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PRESENTATION BY RONNIE BISSESSAR ON DIRECTORS' DUTIES IN RELATION TO FINANCIAL OVERSIGHT, PROCUREMENT AND WHISTLEBLOWING

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PRESENTATION BY RONNIE BISSESSAR ON DIRECTORS' DUTIES IN RELATION TO FINANCIAL OVERSIGHT, PROCUREMENT AND WHISTLEBLOWING

Overview

1. My presentation will include (but not be limited to):-

   A. the fiduciary duties and responsibilities of directors and officers specifically in relation to financial oversight, corporate reporting and compliance and regulatory requirements with particular reference to the Companies Act Chapter 81:01 ("*CA*") and the Integrity in Public Life Act Chapter 22:01 ("*IPLA*")

   B. recent case law on directors' duties and responsibilities in relation to financial oversight, corporate reporting and whistleblowing; and

   C. directors' roles/responsibilities in relation to procurement legislation with a view to the establishment of whistleblowing policies and governance protocols.

A. Fiduciary Duties

2. Directors, whether of private limited liability companies, publicly listed companies or state owned enterprises ("*SOE's*") are all fiduciary agents and are statutorily required to act in accordance with sections 99(1), (2) and 60(b) of the CA which requires them to:-

   (1) act honestly and prudently in the best interest of the company; and

   (2) to maintain oversight over the company's business and affairs.

3. Directors of SOE's however, in addition to their fiduciary duties under the CA, are persons in *public life* and are caught by the provisions of the IPLA. A person in *public life* by the Schedule to the IPLA include:-

   Members of the boards of statutory bodies and state enterprises including those bodies in which the state has a controlling interest.

4. Summarily, all directors are required to act in the Company's best interest and this has been determined juridically as meaning in its best *financial* interest and for these purposes, by section 99(2) of the CA, directors are enjoined to consider (among other interests):-

    (a) the employees' interest; and

    (b) the shareholders' interest.

5. It is noteworthy that both *interests* require consideration of different objectives; this is in the context that the employees' interest (generally job security and benefits) are inconsistent with the shareholders' interest (the bottom line). In reconciling these disparate interests, directors are required to act in the company's best interest and for these purposes, where there are competing interests, a prudent and diligent director is likely to act based on the advice of executive management (through the CEO's Notes to the Board) and external advisors.

6. It is also a matter of good form for directors' decisions, particularly those which are likely to be challenged, to be supported in the minutes with generous references to the information provided to the board, the sources of the information, the advice given to the board by the executive management, the external advices (if received) together with the *minutiae* of the analyses which crystallise the decision; directors who dissent from the board's decision should have their dissent expressly noted in the minutes otherwise the decision will be regarded as unanimous: section 86(1)(b) of the CA.

7. Between 2001 to the present there has been numerous instances of corporate excesses including (but not limited to):-

    (i) Enron Corporation's fraudulent accounting practices which put the energy company out of business in 2001 with a loss of US$2.0 billion in employees' pensions funds and the imprisonment of its CEO Geffrey Skilling for fourteen (14) years;

(ii) Worldcom's bankruptcy protection in 2002 after disclosing that it had inflated its cash flow by US $3.8B and leading to the imprisonment of its CEO Bernard Ebbers for twenty five (25) years in 2005;

(iii) Adephia Communications Corporation, one of the largest cable companies in the US which collapsed in 2002 after its founder and his son had been found guilty of embezzling US$1.9B for which they were imprisoned;

(iv) TYCO International Limited whose former CEO Dennis Kozlowski and CFO Mark Swartz were found guilty in 2005 for giving themselves illegal bonuses and were imprisoned;

(v) Toyota Motor Corporation which was fined by the US Justice Department US$1.2 B in 2014 for trying to avoid criminal prosecution leading to a recall of 10M vehicles;

(vi) BP plc which in 2010, two (2) years after the Gulf of Mexico oil spill, agreed to plead guilty to several charges including lying to Congress and in July 2015 agreed to provide restitutionary damages totalling US$52.8B to five (5) Gulf Coast States; and

(vii) Petrobras, the state run Brazilian oil firm accused of the biggest corruption scheme in Brazil's history which was accused in 2014 of paying at least US$2.0B in bribes over a decade;

8. Closer to home there has been the debacles associated with HCU, Clico and FCB (the shares issue).

9. In order to make directors more accountable, there has been a *plethora* of legislation and the courts have more rigorously underscored that directors' duties are subject to scrutiny not only from shareholders but also regulators and in that context, the board of inland

revenue, the national insurance board and more recently the financial intelligence unit are able to access board minutes as part of their due diligence.

10. Moreover the legislation has become so much more intrusive:-

(1) in the US, the Sarbanes-Oxley Act requires *inter alia* the authors of financial statements to sign the documents certifying their approval of it;

(2) in Trinidad and Tobago the IPLA at section 17 permits the Integrity Commission to refer a breach of the IPLA to the DPP; and

(3) similarly at sections 23-31 the IPLA has developed a Code of Conduct for persons in public life.

11. It is noteworthy that the fiduciary duties also apply equally to senior officers of the company.

B. Directors' duties and responsibilities – case law

12. There has been recent cases from the High Court and the Court of Appeal which have underscored the onerous duties of directors in relation to financial reporting and compliance.

(1) in CV 2013-00212 between UTT –v- Prof Ken Julien and Ors, Kokaram J on 11th April 2014, in an interlocutory application, at paragraph 47 considered whether directors acted prudently in failing to terminate a lease and identified the issue as being whether the directors procured and acted upon expert advice and at paragraph 57 noted that:-

> *"A breach of trust in itself is a violation of an equitable obligation…the remedy of which lies in equity"*

(2) in CV 2011-03992 between ETEK -v- Kenneth Julien and Ors. Rampersad J on 28th October 2013 described section 99(1) of the CA in terms that while a duty of care is not owed by a director to a shareholder,

there is a fiduciary duty owed by the director to the company and *ipso facto* its shareholders [paragraphs 38 – 40]; and

(3) in HCA No. 2839/2002 between Mora Van Holdings Limited & Ors. -v- Krishna Persad & Associates Ltd, Ventour J on 06th February 2014 described the whole notion of *oppression* as being a claim by the shareholder against directors pursuant to section 242(1) of the CA [paragraphs 45-60].

13. Summarily, the cases underscore that:-

(1) the courts treat with breaches of duties robustly and the *onus* of proof, once an issue of fraudulent corporate conduct is raised, shifts to the *impugned* director to defend his decision; this is in the context that by that date, the director may have ceased operating as a director and *ipso facto* does not have the minutes or any other documents to support or defend his decision;

(2) the indemnity insurance usually taken by a company in favour of its directors which provides for the reimbursement of legal costs and damages in suits brought by aggrieved shareholders will no longer apply if the director is adjudged to be guilty of a fiduciary duty; the effect is that the director is required to defend his decision and if necessary pay damages out of his personal funds; and

(3) the directors' failure to act prudently is assessed in the context of the information/material that is available to them and whether they should have elected to procure independent and competent expert advice and, assuming that they did, whether they should have acted upon the advice.

C. **Procurement/Whistleblowing legislation**

14. The Public Procurement and Disposal of Public Property Act No. 1 of 2015 ("*the PPDPPA*") provides for public procurement and for the retention and disposal of public property in accordance with the principles of good governance, namely, accountability, transparency, integrity and value for money; it also establishes the office of Procurement Regulator and repeals the Central Tenders Board Act, Chap. 71:91.

15. Part 2 of the PPDPPA governs the Office of Procurement Regulator and by Section 10(1)(a):-

> *"(1) The Office shall be governed by a Board which shall be appointed by the President after consultation with the Prime Minister and the Leader of the Opposition and shall comprise no less than eight and no more than eleven members as follows:-*
>
> *(a) the Procurement Regulator who shall be the Chairman and who shall have at least ten years' experience in matters relating to procurement and possess—*
>
> *(i) a degree from an accredited University in a field relating to finance, economics or law; or*
>
> *(ii) a degree from an accredited University in accounting or an equivalent professional qualification in accounting…*"

16. The Procurement Regulator is to be appointed for a term of seven (7) years and may be reappointed but not for more than two (2) consecutive terms (section 11(1)); it is note-worthy that a *public body* for the purposes of the PPDPPA includes, by section 2, a ministry or department of a ministry, a statutory body or a SOE.

17. The Procurement Regulator's principal business is the day-to-day management, administration, direction and control of the business of the Office with authority to act in the conduct of the business of the Office of the Procurement Regulator (section 11(2));

the Procurement Regulator has not yet been appointed although the provisions relating to his appointment have been promulgated.

18. The Prime Minister has suggested that whistleblowing legislation is imminent; presently in Trinidad and Tobago section 42A of the Integrity in Public Life Act Chapter 22:01 protects whistle blowers but only in relation to unlawful activities of persons in public life. Based on the Prime Minister's statement, it is likely that section 40 of the PPDPPA will shortly be promulgated.

19. Section 40 of the PPDPPA protects whistle blowers who report unlawful procurement activities to the DPP, the Police, the Integrity Commission or the Office of the Procurement Regulator

20. Section 40 states that:-

> "*A person shall not be dismissed, suspended, demoted, disciplined, harassed, denied a benefit or otherwise negatively affected because—*
>
> *(a) he, acting in good faith and on the basis of a reasonable belief, has—*
>
> *(i) notified the Director of Public Prosecutions, the Police, the Integrity Commission or the Office that his employer or any other person has contravened or is about to contravene this Act;*
>
> *(ii) done or stated the intention of doing anything that is required to be done in order to avoid having any person contravene this Act; or*
>
> *(iii) refused to do or stated the intention of refusing to do anything that is in contravention of this Act; or*
>
> *(b) his employer or any other person believes that he will do something described in paragraph (a).*"

21. The Trinidad and Tobago Transparency Institute's President Deryck Murray on 09th February 2015 expressed his dissatisfaction as to the current state of affairs in relation to

whistle-blower legislation. He called for *proper* whistle blowing legislation (as quoted in the Express newspaper on 10th February 2015):-

> "*Where that usually falls down is at the point where you are going to pass it on to the investigative body and the individual says, 'I don't think I want my name to go forward, I am not prepared to go further.' So we have the information (about corruption), but then we can't go to the next step*."

22. The progress made by the PPDPPA is certainly welcomed but, according to Murray, the public's confidence in whistle blowing protection has to be developed by proper implementation. Moreover the PPDPPA only protect persons who are reporting prohibited conduct in relation to the provisions of the Act itself, that is, procurement; it does not have a wider application.

Relevance of the PPDPPA to the private sector

23. Private companies which supply goods and services to SOE's for which public monies are used, are caught by the PPDPPA so that allegations of corruption, bid rigging, bribery or insider dealings by the private sector may be reported to the authorities pursuant to section 40.

24. This means that private companies as suppliers of goods and services to SOE's should establish procurement protocols to protect its officers and directors from allegations of fraudulent conduct;

25. Accordingly, directors of private companies should challenge their corporate secretaries/legal officers/compliance and regulatory officers to prepare a checklist against which all goods and services being delivered to SOE's should be evaluated; this is consistent with *inter alia* section 29 (1)(c) of the PPDPPA which provides that *A procuring entity shall ensure that suppliers and contractors have not, and their directors or officers have not, been convicted of any criminal offence* (emphasis added)

26. Section 4 of the PPDPPA defines the *procuring entity* as *a public body engaged in procurement proceedings* so the effect of section 29 of the PPDPPA therefore is to ensure that public bodies may only conduct procurement with *suppliers and contractors* whose *directors or officers have not been convicted of any criminal offence.*

27. This is not dissimilar from section 69 of the Companies Act Chap 81:01 which governs the disqualification of directors. Section 69(2) states that the Court, in determining whether or not to disqualify a director under section 69(1), shall *have regard to all the circumstances that it considers relevant, including any previous convictions of the individual in Trinidad and Tobago or elsewhere for an offence involving fraud or dishonesty or in connection with the promotion, formation or management of any body corporate*.

28. Where section 4 of the PPDPPA differs from section 69 of the Companies Act is that the former effectively prevents procurement between public bodies and companies in which directors have acted in a way that may decrease the public's trust in dealings with such companies. (emphasis added)

29. The PPDPPA also places an onerous burden on companies which may be interested in procurement because at section 29(2) it is evident that their directors and officers are to prove *inter alia* that they are not or have not been convicted of any criminal offence. This is a reversal of the ordinary burden of proof.

30. Moreover, at section 29(6) the PPDPPA provides that a supplier or contractor who is found to have provided *materially inaccurate* information concerning the qualifications of the supplier or contractor (and this no doubt includes the section 29(2) responsibilities) *shall* be disqualified. Disqualification therefore is mandatory.

31. On 09th December 2014 Professor of Employment Law David Lewis who is a world renowned expert in whistleblowing in an address in Trinidad and Tobago noted:-

"It seems clear to me that one of the main reasons corruption is so prevalent in Trinidad and Tobago is that there is no political will to take effective action to combat it

Procurement and general integrity statutes have been approved by Parliament but there is no effective whistleblowing legislation. Since Trinidad is no longer regarded as an under-developed nation, in my opinion, there is no good reason for it to lag behind Jamaica in respect of whistleblowing measures"

32 It is significant that within a month of this address, the provisions for the appointment of the Office of Procurement Regulator were promulgated and the recent utterances of the Prime Minister suggests that section 40 of the PPDPPA will shortly come into force which protects whistleblowers who report unlawful procurement activities; the optimism that is thereby engendered is tempered only by the fact that section 42A of the Integrity in Public Life Act Chapter 22:01 which protects whistleblowers who report illegal activities of persons in public life has been in force for over fifteen (15) years but has not led to a single reported prosecution for criminal conduct.

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