

Democratising companies?

union representation on company boards

Board-level representation for trade unions was recently placed in the spotlight with the appointment of the NUM President, James Motlatsi, to the board of AngloGold, the country's largest gold mining company.

The NUM is one of the few unions in South Africa that has previous experience of board level representation. Its general secretary, Gwede Mantashe, participated in Eskom's Electricity Council from 1993 to 1997 and had a short sojourn on Samancor's board between 1996 and 1997. These cases provided the union with sharply contrasting experiences - Eskom has been seen as a success, whereas Mantashe has dubbed his involvement in the Samancor board "a disaster".

Other unions which are currently testing the water include the CWU, which has a nominated representative on the Telkom Board. The CWU and other unions are also considering an offer of seats on the board of the Post Office. In both these cases changes in the composition of the board were initiated by the Minister of Posts and Telecommunications, Jay Naidoo, using the legislative powers available to him and his role as a key shareholder in these enterprises.

Board-level participation may be different in the private and public sectors, and may also come about in different ways. There are a number of factors which shape the value of this experience for

Union representation on company boards is a new phenomenon in this country.

Ian Macun draws on international experience to provide some pointers for South African unions.

trade unionists. These include the number of seats on offer, whether they are involved as individuals or as representatives of their constituency and the role of other board members.

In South Africa there is, as yet, no legislation which specially addresses board representation. The guidelines which exist to define the role of non-executive members of boards are few and rather rudimentary, particularly where state enterprises are concerned. The most recent intervention in this regard is the King Report on Corporate Governance, which was published in November 1994. Private sector company boards are governed by the Companies Act.

In the absence of a clear legislative framework, and in the context of different views about the value of board-level participation, this is likely to remain an area of experimentation and one that will be approached cautiously by unions. It is

also an issue over which existing board members are likely to be uncertain and to have a number of concerns.

Key issues which are likely to be of concern to trade unions and company boards are:

- ☐ potential conflicts of interest between serving the interests of workers and serving the interests of the company;
- ☐ how to deal with wage mandates;
- ☐ union participation and conflict on boards;
- ☐ directors' fees;
- ☐ the value of employee/union representation;
- ☐ capacity questions.

In Germany, a system of co-determination at management level is statutorily supported and has been in practice since the 1950s. What follows draws on the German experience. This is not to suggest that the German model should be followed in South Africa. Rather, it will be used as a reference point to suggest ways of thinking about union participation on company boards.

Conflict of interest

A basic problem is whether union representatives can act according to the fiduciary and other responsibilities of directors and at the same time represent workers' interests. This potential conflict may be regulated by law, but it will also be affected by the way in which companies are viewed as economic and social institutions, and by the way in which industrial relations have evolved in a particular country.

Under German law, co-determination at managerial level (through the Supervisory Boards) is aimed at ensuring employee participation in important entrepreneurial plans and decisions. Supervisory Boards are composed of equal numbers of shareholder and employee representatives,

in proportions that vary with the size of the company. The employee representatives are elected by a group of delegates who, in turn, are elected by all employees. Wage earners, salaried employees and executives have to be represented in accordance with their numerical strength in the company, with adequate protection for minorities. The chairpersons and vice-chairpersons are elected by a two-thirds majority of board members.

The Supervisory Board meets for approximately four hours, four times a year. The worker directors meet beforehand to caucus. When a Supervisory Board makes plans and decisions, it has to take into consideration the interests of both shareholders and employees. The role of employee representatives is to bring their knowledge and opinion to bear on the matter under discussion. Underlying the German system of co-determination is a different theory of the enterprise. Enterprises are public institutions, not just the property of their shareholders. Employees, managers and trade unions are also regarded as key stakeholders.

Although Supervisory Boards function in relation to a broader set of interests, they are bound to act in the interests of the company. This involves a commitment to contribute to the preservation of corporate assets, to the continued existence of the company and to safeguard the interests of shareholders, employees, business partners and the public when developing corporate plans. This should not prevent employee representatives from bringing the interests of their constituency into the deliberations of the board, but the pursuit of their specific interests is limited by the company interest. In practical terms, co-determination at board level may conflict



Board-level representation may conflict with workers' interests.

with the direct, short-term interests of employees, for example, in the case of staff cutbacks or plant closure.

The system of Supervisory Boards works in Germany because of the experience, level of sophistication and near parity which employee representatives enjoy with shareholders. They also work because the representatives are acting on behalf of employees, not the union. It should also be borne in mind that participation in Supervisory Boards takes place alongside representation on Management Boards, *via* the appointment of a Labour Director and the Works Councils in enterprises.

In Sweden, there is legal provision for board representation for employees by way of 'worker directors' on the company board. Worker directors have the same standing as other board members. They are appointed by unions, or elected by the workforce in non-unionised companies. Board representation is, however, regarded

primarily as a way of keeping unions and the workforce informed, rather than as an instrument for them to influence managerial decisions.

In South Africa, the situation is slightly different. The Companies Act states that board members have a duty and a responsibility to the company. The articles of association of a company cannot override the Act. An interpretation which is widely accepted is that the company exists to make a profit and to satisfy its shareholders.

Board members, whether they be trade unionists or anybody else, are tied to these responsibilities. Whether this notion of the company is open to broader interpretation under South African law requires further investigation.

The King Report moved closer to the German situation. Its interpretation of 'good governance' extends beyond the narrow economic well-being of companies. The report identified three

stakeholders with respect to corporate governance:

- ☐ shareholders;
- ☐ parties who contract with the company (employees);
- ☐ non-contractual parties who have dealings with the company, for example, the state.

One of its recommendations was that corporations should develop systems which will ensure information sharing and enable employees to gain a better understanding of the company for which they work.

The King Report confined itself to the private sector. State enterprises and the public sector will presumably be governed by separate legislation. A draft 'protocol' regarding the governance of state enterprises, which is partly influenced by the King Report, is apparently in circulation at the moment. The document has not been made public.

A simple way around the difficulty of board members having to juggle different and conflicting interests would be for trade unions to nominate persons to a board, as in Sweden, and as the CWU has done at Telkom. In this way, they may gain a sympathetic voice and access to information, without having to be directly exposed to the contradictions presented by the legislative and labour situation.

Wages

An obvious concern for South African unionists is how to conduct themselves when the company board discusses a mandate for wage negotiations. In South Africa, company-level negotiations are common. In Germany, wage bargaining is done at industry level. This institutional separation of collective bargaining from plant level production issues is crucial to the functioning of the German system.

Where wage adjustments are made at enterprise level (which is becoming more common), they are referred to executive committees or a sub-committee of the board, which may exclude employee representatives. In Sweden, worker directors are always in a minority and do not participate in collective bargaining matters.

South African union representatives could either recuse themselves from proceedings that have a bearing on collective bargaining, or act on the basis of equal responsibility with other board members – which would clearly give rise to a number of contradictions. It is common practice, however, for company boards in South Africa to have remuneration sub-committees



James Motlatsi.

composed of non-executive directors, which decide on wage mandates and the remuneration of executives. Trade union representatives do not sit on these sub-committees.

Conflict

The extent to which employee or union representatives will be able to influence the board will clearly be affected by their status on the board, the constituency which they represent, the composition of the board and the attitude of unions and workers towards board participation. It is worth noting that in the German system, the chairperson of a Supervisory Board is elected from amongst the shareholder representatives. He/she has a casting vote in the event of any deadlock. In some countries, the decision-making powers and status of board members are circumscribed in ways that may reduce the potential for conflict. In Finland, employee representatives are excluded from discussions on managerial pay, appointments and industrial conflict. In France, employee members of the boards of private companies do not have voting rights, although they are full voting members in public sector corporations.

In South Africa at the moment 'democracy rules'. Differences on issues are put to the vote. In a more general sense, the way in which conflict is dealt with depends very much on the strength of the chairperson. As one board member put it: "One does not want the board to be a negotiating forum." Current moves to avoid situations where the company chief executive also serves as chairperson of the board may reduce the potential for conflict. The trend towards non-executive board members may also help. These members may provide a more 'neutral' voice, or represent the interests of particular stakeholders. Changes in the structure of boards would, presumably, alter

the 'politics' of boards, although it seems that the dominant role of boards at present is to support management.

Directors' fees

In Germany, employee representatives are paid a small honorarium for their participation in Supervisory Boards. This fee is, however, transferred to the Hans Bockler Stiftung, a union education centre linked to the largest union federation, the DGB. This brings in approximately 32-million Deutsche marks per annum. Supervisory Board members are entitled to ten days paid leave per annum to attend to their duties as board members.

In South Africa, it used to be the case the executive directors did not receive payment. Currently, both executive and non-executive directors are being paid a fee. Executive directors' fees are disclosed in annual financial reports. Many non-executive directors pay their fees over to their full-time employers. This would, presumably, apply to unionists as well.

Value

A valid question that may be asked by both management and unionists is, what value or benefit do union representatives bring to a company board? In other countries, board-level participation tends to be justified in four ways:

- The economic legitimization that boards provide to corporate governance is supplemented by a social form of legitimization. It could be argued that the involvement of non-executive directors fulfils this purpose. This is true up to a point. There is, however, no guarantee that representatives of public interests outside of the firm will necessarily give sufficient consideration to the interests of employees. Social legitimization thus concerns the effective representation of both public and employee interests

in shaping and implementing corporate policy.

- Union and employee board representation creates greater equality between capital and labour and recognises the importance of an employee voice in decision-making and policy-making. In this sense, board representation can be said to be part of the democratisation of firms and improved forms of governance.
- Employee board representation can be justified in relation to improved monitoring of management and managerial power.
- Employee representation on the board may contribute to improved company performance by ensuring that adequate attention is paid to the development of human resources and labour relations.

The extent to which these broad justifications translate into concrete benefits to firms and their employees is difficult to judge. This will depend, to a large extent, on legal support for employee or union representation, the dynamics of their role on company boards and the extent to which democratisation of corporate governance is accepted by business, labour and government.

Capacity

In South Africa, systematic attention will have to be given to the capacity of trade union representatives to participate meaningfully on company boards. Experience has shown that union participation has been shaped to a significant extent by the strengths of the individual.

A board member points out that "company boards are not a supportive environment". Private sector boards tend to cater for particular individuals. They are not orientated to deal with persons who represent other interests. Decisions have to be made within a short space of time

and boards try to avoid situations where decisions are made outside of the structure, thereby reducing their role to that of a 'rubber stamp'. The boards of state enterprises may be slightly different. In the case of Eskom, the Electricity Council includes representatives from civil society, consumer groups and labour, which makes it more of a stakeholder-type of body. This may provide more latitude when it comes to the way in which boards function, and may make engagement by union representatives more straightforward. It will not, however, do away with the need for capacity issues to be addressed. ★

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