



The role of the company secretary in promoting good corporate governance in South Africa [AS APPROVED BY THE POSTGRADUATE STUDIES COMMITTEE]

By

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DECLARATION

I, Student number, **606241** declare that this Research Report is my own unaided work. It is submitted in partial fulfillment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

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ABSTRACT

The global prevalence of corporate scandals involving misconduct has drawn public attention to corporate governance, highlighting the role of the company secretary as a key corporate governance officer. However, company secretaries are often overlooked, despite their importance for facilitating corporate governance. The term ‘secretary’ itself is misleading, as it suggests a purely administrative position. Prior to the role’s development, the connotation was correct. Company secretaries were known as the administrative officer of the company. The implication of this has been, and remains, that the role is not fully leveraged. This view contrasts with the multifaceted functions company secretaries perform today in corporate governance matters and beyond. The emphasis on corporate governance has resulted in modern company secretaries taking on a range of positions with broader powers and extensive duties transforming their roles into guardians of corporate governance. The position is already incorporated into governance codes, the recent Companies Act 71 of 2008 and practice. However recent corporate failures raise concerns whether the role of the company secretary within South Africa's corporate governance framework has the potential to fulfil this corporate governance expectation. This research report will discuss how factors such as the historical marginalisation, legal ambiguity, lack of knowledge and framework fragmentation of the role has contributed to its underutilisation and undervaluation. Effectively hindering it from reaching its full potential within corporate governance and relegating it to the status of an unrecognised hero despite its significant role in corporate governance. This research report further examines the role of the company secretary within the corporate governance framework, highlighting its potential to succeed in this crucial corporate governance position and proposing improvements to maximise this potential. This research report asserts that selection, implementation and utilisation of a suitable company secretary can prevent or mitigate instances of poor corporate governance and, in some cases corporate scandals, bringing to the fore a new corporate ‘governance hero’.

Key words: Corporate Governance, Company Secretaries, Corporate Scandals in South Africa, Corporate Governance Framework

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1. INTRODUCTION

Global recognition of the company secretary's pivotal role in corporate governance has given rise to a potential corporate 'governance hero'.¹ The company secretary is a primary officer of a corporation responsible for, among other things, ensuring compliance with legal, regulatory and governance requirements, facilitating communication and information flow amongst the board, management, and shareholders and providing advice and guidance on corporate governance matters.² In summary, the company secretary is tasked with being the 'governance watchdog'.³ Although the corporate governance framework created this role it appears to have fallen short in endowing the role with the requisite powers and authority to fully meet this task and leverage this position.

In South Africa recent reports of 'state capture' have highlighted the need for a governance warden and the importance of greater corporate governance compliance, elevating the role of the company secretary to prominence⁴. This has spurred the discussion around this often overlooked yet important facet of corporate governance. As the prudent use of the company secretary's position could have aided in the avoidance of several notable corporate governance scandals associated with 'state capture,' including those involving the South African Broadcasting Corporation SOC Ltd (SABC), Denel SOC Ltd (Denel), Steinhoff International Holdings (Steinhoff) and VBS Mutual Bank (VBS).⁵

However, despite the potential of the company secretary's role in improving governance it has been undervalued in South African company law making it less effective.⁶ This is due to several reasons which will be discussed in this research report, including the misnomer 'secretary' which creates an illusion of a purely administrative position.⁷

¹ Loren Wulfsohn 'The company secretary as polymath' (2014) Issue 34 *Private Sector Opinion, IFC Corporate Governance Knowledge Publication* at 2-5 (Wulfsohn); The Chartered Governance Institute of Southern Africa NPC 'CGISA Best practice Guide - The role of the company secretary in state capture and corruption: red flags and lessons learned' 15 September 2021 at 1-5, available at <https://www.cgiglobal.org/insights/southern-africa/cgisa-best-practice-guide-the-role-of-the-company-secretary-in-state-capture-and-corruption-red-flags-and-lessons-learned/> accessed on 3 December 2022 (CGISA).

² Wulfsohn op cit note 1 at 4-7.

³ Wulfsohn op cit note 1 at 5.

⁴ For context and in summary the term 'state capture' in South Africa denotes the unethical conduct of government officials who utilise state resources to enrich themselves, a practice also known as kleptocracy see Maira Martini 'State capture: An overview' (2014) *Transparency International* at 2 available at https://knowledgehub.transparency.org/assets/uploads/helpdesk/State_capture_an_overview_2014.pdf accessed on 20 January 2022 (Martini).

⁵ CGISA op cit note 1 at 1-5.

⁶ The Companies Act 71 of 2008 (the Act).

⁷ Wulfsohn op cit note 1 at 2-5.

South Africa's corporate governance framework which includes the recent Companies Act 71 of 2008 (the Act),⁸ the King IV report and the King Code,⁹ common law and case law integrates and assigns the role of enforcing and implementing corporate governance to the company secretary.¹⁰ The company secretary therefore is in a unique position to improve governance in a corporation.¹¹ Nonetheless, the company secretary's role in corporate governance can be more effective if the secretary appointed is qualified and suitable and if their functions and powers are properly defined and exercised in accordance with the relevant framework. This can potentially avoid the risk of poor corporate governance and in some cases, mitigate corporate malfeasance. This in turn could result in fewer corporate scandals.

The question arises: Is the current role as outlined in South Africa's corporate governance framework adequate for the task, and if not, how can it be enhanced? This research report investigates the factors that hinder effective use of the company secretary's role. It argues that specific improvements to the corporate framework and better utilisation could vastly improve corporate governance without the need for a corporate framework overhaul. In this research report, the terms 'secretary' or 'secretaries' refer to the company secretary or secretaries, as the context may indicate.

1.1 Research Question and Objective

The wake of the state capture cases brings to the forefront the main research question of this report: Does the role of the company secretary within South Africa's corporate governance framework have the potential to fulfil the expectation as a 'governance watchdog' and if not, what measures can be implemented to enhance the role and promote better corporate governance?

In order to answer the research question above the following ancillary questions will be considered:

- (a) how is the role of the secretary regulated in the South African corporate governance regulatory environment?
- (b) what are the advantages and weaknesses of the role in the corporate governance framework?

⁸ The Act.

⁹ The Institute of Directors in Southern Africa NPC 'King IV Report on Corporate Governance for South Africa, 2016' 1 November 2016 IoDSA at 29, available at <https://www.adams.africa/wp-content/uploads/2016/11/King-IV-Report.pdf> accessed on 28 August 2022 (King IV) and the King IV Code on Corporate Governance in Chapter 5 of King IV (hereinafter King Code) together (King IV).

¹⁰ Section 86-89 of the Act; King IV at 29, 85, 93, 101, 109 and 116; King Code at 59-60; common law and case law discussed herein.

¹¹ Wulfsohn op cit note 1 at 4-7.

- (c) what recommendations can be made to address any weaknesses identified?
- (d) how does appointing a qualified and suitable secretary, along with implementing recommended improvements, if any, contribute to fostering good governance?

1.2 Outline of the study

This research report is divided into six sections. Section one, the introduction sets out the context for this research report and contains the research question and objective. Section two briefly looks at the concept of corporate governance and the corporate governance framework applicable to secretaries. Section three will consider the history and evolution of the role in corporate governance looking at the current qualifications, duties, and skills of the secretary. An analysis of the corporate governance framework will also be covered in section three. Section four considers the liability of secretaries and possible revisions to the Act. Section five considers the possible challenges faced by secretaries and the recent corporate scandals in South Africa. Section six concludes and presents the author's findings and recommended strategies to optimise the use of secretaries for good corporate governance based on the research and analysis conducted in this research report.

2. THE SOUTH AFRICAN CORPORATE GOVERNANCE FRAMEWORK

South Africa's corporate governance framework is buttressed by the Act, the King IV report, the King Code,¹² common law and case law.¹³ Corporate governance principles are also recognised by the Constitution,¹⁴ which places an obligation to develop legislation to give effect to the spirit, purport and objects of the Bill of Rights.¹⁵ South Africa's common law on corporate governance stems from English law and Roman Dutch law.¹⁶ The common law operates concurrently with legislation and has not been replaced.¹⁷ The Act is the current legislation governing secretaries' roles in corporates. Corporate governance has been further institutionalised in South Africa through the King Reports¹⁸

Corporate governance pertains to the structures and processes associated with management, decision making and control in corporations.¹⁹ There are many definitions of corporate

¹² King IV op cit note 9 at 29 and 35.

¹³ Section 86-89 of the Act; King IV at 29, 85, 93, 101, 109 and 116; King Code at 59-60; common law and case law discussed herein.

¹⁴ Constitution of the Republic of South Africa, 1996 (the Constitution).

¹⁵ Section 39(2) of the Constitution.

¹⁶ Tshepo Mongalo 'South Africanizing company law for a modern, competitive global economy' (2004) 121 *SALJ* 93 at 93-94 and 99 (Mongalo).

¹⁷ Piet Delpont *et al* (eds) *Henochsberg on the Companies Act 71 of 2008* (2011) 296-297 (Delpont 2008).

¹⁸ Monray Marsellus Botha 'The role and duties of directors in the promotion of corporate governance: A South African perspective' (2009) 30(3) *Obiter* at 702-704 (Monray).

¹⁹ Cassim FHI, Cassim, MF, Cassim R *et al* *Contemporary Company Law* 2 ed (2012) 472-473 (Cassim *et al*).

governance but the most accepted one stems from the Cadbury Report²⁰ which defines it as ‘the system by which companies are directed and controlled’.²¹ Corporate governance entails effective and responsible leadership including ethical values, accountability and transparency.²² King IV has defined corporate governance as ‘the exercise of ethical and effective leadership by the governing body towards the achievement of the following governance outcomes: ethical culture; good performance, effective control and legitimacy’.²³ It is a performance management system to ensure corporate entities are run correctly and guided by the above values.²⁴

Weak corporate governance has been identified as a catalyst for corruption and a cause of corporate failures.²⁵ Corporate governance is considered a preventative measure against these issues.²⁶ Therefore, there has been a renewed emphasis on corporate governance, particularly the role of leading players such as the secretary within the framework.²⁷ Reference to ‘framework’ or ‘corporate framework’ in this research report refers to the South African corporate governance framework as set out in this section, unless the context indicates otherwise. Section three below examines the office and role of the secretary.

3. THE COMPANY SECRETARY

3.1 Definition of the secretary

The Act does not define the term ‘company secretary’.²⁸ However, in terms of section 88(1) of the Act, ‘A company’s secretary is accountable to the company’s board,’ and it includes anyone who performs the functions of a secretary as outlined in sections 86 to 89 of the Act (discussed below).²⁹ A secretary may also be considered a ‘prescribed officer’(PO) as defined in section 1 and Reg 38³⁰ of the Act. In section 1, a PO is defined as ‘a person who, within a company,

²⁰ Adrian Cadbury ‘Report of the Committee on the Financial Aspects of Corporate Governance’ *The Financial Reporting Council* 1 December 1992 available at [https://www.frc.org.uk/getattachment/9c19ea6f-bcc7-434c-b481-f2e29c1c271a/The-Financial-Aspects-of-Corporate-Governance-\(the-Cadbury-Code\).pdf](https://www.frc.org.uk/getattachment/9c19ea6f-bcc7-434c-b481-f2e29c1c271a/The-Financial-Aspects-of-Corporate-Governance-(the-Cadbury-Code).pdf), accessed on 15 October 2023 (Cadbury Report).

²¹ Ibid at para 2.5.

²² Cassim *et al* op cit note 19.

²³ Michalsons ‘King Report and King Code on Corporate Governance’ 23 December 2022 *Michalsons* available at <https://www.michalsons.com/focus-areas/information-technology-law/king-report-king-code-on-corporate-governance> accessed on 23 December 2022.

²⁴ Cassim *et al* op cit note 19.

²⁵ CGISA op cit note 1 at 22; Cassim *et al* op cit note 19.

²⁶ Martini op cit note 4 at 7.

²⁷ Michelle Adams *The Evolving Role of the Company Secretary and its Impact on Corporate Governance* (unpublished LLM thesis: University of the Western Cape, 2020) 1-5 and 13-20.

²⁸ Section 1 of the Act.

²⁹ Sections 86-89 of the Act.

³⁰ Section 1 of the Act read with Regulation 38 of the Companies Regulations in GNR.351 GG No. 34239 of 26 April 2011 (Reg 38).

performs any function that has been designated by the minister in terms of section 66 (10)'.³¹ Section 1 is to be read with Reg 38 and if a secretary exercises the level of management or control as required by the definition of PO, they would be considered a PO.³² Determining if a secretary qualifies as a PO should be done on a case-by-case basis³³, but considering the wide governance role of secretaries, they are most likely to fall into this category.³⁴ For example, King IV principle 10 provides that 'the governing body should ensure that it has access to professional and independent guidance on corporate governance'. For companies, this role is fulfilled by the secretary'.³⁵ This role can be wide enough for a secretary to fall into the definition of PO.

In comparison the UK, defines a secretary as an officer of a company³⁶. While the UK CA doesn't explicitly detail secretaries' duties, their status as officers implies certain responsibilities, potentially rendering them liable for prosecution for non-compliance.³⁷ South Africa's legislation should offer similar clarity, either by defining the term or assigning secretaries as PO's. This aspect is further explored in section 4 of the research report. From the outset the absence of a clear definition in the framework may hinder the role in effectively carrying out its corporate governance responsibilities.

3.2 Transformation of the secretary's role

Presently secretaries are considered stakeholders in corporate governance because they have statutory and fiduciary duties to ensure compliance with the law, the company's constitution and the principles of governance.³⁸ However, in early 19th Century, secretaries were mere administrators. For example, the court in *Dey v Goldfields Building Finance & Trust Corporation Ltd* recorded that the office of secretary and the office of director are incompatible.³⁹ Prior to 1971,⁴⁰ the secretary was only responsible for administrative tasks,

³¹ Section 1 of the Act.

³² Reg 38 op cit note 30 and see discussion on PO in section 4.

³³ Jacqueline Cousins 'Prescribed Officers' *Resolve Corporate Services* 7 December 2020 available at <https://www.rslv.co.za/newsletters/2020/prescribed-officers/> accessed on 30 March 2024.

³⁴ Delport 2008 op cit note 17 at 335-336.

³⁵ King IV op cit note 9 at 85.

³⁶ Section 1173 of the Companies Act 2006 (UK CA).

³⁷ Practical Law Corporate 'Company secretary: appointment, role and responsibilities' with assistance from Peter Swabey, Policy & Research Director, *The Chartered Governance Institute* available at [https://uk.practicallaw.thomsonreuters.com/6-384-9539?transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/6-384-9539?transitionType=Default&contextData=(sc.Default)) accessed on 1 April 2024.

³⁸ Section 88 of the Act, Principle 10 of King IV, para 91, 93 -98 of the King Code and common law fiduciary duties.

³⁹ *Dey v Goldfields Building Finance & Trust Corporation Ltd* 1927 WLD 180 para 193 - 194.

⁴⁰ Andrew Kakabadse, Nadeem Khan and Nada Kakabadse *Leadership on the board: the role of company secretary* in Storey J., Hartley J., Denis J.-L., t' HartP. and Ulrich D. (eds.) *The Routledge Companion to Leadership* (2017) 243-244.

minute-taking, record-keeping and document-filing.⁴¹ Given the functions of the office the secretary became known as the chief administrative officer of the company.⁴² The court in *George Whitechurch*⁴³ described the secretary's duties as being 'of a limited and of a somewhat humble character' and the secretary was seen as 'servant' of the company.⁴⁴

Owing to the global emphasis on corporate governance as a solution to corporate scandals,⁴⁵ the role of the secretary has gradually grown to become oriented towards supporting corporate governance.⁴⁶ South Africa followed global trends in recognising the secretary's new role as custodian of good corporate governance as evidenced in case law jurisprudence.⁴⁷ In the *De Villiers cases*,⁴⁸ Macmed signed loan agreements to acquire a business using its subsidiary.⁴⁹ The acquisition was an ill-informed decision leading to failure of both companies.⁵⁰ The secretary was identified as having failed his governance duties by playing a prime role in the collapse of Macmed as it acted as 'Macmed secretary and de facto financial director'.⁵¹

As set out here, the transformed role does enable secretaries to carry out their governance duties but there is doubt whether this suffices. The overview below further considers the development of the secretary's governance role within the framework, setting out advantages and weaknesses and identifying areas where improvements may be necessary to better achieve its governance objectives.

3.3 The role of the secretary in common law

The common law is being considered as it sets out the basic tenets of the secretary's role part of which is still retained. The concept of a company secretary stems from English common law with references found in case law as early as 1841, describing the role as a 'secretary of the society'.⁵² The founding legislation of UK corporate law, the Joint Stock Act of 1856,

⁴¹ Ibid; Piet Delport *et al* (eds) *Henochsberg on the Companies Act 61 of 1973* 5 ed (2011) 516.

⁴² Ibid.

⁴³ *George Whitechurch Ltd. v. Cavanagh* 1902 A.C. 117 para 124.

⁴⁴ Kakabadse *et al* op cit note 40.

⁴⁵ Corporate governance is not the focus of this paper and will be discussed briefly in the context of the evolution of the Secretary's role; Cassim *et al* op cit note 19.

⁴⁶ International Finance Corporation World Bank Group 'The Corporate Secretary: The Governance Professional' January 2016 p 1-3 available at <https://www.ifc.org/content/dam/ifc/doc/mgrt/cg-cosec-june-2016.pdf> accessed on 23 December 2022 (IFC).

⁴⁷ *Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd* 1971 (3) All ER 16; *De Villiers and another NNO v BOE Bank Ltd* 2004 (2) All SA 457 (SCA) and *Intramed (Pty) Ltd (in liquidation) v Standard Bank of SA Ltd* 2005 (1) All SA 460 (W) (together *De Villiers cases*)

⁴⁸ *De Villiers cases*.

⁴⁹ *De Villiers cases*; Ramani Naidoo *Corporate governance: An Essential Guide for South African Companies* 2 ed (2009) 204-205.

⁵⁰ Ibid.

⁵¹ *De Villiers and another NNO v BOE Bank Ltd* op cit note 41 at para 23-24; Ramani op cit note 49.

⁵² *Pontifex v Bignold* para 71, (1841) Manning & Granger's Common Pleas Reports Vol. 3 63 English Reports (England and Wales).

referenced the role but did not include details.⁵³ In 1845, the role was identified as being that of an officer of the company associated with administrative matters.⁵⁴ Subsequent legislation of the time did not change this description.⁵⁵ This was reinforced in the case of *Barnett, Hoares & Co v South London Tramways Co*,⁵⁶ with the court stating ‘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...’⁵⁷

The House of Lords in the case of *Reuben v Great Fingall Consolidated Co* similarly held that ‘the Secretary of the Company... is a mere servant’.⁵⁸ South Africa adopted this administrative approach because its historical legislative policy closely followed precedents set in England.⁵⁹ English common-law doctrines in relation to secretaries also continued (and continues) to apply in South Africa, example fiduciary relationship between the secretary as employee and the company as employer.⁶⁰ After a century, the role transformed and was acknowledged in *Panorama* by the English Court of Appeals in 1971, that a secretary is now a person of importance and:

‘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.’⁶¹

The secretary’s expanded responsibilities and duties surpassing mere administrative tasks led to this change.⁶² The 1992 Cadbury Report recognised the role of secretaries in good corporate governance.⁶³ The report stated that the board of directors will look towards the secretary for guidance and for advice on implementation of best practices.⁶⁴ South African corporate law followed suit moving from the common law regulation to legislating the enhanced role for the

⁵³ Joseph Sigauke and Rosemary Sibanda ‘The company secretary’s role in CG: Private and public owned South African companies’ (2015) 13(1) *Corporate Ownership & Control* 402; Kakabadse *et al* op cit note 40.

⁵⁴ Kakabadse *et al* ‘Company secretary: a role of breadth and majesty’ (2016) 11 (3) *Society and Business Review* at 336-338 (Kakabadse).

⁵⁵ Sigauke & Sibanda op cit note 53.

⁵⁶ *Barnett, Hoares & Co v South London Tramways Co* (1887) 18 QBD 815, 817; *Newlands v National Employers Accident Association* (1885) 54 LJQB 428, 430 reaffirmed the position albeit an Australian case.

⁵⁷ *Ibid.*

⁵⁸ *Reuben v. Great Fingall Consolidated* (1906) AC 439; Aniebiet.A Ubon and Innocent Abidoye ‘The Role and Status of a Company Secretary in Modern Corporate Governance in Nigeria; a Case of ‘A Mere Errand Boy’’ (2015) *SSRN Electronic Journal* 1 2.

⁵⁹ Mongalo op cit note 16 at 93-94 and 99.

⁶⁰ *National Union of Metalworkers of South Africa obo Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Limited and Others* 2019 (8) BCLR 966 (CC) at para 55-67.

⁶¹ *Panorama* op cit note 47.

⁶² Milo Qin ‘A brief introduction to the position of company secretary’ *Cogency Global* 13 February 2020 available at <https://www.cogencyglobal.com/blog/brief-introduction-to-the-position-of-company-secretary> accessed on 18 December 2022.

⁶³ Cadbury Report op cit note 20; Sigauke & Sibanda op cit note 53.

⁶⁴ Cadbury Report op cit note 20 para 4.25.

first time in the Companies Act 61 of 1973 (1973 Act). However, these common law jurisprudential principles empower secretaries in their governance role and should be remembered and relied upon by secretaries when fulfilling their duties. Entrenching these principles in legislation can accomplish this. Key legislation specific to the secretary's role should also be considered and will be discussed below.

3.4 The key legislation

The role of the secretary developed across various legislation. This research report focuses on the two main statutes, the 1973 Act and the Act. It is still useful to briefly look at the 1973 Act as it integrated the position around secretaries, and this now aligns with contemporary governance needs.⁶⁵ The Act is the current legislation.

3.4.1 The secretary in the 1973 Act

Chapter IXA, sections 268A to 298I of the 1973 Act provided for, amongst other things, the compulsory appointment of secretaries for public companies only, their duties and resignation protocols.⁶⁶ Chapter IXA was the first company law legislative instrument that acknowledged the developed role of secretaries and confirmed that secretaries' duties were not restricted. This was indicated by the phrase: 'A secretary's duties include, but are not restricted to —'.⁶⁷ Furthermore, the secretary's failure to comply with certain provisions constituted an offence punishable by a fine or in certain instances imprisonment or both.⁶⁸

This position was first codified in the 1973 Act. Since 1973, legislative efforts have aimed to give effect to secretaries' governance role, making it their duty to provide directors with guidance regarding their duties, responsibilities, and powers.⁶⁹ Additionally, secretaries were regarded as officers of the company, playing a crucial role in management.⁷⁰ Section 1 of the 1973 Act provided "'**officer**", in relation to a company, includes any managing director, manager or secretary...'. Failure by directors to appoint a secretary was deemed an offense highlighting the importance of the role.⁷¹

It should be noted that not all companies had to appoint a secretary.⁷² Key elements from the 1973 Act, such as explicitly defining secretaries as officers of the company should have been preserved in the Act (which replaced it). As the Act (discussed below) does not define the term

⁶⁵ Monray op cite note 18 at 704.

⁶⁶ Delpont *et al* op cit note 41 at 516-518.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Ibid at 286G(a).

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid.

‘officer’ neither does it define the term ‘company secretary’ and only the term PO is defined without specifically including the secretary in the definition.⁷³ As mentioned, this could contribute to the limited impact of the secretary's role in governance in South Africa.

3.4.2 The secretary in the Act

The secretary is a vital cog of corporate governance in the Act. One of the purposes of the Act is to promote the development of the South African economy by encouraging high standards of corporate governance.⁷⁴ The Act covers several corporate governance matters, including obligations relating to PO's, disclosures and reporting.⁷⁵ The Act sets out the law currently as it relates to secretaries.⁷⁶ One of the central obligations of the secretary is to have working knowledge of the Act.⁷⁷ This makes the secretary and the board the only offices that have a bird's eye overview of the company's competencies.

This research report will now examine the pertinent sections of the Act applicable to secretaries. Sections 85 to 89 of the Act govern the functions and competencies of secretaries. Section 85 relates to registration of the secretary with the Registrar of companies, section 86 covers appointment, section 87 covers juristic person(s) or partnerships appointed in the position, section 88 covers duties and section 89 covers resignation or removal of the secretary.⁷⁸ Sections 85, 87 and 89 of the Act are administrative and procedural in nature and do not set out substantive requirements applicable to secretaries.⁷⁹ Section 85 of the Act places an obligation on the company to maintain a record of its secretaries including any name, former name, registration number and registered office address if a juristic person and the date of every appointment.⁸⁰ Furthermore, a notification of appointment must be filed with the registrar of companies.⁸¹

Sections 85 and 89 of the Act promote accountability and transparency in relation to the secretary by identifying the secretary and recording such identification on the company record. Section 87 of the Act goes on to clarify (and permit) the appointment of a juristic person or partnership as a secretary.⁸² In contrast, the Act does not allow appointment of a juristic person

⁷³ Section 1 of the Act.

⁷⁴ Section 7(b) (iii) of the Act.

⁷⁵ The Act.

⁷⁶ Sections 85 to 89 of the Act.

⁷⁷ Section 88 of the Act; King IV op cit note 9.

⁷⁸ Sections 85 to 89 of the Act.

⁷⁹ Sections 85, 87 and 89 of the Act.

⁸⁰ Section 85 (1)(a) and (1)(b) of the Act.

⁸¹ Section 85 (3) of the Act.

⁸² Section 87 of Act.

as a director.⁸³ Since it is typically easier for a juristic person to evade accountability and invoke separate liability compared to a natural person, it is suggested that section 87 be re-evaluated. This reconsideration could address another potential obstacle preventing the successful utilisation of this position to prevent corporate scandals.

Although all the King Reports recommend mandatory appointment of a secretary for all companies,⁸⁴ section 86 of the Act provides for the mandatory appointment of a secretary for all public and state-owned companies only⁸⁵ Private, personal liability or non-profit companies need not comply with section 86, except to the extent that the company's memorandum of incorporation (MOI) provides otherwise.⁸⁶ It is argued that this demonstrates the legislature's failure to fully realise the secretary's potential in implementing and improving corporate governance, and promoting the imperative of ensuring that companies practise good governance.

The Act does not set out in detail the substantive requirements or qualifications for a secretary save to state that every company secretary must '(a) have the requisite knowledge of, or experience in, relevant laws; and (b) be a permanent resident of the Republic, and remain so while serving in that capacity'.⁸⁷ The obligation is on the incorporators, directors, or members (depending on who makes the appointment) to appoint someone who meets the criteria set out in the Act or rules of the company.⁸⁸

In terms of skills, the Act does not provide details on the skills that a secretary must possess. However, to ensure that this important role is well filled, this research report considers the following (not a closed list) as fundamental practical attributes: objectivity and independence;⁸⁹ diplomacy; effective communication (written and spoken);⁹⁰ business acumen;⁹¹ active listening;⁹² raising and being aware of reputational risk issues;⁹³ generating alternative

⁸³ Section 69(7) of the Act.

⁸⁴ King I, King II, King III, and King IV (collectively referred to as the King Reports).

⁸⁵ Section 86(1) of the Act.

⁸⁶ Section 86(2)(a) and (b) of the Act; Delport 2008 op cit note 17 at 332(33)-333.

⁸⁷ Ibid; Delport 2008 op cit note 17 at 335-336.

⁸⁸ Ibid.

⁸⁹ King IV op cit note 9 at 60.

⁹⁰ IFC op cit note 46 at 6.

⁹¹ Ibid.

⁹² Ibid.

⁹³ Ibid.

solutions;⁹⁴ respecting confidences;⁹⁵ disagreeing constructively;⁹⁶ emotional intelligence and finding commercial approaches.⁹⁷

The lack of specifics on the prescribed skills of a secretary is problematic. These fundamental skills should be included in the Act to make it more effective. Although no specific qualification is needed, a secretary should have some form of credentials. This should be clearly stated in the Act as the current provisions are unclear. Some form of training should be required, and the legislature should step in and provide guidance in the Act. The secretary also doesn't need to belong to a professional body and in practise the role is usually occupied by a lawyer, chartered secretary or accountant.⁹⁸ It is posited that the Act should obligate secretaries to belong to a professional body. This would ensure verification of qualifications; provide ongoing learning and enhance accountability through monitoring.⁹⁹ It is noted the Act provides that a person disqualified from being appointed as a director of a company will also be disqualified from being a secretary.¹⁰⁰ The Act should then imply an extension of directors 'duties and qualifications to the secretaries as recommended in section 4.

The employment contract, MOI, and general company practise (which should implement King IV and the Act) determine the nature of the secretary's relationship, functions, rights, and duties.¹⁰¹ Section 88 of the Act imposes a statutory mandate on the secretary to provide:

'... the directors of the company collectively and individually with guidance as to their duties, responsibilities and powers' [and to make] 'the directors aware of any law relevant to or affecting the company' [and to report] '... to the company's board any failure on the part of the company or a director to comply with the with the memorandum of incorporation or [the Act].'¹⁰²

The duties of the secretary set out in section 88(2) (a) to (g) of the Act is summarised below noting that this is not an exhaustive list:¹⁰³

- providing guidance to the directors of the company collectively and individually as to their duties, responsibilities, and powers;¹⁰⁴

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ Delport 2008 op cit note 17 at 335-336.

⁹⁹ CGISA op cit note 1 at 32.

¹⁰⁰ Delport 2008 op cit note 17 at 332(30).

¹⁰¹ *Burland v Earle* 1902 AC 83 (PC) at 101; *Strathsomars Estate Co Ltd v Nel* 1953 (2) SA 254 (E) at 256.

¹⁰² Section 88(2)(a)-(c) of the Act.

¹⁰³ Moore South Africa 'The Role of the Company Secretary' MOORE South Africa June 2009 available at <https://www.moore-southafrica.com/services/business-services/business-outsourcing/company-formation-secretarial/the-role-of-the-company-secretary> accessed on 20 January 2022.

¹⁰⁴ Section 88 of the Act; Delport 2008 op cit note 17 at 335-336.

- making the directors aware of any law relevant to or affecting the company;¹⁰⁵
- reporting to the board any failure on the part of the company or a director to comply with the MOI or rules of the company or the Act;¹⁰⁶
- ensuring that minutes of all shareholders' meetings, board meetings and the meetings of any committees of the directors, or of the company's audit committee, are properly recorded in accordance with the Act;¹⁰⁷
- certifying in the company's annual financial statements whether the company has filed required returns and notices in terms of the Act, and whether all such returns and notices appear to be true, correct and up to date;¹⁰⁸
- ensuring that a copy of the company's annual financial statements is sent to every person entitled to it;¹⁰⁹ and
- carrying out the functions in respect of the annual transparency and accountability report.¹¹⁰

Although the Act does not elaborate on the additional governance duties of the secretary, this research report argues that it is clear from the open wording 'a company secretary's duties include, but are not restricted to,'¹¹¹ that the legislature contemplated the many roles in governance the secretary plays in a company. The legislature is also aware of the secretary's governance responsibility, as evidenced by the first three duties listed in section 88 (first three bullet points above), which all relate to governance.¹¹²

The duties listed above are core duties and encompass the essence of the role within corporate governance. The duties are not restrictive and do not stop the secretary from complying with other governance duties not specified. Considering this, it is not clear why the legislature did not make the appointment of secretaries obligatory for all companies. Effective utilisation of a secretary by management or the board, applying the Act and Johannesburg Stock Exchange Listings Requirements (JSELR)¹¹³ where applicable, should further assist secretaries to ensure

¹⁰⁵ Ibid.

¹⁰⁵ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ Johannesburg Stock Exchange 'Limited Listings Requirements' available at <https://www.jse.co.za/sites/default/files/media/documents/2019-04/JSE%20Listings%20Requirements.pdf>, accessed on 13 December 2023.

good corporate governance despite any identified shortcomings. The JSELR apply to public companies only.

Public companies listed on the JSE must comply with the JSELR in relation to corporate governance.¹¹⁴ The JSELR incorporates and makes certain corporate governance practices from the King Code compulsory including the appointment of a secretary.¹¹⁵ Companies must disclose annually their corporate governance compliance in crucial areas including significant corporate actions in a statement.¹¹⁶ This statement and any reports on corporate governance must be prepared by the secretary.¹¹⁷ Compliance with the JSELR is in addition to the Act's relevant corporate governance provisions.¹¹⁸ Section 38.4(h) of the JSELR provides:

‘all issuers must appoint a company secretary in accordance with the Companies Act and should apply the recommended practices in the King Code. The board of directors must consider and satisfy itself on the competence, qualifications and experience of the company secretary. The issuer must confirm this by reporting to shareholders in its annual report that the board of directors has executed this responsibility;’

The JSELR is conscious of the secretary's potential to promote good corporate governance when properly qualified and utilised.¹¹⁹ However, it also appreciates that the secretary may encounter possible coercion or manipulation by other actors within an organisation, and, as such, reporting acts as a mechanism for providing transparency.¹²⁰ This research report contends that these provisions are useful for improving corporate governance in relation to the secretary and should be considered for incorporation into the Act to make them binding on companies.

These rules supplement and reflect King IV's guidance and the King Code. The modern governance role of the secretary is set out in King IV as the reasonable provider of professional and independent guidance on governance.¹²¹ This component of the framework is crucial in enabling the secretary to effectively fulfill the role of a governance guardian. This should be capitalised on and incorporated in the framework, alongside incorporating the other recommended adjustments to aid secretaries to fully realise their governance potential.

¹¹⁴ Ibid at 1.1 and 3.84(h).

¹¹⁵ Ibid.

¹¹⁶ Ibid at 8.63(a) and Ezra Davids and Ryan Kitcat *South Africa in The Corporate Governance Review* 13 ed Chapter 15 (2022) *The Law Reviews* 237-238.

¹¹⁷ JSELR op cit note 113 at para 7.F.5, 7.F.6, 11.58.

¹¹⁸ Ibid.

¹¹⁹ Ibid 3.84, 4.8-4.10, 7.F.5, 7.F.6. and 8.63(a).

¹²⁰ Ibid.

¹²¹ Parmi Natesan and Prieur du Plessis ‘Company secretaries emerging as governance custodians’ *Institute of Directors* 31 October 2018 available at <https://www.iodsa.co.za/news/news.asp?id=424920> accessed on 17 February 2022.

3.5 The secretary in King IV and the King Code

The King report, first published in 1994 to tackle corporate governance set out a code of practices and conduct for good corporate governance in South Africa.¹²² The role of the secretary in promoting good corporate governance was recognised as early as King I.¹²³ It noted that the 1973 Act was deficient as it didn't provide for the perquisite appointment of a secretary for all companies. King I stated 'There is no requirement in the [...] Act for the board to appoint a company secretary. This anomaly should be corrected'.¹²⁴ As mentioned, this has not yet been implemented. Keeping in line with the global focus on corporate governance, the King Report is periodically revised.¹²⁵ King IV replaced its predecessors and expanded on the principles of corporate governance, including provisions relating to the secretary.¹²⁶ In line with previous iterations, King IV emphasises obligatory appointment of a secretary for all companies to provide professional corporate governance services to the governing body as a matter of leading practice.¹²⁷

Although the role of the secretary is constantly developing, secretaries still face challenges in implementing corporate governance principles, including: lack of resources, conflicts of interest stemming from multiple roles, bullying or victimisation by other stakeholders, lack of corporation by the board and management and misunderstandings of the secretary's role thus flouting governance guidance provided by the secretary.¹²⁸ King IV identified these challenges and provided comprehensive directives setting out the functions and expectations of the board/management in relation to the secretary in the King Code section on 'Professional corporate governance services to the governing body'.¹²⁹ Noting that it should:

- be aware of the duties imposed upon the secretary, ensure the secretary is empowered and the position carries the required authority (paragraph 93 King Code);¹³⁰
- approve the appointment, employment contract and remuneration of the secretary (paragraph 94 King Code);¹³¹

¹²² Philip Armstrong 'The King Report on Corporate Governance' (1995) 3(2) *Juta's Bus. L.* 65.

¹²³ Mervyn E King S.C. 'The King Report on Corporate Governance' 29 November 1994 *The Institute of Directors South Africa* 22-23 available at https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/94445006-4F18-4335-B7FB-7F5A8B23FB3F/King_1_Report.pdf accessed on 23 December 2022 (King I).

¹²⁴ Ibid.

¹²⁵ King IV op cit note 9 at 3-7.

¹²⁶ Ibid.

¹²⁷ King IV op cit note 9 at 29 and 59.

¹²⁸ Sadie S, Matisonn J & Paxton S 'The challenges facing company secretaries in South Africa today' 2018 *The Corporate Report* 8 (3) (*Juta*) 8-12 available at https://www.chartsec.co.za/documents/latestNews/Sadie-Matisonn-Paxton_Challenges_facingcompanysecretaries.pdf accessed on 27 October 2023.

¹²⁹ King IV op cit note 9 at 59-60.

¹³⁰ Ibid.

¹³¹ Ibid.

- oversee the secretary has the necessary competence to provide independent guidance (paragraph 94 King Code);¹³² and
- evaluate (annually) the secretary's performance and independence (outsourcing the role), (paragraph 98 King Code).¹³³

Additional principles warranting attention are the secretary should: have access to the governing body whilst maintaining an arms-length relationship (independence) (paragraph 96 King Code);¹³⁴ undergo a fit and proper test as is recommended for new director appointments (paragraph 94 King Code)¹³⁵ and ideally not be a director of the company (paragraph 96 King Code).¹³⁶ Notwithstanding its distinguished importance, the appointment of a secretary remains optional for private companies rather than being imperative.¹³⁷

Per King IV secretaries should be aptly qualified to provide corporate governance support at the highest level of decision-making in the organisation.¹³⁸ Practically this would necessitate secretaries to be well versed with the corporate framework, financial practice and have some level of business acumen. Reporting and accountability are also provided for as lack of compliance by directors is to be reported by the secretary to the governing body via the chair.¹³⁹ The prescribed application of King IV and JSELR, although containing manifestly beneficial provisions pertaining to secretaries, is restricted to JSE listed companies.¹⁴⁰

Apart from JSE listed companies, all King Reports are not law and are not legally binding on companies¹⁴¹ but they should be. Given that the report compromises of leading best practices, there is a societal expectation that corporates incorporate these principles.¹⁴² Companies often incorporate these provisions in their MOIs and policies but there is no obligation to and it can be avoided by a company.¹⁴³ Given the significant impact it has on the secretary's role in the corporate governance of corporations, this should not be the case.

¹³² Ibid.

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ King IV op cit note 9 at 29.

¹³⁸ King IV op cit note 9 at 60.

¹³⁹ Ibid.

¹⁴⁰ JSELR op cit note 113.

¹⁴¹ King IV op cit note 9 at 35.

¹⁴² Ibid.

¹⁴³ Ibid.

3.6 The secretary in case law

The corporate governance practices in King IV have found their way into case law jurisprudence forming part of the common law and the norm for behaviour.¹⁴⁴ The court in *SABC v Mpofu*,¹⁴⁵ considered the principles in King to be binding on state-owned entities. Further, in *Minister of Water Affairs v Stilfontein Gold Mining Company*,¹⁴⁶ the court referred to corporate governance principles as a yardstick against which directors' conduct should be measured in the context of their fiduciary duties. Case law interpreting the application of corporate governance forms part of the framework enabling secretaries to carry on their governance role. The case law underlines the application and supports the idea, of incorporating governance codes into the Act which would benefit the secretary's role in governance.

3.7 Analysis of the secretary in the South African corporate governance framework

From the above, it is clear that the contemporary secretary is expected to fulfil numerous governance centred roles within the corporate governance framework and the framework has largely been developed to allow the secretary to perform this role. However, there are loopholes in the framework that can hinder the secretary and it is argued that addressing these will enable the secretary to emerge as a 'governance hero'. While the governance framework sets out the requirements of the secretary, external factors also play a role in determining the skills, duties and qualifications of the secretary such as the company's MOI, employment contract and industry.¹⁴⁷

Secretaries' duties are both exceedingly broad in scope and onerous as the role includes being the company scribe, compliance officer, advisor, communications officer; educator, governance watchdog, stakeholder, relationship officer and tax compliance office.¹⁴⁸ Given their governance position there is a responsibility on secretaries to be moderators and to some extent enforcers, as they are to redress governance non-compliance. Considering the above, this research report argues that secretaries must also assist in the induction, ongoing training and education of directors and executive management in their governance responsibilities. Secretaries must manage a relationship with board members, shareholders and others in drafting and implementing policies.

¹⁴⁴ Ibid.

¹⁴⁵ *South African Broadcasting Corporation Ltd and Another v Mpofu* 2009 (4) All SA 169 (GSJ).

¹⁴⁶ *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Limited & Others* 2006 (5) SA 333 (W) at 16.9.

¹⁴⁷ Kakabadse op cit note 54 at 337-338.

¹⁴⁸ Wulfsohn op cit note 1 at 8.

The basic knowledge secretaries need includes relevant law, financial accounting, corporate governance strategy, corporate secretarial practice and knowledge of the relevant business.¹⁴⁹ These lists are not exhaustive and comply with the Act and King IV. It may not be possible to address all these factors within the framework, but efforts can be made to reduce the potential negative impact these may have on the secretary's governance role. It is trite that ignorance of the law is not an excuse, and a secretary could not claim ignorance of their statutory duties. Given the foregoing, the material sections of King IV, the King Code and the JSELR governing secretaries should be incorporated into the Act and made applicable to all companies. Appointing a secretary possessing the requisite skills and qualifications, empowered by the company and improved framework, by complying with their duties of implementation and enforcement of governance policies, will likely substantially prevent or at least deter and effectively manage corporate governance failures in a company.¹⁵⁰ The framework compromising of various elements should be read and applied together.¹⁵¹ Secretaries must master and skilfully implement the framework avoiding the cracks. Noting that business practices and governance expansion justify further transformation of secretaries' roles in the existing framework.¹⁵² The current role within the framework has the potential to fulfil its governance expectation but has room for improvement to ensure fulfilment. This should also include reinforcing parts of the framework that ensure accountability and liability for secretaries in governance roles as set out below.

4. LIABILITY AND ACCOUNTABILITY OF THE SECRETARY

A director, employee and/or officer of the company by virtue of their relationship with the company, have common law fiduciary duties to the company.¹⁵³ The court in *Daewoo* confirmed that the secretary, through their position and employment, holds a fiduciary relationship with, the company and is subject to an implied fiduciary duty.¹⁵⁴ The directors' common law fiduciary duties, some of which are incorporated in sections 75 (director's personal financial interests) and 76 (standards of directors' conduct) of the Act, exist side by side with the common law and include the duties to: act in good faith; not make unauthorised profits; avoiding and disclosing (potential) conflict of interests; not exceed their powers; maintain an unfettered discretion and not misappropriate opportunities.¹⁵⁵ The secretary

¹⁴⁹ Ibid.

¹⁵⁰ Section 3 of this paper.

¹⁵¹ Cassim *et al* op cit note 19 at 504.

¹⁵² Section 3 of this paper.

¹⁵³ Delport 2008 op cit note 17 at 298(21)-299 and 300-308.

¹⁵⁴ *Daewoo Heavy Metals (SA) Ltd v Banks* 2004 (2) All SA 530 (C) at 533 (*Daewoo*).

¹⁵⁵ Delport 2008 op cit note 17 at 295-299.

likewise is seized with these duties holding the secretary to a higher standard of accountability than other role players in a company and on par with directors.

However, although secretaries have fiduciary duties on par with directors, they don't specifically share the benefits, protections or indemnifications available to directors under the Act.¹⁵⁶ This should be included in the Act to bolster secretaries' confidence in enforcing their governance role. Another question emerges regarding a potential conflict between the secretary's fiduciary duty to the company under the board's direction and its duty to the board. Clarifying the reporting line could resolve this.

Additionally, the company may still have recourse against the secretary, not only as an employee but also as a PO through the common law.¹⁵⁷ As a secretary is likely to be a PO¹⁵⁸ in line with Reg 38.¹⁵⁹ Reg 38 provides:

‘...a person is a “prescribed officer”...if that person — (a) exercises general executive control over and management of the whole, or a significant portion, of the business and activities of the company; or (b) regularly participates to a material degree in the exercise of general executive control over and management of the whole, or a significant portion, of the business and activities of the company.’

Reg 38 applies regardless of whether the person is a director or not, to any title given to an office held or function performed by such person in relation to the company.¹⁶⁰ Thus, additional statutory duties, alongside common law duties, apply to a secretary (subject to Reg 38) as PO's have the same fiduciary duties as directors.¹⁶¹ Additional provisions in the Act applicable to directors apply to PO's and as such, the secretary, for example on ineligibility, disqualification (section 69) and liability (section 77).¹⁶²

Regarding liability, if the secretary, breaches its duty (by way of omission or commission, in common law or statute), it may incur civil and/or criminal liability.¹⁶³ A corporate governance breach by a secretary will be in breach of both these duties. Civil liability for any loss, damages

¹⁵⁶ Section 76(4)(b), 76(5) and 77(9) of the Act.

¹⁵⁷ Delport 2008 op cit note 17 at 295-298 and 335-336.

¹⁵⁸ Ibid.

¹⁵⁹ Reg 38 op cit note 30 and see discussion on PO in section 3.1.

¹⁶⁰ Reg 38 op cit note 30 at Reg 38(2); Leigh Hefer & Jayne Hunter-Rhys ‘Under which circumstances may a company secretary be deemed to be a prescribed officer of a company?’ *Company Secretary's Handbook* 2021 published by Genesis Corporate Services available at <https://support.infodocs.co.za/cosec/under-which-circumstances-may-a-company-secretary-be-deemed-to-be-a-prescribed-officer-of-a-company/> accessed on 7 September 2023 (Leigh & Hunter-Rhys).

¹⁶¹ Annamarie van der Merwe ‘The Potential Liability of the Company Secretary’ *iThemba Governance & Statutory Solutions* 27 October 2015, available at <https://www.chartsec.co.za/documents/2015SpeakerPresentations/10h15%20%203.%20Annamarie%20iThemba%20Cosec%20Liability%20Presentation%20Oct%202015.pdf> accessed on 10

November 2022; Delport 2008 op cit note 17 at 295-298 and 300-303.

¹⁶² Ibid; Leigh & Hunter-Rhys op cit note 160.

¹⁶³ Delport 2008 op cit note 17 at 300-308.

or costs sustained by the company as a result is envisaged in section 218(2) of the Act which provides that any person who contravenes any provision of the Act is liable to any other person for any loss suffered by that person as a result of that contravention.¹⁶⁴

Furthermore, section 214 of the Act provides that if a person was knowingly a party to false statements,¹⁶⁵ reckless conduct, and non-compliance with the Act, a fine or imprisonment not exceeding 10 years or both, may be imposed in terms of section 216 of the Act relating to offences committed in terms of the Act.¹⁶⁶ The secretary could also face criminal liability for fraud as a non-disclosure or any breach of statutory or common law duties, may also amount to fraud.¹⁶⁷

As mentioned above, the Act does not expressly state that a secretary is a PO.¹⁶⁸ Although the legislature is aware of the role of secretaries, it passed up the opportunity to specifically designate them as POs, which would have given their position in the legislation more substance. A secretary should not escape the additional accountability and liability imposed by the Act on a PO, in addition to common law obligations. Inclusion of a provision in the Act expressly stating that a secretary is a PO or incorporating specific accountability and liability provisions for secretaries, could contribute to bettering its governance role.

5. FAILURES OF SECRETARIES IN CORPORATIONS

The preceding sections demonstrate that the current framework shows potential for empowering secretaries and indeed empowers them to fulfill their governance role. As depicted, the framework comprises of many governance-friendly provisions providing the secretary with an advantage. However as mentioned the potential pitfalls identified could lead to governance failures. This section briefly examines corporate governance failures and the secretary's role, focusing on lessons learnt from past mistakes for future improvement.¹⁶⁹ These scandals showcased instances where secretaries failed and performed poorly in the role as either they were in some cases not, properly qualified, invested in the role or fit for the purpose.¹⁷⁰ Noting that these scandals also revealed that the secretary's presence does not always prevent or deter poor governance and misconduct.

¹⁶⁴ Ibid.

¹⁶⁵ Section 214 of the Act.

¹⁶⁶ Section 216 of the Act.

¹⁶⁷ Delport 2008 op cit note 17 at 298(7).

¹⁶⁸ Delport 2008 op cit note 17 at 335-336.

¹⁶⁹ CGISA op cit note 1 at 1-5.

¹⁷⁰ Ibid and at 32-36.

The discussion will be limited to specific corporate scandals involving among others, the SABC, Steinhoff, Denel, and VBS.¹⁷¹ The background will not be discussed in detail. The lessons learned provide guidance for possibly reworking the role within the framework to fully leverage the secretary's potential in improving corporate governance. Furthermore, the scandals demonstrate how an inadequately qualified secretary can contribute to a company's demise.

The first of these scandals relates to the SABC, a stated owned broadcasting company, which suffered from several governance collapses under the leadership of the former chief operating officer Hlaudi Motsoeneng (Motsoeneng).¹⁷² Motsoeneng, friend of the former president, unqualified for the position, facilitated corruption at the SABC.¹⁷³ A parliamentary ad hoc committee formed to investigate the SABC, released a report revealing lack of financial compliance, interference, unlawful dismissals, poor transparency and fraud.¹⁷⁴

There was a collapse of governance systems as the board failed to look into allegations and management failed to facilitate corporate governance.¹⁷⁵ All of this occurred in the presence of a secretary.¹⁷⁶ Although the secretary was aware that the board's process for appointing Motsoeneng was flawed, she remained silent and did not raise it with the board.¹⁷⁷ The secretary alleged that she was being bullied and prevented from speaking in board meetings.¹⁷⁸ In relation to the secretary, it was observed:

‘Despite the Company Secretary having served in the position for a long period of time, and despite her having been highly experienced and highly qualified, the evidence suggested that she failed to provide adequate guidance to the Board. Former Board members gave evidence of an unusually large number of special meetings convened at short notice and without proper notification or adequate documentation, and frequent round-robin decision-making, albeit – according to the SABC – ratified at the next quorate meeting. This modus operandi appears to point to deliberate attempts to stifle Board discussion and to manipulate the Board's decision-making...’

Another example of a secretary's failure is Denel, a state-owned aerospace and military technology conglomerate that was also subject to ‘state capture’.¹⁷⁹ Almost immediately after

¹⁷¹ Ibid.

¹⁷² Ibid at 9-10.

¹⁷³ Ibid.

¹⁷⁴ Parliamentary Monitoring Group ‘ATC170224: Final Report of the Ad Hoc Committee on the SABC Board Inquiry into the fitness of the SABC Board’ 24 February 2017 available at <https://pmg.org.za/taled-committee-report/2898/> accessed on 3 April 2023.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid.

¹⁷⁸ Ibid.

¹⁷⁹ CGISA op cit note 1 at 11-12.

their appointment, the board of directors began to implement a slew of poor decisions that brought the state-owned company to its knees.¹⁸⁰ The secretary, the chief executive officer, and the chief financial officer were suspended by the board on false charges of misconduct.¹⁸¹ The board nominated a non-executive director who was also a member of the audit and risk committee to serve as acting secretary in conflict of interest.¹⁸² There was a deliberate effort to take charge of the office of the secretary.¹⁸³ This is a prime example of how secretaries can be placed in the firing line and victimised for maintaining their ethical and legal duties.¹⁸⁴ The secretary attempted to place good corporate governance at the fore.¹⁸⁵ As opposed to enquiring into the allegations, the board placed the executives including the secretary in the firing line.¹⁸⁶ Another case of where a secretary failed and was bullied, is in South African Airways SOC Ltd. The secretary's office was severely incapacitated, and thus failed to note that an incorrect recording of the board minutes was circulated by the deputy secretary, furthering the agenda of a dominant corrupt chairperson. This chairperson tried to intimidate the board and the secretary.¹⁸⁷ Although it is unclear if the conduct of the deputy was an omission or deliberate, failure to correct the error was a breach of the secretary's duty.¹⁸⁸

In Johannesburg Roads Agency, the secretary alerted the board to governance problems which they ignored.¹⁸⁹ The board suspended the secretary after she blew the whistle on corruption and had made a disclosure in terms of law.¹⁹⁰ Section 159 of the Act offers protection to whistleblowers, including secretaries or employees, from civil, criminal or administrative liabilities when disclosing information about misconduct within an organisation.¹⁹¹ This protection applies if (amongst other things) the disclosure reasonably suggests the commission or likely commission of a criminal offense or if someone has failed, is failing, or is likely to fail to comply with a legal obligation.¹⁹² The disclosure/reporting is to be made to a relevant

¹⁸⁰ Ibid.

¹⁸¹ Alec Hogg 'How Denel was served to Guptas on a platter after axing of three executives #Zondo' 27 October 2020 *BizNews* available at <https://www.biznews.com/sa-investing/2020/10/27/denel-state-capture-enquiry> accessed on 3 April 2023.

¹⁸² CGISA op cit note 1 at 11-12.

¹⁸³ Ibid.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid at 13-14.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid at 20 - 21.

¹⁹⁰ Ibid at 8 and section 159 of the Act.

¹⁹¹ Ibid.

¹⁹² Ibid.

authority or the board to take action.¹⁹³ A secretary may be the recipient of a disclosure.¹⁹⁴ Unfortunately, this provision in practice has failed to protect secretaries as intended and should be better implemented.¹⁹⁵ This underscores another reason why the role of secretaries in corporate governance may not be as effective as it ought to be. This case, however, demonstrates how a secretary by fulfilling its governance role and reporting corruption, ensures good corporate governance and why peremptory appointment of a secretary is essential for all companies to maintain good governance.¹⁹⁶

The preceding examples highlight the difficulties that secretaries face in organisations, but being bullied is not an excuse to ignore one's responsibilities. The absence of guidance from a secretary can lead to corporate failure. As a result, the appointment and use of an appropriate secretary should improve governance. It is critical to recognise that the secretary must not only have the necessary qualifications, but also the necessary integrity to resist bullying. Corporate scandals often reveal another prevalent issue, which is the absence of independence and objectivity in the secretary's role. This can lead to the ineffective performance of their duties, resulting in bypassing corporate governance procedures and eventually contributing to a company's collapse.

King IV, the King Code and case law discussed above raises independence and objectivity as a requirement and caution against a secretary being a director or taking on dual appointments within a company. The secretary in Steinhoff was simultaneously a secretary and director.¹⁹⁷ The secretary together with other executives and management structured and implemented fictitious transactions over a period which inflated the profits of the Steinhoff N.V. group of companies.¹⁹⁸ Given the position of the secretary, corporate governance procedures were ignored.¹⁹⁹

In VBS, the secretary simultaneously occupied position of CFO.²⁰⁰ The secretary's focus on his role as CFO overshadowed his role as secretary, leaving limited focus on corporate governance. The requisite checks and balances were eliminated. There were often conflicting

¹⁹³ Ibid.

¹⁹⁴ Ibid.

¹⁹⁵ Ibid.

¹⁹⁶ Ibid.

¹⁹⁷ CGISA op cit note 1 at 25 - 26.

¹⁹⁸ Ibid.

¹⁹⁹ Ibid.

²⁰⁰ Terry Motau assisted by Werksmans Attorneys 'The Great Bank Heist: Investigators Report to the Prudential Authority' 2018 at 11-19 available at <https://www.corruptionwatch.org.za/wp-content/uploads/2018/10/VBS-Mutual-Bank-The-Great-Bank-Heist.pdf> accessed on 3 April 2023; CGISA op cit note 1 at 22-24, 33.

interests between the two roles.²⁰¹ If the two positions had been held by two different individuals, it is possible that the corporate failures would have been identified earlier and could have been prevented, avoiding a corporate collapse.

An essential requirement is for the secretary to be independent and not a director of the company.²⁰² The dual appointment has the effect of ignoring good governance, making it easier for governance to collapse.²⁰³ It removes the transparency provided by secretaries.²⁰⁴ The secretary must maintain, as far as reasonably possible, an arms-length relationship with the board, its directors and management.²⁰⁵

After reviewing the aforementioned cases involving either the implication or victimisation of the secretary, the red flags below should serve as valuable lessons. As seen in this study, corrupt structures may target secretaries that are considered a potential threat to corruption.²⁰⁶ A dominant CEO or chairperson can victimise a secretary and thus the secretary should put in place procedures to evaluate the board to try and avoid this from happening.²⁰⁷ Should this fail, the secretary may look to follow the whistleblowing processes (which may not always work).²⁰⁸ The secretary needs to avoid conflicts of interest and have adequate knowledge of conflict of interest in the governance framework.²⁰⁹ It is imperative the secretary insists on running background checks on the present board, future board appointments, shareholdings of that director/candidate and any associations they be part of.²¹⁰ This may provide insight into any conflicts or potential conflicts of interest.²¹¹ Secretaries need to ensure the accuracy of their records as these can be used as evidence in court proceedings.²¹² Other challenges facing secretaries is managing the many roles placed on them and getting through numerous tasks daily.²¹³ Lack of structure in the organisation may make it difficult to implement policies.²¹⁴ The lack of appreciation for the role of secretaries by the board and or management has also

²⁰¹ Ibid.

²⁰² Ibid.

²⁰³ Ibid.

²⁰⁴ Ibid.

²⁰⁵ Ibid.

²⁰⁶ Ibid at 32.

²⁰⁷ Ibid.

²⁰⁸ Ibid and Section 159 of the Act.

²⁰⁹ Ibid at 33.

²¹⁰ Ibid.

²¹¹ Ibid.

²¹² Ibid at 34.

²¹³ Sadie op cit note 128 at 18-19.

²¹⁴ Ibid.

presented itself as a challenge.²¹⁵ Secretaries need to ensure that the board and new directors receive regular training in order to address and deal with these challenges.²¹⁶

In many instances where management was involved in a governance collapse, the board was unaware of its role in good corporate governance and the support it is obliged to provide to the secretary.²¹⁷ The secretary may employ the above tactics to possibly prevent scandals or minimise the impact of a corporate failure. The role of the secretary in the framework should be altered in line with the lessons set out in this section as well.

6. CONCLUSION

Through tracing its history, this research report illustrates that the current role of secretaries in the corporate governance framework developed since the common law position to equip secretaries to perform the role as a shepherd of corporate governance. It affirms the potential of South Africa's current framework to fulfil this expectation. It also recognises the inherent risks of governance failures within the existing framework and calls for improvement. This is one of the prime points outlined in the report, highlighting why the secretary continues to be an unacknowledged hero of corporate governance.

Preceding discussions reflect that the secretary is the primary person in charge of corporate governance in companies, but their appointment is not mandatory in all cases. In terms of corporate governance, the secretary has extensive powers, duties and responsibilities outlined in the Act, King IV, King Code and common law. The King IV, the King Code, JSELR and certain common law provisions, on the other hand, are not incorporated into or enforced by legislation. Even though these provisions are currently considered part of the corporate framework, incorporating them into legislation gives them legal force. Beneficial provision from the 1973 Act can also be included as suggested.

The corporate scandals highlight the importance of having a competent and qualified secretary to achieve good corporate governance, which necessitates appropriate qualifications and qualities. Although secretaries were employed in all of the governance collapses discussed, not all of the secretaries appointed were suitably qualified or possessed the necessary character.

This research report proposes, the corporate governance framework could benefit from the inclusion of provisions designed to mitigate the risk and obstacles faced by secretaries in the state capture scandals. Example, including restrictions on dual appointments in the secretary's role, given its importance in corporate governance implementation.

²¹⁵ Ibid at 16-17.

²¹⁶ Wulfsohn op cit note 1 at 12-13.

²¹⁷ Ibid.

Based on the discussions in this research report, the absence of a secretary or the appointment of an ineffective one facilitates poor governance in corporations. This research report submits governance collapses can be possibly avoided or the impact minimised by appointing an appropriate and suitably qualified secretary; well versed in the corporate framework; who follows and implements the corporate framework; actively educates the board to act as its ally in the corporate governance compliance fight; insists on running background checks; sharing findings and avoiding potential conflict of interests. At the very least this would result in improved corporate governance. Noting that, as in the Denel case, this may not always be possible or beneficial.

The material impact of the secretary both positive and negative on corporate governance is demonstrated throughout this research report; however, there is a clear lack of guidance on the role in the Act. The provisions of the Act are largely limited to the secretary's duties and responsibilities. The Act can be expanded as recommended in this report. Consideration should be given to revising the Act to clearly define the role, to require the appointment of a secretary in all companies, to align the duties and responsibilities with King IV, the King Code, common law and the 1973 Act (where appropriate), and to incorporate these sources (or any subsequent King report) either directly or by reference. In doing so, the Act should consider the extent of authority and power called-for by the secretary to carry out its duties effectively and extend its provisions accordingly.

Specific provisions to deal with coercion or attempts to limit the secretary's power are absent from the Act and common law, despite acknowledging such actions could lead to corporate collapse. The general liability and penalty provisions of the Act (sections 214 – 218) and common law cannot be relied on solely as they lack sufficient specificity. This research report proposes that the Act should have specific provisions for holding the secretary accountable and imposing penalties similar to that provided for directors in the Act. Alternatively, the secretary should be clearly defined as a PO. While it is widely assumed that a secretary is a PO, the Act does not expressly state this, and it should so that the additional accountability and liability that the Act imposes on a PO is applicable to the secretary as well.

The common law duties should be fully defined in the Act and expressly applicable to secretaries. Provisions should be included specifically to provide for the personal liability of any person within a company who fails to follow the secretary's corporate governance advice and causes damage, loss, or liability to the company as a result.

It is argued in this research report, that while the corporate framework recognises the value of a suitable and qualified secretary in improving and implementing corporate governance, there are some areas where it falls short in aiding.

To address this, it is suggested that the relevant provisions pertaining to the role of secretaries in the corporate framework be consolidated and given the force of law. A dedicated comprehensive chapter on secretaries in the Act would be justified and useful in drawing attention to their potential. More so given the recent increase in corporate scandals.

Implementing the proposed amendments would ensure that secretaries' roles are effectively utilised in South African companies, potentially leading to improved corporate governance and a reduction in corporate scandals and failures.

By consolidating the appropriate provisions of the framework giving it the force of law, the governance potential of secretaries would be 'officially' recognised and justified in law, ultimately leading to better implementation of their role in corporations. This report recognises that mitigating every governance risk within the role as set out in the current framework may not always be feasible, but taking action could pave the way for the unsung hero to finally receive recognition.

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