

THE ROLE OF THE  
COMPANY SECRETARIES  
CAN PLAY IN PROTECTING  
WHISTLEBLOWERS

*CYNTHIA STIMPEL*

DATE: 12 OCT 2023

VENUE: CEDARWOODS  
OF SANDTON

# CONTENTS

---

- WHAT IS CORPORATE GOVERNANCE
- CORPORATE GOVERNANCE PILLARS
- FIDUCIARY DUTIES OF DIRECTORS
- OVERVIEW OF WHISTLE BLOWING
- LEGISLATION IN PLACE FOR WHISTLEBLOWERS
- INTERNATIONAL LEGISLATION
- REPERCUSSIONS FOR WHISTLEBLOWERS
- STATE CAPTURE RECOMMENDATIONS
- SUGGESTED SOLUTIONS AND RECOMMENDATIONS
- CONCLUSION

# COMPANY SECRETARIES AS REFEREES

---



## OPENING QUOTE

---

*“When we are no longer able to change a situation –  
we are challenged to change ourselves.”*

*(Viktor Frankl)*

# WHAT IS CORPORATE GOVERNANCE

---

- Corporate governance is the system, by which companies are directed and controlled.
- Boards of directors are responsible for the governance of their companies.
- The shareholders' role in governance is to appoint the directors and the auditors and
- to satisfy themselves that an appropriate governance structure is in place.
- The Company Secretary's role is the “gatekeeper” of governance in a Board

## GOVERNANCE (PROF MERVYN KING)

---

- Good Governance will not result from a mindless qualitative compliance with a governance code or rules.
- Good governance involves fairness, accountability, responsibility and transparency on a **foundation of intellectual honesty**.
- One has to apply one's mind in an unfettered and unbiased manner in making a decision that is in the **best interests of the company**.

## GOVERNANCE – DIRECTOR AND CO-SEC

---

- A good director identifies where his company is situated in the context of the local, national and international community.
- He will ask himself how the company relates to these communities and where it fits in when it comes to the laws, regulations of the communities

# ROLE OF COMPANY SECRETARY

---

## ➤ Statutory Responsibilities:

- complies with the law, maintains certain statutory registers, makes filings with the Registrar of Companies – CIPC –AFS etc.

## ➤ Corporate Governance

- Organisational Governance / Supporting the Chairperson
- Board and Committee process / Board Development
- Communication with Stakeholders / Disclosure and Reporting
- Increased burden of regulation



## ROLE OF COMPANY SECRETARY

---

- Increased focus on Governance
- Role has evolved over the years
- Seen as the guardian of the company's compliance with legislative requirements and best practice

# GOVERNANCE CONCERNS – 5 DEADLY SINS

---

➤ PRIDE

➤ ARROGANCE

➤ GREED

➤ SLOTH

➤ FEAR

# FIDUCIARY DUTIES OF DIRECTORS & CO-SEC

---

- GOOD FAITH – INTELLECTUAL HONESTY, NO CONFLICT OF INTEREST
- CARE – BEST INTEREST OF THE COMPANY
- SKILL – YOUR PRACTICED ABILITY APPLIED IN THE ORGANISATION
- DILIGENCE – STUDY THE FACTS AND UNDERSTAND THE ISSUE,S DO OWN RESEARCH

# SAA SAGA

---



# SAA BOARD ROLES AND RESPONSIBILITIES – DUTY BOUND BY LEGISLATION

---

- The South African Airways Act 5 of 2007: Schedule 2 Company
- The Companies Act 71 of 2008
- The King Code of Governance for South Africa (“King VI”)
- The International Air Transport Associations (IATA)
- Public Finance Management Act (PFMA) of 1999, as amended
- National Treasury Regulations
- SAA’s Internal Policies – Supply Change Management Policy, Financial Risk Policy, DOA etc.

# SAA BOARD COMMITTEES AND SUB-COMMITTEES

---

- CEO AND EXECUTIVE – EXCO
- AUDIT, FINANCE AND RISK COMMITTEE - ARC
- LEGAL, COMPLIANCE AND RISK COMMITTEES -
- FINANCIAL RISK SUB – COMMITTEE
- REMUNERATION COMMITTEE
- NO SOCIAL AND ETHICS COMMITTEES.
- All had additional Legislation and Governing Bodies: SAICA, IoDSA, IRMSA, ETC.

## What Went Wrong?!

Cheryl Carolus – Previous Chairperson of SAA Board:

*"The board has just become untenable, our reputation and professional integrity had just been dragged through the mud, without any clarification or support, and believe that this had reached a point where the relationship has been broken irretrievably."*

# WHAT WENT WRONG?! WHERE WAS THE CO-SEC?!

---

- Ministerial Level
  - ❖ Untruths re SAA AFS
  - ❖ Untruths re SAA – No Strategy, No Vision - Unpatriotic
  - ❖ Mumbai Route, SAA Funding,
- Board Level – Compromised – Chairperson, Members
- CEO Level – Revolving Door of Executives
- ACFO – Compromised
- ACPO - Compromised



# SAA CASE STUDIES

---



## Case 1 – Emirates Deal

### Emirates Transaction – BOARD APPROVED

Ms Myeni told Mr Bezuidenhout that President Zuma instructed her telephonically that SAA should not conclude the agreement with Emirates.

Consequences:

A MOU was supposed to be signed – *SAA would have earned R170 Million annually from this by allowing to sell tickets on Emirate Airline.*

## Case 2 – Airbus Deal

### Airbus Deal – 10 vs 2 Aircraft

- Ms Myeni's letter to the Minister accurately reflected the 27 May 2013 - Board Resolution approving the purchase of **10 A320** Aircraft.
- During the Board meeting of 2 June 2013, Ms Myeni attempted to suggest that the Board had only approved Pembroke financing the **first two A320** aircraft.
- The Board members had to set Ms Myeni straight - the Board had approved Pembroke financing the first ten aircraft. There was no decision to change the 27 May 2013 resolution. They called a special meeting to discuss, she did not attend.
- The Board Minutes could not be traced for the State Capture Commission.

## Case 3 – Swap Deal

- AIRBUS SWAP DEAL – FROM 10 A320 TO 5 A330 RETURN PDPs
- Changed the Section 54 Application
- Attempted to include an “African Aircraft Leasing Company
- Unsolicited Proposal for Finance from Nedbank – Masotsha Mngadi - Exec

### CONSEQUENCES:

- Minister Nene Fired, Mr Bezuidenhout back to Mango, ‘Mr Dixon – Board member resigned, Mr Meyer resigned, Ms Mpshe – Acting CEO sent back to HR –GM and then suspended.
- SAA almost lost R1.5 Billion.

## Case 4 – BNP Deal

- FUNDING FOR SAA – BNP DEAL
- Board involvement in RFP and Service Suppliers
- Board - 3 Dec 2015 – FDC – Letter provided at a Board Meeting
- Transaction Advisor RFP – Mandate to review Loans, Leases, Balance Sheet
- Transaction Advisor Award to BNP at a cost of R1,68 Million
- BNP scope changed – to source funding of R15 Billion – Approved by Board
- Success Fees Initial 3% reduced to 1.5% - Cost SAA R225 Million excl VAT. In addition a “Cancellation Fee” of R49.9 Million

# CORPORATE GOVERNANCE RULES IGNORED!

---

- Playing Chess with SAA, SOE's and South Africa.
- Main ingredient: Fear and Greed
- Start at the top and set up the right people in the right places – who have no integrity, who are compromised, who are greedy, who are fearful, who do not challenge/ask questions.
- Ministers were moved who challenged: Hogan, Nene, Gordhan,
- CEO's were moved who did not play ball
- CFO's were threatened/ forced to resign

## CORPORATE GOVERNANCE RULES IGNORED!

---

- Acting CEO – Musa Zwane – Signed Airbus Swap Deal and BNP Deal
- Interim CFO – Phumeza Nhantsi – Signed Airbus Swap Deal and BNP
- Three Non Exec Board Members – Myeni, Tambi, Kwinana
- Dissenting Director were either suspended, dismissed or side-lined
- Directly involved in Operations – completing Section 54, Meeting with Airbus, African Leasing Companies, Funders, staff.

# CORPORATE GOVERNANCE RULES IGNORED!

---

- Dereliction of Fiduciary Duties
- Conflict of Interest
- Business Judgement Rule
- Dissenting Director Obligations
- Directly involved in Operations – completing Section 54, providing supplier names.



## COURT CASE – DELINQUENT DIRECTOR - JUDGMENT

---

- ❑ *Ms Myeni is declared a delinquent Director in terms of Section 162 (5) of the Companies Act.*
- ❑ *This declaration of delinquency is to subsist for the remainder of Ms Myeni's lifetime, subject to the provisions of Sections 162 (11) and (12) of the Companies Act.*

# LEGISLATION IN PLACE FOR PROTECTION OF WHISTLBLOWERS IN SA - PART I

---

- Constitution of South Africa - Act 108 of 1996 - Sections 9,14,16, 23
- Companies Act 71 of 2008 – Section 159
- Protected Disclosures Act 26 of 2000 and Amended Act 5 of 2017 - PDA - Sections - All
- Labour Relations Act 66 of 1995 - LRA - Sections 185,186,187, 188A and 194
- Financial Intelligence Centre Act 38 of 2001 - Sections 28,29, 37, 38
- Pension Funds Act 24 of 1956 - Sections 9B, 13B, 37
- National Environmental Management Act 107 of 1998 - Section 31

# LEGISLATION IN PLACE FOR PROTECTION OF WHISTLBLOWERS IN SA - PART 2

---

- Municipal Finance Management Act 56 of 2003 - Sections 32(6), 32(7) 102 (2)
- Public Finance Management Act 29 of 1999 - Section 38 (1)g
- Prevention and Combatting of Corrupt Activities Act 12 of 2004 - Sections 18 and 34
- Protection from Harassment Act 17 of 2011 - Section 1 and 2
- Defense Act 42 fo 2002 - Section 50
- Witness Protection Act 112 of 1998 - Section 7 and in general.

# TO BLOW OR NOT TO BLOW

---

- MARTHA NGOYE - PRASA - STOPPING SWIVAMBO LEASING
- MOSILO MOTHEPU - TRILLIAN
- BIANCE GOODSON - TRILLIAN
- THEMBA MASEKO - GCIS
- SMANGALISO THABISO ZULU - KZN HARRY GWALA MUNICIPALITY
- BABITA DEOKARAN - HEALTH DEPT
- SIMPHIWE MAYISELA - PIC
- LENNOX GARANE - PARLIAMENT - SUICIDE PROTEST
- BABITA DEOKARAN – GAUTENG HEALTH DEPT and TEMBISA HOSPITAL

# LESSONS LEARNED FROM WHISTLEBLOWING

---

- Changing labour regulations to allow a fair remedy in case of an occupational detriment done to a whistleblower;
- Establish whistleblower Legislation which protects the whistleblower holistically.
- Allowing rewards/ reparations/ compensation to the whistleblower in case of asset recovery following a disclosure;
- Establishing systems and processes to be designed and put in place together with legislation
- Establishing mechanisms and to safeguard whistleblowers' physical safety; and
- Extending protection measures to third persons who assisted the whistleblowers, such as family, colleagues or civil society organisations.
- Create Whistleblower Fund to support whistleblowers who have suffered financially and more.

## Questions

*"The time is always right to  
do what is right!"  
~ Martin Luther King*



*"The only thing necessary for the  
triumph of evil is for good men (and  
women) to do nothing."  
~ Edmund Burke (1770)*

## CLOSING QUOTE

---

*“Be the change you wish to see in the world.”*

*(Mahatma Gandhi)*

