

The Corporate Report

Facilitating Business in South Africa

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The Corporate Report

Facilitating Business in South Africa

Editors

ME King (Editor-in-Chief)

A van Wyk

MD Kuper



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1st Floor, Sunclare Building

21 Dreyer Street

Claremont 7708, Cape Town

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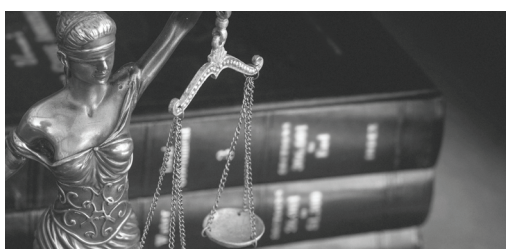
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The challenges facing company secretaries in South Africa today

Stephen Sadie, Joanne Matisonn and Sabrina Paxton

Chartered Secretaries Southern Africa (CSSA), which started in South Africa in 1909, has always advocated the important role of the company secretary. This was given great impetus with the first King Report in 1994 and has continued right up until the Report on Corporate Governance in South Africa, 2016 (King IV™). Mervyn King, the chairman of the King Committee, has on many public platforms spoken about the important role that company secretaries perform. The Companies Act also outlines the key roles of the company secretary.

Company secretaries in South Africa face numerous challenges. This article focuses on some of the key challenges facing company secretaries. Corporate governance has hogged the headlines in South Africa over the past few years. This has added extra pressure onto the already difficult role of the company secretary. It has also meant that there is further scrutiny on the company secretary. There are numerous challenges facing company secretaries and this article attempts to delve into the more prominent challenges.

South Africa has 375 listed companies on the JSE as at June 2018. This is insignificant compared to the great stock exchanges of the world such as London, New York, Sydney, Hong Kong and Singapore. Correspondingly, South Africa has far less company secretaries than other markets on a pro rata basis. In terms of the Companies Act 71 of 2008 (Companies Act), only

Chartered Secretaries Southern Africa (CSSA), which started in South Africa in 1909, has always advocated the important role of the company secretary. This was given great impetus with the first King Report in 1994 and has continued right up until the *Report on Corporate Governance in South Africa, 2016 (King IV™)*. Mervyn King, the chairman of the King Committee, has on many public platforms spoken about the important role that company secretaries perform. The Companies Act also outlines the key roles of the company secretary.

Adviser and confidant

An important part of a company secretary's role is to act as the board adviser and confidant. This is an evolving role as it takes time and numerous interactions to build up a trust relationship with board members. In order to build this trust relationship,

An important part of a company secretary's role is to act as the board adviser and confidant.

public companies and state-owned companies have to appoint a company secretary. However, many other entities such as unlisted companies and not-for-profits have also appointed company secretaries even though they are not required by law to have one.

it is incumbent on the company secretary to take the initiative in setting up regular meetings with the chairman of the board, the chairmen of the various board committees, the chief executive officer and chief financial officer. There is a natural tension between

Each director must feel confident that they can speak freely to the company secretary, knowing that the discussions will remain confidential and will not be used to advance someone else's agenda.



the executive and non-executive directors and any confidential information that the company secretary receives in these meetings must be kept confidential. Each director must feel confident that they can speak freely to the company secretary, knowing that the discussions will remain confidential and will not be used to advance someone else's agenda. This can be quite burdensome for a company secretary as there is no one else to share this information with. Accordingly, the company secretary must

reputational risk is also a useful means of educating board members.

The natural tension between executive directors and non-executive directors falls to the chairman to manage. However, if the company secretary becomes aware of anything untoward by the executive directors and reports this to the chairman, this could break the trust relationship with the executive directors with whom the company secretary has to work.

The natural tension between executive directors and non-executive directors falls to the chairman to manage.

devise ways of dealing with any internal tension arising from holding serious, complex confidential information. If the matter is of a serious magnitude, the company secretary should have the authority to seek advice from the company's attorneys at the cost of the company. However, in the normal course of business, being the corporate governance adviser should just entail understanding the priorities and issues that each board member has and devising ways to assist and improve the effective performance of the board that has the buy-in of all the directors. This comes with experience and maturity in the role.

Ethics

The first principles of King IV™ deal with the importance of ethical leadership. The reason for its prominence is that if the board does not lead the company ethically, then there is no basis for the company to flourish. We live in an age where sustainability is a significant objective of governance but unfortunately this is impeded in many cases by widespread fraud and unethical behaviour. The company secretary needs to champion the cause of good corporate governance.

There are several opportunities for the company secretary to ensure that ethical awareness remains at the forefront of the board's consciousness, such as ethics training, providing the board with articles about ethical issues, reminding the directors of their fiduciary duties and the consequences of failure to fulfil them. Using other companies as examples of corporate governance lapses and the corresponding

In the normal course of events, an ethical culture generally means ensuring that all the governance processes are in place and are complied with. The company secretary should also be alert to best practice developments, both locally and internationally, to implement ongoing improvements in the governance framework. The action items from an independent board evaluation process are often a good source of information to understand what issues require the board's attention and are an opportunity to improve the ethical climate of the board and the company, and to ensure transparency within the company.

The company secretary should play an instrumental role in ensuring that the annual board evaluation process is robust and reveals any underlying tensions and ethical breaches that need to be addressed. Unfortunately, power and greed can be powerful incentives. If a director or employee is determined to act unethically or fraudulently, the only action that the company secretary can take is to ensure that sanctions articulated in policies are strictly applied. The company secretary can play a role in ensuring that the policies provide for appropriate checks and balances to be put in place to, hopefully, reveal transgressions. The ongoing debacle of Steinhoff is unfortunately not an isolated incident of fraud being committed despite sign-off of the annual financial statements by the audit and risk committee, the board and the auditors.

A CEO may endeavour to request that the company secretary take a course of action or implement an instruction that is not indicative of good corporate

governance. This puts the company secretary in a difficult position and even though the company secretary reports to the chairman of the board, the chairman may not always offer protection. This could be based on the perceived value of a director against the perceived value of a company secretary.

As the custodian of corporate governance, the company secretary needs to demonstrate courage when it appears that the board or a board member wants to do something unethical. This can be a very difficult situation to navigate as the company secretary has to manage upwards and if the matter is serious, the company secretary can be victimised. Although we have whistleblowing legislation in place and the company secretary would follow the company's whistleblowing policy applicable to all employees, the actual implementation does not encourage whistleblowers to speak up. The nature of the company secretary's job may result in the company secretary being the only person who becomes privy to information that indicates possible fraud or unethical behaviour, particularly if the culprit is a board member. Whether the company secretary decides to speak out or not, is a decision that he or she will have to live with for the rest of his or her life. Whilst we are just emerging from an environment where it appeared that the villains were impervious to prosecution and consequent management, we are now entering a different era where there is more support for good corporate governance. We are hopeful that this will encourage whistleblowing when required, which leads to a more positive and fairer outcome. A decision made in an environment of impunity may prove to be very costly to a person's reputation in the new corporate governance environment.

There often appear to be ways in which the perpetrator can ascertain who the whistleblower is. Being a whistleblower can result in a company secretary losing his or her job and the incumbent would need to weigh up the merits of the case and the possible impact on his or her career, reputation and livelihood before deciding to become a whistleblower.

By continually striving to improve the ethics in a company, the company secretary can contribute

to developing and maintaining an ethical culture. However, if a board or an individual is going to perpetrate fraud or unethical behaviour, the board must have in place the maximum deterrents. This would entail ensuring that the policies that the board approves have stringent sanctions for contraventions, which must be strictly implemented without any bias.

Independent processes are key to providing the necessary checks and balances, such as ensuring that whistleblower reports are only sent to the company secretary and the chief executive officer and if the matter involves either one of them, it should be sent to the chairman of the board. These reports should also be tabled at the quarterly audit and risk committee meetings to act both as a deterrent to would-be fraudsters and as an oversight role of the ethical culture in the company. The larger the company, the more independence can be built into the monitoring process, which strengthens the governance framework.

One of the roles of the company secretary is to protect whistleblowers. A whistleblower is more likely to speak out if his or her job security and reputation are not at risk. Were it not for whistleblowers, we would not today be in a position to understand the full effect of state capture and how close South Africa came to going over the precipice. A recent case in South Africa involved the Johannesburg Roads Agency (JRA). A new board was appointed in March 2017, and not long after that Karen Mills, company secretary, raised concerns about governance in the JRA with the city's group governance function. Following this, Mills said that the board had then ordered her to speak only to the chairman of the audit committee in future. During the week of 7 August 2017, the JRA suspended Mills, following a protected disclosure, which Mills had made to General Shadrack Sibiya, the head of group forensic and investigative services at the City of Johannesburg. The suspension of Mills raises concerns about the freedom one has to make a protected disclosure without fear of being negatively targeted. Managing Director, Dr Sean Phillips, a respected engineer, also resigned, as did Mpho Kau, head of infrastructure development. Phillips complained about the chairman's interference in the procurement process. Mills is a longstanding company secretary and has held senior company secretarial roles, for example, at

Rand Mutual Assurance. Eventually the JRA agreed to a settlement with Mills.¹

Conflicts of interest are another key aspect of ethics. This is a key area for the company secretary to monitor and advise the board on how to address conflicts of interest, when such matters arise. The first step is to ensure the board has a robust conflicts of interest policy in place. In terms of the Companies Act, directors are obliged to provide the company secretary with a completed and signed declaration of

secretary should have a mentor to develop these critical skills.

Andrew Colman, professor of psychology, describes EQ (emotional quotient) as 'the capability of individuals to recognise their own emotions and those of others, discern between different feelings and label them appropriately, use emotional information to guide thinking and behaviour, and manage and/or adjust emotions to adapt to environments or achieve one's goal(s)'.²

Conflicts of interest are another key aspect of ethics.

interest form at least annually or whenever there are significant changes. They need to declare all financial, economic and other interests held by related parties.

For example, one could read an article in the newspaper one day and notice that a director of the company has flouted tender rules in another company and the matter is under enquiry. The company secretary should raise it with his or her board to address the matter. The director should be asked to provide an

Emotional intelligence entails a company secretary being attuned to the dynamics on the board: who is confident, who are likely to be potential allies when needing to bring a difficult issue to the attention of the board, who is a good sounding board to debate governance matters with and who is likely to assist in promoting new, improved governance policies and practices.

Company secretaries have an interesting role in that they engage with a large number of board and

Company secretaries have an interesting role in that they engage with a large number of board and committee members on a daily basis, many of whom tend to have dominant personalities.

explanation and the matter should be dealt with by the board. The board may need to take action to avoid reputational damage. The chairman needs to ensure that once a director has declared a conflict of interest on a particular agenda item, the director must recuse him or herself when it comes to that agenda item.

Emotional intelligence

Demonstrating emotional intelligence is closely aligned to ensuring that the company maintains an ethical approach in its decision making and all its interactions with stakeholders. This too comes with experience and maturity. Ideally, a company

committee members on a daily basis, many of whom tend to have dominant personalities. Accordingly, it is extremely important for company secretaries to learn how to manage a variety of different, and sometimes difficult, personalities in order to get the job done.

This is not to say that company secretaries can get by without possessing the requisite technical skills required to perform their job effectively but rather that often, important soft skills tend to be overlooked. Whereas interestingly, it is typically the soft skills that facilitate and expedite career growth: 'IQ gets you hired whereas EQ gets you promoted'.³

¹ Sabrina Paxton 'Editorial: whistleblowing – company secretaries are in the firing line' *CSSA Technical Newsletter 5* (August/September 2017).

² Seamus Gillen 'The importance of EQ in the boardroom', available at <<https://www.linkedin.com/pulse/importance-eq-boardrooms-seamus-gillen-ba-mba-fcis/?published=t20180220>> (accessed 28 July 2018).

³ Rod Charlton 'Emotional intelligence for company secretaries and governance professionals – learning to bring out the best in yourself and others', workshop in Johannesburg on 17 July 2018.

It is always easier to work with people with whom you have built a good relationship and the same rings true for the relationship between the chairman/board members and the company secretary. According to Charlton, one of the consistent findings that emerge from studies of high performing

is incredibly important in terms of bringing out the best of yourselves and others in the workplace. This is particularly important for company secretaries, who are often faced with the pressures of demanding schedules, strict deadlines and difficult board members.

People tend to prioritise tasks if the instruction is given to them by someone with whom they have a good relationship.

environments is that they differ from average or poor performing environments in terms of the quality of relationships. People tend to prioritise tasks if the instruction is given to them by someone with whom they have a good relationship.⁴ In order to ensure that the company secretarial department fulfils its mandate, which is a complex and critical one, a spirit of teamwork or *Ubuntu* is required. *Ubuntu* is a traditional African philosophy that ‘considers the success of the group above that of the individual’.⁵ Furthermore, the company secretary needs to work with many individuals always displaying the spirit of *Ubuntu*.

Charlton goes on to explain that the research shows that high performers are able to embrace criticism and negative feedback and use it to better themselves and yet almost everyone finds this difficult because of the emotions that it generates within us. Many people

So what can a company secretary do to ensure that they remain cool, calm and collected whilst others are panicking around them?

Charlton recommends practising breathing techniques and meditation regularly at home in order to learn how to calm your mind and manage your response when you find yourself in stressful situations at work. In addition, when one finds oneself in a stressful situation, it is useful to take a moment to consider your response in your mind before actually responding.

Charlton explains that whilst one cannot take responsibility for the emotional state of others, one can attempt to manage one’s own emotional state and how it affects one. Managing the emotional state of someone else may seem virtually impossible but it can be relatively easy if one thinks about how you

Managing the emotional state of someone else may seem virtually impossible but it can be relatively easy if one thinks about how you would like to be treated in the workplace.

become defensive and reactive and as a result, they lose the opportunity to propel themselves forward to becoming a better performer.

The higher our level of arousal in stressful situations, the greater the strength of the electrical current in our brains, which impedes clear thought processes. Accordingly, learning to balance emotions

would like to be treated in the workplace. Company secretaries of larger companies, who lead a team of other company secretaries, should also consider the environment and morale that they would like to achieve in their team. Charlton explains that it is advisable to inform your team that they will not be disciplined for making genuine mistakes as long as they communicate the mistake to their direct superior

⁴ Charlton, *ibid*.

⁵ Stephen Lundin ‘Ubuntu – “I am what I am because of who we all are”’, available at <<https://motivationinspirationandlife.wordpress.com/2012/06/02/ubuntu-i-am-what-i-am-because-of-who-we-all-are/>> (accessed 16 July 2018).



We live in an age where sustainability is a significant objective of governance but unfortunately this is impeded in many cases by widespread fraud and unethical behaviour.

as soon as they become aware of it. The reason for this being that if you create the impression that you are intolerant of mistakes, this will only result in mistakes being brushed under the carpet, where they cannot be managed and this can lead to dire consequences.

Furthermore, as a team leader, you may think that you should not show your team any signs of vulnerability in the workplace. However on the contrary, according to Charlton, a degree of vulnerability can actually be very beneficial in creating a sense of trust and bringing the team closer together.

Having a high level of EQ is directly linked to high performance in the workplace. Fortunately, one can learn to increase one's EQ by assessing one's emotional state regularly and practising techniques that assist in managing emotions in such a way that enables one to bring out the best in one's self and others.

Many board members have large egos and the company secretary has to always be diplomatic, particularly in difficult situations. The company secretary needs to take his or her own ego out of the situation and aim for win-win outcomes. This entails the company secretary developing a high level of self-awareness.

A company secretary should always be authentic and adhere to his or her principles, which in the long run will earn their colleagues' respect. Respect is earned rather than demanded.

Apologising doesn't always mean that you are wrong but it shows that you value the relationship more than your ego and that the focus is primarily on acting in the best interests of the company.

It takes strength and courage to apologise, which shows humility. Apologising doesn't always mean that you are wrong but it shows that you value the relationship more than your ego and that the focus is primarily on acting in the best interests of the company.

The company secretary can become a football with different board members, who have their own

agendas. For example, board members sometimes endeavor to change minutes to reflect matters that didn't happen in the meeting or bias in a decision to advance their own agendas. At times like this, the company secretary has to demonstrate both courage and emotional intelligence to ensure that the minutes remain a true reflection of the proceedings.

Stakeholder relationships

A company should establish an ongoing stakeholder engagement programme. The starting point is for the company secretary to draft a stakeholder engagement policy, which identifies the material stakeholders and the desired outcomes of engagement interactions. Considering the number of corporate failures that attract media attention, and there may be many that do not capture the media's attention, the company secretary can play a role in ensuring that regular engagement is in fact taking place with material stakeholders, their legitimate needs and expectations are being addressed and the outcome thereof is reported to stakeholders.

The annual general meeting is a good opportunity to encourage shareholders to engage with the company and for the company to articulate its achievements and future strategic and operational direction.

It is prudent for the chief executive officer to engage with key shareholders on the proposed resolutions to be put to shareholders at the annual general

meeting before the notice of annual general meeting is distributed to shareholders. Remuneration is a hotly contested issue which seems to be a major area of controversy at AGMs. A recent article⁶ identifies the voting patterns of major institutional shareholders, noting the opposition to companies' remuneration policy and implementation report between 1 September 2017 and 6 May 2018. Some of

⁶ Inge Lamprecht 'Executive remuneration: pressure mounts to introduce "clawback" provisions' *Moneyweb* (accessed 13 July 2018).

the highest opposition votes were from Allan Gray Proprietary Limited which voted 28,6% of the time against a company's remuneration policy and the Public Investment Corporation that voted 39,1% of the time against the remuneration implementation report. Timeous engagement with key shareholders should provide the company with an opportunity to understand shareholders' concerns and address them. The votes at an annual general meeting should not be a surprise to the issuer. Of course, it is possible that shareholders may not apply their minds to the resolutions until just before the deadline for submitting their proxies but this should be the exception rather than the norm.

Preparation for the annual general meeting and other general meetings is a key area where the company secretary can add value. He or she should be well

7.7 million votes, which arrived at the last minute in favour of ordinary resolution 7.1. Van Zyl was having none of it and relegated the votes to the abstain bin. With hindsight van Zyl 'may have thought how much better things would now be if the "enforcers" at Steinhoff, from whose board he recently resigned had been such sticklers'.⁷

Reporting

Apart from ensuring that statutory reporting is complied with, the company secretary can play a key role in the quality of the integrated report. A key shortfall is that many companies outsource the writing of the integrated report to ensure it meets integrated reporting standards. However, integrated thinking and decision making should start at the strategic planning stage and be carried through to reporting back to the board on the progress of the

It is mandatory for public companies in South Africa to have non-binding votes on remuneration.

prepared to address any technical issues and ensure a well-organised function. The company secretary needs to ensure that the chairman of the board, the chairmen of the various committees, particularly the remuneration committee; and audit and risk committee have applied their minds to possible questions that could arise and have already considered suitable replies.

It is mandatory for public companies in South Africa to have non-binding votes on remuneration. In the event that either the remuneration policy or the implementation report, or both are rejected by shareholders exercising 25% or more of the votes, the issuer must invite dissenting shareholders to engage on these issues. The chairman of the remuneration committee needs to report back at the following AGM, on the outcome of the engagement.

The Clearwater case has decided that proxies can be accepted until the last minute in an AGM. Full marks go to Sanlam's company secretary, who tried to persuade Johan van Zyl, Sanlam's chairman to accept

implementation of strategic objectives and the impact on the six capitals, as articulated in the International Integrated Reporting Framework. This should then form the basis for the content of the integrated report. The company secretary should endeavor to ensure that this becomes a key focus for the next phase of integrated reporting. The company secretary can play a key role in coordinating the team responsible for the integrated report. The company secretary, by virtue of their position in board meetings, has privileged insight into the numerous aspects that will eventually culminate in the final integrated report. Though it can seem like a daunting task for any company secretary, guidance, assistance and general networking can be leveraged through organisations such as CSSA, which has been promoting annual reporting through its awards for 63 years, or through the Integrated Reporting Committee of South Africa.

Communication

The company secretary is a pivotal link in the communication between the board and management, often using the executive committee as a conduit.

⁷ *Business Day* 'Sanlam AGM A lively show of muscle flexing', available at <<https://www.pressreader.com/south-africa/business-day/20180608/281891593970828>> (accessed 31 July 2018).

The company secretary can maximise the executive committee meetings to ensure that the board and all committees' action items and preparation for upcoming board and committee meetings are thoroughly addressed at this forum. Critically analysing the content of the board papers provides the company secretary with an opportunity to assist in ensuring that the board receives the right level of information, both qualitatively and quantitatively, to ensure the efficient, effective functioning of board and committee meetings.

Understanding the company's culture and values will assist the company secretary in drafting the most appropriate policies, board charter and committees' terms of reference. For example, it would not serve the company well to draft a board charter that requires

secretary can act more easily with courage in advancing the benefits of good corporate governance.

Ramaphosa has argued that boards should not be involved in procurement. In SOCs, board tender committees were established, when the companies were corporatised in the late 1990s as set out in their memoranda of incorporation. This is where much of the patronage and control over tenders happened.⁸ The Gauteng provincial government has embarked on a process of open and transparent tenders. This has dramatically reduced the number of court challenges. It is true that sunlight is often the best disinfectant.

Being a company secretary in an SOC means that there are a range of additional, unique problems

The policies and terms of reference must at all times comply with the law and preferably more than that, but they must be realistic and capable of implementation.

significant resources if the company secretary has no assistance and the board is more comfortable with a minimalistic governance regime. The policies and terms of reference must at all times comply with the law and preferably more than that, but they must be realistic and capable of implementation.

Public sector

President Cyril Ramaphosa has painted a picture of a new dawn, a clean government and improving the quality of life of all South Africans. This is the dream of the rainbow nation. A company is just a microcosm of the problems reflected in the macro economy. Business needs to embrace the President's vision and the company secretary can contribute to the fulfilment of this dream, making the role of a company secretary very rewarding. Government has already started to demonstrate its commitment to good corporate governance by changing the boards of some of the larger state-owned companies such as Eskom, SABC, Transnet and Denel. In this more supportive environment, the company

to deal with. Given the number of corporate governance lapses in SOCs in the past few years, a number of company secretaries would have faced very difficult challenges.

Theresa Geldenhuys, the former SABC company secretary, seems not to have handled these challenges very well. In April 2018 SABC executives refused to appear before the parliamentary portfolio committee and spent R680 000 on travel and hotel expenses. Geldenhuys spent R100 000 while current company secretary Lindiwe Bayi spent R34 000.⁹ The SABC delegation walked out en masse of a parliamentary ad hoc enquiry on 7 December 2016. Later on when proceedings resumed, the committee queried why Geldenhuys had participated in a walkout. Geldenhuys replied that she was supporting the chairman, James Aguma. The ad hoc committee queried why at the request of minister Faith Muthambi, she wrote a report on the behaviour of board members, including Krish Naidoo. The committee accused her of bypassing the

⁸ Carol Paton & Hilary Joffe 'Ramaphosa's move to cut boards out of tender loop will stem corruption', available at <<https://www.businesslive.co.za/bd/national/2018-02-19-how-ramaphosas-changes-to-acquisition-process-will-help-curtail-corruption/>> (accessed 27 July 2018).

⁹ Timeslive 'SABC spent R680 000 for bosses to hang out in Cape Town', available at <<https://www.timeslive.co.za/news/south-africa/2018-04-25-sabc-spent-r680000-for-bosses-to-hang-out-in-cape-town/>> (accessed 29 July 2018).

board in terms of the Companies Act and reporting directly to the minister.¹⁰

Suzanne Daniels had a meteoric rise at Eskom. She held the position of general manager in the office of the then chairman, Ben Ngubane. Between October 2015 and June 2017, she took up the role of group company secretary and acting head of legal and compliance earning a salary of approximately R2,7 million. Eskom charged her with misconduct and negligence on a number of issues. She was intricately involved in several dubious payments, inter alia, the R1,6 billion McKinsey/Trillian payment and the R659 million upfront payment to Tegeta. She also arranged R800 000 in legal fees for Ben Ngubane for a matter that related to SABC.¹¹ She was eventually dismissed from Eskom on 20 July 2018.¹² Although

some cases, wears the compliance and risk hats where the company does not have a separate department for each of these critical areas. This is often done to save on costs. Company secretarial, risk and compliance is sometimes treated as a combined area and delegated to one individual – usually the company secretary. This may be challenging for the company secretary in that these three fields require dedication and proper time management to navigate thoroughly and to prevent any damages being suffered by the company. These three areas of operation are challenging in their own right and require the necessary skill, character and knowledge to successfully discharge the duties associated therewith. Risk is a significant area and needs to be properly dealt with if a company is to avoid being placed into liquidation or suffering irreparable reputational damage.

Chartered Secretaries Southern Africa is the first division of its international body to develop a public sector governance module.

some had regarded her as a whistleblower when she appeared in parliament in 2017, Advocate Nazeer Cassim, who chaired her disciplinary hearing, still found her guilty of all the charges. He indicated that most of what she revealed in parliament was already in the Public Protector's report and also already in the public domain.¹³ Eskom has undergone a major cleanup process and a number of senior executives, who were involved in state capture, were either fired or resigned before they could be fired.

Chartered Secretaries Southern Africa is the first division of its international body to develop a public sector governance module as its small contribution to building a layer of governance professionals in the public sector.

Multiple roles

In some South African companies, a professional may be given a number of roles. The company secretary, in

Some companies have also combined the legal counsel and company secretarial role. Challenges may arise in that legal counsel requires a particular mindset and is not automatically a governance professional. Legal counsel is not always in a position to advise the board on governance matters. Similarly, company secretaries cannot just take on the role of legal counsel as this is a highly specialised role.

Compliance

One of the key tasks of the company secretary is to ensure that all companies, irrespective of their size, comply with relevant legislation, policies and procedures. In addition to acts of legislation, compliance with the King IV™ Report is of significant importance to ensure that a company functions ethically and efficiently. Failure to comply with legislation and governance practices may lead to financial and reputational damage – which could take years to rectify.

¹⁰ Chantall Presence 'Gloves off as former company secretary testifies at SABC enquiry', available at <<https://www.iol.co.za/news/gloves-off-as-former-company-secretary-testifies-at-sabc-20161213>> (accessed 19 July 2018).

¹¹ Jessica Bezuidenhout 'Eskom drops bombshell in "whistle-blower" Suzanne Daniels' hearing', available at <<https://www.dailymaverick.co.za/article/2018-05-15-eskom-drops-email-bombshell-in-whistle-blower-suzanne-daniels-hearing/>> (accessed 23 July 2018).

¹² Jessica Bezuidenhout 'Victim, villain or pawn: Why Eskom "whistle-blower" Suzanne Daniels was fired' available at <<https://www.dailymaverick.co.za/article/2018-07-23-victim-villain-or-pawn-why-eskom-whistle-blower-suzanne-daniels-was-fired/>> (accessed 23 July 2018).

¹³ Chris Barron 'Q&A' *Sunday Times* (Johannesburg 29 July 2018).

South Africa, like many other jurisdictions, makes provision for different types of companies each with their own respective legislative requirements. The Companies Act details the procedural requirements of the various companies and the penalties applicable in the case of default. King IV™ applies to all types and sizes of companies, and contains sector supplements to ensure that the principles are relevant in the context of all businesses operating in South Africa. King IV™ has shifted from a tick-box approach to an outcomes-based approach, and requires that companies apply and explain their adherence to governance principles.

King IV™ has shifted from a tick-box approach to an outcomes-based approach, and requires that companies apply and explain their adherence to governance principles.

Several industries in South Africa have sector specific legislative requirements. Certain Acts are only applicable to specific sectors or companies. The key sectors which operate in South Africa are finance, real estate and business services, general government services, as well as trade, catering and accommodation, and manufacturing.¹⁴ Company secretaries should have a good understanding of the legislation applicable to the specific industry within which their company operates.

The company secretary is accountable to the board, and the duties listed in the Companies Act are broadly compliance functions. Compliance is not limited to legislative compliance and encompasses a much broader spectrum of the company secretary role, including duties of administrative compliance and those of governance compliance. Administrative compliance includes the timeous lodgment of a number of documents with regulatory bodies such as the Companies and Intellectual Property Commission (CIPC). Governance compliance in terms of King IV™ requires companies to function in a certain manner and to carry out their daily tasks in

a way that will ensure they are seen as ‘good corporate citizens.’¹⁵ Though King IV™ is not law, many courts have made reference to King IV™ in their judgements, and in determining whether the board discharged its functions adequately and with the necessary skill, care and diligence. The more King IV™ is referred to in court cases, the greater potential for its principles to form part of precedents. The Johannesburg Stock Exchange (JSE) Ltd has made compliance with King IV™ mandatory for all listed public companies by including the provisions of King IV™ in the JSE Ltd’s Listings Requirements. The Companies Act makes it mandatory for all public companies and state-owned

companies to appoint a company secretary.¹⁶ The company secretary of a public company would thus need to ensure compliance with the JSE Ltd listings and debt requirements, as applicable, and thereby ensure compliance with King IV™ principles. The Companies Act requires companies above a certain threshold public interest score to appoint a social and ethics committee. The social and ethics committee is responsible for monitoring ethical issues and whistleblowing policies within the company as well as implementing training on ethics.

Because this is a relatively new committee, directors are not fully aware of their responsibilities encapsulated under the requirement for mandatory social and ethics committees. The company secretary can play a proactive role in ensuring that all corporate social investment initiatives tie in with the company’s strategies and ensure that there are meaningful outcomes for the company and its key stakeholders. For example, Woolworths has strong programmes to encourage small black farming communities, which then become integrated into their supply chain.

¹⁴ Brand South Africa ‘South Africa’s economy: key sectors, 2014’, available at <https://www.brandsouthafrica.com/investments-immigration/economynews/south-africa-economy-key-sectors> (accessed 16 July 2018).

¹⁵ King IV Report on Corporate Governance in South Africa, 2016 (King IV™).

¹⁶ Section 86(1).



A key issue for companies is diversity.

Although it is called a social and ethics committee, a review of Regulation 43 to the Companies Act, indicates that all the duties of the social and ethics committee relate to the social aspects and not the ethical aspects. The company secretary should draw this to the board's attention when they set the terms of reference of the committee to ensure that it can play a key role in having oversight of the ethical culture and monitoring ethical transgressions.

Another key issue for companies is diversity. Public companies must develop a policy on the promotion

BEE Commission.¹⁹ This announcement must also be uploaded on the issuer's website.

The company secretary needs to ensure that a gender and racial diversity discussion is placed on the agenda at board meetings in order to make this topic relevant and subject to proper implementation.

The JSE Ltd Listings Requirements, in addition to the Companies Act, pose an additional compliance arm for the company secretary of a public company. The JSE Ltd has regulatory authority over the company

The company secretary needs to ensure that a gender and racial diversity discussion is placed on the agenda at board meetings in order to make this topic relevant and subject to proper implementation.

of racial and gender diversity at board level, and these policies must be disclosed in the company's integrated report. This remains a challenge for companies as each company will have its own requirements regarding the requisite skill and knowledge required at board level. Local statistics indicate that less than 20% of directors are female.¹⁷ Board directors with five years or less service are much more likely to say that racial diversity is important than board directors with service of more than ten years (84% as compared to 65%).¹⁸

Public companies must develop a black economic empowerment (BEE) compliance report in accordance with broad-based BEE legislation, and provide the report to the BEE Commission. The amended Listings Requirements state that the issuer must make a SENS announcement as to the availability of the report, unless they have been granted an exemption by the

secretary.²⁰ Penalties for non-compliance with JSE Ltd Listings Requirements include a fine; disqualification of an issuer's director/s from holding office and suspension of an issuer's certificate.²¹ It is thus vital for the company secretary to ensure compliance to avoid bringing the company and its directors into disrepute. An example of a failure by the company secretary to comply with the JSE Ltd Listings Requirements can be found in the case of Sagarmatha, which failed to ensure that their financial statements were filed at the CIPC, resulting in the JSE Ltd refusing their listing.²²

Governance of risk

Risk and governance go hand in hand. Proper governance of risk within an entity is critical to its long-term success and sustainability. Principle 11 of King IV™ states that 'the governing body should govern risk in a way that supports the organisation

¹⁷ Nadia Mans-Kemp & Suzette Viviers 'Diversity makes for a dynamic workplace', available at <<https://www.businesslive.co.za/bd/opinion/2018-03-06-diversity-makes-for-a-dynamic-workplace/>> (accessed 20 July 2018).

¹⁸ PWC 'The governance divide boards and investors in a shifting world, PwC's Annual Corporate Directors Survey', available at <<https://www.pwc.com/us/en/governance-insights-center/annual-corporate-directors-survey/assets/pwc-2017-annual-corporate--directors--survey.pdf>> (accessed 20 July 2018).

¹⁹ Webber Wentzel 'Amendments to the JSE Listings Requirements in relation to corporate governance', available at <<http://www.webberwentzel.com/www/content/en/alignment-of-the-listings-requirements>> (accessed 16 July 2018).

²⁰ JSE 'Understanding JSE Investigations and Imposition of Censures', available at <<https://www.jse.co.za/content/JSEEducationItems/CensuresBrochure.pdf>> (accessed 17 July 2018).

²¹ Ibid.

²² Accounting Academy 'Steinhoff: Where was the company secretary?', available at <<https://accountingacademy.co.za/news/read/steinhoff-where-was-the-company-secretary>> (accessed 17 July 2018).

in setting and achieving its strategic objectives'. Principle 10 of King IV™ provides that 'the governing body should ensure that the appointment of, and delegation to, management contribute to role clarity and the effective exercise of authority and responsibilities'. Each principle in King IV™ contains certain recommended practices for an entity to achieve the said principle. Under the recommended practices of principle 10, a company is not obliged to appoint a company secretary (by law) but, 'should as a matter of leading practice, consider appointing a company secretary or other professional, as is appropriate for the organisation, to provide professional corporate governance services to the governing body'. Risk governance would fall under 'professional corporate governance services', and though the board is ultimately responsible for risk management, the company secretary would play a key role in advising the board as to what is required in terms of their responsibilities and duties pertaining to risk management.

Company secretaries in South Africa need to have knowledge of risk management so that they may be

many other contributing factors, and the combination of its audit and risk committee, the size and complexity of the company was such that it should not have been a combined committee.²³ The governance failures, which took place within Steinhoff were immense, and questions have been raised as to the function of key role players such as the audit and risk committee, the board, and the external and internal auditors. The role of the company secretary in Steinhoff's lack of proper corporate governance structures and procedures did not escape scrutiny.²⁴

Artificial intelligence

With the rapid developments being made in artificial intelligence (AI), and many companies implementing AI in their workplace in various manners, the question on the minds of company secretaries in South Africa is what impact AI may have on their future role. The company secretary's role comprises both administrative and technical aspects and has evolved exponentially in the last few years. As the 'trusted adviser' to the board, the company secretary is no longer an administrative clerk but rather the trusted adviser in areas of corporate governance,

Research has shown that AI will have the ability to double the growth rate of the South African economy by 2035.

in a position to advise the board comprehensively, and be alerted when risk is not being managed efficiently. A failure to govern risk effectively within an organisation may lead to catastrophic consequences and may tarnish a company's reputation, possibly even leading to its demise. In South Africa, where fraud and corruption are rife, it is imperative that risk management is given the necessary attention by the board. King IV™ cautions against the combination of an audit and risk committee unless it would have the necessary time to properly analyse the risks of the entity. If we look at the recent Steinhoff saga, amongst

regulations and the law within the company. The responsibilities of the company secretary are diverse and are provided to the board, the company and relevant stakeholders.

There is no doubt that AI will impact the South African workforce. Research has shown that AI will have the ability to double the growth rate of the South African economy by 2035.²⁵ Though AI will likely change the way in which a company operates, with certain low-skilled jobs becoming redundant, AI will also open the door

²³ The Conversation 'Did Steinhoff's board structure contribute to the scandal?', available at <<http://theconversation.com/did-steinhoffs-board-structure-contribute-to-the-scandal-89704>> (accessed 17 July 2018).

²⁴ Accounting Academy 'Steinhoff: Where was the company secretary?', available at <<https://accountingacademy.co.za/news/read/steinhoff-where-was-the-company-secretary>> (accessed 17 July 2018).

²⁵ Rob Jardine 'How artificial intelligence will impact the South African workforce', available at <<http://www.itnewsafrika.com/2018/03/how-artificial-intelligence-will-impact-the-south-african-workforce/>> (accessed 17 July 2018).

for the creation of new jobs which are currently beyond human perception.²⁶

There are functions within the company secretary's role, which could be automated. These include:

- the lodgment of documents with regulatory bodies such as the CIPC
- the filing and distribution of annual financial statements
- the distribution of board packs
- the distribution of minutes of meetings
- drafting repetitive and standard clauses of contracts
- reviewing contracts, policies and manuals to identify 'hot spots', which require further attention.

Drafting minutes of meetings is a key function of the company secretary. Taking minutes is a specialised skill and requires interpretation of complex discussions, body language, nuances and the application of the company's strategy and objectives. Deciding what to include in the minutes of a meeting is not so simple. Detailed insight into the company's values, mission and strategy is required to capture the ethos and the underlying tone of meetings, in addition to the factual statements and instructions.

The company secretary should form a special bond with the chairman and the CEO of the company, and learn how to navigate these sometimes complex and critical relationships.

At present, robots may not have the capacity to take a concise set of minutes. However, robots go through machine learning and may at some point in the future be able to take a reasonable set of minutes. However, as Matcher points out, it would take thousands of hours to train a robot to take minutes, which is currently not feasible.²⁷

The company secretary should form a special bond with the chairman and the CEO of the company, and

learn how to navigate these sometimes complex and critical relationships. The chairman and the CEO look to the company secretary as their confidant and right-hand person on a variety of sensitive company issues, in addition to advising them on legal and governance matters – it is doubtful that a robot would be able to replace this human interaction between these key leaders within a company.

As the trusted adviser, the company secretary needs to marry logic with reason and judgement, and though a robot would be able to capture all legal and governance provisions applicable to a company, the application thereof in light of the company's strategic objectives is not so clear-cut. Ethical considerations and emotional intelligence are two key human traits, which are critical in successfully applying factual information. Osborne argues that:

Machines lack common sense and cannot always pick up on social and emotional cues, something that is at the core of the company secretarial role. Emotional intelligence (EQ) is one area where humans still pip machines to the post and, fortunately for the profession, EQ is, and is likely to remain, one of the prerequisites for performing the role well.

*Commercial and ethical decisions still rest with humans rather than computers, as does the management of relationships and boardroom dynamics, and the advisory and problem-solving role that the company secretary enjoys in the boardroom is unlikely to be entrusted to a robot just yet.*²⁸

The emotional intelligence required in the role of the company secretary is vitally important. As the liaison between the board and management of the company,

²⁶ Rob Jardine 'How artificial intelligence will impact the South African workforce', available at <<http://www.itnewsafrika.com/2018/03/how-artificial-intelligence-will-impact-the-south-african-workforce/>> (accessed 17 July 2018).

²⁷ James Matcher, EY Intelligent Automation Leader Africa interview with Stephen Sadie on 25 July 2018.

²⁸ Simon Osborne 'Governance will endure the rise of the machines', available at <<https://www.icsa.org.uk/knowledge/governance-and-compliance/indepth/comment/simon-osborne/company-secretary-ai-machine-learning-automation>> (accessed 17 July 2018).

and managing stakeholder relations, the company secretary needs to possess empathy, logic, reason, compassion, ethical values and subjective judgement. It is doubtful that a robot would be in a position to display these human characteristics in the foreseeable future though it could alleviate the company secretary of many of his or her administrative and repetitive tasks.

Company secretaries would be well advised to continue upskilling themselves in the face of this onward march by AI.

Company secretaries would be well advised to continue upskilling themselves in the face of this onward march by AI. We don't know how quickly technology is going to advance but it is very clear that it will. Time periods are changing and developments are taking place exponentially. At the very least, company secretaries should understand the language of AI, robotics and machine learning so as to be able to be early adopters of technological changes that are on the horizon.

Professional body

The company secretary profession is changing rapidly. Professions generally need a professional body to grow the profession. Professional bodies set professional standards and entry requirements for their members. They also play an important role in disciplining errant members and protecting the public. Chartered Secretaries Southern Africa has, since its early days in 1909, been the professional body for company secretaries. In the last 30 years there has been a resurgence of interest in corporate governance, mostly due to numerous companies collapsing and the role that the various King reports have played. Chartered Secretaries Southern Africa helps to educate company secretaries on what is required of them. It is part of an international body, the Institute of Chartered Secretaries and Administrators (ICSA), which allows it to learn from and contribute to best practice of company secretaries and governance professionals globally. Chartered Secretaries Southern Africa organises continuous professional development for its members so that they can stay abreast of the latest developments in the profession. Recently CSSA has

created a second designation, chartered governance professional, for those members, who do not want to be company secretaries but may still want to be active in the governance arena such as legal counsel, risk managers, compliance officers and so on.

All members of CSSA need to adhere to its code of ethics, and all unethical behaviour on the part of

any member is dealt with efficiently via its relevant investigations and disciplinary committees.

Members are encouraged to display professionalism and good corporate governance practices in all they do, and to lean on the institute and other members for support and encouragement in this challenging environment.

Conclusion

Though company secretaries in South Africa face a multitude of challenges, these should be viewed as opportunities: opportunities to bring about a new dawn in the corporate governance landscape by motivating an ethical corporate culture; opportunities to be seen as role models of the company by leading their teams by example through efficient communication and professionalism; opportunities to set good corporate governance practices into motion by advising their boards on the correct procedures to be followed and by speaking out when irregularities are evident; opportunities to be courageous and confident in their daily work lives by staying abreast of all compliance functions and by maintaining good relations within the company and with external stakeholders; and opportunities to be the mouthpiece of the company when voices need to be heard.

There will inevitably be times when the company secretary will, for example, as the confidant to the board, be faced with difficult situations. In these instances we encourage company secretaries to evaluate the impact of remaining silent and the benefit of speaking out when required, whilst always

acting ethically and within the bounds of the law. We also encourage all company secretaries to belong to a professional body such as CSSA, which will provide them with a platform to network, to continually learn and to seek advice on a multitude of issues. In the final analysis, we can only guarantee our

own individual ethical and professional behaviour, and hope that this new dawn of transparency and ethical conduct will spread across all industries and professions. The company secretary profession remains an exciting and rewarding profession for those looking for a fulfilling career.

Stephen Sadie has been the CEO of Chartered Secretaries Southern Africa (CSSA) since January 2009. Stephen is a member of the King Committee and also serves on the Council of the global Institute of Chartered Secretaries and Administrators (ICSA). He was Secretary of the Corporate Secretaries International Association (CSIA) from 2010–2012.



Stephen has held a number of senior positions in the education sector. He was Director: Strategic Support at the South African Qualifications Authority. He was also Director: Research and School Improvement at the Matthew Goniwe School of Leadership and Governance, which was responsible for training all 2000 school governing bodies in Gauteng. Prior to that, Stephen was Chief Education Specialist: Curriculum Delivery and Support at the Johannesburg East District of the Gauteng Department of Education, which was responsible for 120 schools.

Stephen holds MBA, M.Ed, H.DipEd (PG) and BA degrees from Wits University and a BA (Hons) from UCT. He has presented a number of papers on corporate governance and education at conferences.

Author

Sabrina Paxton is a qualified attorney and has over seven years' experience in both the private and public legal sectors, having worked for KR Inc as Head of Department, and as Legal Manager in the company secretarial department of a public company, Business Partners Ltd. Sabrina has worked as an independent legal consultant in the field of corporate commercial law. She has an LLB (cum laude) and an LLM.



Sabrina is currently the technical adviser at Chartered Secretaries Southern Africa (CSSA), and has broadened her legal expertise to include corporate governance experience. She is a judge of the JSE/CSSA Integrated Reporting Awards, and has written articles for CSSA publications – boardroom, technical newsletter and eZine.

Sabrina's skillset includes legal drafting, and advisory skills in both the legal and corporate governance fields.

Author

Joanne Matisonn has worked as a group company secretary in a listed environment for over 20 years, providing the full range of company secretarial services and governance consulting. Joanne is currently Company Secretary of Accelerate Property Fund Ltd and also provides company secretarial services and governance consulting through Matisonn Governance. She holds the following qualifications: FCIS, H.Dip.Co Law (Wits), Master's degree in Applied Ethics for Professionals (Wits).



Joanne served on the task force for the chapter, Board and Directors, for both the King II and King III Reports. Having completed her CSSA in 1994, she became a Fellow in 2004 and served as a director on the CSSA board from 2004–2008. She is currently a member of CSSA's Technical Committee. Joanne is also a Fellow of the Institute of Directors and served on their Corporate Governance Forum for approximately six years.

Having completed her Master's degree in Applied Ethics, Joanne is passionate about raising standards of corporate governance and ensuring that businesses not only have the right governance documentation in place but also implement the right practices, because it is the right thing to do. She has also served as a principal officer, trustee and chairman of retirement funds and a trustee on a medical aid board for an extensive period.

Joanne is a judge of the JSE/CSSA Integrated Reporting awards. She has written articles for numerous publications including *Global Governance Voice*, *Without Prejudice*, *Business Brief*, *Directorship* and *Boardroom* and has been interviewed on a number of *Beyond Governance* shows on ChaiFM.

Author

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