

THE COMPANY SECRETARY AS A COMPLIANCE LEADER – MAINTENANCE OF GLOBAL STANDARDS.

© By Kariuki Muigua.*

1. Abstract.

In this paper the author briefly examines the office, duties and roles of a Company Secretary. More importantly, the author seeks to explore the role of a Company Secretary as a compliance officer. It is imperative that for a Company Secretary to be an effective compliance leader, he or she ought to be disciplined and ethical in the practice. It is in this regard that the author looks at the disciplinary provisions under the Certified Public Secretaries Act¹ (herein after referred to as the Act) and the offences set out therein,² against the backdrop of the key functions of the Institute of Certified Public Secretaries of Kenya (hereinafter referred to as 'the institute') which include the promotion of standards of professional competence and practice among members of the institute.³

Are the disciplinary and penal sanctions spelt out in the Act adequate to ensure high standards of professional competence in the Company Secretarial Practice in Kenya?

To what extent can the Proposed Guidelines of Professional Ethics and Conduct for the Certified Public Secretaries of Kenya assist the institute to maintain global standards of excellence?

*CPS(K), LLB, LLM(Nbi); MKIM; MCI Arb; PhD student university of Nairobi; EIA, EA Lead expert NEMA. The author is a member of the ICPSK Disciplinary Committee, a legal researcher and teaches at various institutions of higher learning.

¹ CAP. 534 Laws of Kenya. S. 24 therein outlines the disciplinary provisions, S. 25 sets up the disciplinary committee and S. 27 sets out the possible recommendations that can be made by the disciplinary committee; such recommendations include 'no further action', a reprimand, cancellation of registration of a member or suspension of the practicing certificate.

² Offences are under S. 35 and include prohibitions of the use of a designation that one is not entitled to by a person or a corporate body – penalties are prescribed.

³ S. 7 of the Act, supra.

Do the Proposed Guidelines of Professional ethics and Conduct ensure that the Company Secretary becomes a better compliance leader?

Do the provisions of the Act ensure a framework that can deliver high standards in the ever-changing and competitive and globalised business environment?

What challenges does the Kenyan framework face and what opportunities exists for reform in order to ensure delivery of excellent secretarial services that can stand scrutiny in the international plane?

1.1 The Certified Public Secretary

Certified Public (or Professional) Secretaries are distinguished by meeting the certification requirements set forth by various professional bodies in different jurisdictions, which include a rigorous exam.⁴ The areas covered in the Certified Public Secretary exam indicate the key areas of career duties performed by Certified Public Secretaries, which include accounting, communication and office administration, office technology and management.⁵ As secretaries develop increasingly sophisticated skills in these areas, they advance to positions of greater responsibility that go well beyond how the role of 'secretary' has been traditionally defined. A Certified Public Secretary administers databases, creates financial presentations and performs other tasks that make these professionals indispensable to the executive team.

The chief concern of the profession is about good governance and the enhancement of productivity in organisations.⁶ The CPS profession plays a pivotal role in promoting positive work ethics, efficiency in business management and good corporate governance. The mission of the profession is to contribute effectively to the improved life of mankind by

⁴ In the U.K for example, the International Association of Administrative Professionals (IAAP) is charged with this role while the Institute of Certified Public Secretaries of Kenya (ICPSK) is the relevant body in Kenya.

⁵ www.education-portal.com/Career Education.

⁶ www.icpsk.com

promoting good corporate and institutional governance through sustainable quality training, quality assurance and positive ethical practice by members.⁷

The profession applies in various sectors with members being able to carry out key roles in the public sector, local authorities, the co-operative sector, Non-Government organisations, and a host of other different organisations. The title of the CPS varies according to type of organisation and possible titles include, but are not limited to Company/Corporate Secretary, Administration Managers, Human Resource Managers, Provincial Administrators, Personnel Officers, Executive Officers, County and Town Clerks, Secretary/Managers, Hospital Administrators, Project Managers, Charity Trustees, Private Practitioners, Lecturers etc.

Depending on the field of employment, the roles of a certified secretary may vary but they all have one thing in common; ensuring that whatever entity they work for complies with the laws of the land and internal management procedures by their employers. Some of the duties and roles duplicate themselves in the various forms of secretarial employment while others are unique to a company secretary. The distinction is not important to this discussion however.

2. The Company Secretarial Practice in Kenya.

A company secretary is a senior position in a private company or public organisation, normally in the form of a managerial position or above. Despite the name, the role is not a clerical or secretarial one in the usual sense. The company secretary ensures that an organisation complies with relevant legislation and regulation, and keeps board members informed of their legal responsibilities. Company secretaries are the company's named representative on legal documents, and it is their responsibility to ensure that the company and its directors operate within the law.

In **Panorama Development (Guildford) V Fe Fideli's Furnishing Fabrics Ltd**⁸ The company secretary ordered self drive cars using a different company's letterhead and when

⁷ *Ibid.*

the cars arrived he devoted them to his personal use. The defendant company was sued for the price of the cars. It raised a defence that it was not bound because the secretary who made the order was an insignificant person in a company (depending on earlier conceptions of the secretary).

The Court of Appeal rejected the defence and pointed out that the secretary is an important company officer with in-exhaustive powers, duties and responsibilities and who can make representations on behalf of the company and can enter into contracts in the day to day running of the company's business. Consequently because of his position in the company, the secretary can be held liable not only to his company but also to the shareholders in civil suits.

2.1 Appointment.

Section 2 of The Companies Act (Cap. 486) defines a company's officer as including the company's secretary.

According to section 178, in a company where there is only one director, he can't become the company secretary under section 179, although a company can be appointed secretary of another if its not *ultra vires*.

Section 178(A) recognizes the importance of the role of the Corporate Secretary, by requiring the Secretary of a public company to be qualified in accordance with Section 20⁹ of the Certified Public Secretaries of Kenya Act (Cap. 534).

Under Section 189, a person is disqualified from becoming a secretary for a period not exceeding 5 years if he has ever been convicted of any offence relating to the company's affairs from the date he has been convicted.

⁸ (1971)3 WLR 12

⁹ A person is qualified under the Act if; he has been awarded a final certificate of the Certified Public Secretaries Examination by the examinations board, if he is on 30/6/02 a citizen of Kenya or ordinarily resident in Kenya and a member of the Institute of Chartered Secretaries and Administrators, is at the commence of the Act registered as an accountant under S. 24 (1) of the Accountants Act or he is on 30/6/02 an advocate of the High Court of Kenya. Similarly, the Registration Board may from time to time approve qualifications which it considers sufficient to allow a person to be registered and may in a like manner withdraw such approval.

2.2 Duties

They are not specified by the Companies Act, but are usually contained in an employment contract. The general duties include taking of the company's minutes, filing of the documents at the company's registry, ensuring the books of accounts in respect of the company are properly kept and general secretarial duties. They can conduct and record transfer of shares and conduct correspondence with shareholders as regards calls, transfers, forfeiture, e.t.c. Where working for quoted companies, the secretaries ensure compliance with Nairobi Stock Exchange and Capital Markets Authority requirements. Where working in banks, they also ensure compliance with Central Bank of Kenya statutory requirements.

2.3 Other duties

The company secretary usually undertakes the following duties:

- a) Maintaining the statutory registers. These are;
 - The register of members.
 - The register of directors and secretaries.
 - The register of director's interests.
 - The register of changes.
- b) Ensuring that statutory forms are filed promptly; you cannot simply send a letter to notify the Registrar that you wish to change the situation of the company's registered office or that changes have occurred among directors or secretaries or their particulars.
- c) Providing members and auditors with notice of meetings.
- d) Sending the Registrar copies of resolutions and agreements.
- e) Supplying a copy of the accounts to every member of the company, every debenture holder and every person who is entitled to receive a notice of general meetings.
- f) Keeping, or arranging for the keeping, of minutes of directors' meetings and general meetings.
- g) Ensuring that people entitled to do so can inspect company records.

- h) Custody and use of the company seal; the secretary is usually responsible for its custody and use.

The secretary as an officer of the company may be liable for defaults committed by the company. For example failure to file any change in the details of the company's directors and secretary, and the company's annual return. The secretary may also have to make out a statement of the company's affairs if an administrative receiver or a provisional liquidator is appointed or if a winding-up order is made.¹⁰ It is clear from the above that the secretary plays a fundamental role in ensuring that a company operates within the law and complies with the various requirements. How then can a company secretary become an effective compliance leader?

Company secretarial practice in Kenya is growing rapidly. Disciplinary cases are few. Does it mean there are no problems? Does it mean that the members of the institute conduct themselves in a manner that is professionally sound?

We need to examine the thesis that actually what the Act spells by way of disciplinary and penal sanctions is not adequate to ensure high standards of professional competence in the company secretarial practice in Kenya. Further, the Act at the moment does not present a framework that can deliver high standards in the ever-changing, competitive and globalised business environment.

Do we have a satisfactory benchmark for the company secretarial practice in Kenya or is there a need to raise the bar?

Is it time we brought into force the Code of Ethics to regulate the conduct of company secretaries in Kenya so as to raise the standards further? One of the functions of the Institute is to promote international recognition of the institute.¹¹ Implicit in this duty is the need to keep up with the international standards of professional excellence.

¹⁰ www.sfsgo.com, accessed on 18th May 2009. SFS stands for Small Firms Services Ltd.

¹¹ S. 7(c) of the Act.

Institutes dealing with secretarial practices in other jurisdictions have gone beyond strict legal regulation to drawing up codes of ethics that go beyond what the law on its own can do.

2.4 The Malaysian experience.

In Malaysia for instance, the code of ethics addresses issues of professional competency and skill.¹² They call for good faith, responsibility and honesty, reasonable care and due diligence in the exercise of a company secretary's duties.¹³ The code of ethics calls for moral responsibility, efficiency and administrative effectiveness.¹⁴ Clearly it goes beyond the bare law requires. It delves into the arena of morals and personal discipline.

The code calls for 'objective and positive attitude' in the dealings of the company secretary.¹⁵ A company secretary is duty bound to disclose any information that suggests a fraud is being or is likely to be practiced by the company or any of its directors or employees.¹⁶ The code also requires the company secretary to be impartial in his dealings with the shareholders, directors and 'without fear of favour use his best endeavours to ensure the directors of the company comply with relevant legislations, contractual obligations and other relevant requirements.'¹⁷ The company secretary is required to be knowledgeable and be aware of all reporting and other requirements imposed by statute under which the company is incorporated.¹⁸

¹² See the Malaysian Code of Ethics for Company Secretaries clause (i).

¹³ *Ibid* clause (ii).

¹⁴ *Ibid* clause (iii)

¹⁵ *Ibid* clause (vi)

¹⁶ *Ibid* clause (viii)

¹⁷ *Ibid* clause (xi)

¹⁸ *Ibid* clause (xiv)

2.5 The Indian scenario.

The Institute of Company Secretaries of India (ICSI) has in its roll over 20,000 members.¹⁹ There is a code of conduct governing the council members, senior management of the institute as well as a code of conduct governing members of the institute.²⁰ The codes are meant to lay down certain ground rules to promote ethical conduct and good practices and to deter wrong doing. The codes cover issues of conflict of interest, fair dealing, confidentiality, encouraging the reporting of illegal behaviour, prohibition of the use of inside information, sexual harassment, duty of care and diligence.²¹ There is clearly an attempt to strive to promote and encourage development of ethical culture in the institute and the profession of the company secretary.²²

2.6 The United Kingdom (UK).

The UK company secretary has a duty to ensure good corporate governance. The company secretary is responsible for ensuring that the code of conduct for company secretaries and the directors is adhered to.²³

Under the direction of the chairman, the company secretary's responsibility is to ensure that good information flows within the board, its committees and between senior management, non executive directors as well as facilitating induction and professional development as required.²⁴ The profession in the UK is spearheaded by the institute of Chartered Secretaries & Administrators (ICSA) which regulates and advises the company secretarial profession.

¹⁹ www.icsi.edu accessed on 31/3/09.

²⁰ *Ibid*

²¹ *Ibid*

²² *Ibid*

²³ www.icsa.org.uk accessed on 31/3/09.

²⁴ *Ibid.*, Corporate Governance Codes (2)

The Institute of Chartered Secretaries & Administrators lays emphasis on the observance of key global governance trends which include more focus on disclosure, transparency, accountability, shareholder rights and engagement, risk management and internal controls, corporate social responsibility and ethics.²⁵ (Emphasis ours)

3. The Disciplinary Provisions

The disciplinary provisions under the Act are spelt out in S. 24. A member of the institute is deemed guilty of professional misconduct if he allows any person to practice in his name as a Certified Public Secretary unless such person is the holder of a practicing certificate and is in partnership or employed by him.²⁶ A member of the institute may also be found guilty of professional misconduct if he practices or attempts to practice or allows any person in his employment to practice without holding a current valid annual licence.²⁷ Company secretaries are not allowed to enter into partnerships with a person who does not hold a practicing certificate or secure professional business through the services of such a person or by means not open to a Certified Public Secretary.²⁸

A company secretary is not allowed to pay a share, commission or brokerage out of the fees for or the profits of his professional services to a person who does not hold a practicing certificate.²⁹ Disclosure of information acquired in the course of professional engagement other than to a client, without the consent of the client or otherwise than required by law is prohibited.³⁰

²⁵ *Op Cit.*

²⁶ S.24(2)(a)

²⁷ S.24(2)(aa)

²⁸ S. 24(2)(b)

²⁹ S. 24(2) (c).

³⁰ *Ibid* S. 24(2)(d)

A member of the institute is not supposed to certify or submit in his name or in the name of his firm a report of statutory returns and or complete such statutory returns and related records if they have not been made by him or a partner or an employee in his firm.³¹

A company secretary may also be found guilty of professional misconduct if he fails to disclose in a statutory return or otherwise a material fact known to him if the disclosure of that fact is necessary to ensure that the statutory returns are not misleading.³²

A company secretary is also under a statutory duty to report a material misstatement known to him to appear in a statutory return with which he is concerned in a professional capacity. Failure to report such a misstatement may cause him to be found guilty of professional misconduct with all the attendant consequences.³³

A company secretary is supposed to conduct his professional duties with due diligence and may be found to have misconducted himself if he is grossly negligent.³⁴

A member of the institute may be guilty of professional misconduct if he expresses an opinion on any matter with which he is concerned with in a professional capacity without obtaining sufficient information on which to base the opinion.³⁵

Company secretaries are supposed to keep the funds of a client in a separate banking account and to use such funds for the purposes for which they are intended. A breach of this rule may lead to disciplinary proceedings against the company secretary.³⁶ A company

³¹ *Ibid* S. 24 (2) (e). The Act talks of “he”. It is submitted here that it covers women as well!

³² *Ibid* S.24(2)(f)

³³ *Ibid* S. 24(2)(g)

³⁴ *Ibid* S. 24(2)(h)

³⁵ *Ibid* S. 24(2)(i)

³⁶ *Ibid* S. 24(2)(j)

secretary who includes in any statement, return or form to be submitted to the council³⁷ any particulars knowing them to be false is guilty of professional misconduct.³⁸

A member of the institute is guilty of professional misconduct if he does or fails to do any other act which may be prescribed³⁹(emphasis ours). The categories of offences for which disciplinary action may be taken against a member are not closed and S. 24(2) (1) ensures that the range of prohibited conduct (through doing or not doing some act) is not closed.

3.1 The disciplinary committee.

The disciplinary committee is established by S. 25 of the Act and is clothed with wide powers.⁴⁰ It has teeth to bite and can indeed issue recommendations that include a reprimand, cancellation of registration of a member or suspension of a practicing certificate or annual licence.⁴¹ The disciplinary provisions under S.24 are buttressed by other provisions in the Act, including penal provisions under S. 35 prohibiting persons who are not properly qualified to assume the title of Fellow of the Institute of Certified Public Secretaries of Kenya (ICPSK), Honorary Fellow of the ICPSK or Member of the ICPSK.⁴²

Persons who are convicted by a court of competent jurisdiction⁴³ or are adjudged bankrupt⁴⁴ or are of unsound mind⁴⁵ are disqualified from registration. They may also be deregistered on the same grounds⁴⁶

³⁷ Council of the Institute established under S. 5 of the Act.

³⁸ *Op Cit* S. 24(2)(k)

³⁹ *Ibid* S. 24(2) (1). The minister may make regulations under S. 37 of the Act prescribing anything that requires to be or which may be prescribed under the Act and for the carrying out or giving effect to the Act.

⁴⁰ Sections 27 and 28 of the Act. The fourth schedule to the Act sets out how proceedings are to be carried out. Proceedings on the inquiry are deemed to be judicial proceedings for purposes of Part XI of the Penal Code (CAP 63). The committee has power to summon witnesses, administer oaths and hear all parties. Members have the same immunity with regard to the proceedings as Judges of the High Court.

⁴¹ *Supra*, abstract; S. 27 of the Act.

⁴² S. 35(a),(b) and (c)

⁴³ S. 21 (1) (a) of the Act.

⁴⁴ *Ibid* S. 21(1)(b)

4. The Kenyan CPS and Ethics – Maintaining Global Standards.

There is clearly a need to raise bar in order to maintain the requisite global standards of excellence in the CPS profession. We have to look beyond the bare words of the statute and come up with guidelines on the professional conduct which if implemented and adhered to will raise the profession to new levels of responsibility and professional competence.

The proposed Guidelines on Professional Ethics and Conduct for Certified Public Secretaries of Kenya are currently in existence, albeit in draft form.⁴⁷ The draft guidelines aim at maintaining high moral standards, personal integrity and sound reputation. Members are required to comply with the code.⁴⁸ The draft guidelines reiterate the disciplinary provisions of S. 24(2) of the Act but go beyond that to emphasise integrity⁴⁹ and professional independence.⁵⁰

The draft guidelines outlaw nepotism/favouritism, in that a member is not supposed to favour relatives, friends or associates in decision making or the provisions of services.⁵¹ Members are required to maintain high levels of professional knowledge and skills to carry out their work.⁵² Confidentiality is emphasised⁵³ and members are forbidden from engaging in any activity or business which is incompatible with the practice of a CPS or which would lower the dignity of the CPS profession.⁵⁴

⁴⁵ *Ibid* S. 21(1)(c)

⁴⁶ S. 23(1)(b)

⁴⁷ These are available at the institute.

⁴⁸ *Ibid* part II Art. 4

⁴⁹ *Ibid* Part III Art. 6

⁵⁰ *Ibid* Art. 7

⁵¹ *Ibid* Art. 8

⁵² *Ibid* Art. 9 Continuous Professional Development (CPD) is underlined.

⁵³ *Ibid* Art. 10

⁵⁴ *Ibid* Art. 11

There are specific provisions relating to in house counsel.⁵⁵ Other areas covered include professional courtesy,⁵⁶ non-discrimination⁵⁷ and sexual harassment.⁵⁸ Members are required to have professional courtesy and not to sexually harass a member of the public or a colleague. Undertakings⁵⁹ are to be honoured; clients' money has to be properly documented.⁶⁰

The draft Article 31 which deals with compliance is worthy of note.

“Failure to follow the guidance given by this code may not in itself constitute misconduct but means that the member concerned may be at risk of having to justify his actions in answer to a complaint. The council will inquire into the apparent failure by a member to observe the ethical requirements and may refer the matter to the Disciplinary Committee in accordance with s. 24 of the CPS Act.”

This article takes us back to s. 24 of the Certified Secretaries Act, which section in itself is not all encompassing and needs this code of ethics (dubbed 'guidelines') to give it sharp teeth. It may be necessary to convince the Minister to convert the draft guidelines into regulations under s. 37 of the Certified Secretaries Act. That way it may be possible to enforce them.

Non compliance with the code should constitute professional misconduct punishable according to the degree of the act or omission complained of. Penalties should be set out in regulations to be promulgated by the Minister.

A complaint based on moral turpitude and does not amount to professional misconduct under the Act, may not stand the scrutiny of the disciplinary committee. The acts or

⁵⁵ *Ibid* Art. 12

⁵⁶ *Ibid* Art. 15

⁵⁷ *Ibid* Art. 16

⁵⁸ *Ibid* Art. 17

⁵⁹ *Ibid* Art. 28

⁶⁰ *Ibid* Art. 29. See also the Certified Secretaries Act s. 24(j); clients funds have to be kept separate

omissions that amount to professional misconduct need to be specifically prescribed, either in the Act or through regulation made pursuant to the act.

5. CONCLUSIONS.

The Company Secretary can only be an effective compliance leader if he is disciplined and ethical. As we have seen in this paper, the Company Secretary is vested with a lot of duties that are vital to the smooth running of the company. Most of these involve ensuring compliance with mandatory provisions of law and that is why the Company Secretary is typically viewed and referred to as a compliance officer, though that is not all he does.

He is required to advise the directors who are the governing organ of the company, who at times could be laymen, all the laws and protocol that has to be adhered to. Any breach of his duty or laxity on his part would mean that the company is not operating in its full lustre. The disciplinary and penal provisions in the Act represent a good first step towards achieving a high level of professional ethics. Sanctions alone however will not work. There is a need to create awareness and build an ethical culture within the profession. Compliance with ethical standards is best achieved if it is voluntary.

The Act as framed has a high standard of delivery within the CPS profession. However we cannot be complacent. More needs to be done. The Guidelines of Professional Ethics and Conduct for the Certified Public Secretaries of Kenya can take us one step further toward excellence. But there has to be acceptance of the said guidelines. They must encompass a code of ethics that is enforceable. This can be achieved through entrenchment into the Act or the regulations made there under.

The disciplinary Committee of the ICPSK has not been very busy.⁶¹ This is not to say that members have not been engaging in acts that fall short of the internationally accepted standards of ethics.⁶² They walk through the legal net cast before them as the holes in it are

⁶¹ In a space of the last four years, it has dealt with three cases only.

⁶² Members have been known to falsify company records at the behest of unscrupulous directors without regard to their ethical standing and the fiduciary duty that they owe to the shareholders.

too big. A case in point is s. 24 (l) which is meant to be wide enough to cover other disciplinary scenarios not covered in the Act. However, the section is challenged for creating no known offence and those charged under it may go scot-free. The section needs regulations to be operative.

It is time we raised the bar to maintain global standards and recognition that have been the impetus of our profession and association generally. Our members should be women and men of integrity, exhibiting high moral and ethical standards in their practices and setting an example to members of other professions.

The Kenyan framework within which we operate is exposed to the ever shrinking world. Globalization is here to stay. Companies are expanding beyond borders and services have become internationalised. The Kenyan CPS profession must have a global outlook and must also observe the internationally acceptable code of ethics.

There is a need to educate the members on the need to cultivate and maintain integrity, perfection and ethical standards. The CPS is a key decision maker who can help shape Kenya and the rest of the world into a better place. We have a responsibility to ensure sound corporate governance by upholding the values of disclosure, transparency, accountability, corporate social responsibility, ethics and all the other tenets that uphold the same.

At a personal level members of the institute should aim at achieving perfection and professional excellence. Skills and more knowledge should be sought so as to enable the members undertake work competently. It may not be possible to outlaw incompetence but members should do what is within their power to improve their knowledge of the relevant regulations, business environment and standards required to carry out their work.

Let us raise the ethical bar so as to maintain global standards.