



10 September 2021

Deputy Chief Justice Raymond Zondo

Chairperson: Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State

Dear Deputy Chief Justice Zondo

Submission by the Institute of Directors in South Africa

As the important work done by your Commission draws to a close, and you begin to consider your report and recommendations, the Institute of Directors in South Africa (IoDSA) respectfully begs leave to submit what we hope will be some helpful observations and recommendations relating to the area of governance, leadership and directorship.

1. Standing of the IoDSA

The IoDSA is a non-profit company and the professional body for directors with approximately 9 000 members. As the convenor of the King Committee and owner of the King Reports on Corporate Governance, the IoDSA can claim to be the promoter of good corporate governance in South Africa. However, membership of the IoDSA is at present voluntary, as individuals are not obliged or required to be members of a professional body to serve as directors.

We have been in existence in South Africa for 60 years, and during that period have conducted professional development and training, board evaluations and other governance advisory services for entities in both the public and private sectors, as well as regular surveys relating to governance issues. In the process, we have accumulated a substantial body of knowledge and information relating to board performance, governance and leadership. We also maintain close relationships with our former parent, the Institute of Directors UK, and other governance role-players internationally and across the continent of Africa.

The IoDSA has long advocated the need to professionalise directorship (see Annexure A) along with the manner in which these positions are viewed and regulated, and we are currently the only professional body for directors to be registered with the South African Qualifications Authority (SAQA). *(Please see 2b below for details on the professional designations developed by the IoDSA.)*

Overall, our official mission is to create *better directors, better boards and better business*.

2. The director landscape in South Africa

The testimony before the Commission has strikingly demonstrated just how important a role directors play in creating and maintaining well-governed organisations, and how dire the consequences if they do not appropriately discharge this critical responsibility. It is quite clear that the failure of boards (and the individuals on them), in both the public and private sectors, to understand or practice their governance role and to fulfil it adequately lies at the heart of state capture.

This state of affairs can be traced back to the fact that there is no integrated framework for how directors are appointed, governed, regulated and disciplined if necessary. Principle 7 of King IV, the currently applicable governance code in South Africa, clearly recommends that *“The board should comprise the appropriate balance of knowledge, skills, experience, diversity and independence for it to discharge its governance role and responsibilities objectively and effectively.”*

We draw the following observations about the state of directorship in South Africa to your attention:

- As our law currently stands, there are no minimum criteria that directors must meet. It is true that some disqualification criteria are set out in s69(7) of the Companies Act (Act 71 of 2008) but, aside from these, anyone can serve as a director. Aside from some fit and proper assessments performed by some regulators, there is also no uniform and consistent criteria for directors applied by regulators and other policymakers¹.
- It is also clear that even with some oversight by regulators and policy makers, the IoDSA notes that in none of the recent high-profile cases of director delinquency have the regulators or policy makers been involved in holding directors to account. This function has rather been fulfilled by civil society groups.
- The JSE does mandate the application of King IV, but there is no such requirement in the legislation and regulations governing the public sector. While some public entities have committed to applying the King Reports, some are still applying King III or the Protocols on Governance in the Public Sector, which was based on King II. Consequently, they have not kept abreast of the trends in corporate governance globally as embodied in the most recent King Report, King IV.

The IoDSA’s 60 years of engagement with the director community in South Africa, and interaction with global bodies concerned with directorship and governance, clearly indicates that two key issues underlie the governance challenges facing South Africa:

- The process for nominating board members is not reliably objective and transparent, and often does not take into account the needs of the organisation. This is a particular challenge in the public sector, but it is also evident in the private sector.
- Many directors lack the specialised skills and knowledge they need to adequately discharge the duties of a modern-day director. Some also lack the will to fulfil their duties properly, for which they should be held accountable.

¹ Some of the relevant regulators and policy makers are the Johannesburg Stock Exchange (JSE) and other stock exchanges, the Companies and Intellectual Property Commission (CIPC), the Companies Tribunal, National Treasury, the Financial Sector Conduct Authority (FSCA), the Prudential Authority, the Standing Committee on Public Accounts (SCOPA) and Cabinet

The following two sections look at these two issues in a little more detail.

a. Nomination (selection) process for directors

King IV makes a few important recommendations relating to the governance of the nomination process.

The first of these is that *“The processes for nomination, election and ultimately, the appointment of members to the governing body should be formal and transparent”* (Recommended Practice 15). However, it is frequently the case in both the public and private sectors that the process and criteria used for appointments are not made clear, nor are consistently or uniformly applied.

King’s second recommendation (Recommended Practice 16) in this regard is that

Before nominating a candidate for election, the governing body should consider the following:

- *The collective knowledge, skills and experience required by the governing body.*
- *The diversity of the governing body.*
- *Whether the candidate meets the appropriate fit and proper criteria*

It is painfully clear that these criteria are often not considered when making board appointments, which seem frequently to be made in isolation without considering what the board (and thus the organisation) needs to achieve its strategic goals or fulfil its mandate. This is of particular importance when it comes to boards with stakeholder/ constituency representation—an individual’s fitness for a board appointment goes beyond his or her ability to represent a particular stakeholder. A board and its individual directors have an overriding duty to advance the interests of the entity they are entrusted to govern, while considering the needs, interests and expectations of its material stakeholders.

b. Directorship as a profession

As noted above, the IoDSA has over the years concluded that directorship is a profession like any other, requiring a set of defined skills, knowledge and experience. This has become clearer as the global understanding of corporate governance and its role in enabling successful organisations has matured.

Alongside the professional skills a modern director needs, it is vital that individuals who serve as directors possess the necessary personal qualities. Directors should above all be ethical, independent and courageous. Courage and independence are particularly necessary because directors must put the interests of the organisation first, and this may mean going against the interests of the parties which appointed them or, indeed, their own interests.

A related point, revealed time and again in the evidence before the Commission, is that directors often do not fully understand their roles and responsibilities as directors.

The IoDSA has already launched two SAQA-registered professional designations for directors: Chartered Director (SA) and Certified Director. These professional designations are designed to

provide a formal path by means of which individuals can acquire the skills identified in the IoDSA's Director Competency Framework, and can keep those skills up to date via an annual continuous professional development requirement. Holders of our designations also bind themselves to our Code of Conduct, and can thus be disciplined if necessary.

The IoDSA accepts that professionalising directorship will not automatically eliminate incompetent or corrupt directors any more than professionalising medicine or engineering achieved that goal. It will, however, provide an objective framework for ensuring that directors have the required skills in terms of an objective competency framework, and that they can be disciplined in terms of a professional Code of Conduct.

The IoDSA's membership currently includes 131 Chartered Director (SA)s and 294 Certified Directors, and we are actively advocating the need for all our members to acquire a professional director designation.

3. Recommendations

South Africa urgently needs to reverse the tide of corruption and associated state capture in order to secure its future. The work of the Commission, and in particular its recommendations, are widely seen as important in setting the comprehensive change agenda needed to set the country on a positive future trajectory.

Change will not be successful unless our leaders understand what is expected of them. Our institutional leaders need to display and embody a set of defined characteristics. These hold good not just for the leaders of institutions like companies, non-profits and state-owned entities, but arguably should define those who lead South Africa Inc. These leadership characteristics are:

- The correct mixture of knowledge, skills and experience.
- A commitment to ethical behaviour and decision-making directed towards the best interests of the organisation they are serving, in line with the ICRAFT model (integrity, competence, responsibility, accountability, fairness and transparency).

Perhaps most important of all, our leaders need to be held accountable for their actions, and a means for removing transgressors swiftly from office must be found. Excessive reliance on lengthy and expensive court processes needs to be replaced by alternative frameworks for accountability, without compromising the *audi alteram partem* principle.

Bearing these observations in mind, the IoDSA respectfully asks for the Commission to consider including the following recommendations in its final report:

- a. Bolster the legislative framework.** It is observed that while the current legislative/ oversight framework is fragmented, it is nonetheless solid in the sense that it is quite clear what is expected of corporate leaders. However, the IoDSA contends that creating an integrated framework that includes continuous professional development for directors/ decision-makers will ensure that both leaders and those providing oversight of leaders know exactly what is expected of them, and against which standard they will be measured and held accountable.

- i. **Enforce a statutory professional body for directors.** The legislation should stipulate that directors cannot register with CIPC unless they are a member of a SAQA-registered professional body and have achieved the necessary competency level to win a professional designation. This would mean that, like any other professionals, directors would need to have a practice number in order to operate in their profession.

At a practical level, it should be recognised that the pool of adequately trained and certified directors is small at present, so the legislation should make provision for members of such a SAQA-registered professional body to take up a director's post provided they have embarked on the journey towards professional certification, and that they achieve the certification within a three-year period from their date of appointment.

- ii. **Stipulate a consistent and transparent nominations process.** Entities (in both public and private sectors and across industry sectors) of a certain size or that fulfil a public interest should be mandated to follow a very clearly governed and transparent nominations process. The process should stipulate a nominating panel made up of representatives of appropriate stakeholder interests, such as regulators, professional bodies, civil society and the like.
- iii. **Stipulate that public sector entities apply the principles of the most recent King Report.** It would be desirable for both the public and private sectors to be held to the same governance standards in order to create a more equitable and effective socio-economic dispensation. In addition, regulators and policy makers should be encouraged to leverage off of King IV to strengthen their oversight and hold directors to the expected standard of performance and accountability.
- iv. **Establish a constitutional means of alternate dispute resolution** that will facilitate prompt and effective consequence management for transgressing directors or lax overseers.

- b. **Establish uniform governance training for national leaders.** Parliament and the State both play key roles in providing governance oversight for the public and private sectors. It is clear, though, that many members of these institutions do not fully understand the nature of the governance role they are expected to play, and the importance of good governance generally. A key issue here is the imperative to distinguish between party political or other stakeholder interests and the best interests of the organisation in question, and indeed the country as a whole (South Africa Inc). It would be ideal if MPs, state functionaries and office-bearers in political parties were mandated to receive focused training and information relating to their governance role specifically when providing oversight and, more generally, when providing national leadership. Our leaders need to know what is expected of them, and they should be expected to acquire the necessary training to discharge their responsibilities in the same way that a director should be expected to attain a professional designation.

South Africans have lost faith in the institutions of their society. They are looking to your Commission's report for a set of recommendations that will indicate how those that abuse these institutions will be held to account and, more important still, that will begin to erect a framework that supports better governance and ethical decision-making across the whole of society. We trust the recommendations contained in this letter make a contribution to helping the Commission fulfil these high expectations.

In conclusion, the IoDSA is most willing to make any further input that you or your team need within our area of expertise.

Yours sincerely

Parmi Natesan
Chief Executive Officer

Annexure A

In the past several years, the IoDSA has pursued several courses aimed at highlighting current governance shortcomings and how to rectify them:

- Provided input to the Department of Public Services and Administration for a proposed guide to the appointment of board members at state-owned enterprises. We felt this was an exciting development that could have a positive impact. We later heard it had been tabled at cabinet, but since then nothing further has been heard about the proposed guide.
- Held various meetings with CIPC, DPSA, National Treasury and National School of Governance.
- Issued many press releases relating to governance failures in both the private and public sectors, and what needed to be done.

The IoDSA has also been talking about the need to professionalise directorship for a long time. In this regard, we have issued the following press releases:

<https://www.iodsa.co.za/news/577694/Governments-moves-to-strengthen-nomination-process-for-SOEs-appointments---cautiously-welcomed.htm>

<https://www.iodsa.co.za/news/news.asp?id=563249&hhSearchTerms=%22SOE%27%22>

<https://www.iodsa.co.za/news/news.asp?id=489482&hhSearchTerms=%22SOE%27%22>

<https://www.iodsa.co.za/news/news.asp?id=515055&hhSearchTerms=%22SOE%27%22>

<https://www.iodsa.co.za/news/news.asp?id=437634&hhSearchTerms=%22SOE%27%22>

<https://www.iodsa.co.za/news/news.asp?id=276085&hhSearchTerms=%22SOE%27%22>

<https://www.iodsa.co.za/news/news.asp?id=174553&hhSearchTerms=%22public+and+sector%22>

<https://www.iodsa.co.za/news/563249/Defending-cadre-deployment-will-keep-governance-of-SOEs-at-risk.htm>

<https://www.iodsa.co.za/news/news.asp?id=406301&hhSearchTerms=%22skills%22>

<https://www.iodsa.co.za/news/news.asp?id=520060&hhSearchTerms=%22skills%22>

<https://www.iodsa.co.za/news/news.asp?id=368172&hhSearchTerms=%22skills%22>

<https://www.iodsa.co.za/news/news.asp?id=153689&hhSearchTerms=%22skills%22>

<https://www.iodsa.co.za/news/news.asp?id=241068&hhSearchTerms=%22skills%22>

<https://www.iodsa.co.za/news/news.asp?id=174553&hhSearchTerms=%22nomination%22>

<https://www.iodsa.co.za/news/news.asp?id=175136&hhSearchTerms=%22nomination%22>

We have also written papers and hosted events on this topic.

https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/49D62EF3-F749-403C-BE47-73C50F27F30F/Challenges_facing_Public_Sector_Boards.pdf

https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/892105F1-D3AF-4E96-991F-8AAF225CFE0/Director_Due_Diligence_January_2021.pdf

ENDS