



**Chartered
Secretaries**
Southern Africa

CSSA Best Practice Guide CONFLICTS OF INTEREST

Prepared by Sabrina Paxton, Technical Adviser and the Technical Committee of the CSSA

November 2019

1.

Introduction

2.

Regulation of conflicts of interest

3.

Insider trading

4.

The role of the company secretary

5.

Additional examples of conflicts of interest

6.

Conclusion

Chartered Secretaries Southern Africa
Riviera Road Office Park (Block C)
6 – 10 Riviera Road, Killarney
Johannesburg, 2193

Published: November 2019

Copyright © Chartered Secretaries Southern Africa 2019 All rights reserved.

No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form, or by any means, without prior written permission, in writing, from the publisher.

1

Introduction

Conflicts of interest occur frequently in the boardroom, and need to be appropriately managed, to ensure compliance with various legislative, governance and compliance requirements companies are subject to. The creation of an ethical culture within companies is paramount to its long-term success.

Ethical culture is also required to ensure that conflicts of interest are addressed and handled appropriately, and do not lead to unethical behaviour and corruption. Where companies allow conflicts of interest to exist without following proper procedures, the reputation of the company will be adversely affected. Company secretaries, as the trusted advisors in the boardroom, need to ensure that the board is aware of process and legal requirements by which conflicts of interest should be managed. Given the role of the company secretary as trusted advisor to the Board, this will require company secretaries to be resolute in ensuring compliance with these legal and common law principles, especially where they are aware of non-compliance. Where company secretaries take a back seat and remain silent, they will inevitably be seen as complicit to such behaviour. This guide mainly deals with conflicts of interest of a personal financial nature. This guide aims to assist company secretaries to understand conflicts of interest and the processes that need to be adhered to when such conflicts arise. We trust that the use of practical examples will assist in better understanding the theory behind managing conflicts of interest.



Companies Act of 2008

General principles

The duty to avoid a conflict of interest is one of the fiduciary duties of directors. A director must, at all times, act in the best interests of the company, and in so doing, avoid conflicts of interest and/or adhere to all prescribed processes where a conflict arises. S75 of the Act deals with conflicts of interest and applies not only to directors but to prescribed officers and members of board committees respectively. In terms of s75(5), these persons are required to disclose any “personal financial interest” that he or she or a related person has in respect of a matter to be considered at a board meeting. S1 of the Act defines a “personal financial interest” as a “direct, material interest of that person of a financial, monetary or economic nature, or to which a monetary value may be attributed.” The word “material” is defined in s1 as “significant in the particular circumstances to a degree that is:

- (a) of consequence in determining the matter; or
- (b) might reasonably affect a person’s judgment or decision-making in the matter.”

Whether an interest is deemed to be material will depend on each case, but such interest must, in all cases, be significant¹. A “related person”, in terms of s75 and when used in reference to a director has the meaning set out in s1, but also includes a second company of which the director or a related person is also a director, or a close corporation of which the director or a related person is a member.

Disclosure

As required by s75(5), directors must disclose the following:

- (a) the personal financial interest that he or she or a related person has and its general nature, before the matter is considered at the meeting;
- (b) any material information relating to the matter and known by him or her must be disclosed at the meeting;
- (c) any observations or significant detail relating to the matter, should this be requested by the other directors (not mandatory).

Though the general nature of the interest must be disclosed, courts have held that the disclosure must contain enough detail to enable the board to adequately consider the interest and the gains or advantages that the director may have as a result thereof (*Camelot Resources Ltd v MacDonald (1994) 14 ACSR 437*).

S75(5) deals with recusal and provides as follows. Once the director has disclosed a conflict of interest, he or she must recuse him or herself from the meeting when that matter is to be considered and may not take part in the discussions, except by first providing material information relating to the matter and known by him or her (i.e. (b) above). The recusal of the director will not have an impact on the quorum of the meeting as he or she will be considered present for quorum purposes, but for voting purposes, will be considered absent.

S75 does not prohibit a conflicted director from negotiating agreements, but does exclude the conflicted director from voting on the matter. Section 75 applies only to board meetings. Once the board approves, having followed section 75, it is then left to the CEO/CFO to manage. That CEO/CFO naturally has common law duties to promote the interests of the company above any personal financial interest he/she may have, and to stay within the bounds of the board resolution, but s75 no longer applies as there is no longer referral back to the board. This also applies to situations where the board resolution is passed after the negotiations are finalised or near an end. During the preceding course of negotiations the conflicted director must nevertheless exercise fiduciary duties and act in the company’s best interests, but there is “control” exercised over his possible conflict of interest at the board approval stage. Otherwise it would indeed be an impractical and unworkable regime as often the conflicted director will have all the expertise on the matter and arguably that is why the legislature was not inclined to introduce a blanket rule against conflicted directors even negotiating.

Where an agreement has already been concluded and a director or a related person thereafter gains a personal financial interest in that agreement, s75(6) states that the director must “promptly” disclose to the board the nature and extent of the interest and the material information pertaining to the acquisition of such interest. For purposes of s75(6), it is important to note that the disclosure will only be required if the company has a material interest in the agreement².

Disclosure must be made to the board and cannot simply be made to a board committee. Where the company has only one director, s75(3) disclosure must then be made to the company’s shareholders and must be approved by way of an ordinary resolution.

An example of a disclosure of interests form is attached as **Annexure A**.

1. Cassim, R, “Contemporary Company Law”, 2016, second edition, page 568.
2. Cassim, R, “Contemporary Company Law”, 2016, second edition, page 571.

2 | The regulation of conflicts of interest *(continued)*

Failure to disclose

A failure to disclose a conflict of interest would amount to a breach of a fiduciary duty on the part of the director. S77, dealing with liability, applies to directors, prescribed officers, alternate directors, members of the audit committee or other board committee, irrespective of whether such persons are members of the board of directors. Where a director breaches his or her fiduciary duty, in regard to conflicts of interest, such director will be liable for any loss, damages or costs sustained by the company as a result of such breach³. A director of a company will, in addition, be held liable where that director:

- (a) purports to bind the company or authorise the taking of any action by or on behalf of the company without the requisite authority;
- (b) acts in the name of the company in a way that is false or misleading; or
- (c) knowingly or recklessly signs or consents to the publication of a financial statement which is false or misleading.

Such a director is held personally liable to the company and to any other affected person for any consequential loss suffered by the company or such person⁴.

Case Law Example

In the case of *Omar v Inhouse Venue Technical Management (Pty) Ltd 2015 (3) SA 146 (WCC)*, the court held that where there has been a failure to disclose a personal financial interest, the transaction is rendered invalid, unless the shareholders ratify the decision or the court declares it valid. Source: <http://www.khl.co.za/publications/polity/29-02-2016%20Polity%20Article%20-%20Genevieve%20Wagener%20KHL.pdf>

In the case of *S v Gardener 2011 (4) SA 79 (SCA)*, two CEOs were convicted by the court of fraud for intentionally and fraudulently not disclosing their interests of a personal nature in certain contracts within the company. As declared in *S v Gardener* (para 58), a company can only make decisions through a properly informed board, and by withholding proper information directors render the board both “blind and mute”. Source: <http://www.saflii.org/za/cases/ZASCA/2011/24.html>

Related parties – Companies Act

The definition of a related party is contained in s2 of the Companies Act and can be summarised as follows. An individual is related to another individual, broadly speaking, if they are family. An individual is also related to a juristic person if the juristic person is controlled directly or indirectly, by the individual.

A juristic person, in turn, is related to another juristic person if either is directly or indirectly controlled by the other; either is a subsidiary of the other; or a person (natural or juristic)

directly or indirectly controls each of them or their businesses.

In the case of the business part of this definition, it is not clear if this relates to the whole or part of the business in question. According to the definition, holding companies and subsidiary companies are now related to each other⁵.

From a strict Companies Act point of view, if a director’s cousin is at the other side of a transaction for example, they would have no legal obligation to disclose this and recuse themselves from the decision, but doing so, would be the ethical thing to do⁶.

3. S77 of the Companies Act.

4. <https://www.werksmans.com/wp-content/uploads/2013/04/Director-duties-and-liabilities-FINAL-updated-electronic.pdf>

5. <https://www.iol.co.za/business-report/opinion/new-companies-act-who-is-related-to-whom-and-why-705177>

6. Pretorius, C “Conflicts of interest come in all shapes and sizes”, *boardroom magazine*, September 2018.

2 | The regulation of conflicts of interest *(continued)*

Conflicts of interest and incomplete projects: How Lottery money is being spent

Undeclared conflicts of interest and incomplete or shoddy construction characterise many projects funded by the National Lotteries Commission (NLC). Our research uncovers what is possibly only a fraction of the questionable grants involving Lottery money.

PKT Consulting Engineers, which is involved in the construction of Lethabong Old Age, and the recently completed Credo Mutwa Museum and Library, has links to NLC chief operating officer Phillemon Letwaba and members of his family. Letwaba, his wife, Daisy, and his brother Johannes, as well as their father, Oupa, who has since died, were all directors of PKT before they resigned their directorships on March 1, 2017. On the same day that the Letwabas resigned, Themba Mabundza was appointed as the sole director of PKT. Mabundza, 37, is an active director in 54 different companies across a wide spectrum of industries.

Two of the companies of which he is a director have received grants from the Lottery.

Source: <https://www.dailymaverick.co.za/article/2019-08-01-conflicts-of-interest-and-incomplete-projects-how-lottery-money-is-being-spent/>

Related parties – King IV

Conflicts of interest are linked to ethical behaviour, which is difficult to define. King IV's definition of related parties is similar to that contained in the Companies Act. In addition to the definition in the Act, King IV specifies that an individual is related to another individual if they are separated by no more than two degrees of natural or adopted consanguinity or affinity. This then means that the member's "first degree" relatives would include the natural or adopted consanguinity parents, siblings and children and with "affinity" would include the mother- and father-in-law, sisters- and brothers-in-law. The "second degree" relatives are the member's natural or adopted consanguinity or affinity grandparents, grandchildren, aunts, uncles, nephews, nieces or half-siblings⁷.

Nepotism rules Prasa, says ex-boss

The Passenger Rail Agency of SA (Prasa) is riddled with nepotism and conflict of interest where senior employees employ their relatives and give their spouses business.

This is according to former acting CEO of Prasa Collins Letsoalo who had in December 2016 requested employees to declare business interests and disclose blood relations with other employees. "The results were shocking to say the least; we found massive conflict of interest and what looked like the highest form of nepotism," Letsoalo said.

He said an employee who worked in his office had his wife doing business with the company. He said there were instances where people were "bused in from the Eastern Cape" to be given jobs in the organisation. "You have someone having 12 relatives working in the same department."

Prasa spokesperson Nana Zenani and Molefe had not responded to Sowetan's request for comment by the time of going to press.

Source: <https://www.sowetanlive.co.za/news/south-africa/2018-12-18-nepotism-rules-prasa-says-ex-boss/>

7. King IV practice note: declarations of interest, published by IoDSA, 2018.

2 | The regulation of conflicts of interest *(continued)*

Related parties – JSE listings requirements

S10 of the JSE listings requirements defines a related party as:

- “(i) a material shareholder;
- (ii) any person that is, or within the 12 months preceding the date of the transaction was, a director of the issuer or its holding company. For the purpose of this definition, a director includes a person that is, or within the 12 months preceding the date of the transaction was, not a director, but in accordance with whose directions or instructions the directors are or were accustomed to act;
- (iii) any adviser to the issuer that has, or within the 12 months preceding the date of the transaction had, a beneficial interest, whether direct or indirect, in the listed company or any of its associates;
- (iv) any person that is, or within the 12 months preceding the date of the transaction was, a principal executive officer of the issuer, by whatever position he may be, or may have been, designated and whether or not he is, or was, a director;
- (v) the asset manager or management company of a property entity, including anyone whose assets they manage or administer;
- (vi) the controlling shareholder of the persons in paragraph (v);
- (vii) an associate of the persons mentioned above.”

Steinhoff report reveals maelstrom of conflicts of interest

Steinhoff contracts related to key management personnel:

- Christo and Jacob Wiese had an interest in the acquisition of Building Supply Group. Both were shareholders and directors of the seller, Invicta, while Jacob was a director of buyer Pepkor, majority owned by Steinhoff.
- In 2016, Lancaster Electricity, partially owned by Naidoo, entered into a joint venture with a Pepkor unit where sales income is earned and shared between the joint-venture partners on an equal basis.
- MJD Aviation, in which Jooste and former interim CEO Danie van der Merwe are partners, provided services to Steinhoff. Van der Merwe said he is aware of the details in the annual report and confirmed they're accurate.
- Law firm Hoffman, in which former Steinhoff executive Stehan Grobler is a partner, provided legal services to group companies. Grobler didn't immediately respond to emailed and mobile-phone message requests for comment.
- Steinhoff loaned Hoffman money to buy shares in KAP Industrial Holdings; Hoffman also rented office space from Steinhoff.
- Upington granted a loan of €47.4m to Steinhoff during the 2017 financial period with a carrying interest rate of 0.5 %.
- In June 2017, Steinhoff unit Delta Properties was sold to Steinhoff Familienholding GmbH for €2.7m.
- An aircraft-retainer agreement was entered into between Toerama, an entity controlled by Christo Wiese, and Steinhoff in 2016. An office space and services agreement was entered into between Wiese's Titan Financial Services and Steinhoff in 2016.
- Christo Wiese's Titan Asset Management was paying Steinhoff rent for the use of office space.
- To fund the acquisition of Mattress Firm and Poundland, Upington and Lancaster Group took part in the capital raising and were paid underwriting commissions.
- In late 2016, a number of Steinhoff's managers bought a property in Portugal from the retailer's Conforama unit. The French chain then rented the space from the buyers at below market value.
- A unit of Habufa, in which Steinhoff held a 50% stake, loaned Jooste's Mayfair Holdings \$65m in 2016.
- Pepkor purchases products from Lodestone Brands, a company believed to be indirectly controlled by Jooste.

Source: <https://www.fin24.com/Companies/Retail/steinhoff-report-reveals-maelstrom-of-conflicts-of-interest-20190510>

2 | The regulation of conflicts of interest *(continued)*

King IV

The King IV practice note on declarations of interest provides useful guidance on how to manage a conflict of interest. The content of this practice note is summarised in the following few paragraphs. The recommended practices mentioned in King IV are not mandatory, but do provide useful guidance on how to achieve each of the stated principles. Principle 7 provides as follows:

“The governing body should comprise the appropriate balance of knowledge, skills, experience, diversity and independence for it to discharge its governance role and responsibilities objectively and effectively.”⁸

Of importance for purposes of this paper, is the mention of independence, which is directly linked to avoiding a conflict of interest. One of the recommended practices under principle 7, is that at the start of each board meeting, directors ought to declare any conflict in regard to any item on the board agenda, and such conflict must then be managed adequately and in line with legal provisions. Also recommended, is that each director ought to submit a declaration of all financial, economic and other interests held by the director and related parties at least once a year, or when there are material changes thereto. The responsibility to keep such declaration up to date is that of the director and not other officials such as the company secretary.

Each board agenda ought to have a standing item at the beginning of the agenda on declarations of interest. Any such declaration must be properly minuted by the company secretary, and the chairperson must ensure that such declaration is managed within the bounds of the law and that all processes are followed correctly.

The Public Finance Management Act (PFMA)

In the public sector, the PFMA is relevant and applicable. S50(3) of the PFMA, dealing with the fiduciary duties of accounting authorities states that a member of an accounting authority must:

- (a) disclose to the accounting authority any direct or indirect personal or private business interest that that member or any spouse, partner or close family member may have in any matter before the accounting authority; and

- (b) withdraw from the proceedings of the accounting authority when that matter is considered, unless the accounting authority decides that the member’s direct or indirect interest in the matter is trivial or irrelevant.

Parliament code of conduct

The parliament code of conduct South Africa identifies the process for managing a conflict of interest of a member of parliament. S1 of the Code defines a conflict of interest as “a situation in which a member contrary to the obligation and duty to act for the benefit of the public exploits the relationship for personal or pecuniary benefit.”⁹ The process for managing a conflict of interest is set out in s5 of the code, which advises as follows:

“A Member must:

- resolve any financial or business conflict of interest in which he or she is involved in his or her capacity as a public representative, in favour of the public interest; and
- always declare such interest, and where appropriate, the Member should recuse himself or herself from any forum considering or deciding on the matter.

8. Principle 7 of the King IV report on corporate governance, published by the IoDSA, 2016.
9. <https://www.parliament.gov.za/code-conduct>.

2 | The regulation of conflicts of interest *(continued)*

A Member must:

- not accept any reward, benefit or gift from any person or body:
 - that creates a direct conflict of financial or business interest for such Member or any immediate family of that Member or any business partner of that Member; or the immediate family of that Member;
 - that is intended or is an attempt to corruptly influence that Member in the exercise of his or her duties or responsibilities as a public representative;

- not use his or her influence as a public representative in his or her dealings with an organ of State in such a manner as to improperly advantage the direct personal or private financial or business interests of such Member or any immediate family of that Member or any business partner of that Member or the immediate family of that Member;

- not engage in any personal or private financial or business activity, which leads to his or her using information or knowledge acquired in his or her dealings with an organ of State as a public representative which is not available in the public domain, in such a manner as to improperly advantage the direct personal or private financial or business interests of such Member or any immediate family of that Member or any business partner of that Member or the immediate family of that Member;

- declare any direct personal or private financial or business interest that that Member or any immediate family of that Member or any business partner of that Member or the immediate family of that Member may have in a matter to be considered or decided on before any parliamentary committee or other parliamentary forum of which that Member is a Member or in which that Member is participating; or

- withdraw from the proceedings of that committee or forum when that matter is considered or decided on, unless that committee or forum decides that the Member's interest is trivial or not relevant; and

- if he or she makes representations as a Member to a Cabinet Member or any other organ of State with regard to a matter in which that Member or the immediate family of that Member or any business partner of that Member or the immediate family of that Member has a direct personal or private financial or business interest, that Member must declare that interest to that Cabinet Member or organ of State; or

- not lobby for any remuneration or receive any reward, benefit or gift for that Member or for the immediate family of that Member or the business partner of that Member or immediate family of that Member, for making such representation as a Member on behalf of any person or body."¹⁰

10. <https://www.parliament.gov.za/code-conduct>.

2 | The regulation of conflicts of interest *(continued)*

Dlodlo found in breach of MPs' ethics code after Dubai hotel stay

Minister of Public Service and Administration Ayanda Dlodlo has been found to have breached the code of ethical conduct and disclosure of members' interests after she failed to disclose a 2015 trip to Dubai where she stayed in the luxurious Oberoi Hotel.

On Monday, a joint committee on ethics and members' interests report on the investigation into Dlodlo was published in Parliament's tablings.

Hlongwane was implicated in former Public Protector Thuli Madonsela's 'State of Capture' report. At the time, Dlodlo confirmed that Hlongwane paid for the trip and said she knew him since they were children.

Dlodlo also stated that she never meant to break the code.

"The reason why she did not declare the stay at the Oberoi hotel and the additional benefits of spa massages, room service and car hire was because she considered Mr Fana Hlongwane her brother."

The ethics code states that gifts from family members do not constitute a conflict of interest.

However, the committee found that the Dlodlo's relationship with Hlongwane "does not cover the type of brother and sister relationship that exists between Mr Fana Hlongwane" and Dlodlo.

"Having considered the explanation given by the member, the committee concluded that it is clear that Mr Fana Hlongwane is not her spouse, permanent companion or dependant. The member was therefore obliged to disclose her stay at the Oberoi hotel (accommodation), the spa massages, room service and car hire," reads the report.

Source: <https://mg.co.za/article/2019-03-12-dlodlo-found-in-breach-of-mps-ethics-code-after-dubai-hotel-stay>

3 | Insider trading

Insider trading is unethical and poses a risk to the fulfilment of a director's fiduciary duties and inevitably leads to a conflict of interest. The Financial Markets Act 19 of 2012 defines an insider in s77 as a person with inside information who deals directly or indirectly, or through an agent for his or her own gain in the listed securities to which the inside information relates; a person who discloses inside information to another, and a person with inside information who encourages another to deal in listed securities to which the inside information relates.

After insider trading charges against a congressman, House set to ban members from serving on corporate boards

When Rep. Chris Collins was charged in August with insider trading, it sparked a push to bar House members from serving on the boards of publicly traded companies. A ban could come shortly, thanks to a rules package proposed by House Democrats as they prepare to take control of the chamber on Thursday. The rules changes would "close the conflict of interest loophole" by prohibiting representatives and their staff from sitting on corporate boards, said Speaker-designate Nancy Pelosi.

Collins has been accused of insider trading with family members who were holding the stock of an Australian biotech company on whose board he was serving.

Source: <https://www.marketwatch.com/story/after-insider-trading-charges-against-a-congressman-house-set-to-ban-members-from-serving-on-corporate-boards-2019-01-02>

3

Insider trading *(continued)*

S78 of the Financial Markets Act states that insider trading transpires where a person knows that he or she is in possession of inside information and deals in that security directly or indirectly. Directors, by virtue of the position they hold within a company and information they are privy to, are potential insiders. As mentioned earlier, directors must always act in good faith and in the best interests of the company. Directors cannot use their position to gain an advantage for themselves or related parties¹¹.

King IV advocates that the board should comprise a majority of non-executives and that most should be independent. To help prevent insider trading by directors, King IV recommends that every listed company should have a policy in place to

prohibit dealing in its securities by directors for a designated period preceding the announcement of its financial results¹².

Under the JSE listings requirements, a company must announce details of all dealings in securities by a director or a company secretary in that company. Under JSE LR 3.66, a director cannot deal in any securities relating to the issuer of which he or she is a director, without first notifying and receiving permission from the chairperson.

Where directors use confidential information for their own gain, they would have breached their fiduciary duty and would be liable to explain any profits they have generated, to the company. This is the case even where the company has not suffered any loss as a result¹³.

Steinhoff's secret history and the dirty world of Markus Jooste

For example, Jooste used one such company to amass a stake in a listed Australian firm shortly before Steinhoff acquired it. This may have been an example of insider trading, which is illegal.

This pattern of purchasing hidden stakes in companies, which were in some cases bought by Steinhoff for a premium, confirms what investigators have been trying to uncover.

Our revelations about Jooste's secret dealings came, in part, from the Panama Papers — the cache of 11.5-million documents leaked in 2015 by Panamanian law firm Mossack Fonseca to German newspaper *Süddeutsche Zeitung* and shared with journalists around the world. But a substantial number of new documents were also sourced from people with intimate knowledge of Steinhoff's inner workings.

Source: <https://www.businesslive.co.za/fm/features/cover-story/2018-11-01-steinhoffs-secret-history-and-the-dirty-world-of-markus-jooste/>

4

The role of the company secretary

When it comes to managing conflicts of interest, the company secretary plays a role in a variety of areas, which directly or indirectly relate to conflicts of interest. Below are some specific areas, which pertain to the company secretary's role in regard to conflicts of interest.

Competence and emotional intelligence

As a starting point, the company secretary needs to ensure that he or she has adequate knowledge on what conflicts of interest are in the context of the Companies Act, King IV, the JSE listings requirements, and the processes to be followed

where conflicts of interest exist. Apart from the legal requirements, there is an ethical duty in respect of conflict of interest management, which the company secretary should guide the Board on, irrespective of the pressures the company secretary may face from within and outside the boardroom. The boardroom is a dynamic place – a place where loyalties can become divided, particularly where a director represents either a shareholder, employees, funders or other stakeholders. Company secretaries need to be courageous and flag issues of concern without fear or favour.

11. https://repository.up.ac.za/bitstream/handle/2263/67856/Olivier_Regulation_2018.pdf?sequence=1&isAllowed=y

12. https://repository.up.ac.za/bitstream/handle/2263/67856/Olivier_Regulation_2018.pdf?sequence=1&isAllowed=y

13. Cassim, R, "Contemporary Company Law", 2016, second edition, page 932.

Induction

Induction plays a vital role in assisting new directors to understand their fiduciary duties and responsibilities. The company secretary needs to ensure that the induction pack contains adequate and detailed information on conflicts of interest, with reference to all statutes and codes. In addition, a detailed explanation of what is required needs to be given to the new directors and the company secretary thus needs to ensure that he or she understands conflicts extensively to be able to discuss this with the new directors confidently and thoroughly.

Company secretary to be on guard for perceived conflicts of interest

In providing support to any director recruitment process, it is incumbent on the company secretary to insist on the background checks as to previous board appointments or current board appointments of the director concerned. In addition, checks should be done on shareholdings of that director and any associations he or she may be part of. This may provide insight into any conflicts or potential conflicts of interest before such director is appointed to the board. It

would be good practice for directors to sign off against their CIPC listings or disclosures of directorships, at least annually.

In the public sector, great care needs to be taken that not even the perception of potential for conflicts of interest is created. Where such a risk of perception arises, the director ought to resign. Corruption Watch suggests that public servants conduct themselves in the following manner, which is not an exhaustive list, in regard to conflicts of interest:

- Public servants must disclose financial interests if in senior management positions;
- Public servants must withdraw from the supply chain management process if they have an interest in the contract being awarded;
- Public servants must not receive external remuneration without prior consent;
- Public servants must not conduct themselves in a manner that could damage the reputation of the public entities they work for¹⁴.

What does Brian Dames' resignation mean for the Eskom task team?

Brian Dames — the chief executive of Patrice Motsepe's African Rainbow Energy and Power — has stepped down from the Eskom Sustainability Task Team.

The team, set up on December 14, was meant to recommend what action the government should take regarding Eskom's operational challenges.

In a statement released by the presidency on Wednesday, Dames noted a "perceived conflict of interest relating to the scope of work and terms of reference of the Eskom Sustainability Task Team."

Source: <https://mg.co.za/article/2018-12-19-what-does-brian-dames-resignation-mean-for-eskom-task-team>

A "zero-gift" policy reduces the potential for conflicts of interest, given the need for uncompromised independence in decision-making.

Board charter or policy

Provisions relating to conflicts of interest need to be contained in either the board charter or in a conflicts of interest policy. If contained in the board charter, the company secretary needs to ensure that there is information on ethical behaviour and on

how declarations of interest are to be managed, with detail as to the process to be followed. Also to be included in the board charter is a clause around the scenario where a director wishes to take up another directorship. In this scenario, the director concerned ought to be required to advise the chairperson as a courtesy and to inform the chairperson of the proposed appointment – where it would not amount to a cross-directorship, the appointment would most probably be allowed.

14. <https://www.corruptionwatch.org.za/wp-content/uploads/2015/06/Corruption-Watch-Conflict-of-interest.pdf>

Example:

Holding company holds the shares in Sub A and in Sub B and wishes to sell its shares in Sub B to Sub A. Holding company directors are also directors in Sub A and in Sub B. At the board meeting of Sub A, these directors would be able to provide inputs about the assets of Sub B, and any other key information – but would need to recuse themselves when it comes to the discussion on price. Normally, a sub-committee of independent directors would then take over the meeting from this point.

A conflicts of interest policy will, at minimum, normally require directors of XYZ company to disclose an interest in any company that:

- has contracts with XYZ;
- is a competitor of XYZ;
- is a party to an acquisition of XYZ and/or its subsidiaries;
- is a party to a joint venture or other business venture with XYZ or its subsidiaries;
- tenders for advisory or other professional services of XYZ;
- is a party to any transaction that needs to be approved at board level.

The conflicts of interest policy would also ordinarily require directors to disclose interests in any new or existing contracts of the company, whether on a personal basis or on a related-party basis.

Company secretary must be proactive

As the trusted advisor to the board, the company secretary needs to play a proactive role and assist board members with the submission of their annual declarations, and should even draw up a template for directors to use. Where the declarations are not forthcoming, the company secretary ought to follow up with the director/s concerned and if still not forthcoming, approach the chairperson for assistance. As already mentioned, declarations of interest should be a standing item on the board agenda and should be at the top of the agenda. The company secretary needs to remind the chairperson at the board meeting, to reflect on the agenda and enquire if any director present has a conflict or potential conflict, which then needs to be noted by the company secretary in the minutes. This item on the agenda must be given adequate attention and must not be brushed over as a mere tick-box item. All directors need to be reminded of their duties and any questions or concerns must be handled and addressed in sufficient detail.

Example:

The CEO of ABC Bank, Ms Jane Doe sits on your board.

The treasury executive submits an agenda item to the company secretary office for the board to approve long term funding of R100 million from ABC Bank. When putting the agenda together, the company secretary is to remind the chairperson that Ms Jane Doe is the CEO of ABC Bank. The company secretary is to also call Ms Jane Doe and alert her of the proposal so that Ms Doe is informed in advance of the board meeting. In conversation with Ms Doe, the company secretary is to advise her that she would need to excuse herself when this item came up for discussion at the board meeting.

4

The role of the company secretary *(continued)*

The company secretary needs to be confident and courageous. He or she cannot sit silently in the boardroom, but needs to advise where required and assist the chairperson. As the board meeting progresses, the company secretary ought to remind the chairperson around any conflict that may exist in regard to a specific agenda item which is known to the company secretary, and ought to provide guidance to the directors in attendance as to whether the director conflicted must be excused from the meeting when that item is discussed.

Example:

Company secretary: "Chairperson, Mr Bloggs is a director/shareholder of XYZ company – we are now to discuss a potential opportunity with XYZ company. The opportunity is significant and therefore I recommend that Mr Bloggs is excused from the meeting"

Chairperson – "Thank you. I agree. Mr Bloggs you are excused, the company secretary will call you back into the meeting when we get to the next item"

Mr Bloggs: "Yes Chairperson." Mr Bloggs then leaves the meeting.

Alternately:

Mr Bloggs anticipates the situation and voluntarily leaves:

Mr Bloggs: "Chairperson, a reminder that I am a director/shareholder of XYZ company and given the significance of the next discussion, I excuse myself the meeting".

Chairperson: "Thank you Mr Bloggs, you are excused, the company secretary will call you back into the meeting when we get to the next item"

The company secretary is to record the leaving and re-joining of the meeting by Mr Bloggs in the minutes.

It may sometimes occur that directors are not forthcoming in regard to their conflicts or potential conflicts of interest. The company secretary needs to remain alert at all times and ought to check Sens announcements and media statements as to other appointments or interests of the directors. Where the company secretary comes across anything relevant, he or she must then discuss this with the chairperson and the director concerned, and take legal advice if necessary, the costs of which should form part of the company secretary's budget. In certain instances, the director may have to resign from the board where the conflict cannot be managed, and the company secretary needs to have the confidence to advise the chairperson accordingly. Most companies have a code of conduct that deals with conflicts of interest. Where the company does not have such a code of conduct, the company secretary ought to draft one for board approval and adoption so as to ensure that conflicts are properly managed.

5

Additional examples of conflicts of interest

Conflicts of interest may be actual or perceived. Actual conflicts are those that occur where financial or other personal or considerations compromise individuals' objectivity, judgment, integrity, and/or ability to fulfil their legitimate responsibilities to the organisation¹⁵. Perceived conflicts of interest are existing situations or relationships that reasonably could appear to other parties to involve a conflict of interest and exist in situations where an individual employee, a member of the individual's family, or a close personal relation, has financial interests, personal relationships, or associations with an external entity, individual or organisation, such that his or her activities within their own organisation could appear to be biased¹⁶.

15. <https://www.tei.org.za/index.php/resources/articles/business-ethics/7689-let-s-just-declare-conflicts-of-interest-and-get-on-with-it>

16. <https://www.tei.org.za/index.php/resources/articles/business-ethics/7689-let-s-just-declare-conflicts-of-interest-and-get-on-with-it>

5

Additional examples of conflicts of interest *(continued)*

Some examples of actual conflicts are the following:

→ Bob green is a director of XYZ. Bob's wife is the CEO of the bank from which XYZ obtains a loan and credit.

→ XYZ hires Bob's son to provide strategy consulting sessions to XYZ.

→ Bob owns a 20% share in a construction company hired by XYZ to renovate the offices of XYZ.

A perceived conflict of interest arose in the following scenario:

Nothin' suss: Defence denies 'nepotism' accusation in limited-tender procurement deal

The Department of Defence says there was nothing wrong with a procurement official's decision to bypass a competitive tender process and award a contract to a company that had employed their son in the past. An anonymous public servant "with close knowledge of the contract" took a very different view and told the ABC's defence reporter Andrew Greene it was clearly nepotism and a breach of the rules. "If he'd declared the conflict of interest prior, he would not have been allowed to be the financial delegate and approve the contract"

"A perceived conflict is trickier. In these situations there may be no actual or potential conflict, but someone could think (reasonably, of course) there is one and this can have its own ramifications."

In this case the department denies there was an actual conflict of interest but it would be harder to argue there is not a perceived conflict, given the perspective expressed by the anonymous public servant.

Burfoot notes that a perceived conflict can arise even when a public servant is totally innocent and unaware of the relevant facts, and says managing them is more complicated than dealing with actual conflicts of interest, firstly because there are usually more stakeholders involved. He says public servants need to "appreciate the significance of maintaining public confidence in their integrity and that of the government" at all times.

Source: <https://www.themandarin.com.au/118570-nothin-suss-defence-denies-nepotism-accusation-in-limited-tender-procurement-deal/>

If I was corrupt, take evidence to the cops – defiant Koko

Koko rubbished corruption claims against him after media reports at the weekend alleged that he offered multibillion-rand contracts to a Swiss engineering company if only it subcontracted a company partly owned by his stepdaughter, Koketso Choma.

According to reports, Koko offered electrical engineering company Asea Brown Boveri (ABB) R6.5 billion in contracts to work on Kusile power station in Mpumalanga if Impulse International, a company which Choma partly owned, was subcontracted.

ABB was in 2015 awarded a control and instrument contract worth R2.2 billion and subsequently subcontracted Impulse International for R800 million. Impulse, it is reported, had failed two of ABB's tests for subcontract appointment, first scoring 59% then 43%, resulting in not qualifying for the work.

Impulse was, however, hired and after starting the work, it received a pass rate of 94%. The company was given a R25 million contract without the necessary approvals. Eskom proceeded to approve several variation orders, escalating the contracts' value by hundreds of millions of rands. Koko was allegedly personally involved in the pricing of the contracts while Eskom project managers who questioned the costs and processes followed were reportedly kicked out of projects.

Source: <https://citizen.co.za/news/south-africa/state-capture/2099388/if-i-was-corrupt-take-evidence-to-the-cops-defiant-koko/>

Managing conflict of interest is proving tricky for many of SA's directors

Section 75 of the Companies Act 71 of 2008 regulates the position of a director who has personal financial interests in a company's business. As fiduciaries, directors must not put themselves in a situation where their personal interests conflict with their duties to the company. It is important that directors are not swayed by their own personal interests. They must properly comply with the prescribed disclosure requirements, as failure to do so could have dire consequences.

A personal financial interest does not mean that there is any transgression – the transgression arises when the director fails to properly manage that interest. The rationale of the disclosure requirements is that if the board is informed of a director's interest in a matter, it would be free to decide whether, and on what terms, to proceed with a transaction. Managing a conflict may be as simple as recusing himself from a decision. But, if the conflict results in an untenable situation, the director may have to withdraw from the situation altogether, such as resigning from the board of one of the companies.

It cannot be stressed enough that the failure to disclose a personal financial interest could render the transaction invalid, unless the decision is ratified by the shareholders or declared valid by a court. But it would be costly for a company to take these steps and may delay the transaction. Explaining to shareholders the reason its directors initially failed to disclose their interests may reflect poorly on the reputation of its directors.

Furthermore, a director will be in breach of his fiduciary duty to avoid a conflict of interest if he fails to disclose his interest (unless the transaction is ratified by the shareholders). He may in certain circumstances even face criminal action for fraud or theft. A key point is that material information must not be withheld from the board to the detriment of the company and its shareholders.

Source: Business Day, Business Law & Tax, Rehana Cassim, October 2019 edition, P8

A few practical examples of how to manage conflicts in the private sector include:

- A common conflict of interest arises where non-executive directors' fees are "approved" by the board (although still noting that these are still approved by shareholders). The approach in practice is that management tables the fees at the remuneration committee meeting together with a benchmark, and then this goes to the board. What the non-executive directors need to ensure is that a proper process was followed in arriving at the revised fees and that they seem reasonable.

- The board of XYZ is considering whether to approve a loan to another non-profit, ABC. A director of XYZ serves as a director of ABC. This director of XYZ must disclose this conflict and recuse himself or herself from the discussions and decision-making in respect of this matter.

- A director of XYZ is one of 10 partners at ABC law firm. XYZ is considering hiring ABC to represent it in a litigation case instituted against XYZ. The director will not work on the matter. Before hiring ABC, the board of XYZ must determine whether the director's compensation will be affected by hiring ABC. The director must recuse himself or herself from the discussions and decision-making in respect of the matter.

5 Additional examples of conflicts of interest *(continued)*

A few examples of conflicts in the public sector include:

- Influencing government tender processes so that your family members and friends are awarded state contracts;

- Abusing your position within a government department to ensure your friends and family members are hired into the same department;

- Accepting bribes in order to disclose confidential information about the government department that you work for;

- Tendering for a municipal contract when you are an employee of the municipality¹⁷.

Corruption	Conflict of interest	Fraud
<ul style="list-style-type: none"> → Bribery → Nepotism → Patronage → Graft → Misappropriation 	<ul style="list-style-type: none"> → Self-dealing → Accepting benefits → Influence peddling → Using your employer's property for personal advantage → Using confidential information → Obtaining outside employment or moonlighting, and taking advantage in post-employment 	<ul style="list-style-type: none"> → Embezzlement of funds → Bid rigging → Fronting
<p>Source: https://repository.up.ac.za/bitstream/handle/2263/25706/Complete.pdf?sequence=5&isAllowed=y</p>		

6 Conclusion

Conflicts of interest are a common occurrence and company secretaries are likely to come across conflicts in the boardroom on more than one occasion. As such, company secretaries need to understand legislation and governance requirements in regard to conflicts of interest thoroughly and need to be confident and courageous when advising the board on this topic. The mere disclosure of a conflict of interest is not sufficient – all legal processes need to be duly adhered to once the disclosure has been made. Though the chairperson leads the board meetings, company secretaries may need to step in at times and remind the chairperson of an existing or potential conflict of interest. As minutes may form part of legal proceedings, company secretaries must ensure that all conflicts of interest are adequately noted in the minutes. It is vital for all company secretaries to maintain the highest degree of ethics, independence and morality, particularly where personal agendas and gains on the part of directors may sometimes make their way into the boardroom. Such conduct cannot be allowed, and company secretaries need to play an active role in managing conflicts of interest.

17. <https://www.corruptionwatch.org.za/wp-content/uploads/2015/06/Corruption-Watch-Conflict-of-interest.pdf>

Annexure A

DISCLOSURE OF INTERESTS IN TERMS OF SECTION 75(4) OF THE COMPANIES ACT, 71 of 2008

This declaration serves as a general notice to the directors of the companies listed hereunder that the under mentioned director is to be regarded as interested in any contract which may, after the date of this notice and before the date of its expiry, be entered into with any of such companies or firms.

SURNAME:

FULL FORENAMES:

RESIDENTIAL ADDRESS:

POSTAL ADDRESS:

BUSINESS ADDRESS:

OCCUPATION:

NATIONALITY:

IDENTITY NUMBER:

DATE:

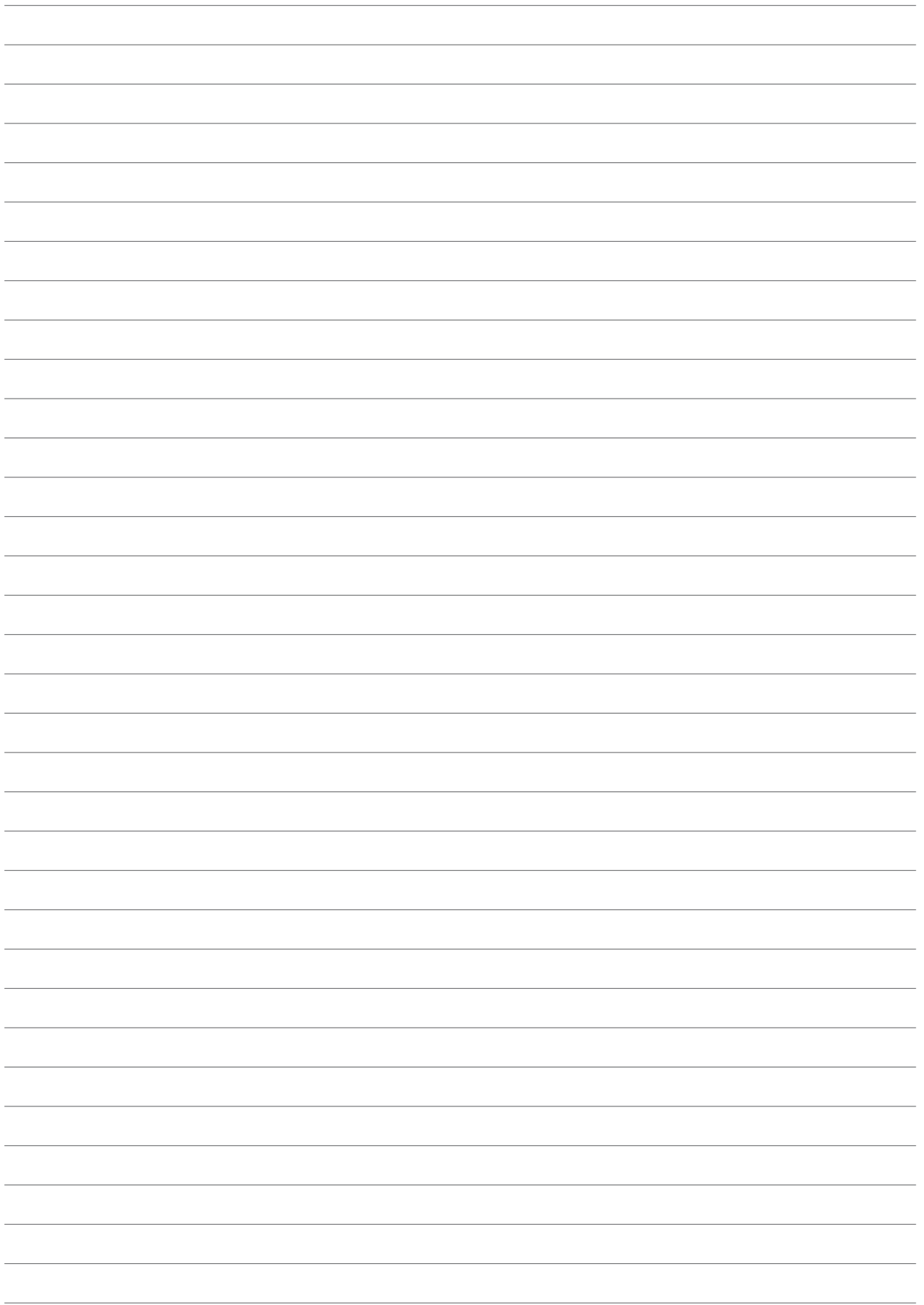
SIGNED:

DIRECTORS PARTICULARS AND LIST OF DIRECTORSHIPS/INTERESTS

NAME OF COMPANY	REGISTRATION NUMBER	REGISTRATION OFFICE	NATURE OF INTEREST	DATE APPOINTED	COMMENTS

SIGNATURE

DATE





Riviera Road Office Park (Block C) | 6 – 10 Riviera Road | Killarney | 2193 | Johannesburg | South Africa

Tel: +27 11 551 4000 | Fax: +27 11 551 4028 | Email: technical@chartsec.co.za

www.chartsec.co.za