CORPORATE GOVERNANCE -BOARDS OF PARTNERSHIPS AND STATE OWNED ENTITIES IN MINERALS, OIL AND GAS INDUSTRIES “A PERSONAL PERSPECTIVE BY SHEILA KHAMA”

Chapter 7: Role of Executives and Public Officials

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Companies, governments and boards of directors comprise organizational structures with unique hierarchies and a specific chain of command. If this collective is harmonized then organizations function well, if not the outcomes can be counterproductive to the goals of the very organization they are intended to serve. Boards and those that serve them are not exempt from this principle**.** In previous chapters, I stated that to be effective directors need timely and full access to information. But there are other requirements. Directors' voices must be audible and their wishes fully complied with. To succeed, a board of directors depends on the loyalty, diligence, guidance and support of their peers and a few critical office bearers in the corporate hierarchy. In the context of an effective board, the most important of these are the chairperson, CEO, and compliance officer. For the most part, the structure functions well, but in some instances they can be a disaster, undermining board effectiveness. Though these challenges apply across the board and are not unique to the industries in question nor type of companies under discussion, I deem them worthy of discussion because though it is reasonable to assume that office bearers fall in line with the wishes and goals of the board. my experience is that this is not always the case.

7.1. Chairperson of the Board

The first most important office bearer is the chairperson of the board of directors. Although the role of CEO and Chairperson are sometimes performed by one individual, increasingly they are separate. The goal is to separate the authority that appoints and oversees the work of the executive management from the management itself. In cases where they are held by one person, to ensure checks and balances, the chairpersonship of the audit and remuneration committees of the board is assigned to a non-executive director. This is because combining the role of a CEO and that of the chairperson of the board together blurs lines of accountabilities on matters in which the chairperson potentially has a vested interest. Hence, increasingly in the UK the trend is to separate the two while in the US it is still common for the CEO to also be the chairperson of a company. Regardless of which side of the argument individuals stand, all recognize the importance of an effective chairperson in the successful performance of a board's duties.

The relationship between the chairperson and CEO notwithstanding, the chairperson must effectively convene meetings, direct discussions and ensure compliance with due process. An active and engaged chairperson can also be a visible face of the company, actively championing corporate interests. An effective chairperson is a reliable source of wisdom, a mentor and a confidant for the CEO. In case of tension between executive management and shareholders, he or she can be a bridge builder. He or she can be a relationship builder, actively and constructively engaging multiple stakeholders to articulate corporate value proposition, align interests and build public trust. In minerals, oil and gas SOEs or partnerships with the state , the chairperson can also manage relations with host governments, screening the CEO from political interference and leaving the CEO space and time to focus on day-to-day operations. A chairperson can be an effective brand ambassador by embodying and living corporate values. On the other hand, a disengaged or domineering maverick chairperson is unhelpful to the corporate governance principles and is a source of disruption.

Case 5 Misalignment Between the Chairperson and the Board of Directors

The chairperson and the members of the board of directors of a properly functioning board are fully aligned and relationships with each other and the CEO are managed in keeping with corporate hierarchical structure. The chairperson and the directors provide strategic leadership, while the CEO and management on the other hand implement the wishes of the board. Any differences of view between the board and the CEO are a function of objective and rigorous debate that can be expected in the course of business. Differences that emanate from a divergence of corporate philosophy, values or strategy can, however, be symptomatic of a deeper structural problem.Consider the following case.

Recently, I observed a situation in which this was clearly the case. I noted that the CEO literally led the board and not the other way around, as one might expect. The organization is an acclaimed international NGO, chaired by a recently appointed but seasoned former politician. On the other hand, the CEO had been with the organization for more than a decade. To this end, the CEO is a wealth of knowledge and institutional memory and had witnessed the organization's growth from humble beginnings to one of the most powerful and visible civil society global brands.

Because of the CEOs length of service relative to the chairperson and many members of the board, the CEO therefore enjoyed a position of advantage in his understanding of historic and current matters placed before the board. This was clear in the way he articulated issues and went about arguing cases to the board and in implementing resolutions of the board. To this end, the CEO administered the organization, influenced strategy and other decisions of the board consistent with his institutional memory and historic views of what served or did not serve the organization. The problem was that, though possibly well-intentioned, this approach was neither inclusive nor reflective of the views and aspirations of the board. As such, from a governance perspective the actions were counterproductive and likely to render the board ineffective. Here are a few observations of the dysfunctional nature of the board and its deliberations;

- the chairperson seemed unaware of the importance of cultivating a relationship of trust between himself and members of the board rather than only with the CEO;
- the chairperson often articulated the views of the CEO to the board and not the other way around. This effectively made the chairperson the CEO's mouthpiece whether knowingly or not;
- due to the chairperson's comparatively limited organizational knowledge, the CEO manipulated strategy and processes in line with personal views and preferences. This included selective provision of strategic information. Clearly, this was in recognition of the fact that the Chairperson was ill-equipped to perceive this and therefore unable to discern any discrepancies;
- the CEO and the chairperson enjoyed a close relationship to the exclusion of other directors, creating a rift between themselves and the rest of the board;
- the directors appeared helpless, unskilled and/or unwilling to break the cycle;
- for reasons I need not speculate upon, the CEO appeared relentless in his approach and only an experienced board would have been able to intervene successfully.

This kind of power play is not unusual and so a seasoned and assertive board would easily have been able to rally behind the chairperson and provide adequate support to ensure a healthy balance of power. Ideally, the chairperson should have dealt with the matter immediately upon assumption of duty. This could have avoided the relationship vacuum through which the CEO was now able to impose his will and progressively established an illegitimate alliance with the chairperson.

I suspected that the chairperson was oblivious to the organizational power dynamics and the impact of his behaviour, which nevertheless made him complicit. By contrast, the directors were aware of the CEO's tendencies, felt frustrated by the situation but still did not arrest the matter. Because of the time delay, it was no longer possible to intervene without taking drastic measures. Addressing the situation called for forthrightness and a pronounced sense of accountability on the part of the directors.

Following a meeting during which the board proceedings were subject to the same counterproductive dynamics, one of the directors approached me and expressed discontent with the situation. I acknowledged that the relationship between the CEO and board appeared abnormal and was potentially unhealthy. In our conversation, the director proceeded to ask me what I thought could be done. After a brief consideration, I gave her two options. Firstly, I suggested that she and other directors may want to approach the matter directly; and meet the chairperson to share their concerns However, I also confessed that I believed that this would be a more difficult approach because it required the chairperson's acceptance of the board's analysis and conclusions (including those regarding the part he might have played in the matter). I expressed the view that this was unlikely and the risk of a fallout was a likely outcome because being direct requires goodwill between those involved and, in this instance, I did not think this was the case.

So, I offered an alternative approach that was intended to be subtle but more likely to achieve the same goal of wresting the chairperson away from the domineering personality of the CEO. To this end, I suggested that the directors consider scheduling informal but regular meetings between themselves and the chairperson. Because the CEO was not a board member, I thought excluding him would not raise eyebrows. By interacting without a formal agenda and without the conversation being filtered through the eyes and ears of the CEO, this would enable the directors and the chairperson to bond and progressively shift the corner poles. Based on a growing level of trust and the changing balance of power, room would gradually be created to enable the board to lead and address substantive issues. It would also send a clear signal to the CEO on the desired hierarchical structure. Importantly, the risk of fracturing relationships further would be lessened.

Of course, when dealing with human behaviour there are no guarantees. But the responsibility of any board that seeks to be effective is to ensure that the business environment of the organization is healthy. Such conditions require a recognition of the fact that, unless addressed, an unhealthy environment detracts from the work of the board because doing nothing means that the chairperson and directors became complicit.

7.2. Chief Executive Officer (CEO)

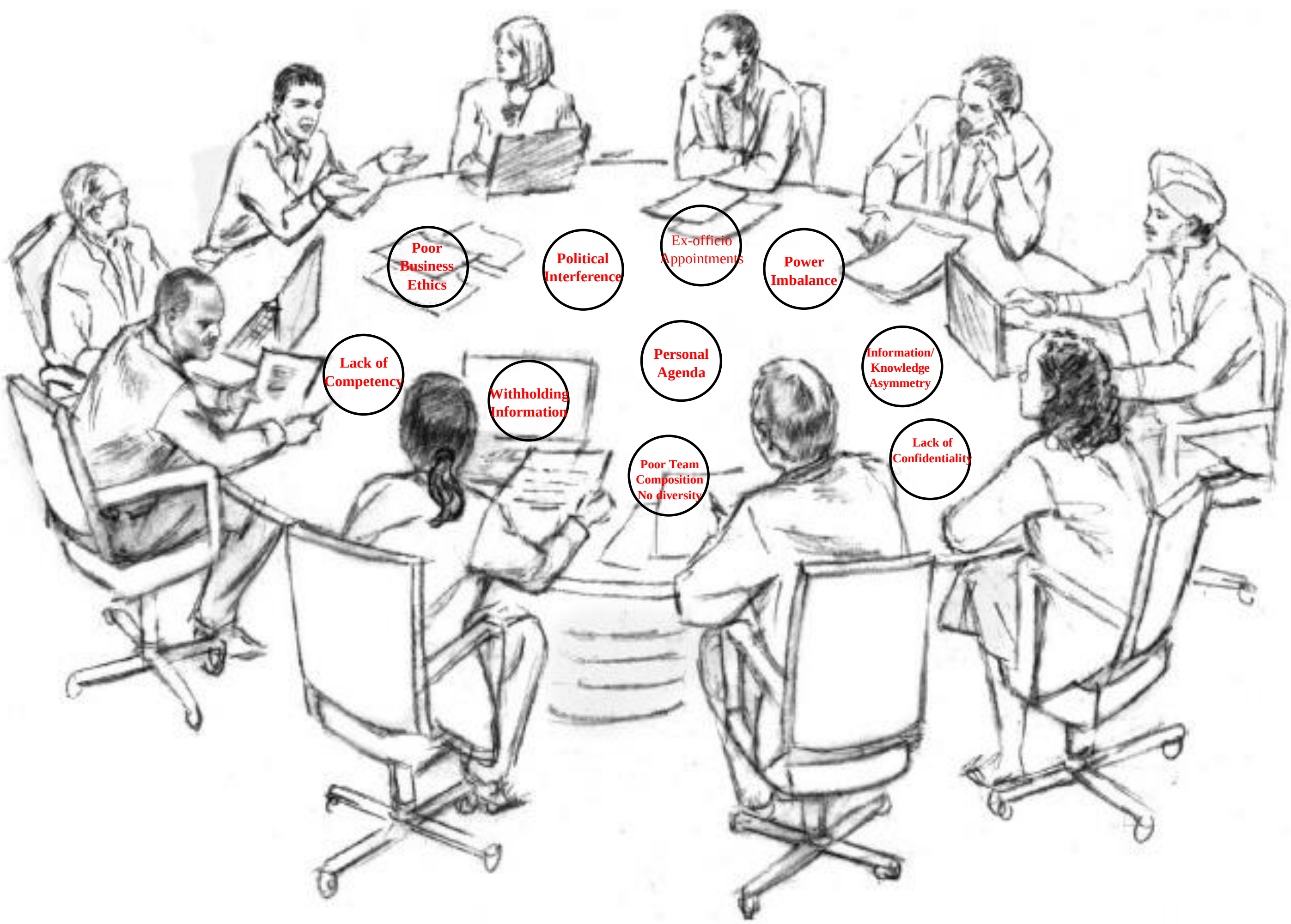
The role of the CEO is to ensure day-to-day implementation of corporate strategy to meet performance targets agreed with the board. But the role of the CEO to deliver long term value can often conflict with pressure to deliver short-term gains because he or she serves at the will of the shareholder representatives who appoint him or her. Nevertheless, as with the chairperson, he or she personifies corporate values in and outside the company. In the context of the minerals, oil and gas sectors, public trust or lack of trust in the company can often be traced to the conduct and personal brand of a CEO. Hence the importance of striking the right balance between shareholders and other interests groups. Specifically, as a director who has day-to day access, the CEO can enhance or undermine board effectiveness in many practical ways. Firstly, the CEO controls and sanctions information flow between the executive team and the board. In the event of a CEO who puts his or her personal ambitions and desire for power above the interest of the company, information can be used to serve the CEO while undermining the board. Quite apart from selectively sharing information and adopting biased disclosure of information, by simply setting out an agenda for the board to highlight issues in line with personal goals, a CEO can significantly circumvent the board's leadership position and diminish its effectiveness. In cases of SOEs in minerals, oil and gas companies, a CEO who displays such behaviour can compromise national interests significantly. Imagine an audit committee that does not have all the information it needs?

On the other hand, this behaviour on the part of CEOs is one of the explanations for what might appear to the public to be overnight collapse of some multinational companies, despite the oversight and presence of competent groups of individuals on corporate boards and its committees. One explanation for such corporate demise is the fact that often the board is blind to the detrimental actions of overly ambitious CEOs until it is too late to intervene and for a board to effect change. So, it is imperative that the CEO is aligned to corporate objectives and not driven by personal interests (see Case 5 above). In the event of the latter, the board must assert its authority.

I have referred to the importance of timely and comprehensive information for the board. Some CEOs confuse this to mean lots and lots of information. Too much detail is very unhelpful because not only is a waste of valuable time, but it also burdens directors with having to find their way through unnecessary detail just so they can get to relevant information. What directors need upfront and with each paper presented is a statement indicating the purpose of the report. Important questions to answer upfront are, what is being requested of the board? To to consider, decide, grant approval, note the information only or is there some other purpose? This is ideally presented in the form of an abstract *cum* executive summary. It is also useful for the documents to be separated between essential reading material and mere background information. Either way, the more succinct, the better. It is also worth remembering to avoid jargon and limit the use of complex terminology to essential technical words. There is a difference between lecturing and informing and it is always best not lecture. But a director's knowledge of these issues, his/her rights and obligations in relation to the CEO improves oversight.

Finally, a good CEO knows that he or she was hired because the board believes he or she is capable and to avoid spending time showing off his or her skills. Here is a brief anecdote. Some time ago I served on a board of a company whose CEO had a legal background. Every time the board asked for a legal perspective, we would get a longwinded response, which was really the CEO proving knowledge of the law. We were weary of it but thought he would sense our discomfort. With time, it became clear he did not. After one such meeting, I pulled him aside and, not in so many words, said, "I know you mean well but your response today suggested you are missing an important point. The point is that the board hired you because we know you are competent, otherwise you would not be here. So, you need not feel under pressure to prove your knowledge. In future, it would be helpful if you could just get straight to point and focus on a solution and not the background to the solution. Unless proven otherwise, assume that the board takes your competency on face value."

Diagram 7: *What Does Not Work in the Boardroom*



7.3. The Compliance Officer

The role of compliance officer has evolved over the years from one who simply records deliberations and keeps records to one who oversees corporate compliance with a myriad of legal requirements. In my eight years as compliance officer for 20 subsidiaries of Anglo American Corporation in Botswana in the 1990s, I witnessed this evolution first-hand. By the time I served as a director during the millennium, the world of compliance had become even more complex. I know from both experiences that a compliance officer can contribute meaningfully towards board effectiveness or lack thereof. An interesting feature of this role is that it can be and sometimes is performed by another body corporate or an individual outside the company. It was common then but it has all but been done away with. Nevertheless, the arrangement is symbolic in two respects. It attests to the inherently multi-dimensional nature of the function and the unique relationship between the compliance officer and the CEO. Firstly, the primary responsibility of the compliance officer is to serve the chairperson (and the board), who is sometimes not part of the day-to-day running of the business. On the other hand, the office bearer also guides the CEO, chairperson and directors on compliance matters by providing information timeously and ensuring compliance with the relevant laws governing the conduct of the corporate entity and its directors. This gives rise to multiple and overlapping reporting lines. As such, some challenges relating to the role must also be seen in the context of the structures.

To start with, in cases where the compliance officer is an employee appointed by the CEO, he or she not only performs the role of guiding the board, he or she also works within the hierarchy of the company, often reporting to the CEO daily and to the Chairperson on an ad-hoc basis. In these circumstances, the potential for conflict arising from the officer's support to the two, is greater. The challenge arises from the fact that the compliance officer is under the daily direction of the CEO, at whose wishes he or she serves, while providing services directly to and in line with the needs of the chairperson. The chairperson may have a different view of day-to-day corporate priorities from those of the CEO. Acceptance of the governance chain of command is what should guide the compliance officer and should raise no concerns from the CEO. But if they do, it is indicative of lack of knowledge or bad intentions.

Either way, the compliance officer's reliable recording of the board proceedings, and provision of counsel to the chairperson and directors is not only vital for corporate compliance but, in case of a rogue CEO, it can ensure the necessary balance of power in the boardroom. To be effective in doing this, the compliance officer must be competent in hi or /her role, have the confidence of the chairperson and personal courage of convictions to disclose any misconduct on the part of the CEO in so far as it undermines the chairperson and the board (see Case 6 below).

As custodian of corporate records and a source of guidance on board procedures, the compliance officer is also an important gatekeeper and source of corporate memory. Manipulation of agenda, misstating of records of proceedings and deliberate altering of other corporate records are common channels used by roguish executives to circumvent corporate governance whether in the public or private sector. To succeed in doing this, the executives require that the compliance officers be complicit. For instance, the simple act of a writing style and a turn of phrase adopted by an officer to record board decisions can misconstrue facts and change the course of corporate history. By contrast, an officer who acts as the corporate memory and alerts the chairperson of actions that are pending, improves governance by ensuring that decisions of the board are implemented consistently and in line with the wishes of the board. Sadly, experience teaches us that neither one of these can be taken for granted.

Case 6: Corporate Power Politics and How Executives Can Undermine a Board

One of the risks that face boards is that, if confronted with an ambitious and self-serving executive management team, lack of access to day-to-day transactions and information becomes a major disadvantage. If the executives collude in manipulating the chairperson and the board, the challenge can be magnified. This is particularly true for non-executive directors but applies across the board. Directors need to have ways of recognizing such behaviour and tackling the problem before it becomes pervasive. One way of doing this is to demand accurate recording and provision of updates with respect to implementation of decisions of the board from the executive management. In my experience, assuming that executives will abide the wishes of the board is a reasonable expectations in most cases, but sadly there are also exceptions. On the other hand, wisdom teaches us to plan for what might go wrong or risk being caught off guard. Interestingly when executives have a different agenda their actions neither have to be explicit nor significant to erode the effectiveness of the board over time. Done progressively and however insignificant, the impact is the same. The board becomes a lame duck.

In an organization I once worked for, I observed the negative effects of the inability of the board to monitor the executive team, specifically as related to implementation of board decisions. In one specific case, for reasons I did not quite understand, several executive vice presidents of this organization, including the corporate secretary, were reluctant to implement the vision and resolution of the leadership.

The first time I witnessed this was when the VPs appeared to want to set aside a decision that had been taken through a committee of the board chaired by the COO on behalf of the executive chairperson. At the direction of the latter, a decision was taken to set up a unit and it immediately became apparent to me that the executive team was divided in its opinion of what the unit's appropriate governance structure should be. My role was to set up the unit and theirs was to provide long-term strategic guidance.

Some members of the team argued for complete autonomy and called for "no business as usual". Another group argued for integration into an existing corporate structure. It appeared to me that the first team (like the executive chair) perceived the experiment to potentially add value through a departure from the norm. The opposing camp felt that the proposed structure was unnecessarily disruptive to an existing and well-functioning operating structure. Either way, the divisions were clear and following a meeting that opted for the former approach, the executive VP responsible for the project informed me not to take the committee's decision at face value because it was (according to him) common for VPs to make these utterances while not expected executives to follow suit. I was stunned but the VP was the project sponsor who had more than 20 years in comparison to my two months with the organization. So, I proceeded according to his advice.

A few months later, during a progress report meeting, on noticing the deviation from the previous decision, the COO again dug his heels in and insisted on an autonomous structure. The minutes were recorded, I reviewed them and they were in line with the outcome of the deliberations. Under any circumstances, one might have assumed the matter was settled (I certainly did). However, in protest, the project sponsor sought a meeting with the executive chairperson and me to presumably prove that the COO's interpretation of the executive chairperson was flawed. During the meeting, the executive chairperson articulated his vision clearly and took the VP to task for insisting on revisiting old ground. I summarized the outcomes of the meeting and sent a draft to a member of the office of the executive chairperson who had been in attendance to review. The officer corroborated the record. By then it was clear to me that this was essential.

However, before I could circulate the file note, an email report of the meeting was sent from the VP responsible for the project to the COO and copied to me and two other VPs responsible for legal and board matters. The contents were a fundamental misstatement of facts, alleging precisely the opposite of what the executive chairperson had articulated. It was blatantly clear to me that the VP meant to undermine the executive chairperson.

Because wisdom teaches us not to take sides in case of conflict between our principals, in contemplating my response, I was naturally challenged to find the right balance. It was also obvious to me that by misstating the truth about the meeting and not copying the office of the executive chairperson, the VP had taken two important tactical steps to shape outcomes. If his interpretation of the executive chairperson's views were left unchallenged, his version of the truth would supersede the committee's decisions and pave the way for his preferred course of action. By copying me as participant in the discussions, he clearly expected me to turn a blind eye to the misstatements and not to challenge him. Either way, he tested my resolve and must have known that my actions would forever define the fabric of our working relationship. For my part, it was clear that I was damned if I set the record straight and damned if I played along with him. The only question was what I was, willing to take responsibility for?

Having spent years in the boardroom and building my character based on a well-defined set of values, however, there was only one course of action and that was to state the truth firmly, accurately but respectfully and live with the consequences. The alternative (which was unacceptable to me) was to buckle and be swept along with the misstatements and forever be beholden to the VP's self-serving ways. So, I politely acknowledged receipt of the email, confirmed the accuracy of some aspects of it but also indicated that there were material omissions in his email. I proceeded to highlight the omissions and misstatements without explicitly referring to them as such. I attached the full version of the record that had been corroborated by the team in the executive chairperson's office. Unlike the VP, I copied the executive chairperson. I waited for the VP to correct me, but there was no comeback and I took this to mean I was right and his email was a conscious effort to alter the record. I knew too that the battle lines between us were drawn and that I had not seen the last of his efforts.

In the interim, I presented the matter to the board over which the Executive Chairperson presided for final approval and his vision was endorsed. Again, under normal circumstances, one would have assumed that the matter was settled. However, three issues made this unlikely. First, the executive chairperson's tenure was due to end soon. Second, the VP had the support of both his corporate and legal colleagues. Third, in contrast to the three VPs a minimum of twenty years each with the organization I was a corporate novice with no historical alliances to speak of.

One small matter that stood in favour of the executive chairperson was that I was not on a career path and could afford to cross the VP's path and not be intimidated. Nevertheless, the three factors played in favour of the project sponsor and he deployed them to great effect. To start with, the secretary's team simply stalled the implementation of the board's decision by not undertaking a minor but essential task, without which the decision of the board could not be deemed constitutional. On the other hand, the project VP folded his hands and knew that, with the executive chairperson and COO's tenures coming to end, time was on his side. It was a spectacular case of an executive team undermining the effectiveness of the board without ever lifting their hands or compromising themselves in a way that could be verified.

In the end, the only thing one could fault them for with tangible proof was lack of action during what turned out to be eight months. But this was not to be because, as soon as the executive chairperson's successor arrived, he terminated the contracts of the three VPs for completely unrelated reasons (I assume). Only then was the necessary clerical work carried out to pave the way for implementation of the decision of the board.

However, the damage was done to the vision, momentum and morale of the team and mine. But from this I derived very powerful lessons on leadership, personal character, business ethics and was reminded of the potentially detrimental nature of boardroom power play.

Let us start with what I stood to gain (or lose) in digging my heels in while clearly fighting a losing battle. Quite simply, I was guided by personal values, regard for my professional and personal brand, and respect for the trust that the executive chairperson had placed in me. It was inconceivable that I could knowingly misstate the truth in exchange for personal favours. I also knew from experience that, while at face value it might seem that I would have been better off following the VP, in time the VP would have had no respect for me and the investment in that relationship would be worth very little unless I committed to continuously feed the relationship with personal sacrifices. This was not possible because, as a rule, I have always believed that it is preferable to be respected rather than to be favoured or liked.

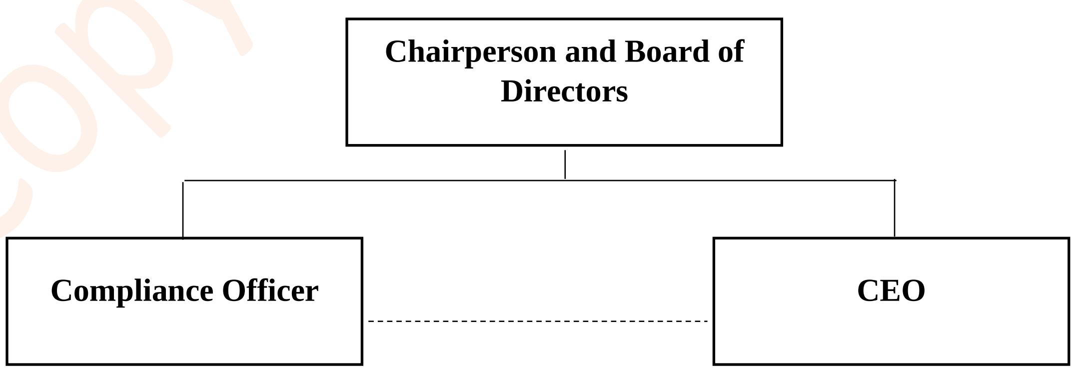
I was also fortunate to be at a stage in my career where I was spoiled for options and elected my professional assignments based on a clear sense of purpose and not pursuit of career progression. Another important factor was that in all our lives we have "sponsors" who guide us through happy and difficult times. As such, they become a constant moral compass. I invest hugely in such relationships because in my experience relationships based on trust and respect are worth more than a short-term career benefit. Such relationships also tend to be few and far between. In the case of this organization, I knew my conduct would also have direct bearing on the credibility and image of my sponsors and it was important to me to protect their reputation and my relationships with them.

But, from a governance perspective, an important lesson is that sometimes the enemy comes from within. So, by being diligent and simply following through on its decisions and demanding update reports from executive management, the board's actions could have been the difference between effectiveness or lack thereof. Otherwise, an executive chairperson faced with a team that places personal interests above corporate goals is doomed.

Unless there are relationships across the organization that can be leveraged to provide the necessary checks and balances, and time is available to root out entrenched personal interests, organizational leaders are vulnerable to their own teams. On the other hand, this experience suggested that compliance and legal teams should not be selected for their skills alone but must be screened for their business ethics too. In organizations that are burdened with politics, the latter probably should be weighted more and here SOEs are a classic case. Without these considerations, boards can be paralyzed, as we see from this case. On the other hand, organizational structures alone are not enough to ensure board effectiveness; personal relationships and ethics are equally important. This experience heightened my awareness of this.

The ideal relationship structure between the three office bearers is depicted in Diagram 8 and supported by sound corporate and personal values it strengthens corporate governance.

Diagram 8: *Structural Relationship: Chairperson, CEO and Compliance Officers*



From a statutory compliance perspective, the compliance officer is an important bridge between the company and regulatory agencies. As such he or she is a useful lens through which the regulators see the work of a company. A progressive compliance officer and related professional associations can provide feedback to agents of the State on loopholes in national laws, leading to their strengthening for the benefit of all. As part of team effectiveness, the compliance officer can support the chairperson with tools to induct new directors into the culture, legal requirements and procedures of the board. These are some of the important links in the corporate governance chain without which a board of directors can be ineffective. Admittedly, there are other executives who are critical to company performance but, in the context of board effectiveness, none are more critical than these three.

In conclusion, it is worth reminding the reader that, in an environment of partnerships and SOEs which is already politically partisan and subject to commercially conflicting interests, the independence and impartiality of the board and all other officers can be the difference between an effective and an ineffective board. Actions as simple as sharing confidential information with members of favoured political parties can cause untold damage to the company. Equally, withholding information from representatives of one shareholder to bolster the position of another on the board can be detrimental. Doing this on an ongoing basis reverses the balance of power between the executive and weakens non-executive directors relative to the executive team that it is supposed to lead. Hence the importance of a unified front between the directors, clear and transparent guidelines for the selection of all office bearers with the potential to impact board effectiveness.

7.4 Public Officials and Corporate Governance

The role of government officials as relates to the subject of this book deserves special attention. As representatives on the boards of minerals, oil and gas companies in which the State has equity, the officials not only have the conventional responsibilities of directors of corporate boards, but they also have those that arise out of holding public office. Though conventional wisdom suggests that public officials, like all other directors, will act in the interests of the body corporate, in the case of public officials it is more likely that they act as *"a special interest group"*. Special interest groups by nature represent a clearly defined constituency with specific interests. Seen in this context, the position of public officials on the board is more aligned to reality and would enable them to act responsibly but without restraint. To appreciate the significance of this it is good to revisit the definition of "fiduciary".

Dictionary.com defines it as "a person to whom property or power is entrusted for the benefit of another".[1] Further, that there are at least four factors that identify or qualify a relationship as a fiduciary one namely:

- the beneficiary has *delegated authority* to the fiduciary to act on its behalf;
- the fiduciary has *discretionary powers* over the beneficiary's assets or interests;
- the fiduciary is in a *position superior* to that of the beneficiary due to *specialized access, knowledge* or *ability*;
- the *beneficiary trusts* that the fiduciary with act in the *beneficiary's best interest*.

Out of this emerges a very onerous task. These four factors illustrate this clearly and highlight the unique position of privilege that public officials enjoy. Public officials have significant authority, the powers of discretion, a superior position relative to investors and the publics, higher degrees of knowledge and capability too. Such position of privilege comes with a level of public trust, confidence and expectations for the officials to abide by high moral ethics. Viewed from the perspective of minerals, oil and gas

[1] www.dictionary. com

corporate environments, this implies a lot. For one, it means that the officials must not take their knowledge for granted. Instead, public officials need to consciously equip themselves in order to competently discharge their duties. It also means that, contrary to the norm, as directors they cannot only act in the interest of equity shareholders and therefore need to look beyond that when making decisions on the board.

Specifically, public officials regulate the sector and account to the publics to ensure that the private sector compliances with legal framework as an integral part of their public duty. At the same time, they regulate to attract investors and have an implied commitment (in law and policy) to protect investors through fairness. As directors, public officials represent public interest as agents of the shareholder on boards of partnerships with private investors or those of SOEs. These three roles introduce some degree of conflict that requires clear separation of duties.

Quite apart from avoidance of conflicting interests, given the rising importance of ESG ratings, officials require a heightened awareness of their unique position which calls for the highest ethical and professional standards as well as exercise of duty of care. Regulators cannot afford to take corporate reports on health, safety and taxation at face value. It is essential to supplement the information with physical inspections. For instance, site visits to operations to inspect equipment supplied by manufacturers helps validate compliance with safety standards and environmental management plans. On financial matters, rigorous tax audits ensure that complex accounting techniques do not mask the true magnitude of revenue generated in order to deprive the State of public revenue while seeking to optimize investor returns. Though the expectations of governments and those of corporates to optimize value is legitimate, the reprocesses by which they respectively achieve this can sometimes be irreconcilable.

An important part of the jigsaw puzzle is the natural resources deposit. Resources management requires skilled geological resource planners and managers to assess operations and ensure that companies extract minerals, oil and gas resources in line with conditions of licencing regimes. In all these cases, lack of in-house skills does not have to hamper the work of the regulator. Such services are readily available in the market and the State can outsource the work that need only be carried out periodically. But whatever the means, it is vital to beef up the regulatory and investment arms of the State to protect public interest.

Public officials account to a long list of stakeholders, including equity shareholders. But, being part of bureaucratic hierarchy compels them to pander to the interests of line supervisors. This is unlikely to help officials navigate the day-to-day hierarchical structure in a way that frees them from the constraints of managing the challenges of the political economy and expectations of political leaders while abiding by fiduciary principles. Ideally, to be effective, public officials who serve on a board should break rank with day-to-day public service. Externally and as shown under Case 7 below, state representatives must be assertive. Failure to embrace these principles undermines effectiveness and contradicts the concept of public service.

7.5 Contribution of An Independent Director in Avoiding Conflict.

Given the relationship between civil servants and politicians and bi-partisan nature of decisions relating to SOEs and partnerships, the boards of these companies must find alternative to reduce adverse effects of political interference. One of these is through the appointment of independent directors to the board. Let's define what "independent" means for our purposes. Typically, an independent director is neither an employee of the company or shareholder, a shareholder (or a member of the family in case of private companies). Instead, according to TaxGuru webpage, '*An Independent Director is a Non-Executive Director who does not have a material or pecuniary relationship with company, except sitting fees, but is* *one who is enriched with appropriate balance of skill, experience, independence and knowledge of the corporate and assigned with the task to monitor and guide the Board in risk management, thereby improving corporate credibility and accountability*[2] The concept of an independence implies free from contractual , material and ideological constraints emanating from pre-existing relations with either the company or the shareholder.

This means that the independent director acts based on what is in the interest of the company and its shareholders which in case of SOEs are the citizens and not any a political party or politician. In addition to resolution of conflicts of interest, an independent directors can bring fresh ideas, needed skills and experience and be a watchdog on board committees. The latter role is particularly important in relation to audit, risk, nomination and remuneration committees that are vulnerable to the biases of the company executives and shareholders. The rationale is that the executive team and those with a vested interest in the corporate culture and system of governance are not likely to also be able to objectively provide oversight because they have a vested interest.

The above notwithstanding, appointment of an independent directors has its own limitations. One of the challenges of independent directors is lack of day-to-day involvement in the running of the company. This limits access to information of the internal environment, company operations and other matters that affect strategy and risk. Hence an independent director is beholden to the very executives that the director is expected to oversee for information necessary to exercise independent judgment. The other is that the director's independent often come sat a hefty price because of their perceived value and demand for their expertise. In SOEs that often do not operate on market principles governments may find it difficult to justify fees to constituents. This is notwithstanding, in case of a desire to strengthen the voice of civil servants on boards of SOEs and partnerships by moderating impacts of political interference through the civil service chain of command, appointment of independent directors is one option.

Case 7 :Knowing and Asserting the Individual Director's Rights is a Must:

As stated in the preceding chapters, one of the most important rights that the board and individual directors have is access information. This includes, but is not limited to, being supported to understand corporate technical, legal and financial reports and to use company resources to research and collate sufficient information to make credible decisions. Put another way, it is the responsibility of a director to actively seek information. It is the responsibility of the executive management auditors (and corporate secretary) to provide comprehensive information to the board routinely or as and when required. The two are the nexus of informed decision-making processes by the board.

Obvious as this might seem, I have found some of SOEs and representatives of governments on partnerships with private investors who either do not know this or are not sufficiently assertive to demand and exercise their right. They inadvertently allow themselves to be bullied by executive management. Consider the following encounter between me and a CFO of a subsidiary on which I was non-executive director a few years ago.

[2] Gupta, B Understanding responsibilities and importance of independent director in a company, Company Law - Articles 04 Mar 2020 - Retrieved from https://taxguru.in/company-law 2020.

Following receipt of documents for a board meeting, I noted that annexures referred to as additional pieces of information were not included. I naturally called the CFO to ask that these be delivered to me and in response he politely said he would consult the CEO to see if these could be released. Two things quickly became obvious. The first was the CFO did not understand the functioning governance structure of the company. The second was that he needed to be educated by the CEO on the role of the executive in relation to the work of the board. Therefore, in response, I was firm and uncompromising. I let the CFO know that I was not seeking permission from either him or the CEO but that I was demanding information to which I was entitled. I, however, welcomed any conversation between him and the CEO if he needed to enlighten himself. I reminded him that, while he reported to the CEO, the directors did not and that the reverse was true. I requested him to convey my sentiments to the CEO, which he must have done because not only did I receive the relevant information but a polite call from the CEO putting the matter to rest.

Let us consider a different scenario. As an advisor to several African governments a few years ago, I often met and discussed capacity building needs of a SOE in one of the client countries. The country has significant mineral wealth and the State created an investment holding company to hold shares in partnership with mining companies. During a meeting with the holding company's executive chairperson, we discussed aspects of the partnership arrangements. This included the shareholder agreements that granted the state the right to nominate representatives to the boards of the companies. To this end, the executive chairperson of the state holding company lamented the fact that their private sector partners, who were also the project managers, did not share information on the operations of the subsidiaries fully and timeously. The head of the State holding company also implied that there was little he could do about the matter. It is worth noting that the problem related to more than a dozen companies that essentially were the national breadbasket. The revelation was therefore staggering in its implications and the potential harm that this could cause to the State's interests unimaginable.

So, what is the solution under these circumstances? There are several ways to help State representatives who find themselves in this dilemma. The first is to guide them through corporate law and the company's constitution, which typically spell out the roles, rights and obligations of each shareholder and representatives (being the directors). Another is to orientate the directors on the contents of the partnership agreements that typically establish the company and details its governance structure and decision-making mechanisms.

Because I knew the latter would address the subject of discussion more directly, I requested to see a copy of one of the agreements. I was amazed at how thorough the legal teams had been in ensuring that the State was granted rights beyond those normally bestowed upon a minority stockholder. The agreements were some of the most favourable to the State that I had ever seen. This included spelling out the State's right of access to information to an unusual level of specificity. Yet, even with this and the State's natural leverage as regulator, here we were with a highly-paid and academically sound team of executives who were being given the run around by a CEO of a subsidiary they owned, licensed and regulated. The missing link was a fundamental lack of appreciation of the rights that came with being a director representing the State as shareholders on the boards. Clearly, there was also a basic absence of common sense coupled with a lack of individual assertiveness. Either way, the moral of the tale is that, to be effective, directors must not only know their obligations and rights but they must also be willing and able to exercise them. There is also the flipside of the coin and that is the role of the CEO and executive team in proactively informing non-executive directors. A competent and ethical team reaches out and provides information to ensure all directors are in the picture. To the degree that the team perceives a knowledge gap, together with the compliance officer and Chairperson they devise orientation programs and hands-on skills development initiatives for non-executive directors and partner representatives. The chairperson particularly has a vested interest because he or she knows a board that does not fully grasp the nature of its rights and obligations is not capable of performing its duties. This is particularly important because executives of private investors in partnership arrangements with the State can be unconsciously biased towards the parent companies. They often show allegiance to the former at the expense of local subsidiaries. Representatives of the State on such boards are vital gatekeepers in ensuring that the management protects the interests of the subsidiary by demanding loyalty. The starting point for the directors is to know and then exercise their right and privilege of access to information. Otherwise, they cannot competently perform their duties.