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Directors' role as the cornerstone of the governance ecosystem

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The governance ecosystem is touted to give accountability, transparency, fairness and responsibility as the pillars on which corporate governance is built to all stakeholders and sanction or root out perverse conduct in an appropriate and balanced manner. This should keep the equilibrium of all stakeholders' rights and obligations in check.

The governing bodies of companies undoubtedly have the single biggest impact on the control environment of a company and as a logical consequence the country's governance ecosystem. The governing body is where direction is set, conduct is emulated from, culture originates and where the buck stops.

Is it the collective experiences of law-abiding South Africans that the directors, prescribed officers and non-director committee members uphold the standards touted relevant to the governance ecosystem? Do South Africans know how to engage the governance ecosystem to be part of a growing and sustainable economy?

The requirement of punishment to hold accountable and redress harm by society that has largely gone unfulfilled

Societies over the ages required justice to be served with the objects set by courts as the objectives of denunciation, deterrence, separation of offenders from society, rehabilitation of offenders, and acknowledgement of and reparations for the harm they have done.

Any unlawful act by a director or directors, declared unlaw by a court will be void and possibly sanctioned by a relevant law read with Section 216 of the Companies Act.

Civil restitution for harm suffered by any person for such unlawful conduct can be claimed under Section 218. The provisions of section 77 of the Companies Act hold the governing body and its individual members accountable for civil liability arising from their duties as directors. In addition, a person can be held liable in terms of Section 162 and be declared a delinquent director.

The Governing Body as the principal party to the governance ecosystem

The governing body of a company is responsible for establishing the control environment of the company as well as setting the ethical guardrails for all involved. As a result, the governing body is the principal party and first line of defence in the governance ecosystem with the highest levels of accountability.

Practically how would governing bodies be held accountable? Privacy and how companies deal with personal information is currently a hot topic and the impact thereof has not filtered into the economy yet. The protection of the individual's Constitutional right to privacy is codified mainly in the Protection of Personal Information Act (POPIA).

What would be the role of the governance ecosystem and the recourse by stakeholders if a company with a Public Interest Score of more than 1,000 points servicing some 4 million clients and the Information Regulator finds it has processed data in contravention of the POPI Act by issuing an infringement notice – an order to stop all processing of all data and an administration fine of R10,000,000?

In the case law created by De Bruyn v Steinhoff and others, the courts found that a person(s) cannot claim for a loss in share price as this is a reflective loss, and consequently, only the injured company can claim losses from its directors. Presumably, based on our Common Law, only the company that suffered the losses will therefore have locus standi as well in any related matter, which begs the question as to why Section 218 refers to "any person" to be able to take recourse?

Presumably in this case the conduct by the company's directors would be unlawful based on the Information Regulator's findings and directives which would fully be within the realm of the Social and Ethics Committee (SEC), in which the chairperson must make a report either verbally or in writing. As this report is not currently part of the accounting records and annual financial statements that fall within the scope of Sections 28 to 32, would a person be able to successfully hold a director accountable for any and all omission(s) or patently false declaration(s) in the SEC chairperson's report? How would a stakeholder obtain such evidence to pursue a successful action?

The King's Principle 12 obligates the governing body to govern the technology and information in a way that supports the organisation setting to achieve its strategic goals and the protection of privacy of personal information, while Principle 13 places the accountability of the governing body to govern in compliance with the applicable laws. How will these King IV principles be used to have directors declared delinquent in terms of Section 162 or to force companies to hold their directors accountable for losses to make the governance ecosystem a reality in South Africa?

There seems to be a case to be made by regulators, such as the South African Revenue Service (SARS), the Independent Regulatory Board for Auditors (IRBA) and the Information Regulator to take action within their respective domains, that an obligation exists then for these regulators to apply the provisions of the Companies Act to make it practical, enforceable and act as a deterrent by taking matters to court in a full circle of the governance ecosystem

The lack of access to information and evidence for any party to hold a governing body accountable or claim redress

Determining the respondent in a legal matter may seem reasonably easy, however, there are parties involved in a governing body that either never need to be disclosed or often are undisclosed or even merely unlisted on the Companies and Intellectual Property Commission (CIPC) portal.

How would any stakeholder prove a director's failures in terms of Section 75? Access to board minutes is not mandated and can be claimed to be confidential. This appears to be a major flaw in the Companies Act whereby stakeholders are given rights but are prevented from exercising such rights. Complicating matters further is that the prescription period of 24 months is set throughout the Companies Act at present.

It seems that the regulators are hesitant to engage directors to have them declared delinquent or hold directors accountable due to the legal quagmire of lengthy and expensive court cases and where the burden of proof is on the one accused. The onus is therefore shifted onto other parties in the governance ecosystem, such as member bodies, to bring any action against directors in an environment where equal access to the law is often heavily skewed in favour of the director(s).

It seems that the principle of balancing rights and obligations between shareholders and directors required by the Companies Act's purpose is seemingly undermined and accepted to be true.

Where to from here? What will change the future?

For shareholders, prevention is certainly better than cure and the selection of the governing body, especially the chairperson of the board and the CEO, is fundamental to employing the right people.

It is uncertain how the vast inherent imbalance between stakeholders and directors to access information relating to offences by directors can be overcome. This risk is certainly to some degree discounted in our economy in the form of economic underperformance, which creates opportunities for companies that are transparent beyond the limited prescribed information. Governing bodies are held accountable, fairness is shown towards all stakeholders and people responsibly own their mistakes.

A step in the right direction would be that the SEC report dovetail with the Integrated Report and the IFRS sustainability reporting requirements into one common theme as it deals with the same concepts. King IV refers to the extended definition of the SEC report in support of this thinking.

ABOUT THE AUTHOR

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