

## **RIGHT TO EXTERNAL LEGAL COUNSEL**

The right of directors to external legal counsel appears not to have been contested in the Corpcapital response. This omission, deliberate or otherwise, in no way detracts from the crucial importance of this issue and the necessity for it to be central part of the enquiry.

It ought to be a major cause of concern to authorities and regulators that a Board of Directors, particularly one containing three lawyers, should even consider contesting this issue. The fact that it was contested, and the aggressive and intimidatory nature of the correspondence, is perhaps the clearest evidence yet of the culture of the board and of the way in which the Board of Directors was run. It also indicates the passive role played by the non-executives, and the aggressive role of the majority of Directors, the executives. The fact that Wim Trengove, as a non-executive director and leading lawyer, having a watchdog responsibility over the executive directors, supported the executives and allowed himself to be compromised on as fundamental issue as this, is a clear indication that the concerns of executives, legitimate or not, tend to dominate and that the non-executive directors were not properly discharging their functions. The executive directors also include in their ranks lawyers. They too should have known better than to write such a letter. As referred to in the letter of resignation, a judge of the High Court has given his unreserved support for a principle, namely, the right of a non-executive director to take external legal counsel. That a non-executive director deemed it necessary to take this unusual step speaks for itself.

The only reason I can think of as to why persons with knowledge of the basic right to legal representation should have written or been party to such a letter is that they thought they could take advantage of my non-legal background and bully me into silence. The tone of the letter bears out this contention. Perhaps they were also uncomfortable that another senior member of the small legal fraternity in South Africa was now aware of what had been going on, and they did not know who it was.

14 November 2002

Nic Frangos  
Building 18  
The Woodlands  
Woodlands Drive  
WOODMEAD

Dear Nic

At the informal meeting on Friday, 25 October 2002:

- You informed the meeting that you have consulted a lawyer to advise you with regard to the matters contained in your memorandum of complaint.
- You refused to disclose to the meeting the identity of the consultant.
- You volunteered to disclose the identity of the consultant in confidence to Wim alone.

Please explain why you are not prepared to allow the other members of the board to know the identity of the consultant.

As you are aware Corpcapital Limited has a corporate governance committee. Its duty is to ensure adherence with best corporate governance practice. The committee is chaired by Wim Trengove SC who is amongst South Africa's most senior and experienced Senior Counsels more than adequately equipped to provide you with any advice you might have required with reference to the matters contained in the complaint.

The audit committee of Corpcapital Limited is chaired by Tom Wixley. He is amongst the most senior accountants in South Africa and is coincidentally the author of acclaimed publications on the subject of corporate governance.

CORPCAPITAL LIMITED (1998/011384/06)

2 ARNOLD ROAD ROSEBANK JOHANNESBURG 2196 PO BOX 471917 PARKLANDS 2121 SOUTH AFRICA  
TELEPHONE +27 11 283 0000 TELEFAX +27 11 283 0088 EMAIL info@corpcapital.com www.corpcapital.com

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DIRECTORS: E ELLERINE (CHAIRMAN); J M LIEBESMAN (CEO); M H SACKS (MANAGING); N J FRANGOS; E GROJMAN  
B K A KALKHOVEN; N N LAZARUS SC; G B LIEBMAN; W H TRENGOVE SC; T A WIXLEY (NON-EXECUTIVE)  
COMPANY SECRETARY: CORPCAPITAL COMPANY SECRETARIES (PTY) LTD

All of the matters raised in your complaint fall within the scope of the activities of either the corporate governance committee or the audit committee.

You were aware that the subject matter of your complaint was highly confidential, potentially controversial and that it would have to be disclosed for the purpose of taking advice.

Please inform us in all of the given circumstances:

- Why you chose not to deal with the issues through the existing committees established by the board for that purpose.
- Why you did not seek to establish the company's approved practices and procedures for directors wishing to take legal advice about the company's affairs.
- Why you did not inform the board of your intention to consult a lawyer with regard to the company's affairs or your actions as a director of the company or request the company's permission to do so.
- Why, similarly, you did not inform the board of your intentions or request its permission to disclose to such lawyer information about the company which you knew to be highly confidential and potentially controversial.
- Why you did not afford the company the opportunity to consider whether the identity of the lawyer consulted by you may be conflicted.
- Why you did not afford the company the opportunity to obtain from your consultant appropriate confidentiality undertakings.

We regard this matter in a serious light. Could we please have your urgent response.

Yours faithfully

  
Corpcapital Limited

**N.J. FRANGOS**  
*Building 18, The Woodlands, Woodlands Drive, Woodmead, 2157*  
*Tel: +27-11-785 4200 - Fax: +27-11-785 4209*

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18 November 2002

Mr J Liebesman  
Corpcapital  
2 Arnold Road  
Rosebank

Dear Jeff

I received a letter from Corpcapital dated 14 November 2002 concerning my consultations with legal counsel. It is not clear from the signature of the document who the author is and the name has not been printed as is customary. Please advise me who sent this letter so that I can send a reply.

Yours sincerely

Nic

**N J FRANGOS**



18 November 2002

Nic Frangos  
Fax No. (011) 785 4209

Dear Nic

The signature on the letter of 14 November 2002 is mine. It was written on behalf and with the consensus of the full board.

Yours sincerely

**BENJI LIEBMAN**

CORPCAPITAL LIMITED (0996901509/06)  
2 ARNOLD ROAD ROSEBANK JOHANNESBURG 2196 PO BOX 471917 PARKLANDS 2120 SOUTH AFRICA  
TELEPHONE +27 11 241 8800 TELEFAX +27 11 243 8000 EMAIL [info@corpcapital.com](mailto:info@corpcapital.com) [www.corpcapital.com](http://www.corpcapital.com)

DIRECTORS: G. BLOEMINK (CHAIRMAN), J. H. LIEBMAN (CEO), M. H. FAGGS (MANAGING), N. J. FRANGOS (FINANCIAL)  
H. K. A. KAZEMPOUN, S. S. LAZARUS, G. G. LIEBMAN, W. B. THINGOVU, S. C. T. A. WESLEY, J. S. NONGENI (DEPUTY)  
COMPANY SECRETARY: CORPCAPITAL COMPANY SECRETARIES (PTY) LTD

*N.J. FRANGOS*  
*Building 18, The Woodlands, Woodlands Drive, Woodmead, 2157*  
*Tel: +27-11-785 4200 - Fax: +27-11-785 4209*

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19 November 2002

Mr E Ellerine  
Chairman  
Corpcapital Limited

Dear Eric

I received the attached letter by telefax on 14 November 2002. The signature was illegible and the letter does not identify its author. I accordingly wrote to the company requesting that the author be identified so that I could respond. In reply I received a telefax from Benji Liebmann confirming that the signature on the attached letter is his, and that the letter was sent on behalf of and with the full consensus of the Corpcapital board.

I am both astonished and dismayed that the board of a public listed company (particularly one which numbers among its members so many legal experts) should even contemplate questioning the right of one of its members to seek independent legal advice on matters which that director regards as fundamental to the discharge of his fiduciary duties to that company. I do not intend to dignify the letter with any response other than that it is my right to brief counsel of my choice, and I have chosen to exercise that right. I believe the Corpcapital board should have encouraged me in doing so. That it has not, is to my mind, further evidence of an unhealthy culture and a desire to avoid any scrutiny or disclosure.

The letter is a further example of the intimidatory tactics that have been employed against me in recent times. I expect you as the chairman of the board to support my legal rights and obligations and to eliminate undue influence and pressure. I would hope that that process will start with an unconditional apology from the board for the letter and immediate confirmation from the board that my rights to independent legal counsel of my choice will be respected and the matter dropped.

Yours sincerely

*Nic*

**N J FRANGOS**

Copies to : J Liebesman  
M Sacks  
E Grolman  
B Kalkoven  
N Lazarus

B Liebmann  
W Trengove  
T Wixley

**Opinion by a Judge of the High Court**

**Question :**

**Is a non executive director of a public company entitled to seek independent legal advice on issues concerning the company where he feels he needs such advice in order to execute his or her fiduciary responsibilities?**

*Most certainly. He seeks advice in his personal capacity in order to do his duty.*

*He is personally liable if he simply acquiesces when he knows or ought to know better.*

*He must be encouraged to act at all times in the best interest of the Company.*

*He is also obliged to take reasonable steps to ascertain the true facts.*

**Is he under any obligation to request the company's permission and/or to disclose to the company the identity of his legal advisor?**

*No and No.*

**Is such consultation covered by the normal lawyer/client confidentiality?**

*Very definitely.*

**If you would prefer not to deal with this I will certainly understand.**

*I appreciate your concern but have no problem with general as opposed to specific advice to identified recipients. The answers are general and apply in all circumstances. I have no idea who may need the advice and offer it as general advice.*