION	ii
ACKNOWLEDGEMENTS	iii
KEYWORDS	iv
TABLE OF CONTENTS	v
CHAPTER 1 INTRODUCTION	1
1.1 Introduction	1
1.2 Background and significance of the problem	1
1.3 Objectives of the research	5
1.4 Research questions	6
1.5 Research methodology	6
1.6 Chapter outline	7
CHAPTER 2 CORPORATE GOVERNANCE	9
2.1 Introduction	9
2.2 What is corporate governance?	9
2.3 The objectives of corporate governance	10
2.4 The benefits of effective corporate governance	13
2.4.1 Organisational culture	14
2.4.2 Deterrent to corruption	14
2.4.3 Beneficial to developing countries and emerging economies	15
2.4.4 Increased company performance	16
2.4.5 Sustainability	17
2.4.6 Interaction with stakeholders	18
2.5. The legislative and regulatory framework of corporate governance in South Africa	19



2.6. International codes of corporate governance	23
2.7. Who is responsible for corporate governance?	24
2.8. Conclusion	25
CHAPTER 3.....	27
THE EVOLVING ROLE OF THE COMPANY SECRETARY	27
3.1 Introduction	27
3.2. A historical overview of the role of the company secretary	27
3.3 The skills required of a company secretary	29
3.4 Dual roles of a company secretary.....	33
3.5. The evolving role of the company secretary.....	36
3.5.1 The invisible leadership, power and influence of the company secretary	37
3.5.2 The company secretary as the knowledge manager	38
3.5.3 The company secretary promotes and shares responsibility for the quality of governance	39
3.5.4 The company secretary is considered a strategic partner or leader	40
3.5.5 The company secretary assists with building an ethical culture.....	41
3.5.6 The company secretary facilitates board induction, training and professional development for board members.....	42
3.5.7 The company secretary is the board's trusted adviser and confidant	42
3.5.8 The company secretary as the chairperson of the board's support	43
3.5.9 The company secretary plays a role in sustainability and corporate citizenship	44
3.6. CONCLUSION	44
CHAPTER 4.....	46
THE LEGISLATIVE AND REGULATORY FRAMEWORK OF SOUTH AFRICA GOVERNING THE ROLE OF THE COMPANY SECRETARY	46
4.1 Introduction	46

4.2 The legislative and regulatory framework of South Africa governing the appointment and duties of the company secretary.....	46
4.3 Liability of the company secretary.....	50
4.4 Conclusion.....	51
CHAPTER 5.....	52
CONCLUSIONS AND RECOMMENDATIONS.....	52
5.1 Introduction.....	52
5.2 Conclusions from previous chapters.....	52
5.3 Should legislation be amended/enacted or promulgated in order to make provisions for the evolving role of the company secretary?.....	53
5.3.1 Mandatory appointment of a company secretary.....	54
5.3.2 Authority of the role.....	54
5.3.3 The independence of the company secretary.....	56
5.3.4 Legal professional privilege.....	58
5.3.5 Changes to enabling legislation.....	59
5.3.6 Principle 10 of King IV.....	59
5.4 Conclusion.....	59
BIBLIOGRAPHY.....	61



CHAPTER 1 INTRODUCTION

1.1 Introduction

This research paper has examined whether and to what extent current legislation must be amended to make provision for the evolving role of the company secretary. The significance of the problem will be discussed by considering the definition of corporate governance and what it seeks to achieve. Why companies experience corporate governance failures, despite certain companies being considered examples of good corporate governance, will also be discussed. The research will also show that corporate governance failures have resulted in the enactment of legislation, codes of good corporate governance and a focus on the role players involved in corporate governance, particularly the company secretary. The objectives of the research intend to highlight the evolved role of the company secretary and the impact of this role on quality and effective corporate governance. The research questions, research methodology and the outline of the chapters of the research paper will be discussed.

1.2 Background and significance of the problem

What is corporate governance? King IV defines corporate governance as 'the exercise of ethical and effective leadership by the governing body towards the achievement of the following outcomes; ethical culture, good performance, effective control and legitimacy'¹.

Does corporate governance result in improved financial results and the prevention of corporate collapses?² Research by Parglender³, Dzingai and Fakoya⁴, and Chauke⁵

¹King IV report on Corporate Governance for South Africa 2016 11.

²Wiese T *Corporate Governance in South Africa, with International Comparisons* (2017) 2 ed 5.

³Parglender M 'The Corporate Governance Obsession' (2016) 42 *Journal of Corporation Law* 20 ed 386.

⁴Dzingai I & Fakoya M 'Effect of Corporate Governance Structure on the Financial Performance of the Johannesburg Stock Exchange (JSE)-Listed Mining Firms' (2017) available at <https://www.semanticscholar.org/paper/Effect-of-Corporate-Governance-Structure-on-the-of-Dzingai-Fakoya/22ab36ad0aee87b57960036511338195036cc607> (accessed 13 April 2020) 1.

⁵Chauke K & Sebola M 'Corporate Governance Failures: Is it the end of Governance as we know it?' (2018) available at ulspace.ul.ac.za/bitstream/handle/10386/2480/chauke_corporate_2018.pdf?sequence=1&isAllowed=y (accessed 13 April 2020) 257.

has indicated that businesses fail as a result of poor corporate governance. According to Waweru, the failure of high-profile companies in the United States of America has been attributed to failures in corporate reporting processes.⁶ The failure of Enron and Worldcom, raised 'a myriad of questions about the effectiveness of contemporary accounting, auditing and corporate governance'.⁷ These questions were raised as Enron appeared to be an example of good corporate governance. Enron was described as an 'exemplar of good governance practices until the end'.⁸

The aforementioned corporate governance failures have resulted in the enactment of legislation by countries together with the enactment of codes to regulate corporate governance as a result of these failures and scandals.⁹ According to Parglender, the United States legislative response to the Enron scandal was the enactment of the Sarbanes-Oxley Act of 2002 (SOX), which reinforced the growing emphasis on corporate governance.¹⁰ As examples, SOX reinforced corporate governance by overseeing financial reporting, regulating auditor independence and requiring that the Chief Executive Officer and Chief Financial Officer certify the accuracy of financial reports filed with the Securities and Exchange Commission.¹¹

In 2015, Volkswagen, installed software to hide its actual emissions while undergoing official emissions testing; pollutants up to 40 times higher than the standard required in the United States of America were emitted.¹² What is interesting to note is that Volkswagen's corporate governance was considered good in terms of the measurables used by both the FTSE4 Good Index and the Dow Jones Sustainability Index.¹³ What was missing from the corporate governance compliance of these companies? Was their compliance merely a tick box exercise?

⁶Waweru N 'Factors Influencing Quality Corporate Governance in Sub-Saharan Africa: An empirical study' (2014) 14 *Corporate Governance* 4 556.

⁷Waweru N (2014) 556.

⁸Tingle B 'What is Corporate Governance? Can we measure it? Can Investment Fiduciaries rely on it?' (2018) 43 *Queens Law Journal* 2 4.

⁹Wiese T (2017) 5.

¹⁰Parglender M (2016) 384.

¹¹Sarbanes-Oxley Act of 2002, Title II and Title III.

¹²Tingle B (2018) 3.

¹³Tingle B (2018) 4.

Interest in corporate governance has peaked as a result of managerial misconduct, corporate fraud, negligence and the massive loss of shareholder wealth.¹⁴ The business sector has experienced a loss of confidence as a result hereof, and it is clear that enhanced corporate governance is required.¹⁵

In the late 1990s and early 2000s, South Africa experienced corporate scandals such as Macmed and Leisurennet.¹⁶ Good corporate governance was not new to South Africa in the late 1990s and early 2000s, as the first corporate governance code, the King Report on Corporate Governance (King I), was published in 1994. This report provided guidance in the form of a code of Corporate Practices and Conduct.¹⁷ The second King Report on Corporate Governance for South Africa was published in 2002 (King II). Companies therefore knew what corporate governance was so why were they not applying the principles?

Recently, South Africa experienced massive governance failures at Eskom, South African Airways (SAA) and Steinhoff.¹⁸ These scandals happened while companies were required to apply the principles and recommended practices of the King Report on Corporate Governance for South Africa 2009 (King III). What went wrong? Was Steinhoff another example of a tick box exercise of corporate governance?

South Africa's power utility, Eskom, a state-owned entity, is unable to keep the lights on. South Africans often face load-shedding which causes major disruptions and lost income to South African businesses.¹⁹ Questionable corporate governance practices, one example being the chairperson of the board's interference in daily business affairs, have resulted in Eskom receiving negative credit ratings.²⁰

SAA is a state-owned entity. The SAA Board failed dismally with regards to approving and implementing a turnaround strategy for the organisation. This is a key role for any

¹⁴Dzingai I & Fakoya M (2017) 1.

¹⁵Dzingai I & Fakoya M (2017) 2.

¹⁶Dzingai I & Fakoya M (2017) 2.

¹⁷King Report on Corporate Governance 1994.

¹⁸Chauke K & Sebola M (2018) 257.

¹⁹Steyn C 'Load Shedding will impact your business, how to survive and thrive when it does' 2019 available at <https://www.iol.co.za/business-report/economy/load-shedding-will-impact-your-business-how-to-survive-and-thrive-when-it-strikes-38946834> (accessed 17 May 2020) 1.

²⁰Thabane T & Snyman-Van Deventer E 'Pathological Corporate Governance Deficiencies in South Africa's State-Owned Companies: A Critical Reflection' (2018) 21 *PER/PELJ* 21.

board.²¹ The board failed to implement any of the 'eight turnaround strategies that were developed over a period of 6 years'.²² The former non-executive chairperson of the SAA board, Ms Dudu Myeni, was declared a delinquent director for life by the High Court of South Africa on 28 May 2020.²³ The court found that Ms Myeni 'failed abysmally in executing her fiduciary duty'.²⁴

Corporate governance seeks to ensure that business is conducted in an ethical manner, that an organisation performs optimally, that the relevant role players within an organisation have the necessary authority to perform their tasks effectively and that such parties are held accountable for their actions.²⁵ There are many role players within the corporate governance framework, such as board members, the chairperson of the board, Chief Executive Officer (CEO) and Chief Financial Officer (CFO), shareholders and stakeholders, and the company secretary.

The primary governance role of all boards is to set and steer the strategic direction of the organisation, approve policy and planning, ensure accountability for organisational performance and to oversee and monitor implementation and execution by management.²⁶ It is therefore clear, that the board is responsible for effective corporate governance. In the examples used above, the boards achieved a measure of corporate governance, managed to fulfil certain requirements and apply the principles but somehow still got themselves into trouble.

The aforementioned are examples of governance failures that have prompted governance agencies to refine the role of the governance professionals and their relationships with the company.²⁷ According to Lee, 'the company secretary, as a corporate professional and corporate governance officer, can perform an oversight function to increase the quality of governance'.²⁸ The role of the company secretary has, over the years, evolved into a prominent one in ensuring that an organisation

²¹King IV 2016 21.

²²Thabane T & Snyman-Deventer E (2018) 16.

²³*Organisation Undoing Tax Abuse v Duduzile Myeni* reported case 15996/2017 (27 May 2020) para 285 112.

²⁴*Organisation Undoing Tax Abuse v Duduzile Myeni* reported case 15996/2017 (27 May 2020) para 273 108.

²⁵King IV 2016 40.

²⁶King IV 2016 21.

²⁷Lee J 'The Corporate Governance Officer as a Transformed Role of the Company Secretary' (2017) 14 *South Carolina Journal of International Law and Business* 2 107.

²⁸ Lee J (2017) 109.

subscribes to the principles of good corporate governance.²⁹ The company secretary was considered a 'humble clerk'; however the role has evolved to one that can ultimately impact board effectiveness.³⁰ Research will show that the role of the company secretary has become a strategic role: 'The role has evolved from the 18th century mere servant administrator which supported the board to the contemporary elevation of the role as a strategic and compliance focused position.'³¹

1.3 Objectives of the research

The objectives of the research are to show that an effective company secretary can enhance the quality of corporate governance. The research will indicate that an effective company secretary has embraced the evolution of the role and performs in accordance therewith.

In considering the questions posed above, the research will show that what the failed companies were missing was the guidance and advice of a company secretary in respect of quality and effective corporate governance. They were missing a professional person who could advise on corporate governance matters and not simply ticking the boxes for the sake of compliance, and an independent role player with a professional background who has the ability and the platform to guide, advise and monitor the quality of corporate governance.

It is noted that while the roles of certain role players, such as boards, CFOs and CEOs within corporate governance are more 'legislatively developed, formally recognised, and widely researched as leadership practices,'³² the role of the company secretary is not one of them.

²⁹King III Report on Corporate Governance for South Africa 2009 43.

³⁰ McNulty T & Stewart A 'Developing the Governance Space: A study of the role and potential of the company secretary in and around the Board of Directors (2014) available at <https://journals.sagepub.com/doi/full/10.1177/0170840614656919> (accessed 2 January 2020) 3.

³¹ Nowland J, Chapelle L & J Johnston 'The Role of the Company Secretary in facilitating Board Effectiveness: Reporting and Compliance' (2020) available at onlinelibrary-wiley-com-ezproxy.uwc.ac.za/doi/Full/10.1111/acfi12632 (accessed 22 March 2020) 2.

³²Kakabadse A, Khan N & Kakabadse N 'Leadership on the board: the role of the company secretary (2017) available at <http://centaur.reading.ac.uk/68907/> (accessed January 2020) 241.

The purpose of this research paper is therefore to consider the evolving role of the company secretary in respect of current legislation governing the appointment and role of the company secretary, and whether such legislation must be amended to make provision for the manner in which the role of the company secretary has evolved. It will be considered whether the evolving role of the company secretary enhances or impacts the quality and effectiveness of corporate governance.

1.4 Research questions

The research question is:

Whether and to what extent current legislation should be amended to make provision for the evolved role of the company secretary?

In considering this question, the following will be considered and discussed:

1. What corporate governance is, how it is defined and what are the benefits.
2. The legislative framework of corporate governance in South Africa and international codes of corporate governance.
3. A historical overview of the role of the company secretary.
4. The qualifications and skills required of a company secretary.
5. The dual roles of the company secretary and the benefits and disadvantages of having a company secretary.
6. How the role of the company secretary has evolved and what its impact is on quality corporate governance and board effectiveness.
7. The legislative/regulatory framework in South Africa governing the appointment, roles and duties of the company secretary.
8. The liability of the company secretary.
9. To consider and make recommendations on whether legislation should be amended/enacted or promulgated in order to make provision for this evolving role.

1.5 Research methodology

The research undertaken was a desktop study, primarily based on internet sources and online resources obtained from the University of the Western Cape. The primary

resources are the Companies Act 71 of 2008, King III Report on Corporate Governance for South Africa 2009 as well as the King IV report on Corporate Governance for South Africa 2016. Secondary resources are books, case law, journals, academic articles and internet resources.

1.6 Chapter outline

The research undertaken will be discussed in the following chapters:

Chapter 1

This chapter will contain an introduction, the significance of the problem, the objectives of the research, the research question and focus areas, research methodology and the outline of the chapters which will be discussed.

Chapter 2

This chapter will focus on the definitions of corporate governance, what corporate governance is, the legislative/regulatory framework of corporate governance in South Africa and the international codes of corporate governance and their relevance. The objectives and benefits of corporate governance as well as who is responsible for corporate governance will be addressed.

Chapter 3

The chapter will begin by providing a historical overview of the role of the company secretary, an analysis of the qualifications and skills of the company secretary, the duality of roles of the company secretary, how the role has evolved and the impact of this on corporate governance.

Chapter 4

The legislative/regulatory framework in South Africa governing the appointment, roles and duties of the company secretary will be discussed. This chapter will also discuss the liability of the company secretary.

Chapter 5

This final chapter contains the conclusion and recommendations on whether legislation should be amended/enacted or promulgated in order to make provision for the evolving role as well as the liability of the company secretary.



CHAPTER 2 CORPORATE GOVERNANCE

2.1 Introduction

This chapter will focus on the definitions of corporate governance, what corporate governance is, the legislative/regulatory framework of corporate governance in South Africa and the international codes of corporate governance and their relevance. The objectives and benefits of corporate governance will be discussed, as well as who is responsible for corporate governance. The company secretary is required to support the board and therefore plays a central role in corporate governance.³³ He or she must have the requisite knowledge and experience of the legislative/regulatory framework as well as the objectives and benefits of corporate governance in order to appropriately guide the board in terms of its responsibilities.

2.2 What is corporate governance?

There are several definitions of corporate governance. Du Plessis defines it as, 'the system of regulating and overseeing corporate conduct and of balancing the interests of all internal stakeholders and other parties who can be affected by the corporation's conduct in order to ensure responsible behaviour by corporations and to achieve the maximum level of efficiency and profitability for a corporation.'³⁴ Wiese interprets corporate governance as,

'a system of checks and balances on the exercise of power within a company, ensuring compliance by the company with its legal and regulatory obligations, the implementation of a risk management process, and accountability to stakeholders of the company.'³⁵

The G20/OECD Principles of Good Corporate Governance defines corporate governance as 'a set of relationships between a company's management, its board,

³³King IV Report on Corporate Governance for South Africa 2016 59.

³⁴Du Plessis J *Principles of Contemporary Corporate Governance* 2 ed (2011) 10.

³⁵Wiese T *Corporate Governance in South Africa, with International Comparisons* 2 ed (2017) 2.

its shareholders and other stakeholders.³⁶ It also 'provides the structure through which the objectives of the company are set and by which the means of attaining those objectives and monitoring performance are determined.'³⁷ Corporate governance is indeed based on relationships between the role players involved in the management of the company and the manner in which they work together and are accountable to each other.

King IV defines corporate governance as 'the exercise of ethical and effective leadership by the governing body towards the achievement of the following governance outcomes: ethical culture, good performance, effective control and legitimacy'.³⁸ In considering the definitions, the King IV definition is preferred as it encompasses what good corporate governance is and so will be the point of reference. It is preferable as it focuses on the way the board leads and how this leadership achieves four specific outcomes, namely ethical culture, good performance, effective control and legitimacy. The role of the company secretary has evolved to such an extent that the company secretary can lead the board in achieving these four outcomes. This will be discussed in greater detail in chapter 3. The board may achieve these outcomes in a more meaningful manner than a mere 'tick box exercise' with the assistance and guidance of an effective company secretary.

2.3 The objectives of corporate governance

The objectives of corporate governance are leadership, oversight of management, ethical compliance with laws and regulations, risk management, achievement of sustainability, transparency and disclosure and accountability to stakeholders.³⁹ An ethical organisational culture will assist with achieving the objectives of corporate governance, such as managing risk and compliance with laws and regulations.

Ethical conduct is central to corporate governance. Organisational ethics refer to the ethics and values which form the basis of decisions made, behaviour and the

³⁶OECD (2015) G20/OECD Principles of Corporate Governance available at <http://dx.doi.org/10.1787/9789264236882-en> (accessed 27 April 2020) 9.

³⁷OECD (2015) 9.

³⁸King IV 2016 20.

³⁹Wiese T (2017) 3.

'relationships between the organisation, its stakeholders and the broader society.'⁴⁰ This speaks to the conduct of individuals acting on behalf of a company. Ethical compliance with laws and regulations goes beyond ticking the boxes. It means that an organisation whose foundation is grounded in ethics complies with the law willingly and acts as a good corporate citizen. Principle 1 of King IV exemplifies this; it states that the board should lead ethically and effectively, and accountability and transparency are characteristics of such leadership.⁴¹ Ethical leadership starts from the top and the board should lead by example. King IV provides guidance on what ethical leadership is and states that it is 'exemplified by integrity, competence, responsibility, accountability, fairness and transparency'.⁴² Principle 2 of King IV states that the board should govern the organisation in a way that supports an ethical culture.⁴³

Steinhoff International Holdings N.V. became front page news in December 2017 when its auditors, Deloitte South Africa, refused to sign off the annual financial statements and instead requested a forensic investigation.⁴⁴ The CEO, Markus Jooste, resigned from the company indicating that he had 'made mistakes' in correspondence addressed to certain employees.⁴⁵ Steinhoff International Holdings (Steinhoff) listed on the Johannesburg Stock Exchange (JSE) in 1998.⁴⁶ It was a JSE listed company until 2015 when it moved from the JSE to the German stock exchange.⁴⁷ As a JSE listed company, Steinhoff was required to apply the principles and recommended practices of the King Report on Corporate Governance for South Africa 2009 (King III) on an 'apply or explain' basis.⁴⁸ Steinhoff did not disappoint from a legal compliance point of view, they appeared to tick all the boxes. Their

⁴⁰King IV 2016 12.

⁴¹King IV 2016 43.

⁴²King IV 2016 20.

⁴³King IV 2016 44.

⁴⁴Roussouw J & Styan J 'Steinhoff Collapse: A failure of Corporate Governance' (2019) available at [www-tandfonline-com.ezproxy.uwc.ac.za/doi/pdf/10.1080/02692171.2019.1524043?needaccess](http://www.tandfonline-com.ezproxy.uwc.ac.za/doi/pdf/10.1080/02692171.2019.1524043?needaccess) (accessed 16 June 2020) 166.

⁴⁵Roussouw J & Styan J (2019) 166.

⁴⁶Roussouw J & Styan J (2019) 164.

⁴⁷Roussouw J & Styan J (2019) 164.

⁴⁸Pierce V & Kennedy-Good S 'King III - what does it all mean?!' (2009) available at <https://www.polity.org.za/article/king-iii-what-does-it-all-mean-2009-12-01>(accessed 1 July 2020) 1-2.

annual/integrated reports between 1999 and 2015 could be considered best practice.⁴⁹

It appears that Steinhoff is another example of a tick box exercise of corporate governance. Steinhoff's compliance was not 'underpinned by ethical commitment'⁵⁰ by its board and executives. It is therefore not surprising that Steinhoff 'has not established a formal process for obtaining assurance on ethical awareness and ethical compliance within the group'.⁵¹ Steinhoff published this same statement in its company reports from 2011 to 2016.⁵² Clearly, the Steinhoff board and executives did not operate from an ethical basis and they could not obtain assurance in respect of ethical compliance and awareness as their foundation was not grounded in ethical conduct. Use of this same statement for five years shows the lack of commitment to ethics in general. Did Steinhoff make any effort from 2011 to obtain the said assurance? If they could not obtain such assurance, did they consider any actions to address any ethical shortcomings? An effective company secretary would have assisted with building an ethical organisational culture and would have exercised proper oversight and guidance in respect of certain statements made in the integrated report.

The objectives of transparency and accountability flow from ethical conduct. Boards must hold directors accountable for their actions and directors must hold each other accountable. The *Organisation Undoing Tax Abuse* approached the High Court for an order to declare Ms Dudu Myeni, the former non-executive chairperson of SAA, a delinquent director (Myeni judgment).⁵³ In a judgement granted by the High Court of South Africa on 28 May 2020, Ms Myeni's behaviour as the chairperson of the board was described as reckless and wilful.⁵⁴ Sadly, no references could be found in the Myeni judgment that the board of SAA attempted to address Ms Myeni's conduct or

⁴⁹Naude P, Hamilton B & Ungerer M 'USB Management Review- Business Perspectives on the Steinhoff saga' (2018) available at https://www.usb.ac.za/wpcontent/uploads/2018/06/Steinhoff_Revision_28_06_2018_websmall.pdf (accessed 16 June 2020) 21.

⁵⁰ Naude P, Hamilton B & Ungerer M (2018) 16.

⁵¹ Naude P, Hamilton B & Ungerer M (2018) 17.

⁵² Naude P, Hamilton B & Ungerer M (2018) 17.

⁵³*Organisation Undoing Tax Abuse v Duduzile Myeni* reported case 15996/2017 (27 May 2020) para 2 2.

⁵⁴*Organisation Undoing Tax Abuse v Duduzile Myeni* reported case 15996/2017 (27 May 2020) para 272 107.

hold their chairperson accountable for her actions. Had they done this, it may have minimised the subsequent losses and reputational damage suffered by SAA.

Where companies act with transparency, stakeholders are able to see that companies operate with integrity when doing business.⁵⁵ Improved reporting, effective internal controls and independent external audits will contribute to transparency and disclosure.⁵⁶ Focusing on this may show that companies view corporate governance as more than simply a tick box approach. A corporate governance system that is functioning and well defined will benefit companies, as will be shown below.⁵⁷

Considering the increased risk faced by businesses, it is clear why risk management must be an objective of corporate governance. Business must consider the likelihood and impact of risks identified in corporate plans to mitigate such risk and consider whether there are any opportunities that can be gained from such risk⁵⁸. Corporate governance has ensured a focus on risk management and Principle 11 of King IV provides guidance in the form of recommended practices to companies on the governance of risk.⁵⁹ Fostering an effective risk culture by the board is also recommended by the ICGN Principles of Corporate Governance, the board should lead in respect of fostering an effective risk culture.⁶⁰

2.4 The benefits of effective corporate governance

There are several benefits to corporate governance. The company secretary assists with attaining and enhancing these benefits by providing appropriate advice and ensuring that the board is fully aware of the benefits. The company secretary will assist

⁵⁵Price NJ 'Importance of Corporate Governance in an Organization' (2017) available at <https://insights.diligent.com/corporate-governance/importance-of-corporate-governance-in-an-organization> (accessed 12 March 2020) 3.

⁵⁶Worldbank 'Corporate Governance of State-Owned Entities A Toolkit' (2014) available at <https://openknowledge.worldbank.org/bitstream/handle/10986/20390/9781464802225.pdf?sequence=1&isAllowed=y> (accessed 19 May 2020) 215.

⁵⁷Waweru N Factors Influencing Quality Corporate Governance in Sub-Saharan Africa: An empirical study (2014) 14 *Corporate Governance* 4 559.

⁵⁸King IV 2016 30.

⁵⁹King IV 2016 61.

⁶⁰ICGN Global Governance Principles (2017) 5 ed available at http://icgn.flpbks.com/icgn_global_governance_principles/ICGN_Global_Governance_Principles.pdf (accessed 14 June 2020) 20.

with drafting, implementing and ensuring policies required by the business to enhance culture, deter corruption, promote effective company performance, sustainability and interaction with stakeholders.

2.4.1 Organisational culture

Corporate governance shapes the culture of an organisation, together with the level of board involvement in corporate governance,⁶¹ as per the famous quote by Peter Druker, 'culture eats strategy for breakfast'.⁶² Culture can either result in success or ruin the implementation of a company's strategy, and this will impact good corporate governance. For effective corporate governance, the board must cultivate a corporate culture based on ethics and accountability. The board has the responsibility to ensure that training and awareness is provided to all employees and suppliers of the type of conduct expected of them and the repercussions for acting in contravention thereof.⁶³ The board should lead in this regard by living the company values and adhering to the company's code of conduct or ethics.⁶⁴ The behaviour of the board members must enforce a zero tolerance approach towards fraud and corruption by ensuring that employees and other stakeholders are able to report allegations of fraud or breaches of the law without fear of reprisal.⁶⁵

2.4.2 Deterrent to corruption

Good corporate governance is a deterrent to corruption and unethical business practices.⁶⁶ It serves as a deterrent as the board must address unethical and unlawful behaviour and report on the outcomes taken to address such behaviour. This will ensure that the organisations that they govern are responsible corporate citizens. Compliance with the Constitution, the law and its own policies and procedures is a recommended practice which indicates an organisations commitment to be a good corporate citizen.⁶⁷ A focus on legal compliance and ethical behaviour will ensure that

⁶¹Price Nicholas J (2017) 4.

⁶²Druker P. 'The Management Centre Culture eats strategy for breakfast' available at <https://www.managementcentre.co.uk/culture-eats-strategy-for-breakfast/> (accessed 12 March 2020).

⁶³ICGN (2017) 19.

⁶⁴King IV 2016 45.

⁶⁵ICGN (2017) 19.

⁶⁶Rossouw GJ 'Business Ethics and Corporate Governance in Africa' (2005) 44 *Business & Society* 1 95.

⁶⁷King IV 2016 45.

perpetrators are brought to book. King IV recommends the use of whistle-blowing initiatives, such as an ethics hotline, to report unlawful and unethical behaviour.⁶⁸ Reports can be made anonymously which serves to encourage reporting of unethical behaviour or non-compliance with legislation. Whistle-blowers are protected against disclosures made to their employer or other parties as listed in the Protected Disclosures Act 26 of 2000.⁶⁹ Where the board has a zero-tolerance approach to fraud and corruption, this should be driven by its internal policies. By incorporating the actions in the preceding paragraph, stakeholders will be aware of the company's stance towards fraud and corruption and will act ethically and act against those who violate the company's code of conduct and values.

2.4.3 Beneficial to developing countries and emerging economies

For emerging and transition economies, effective corporate governance has been identified as critical for all economic transactions.⁷⁰ Good corporate governance benefits developing countries and emerging economies. A developing country will be able to attract foreign investment if it is seen to uphold good corporate governance.⁷¹ There is less risk associated with companies that are well governed and they are therefore more likely to attract investors.⁷² These countries should, therefore, ensure that they have functioning and well-defined corporate governance systems⁷³ in place as mentioned above. Applying recommended practices for good corporate governance in areas such as board composition, ethical behaviour and separation of the role of the CEO and chairperson will greatly assist with a well-defined and functioning corporate governance system in developing countries. A study by Ehikioya indicated adverse performance by a board where the CEO acted as the chairperson and more than one family member was a board member.⁷⁴ Corporate governance will

⁶⁸King IV 2016 45.

⁶⁹Protected Disclosures Act 26 of 2000 s 1.

⁷⁰Kyereboah-Coleman 'Corporate Governance and Firm Performance in Africa: A Dynamic Panel Data Analysis' (2008) available at <https://www.researchgate.net/publication/263050770> (accessed 1 August 2020) 1.

⁷¹Waweru N (2014) 559.

⁷²Dzingai I & Fakoya M 'Effect of Corporate Governance Structure on the Financial Performance of the Johannesburg Stock Exchange (JSE)-Listed Mining Firms' (2017) available at <https://www.semanticscholar.org/paper/Effect-of-Corporate-Governance-Structure-on-the-of-Dzingai-Fakoya/22ab36ad0aee87b57960036511338195036cc607> (accessed 13 April 2020) 3.

⁷³ Dzingai I & Fakoya M (2017) 3.

⁷⁴Waweru N (2014) 559.

ensure higher valuations of companies which will result in investor goodwill, 'attracting investment, raising funds, lowering bankruptcy risk and strengthening the foundation of corporate governance'.⁷⁵ A company will be unable to access capital it may require to grow or expand its operations if it does not exercise quality corporate governance.⁷⁶ Higher financial performance is linked to South African companies with effective corporate governance.⁷⁷

2.4.4 Increased company performance

A company's performance is an indicator of effective corporate governance. This is because board composition and skills of the board, independence, and non-executive board members all contribute to effective corporate governance and consequently good performance. Good corporate governance serves as the basis for a company that performs well.⁷⁸ Business operations based on a strategy aligned to good corporate governance will contribute to the financial performance of a company.⁷⁹ A study conducted by Kyereboah-Coleman on corporate governance and firm performance in Africa indicated that larger boards are less effective and that smaller boards enhanced firm performance, non-executive directors contributed to a firm's performance and that 'separation of the role of the CEO and Chairperson of the board' contributed positively to firm performance.⁸⁰ In addition, results from the random effects model, used in a different study, also indicated that large boards do not increase value to the company and may decrease the financial results of a corporation.⁸¹ Boards are therefore encouraged to evaluate the decisions that they make to determine whether the desired performance for the organisation was achieved. This can be achieved by conducting regular performance evaluations, which should include their composition, on the effectiveness of the board and ensuring that areas for improvement are noted and dealt with. King IV recommends that the board

⁷⁵Waweru N (2014) 559.

⁷⁶OECD (2015) 10.

⁷⁷Dzingai I & Fakoya M (2017) 3.

⁷⁸Sahay M 'Effectiveness of Corporate Governance and Measurement Challenges' (2016) 14 *Corporate Ownership and Control* 1 300.

⁷⁹Sahay M (2016) 301.

⁸⁰Kyereboah-Coleman A (2008) 8-10.

⁸¹Dzingai I & Fakoya M (2017) 12.

should consider, reflect and discuss its performance and that of its committee at least every second year.⁸²

2.4.5 Sustainability

Sustainable development 'is development that meets the needs of the present without compromising the ability of future generations to meet their needs'.⁸³ Corporate governance has been shown to contribute to the long-term sustainability of an organisation.⁸⁴ Ideally, this will ensure that organisations, as part of their strategies, focus on ensuring their future relevance and that they have taken care of the environment in which they operate so that it is safe and suitable for future generations. King IV advocates an integrated approach to the triple context, namely the economic viability of the company, the natural environment in which the company operates and corporate social responsibility.⁸⁵ Corporate Social Responsibility (CSR) or Corporate Social Investment are activities and monetary investment by an organisation to balance the effect of its business activities or operations on the communities and environment where it operates.⁸⁶ The benefits of CSR for organisations range from⁸⁷:

1. Increased market share as customers choose to buy from socially responsible companies;
2. Attracting new quality employees and employee retention as employees are witnesses as to what socially responsible measures the company is incorporating; and,
3. Enhanced reputation if the company is serious about CSR.

CSR results in targeted focus areas on social issues. Organisations, such as mining companies, are focused on instituting measures to sustain and protect the environment and surrounding communities in which they operate. As part of being a good corporate citizen, organisations must consider employment equity, health and

⁸²King IV 2016 58.

⁸³King IV 2016 26.

⁸⁴Roussouw GJ (2005) 95.

⁸⁵King IV 2016 18.

⁸⁶Blog 'Corporate Social Investment and Corporate Social Responsibility-Is there a difference' (4 June) available at <https://umsizi.co.za/corporate-social-investment-corporate-social-responsibility-difference/> (accessed 1 August 2020) 1.

⁸⁷Wiese T (2017) 132.

safety of employees, human rights and economic transformation, to mention a few.⁸⁸ Governments and organisations all over the world face climate change, resource scarcity, poverty and vulnerable ecosystems.⁸⁹ Organisations have added to these concerns in the past by, for example, not disposing of waste safely or by polluting the environment in which they operate in. Sustainability and corporate governance place an obligation on corporations to support and enhance the ecological and social fabric we depend upon instead of breaking it down.⁹⁰ The company secretary will ensure a focused approach to the matters mentioned in this paragraph by ensuring they remain on the board's social and ethics agenda and will guide reporting on these matters in the annual or integrated report.

2.4.6 Interaction with stakeholders

The G20/OECD Principles of Corporate Governance recognise the rights of stakeholders as part of the governance process. King IV promotes a 'stakeholder inclusive approach' which means that the board considers the legitimate needs, interests and expectations of material stakeholders.⁹¹ In general, material stakeholders are shareholders, customers, employees, the local community and suppliers as they are impacted by the company's decisions. Ideally, these stakeholders will promote good corporate governance and an effective board as they have an interest in the sustainability of the company. The board should take cognisance of how important decisions will impact these stakeholders; it can do so by following certain recommendations in Principle 16 of King IV. Principle 16 recommends approving policy that dictates how stakeholder relationships are governed and managed, building effective stakeholder relationships, the identification of material stakeholders and how they are impacted by company decisions.⁹²

⁸⁸King IV 2016 45.

⁸⁹Benn S, Dunphy D & Griffiths A 'Organisational Change for Corporate Sustainability' 3 ed (2014) available at https://books-google-co-za.ezproxy.uwc.ac.za/books?hl=en&lr=&id=WW-LAwAAQBAJ&oi=fnd&pg=PP1&dq=Benn+S+Organisational+Change+for+Corporate+Sustainability&ots=Jlq7UcQVWv&sig=NK7UGuez_M9OghqTTA7814AKeQg#v=onepage&q=Benn%20S%20Organisational%20Change%20for%20Corporate%20Sustainability&f=false (accessed July 2020) 4.

⁹⁰Benn S, Dunphy D & Griffiths A (2014) 8.

⁹¹King IV 2016 25.

⁹²King IV 2016 71.

Organisations should ensure they obtain feedback from all stakeholders on matters that affect them, such as utilising customer satisfaction surveys or approved minutes of meetings with specific stakeholders. This will ensure that they consider the legitimate needs and expectation of their stakeholders. The company secretary will guide the board in terms of reporting how the company manages stakeholder relationships to ensure their needs and expectations are considered.

2.5. The legislative and regulatory framework of corporate governance in South Africa

In South Africa, the current corporate governance framework consists of the common law, the Companies Act 71 of 2008 (the Act), the King IV Report on Corporate Governance for South Africa 2016, the Johannesburg Stock Exchange (JSE) listing requirements and other legislation such as the Broad-Based Black Economic Empowerment Act 53 of 2003 (BBB-EE Act). Public entities must also comply with the Public Finance Management Act 1 of 1999 (PFMA). Section 50 of the PFMA sets out the fiduciary duties of the accounting authority or board, such as acting with fidelity, honesty and integrity and in the best interests of the public entity.⁹³ Section 51 of the PFMA prescribes the general responsibilities of public entity boards.⁹⁴

South Africa enacted the Joint Stock Companies Limited Liability Act 23 of 1861 (Joint Stock Companies Act) of the Cape Colony which was the first legislation governing joint stock companies in South Africa.⁹⁵ The first legislation governing all types of companies in South Africa was the Companies Act of 1926.⁹⁶ This was followed by the Companies Act of 1973.⁹⁷

Company law and corporate governance has certainly evolved in South Africa since the promulgation of the Joint Stock Companies Act and the Companies Act of 1926. These pieces of legislation⁹⁸ did not make provision for the growth in companies,

⁹³ Public Finance Management Act 1 of 1999 s 50(1)(b).

⁹⁴ Act 1 of 1999 s51

⁹⁵ South African Company Law for the 21st Century, Guidelines for Corporate Law Reform in GN 1183 GG 26493 of 23 June 2004 12.

⁹⁶ Companies Act 46 of 1926.

⁹⁷ Companies Act 61 of 1973.

⁹⁸ Companies Act 46 of 1926, Joint Stock Companies Limited Liability Act 23 of 1861.

increased risk, the evolving role of directors, prescribed officers and the company secretary, nor their liability. As an example of the phenomenal growth of a company, Walmart's turnover was five times higher in 2012 than the GDP in South Africa at the time.⁹⁹

The growth in businesses highlighted other concerns such as the separation of ownership and control of companies. Separation of ownership and control clarifies the role between directors, who manage the day to day affairs of the company and the shareholders, who invest in the company.¹⁰⁰ The interests of directors and shareholders however, are not always aligned and may result in conflicts of interest. As an example, directors may be motivated to act in their own interest to the disadvantage of the company and shareholders.¹⁰¹ Guidance or legislation was required for matters such as this. Bearing in mind the political context of South Africa at the time, the Companies Act of 1973 was still applicable to companies in 1994 when South Africa held its first democratic elections. This Act therefore did not make provision for the role of companies in the changing political landscape in South Africa. Corporate governance was introduced to South Africa in the form of the King Report on Corporate Governance which was published in 1994. This report became known as King I and contained a code of corporate practices which was voluntary.¹⁰² This was followed by the King Report on Corporate Governance for South Africa (King II) which was published in 2002 and King III which was published in 2009. King IV, which is outcomes based, was published in 2016, and it contains 17 principles which 'embody the aspirations of the journey towards good corporate governance'.¹⁰³ King IV follows an 'apply and explain' approach which means that application of these principles by the board are assumed and the board is required to disclose how it applies these principles. The role of the company secretary is crucial in this regard as King IV contains recommended practices that give effect to these principles.¹⁰⁴ The

⁹⁹Wiese T (2017) 4.

¹⁰⁰ Steyn B & Stainbank L 'Separation of ownership and control in South-African listed companies' (2013) available at http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2222-34362013000300006 (accessed 14 June 2020) 3.

¹⁰¹Steyn B & Stainbank L (2013) 3.

¹⁰² Armstrong P 'King Report on Corporate Governance' (1995) 3 *Juta Business Law* 2 65.

¹⁰³King IV 2016 40.

¹⁰⁴King IV 2016 41.

company secretary can advise the board on how to apply and what to explain. A board may have engaged in practices other than the ones recommended in King IV, which reflect the application of the King IV principles. The company secretary will be required to advise the board on the suitability of such practices in relation to the principle and how to report. Alternatively, the company secretary will be expected to advise the board whether it should adopt the recommended practises in the King IV report instead.

The Act came into effect on 11 May 2011 and one of its purposes is to promote compliance with the Bill of Rights in the Constitution.¹⁰⁵ Part F, chapter 1 of the Act contains provisions relating to the governance of companies, which regulates governance matters, such as the conduct of directors. Directors are required to act in 'good faith, for a proper purpose, in the best interest of the company and with the necessary degree of care, skill and diligence'.¹⁰⁶ A proper induction and training session is therefore crucial, preferably before directors formally take office, in order to ensure that they understand the requirements of their role and the conduct that is expected of them. It is indeed the role of the company secretary to facilitate board induction, training sessions and ensure that board members have a clear understanding of their fiduciary duties.¹⁰⁷ This will ensure that board members are equipped with the necessary knowledge prior to the first board meeting, enabling them to ask relevant questions during board meetings.

A board will not be effective if they do not know what their duties and responsibilities are and what they must do to ensure that the outcomes of King IV are met. If directors act in good faith, in the best interest of the company and with the necessary degree of skill and diligence, it will certainly contribute to the attainment of the King IV outcomes, namely an ethical culture, good performance, effective control and legitimacy.¹⁰⁸ The company secretary should include the Business Judgement Rule, as part of the induction agenda; board members will be able to rely on this rule and escape liability if certain requirements are met. In terms of this rule, directors are deemed to have

¹⁰⁵Companies Act 71 of 2008 s 7.

¹⁰⁶Act 71 of 2008, s 76(3)(a)-(c).

¹⁰⁷King III Report on Corporate Governance for South Africa 2009 43.

¹⁰⁸King IV 2016 20.

acted in the best interest of the company and with the necessary degree of care, skill and diligence if:

1. 'They have taken reasonably diligent steps to become informed about a particular matter,
2. Had no material personal financial interest or declared any interest in respect of the particular matter in accordance with Section 75 of the Act; and
3. There was a rational basis for believing that the decision was in the best interest of the company.'¹⁰⁹

The company secretary would be remiss if he or she did not advise board members that they are accountable for their actions and that they can be held personally liable for reckless and negligent trading if they fail to discharge their duties accordingly.¹¹⁰

The Act, in line with King IV, makes provision for a Social and Ethics committee.¹¹¹ This committee, with the guidance of the company secretary, will ensure that companies act as responsible corporate citizens and not only focus on making a profit but also take cognisance of its social responsibilities towards the communities in which it operates. The Act is therefore aligned with the Constitution, corporate governance and other legislation such as the Broad-Based Black Economic Empowerment Act 53 of 2003 which will enable a company to act as a good corporate citizen.¹¹²

Case law or common law forms part of the corporate governance legal and regulatory landscape in South Africa.¹¹³ The Myeni judgment, discussed above, is significant as the court relied on the King reports thereby confirming that they are part of the legal framework for corporate governance in South Africa. The judge in this matter specifically referenced the obligations of the chairperson as set out in Principle 2.16 of King III, which was applicable at the time of Ms Myeni's failures.¹¹⁴ When reading

¹⁰⁹Act 71 of 2008 s 76(4)(a).

¹¹⁰ Act 71 of 2008 s 77(3)(b).

¹¹¹Act 71 of 2008 s 72(5).

¹¹²South African Company Law for the 21st Century in GN 1183 GG 26493 of 23 June 2004 14.

¹¹³*Organisation Undoing Tax Abuse v Duduzile Myeni* reported case 15996/2017 (27 May 2020) para 32 16.

¹¹⁴*Organisation Undoing Tax Abuse v Duduzile Myeni* reported case 15996/2017 (27 May 2020) para 36 17.

this judgment, one cannot help but ask ‘where was the company secretary?’, who is required to support and advise the chairperson of the board.

2.6. International codes of corporate governance

The following codes of corporate governance are relevant as they are considered international best practice and they provide recommendations for sound corporate governance frameworks. Section 39 of the Constitution states that international law must be considered when interpreting the Bill of Rights.¹¹⁵ The Bill of Rights is relevant to corporate governance as companies who strive to be good corporate citizens must uphold the rights guaranteed in the Bill of Rights such as equality before the law, freedom of trade, fair labour practices, and protection of the environment.¹¹⁶ The United Nations Global Compact, Principles of Corporate Governance¹¹⁷ and the Global Governance Principles¹¹⁸ are considered to be the international codes of corporate governance.¹¹⁹ The United Nations Global Compact (UN Compact) requires businesses to conduct their operations in accordance with ten principles based on human rights, fair labour practices, protection of the environment and anti-corruption.¹²⁰ The G20/ Organisation for Economic Co-operation and Development’s (OECD) Principles of Corporate Governance provides the foundation for a governance framework in the form of six non-binding principles, which are: an effective governance framework, equitable treatment of shareholders, institutional investors and other intermediaries, the role of stakeholders, disclosure and transparency and the responsibilities of the board.¹²¹ The International Corporate Governance Network’s (ICGN) Global Corporate Governance Principles provide a corporate governance framework specifically focused on investment decision making.¹²² The eight principles

¹¹⁵Constitution of the Republic of South Africa 108 of 1996.

¹¹⁶Act 108 of 1996 s 9-24.

¹¹⁷ OECD (2015)

¹¹⁸ ICGN Global Governance Principles (2017)

¹¹⁹Wiese T (2017) 5.

¹²⁰United Nations ‘Global Compact’ available at <https://www.unglobalcompact.org/what-is-gc/mission/principles> (accessed 15 June 2020).

¹²¹OECD (2015) 11.

¹²²ICGN (2017) 2.

are set out in Part 1 and are considered an international source of best practice.¹²³ These eight principles are: the board's role and responsibilities, leadership and independence, composition and appointment, corporate culture, risk oversight, remuneration, reporting and audit and shareholder rights.¹²⁴

Part 2 provides guidance on the eight principles.¹²⁵ If one compares King IV to the UN Compact, OECD and ICGN principles, then the principles and recommended practices of King IV are certainly aligned with international best practice in respect of corporate governance.

2.7. Who is responsible for corporate governance?

The board is primarily responsible for corporate governance. In terms of Section 66 of the Act, the board must manage and direct the affairs of the company.¹²⁶ The board is responsible for setting company strategy, approving policies and plans required to implement the strategy, overseeing and monitoring the implementation of the strategy and ensuring that management is held accountable accordingly for implementation of the strategy.¹²⁷ While the board is responsible for effective corporate governance, it depends on various other role players within the organisation to assist with good corporate governance such as executives, the company secretary and senior management.¹²⁸

The G20/OECD Principles of Corporate Governance as well as the ICGN's Global Corporate Governance Principles set out detailed and similar responsibilities for the board, some of which are mentioned below:¹²⁹

1. act on a fully informed basis, in good faith, with due diligence and care, and in the best interest of the company;
2. the fair treatment of all shareholders;

¹²³ICGN (2017) 4.

¹²⁴ICGN (2017) 9-10.

¹²⁵ICGN (2017) 11.

¹²⁶Act 71 of 2008 s 66(1).

¹²⁷ King IV 2016 40.

¹²⁸Sahay M (2016) 300.

¹²⁹ OECD (2015) 45-54.

3. apply high ethical standards and consider the interests of stakeholders;
4. review and guide corporate strategy, risk management, and the setting of performance objectives;
5. the effectiveness of the company's governance practices;
6. selecting key executives and succession planning;
7. aligning board and executive remuneration with the longer- term interests of the company;
8. formal and transparent board nomination process;
9. monitoring and managing potential conflicts of interest;
10. ensuring the integrity of the corporations accounting system; and,
11. corporate culture and risk oversight.¹³⁰

Sole responsibility for corporate governance no longer appears to rest solely on the board as the role of the company secretary is evolving towards shared responsibility for good corporate governance and effective boards.¹³¹

2.8. Conclusion

There are several definitions of corporate governance: however, the King IV definition of corporate governance is preferable. It is clear from the above that the board has a daunting task in ensuring effective and quality corporate governance for the companies they lead, from ethical leadership, compliance with legislation and regulations, knowing the objectives and benefits of corporate governance, to applying the principles of corporate governance and reporting thereon. The company secretary must facilitate induction and training to ensure that board members can effectively fulfil their roles, as they are accountable for their actions and can be held personally liable for reckless and negligent trading if they fail to discharge their duties.¹³² The Steinhoff and Myeni judgments serve as examples of why companies require the guidance and advice of an effective company secretary to assist the board in discharging its corporate governance responsibilities. The role of the company secretary has a

¹³⁰ICGN (2017) 19-20.

¹³¹ Peij SC 'Does the company secretary share responsibility for board effectiveness?' 2017 *Governance Directions* 652.

¹³² Act 71 of 2008 s 77(3)(b).

material impact on corporate governance and has evolved from a role focused purely on administrative tasks. This will be discussed further in the next chapter.



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CHAPTER 3

THE EVOLVING ROLE OF THE COMPANY SECRETARY

3.1 Introduction

The previous chapter highlighted the possible contributions the company secretary can make to good corporate governance. This chapter begins by providing a historical overview of the role of the company secretary. Following that will be an analysis of the qualifications and skills and the duality of roles of the company secretary.

The company secretary must possess certain basic qualifications and interpersonal skills which contribute to the success of the role. Similarly, these qualifications and skills may result in them taking on dual roles which may either be a benefit or disadvantage to corporate governance. The chapter also assesses how the role of the company secretary has evolved. A historical overview is provided to show to what extent the role has evolved, and whether the evolved role has an impact on quality and effective corporate governance.

3.2. A historical overview of the role of the company secretary

According to Trubshaw, the word 'secretary' originates from Latin and means 'confidential officer'.¹³³ The company secretary was regarded as such as he or she was, and is still, privy to confidential matters which are usually of strategic importance and which are discussed and debated at board level. The company secretary received an official title in the early 1900s, when shares of British companies were offered abroad.¹³⁴ The role of the company secretary achieved legal status in 1841 when the power of the company secretary was discussed in the case of *Pontifex v Bignold*.¹³⁵

¹³³Trubshaw R *Responsibilities within the Governance Space: A study of the Role of the Company Secretary on Contemporary Boards* (unpublished, Master of Philosophy-Accountancy, Queensland University of Technology, (2018) 10.

¹³⁴Lee J 'From housekeeping to gatekeeping: the enhanced role of the company secretary in the governance system' (2015) available at <https://ssm-com.ezproxy.uwc.ac.za/abstract=2733180> (accessed 29 February 2020) 3.

¹³⁵Kakabadse A, Khan N & Kakabadse N 'Leadership on the board: the role of the company secretary' (2017) available at <http://centaur.reading.ac.uk/68907/> (accessed January 2020) 243.

The company secretary appeared in case law from as early as 1841 and he /she was required to attend meetings and advise directors.¹³⁶

In the 1887 case of *Barnett, Hoares and Co v South London Tramways*, the company secretary was referred to as a servant who should do what he is told.¹³⁷ The court stated that 'no person can assume he has any authority to represent anything at all'.¹³⁸ By 1971, the role of the company secretary started changing. In *Panarama Developments Ltd versus Fidelis Furnishing Fabrics Ltd*, the company secretary of Fidelis Furnishing Fabrics (Fidelis) entered into an agreement on behalf of Fidelis for the use of vehicles by the company.¹³⁹ He used the vehicles personally and when the costs of the vehicle were claimed from Fidelis, they responded by saying that the company secretary did not have the authority to bind the company.¹⁴⁰ However, the court found that the company secretary was no longer regarded as a mere servant but as the 'chief administrative officer' of the company with the 'implied actual authority' by 'virtue of his position as company secretary' to bind the company with third parties.¹⁴¹ It is clear from this case that the role of the company secretary has evolved in terms of being recognised as one which now carries authority.

The traditional duties of the company secretary are: to set the meeting agenda, usually in consultation with the chairperson and CEO; to advise of the time, date and place of the meeting;¹⁴² ensuring a quorum is present before the meeting begins; organising presenters and advisors; compiling and circulating board packs to directors and other attendees; and assisting with the preparation of formal resolutions or submissions.¹⁴³ While regarded as traditional roles, they are still relevant today.

¹³⁶Sigauke J et al. 'The Company Secretary's Role in Corporate Governance: Private and Public Owned South African Companies' (2015) 13 *Corporate Ownership & Control* 1 402.

¹³⁷*Barnett, Hoares and Co v South London Tramways Co [1887] 18 Q.E.D. 815* available at netk.net.au/contract/Barnett.aspx (accessed 20 April 2020) 2.

¹³⁸*Barnett, Hoares and Co v South London Tramways Co [1887] 2.*

¹³⁹Alchetron *Panarama Developments Furnishing Fabrics Ltd*, available at [alchetron.com/Panarama-Developments-\(Guildford\)-Ltd-Fidelis-Furnishing-Fabrics-Ltd](http://alchetron.com/Panarama-Developments-(Guildford)-Ltd-Fidelis-Furnishing-Fabrics-Ltd) (accessed on 7 July 2020) 2.

¹⁴⁰Alchetron (2020) 2.

¹⁴¹Alchetron (2020) 2.

¹⁴²International Finance Corporation 'The Corporate Secretary: The Governance Professional' (2016) available at openknowledge.worldbank.org/handle/10986/25393 (accessed on 19 February 2020) 13 and 14.

¹⁴³International Finance Corporation (2016) 17 to 20.

One of the most important traditional roles of the company secretary is to take accurate minutes that reflect the discussions at the meeting.¹⁴⁴ Even though this is seen as part of the traditional role of the company secretary, it is not a simple, often underestimated, administrative task. The board minutes reflect resolutions taken and actions are recorded for further follow up in the form of matters arising to the minutes.¹⁴⁵ The company secretary is required to capture the essence of the discussions at the meeting, as verbatim minutes are no longer required.¹⁴⁶ It is particularly important to ensure that board committee minutes are accurate as the committees undertake important tasks on behalf of the board and delve into detailed discussions relating to such tasks.¹⁴⁷ These minutes will therefore provide the board with assurance that the committees have discharged their duties effectively.

Another one of the traditional roles of the company secretary is to file company documents, such as annual returns. In the United Kingdom, company secretaries are regarded as chief administrative officers and are still responsible for filing company documents with the Registrar of Companies House.¹⁴⁸ It is because of these clerical functions that the company secretary has, in the past, been regarded as a 'humble clerk'.¹⁴⁹ The extent to which the role has evolved will be addressed later in this chapter.

3.3 The skills required of a company secretary

In her work '*The company secretary as polymath*', Wulfsohn describes the company secretary as a polymath, which is 'a person whose expertise spans a significant number of different subject areas; such a person is known to draw on complex bodies of knowledge to solve specific problems'.¹⁵⁰ The company secretary's knowledge and

¹⁴⁴Companies Act 71 of 2008 s 88 (2)(d).

¹⁴⁵Wulfsohn L 'The Company Secretary as a Polymath' (2014) available at documents.worldbank.org/en/publication/documents-reports/documentdetail/619491468154784717/the-company-secretary-as-polymath (accessed 6 July 2020) 9.

¹⁴⁶Wulfsohn L (2014) 10.

¹⁴⁷Wulfsohn L (2014) 9.

¹⁴⁸Lee J (2015) 4.

¹⁴⁹McNulty T & Stewart A 'Developing the Governance Space: A study of the role and potential of the company secretary in and around the Board of Directors, (2014) available at <https://journalssagepub.com/doi/full/10.1177/0170840614656919> (accessed 2 January 2020) 13.

¹⁵⁰Wulfsohn L (2014) 4.

understanding is no longer limited to basic company law and administrative requirements relating to the submission and filing of documents. Today, the company secretary's knowledge must extend to matters beyond administrative requirements such as the industry in which the company operates and organisational culture and risk management.

While the Act does not set out a specific qualification, Section 86 (2)(a) states that the company secretary must have the 'requisite knowledge of, or experience in, relevant laws'.¹⁵¹ Relevant laws refers to the laws the particular organisation must comply with and may include the Act or the Johannesburg Stock Exchange listing requirements.

Principle 10 of King IV cites the following requirements for a company secretary¹⁵²:

1. gravitas, objectivity and independent judgement, which is the 'absence of an interest, position, association or relationship which ... may unduly influence or cause bias in decision making';¹⁵³
2. necessary competence, which means 'the requisite knowledge or experience in' as stated above; and,
3. an arms-length relationship to be maintained between board members and the company secretary.¹⁵⁴

The company secretary should have basic financial knowledge.¹⁵⁵ Company secretaries come from diverse professional backgrounds such as attorneys, chartered secretaries and chartered accountants; they either have financial or accounting degrees or Master's degrees in business administration.¹⁵⁶ Different and varying backgrounds will add a different dimension to the areas the company secretary will be effective in.

Formal qualifications for company secretaries vary from country to country. In terms of professional qualifications, the United Kingdom's (UK) Companies Act of 2006 requires that a company secretary must either be a barrister, advocate, solicitor, or a

¹⁵¹Act 71 of 2008 s 86 (2)(a).

¹⁵²King IV 2016 60.

¹⁵³King IV 2016 13.

¹⁵⁴King IV 2016 60.

¹⁵⁵Grant Thornton 'Is the role of the company secretary fit for the future? (2018) available at grantthornton.co.uk/insights/is-the-company-secretary-role-fit-for-the-future (accessed 1 March 2020) 15.

¹⁵⁶Sigauke J et al. (2015) 409.

member of a prescribed professional body recognised under the UK Companies Act.¹⁵⁷ Alternatively, the company secretary must satisfy directors that he or she is capable of discharging the duties of such an office. In terms of the Malaysian Companies Act, the company secretary must be a member of a professional body prescribed by the Minister or hold a valid licence issued by the Companies Commission of Malaysia.¹⁵⁸ In terms of an amendment to the Company Secretaries Act of 1980 in India, only members of the Institute of Company Secretaries of India may act as a company secretary.¹⁵⁹

In South Africa, company secretaries may become members of the Chartered Secretaries Southern Africa (CSSA). Botswana, Lesotho, Namibia and South Africa are members of the CSSA, which was established in 1909.¹⁶⁰ The CSSA's vision, in line with the Chartered Secretaries International Association (CSIA), is to promote corporate governance and one of its objectives is to 'promote the professional status of suitably qualified corporate secretaries or company secretaries'.¹⁶¹ The South African law school offers a chartered secretary professional qualification which is accredited by CSSA and the company secretary is qualified by examination and membership of CSSA.¹⁶² While this qualification is not a requirement under the Act, certain companies may require it for the purposes of appointing a company secretary. Pursuing this qualification will certainly benefit any company secretary.

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¹⁵⁷Fuzi S, Halim S & Khudzari J 'Comparative Analysis on the Requirements, Qualifications and Responsibility of Company Secretaries in the UK, Malaysia and India' (2019) 16 *Journal of Administrative Science* 1 122.

¹⁵⁸ Fuzi S, Halim S & Khudzari J (2019) 122.

¹⁵⁹The Company Secretaries Act 1980, as amended by The Company Secretaries (Amendment) Act, 2006 available at https://www.mca.gov.in/Ministry/actsbills/pdf/The_Companies_Secretaries_Amendment_Act_2006.pdf (accessed 18 July 2020) s2(2).

¹⁶⁰Chartered Secretaries Southern Africa available at https://www.csiaorg.com/member-info/4/1/csia-member-about/#member_detail (accessed 18 July 2020).

¹⁶¹Vision and Mission of Chartered Secretaries Southern Africa available at <https://csiaorg.com/about-us/csia-vision-mission/> (accessed 29 October 2020).

¹⁶²The South African Law School Chartered Secretaries Qualification available at <https://www.lawschool.co.za/chartered-secretary-cssa-2/> (accessed 18 July 2020).

Apart from the formal qualifications mentioned above, the company secretary requires the following characteristics in order to be effective:

1. Honesty and integrity- the company secretary must be beyond reproach in his or her actions;¹⁶³
2. Courage to speak out¹⁶⁴ where conduct of board members may result in breaching legislation or the company code of conduct;
3. Confidence when discharging their duties;
4. Trustworthiness in terms of the advice and guidance provided and maintaining confidentiality, and
5. A good communicator as the company secretary is the interface between board and management.¹⁶⁵

The company secretary requires strong emotional intelligence to fulfil the role of the corporate secretary.¹⁶⁶ Emotional intelligence is the ability to recognise and manage one's own emotions and that of others and then being able to adjust one's behaviour accordingly.¹⁶⁷ The components of emotional intelligence are self-awareness, self-regulation, social skills, empathy and motivation.¹⁶⁸ An article about challenges facing a company secretary reflects that boards may comprise of several members with 'dominant personalities and large egos to match'.¹⁶⁹ Emotional intelligence will assist the company secretary to distinguish between these various personalities and large egos in order to obtain the most suitable outcome for the business.

For example, it may happen that a board member has a direct material interest in an agenda item, declares it but refuses to vacate the board room. This, inevitably, poses a risk to the board member himself as well as the full board. The company secretary should identify their emotion which may be irritation or anger, manage it, and consider

¹⁶³Wulfsohn L (2014) 16.

¹⁶⁴Sadie S, Matisson J & Paxton S 'Challenges facing the company secretaries in South Africa today' (2019) available at https://www.chartsec.co.za/documents/latestNews/Sadie-Matisson-Paxton_Challenges-facing-company-secretaries.pdf (accessed 7 July 2020) 11.

¹⁶⁵ Lee J 'From housekeeping to gatekeeping: the enhanced role of the company secretary in the governance system' (2015) available at <https://ssm-com.ezproxy.uwc.ac.za/abstract=2733180> (accessed 29 February 2020) 4.

¹⁶⁶International Finance Corporation (2016) 6.

¹⁶⁷Sadie S, Matisson J & Paxton S (2019) 12.

¹⁶⁸Gulati R 'Company Secretary: An Emotionally Intelligent Leader' (2020) available at <https://blogs.byteinject.com/byteinject-wow/company-secretary-an-emotionally-intelligent-leader/> (accessed 9 July 2020) 5.

¹⁶⁹Sadie S, Matisson J & Paxton S (2019) 15.

the emotions of the board member and others. Based on what the company secretary sees, he or she will be able to determine the approach required to ensure the member leaves the room. Although the board member may feel embarrassed, the company secretary must show empathy and motivate the board member to return to the meeting, without causing any further embarrassment to such board member. This will ensure that the company secretary acts with the necessary tact and diplomacy when required. Enhancing this skill will ensure that effective communication takes place, as the company secretary will be able to anticipate how to successfully engage with board members based on their respective personalities.¹⁷⁰

To provide an effective contribution to quality and good corporate governance the company secretary requires both the technical and essential soft skills discussed above.

3.4 Dual roles of a company secretary

Company secretaries often fulfil dual roles or wear different hats within their organisations such as legal advisor, gatekeeper or compliance officer.¹⁷¹ Listed companies may combine the company secretary and compliance officer roles.¹⁷² This may create efficiencies as the company secretary will be present in board and shareholder meetings and will have the knowledge and approvals to execute necessary documents and notices required by the particular stock exchange.

In research conducted by Grant Thornton, 22% of respondents indicated that company secretaries had combined roles either as legal counsel or as financial directors.¹⁷³ Factors such as the qualifications and experience of the company secretary, the nature and size of the organisation and the manner in which the role has developed internally will determine whether the role of the company secretary will be combined with another role.¹⁷⁴ Grant Thornton caution that the independence of the role may be

¹⁷⁰Kakabadse A, Khan N & Kakabadse N (2017) 253.

¹⁷¹ Nowland J, Chapelle L & J Johnston 'The Role of the Company Secretary in facilitating Board Effectiveness: Reporting and Compliance' (2020) available at onlinelibrary-wiley-com-ezproxy.uwc.ac.a/doi/Full/10.1111/acfi.12632 (accessed 22 March 2020) 5.

¹⁷²Wulfsohn L (2014) 10.

¹⁷³Grant Thornton (2018) 6.

¹⁷⁴Trubshaw R (2018)16.

compromised when combined, and that insufficient time may be available where governance is not their primary role.¹⁷⁵

While concerns about independence are noted, there are clear benefits when the company secretary fulfils a dual role. Nowland proposes that a dual role of company secretary/Chief Financial Officer (CFO) will result in more detailed financial discussions at board level and a clear focus on financial accounting and reporting which will result in quality financial reports.¹⁷⁶ This is due to the inherent nature of the role of the CFO which is to ensure the financial health of the organisation. Quality financial reporting will certainly contribute to board effectiveness. However, the risk with this combined role is that there will not be an independent company secretary which may, by virtue of the role, alert the board to possible financial discrepancies. It is noted that, clean audits and lower audit fees may be outcomes of this dual role.¹⁷⁷

The benefits of a dual role of company secretary/legal counsel will result in a focus on compliance with legislation, the risks and costs of litigation, and the quality of information provided to the board.¹⁷⁸ A legal counsel/company secretary will also have the added benefit of having worked with external attorneys and Senior Counsel and will know who has the required expertise for certain litigious matters. A Legal counsel/company secretary will easily initiate, draft and obtain board approvals required for instituting or opposing legal action in line with a company's delegation of authority for any litigious matters.

However, there are risks associated with the dual role of company secretary and legal counsel. In the *James Hardie* case, Mr Shafron held the dual role of company secretary and legal counsel.¹⁷⁹ The Australian High Court found that Mr Shafron, as company secretary, was considered an officer of the company and owed a duty of care to the company.¹⁸⁰ The duty of care was breached in that Mr Shafron failed to advise the board to disclose information relating to an indemnity and information

¹⁷⁵Grant Thornton (2018) 6.

¹⁷⁶Nowland J, Chapelle L & J Johnston, 8.

¹⁷⁷Nowland J, Chapelle L & J Johnston (2020) 8.

¹⁷⁸Nowland J, Chapelle L & J Johnston (2020) 9.

¹⁷⁹Friar D 'James Hardie Decision: Liability for General Counsel and Company Secretaries' (2012) available at <https://www.nbr.co.nz/article/james-hardie-decision-liability-general-counsel-and-company-secretaries-ja-126180> (accessed 17 July 2020) 1.

¹⁸⁰Friar D (2012) 1.

relating to funding to pay liability claims.¹⁸¹ Mr Shafron argued that the breach occurred when he exercised his role as general counsel and not as the company secretary; the court however, said that the role is not distinguishable when held by one person.¹⁸² Trubshaw proposes that, when the company secretary acts as legal counsel, they disclose in which capacity they provide advice.¹⁸³ It must be noted that legal advice provided by in-house legal counsel, or an external attorney who provided legal advice to the board either in a meeting or in writing, is covered by legal professional privilege. Such information is protected from disclosure to third parties. Advice provided by the company secretary is not covered by legal professional privilege.

In South Africa, the judgments in the *Mohamed v the President of the Republic of South Africa* 2001 and *Others* 2001 (2) SA 1145 (CC) and *Van Der Heever v die Meester en Andere* 1997 (3) SA 93 (T) cases, confirmed that legal professional privilege extends to 'salaried legal advisors' in the employ of government and private companies.¹⁸⁴ If one applies the case law cited above, and the roles were indeed indistinguishable when held by one person, I would argue that the advice of such legal advisor who also acts as a company secretary is privileged. However, the following requirements must still be met for legal professional privilege to apply: that the legal advisor acted in a professional capacity; that the discussions were confidential; that the purpose was to obtain legal advice; and that the advice provided did not facilitate the commission of a crime or fraud.¹⁸⁵ I agree with Lee's submission that the advice exchanged between a company secretary, without a legal background, and the board, should be privileged.¹⁸⁶ I submit that this must be applied where governance, and not legal, advice is given to individual directors and the board within the same confines of the requirements above for legal professional privilege. This will certainly increase

¹⁸¹Trubshaw R (2018) 17.

¹⁸²Friar D (2012) 3.

¹⁸³Trubshaw R (2018) 17.

¹⁸⁴Wagner K & Brett C 'I heard it through the grapevine: The difference between legal professional privilege and confidentiality' (2016) available at <http://www.derebus.org.za/heard-grapevine-difference-legal-professional-privilege-confidentiality/> (accessed 19 July 2020) 5.

¹⁸⁵ Hogan Lovells 'Legal professional privilege' (2015) available at <https://www.hoganlovells.com/en/publications/legal-professional-privilege> (accessed 19 July 2020) 2

¹⁸⁶Lee J 'The Corporate Governance Officer as a Transformed Role of the Company Secretary' (2017) 14 *South Carolina Journal of International Law and Business* 139.

trust in the company secretary as the board's trusted advisor and confidante as board members will be able to freely share specific information and concerns.

3.5. The evolving role of the company secretary

The role of the company secretary has evolved from an administrative role and being described as a 'humble clerk.' This has been due to societal expectations requiring greater transparency and regulatory changes.¹⁸⁷ The driving force behind the increased importance of the role of the company secretary 'can be attributed to developments in law requiring greater transparency and more precise governance through internal checks and balances.'¹⁸⁸

Whether or not a company secretary is successful depends on the nature of the person and the extent to which they embrace their role and how it has evolved, in order to ensure quality corporate governance. The nature of the industry in which the company secretary operates as well as the historical development of the role within the organisation contributes to the success of the incumbent.¹⁸⁹

Nowland's research, which considers the evolution of the role of the company secretary, has confirmed that the company secretary has a 'significant influence on board practices which is dependent on the role' and how busy the company secretary is.¹⁹⁰ From the research conducted through various academic articles noted in this paper, the following themes have emerged which show to what extent the role of the company secretary has evolved. By embracing these themes, and understanding their evolved role, it is my submission that an effective company secretary can increase quality and effective governance.

¹⁸⁷ Peij SC 'Does the company secretary share responsibility for board effectiveness?' 2017 *Governance Directions* 652.

¹⁸⁸ Lee J (2015) 4.

¹⁸⁹ Kakabadse A, Khan N & Kakabadse N 'Company Secretary: A role of breadth and majesty' (2016) available at <https://pdfs.semanticscholar.org/594b/a19ba5e04c17ede65fceff1ec123d9345457.pdf> (accessed 25 July 2020) 8.

¹⁹⁰ Nowland J, Chapelle L & J Johnston (2020) 28.

3.5.1 The invisible leadership, power and influence of the company secretary

The company secretary can exert influence if he or she is organised and efficient.¹⁹¹ Since the company secretary has the 'ear' of the chairperson, board members may approach them for advice on how and when to deal with specific matters. This allows the company secretary to exercise power and influence, which may result in them prioritising specific matters on the board agenda to ensure adequate discussion by the board in order to reach a quality decision. The leadership practices of the company secretary were studied on "how the company secretary uses 'role, power and influence' to affect board decision making."¹⁹² Interviews conducted demonstrated how the company secretary operates, exercises power and influences board dynamics in and outside of board meetings.¹⁹³ Kakabadse termed these practices 'invisible leadership', which is demonstrated by self-confidence (role), the desires of the chairman (power) and forging alliances (influence).¹⁹⁴ A 2016 study by Kakabadse focused on the strategic leadership of the company secretary and its contributions to board effectiveness and found that the particular combination of technical, commercial and social skills of the company secretary established the third dimensional power of the role.¹⁹⁵ Breadth, which is the technical and commercial skills, and majesty, which is the interpersonal skills which flow from being emotionally intelligent, arise from this power.¹⁹⁶ Enhancing these powers will enable the company secretary to build discretionary capacity which will assist them in contributing to board effectiveness.¹⁹⁷ Discretionary capacity allows the company secretary to juggle between long term goals and quick wins for the board, such as ensuring that a company's carbon emissions are within regulated standards or contributing to a community initiative where the company conducts operations.

¹⁹¹Kakabadse A, Khan N & Kakabadse N (2017) 252.

¹⁹²Kakabadse A, Khan N & Kakabadse N (2017) 243.

¹⁹³Kakabadse A, Khan N & Kakabadse N (2017) 243.

¹⁹⁴Kakabadse A, Khan N & Kakabadse N (2017) 255.

¹⁹⁵Kakabadse A, Khan N & Kakabadse N (2016) 11.

¹⁹⁶ Kakabadse A, Khan N & Kakabadse N (2016) 13.

¹⁹⁷ Kakabadse A, Khan N & Kakabadse N (2016) 13.

3.5.2 The company secretary as the knowledge manager

The company secretary has also been described as the knowledge manager due to their specialist skills and knowledge in respect of corporate governance, as well as the business environment in which the company operates and its stakeholders.¹⁹⁸ In her work, Wulfsohn refers to a study titled '*Deconstructing failure-Insights for Boards*', in which specific themes emerged after studying various corporate crises, one of them being 'defective information flows to and from the board'.¹⁹⁹ The quality of information received by the board is a key determinant of its effectiveness.²⁰⁰ This is exactly where the role of the company secretary comes in, by managing the flow of information to the board.²⁰¹

Peij studied approximately one hundred company secretaries who operate in the Dutch two-tier board system.²⁰² One of the findings of the study indicated that company secretaries were aware that their management of the flow of information between a two-tier board, management and supervisory, and their contribution towards the governance content, has a significant impact on an organisation.²⁰³ Company secretaries in the two-tier board system were therefore well aware that careful management of this particular aspect of their role contributed to board effectiveness. The company secretary, as part of their skill and experience, knows first-hand what information the board requires in order to effectively discharge their governance duties and to ensure that they can 'apply and explain' when reporting in terms of King IV. The company secretary can therefore facilitate and obtain from executive management the timeous and relevant information that must be submitted to the board. This appropriate, relevant and timely information will enhance the discussions at the board meetings thereby contributing to board effectiveness. The quality of a board decision is dependent on the quality of the information forming the

¹⁹⁸Sigauke et al. (2015) 403.

¹⁹⁹ Wulfsohn L (2014) 7.

²⁰⁰ Argudien Y 'Measuring the effectiveness of corporate governance' (2010) available at knowledge.insead.edu/leadership-organisations/measuring-the-effectiveness-of-corporate-governance-1149 (accessed 4 April 2020) 2.

²⁰¹Kakabadse A, Khan N & Kakabadse N (2017) 245.

²⁰² Peij SC (2017) 650.

²⁰³ Peij SC (2017) 651.

basis of board discussions.²⁰⁴ It will also ensure that the board operates effectively and meets its corporate governance obligations. It is for this reason that the company secretary is often described as the 'interface between management, committee meetings, the board and shareholder meetings and the chairperson'.²⁰⁵ By appropriately channelling the latest, relevant critical information, retrieved by the company secretary's interactions as mentioned in the preceding sentence, certainly contributes to the effectiveness of the board, thereby ensuring that critical information is not lost from one meeting or stakeholder to another. One of the themes that emerged from the study on the role, power and influence of the company secretary was that 'highly skilled company secretaries emerge in being the primary point of information and its quality, for board and governance matters'.²⁰⁶

3.5.3 The company secretary promotes and shares responsibility for the quality of governance

The results of a study of company secretaries in different business sectors confirmed that company secretaries play a significant role in promoting corporate governance.²⁰⁷ The internal corporate governance system is championed by the role of the company secretary.²⁰⁸ This is because the company secretary champions legal and governance compliance with internal policies and procedures to ensure the proper governance of an organisation. The findings of Peij's study, mentioned above, indicate that the company secretary has a significant impact on the governance of the organisation and that the role is moving towards shared responsibility for quality of governance and board effectiveness.²⁰⁹ Lee explored how the company secretary as a corporate professional can perform an oversight function to increase the impact on the quality of governance.²¹⁰ Practically, this oversight function would be the guidance and advice provided by the company secretary over board processes, such as ensuring there is a policy which regulates the conflicts of interest.

²⁰⁴Argudien Y (2010) 2.

²⁰⁵Lee J (2015) 4.

²⁰⁶Kakabadse A, Khan N & Kakabadse N (2017) 252.

²⁰⁷Sigauke J et al. (2015) 401.

²⁰⁸Sigauke J et al. (2015) 401.

²⁰⁹Peij SC (2017) 652.

²¹⁰ Lee (2015) 1.

As part of promoting the quality of corporate governance and in line with the Act, the company secretary has an obligation to speak up should board discussions or decisions result in non-compliance with the Act, rules or memorandum of incorporation.²¹¹ If they do not, they will be in breach of the provisions of the Act. The company secretary is in the ideal position to be a whistle-blower, either via an ethics hotline or directly to the chairperson of the board. In South Africa, whistle-blowers are protected against disclosures made to their employer or other parties as listed in the Protected Disclosures Act 26 of 2000. This Act defines which types of disclosures are protected, to whom they can be disclosed, as well as protecting the employee from retaliation and intimidation.²¹² In Malaysia, if company secretaries are aware of wrong doings by any company official, whistle-blowing is encouraged as part of the duties of the company secretary.²¹³ This forms part of ethical compliance and the oversight function of the company secretary, mentioned above, which contributes to quality governance.

3.5.4 The company secretary is considered a strategic partner or leader

As a strategic partner, the company secretary plays a role in the setting, managing and promoting of governance standards.²¹⁴ Since these standards will have a bearing on the company's vision, mission and values, the company secretary's guidance will be required in the development thereof.²¹⁵ Grant Thornton points out that the demand for the role of the company secretary has become that of a strategic partner but the role, however, still has a legacy of being administrative.²¹⁶ This perception can result in the role not carrying the necessary gravitas or authority required. The company secretary is required to advise the board on whether proposed strategies are consistent with good governance and whether they are acceptable from a risk point of view.²¹⁷ Due to the nature of the position, and being present in board discussions, the company secretary is in the ideal position to assess whether matters deliberated on

²¹¹ Act 71 of 2008 s 88 (c).

²¹² Protected Disclosures Act 26 of 2000 s1.

²¹³ Azis N et al. 'Employees and Whistleblowing: A study amongst external company secretaries in Malaysia' 5 *International Journal for Advanced Research and Novelty* 3 4.

²¹⁴ Grant Thornton (2018) 5.

²¹⁵ International Finance Corporation (2016) 114.

²¹⁶ Grant Thornton (2018) 5.

²¹⁷ International Finance Corporation (2016) 113.

and board focus areas actually comply with the strategy. However, such an assessment will only bear fruit if the company secretary maintains their objectivity and independence.²¹⁸ Maintaining independence as a company secretary is indeed a key requirement for the success of the role.²¹⁹ While the company secretary is required to work closely with the chairperson of the board and CEO, he or she should not be swayed or influenced by the desired outcomes of either the CEO or chairperson of the board.

3.5.5 The company secretary assists with building an ethical culture

Further to what was discussed in paragraph 2.4.1 of chapter 2 in respect of culture, the company secretary assists with building an ethical culture, and is known as the 'conscience of the company'.²²⁰ In order to fulfil this role, the company secretary must ensure that the relevant corporate governance policies are in place, that people are managed effectively to comply with such policies and that the board puts appropriate measures in place to deal with non-compliance.²²¹ This will certainly ensure that the appropriate culture is present for corporate governance to thrive.²²² Corporate governance and ethics go hand in hand and 'business ethics underlie the basic principles of corporate governance'.²²³ An ethical organisational culture is an outcome of an effective board that focuses on ethical behaviour. An organisation's ethical conduct will reflect that of its leaders, which is why the board is required to 'lead ethically and effectively'.²²⁴ In this regard the company secretary can improve the board's effectiveness and ensure quality governance by ensuring that ethics is a focus area for the board at the outset of the board's term. This can be accomplished by including ethics training, awareness of the behaviour required by a board member and alignment with the company values as part of the board induction process.²²⁵ Improved

²¹⁸Wulfsohn L (2014) 13.

²¹⁹Peij SC (2017) 651.

²²⁰International Finance Corporation (2016) 131.

²²¹Sadie S, Matisson J & Paxton S (2019) 10.

²²²International Finance Corporation (2016) 4.

²²³International Finance Corporation (2016) 131.

²²⁴King IV 2016 43.

²²⁵Sadie S, Matisson J & Paxton S (2019) 10.

corporate governance and company performance is reliant on the culture of a company.²²⁶

3.5.6 The company secretary facilitates board induction, training and professional development for board members

The purpose of board induction and what must be included on the induction agenda was discussed in paragraph 2.5 of chapter 2 and will not be repeated here. The company secretary contributes to board effectiveness by arranging and ensuring a detailed board induction for new board members as well as training and professional development for board members in order to effectively discharge their duties.²²⁷ Since the company secretary is present in board meetings, he or she can assess which board members are lacking specific skills and accordingly arrange for the necessary professional development. Improved skills will certainly enhance the effectiveness of the board and ultimately, the quality of their decisions.

3.5.7 The company secretary is the board's trusted adviser and confidant

Confidentiality is integral of the role of the company secretary. Trust is implicit between the board and company secretary. Emotional intelligence, professionalism and discharging their duties effectively will build trust in the company secretary. The company secretary is privy to confidential information contained in board packs received in management meetings as well as attendances in board meetings. Individual board members as well as the full board must be able to trust in the company secretary's ability to maintain the confidentiality of their discussions.²²⁸

The knowledge that information shared with the company secretary will be treated confidentially and used only for its intended purpose will establish trust between the board and company secretary. The company secretary will use 'discretionary capacity' as referred to above to determine when and how relevant information will be shared. Obtaining the board's and senior management's trust will indeed facilitate and build solid relationships with board members and management. Having good relationships

²²⁶ Sullivan J et al. 'Stress Testing Corporate Governance' (2018) https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+cg/resources/private+sector+opinion/stress+testing+corporate+governance (accessed on 26 July 2020) 28.

²²⁷ Grant Thornton (2018) 14.

²²⁸ Sadie S, Matisson J & Paxton S (2019) 9.

with the board, chairperson and CEO will certainly enhance the effectiveness of the company secretary.²²⁹ Good relationships are not only required with board members and management, the company secretary must establish relationships of trust with all departments. This will certainly enhance the quality of corporate governance within the organisation. As mentioned above, strong emotional intelligence skills will certainly benefit the company secretary as it will assist them to successfully navigate relationships with the board. The company secretary 'requires higher order skills of mediation, tact and discretion to management relationships.'²³⁰

3.5.8 The company secretary as the chairperson of the board's support

The role of the company secretary is dependent on the chairperson of the board and his / her reliance on the advice and guidance of the company secretary.²³¹ The chairperson's personality and preferences will influence how effectively the company secretary can contribute to corporate governance.²³² A good relationship with the chairperson and providing effective support will secure the trust of the chairperson. Where there is conflict in the boardroom, the chairperson must be able to rely on the company secretary for direction, where relevant. Board decisions ultimately follow from the standards set by the chairperson of the board.²³³ The company secretary must be able to contact the chairperson at any time to discuss any matters relevant to the proper functioning of the board.²³⁴ The company secretary will provide support and guidance to the chairperson in arranging board strategic sessions. This will ensure that strategic matters remain on the board's agenda and that the board regularly reviews progress in respect of its strategy. The chairperson may use the company secretary as a sounding board²³⁵ and test particular matters with the company secretary before sharing it with the board. In order for the company secretary to be effective, it is of the utmost importance that a relationship of trust with the chairperson of the board is established at the outset.

²²⁹Sigauke J et al. (2015) 411.

²³⁰Trubshaw R (2018) 8.

²³¹Kakabadse A, Khan N & Kakabadse N (2017) 251.

²³² Trubshaw R (2018) 30.

²³³ McNulty T & Stewart A (2014) 14.

²³⁴King III Report on Corporate Governance for South Africa 2009 43.

²³⁵ McNulty T & Stewart A (2014) 15.

3.5.9 The company secretary plays a role in sustainability and corporate citizenship

Further to the discussion in paragraph 2.4.5 of chapter 2, the company secretary supports the board by ensuring that sustainability and corporate social responsibility (CSR) remains on the board agenda. Regulation 43 of the Act sets out the mandate of the social and ethics committee.²³⁶ The company secretary can do this by ensuring that where companies are not required to have a social and ethics committee, matters such as fraud, corruption, ethical compliance, Broad-Based Black Economic Empowerment, environmental matters, labour relations and the health and safety of employees²³⁷ are adequately monitored by the board. The company secretary can recommend that a social and ethics committee be formed or consider in which current committee these matters would be appropriately monitored. To ensure quality and effective corporate governance, they can further assist by ensuring that the organisation has adequate policies and procedures in place which augment its role as a responsible corporate citizen. The company secretary will be required to advise the board on how the above matters should be disclosed in the integrated or annual report, including key focus areas and measures in place to monitor corporate citizenship.²³⁸

3.6. CONCLUSION

The company secretary is an exceptional person who must possess strong emotional intelligence, technical skills and be able to successfully navigate relationships with all stakeholders in a bid to ensure quality corporate governance and board effectiveness. It is clear that the role of the company secretary has indeed evolved and the evolved role can further enhance the benefits of corporate governance, as discussed in chapter 2. The role has evolved from a traditionally administrative role to knowledge management, facilitating proper induction, building relationships by establishing trust, enabling an ethical and governance culture, and supporting the chairperson of the board which improves the quality of corporate governance and the effectiveness of the board. Consideration should be given to catering for the evolved role of the company

²³⁶Companies Regulations 2011 GN 351 in GG34239 of 26 April 2011 43.

²³⁷King IV 2016 45.

²³⁸King IV 2016 46.

secretary in legislation. The next chapter will examine the current legal framework governing the appointment, duties and role of the company secretary.



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CHAPTER 4

THE LEGISLATIVE AND REGULATORY FRAMEWORK OF SOUTH AFRICA GOVERNING THE ROLE OF THE COMPANY SECRETARY

4.1 Introduction

This chapter begins by considering the legislative/regulatory framework of South Africa governing the appointment and duties of the company secretary as well as the statutory liability of the company secretary.

4.2 The legislative and regulatory framework of South Africa governing the appointment and duties of the company secretary

In South Africa, the legislative and regulatory framework governing the appointment and functions of the company secretary is governed by Sections 86 to 89 of the Act, paragraph 4.8 of the Johannesburg Stock Exchange listing requirements and the King IV Report on Corporate Governance for South Africa.

All public and state-owned companies must appoint a company secretary,²³⁹ and such appointment must be registered within 10 days.²⁴⁰ Except for public and state-owned companies, other companies are not required to appoint one, although it is considered best practice to do so.²⁴¹ In order to be appointed as a company secretary, such person must have the requisite knowledge and must be a permanent resident in South Africa during their tenure.²⁴² The skills required of a company secretary were discussed in detail in chapter 3. A juristic person may also be appointed as a company secretary provided that its employees were not disqualified from acting in any capacity for a company and that at least one employee or partner of the juristic person complies with the requirements of Section 86.²⁴³

²³⁹Companies Act 71 of 2008 s 86 (1).

²⁴⁰ Act 71 of 2008 s 85(3).

²⁴¹King IV report on Corporate Governance for South Africa 2016 59.

²⁴²Act 71 of 2008 s 86(2).

²⁴³Act 71 of 2008 s 87.

The functions of the company secretary are not limited to what is set out in Section 88 of the Act, which states as follows²⁴⁴:

1. Advising the directors or board members individually and collectively of their duties, responsibilities and powers;
2. creating awareness of laws relevant to the particular company;
3. reporting to the board any failure to comply with the Act, rules of the company or Memorandum of Incorporation;
4. taking accurate minutes of meetings and ensuring they are recorded as prescribed in the Act;
5. certifying in the annual financial statements (AFS) that the company filed true, correct and up to date annual returns and notices;
6. ensuring that the company's AFS was sent to all persons who should receive it; and,
7. filing annual returns in terms of Section 33 of the Act if designated by the company to do so.

In addition to the above, these duties should be read with King III and King IV which provide comprehensive recommendations on the duties of the company secretary. The King IV requirements formed part of the discussion of the skills required of a company secretary in chapter 3, some of which overlap with the King III requirements. The recommended practices in King III are still relevant as they are considered best practices in respect of good corporate governance.²⁴⁵ A company secretary's performance is evaluated against these principles, by board members, to determine his or her effectiveness.²⁴⁶ The following recommended practices in King III are particularly relevant in respect of the evolving role of the company secretary:²⁴⁷

1. assist the nomination committee to ensure the procedure for the appointment of directors is properly carried out;

²⁴⁴Act 71 of 2008 s 88.

²⁴⁵King III Report on Corporate Governance for South Africa 2009 17.

²⁴⁶Practice Note King III Chapter 2 Company Secretary Evaluation Questionnaire (2011) available at https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/24CB4885-33FA-4D34-BB84-E559E336FF4E/King_III_Ch_2_Company_Secretary_Evaluation_Questionnaire_Aug_2011.pdf (accessed 4 October 2020) 3-7.

²⁴⁷King III 2009 43.

2. maintain an arms-length relationship with the board and its directors. In addition to this, King IV specifically mentioned objectivity and independent guidance by the company secretary²⁴⁸;
3. recognise that the company secretary is the knowledge manager (as discussed in paragraph 3.5.2 of chapter 3) and must therefore be a central source of guidance and advice to the board on good governance and changes in legislation;
4. assistance with induction, orientation, ongoing training, education, assessment of specific needs of directors and executive management in their fiduciary duties. The company secretary's role in this regard was extensively discussed in paragraph 2.5 of chapter 2;
5. communicate directly with the chairperson and the board as the chairperson of the board's support, as discussed in paragraph 3.5.8 of chapter 3;
6. keep the committee and board charters or terms of reference up to date with changes in legislation and best practices in respect of corporate governance;
7. liaise with the CEO, chairperson of the board and committee chairpersons in setting the relevant agenda's, and obtaining feedback on specific agenda items and ensure that matters arising are duly responded to and placed before the board;
8. responsibility for raising matters that may warrant the attention of the board. In this way the company secretary promotes and shares responsibility for quality corporate governance.²⁴⁹ An example of this could be highlighting potential legal risks of a management decision;
9. ensuring the proper compilation of board packs and assisting the Chairperson with the annual board workplan. This contributes to board effectiveness as the annual board work plan sets out the key activities of the board for the year, for example the date for approval of the annual financial statements;

²⁴⁸King IV 2016 60.

²⁴⁹Chapter 3, para 3.5.3 39.

10. ensure that minutes of all committee and board meetings are properly recorded and circulated to the board within the prescribed time. The company secretary should also ensure that minutes are approved as per the relevant charters, usually at the subsequent board and committee meetings, and that they are signed off accordingly. As discussed in paragraph 3.2 of chapter 3, minute taking has evolved as verbatim minutes are no longer required; and,
11. assist with the yearly evaluation of the board, individual directors and senior management. The company secretary's role in this regard is crucial in contributing to board effectiveness as the outcome of the yearly evaluation will determine whether the board is effective or not. The company secretary will have to work closely with the chairperson to provide the basis for evaluation as well as determining actions for improvement should the outcome of the evaluation determine that the board is not effective in rendering its duties.

Both King III and King IV state that the removal of the company secretary is a matter for the board, and that the office of the company secretary should be empowered by the board and carry with it the necessary authority.^{250 251} An individual director can therefore not remove the company secretary. This is echoed by section 89(2) of the Act which confirms that the board must remove a company secretary from office.

For companies listed on the Johannesburg Stock Exchange (JSE), paragraph 4.8(c) of the JSE Limited Listing Requirements states that 'all issuers, except an issuer of specialist securities, must appoint a company secretary in accordance with the Act and, as stipulated in King IV, the recommended practices in King IV should be applied'.²⁵² Listed companies are therefore obliged to appoint a company secretary who must fulfil the aforementioned duties listed in the Act and in the King reports. The King reports on good corporate governance clearly show how the role of the company secretary has evolved from King I to King IV. King III contains comprehensive

²⁵⁰King III 2009 43.

²⁵¹King IV 2016 60.

²⁵²The JSE Limited Listing Requirements, Bulletin 1 of 2017 available at <https://www.jse.co.za/content/JSEBulletinItems/Limited%20Listings%20Bulletin%201%2of%202017.pdf> (accessed 4 October 2020) 4.8(c).

provisions which consider the evolving role of the company secretary; however, these codes are voluntary, except for listed companies.

Section 89(2) of the Act provides that if the board removes the company secretary from office, the company secretary can include a statement in the director's report in the company's annual financial statements as to why they were removed from office.²⁵³ This statement must be provided not later than the financial year in which the removal took place.²⁵⁴ This provision serves to protect the company secretary and ensures that the board will act with caution before removing a company secretary without just cause.

4.3 Liability of the company secretary

Can the company secretary be considered a prescribed officer as defined in the Act and be held liable as such? In terms of Regulation 38 of the Act, a prescribed officer is a person who exercises general executive control or who participates to a material degree in the exercise of general executive control.²⁵⁵ Therefore, if the company secretary exercises executive control or participates in the exercise of executive control, they may be considered a prescribed officer in terms of the Act.²⁵⁶ In my opinion, if the company secretary is a prescribed officer, they are subject to the same standards of conduct required of directors in section 76 of the Act and the liabilities as directors in section 77 of the Act. In addition to the responsibilities mentioned above, the company secretary must act in good faith, for a proper purpose, in the best interests of the company and with the necessary skill, care and diligence.²⁵⁷ Section 77 of the Act provides that prescribed officers may be held liable for breach of fiduciary duty; breach of duty of care and skill; any loss, damages or costs suffered by the company as set out in Section 77 (3), and civil liability to any other person who may have suffered a loss or damages and damages suffered by shareholders.²⁵⁸ The court

²⁵³Act 71 of 2008 s 89 (2).

²⁵⁴ Act 71 of 2008 s 89 (2).

²⁵⁵ Companies Regulations 2011 reg 38.

²⁵⁶Johnston A 'Company secretaries: Gatekeepers or doormen? (2018) available at <https://www.withoutprejudice.co.za/free/article/5913/view> (accessed 4 October 2020) 3.

²⁵⁷Act 71 of 2008 s 76.

²⁵⁸Act 71 of 2008 s 77.

found that the company secretary in the James Hardie case was considered an officer of the company and owed a duty of care.²⁵⁹

4.4 Conclusion

The recommended practices contained in King III are considered best practice in respect of corporate governance and must be read together with the recommended practices in King IV. Some of the recommended practices are aligned to the evolving role of the company secretary but are not aligned in terms of the company secretary's clear leadership role and contributions to strategy, culture and sustainability and corporate citizenship.



²⁵⁹Chapter 3 para 3.4.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

This chapter will summarise the conclusions reached in previous chapters and analyse whether current legislation must be amended, or if new legislation must be enacted or promulgated to make provision for the evolving role of the company secretary. It will also consider whether the independence of the company secretary must be regulated by statute as well as recommendations on whether legal professional privilege should apply to the advice of a company secretary who does not have a legal background.

5.2 Conclusions from previous chapters

It is clear from the discussion on corporate governance in chapter 2 that the board has a daunting task in ensuring effective and quality corporate governance for the companies that they lead. Ethical leadership begins with the board who must set the tone. The company secretary fulfils a key role with induction and training of board members to ensure board effectiveness. Corporate failures and scandals discussed in chapters 1 and 2 serve as examples of why companies require the guidance and advice of an effective company secretary to assist the board in discharging its corporate governance responsibilities.

Chapter 3 demonstrated the extent to which the role of the company secretary has evolved over time. The role of the company secretary has a material impact on corporate governance and has evolved from a role focused purely on administrative tasks.²⁶⁰

In concluding chapter 3, it was noted that the company secretary is an exceptional person who must possess strong emotional intelligence, technical skills and be able to successfully navigate relationships with all stakeholders in a bid to ensure quality corporate governance and board effectiveness. It is clear that the role of the company secretary has indeed evolved and this can further enhance the benefits of corporate

²⁶⁰Chapter 3 para 3.2.

governance, as discussed in chapter 2. The role has evolved from a traditionally administrative role to a leadership role of strategic importance.²⁶¹ Consideration should be given to catering for this evolved role of the company secretary in legislation.

The recommended practices contained in King III, with respect to the company secretary, are considered best practice, and must be read together with the recommended practices in King IV. Some of the recommended practices are aligned to the evolving role of the company secretary, however the company secretary's clear leadership role and contributions to strategy, ethical culture, sustainability and corporate citizenship and the shared responsibility for the quality of corporate governance is not aligned.

5.3 Should legislation be amended/enacted or promulgated in order to make provisions for the evolving role of the company secretary?

The role of the company secretary has evolved to a strategic and leadership role which carries authority and makes a significant contribution to the quality of corporate governance and board effectiveness but it is not defined as such in the Act. There is growing recognition of the role of the company secretary but there is a lack of consistency about what this means.²⁶²

One of the many questions posed after the Steinhoff scandal was 'where was the company secretary?'²⁶³ As a result of attending board meetings, a company secretary would have been aware of which transactions were approved by the board, what the contractual amount was, as well as any risks to the business related to that particular transaction. It is clear from various news articles and the Myeni judgment that both Eskom²⁶⁴ and SAA²⁶⁵ had company secretaries at the time that the various corporate governance failures took place. Would an effective and emotionally intelligent

²⁶¹Chapter 3 para 3.5.1 and 3.5.4.

²⁶²Grant Thornton 'Is the role of the company secretary fit for the future? (2018) available at grantthornton.co.uk/insights/is-the-company-secretary-role-fit-for-the-future (accessed 1 March 2020) 13.

²⁶³South African Accounting Authority 'Steinhoff: Where was the company secretary? (2018) available at accountingacademy.co.za/news/read/Steinhoff-where-was-the-company-secretary (accessed 20 June 2020).

²⁶⁴Selisho K 'Former Eskom head of legal admits to breaking the law available at <https://www.oudtshoorncourant.com/News/Article/National/former-eskom-head-of-legal-admits-to-breaking-the-law-201903200219> (accessed 4 October 2020) 1.

²⁶⁵*Organisation Undoing Tax Abuse v Duduzile Myeni* reported case 15996/2017 (27 May 2020) para 63 31.

company secretary who operated from an ethical foundation have made a difference in Eskom, SAA and Steinhoff? I submit that it would have, particularly if current legislation served as the foundation for the evolving role of the company secretary. The elevation of the role of the company secretary in line with the way the role has evolved is therefore required in law.

It is, therefore, my submission that the role of the company secretary should be clearly defined in the Act to make provision for the strategic role that it has developed into. A clearly defined role in law will be beneficial as this will enable the company secretary to significantly contribute to an organisation's governance practices.²⁶⁶

In order to ensure that the appointment and role of the company secretary is well defined in law, it must make provision for the role to be elevated in line with its strategic nature. Legislation should reflect the evolved role of the company secretary with the requisite authority, independence and privilege of the role of the company secretary. I submit that provision should be made for the following inclusions within the law:

5.3.1 Mandatory appointment of a company secretary

The appointment of a company secretary should be mandatory for all companies, except small businesses. If the current practice is to appoint a company secretary without being legally required to do so, then it is clear that companies see the value and benefit of a company secretary. It has been established from the above, and the preceding chapters, that an effective company secretary is indeed valuable and makes a significant contribution to the quality of corporate governance.

5.3.2 Authority of the role

In order to be effective, the role should carry the necessary authority.²⁶⁷ The role must be elevated in line with the evolved role. While recommended in the King reports, the authoritative nature of the role is not currently mentioned in the Act nor is it alluded to. As far back as King II, the board has been required to 'ensure that the company secretary is empowered to enable him or her to perform their duties effectively'.²⁶⁸ King

²⁶⁶ Peij SC 'Does the company secretary share responsibility for board effectiveness?' 2017 *Governance Directions* 651.

²⁶⁷ Chapter 4 para 4.2.

²⁶⁸ Cliffe Dekker Attorneys 'King Report on Corporate Governance for South Africa 2002; What it means to you' available at www.cliffedekker.com (accessed February 2020) 8.

III contains a similar provision but King IV goes further by saying ‘*and* (my emphasis) carries the necessary authority’.²⁶⁹ King IV therefore recognises the extent to which the role has evolved. As discussed in chapter 3, the company secretary is an invisible leader, strategic partner, a knowledge manager, promotes and shares responsibility for the quality of governance and assists the board with building an ethical culture. It is only fitting that this role carries authority in legislation. As these contributions by the company secretary ultimately lead to quality corporate governance, I propose that they be added as recommended practices under professional corporate governance services, principle 10 of King IV. Since the role is constantly evolving, it would not make sense to legislate this specifically. However, by specifying the qualifications of the company secretary in legislation, this will ensure that the role carries with it the necessary authority. As discussed in paragraph 3.3 of chapter 3, the UK Companies Act requires the company secretary to be a barrister, solicitor, advocate or member of a prescribed professional body. While the UK Companies Act does provide an alternative by stating that the company secretary must satisfy directors that they are capable of discharging the duties of such an office, this will still ensure that their qualifications are in line with what is required.

Changing the name from company secretary to something that carries more authority would serve to elevate the role in line with the manner in which it has evolved. Wulfsohn considers a change of name for the evolved role as the term ‘secretary’ no longer does justice to the more strategic roles and responsibilities of a company secretary.²⁷⁰ If one considers the ordinary meaning of the word ‘secretary’, the role is associated with general administrative duties such as answering telephones and booking meetings. Since the role has evolved and is widely recognised as a governance professional,²⁷¹ I submit that the name of the company secretary be changed to ‘chief governance officer’, ‘corporate professional’ or ‘governance professional’. These are some of the terms by which the company secretary has been referred to in respect of the evolving role in the academic articles referred to in this paper. I certainly agree with Wulfson that a change of name for the company secretary is required and will most certainly ensure that the role carries with it the necessary

²⁶⁹ King IV 2016 60.

²⁷⁰Wulfsohn L (2014) 5.

²⁷¹Trubshaw R (2018) 17.

authority. All references to 'company secretary' in any legislation would then be amended accordingly.

If the authority of the role is recognised in legislation, this will ensure that the company secretary has a voice in the boardroom and does not only 'speak when spoken to'. This will ensure that the company secretary is not overshadowed by a dominant CEO or dominant chairperson of the board. In the study conducted by Kakabadse, a chairperson indicated that the role of the company secretary is influenced by what the chairperson requires.²⁷² In paragraph 3.4.8 of chapter 3 it was clear that the role of the company secretary evolved so as to provide support to the chairperson of the board. Whether the support is welcomed and utilised will depend on the disposition and preferences of the chairperson. If the chairperson does not see the value of the role and engage with the company secretary to ensure quality corporate governance, then the rest of the board will follow suit. However, if legislation elevates the role and recognises its authority, the board chairperson will be obliged to give the company secretary a hearing. It may well be that the company secretaries at SAA were not allowed to raise concerns, or if they did, was their advice ignored or disregarded? In the Myeni judgement, references to the company secretary related to administrative tasks, such as certifying an extract from minutes of a board meeting, checking on official communications received, preparing letters for the signature of the chairperson and circulating minutes.²⁷³ Advice related to whether a board resolution was required for a non-binding Memorandum of Understanding for the Emirates deal, which formed part of the turnaround strategy for SAA, was provided by the 'resident governance expert' and not the company secretary.²⁷⁴

5.3.3 The independence of the company secretary

While the independence of the company secretary is dealt with in King IV, it is not regulated in Sections 84-89 of the Act. As an independent gatekeeper,²⁷⁵ maintaining independence is crucial for the role of the company secretary, as they serve as the

²⁷²Chapter 3 para 3.5.8.

²⁷³*Organisation Undoing Tax Abuse v Duduzile Myeni* reported case 15996/2017 (27 May 2020) para 63, 103,164, 172.

²⁷⁴*Organisation Undoing Tax Abuse v Duduzile Myeni* reported case 15996/2017 (27 May 2020) para 39(a), 49.

²⁷⁵ Lee J 'From housekeeping to gatekeeping: the enhanced role of the company secretary in the governance system' (2015) available at <https://ssm-com.ezproxy.uwc.ac.za/abstract=2733180> (accessed 29 February 2020) 6.

interface between board and management, and between board committees and the board chairperson.²⁷⁶ The company secretary can maintain independence by relying on the skills discussed in paragraph 3.3 of chapter 3, particularly emotional intelligence. These skills will guide the company secretary to remain impartial, provide objective advice and guidance and show empathy, while fulfilling the role of the board's trusted advisor.²⁷⁷ Independence will enable the company secretary to report any failure by the company or a director to comply with the provisions of the company's MOI, company rules and the Act.²⁷⁸ Independence of the company secretary will lead to them being able to support the independence of the board members.²⁷⁹ While Lee considered applying provisions relating to the independence of the auditors to the company secretary, his view is that independence should not be legislated as this could stifle the innovation of the evolved role of the company secretary.²⁸⁰ I disagree with this and submit that independence contributes to the success of the role which ultimately ensures quality corporate governance and an effective board.

It is my submission that independence be legislated in a similar manner to that of auditors. Auditors are required to be independent of the company, and section 90(2)(c) of the Act states that the companies audit committee should be satisfied with the independence of the auditors.²⁸¹ This section must be read with section 94 (8) of the Act which requires the audit committee to consider direct/indirect remuneration received, previous appointments and any other criteria determined by the Independent Regulatory Board for Auditors (IRBA).²⁸² Criteria more specific to the role of the company secretary can be determined which will also ensure that an arms-length relationship is maintained with the board and executives. The board itself can review the independence of the company secretary as part of the performance appraisal of the company secretary. As an example of a conflict of interest for a company secretary, one of the Steinhoff employees implicated in the PWC forensic investigation, held the

²⁷⁶Chapter 3 para 3.3.

²⁷⁷Baddeley J & Sim R 'UK: Standing apart as a company secretary' (2018) available at mondaq.com/uk/corporate-governance/715156/standing-apart-as-a-company-secretary (accessed 29 August 2020).

²⁷⁸Chapter 4 para 4.2.

²⁷⁹Baddeley J & Sim R (2018)

²⁸⁰Lee J (2015) 9.

²⁸¹Act 71 of 2008 s 90(2)(c).

²⁸²Act 71 of 2008 s 94(8)(c).

positions of company secretary, head of legal, and the director of treasury and finance during his 20 year tenure at Steinhoff.²⁸³ It appears that this particular employee acted as the company secretary for both Steinhoff and Malenge Sawmills, who were conducting business with each other at the time.²⁸⁴

IRBA provides a manual of information which includes a conceptual framework approach to independence which provides guidelines for determining independence.²⁸⁵ The Institute for Directors Southern Africa can be requested to provide a guidance note, similar to the IRBA manual of information related to the independence criteria of the company secretary. This can be read together with the King reports and the proposed amended legislation. Regulating independence will encourage a move away from dual roles and combining the role of the company secretary with another role such as legal counsel or financial directors. Dual roles pose a threat to the independence of the company secretary.²⁸⁶

5.3.4 Legal professional privilege

Further to the discussion of legal professional privilege in paragraph 3.4 of chapter 3, it is my submission that legal professional privilege should apply to a company secretary without a legal background. Sections 84 to 89 of the Act should therefore make provision for legal professional privilege for non-legal company secretaries. While a company secretary may not have a legal background, the advice provided by the company secretary does have legal repercussions. For example, the company secretary must advise the board on the standard of conduct expected of them as directors, the business judgment rule and guiding the board in the attainment of the King IV governance outcomes, ethical culture, good performance, effective control and legitimacy.²⁸⁷ As discussed in chapter 2, the courts rely on the King reports when considering corporate governance, which may result in liability for a director. It is my

²⁸³Wasserman H 'What you need to know about the eight main Steinhoff suspects' (2019) available at businessinsider.co.za/eight-steinhoff-suspects-2019-3 (accessed 20 June 2020) 4.

²⁸⁴Wasserman H (2019) 4.

²⁸⁵IRBA Manual of Information (2014) available at [https://www.irba.co.za/upload/IRBA%20Rules%20Regarding%20Improper%20Conduct%20and%20Code%20of%20Professional%20Conduct%20for%20Registered%20Auditors%20\(revised%202014\).pdf](https://www.irba.co.za/upload/IRBA%20Rules%20Regarding%20Improper%20Conduct%20and%20Code%20of%20Professional%20Conduct%20for%20Registered%20Auditors%20(revised%202014).pdf) (accessed 27 August 2020).

²⁸⁶Chapter 3 para 3.4.

²⁸⁷Chapter 2 para 2.2.

view that this will not conflict with the company secretary's statutory duty to report non-compliance with the Act or rules of the company by any director or the company,²⁸⁸ as the company secretary would have provided the appropriate advice at the time and must report the non-compliance if the behaviour still subsists.

5.3.5 Changes to enabling legislation

Not all public entities are state-owned companies and they are regulated in terms of their own enabling legislation. I propose that such enabling legislation include the recommendations discussed above and make provision for the mandatory appointment of a company secretary as well as setting out the core duties of the company secretary as in section 88 of the Act. Public entities, more often state-owned entities, are often in the news as a result of corporate governance failures. As a result of the evolving role of the company secretary, he or she will be able to assist a public entity with attaining quality corporate governance with the foundation being rooted in an ethical culture.

5.3.6 Principle 10 of King IV

The extent to which the role of the company has evolved has not been disputed. The incorporation of recommended practices for the company secretary are aligned to the evolved role in Principle 10 of King IV. These practices relate to strategy and leadership, shared responsibility for the quality of corporate governance, and contribute to an ethical culture, sustainability and corporate citizenship.

By inserting these provisions in legislation, and King IV as proposed, the board will be encouraged to comply with these provisions as compliance with the law is a key requirement of being a good corporate citizen. The board must disclose the measures it has taken to monitor corporate citizenship and how these were addressed.²⁸⁹

5.4 Conclusion

To ensure quality and effective corporate governance, boards require the services of a company secretary. The research discussed in the preceding chapters indicates that

²⁸⁸Chapter 3 para 3.5.3.

²⁸⁹Chapter 3 para 3.5.9.

the role of the company secretary has evolved to a strategic and leadership role which contributes to quality and effective corporate governance. By embracing the manner in which the role of the company secretary has evolved, the company secretary will contribute to attaining an ethical culture, effective control, good performance and legitimacy. As such, current legislation should be amended to make provision for the evolved role of the company secretary. It was proposed that the Act be amended to elevate the role of the company secretary which includes a change of name for the role. This will ensure that the role carries the necessary authority. The amended legislation should incorporate independence and legal professional privilege as this will further enhance the contribution of the role of the company secretary to quality corporate governance. These amendments should also be applied to the enabling legislation of public entities, who are not state-owned companies together with the addition of the duties of the company secretary in section 88 of the Act.

Since the evolution of the role is constant, principle 10 of King IV must include recommended practices which align with the evolved role. The above recommendations will certainly assist the company secretary and the board to attain an ethical culture, good performance, effective control and legitimacy, thereby limiting the risk of corporate governance failures.

The logo of the University of the Western Cape, featuring a stylized building with columns and a pediment.

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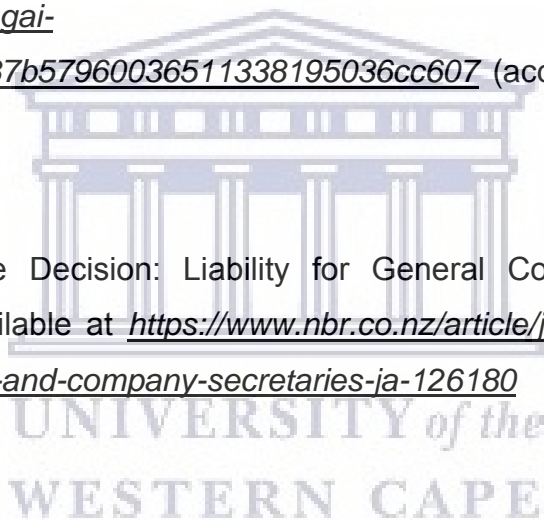
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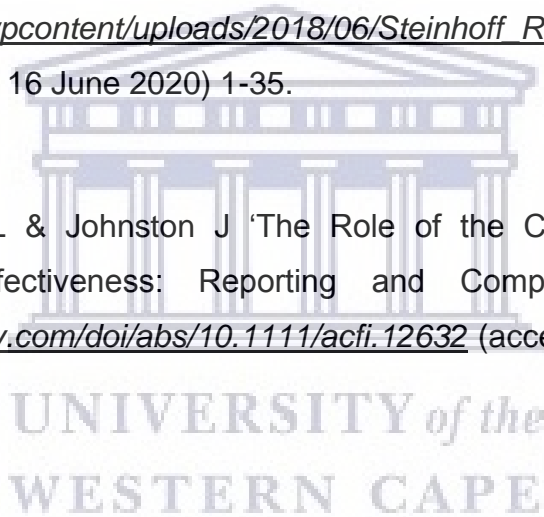
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