

ROLE OF THE COMPANY SECRETARY IN ENVIRONMENTAL COMPLIANCE

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This short article examines the role of the Company Secretary in environmental compliance in Kenya. Environmental Compliance is required by corporate organisations by a wide range of statutes key among which is the Environmental Management and Coordination Act (EMCA)¹. Questions on what is exactly required of a company by Kenyan Law are likely to land on the desk of the Company Secretary. It is thus necessary to look at the requirements of environmental compliance that relate to companies and how the Company Secretary fits into the picture.

In recent years the world has experienced awareness in the area of environmentalism. Companies want to reduce pollution, engage in cleaner production, conserve the environment and generally engage in environmentally responsible corporate behaviour. Some companies even go to the extent of incorporating environmental goals into their vision and mission statements. Ideas such as conservation, pollution control, recycling waste, public awareness and education, use of cleaner fuels and the use of Environmental Impact Assessment and Audits have found their way into the management principles of corporations.

The Company Secretary who is a member of the management finds herself engaged in environmental issues at both policy and operational levels. The survival of the corporate body may well depend on how environmental issues are handled.

The Company Secretary may find herself engaged in issues of environmental compliance as a matter of law. There is thus a need for knowledge of what the law requires in this regard.

¹ Act no. 8 of 1999

Environmental Compliance in this article refers to among other things, the adherence to environmental law and all regulations and guidelines promulgated by the government and other public bodies. It may also refer to carrying out practices that serve to conserve the environment, reduce pollution and generally take into account the health and safety of human beings even where regulation is lacking. This is compliance at the moral /ethical level.

In Kenya it is usual for a person to first become aware of a law when the penal sanctions of that law catch up with him/her.

Company Secretaries should therefore avoid this by noting that under the Environmental Management and Coordination Act² when an offence under the Act is committed by a body corporate, the body Corporate and every director or officer of the body corporate who had knowledge of the commission of the offence and who did not exercise due diligence, efficiency and economy to ensure compliance with this Act shall be guilty of an offence (emphasis ours).

A Company Secretary is increasingly being viewed as an officer of the company. The law thus imposes a duty on the Company Secretary to ensure compliance with environmental law, rules and regulations.

The penalties under EMCA are harsh and can include imprisonment and fines that ran into hundreds of thousands of shillings³.

Offences under EMCA relate among other things, failing to submit to inspection,⁴ offences relating to Environmental Impact Assessment⁵; offences

² Supra s 145 (1)

³ See S 144 EMCA

⁴ S 137

⁵ ibid S 138

relating to records⁶; offences relating to standards⁷; offences relating to hazardous waste⁸; offences relating to pollution⁹; offences relating to restoration orders¹⁰

The Act imports personal liability even where the offence complained of was committed on account of another person (corporate body)¹¹; it is thus possible for a Company Secretary to be personally liable for environmental offences committed by the Company.

The role of the Company Secretary in Environmental Compliance is a statutory one. It is not a matter of choice.

A Company Secretary as an officer of the company must then logically ensure that where an Environmental Impact Assessment is required to be prepared, the same has been prepared in accordance with the law¹².

An Environmental Impact Assessment means a systematic examination conducted to determine whether or not a programme, activity or project will have any adverse impact on the environment¹³.

⁶ Ibid S 139

⁷ Ibid S 140

⁸ Ibid S 141

⁹ Ibid S 142

¹⁰ Ibid S 143

¹¹ Ibid S 145 (3)

¹² Sec s 58 (10 EMCA

¹³ EMCA s 2

Similarly where an Environmental Audit is required to be carried out the Company Secretary should ensure that it is prepared in accordance with the requirements of EMCA or the regulations made thereunder¹⁴

It follows also that the Company Secretary being an Officer of the Company has a duty to ensure compliance with standards set out under EMCA.

If he/she does not do so then liability in criminal law attaches.¹⁵

Similarly a Company Secretary should ensure that hazardous waste and other chemicals and radioactive materials are handled properly.

If the company is charged with an offence relating to hazardous wastes and other radioactive substances then the Company Secretary as an officer of the Company becomes liable in criminal law and may end up paying a fine of not less than one million shillings or to imprisonment for a term of not less than two years or both.¹⁶

EMCA creates offences relating to pollution of the environment.

Thus discharges of any dangerous, materials, substances oil, oil mixtures into land, water, air or aquatic environment with the result effect of polluting the environment, attracts heavy penalties which include paying the cost of removing the pollution¹⁷. Again if the company commits any of the abovementioned offences then the Company Secretary being an officer of the company incurs liability in civil and criminal law.

¹⁴ Ibid s 68 (3)

¹⁵ Ibid s 140

¹⁶ Ibid s 141

¹⁷ Ibid s 142

It is discernible from the above discussion that a Company Secretary has a role to play in Environmental compliance. It is a statutory role and one that should never be overlooked.

Gone are the days when a Company Secretary duty was limited to filing of returns and organizing Board meetings.

The Company Secretary today is considered to be part of the “mind” of the Company. The company secretary is a policy maker. It will be difficult to argue that he/she was not aware of the legal requirement for Environmental compliance. In any case ignorance of the law is not a defence.

Sometimes environmental compliance measures take the form of fiscal incentives and disincentives rather than punishments.

EMCA¹⁸ provides for tax and fiscal incentives, disincentives or fees which include customs and excise waiver in respect of imported capital goods which prevent or substantially reduce environmental degradation caused by an undertaking¹⁹; tax rebates to industries or other establishments that invest in plants, equipment or machinery for pollution control, recycling of wastes, water harvesting and conservation, prevention of floods and using other energy resources as substitutes for hydrocarbons²⁰ tax disincentives to deter bad environmental behaviour that leads to depletion of environmental resources or that cause pollution²¹; user fees to ensure that those who use the

¹⁸ S 57

¹⁹ S 57 (2) (a)

²⁰ Ibid 57 2 (b)

²¹ Ibid 57 2 (c)

environmental resources pay proper value for the utilization of such resources²².

The Company Secretary who is involved in strategic planning within the organization can influence planning on environmental matters so that the company embraces measures aimed at cleaner production, pollution, control, recycling of wastes, water harvesting and the use of cleaner energy resources in place of hydrocarbons.

The Company Secretary can take part in environmental awareness campaigns that corporations launch once in a while. A Company Secretary who is familiar with the environmental compliance regulations and believes in the need to conserve the environment and reduce pollution has a role to play in public education; the public needs to know and appreciate the importance of a clean and healthy environment.

Attendance and contribution at seminars by the Company Secretary may serve to disseminate environmental education both within the company and to the communities which may be affected by the activities of the company.

The Company Secretary may also be involved in the drafting of agreements on environmental codes reached as a result of meetings between stakeholders within a given industry. These could be agreements on setting of environmental standards or joint cooperation with the aim of keeping the environment clean. Knowledge of environmental regulations requirements, penalties and compliance measures will certainly come in handy for the Company Secretary.

The Company Secretary has a role to play in environmental compliance. EMCA provides that every Kenyan is entitled to a clean and healthy environment and

²² Ibid 57 2 (d)

has a duty to safeguard and enhance the environment ²³(emphasis ours). The duty to safeguard and enhance the environment is a statutory duty which binds the Company Secretary as well.

The Company Secretary should take part in “sustainable development” this being the development that meets the needs of the present generation without compromising the ability to use the same by future generations²⁴.

The Company Secretary lives and works within the environment. The air we breathe, the land we walk on, the water we use, the climate, sound, aesthetics and all our surroundings form what is called the environment.

We all have a duty to protect, safeguard and enhance the environment. Compliance with all regulations and initiation of measures to conserve the environment is part of the duty of the Company Secretary and indeed all Kenyans.

²³ EMCA s ³(1)

²⁴ EMCA s 2