

The Role of the Company Secretary : A Tale of Two Worlds (Conference ID: CFP/441/2017)

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1. Introduction

"As a gatekeeper of good governance it is important for the company secretary to maintain an arm's length relationship with the board and its directors, as far as is reasonably possible"¹

The Board Secretary today has evolved into the chief governance officer of the company, with the privilege of being a central repository of organisational history and knowledge by steering through the whole array of Board and Committee meetings. The Board Secretary has an added advantage over other management executives by being the only officer, apart from the Chief Executive Officer, to sit in all Board and Management meetings, albeit without the right to vote.

Evolving out of this privileged position is a critical issue for most Board Secretaries on how to achieve the balance between being independent and having a positive open relationship with the managing director /CEO and chairman which engenders the trust and continued confidence of the board and senior management,² on one hand and retaining the independence and accountability required of the position.

Many Board Secretaries will agree that it is their individual discretion, freedom of choice, personal morals and ethics that play an important role in positively impacting corporate judgment.³ The bulk of their attention span will often be taken up by a careful choreography between board obligations and that of management, calling into practice critical personality skill sets that may not necessarily have been learned from their formal training.

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¹ King III (2009) page 43.

² Naidoo Ramani, Corporate governance: an essential guide for South African companies 2ed (2009) Lexi Nexis, Durban pp 204-205

³ Kakabadse A. The Company Secretary. Building Trust through governance. ICSA (2014) p 5

Thus beyond the fixed administrative capabilities or technical knowledge lies the continuous need to carefully manage relationships through intelligent negotiation, while relishing the challenge of strategic alignment of teams and agendas.⁴This notwithstanding, the Board Secretary is not left without guiding principles in this regard.

This article sets out the evolution of the role of the Board Secretary to today's principal governance officer. It outlines his/her general duties and paints in broad strokes the duties of independence and accountability, with practical suggestions recommended to attempt to achieve the balance between independence and accountability. What is clear is that focus should remain for the company secretary to counter balance competing needs, namely, external and internal controls, risk management and competitive behaviours whilst operating within the principles of good corporate governance.⁵

2. A brief definition of Corporate Governance

The term 'corporate governance' has attracted various definitions and it would therefore be an unenviable task to attempt a one size fits all definition of the term. In consideration of space limitations in this article, the reader is encouraged to read previous articles of the author that delve deeper into the more accepted definitions of corporate governance.⁶Suffice it to say for the present purpose that corporate governance, as an emerging field, does not lend itself to a single definition. Perhaps in its simplest form, corporate governance can be defined as 'the system by which companies are directed and controlled.'⁷ It involves not only 'what the board of a company does'⁸ but also 'how it sets the values of the company.'⁹

In the financial services sector, corporate governance is understood as the process and structure that define the division of power and establishes mechanisms for achieving accountability between the board of directors, senior management and shareholders, while protecting the interests of depositors and other stakeholders.¹⁰

It deals with 'mechanisms by which stakeholders of a corporation exercise control over corporate insiders and management such that their interests are protected.'¹¹ The stakeholders of a corporation could include shareholders, creditors and other claimants who supply capital, as well as other stakeholders such as employees, consumers, suppliers, and the government. The professional managers, the entrepreneurs, and other corporate insiders, which we refer to

⁴ Ibid

⁵ Preamble, Bank of Zambia Corporate Governance Directives 2016

⁶"Single Board Membership in Zambian Banks : a nemesis to good corporate governance?" (Zambia Law Journal (2012/2013); "Corporate Governance in Southern Africa - a call for contextualisation" University of Witwatersrand Student Legal Journal (2012); Corporate Governance in Zambia - a call for contextualisation" Zambia Law Journal (2011); Corporate Governance regulatory framework in Zambia : recommendations for improvement" Masters Degree Thesis (2011)

⁷ Michael N Young et al 'Corporate Governance in emerging economies : a review of the principal-principal perspective' *Journal of Management Studies* 45:1 January 2008 0022-2380 at 197. Available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1467-6486.2007.00752.x/full> [Accessed 3 August 2010].

⁸Young (note 7) at Paragraph 2.5.

⁹Ibid.

¹⁰ Preamble, Bank of Zambia Corporate Governance Directives 2016

¹¹ Kose John and Lemma W. Senbet, Corporate Governance and Board Effectiveness (Journal of Banking and Finance: 1998) p. 372

collectively as ‘managers’, often control the key decisions of the corporation. Given the need to separate ownership from control (that is, distinguishing between stakeholdership and management), how the stakeholders control management often times clouds the discourse in corporate governance, invoking closely related themes on ‘agency’ problems pertaining to corporate governance.¹²

3. Defining the term Company Secretary

The term associated to the role performed by the secretary to a board of directors varies from entity to entity, from one legislative framework to the next, and from jurisdiction to jurisdiction.

For the most part, however, the common terminology employed has included Board Secretary,¹³ Company Secretary, Authority Secretary,¹⁴ Corporation Secretary¹⁵, Secretary¹⁶, or Chief Governance Officer.¹⁷ The King IV Report on Corporate Governance for South Africa 2016 ('King IV') has adopted a distinction in terminology between the company secretary or ‘other professional providing corporate governance services’.¹⁸

Some Board Secretaries share a frustration that the title ‘Company Secretary’ negatively impacts the perceptions of board members, with a suggestion that the title discredits the role to that of simply an administrator, meeting organiser or a tea maker of some sorts.¹⁹

In this article, a usage of these terms interchangeably is understood as referring to an officer who is on charge of performing corporate secretarial services to the Board of Directors, management and the company as a whole.

4. The delicate relationship of CEO, Board and Chairperson

Inevitably, the Board Secretary will ultimately have the on-going role of playing mediator,²⁰ communicator, information provider and bridge between and among the Board, Board Chairperson and Management. This role becomes increasingly blurred where the roles of the three are not clearly defined.

¹² Kose John and Lemma W. Senbet, Corporate Governance and Board Effectiveness (Journal of Banking and Finance: 1998) p.372

¹³ Section 9, Cotton Board of Zambia under the Cotton Act, Act Number 21 of 2005

¹⁴ Section 7, National Pensions Scheme Act, Chapter 256 of the Laws of Zambia

¹⁵ Appointed under “such other staff” pursuant to Section 17 (2), Zambia National Broadcasting Corporation Act Chapter 154 of the Laws of Zambia

¹⁶ s.205 Companies Act; s 19 (3) Zambia Qualifications Authority Act Number 13 of 2011

¹⁷ A Kaul & S.B Gupta. CSR The Role of the Board and the Corporation Secretary, p.29

¹⁸ See under Principle 10, page 60. The King IV draft version used the term ‘corporate governance professional’.

¹⁹ See the research by Kakabadse A, p. 12, for an interesting analysis of this point.

²⁰ See CSR The Role of the Board and the Corporation Secretary p. 84

King IV places responsibility for leading the implementation of approved strategy and policy at the feet of the CEO, who serves as the chief link between management and the governing body²¹ [ie the Board of Directors].

An indelible reference point of poor corporate governance and an unbridled reign of a CEO has been the fall of Enron. In hindsight, this was a good learning point of an unbalanced relationship among the Chairperson, Board, Company Secretary coupled with some level of creative accounting.²² A poignant warning was issued earlier regarding the attitude of then CEO, Mr Kenneth Lay, by the *Economist* preceding the fall of Enron, that begs quotation:

Arrogance . . . is Enron's great failing . . . And how does Mr. Lay respond to this charge? . . . Mr. Lay speaks glowingly of the heyday of Drexel and of its star trader Michael Milken, whom he counts as a friend: they were accused of arrogance . . . but they were just being 'very innovative and very aggressive'. The comparison is not especially well chosen, for it is worth recalling what then happened: Mr. Milken ended up in jail for pushing the law too far, and the arrogant Drexel collapsed in a heap of bad debts and ignominy. For all its arrogance, Enron is hardly likely to share that fate: but hubris can lead to nemesis, even so.²³

It has been argued that when the chairman of the board is also the CEO, it amounts to a situation whereby management is accountable to a body led by management, which paints a grey picture as to how effective the CEO can be in evaluating his own performance.²⁴ Perhaps the biggest archilles heel of having a combined role is the control of the quality, quantity, and timing of the information that is presented to the directors, thereby undermining independent oversight by the Board.

The Board Secretary would do well to remember that both the Chairperson and CEO work for the Board, and are thus both subordinate to the Board as a whole, for the integrity of governance is destroyed if in either case the superior-subordinate relationship is reversed.²⁵ Thus, a Board needs a CEO so that the business proceeds successfully, while the chairperson is responsible that the board itself proceeds successfully, and the CEO is not accountable for board performance nor is the CEO accountable to the chair.²⁶

5. Development of the Role of the Company Secretary

It has been largely argued that the term 'secretary' comes from the latin *secretaries*, meaning a person to whom a secret is entrusted.²⁷

²¹ King IV, Practice Note Number 77, page 58.

²² For an incisive account of Enron's creative accounting, see Jill Solomon and Aris Solomon, Corporate Governance and Accountability, pp36 -39, John Wiley & Sons Ltd. (2004).

²³ The Economist, 1 June 2000

²⁴ Robert AG Monks & Nell Minow, Corporate Governance, (2004 : Blackwell Publishing, USA) pp 208-209.

²⁵ John Carver. A Theory of Corporate Governance : Finding a new balance for Boards and their CEO's. p 5
2010

²⁶ John Carver p. 7,8

²⁷ Naidoo, p 202

Classical English company law viewed the company secretary as fulfilling a very humble role of one who had no authority to make any contracts or representations on behalf of the company. This is reminiscent of the case of *Barnett, Hoares & Company v South London Tramways Company*²⁸ in which it was held in part that:

“[a] secretary is a mere servant: his position is that he is to do what he is told, and no person can assume that he has any authority to represent anything at all;...”

This position has evolved over time, and moving on a century later, was clarified in the seminal case of *Panorama Developments (Guildford) Limited v Fidelis Furnishing Fabrics Limited*²⁹. This is a case concerning enforceability of obligations against a company in which a company secretary, Mr Bayne, hired a number of Rolls-Royce's and Jaguars for the business under the company letter head while his managing director was away. Lord Denning MR outlined the more recent perceptions towards the company secretary wherein he held in part:

.....“But times have changed. A company secretary is a much more important person nowadays than he was in 1887. He is an officer of the company with extensive duties and responsibilities. This appears not only in the modern Companies Acts, but also by the role which he plays in the day-to-day business of companies. He is no longer a mere clerk. He regularly makes representations on behalf of the company and enters into contracts on its behalf which come within the day-to-day running of the company's business...such as employing staff, and ordering cars, and so forth.”

The above position still holds true to this day. Notwithstanding the fact that the English Companies Act of 2006 now does not make it a requirement for private companies to have a secretary³⁰ unlike public companies, the company secretary has come of age in being accepted as an officer of the company and an integral part of the management structure, who regularly makes representations and enters into contracts for and on behalf of the company. In effect, the company secretary functions as the company's chief governance officer.³¹

In Zambia in particular. The legislative horizon clearly seeks to incorporate matters of corporate governance and clearly spell out the role of the Company Secretary. The Zambian Companies Bill³² seeks to entirely repeal and replace the current Companies Act and to hopefully modernise the corporate legislative edifice.³³ Among its key themes are to “incorporate corporate governance and financial reporting provisions and provide for the functions and obligations of a company secretary and a director”.

²⁸ (1887) 18 QBD 815

²⁹ (1971) 2 QB 711

³⁰ Section 270 (1)

³¹ Naidoo p 202

³² The Bill was formulated whilst the co-author was Attorney General of the Republic of Zambia

³³ Section 441

6. Qualifications of the Company Secretary

The qualifications of the Company Secretary will now as almost a matter of course, depending on the size and complexity of the organisation and particular jurisdiction, include the following:

- bachelor's degree in business administration, law or accountancy from a recognised university;
- professional accounting qualification such as ACCA, CIMA, an advocate of the High Court with a current Practicing Certificate from the Law Association of Zambia (LAZ); or be a full member of the Zambia Institute of Chartered Accountants (ZICA) or/ and the Institute of Chartered Secretaries and Administrators (ICSA);
- minimum number of years of experience in a similar role.

It is critical to note that the above qualifications will ordinarily not be spelt out in the Companies Act or such enabling legislation establishing the organisation.

In addition to the academic and professional qualifications, a Company Secretary is required to have a good measure of problem solving, planning, decision making and interpersonal skills. As an organisational leader, the Company Secretary will need to display competences in strategic leadership, dynamism, strong analytical, modeling and commercial reporting skills and good communication skills. The Companies Bill proposes that the Minister of Commerce Trade and Industry should have the power to pass subsidiary legislation to regulate the minimum qualifications in certain sectors. Section 59 (10) provides thus:

“The minister may prescribe minimum qualifications for company secretaries in specific sectors.”

It may be argued that the rationale behind the proposed provision is that certain sectors such as public listed companies and statutory bodies dealing with a wider scope of stakeholders will require a certain level of competence as the ramifications of less than prudent decision making are much heavier.

In the light of economic developments in recent years stakeholders of companies, particularly in the financial services sector, are increasingly concerned with the conduct of the affairs of the company.³⁴ A common intervention is to subject pre-approval of hiring of Company secretary's to a fit and proper test. Section 31 (1) (a)³⁵ provides in part that:

“Notwithstanding anything to the contrary in the Companies Act or any other written law, a person shall not be qualified to be elected a director or to be appointed a chief executive officer, chief financial officer or manager of a licensee if that person-

³⁴ The Changing Role of the Company Secretary. <http://www2.deloitte.com/ie/en/pages/legal/articles/changing-role-secretary.html>. Accessed on 15 October 2016

³⁵ Banking and Financial Services Act, Chapter 387 of the Laws of Zambia

(a) is not a fit and proper person to hold the relevant office in relation to integrity and professional expertise;...”

It may be tempting to assume that company secretary should be a natural person. The Companies Act allows for the secretary to be a body corporate³⁶, and superior courts of Judicature have often recognised this point. The case of *Meryiel Gaile Melrose Marshall v Rory McDougall*³⁷ dealt in part with the question of whether the court had jurisdiction by mandamus to enforce compliance with previous order relating to registration of share transfers and change in an external body corporate acting as company secretary.

7. Duties of the Company Secretary

A modern approach to understanding the overarching role of the company secretary is one of providing a central source of guidance and advice to the members of the board, both collectively and individually, on how their responsibilities may optimally be discharged in the best interests of the company.³⁸ This encompasses guidance on possible conflicts of interest, ethical conduct, compliance, insider trading, general legislative and governance requirements applicable to the company.³⁹

Notwithstanding the above, a few notable traditional roles that have come to be accepted as part of the role of the Company secretary include:

7.1 The Company Secretary as Chief Governance Officer

The Company Secretary is now statutorily required to be a central source of guidance and advice to the Board of Directors, and to the company as a whole on matters of ethics and good corporate governance.⁴⁰ Constantly learning, innovating, changing and stretching, creating and delivering, the Company Secretary is projected to survive and thrive as a true governance professional of the future.⁴¹

The Companies Bill will require a Company Secretary to provide the directors of the company collectively and individually with guidance as to their duties, responsibilities and powers.⁴²

It is worth noting that the Zambian Companies Act providing for the establishment of the company secretary for a company registered under the Companies Act does not seem to be an alterable provision.⁴³ The mandatory nature in which the section is couched can be gleaned from the words used in the section. Section 205. (1) provides that:

³⁶ Section 205 (5), Companies Act, Chapter 388 of the Laws of Zambia

³⁷ (1988 - 1989) Z.R. 206 (S.C.)

³⁸ Naidoo p 204

³⁹ Ibid

⁴⁰ Directive 13.24, Bank of Zambia Corporate Governance Directives 2016

⁴¹ CSR The Role of the Board and the Corporation Secretary p.21

⁴² Section 58 (2) (a)

⁴³ Section 205, Chapter 388 of the Laws of Zambia

“A company **shall** have a secretary” [emphasis added]

Section 205(2) goes further to outline that:

“the persons named in the application for incorporation as the first secretary or joint secretaries of a company **shall, on the incorporation of the company, be deemed to have been appointed as such for a term of one year.**” [emphasis added]

Also clear from the above provision is the fact that a company need not be limited to one secretary. It can have more if its corporate nature and day to day requirements so demand.

The South African Companies Act for instance outlines the statutory duties of the company secretary to make directors aware of any law relevant to or affecting the company, reporting failure to comply with the memorandum of incorporation or the Act to the board, certifying in the annual financial statements whether the company has complied with its reporting obligations under the Act, ensuring publication of the company’s annual financial statements as required by the Act and ensuring the filing of the company’s annual return with the Commission.⁴⁴ It is noteworthy that these duties are exclusive of requirements of publicly listed companies and state owned companies.

7.2 The Company Secretary as Compliance Officer

The Companies Bill posits that one of the duties of the Company Secretary is to inform members of the Board of Directors about all the necessary regulations or those which may affect the meetings of shareholders and of the Board of Directors, submission of reports to different relevant authorities provided for under the Law as well as the impact of failure to comply with such Laws.⁴⁵ Interestingly, one will note that the duty is not restricted to the Board of Directors but is also extended to shareholders as a distinct unit of the company and to external regulators who are now statutorily recognised as key stakeholders for the company secretary.

It is also not uncommon for the Board Secretary to now play a role of Compliance officer provided that the role of compliance is kept distinct. In the area of Anti Money Laundering and financing of terrorism or proliferation, a reporting entity is obligated to designate a compliance officer at management level to be responsible for the implementation and ongoing compliance with the requirements of the Financial Intelligence Centre Act.⁴⁶

7.3 The Company Secretary as In-House Counsel

The role of Company Secretary can be performed by a lawyer, chartered accountant or chartered secretary or any person of similar capabilities.⁴⁷ Where the role is played by a lawyer, the Company Secretary would also ordinarily wear a second hat of in house counsel

⁴⁴ Section 88

⁴⁵ Section 58 (2) (b)

⁴⁶ Act Number 46 of 2010

⁴⁷ In relation to the financial sector, see Directive 13.21, Bank of Zambia Corporate Governance Directives 2016

(more technically referred to as an employed practitioner).⁴⁸ Thus, the Company Secretary would be able to represent his client employer as an advocate or practitioner, either by himself or one of his team members.

Curiously, although the same duties and rules of professional conduct of a practitioner in private practice are extended to in house counsel, there seems to be a lower threshold of qualification for an advocate in private practice to engage as advocate on behalf of clients when compared to in house counsel. The Legal Practitioner's Rules⁴⁹ places a requirement of practice experience of not less than three years which does not apply to non in-house counsels. A similar position holds true for public companies in the United Kingdom that require that a person must have held the office of secretary of a public company for at least three of the five years immediately preceding the appointment.⁵⁰

This has not gone without its own criticism as one school of thought holds that the subsidiary rules fall foul of the principal Legal Practitioner's Act which only requires one's name to be entered on the roll to practice.⁵¹ Section 41 provides that

“Subject as hereinafter provided, no person shall be qualified to act as an advocate within Zambia unless his name is on the Roll and he has in force a practising certificate. Every person whose name is on the Roll and who has in force a practising certificate or who is admitted to practice...**shall be entitled to practise as an advocate in any court in Zambia other than a local court and shall be deemed to be an officer of the Court.**”
[emphasis added]

7.4 The Company Secretary as a Senior Officer of the Company

The Company Secretary has now come to be accepted as an officer of a company capable of binding the company notwithstanding any internal restrictions as to his authority in this regard. Board Secretaries of banks and financial institutions are now categorised as executive officers by the Bank of Zambia⁵², and are required to be employed at the appropriate level of seniority in order to discharge the role effectively and with the necessary gravitas.⁵³

The Zambian Judiciary has not been without its own pronouncement regarding the ostensible authority of officer's of a company. The Supreme Court held in the case of *National Airports Corporation Limited v Reggie Ephraim Zimba and Saviour Konie* thus:

An outsider dealing with a company cannot be concerned with any alleged want of authority when dealing with a representative of appropriate authority or standing for the class or type of transaction.⁵⁴

⁴⁸ See Part V of the Legal Practitioners Practice Rules 2002

⁴⁹ Statutory Instrument Number 51 of 2002

⁵⁰ Section 273 (2) (a), United Kingdom Companies Act 2006

⁵¹ Chapter 30 of the Laws of Zambia

⁵² Directive 13.21, Bank of Zambia Corporate Governance Directives 2016

⁵³ King IV, Practice Note 94, page 60

⁵⁴ SCZ Judgment No. 34 OF 2000

As recognised officer of the company, the modern secretary is an important official who enjoys the power to contract on behalf of the company, even without authority. This is however restricted to contracts in the administrative operations of the company including the employment of office staff and the management of the office together with the hiring of transport. As exemplified in *Re Morvah controls Tin Mining Company Mckay's case*⁵⁵ the secretary owes fiduciary duties to the company which are similar to those of a director.

7.5 The Company Secretary as Chief-Administrative-Officer

This function is perhaps the most acknowledged role of the company secretary as it reflects what traditionally has been his role. A company secretary, as the chief administrative officer, is expected to:

- convene meetings
- maintain statutory records
- ensure compliance with all relevant legal requirements
- facilitation of board induction
- ensures board procedures are followed
- dealing with information needs of board members/board committees
- provision of relevant information to members to enable proper decision making
- publication of board resolutions, approved policies and directives
- oversee rotation of directors as per the organisation's charters
- Ensure appointment of directors is carried out in terms of a transparent, agreed and properly documented process.⁵⁶

The above administrative functions are also replicated in the Companies Bill.⁵⁷

8. Independence versus Accountability

Company secretaries face constant challenges, with recurring themes including; being considered 'traitors' by the executive team, acting as the third person in a CEO-chairman relationship, becoming the pivotal contact for insurmountable problems, supporting chairmen exhibiting poor performance, and maintaining independence from other executives and board members.⁵⁸

For many company secretaries, it is not uncommon to find a common belief that their role is misunderstood and sometimes viewed as administrative.

Two more common conflicts in discharging the duties of the company secretary are highlighted hereunder, which are clearly not exhaustive. The two are highlighted as they form

⁵⁵ [1875] 2 Ch D 1

⁵⁶ See Kar P "Patterns in governance failure" (13 April 2009) accessed at [<http://www.ssrn.com>] on 15 October 2016

⁵⁷ See section 58 (2) (c) - (g)

⁵⁸ Kakabadse p.6

the bedrock of the role and character of the company secretary, and whose exact boundaries are fluid in everyday effectuation.

8.1 The Duty to maintain Independence

Central to the effective functioning of the board secretary is his independence and accountability. So central is this theme that King III expressly advises that “As a gatekeeper of good governance it is important for the company secretary to maintain an arm’s length relationship with the board and its directors, as far as is reasonably possible⁵⁹ [emphasis mine].

Professor Mervyn King and his committee did lay credence to the fact that the effectuation of the duty to maintain independence and accountability may not be as clear cut as theorised, as seen in the inclusion of the words ‘as far as is reasonably possible.’

This, one might hazard, is due to the fact that boards are made up of human beings who collectively bring to the board room individual experiences, nuances, and perspectives. The company secretary therefore requires a level of emotional intelligence, tact and wisdom to safeguard his independence and accountability.

The draft report of King IV has retained this expectation by stating thus:

“The company secretary or other professional providing corporate governance services should have unfettered access to the governing body but, for reasons of independence, should maintain an arms-length relationship with it and its members; accordingly, the company secretary should not be a member of the governing body.”⁶⁰

One thing however that seems settled by the Companies Act is that the company secretary is not mandated to speak on anything other than procedural matters during board meetings. Under Zambia’s Companies Act, the management power of a bank is to be vested in the board of directors collectively. Section 215 of the Companies Act⁶¹ vests the management power of the company, whether private or public, in the directors irrespective of the size of the company, but subject to the residual powers reserved for members of the company under the Companies Act and in the Articles of Association. Section 215 of the Companies Act⁶² provides that:

“(1) Subject to this Act, the business of a company shall be managed by the directors, who may pay all expenses incurred in promoting and forming the company, and may exercise all such powers of the company as are not, by this Act or the articles, required to be exercised by the company by resolution.”

⁵⁹ King III (2009) page 43.

⁶⁰ King IV, Practice Note 96, page 60

⁶¹ Chapter. 388, Volume 21 of the Laws of Zambia

⁶² Chapter 388, Volume 21 of the Laws of Zambia

Notwithstanding that the central management of the company's business is in the hands of the directors collectively, corporate power may be exercised by members of the company acting collectively in certain specified circumstances.⁶³ The separation of these powers has been recognised not only in statutory provisions but also in a plethora of case law.⁶⁴ In the Zambian Supreme Court case of *John Paul Mwila Kasengele and Others v Zambia National Commercial Bank Limited*⁶⁵ it was held that:

“The law is therefore, settled and we need not say any more except perhaps to emphasize that in corporate law, Directors and Managers must dance the Shareholder’s tune. They have no powers to fetter, change or modify a shareholder’s decision.”

8.2 The Duty to be Accountable

A question that behoves the ordinary company secretary is who exactly he is ultimately accountable to. Is it the board as a whole, board members individually, the Chief Executive Officer (CEO), the company, stakeholders, professional body or the court [for legal practitioners]?

The South African Companies Act attempts to resolve this quagmire by stating:

“the company secretary shall be responsible to the board”⁶⁶

The King II report provided under 2.10.3 that :

“In addition to extensive statutory duties, the company secretary must provide the board as a whole and directors individually with detailed guidance as to how their responsibilities should be properly discharged in the best interests of the company.” *[emphasis added]*

King III however did not attempt to make such a bold statement in defining the lines of accountability for the company secretary, possibly due to the difficulty experienced in maintaining a positive relationship among the Chairperson, CEO and the company secretary.⁶⁷

King IV on the other hand has clarified the dual roles of the company secretary by requiring the company secretary to report functionally to the chair of the governing body and administratively to the CEO.⁶⁸

⁶³ Section 216 (1) of the Companies Act, Chapter 388, Volume 21 of the Laws of Zambia. The directors cannot dispose of assets of the company or issue new shares without the approval of the members of the Company. The articles of the Company reserve certain powers for the member of the Company so as to limit the broad management power conferred by section 215 of the Companies Act, Chapter 388, Volume 21 of the Laws of Zambia.

⁶⁴ Zambia traces its law from English Common Law. See Chapter 10 and 11, Laws of Zambia, respectively.

⁶⁵ SCZ Judgment No.11 of 2000.

⁶⁶ South African Companies Act s 88

⁶⁷ Naidoo p 204

⁶⁸ Practice Note 97, King IV, page 60

As regards the grade of the company secretary within the company hierarchy, some pundits have strongly argued that the company secretary's should not report to an office lower than the CEO in light of the fact that the company secretary is now a statutory and regulatory position.⁶⁹

Accountability of the company secretary is of critical importance in light of the increased liability to the office. Under the South African Companies Act, "prescribed officers" [which may likely include the company secretary as part of senior management] of a company will be subject to the same duties of care, skill and diligence and to the fiduciary duties applicable to directors.⁷⁰ The memorandum of incorporation also binds the company and prescribed officers.⁷¹

9. Recommendations

It must be stated from the outset that these recommendations do not present a 'silver bullet' remedy to the company secretary in drawing the balance between independence and accountability. The recommendations below originate from observations of various authors and best practice, and are subject to the overall personal capacity of a company secretary to draw a balance of key relations in the corporate governance mix.

9.1 Promulgation of Company Codes of Conduct and Charters

A low hanging fruit that may be utilised is the drawing up of company policies that regulate the relationship between the company secretary and the board and senior management. These codes and policies must be subjected to constant review and be the standard for performance review of the chief governance offices and corporate bodies namely the CEO, Company Secretary and the Board. King IV suggests that the governing body should ensure that the performance evaluations of the governing body, its committees, its chair and individual members, the CEO and the company secretary or other professional providing corporate governance services result in continued improved performance and effectiveness.⁷²

9.2 Adherence to Professional Rules and Codes of Ethics

The company secretary will often belong to a regulated profession such as accountancy and law. Other professional bodies include the Institute of Chartered Secretaries and the Institute of Directors. Recourse should always be had to the overarching professional rules as a reminder of the basis for the company secretary to continue holding a practicing license.

As regards company secretary's that are also legal practitioners for instance, the Legal Practitioners Rules of 2002 have a sombre reminder on the basic requirements expected of a company secretary not to do or allow anything that compromises or impairs or is likely to compromise or impair any of the following:

⁶⁹ Naidoo p 205

⁷⁰ Kakabadse p.7

⁷¹ S15(6) South African Companies Act

⁷² See Principles 9 and 10, King IV pages 58-60

- “(a) the legal practitioner’s independence or integrity;
- (b) a person’s freedom to instruct practitioners of choice;
- (c) the practitioner’s duty to act in the best interest of the client;
- (d) the good repute of the practitioner or of the legal profession;
- (e) the practitioner’s professional standard of work; or
- (f) the practitioner’s duty to the Court.”⁷³

The duty to the court is repeated in the Legal Practitioners Act which goes further to add that a legal practitioner is subject to the court’s jurisdiction.⁷⁴

The accountancy profession similarly regulates against professional misconduct for actions such as contravention of the Accountants Act, unlawful disclosures, conduct that is dishonest, fraudulent or deceitful, commits an offence under any other law, conduct that is prejudicial to the accountancy profession or is likely to bring it into disrepute, or breach of the Code of Ethics or accounting or auditing pronouncements.⁷⁵

The English position affirms this position by officially recognising the professions of barrister, advocate or solicitor, accountants and chartered secretaries as qualified professionals to act as secretaries. The Companies Act is also replete with a list of Institutes that are statutorily recognised professional bodies.⁷⁶

9.3 Promulgation of Board Charters, Codes of Ethics and Terms of Reference

Board Charters will at a minimum outline the role and independence of the Board Secretary, and the role of the Chief Executive Officer, including adherence to Best Practice. Terms of Reference should contain the following principles:

- the Board is accountable to the shareholders for the company’s achieving what it should and avoiding what is unacceptable
- the Chair is accountable to the board for chairing the process so that directors fulfil their commitment to the discipline they have accepted in the doing job
- the CEO is accountable to the board for fulfilling the board’s definition of business achievement and avoiding the board’s prohibitions.⁷⁷

Closely tied to the above terms is the need to have clarity in the terms and conditions of the Company Secretary’s conditions of service and job description. This is critical in ensuring maximum focus and attention is paid by the company secretary, and removes any ambiguity in reporting lines. A case example is that of *Sam Amos Mumba v Zambia Fisheries and Fish Marketing Corporation Limited*⁷⁸ in which a company secretary sued his previous employer claiming damages for breach of contract resulting from changes in his emoluments. However, the court held in part that a subsequent change in the law or in the legal position affecting a

⁷³ Rule 3 (2).

⁷⁴ Section 85, Legal Practitioners Act Chapter 30 of the Laws of Zambia

⁷⁵ Section 72, Accounts Act Number 15 of 2004

⁷⁶ Section 273 (2), (3) UK Companies Act

⁷⁷ John Carver p. 8

⁷⁸ 1980 Z.R 135 (H.C)

contract is a well recognised head of frustration. The Government directives to the defendant company were a frustrating event and put an end to the contract between the parties.

9.4 Separation of the role of Head of Legal/Compliance and Company Secretary

It has been argued that combining the two roles of Head of Legal and Company Secretary will often raise a conflict of interest. As Company Secretary, one plays a more strategic role working closely with the Board and the Chairperson and may also get involved in management decisions which would prevent him from representing the company as legal counsel.⁷⁹

9.5 Access to the Board

It is advisable that the company secretary maximizes his effectiveness by ensuring that the direct reporting line should be to the chairman, and there should be a healthy and professional team working among the chairman, the company secretary and the CEO. Additionally, company secretaries need to have both direct and informal access to board members (both executive and non-executive directors), the CEO and the Chairperson.⁸⁰

The World Bank's Corporate Governance Country Assessment of Zambia⁸¹ highlighted specific concerns whereby in many listed Zambian subsidiaries of international firms having their managing directors appointed by the parent companies. The Report points out the dangers of the direct relationship between the owner and management that could mean that some important corporate decisions are not made at the board (or AGM) level.⁸² To this effect, an effective Company Secretary that has an open and professional relationship with the Board, shareholders and CEO will be able to remind the key governance officers and levels of decision making on the need to adhere to best governance practice.

10. Conclusion

The article has drawn a historical path in the development of the company secretary's role. It is abundantly clear that the role has evolved into a now accepted executive, compliance, administrative and corporate governance officer of the company. However, a net result of this new multi-faced role is that an unenviable conflict often arises in attempting to accurately draw a balance between the company secretary's independence and accountability. This is compounded in situations where the company secretary is a regulated professional with overarching accountabilities to professional bodies and juridical bodies.

A few suggestions have been put forward to help the discerning company secretary to walk the tight rope, albeit not a silver bullet. It has been suggested that the company secretary will always need to have strategic focus on professional ethics, statutory duty and requirements of codes of practice. A practical translation of these myriad of statutory and practice requirements is effective management of varying personalities of key corporate governance players.

⁷⁹ Kakabadse

⁸⁰ Kakabadse p. 7

⁸¹ 2006, pp 4,5. Available at

<https://openknowledge.worldbank.org/bitstream/handle/10986/8198/691590ESW0ROSC0Zambia0December02006.pdf?sequence=1&isAllowed=y>. Accessed on 15 October 2016.

⁸² ibid

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