

Into the light

Financial Mail (South Africa)

September 26, 2019 Thursday, Investors Monthl Edition

Copyright 2019 BDFM Publishers PTY Ltd. All Rights Reserved

Section: ECONOMY, BUSINESS & FINANCE; Pg. 29

Length: 1417 words

Byline: Ann Crotty

Body

Into the light

Two recent events focus attention on the role of company secretaries - and raise some questions, writes

Is the company secretary finally moving out of the corporate shadows - pushed into the limelight by the increasing regulatory obligations they have to deal with?

No doubt company secretaries have always played a huge role in the smooth functioning of companies, but until now they've been regarded largely as relatively silent enablers; the people behind the scenes who ensure things happen; the person who gently taps the chairman on the arm - recall Sanlam's AGM - to remind him he is required to allow shareholders at an AGM to vote up to the last minute.

But two recent significant developments suggest the company secretary is no longer that quiet, unassuming, easy-to-overlook crucial cog. In early September Naspers made history when it revealed that its company secretary, Gillian Kisbey-Green, had become a multimillionaire by dint of the share awards she had received over several years of dedicated service to the company.

The sum involved suggest Kisbey-Green was not penalised for any role she may have played in Naspers's refusal to provide a breakdown of the AGM voting between the all-powerful A shares and the almost-no-power N shares. Despite JSE regulations, dating back to 2015, requiring this detailed disclosure, Naspers refused to comply until 2018.

The detailed breakdown of the 2018 AGM voting revealed just how overwhelming the power of the few A shareholders was.

But perhaps a little more sinister was the JSE's unprecedented censure of PBT Group's company secretary. On September 3 the JSE released a Sens statement outlining the details of transgressions of its listings requirements by PBT Group and named Bianca Pieters as the transgressor.

It seems PBT had failed to include & certain mandatory disclosures required for a general authority to repurchase shares resolution in the notice of AGM& and had also failed & to procure a resolution by the board of directors to authorise the various repurchases& Apparently, it wasn't at just one AGM that PBT fell foul of JSE regulations: the group implemented several repurchases of its shares between 2014 and 2018 but did not provide the necessary disclosure in any year. And, in a remarkable oversight of one of the Companies Act's most basic requirements, it failed to ensure the board had undertaken the solvency and liquidity test needed before any repurchase can be made.

Into the light

& The role of a company secretary ... is to provide directors with guidance in their duties, responsibilities and powers and to make directors aware of all laws and regulations relevant to the company,& said the JSE, adding that the company secretary takes responsibility for preparing the annual report and ensuring that statutory and regulatory disclosures are validated.

Essentially the JSE was absolving the much more powerful - and better-paid - directors from any obligation to know anything about these critical matters.

Fortunately for Pieters there was no requirement on PBT to issue a separate Sens statement. John Burke, the JSE's director of issuer regulation, tells IM the Sens issued by the JSE would have been seen by shareholders. & In some cases in the past, companies have voluntarily released announcements around censures, providing further context on the matter.& PBT, which sold off assets in 2018 to focus on IT, opted not to issue a Sens statement dealing with the censure. So, apart from Pieters and a possible handful of individuals who are a tad obsessive about these sorts of things, it's safe to say it escaped general notice.

One person who did spot it was shareholder activist Albie Cilliers, who makes it his business to notice these things. Cilliers had brought PBT's generally poor levels of disclosure to the attention of the JSE almost two years ago in the run-up to the sale of the group's non-IT assets.

He was trying to determine whether any related parties were involved in the purchasing of the assets or the sale of PBT shares back to the company at around the same time. The group's website provides little governance-related information.

Cilliers, who was a shareholder, requested information the Companies Act entitles him to. E-mails between him and Pieters outline a fruitless exercise, which meant it was extremely difficult for the activist to make an informed opinion on either the asset sale or the share repurchase.

Cilliers wasn't too happy with the JSE's censure and, though unhappy about his engagements with Pieters, he believes she has been used as a scapegoat.

& The Companies Act does place a lot more responsibility on the company secretary, who has essentially become the frontline for corporate governance, but it's difficult to believe it was Pieters alone who decided to withhold the information I was entitled to,& Cilliers tells IM.

One corporate lawyer, who agrees company secretaries do now have more responsibility, says these responsibilities fall way short of what Pieters is being held responsible for.

& In terms of section 88 the company secretary is accountable to the board and is required to inform the board of any failure to comply with the act or the company's Mol [memorandum of incorporation]. It is the board that should be censured and if it was not informed then the board should act against the company secretary,& says the lawyer.

More chilling from a general governance perspective is that Cilliers says Pieters's refusal to provide the requested information is par for the course. & I have sent requests to about a dozen companies asking for information to which I'm entitled - not one of them had it timeously or correctly.& While Naspers' Kisbey-Green and PBT's Pieters are the most recent to be dragged into the spotlight, the days of the company secretary inhabiting the quieter corners of corporate life were probably numbered by the time Eskom's Suzanne Daniels was fired in July 2018.

As a recent report by the Chartered Secretaries Southern Africa recalls, Daniels had a meteoric rise at Eskom. During her tenure as company secretary, for which she was paid R2.7m a year, she was involved in a number of dubious payments, including the R1.6bn to McKinsey/Trillian and the R659m to Tegeta. Daniels revealed much of this during a parliamentary hearing in 2017 but failed to secure whistleblower status as most of the information was deemed to be already in the public domain by then.

In May 2018 a columnist, in an article on the SA Accounting Academy website, noted that SA's accounting and auditing professions had been hit hard by a slew of value-destroying scandals - stretching beyond the Guptas to Steinhoff and VBS Mutual Bank. But, asks the columnist, where were the other professionals such as the company

Into the light

secretaries? & As the custodians of corporate governance and being intimately aware of board discussions, and resolutions to authorise large-scale cash movements, it can well be asked what is the company secretaries' role in preventing unlawful transactions.& By all accounts very few of the Steinhoff board members had any idea of the large-scale dubious cash movements. Given speculation about former CEO Markus Jooste's unique signing powers, it's also possible the company secretary had no idea.

However, the SA Accounting Academy columnist's suggestion that the company secretary should also be held responsible for Sagarmatha's failure to list in April 2018 hints at the near impossibility of the challenges they are expected to address.

The columnist notes it was a company secretarial failing that cost Sagarmatha its listing on the JSE. & Sagarmatha failed to ensure that their financial statements were filed at the CIPC [Companies & Intellectual Property Commission], resulting in the JSE refusing their listing,& said the columnist of a venture that relied entirely on a R4bn investment from the Public Investment Corp (PIC).

Long before the Mpati commission of inquiry revealed the bizarre and value-destroying thinking behind much of the PIC's multibillion-rand investments, it was evident Sagarmatha was value-less and faced little chance of success. A slack company secretary was the least of its problems.

The irony, as demonstrated by the Sagarmatha saga, is that a company secretary needs the support of the board if they are to hold that board to account. As they emerge from the shadows they might be more assertive in securing this support. It will be no easy task.

Suzanne Daniels ... paid R2.7m a year Picture: FREDDY MAVUNDA

Classification

Language: ENGLISH

Publication-Type: Magazine

Subject: SHAREHOLDER MEETINGS (90%); SHAREHOLDERS (88%); BOARDS OF DIRECTORS (77%); BUSINESS & CORPORATE ENTITIES LAW (76%); STOCK REPURCHASE PLANS (73%); LAW & LEGAL SYSTEM (71%); WEALTHY PEOPLE (66%)

Industry: STOCK REPURCHASE PLANS (73%)

Load-Date: September 29, 2019