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MANAGING CONFLICTS OF INTEREST MUST BE A PRIORITY FOR SOCIETY, BUSINESS AND LEADERS

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The media reports are full of such stories; albeit cheating in sports, State capture, wide-scale corruption at governmental, provincial, municipal, parastatal, corporate and the private business sectors, and similar related matters in the cases associated with the Guptas, Mckinsey, Trillian, KPMG (and other auditors), VBS Bank, including Eskom, Steinhoff, SAA and Transnet executives on a personal level.

Whilst such examples of conflict and poor governance raise an array of ethical, moral and ancillary issues which will be debated long into history, what it does highlight is that managing conflicts of interest and the consequent reputational damage for such entities and/or individuals requires some serious attention from society, business and leaders.

With the rise in digitization, the business models of organisations are evolving and changing, and traditional industries are converging with others as a result. This greatly multiplies the potential for conflicts of interest; for example, is MTN a telephone business or internet or content business?

Given the global recession, what we are seeing is an increase in individuals seeking additional income streams and supplementing their income through outside work creating further potential conflicts of interest that need to be managed. (When was the last time you were asked to declare your outside interests?)

Alarmingly, the rate of corporate governance failures within the business and governmental sectors is not showing any signs of decline. Many of these failures occur as result of poor director and management appointments, unethical leadership, lack of transparency, highly questionable decision-making and inadequate systems of control. Any personal competing and conflicting agendas, as compared to protecting the interests of the organisation, further exacerbate, or are in many instances the direct cause of these governance failures.

"A director must exercise utmost good faith, honesty and integrity in all dealings with or on behalf of the company; he must never permit a conflict between his duties and his personal interests; and he must disclose any actual or potential conflict of interests at the earliest opportunity."

Source: Corporate Governance: An Essential Guide for South African Companies

Being transparent in one's dealings with the organisation being served and avoiding damaging conflictive situations are some of the most highly prized qualities of all modern organisations. But all too often, the media report how the leaders themselves have neglected their duty to serve the interests of the organisation which they were meant to protect; invariably these leaders have placed their own selfish interests above the interests of the organisation. The result is that if your leaders are not actively driving and promoting ethical practices and proper corporate governance, such failures will continue unabated not only at leadership level, but at all levels of the organisation.

Increasingly, as more informed institutional investors and governance activists demand organisational leaders to operate in a more transparent and sustainable manner, there's no doubt that the risks associated with conflict will never be entirely avoided. Whilst human beings are deployed within organisations -- considering the existence of our unique circumstances, wants and desires -- conflicts of interest *will* forever present itself as one of the most contentious issues that organisations and ethics officers will need to address and manage.

"Conflicts of interest are among the thorniest issues that organisations and ethics and compliance professionals face. There are a virtually infinite variety of situations that might create a conflict, existing as they do at the intersection of personal, family, financial and organisational interests."

Source: Ethics & Compliance Initiative

When considering the dilemma of managing conflicts of interest across all levels of leadership and indeed even the organisation's junior employees, it is hardly surprising to see the increase of various corporate governance codes being produced across the world. These governance codes -- which include the likes of the UK Corporate Governance Code (April 2016) and the King IV™ Report on Corporate Governance for South Africa (2016) -- increasingly urge organisations to comply with more ethical standards of behaviour, both at an individual and a corporate level. Moreover, the codes also seek to improve the quality of organisational leadership; such that leaders develop more ethically-based organisations that create long term stakeholder value in a sustainable manner.

For organisations to be fully transparent, each stakeholder -- including shareholders, investors, directors, employees and the organisation's suppliers -- is equally required to act in a transparent manner. This means being open and honest in all of their dealings, and importantly, requires avoiding or managing conflicts of interest. All stakeholders should be able to identify the situations in which they may be conflicted (in fact or in appearance). But in reality, some choose to blatantly disregard their conflicts of interest, whilst others -- for a variety of reasons which may include their cultural beliefs or similar perceptions of entitlement -- don't believe their actions warrant such scrutiny because it's considered an acceptable practice in their own community circles. If organisational stakeholders are not able to avoid these situations, they should disclose the nature of these conflicts and act in accordance with the requirements of their legal and ethical duties, not least also the provisions which should be clearly set out in the organisation's Memorandum of Incorporation (MOI), its policies, letters of appointment, job descriptions, amongst other internal governance instruments. Clearly, it is simply not sufficient to only apply an academic approach to these matters; vested parties must be seen to be acting in the *spirit* and *letter* of these governance provisions and when stakeholders choose to disregard them, they must be held personally accountable.

Balancing conflicting interests of stakeholders

It is now a well-accepted fact that organisations must not operate solely to maximise profits and returns for their majority shareholders, and at the expense of all other stakeholders. In considering the demands of the broad and diverse group of stakeholder interests, it is inevitable that conflict situations will arise. These will need to be carefully managed and balanced by an astute and agile board of directors together with their executive management team, furthermore acknowledging that they will never be avoided completely.

An intricate knowledge of all aspects of the organisation's strategic, operational and governance status is required in order for conflicts or potential conflicts to be anticipated and managed in an open and transparent manner. Whilst a number of organisations may have codes of ethics and conduct in place in an attempt to encourage and guide employees to avoid conflictive situations, the reality is most employees and other key organisational stakeholders generally pay little attention to these ineffectual governance instruments. A more meaningful way to ensure that there are less conflictive and internal competing agendas within the organisation, would be to improve the organisation's internal recruitment processes by diligently selecting and appointing new directors, the senior management and key suppliers through thorough assessments prior to their appointments or selection. Moreover, the organisation could employ a mandatory lifestyle audit which is undertaken by the board, incorporating the executive and selected employees. Conducting regular lifestyle audits, including external board evaluations and 360 degree peer reviews, are some useful examples to identify conflicts, furthermore reinforcing the organisation's commitment to transparency and ethical behaviour.

Conflicted directors guided by law and codes of practice

Conflicts of interest may arise in varying degrees for directors, and conflict may be experienced between the directors on a particular board; between the directors and employees; or between a director and the organisation, where a director seeks to maliciously place their own interests above those of the organisation as a whole.

Situations of conflicted interests between directors themselves may arise in the context of an embattled board; this may include boards that are divided into factions; or those that hold secret meetings between a few select members outside of the board; or boards which are constantly involved in power plays. These conflicts result in a lack of clear and united leadership and may spill over into the rest of the organisation, creating conflicts between certain directors and employees, and may even cause conflicts between employees who are aligned with different board factions.

"A distinguishing mark of the accountancy profession is its acceptance of the responsibility to act in the public interest. Therefore, a professional accountant's responsibility is not exclusively to satisfy the needs of an individual client or employer."

Source: IESBA Code of Ethics for Professional Accountants

Once directors become aware that they are serving on an embattled board, they should act swiftly to address and diffuse the situation, in order to focus on fulfilling their fiduciary duty to act in the best interests of the organisation.

In South Africa, the Companies Act, 71 of 2008 ('the Act') carefully regulates instances in which directors may be conflicted with the organisations which they serve. To this end, the Act is quite broad, covering conflicts of directors and related parties in respect of both *financial* and *non-financial* matters. The procedure for disclosure of conflicts of interest is set out in a step-by-step manner in the Act and consequences for noncompliance include the invalidity of the resultant transactions, as well as potential claims for damages and criminal prosecution being faced by the responsible director.

In addition to legislative mandates surrounding conflict of interest situations for directors, the provisions of recognised corporate governance codes reiterate and expand on common law and statutory requirements, setting out the tenets of best practice and providing directors with the necessary guidance in identifying, avoiding or managing such situations. Indeed, while many organisations will have established codes of conduct and ethics policies to provide further guidance to directors and employees on how to deal with conflicts of interest, it is important that these codes are visible, adhered to, properly implemented and constantly refreshed to suit the changing nature and dynamics of acceptable behaviour. Most importantly these codes must be 'lived' and consistently practiced within all the activities of the organisation and its stakeholders. Substance over form is essential. Organisations must move away from a 'tick box' approach; what is the point of a declaration of interest policy if what is included in the declarations of interests is not interrogated so that potential pitfalls can be identified and proactively managed? It is furthermore imperative, particularly for those organisations who place great emphasis upon their ethical standing and behaviour, that existing and newly appointed directors, including the organisation's prescribed officers, are regularly 'vetted' to ensure they are not compromised as a result of their own dubious activities which has the potential to impair their interests owed to the organisation.

Employees must protect organisational interests

In a similar manner to that of directors, employees are also duty-bound to protect the interests of the organisation for which they work, and there are numerous cases in law where employees have been found guilty of not placing the interests of their organisation foremost, and above their own personal interests. An employment relationship is built on trust and employees must not place themselves in a position where their interests conflict with their fiduciary duty of good faith. This includes preventing, recognising or managing situations in which their interests conflict with those of their employer. This applies not only to their duties within an organisation but to any outside interests that they have which would impact on the employer and employee relationship. Failing to do so could result in possible dismissal, since the trust relationship between the organisation and the employee will be broken.

"In the recent case of City of Cape Town v SALGBC and Others (C353-16, 2 August 2017) the Labour Court found that an employee's failure to declare his involvement in other business entities warranted his dismissal by the employer. The case serves as an important reminder to employees that a failure to declare their involvement in outside enterprises may compromise their duty of good faith owed to their employer and result in their dismissal."

Source: Cowan-Harper Attorneys (Neil Coetzer) - (2017)

All echelons of leadership should set the example

If organisations, directors, employees -- including the organisation's stakeholders -- are required to act without conflicts of interest, then it should follow that the tone and example should be set at all levels of leadership. At the highest levels, the government in any modern society should, by its very nature, be a reflection of the society it governs. Our leaders are expected to serve the interests of their respective stakeholders in an open, honest and transparent manner, furthermore identifying, avoiding and managing conflicts or potential conflicts of interest as they arise.

While conflicts of interest in the public sector should be dealt with through legislative measures, this has not necessarily been the case in South Africa's recent past. The tone for disregarding the harmful effects of conflicting interests was set by former President Jacob Zuma, with examples being the construction of his Nkandla residence, which was the site of a myriad of alleged conflicting interests, as well as the so-called 'state-capture' by the Gupta family, where individual interests were allowed to flagrantly take precedence over those of the government and the country as a whole.

More recently, conflicting interests which border allegations of corruption, have surfaced at the likes of Eskom, the South African Department of Justice and Constitutional Development and in the Johannesburg mayoral office. While these allegations have not necessarily been proved, they point to an environment which necessitates suspicion and investigation, and which does not put a premium on transparency in the interests of value creation and sustainability. This being said, it's ironic how many organisations claim to 'comply' with the highest standards of ethical reporting, furthermore declaring their compliance to various governance codes, yet few of these organisations actually prioritise ethics, stakeholder engagement and communication as a business priority.

As a national priority, South Africans should be called on -- both at an organisational and personal level -- to be scrupulous in their avoiding and managing of all conflicts of interest within their own realm of influence. While newly elected President Cyril Ramaphosa has earnestly begun a "new dawn" for South Africa, such where his objective is to rid various corrupt and conflicted government officials from his leadership ranks, ordinary citizens should not adopt a 'wait-and-see approach' toward their own ethical practices.

As citizens, we also have a duty to serve our country, and to do so ethically and without conflict. As individuals -- including the role we fulfil in business -- we have the ability to correct our own actions without having to wait for the highest levels of government to re-set their, neither our own, moral compasses. There's no doubt that managing the risks of conflict requires hard work and thoughtful approaches. Moreover, it is critical that the ethical bar is substantially raised if we are serious about creating a more prosperous and sustainable country for the future.

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