

**A Critical Analysis of the Liability of Directors in Light of the Unwarranted
Shareholder Involvement in South African State-Owned Enterprises**

By

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DECLARATION

I declare that the work presented in this LLM dissertation is my own original work, that it has not been submitted for any degree or examination at any other university and that all the sources I have used or quoted have been acknowledged by complete reference.

I have not used work previously produced by another student or any other person to hand in as my own.

I have not allowed and will not allow anyone to copy my work with the intention of passing it off as his or her own work.

Signature of the student.....

Signature of the Supervisor

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SUMMARY

South African state-owned enterprises are continually in distress and are failing to meet their objectives. Most of the failures can be attributed to corporate governance contraventions that take place within these enterprises. The regulatory framework of South African state-owned enterprises is wide and diverse in nature. The dissertation will critically analyse the liability of directors in light of the unwarranted shareholder involvement in South African state-owned enterprises.

An overview of the current governance trends within these enterprises will be provided with the view of analysing the existence of effective corporate governance practices. A critic in relation to the current state of governance within these institutions will be provided. The study will outline the role of the board of the directors and the role of government as a shareholder in state-owned enterprises. And also provide the mechanisms that can be utilized to ensure accountability within state-owned enterprises.

Chapter 1: Introduction

1. Background

State-owned enterprises play a pivotal role in ensuring economic growth and financial soundness in a country.¹ They have been acknowledged by the South African government as playing a vital role in the economy, predominantly for the delivery of critical services such as broadcastings, electricity and transportation.² Governments also operate public enterprises as a means of improving employment relations in strategic economic sectors, restraining private and foreign influence over the economy, creating public funds, improving service delivery and boosting economic growth.³ State-owned enterprises are unique in nature given that they have on the one hand a profit making mandate and on the other hand a social service delivery mandate.

Strong concerns in relation to the governance contraventions at state-owned enterprises have been publicly articulated.⁴ In recent years there has been growing recognition that weak governance frameworks and practices are the root cause of corporate failures within South African state-owned enterprises.⁵ It is submitted that corporate governance within state-owned enterprises is vital in order to ensure stability in these enterprises and to achieve the set mandate of the enterprises. This study will argue that corporate failures within state-owned enterprises interrelate with the lack of proper corporate governance practices and political interference by the minister acting on behalf of the main shareholder, as in the case of the South African Broadcasting Corporation where the

¹ Thabane and Snyman-Van Deventer "Pathological Corporate Governance Deficiencies in South Africa's State-Owned Companies: A Critical Reflection" 2018 *PER/PELJ* 1.

² Thomas "Governance at South African state-owned enterprises: what do annual reports and the print media tell us" 2012 *Social Responsibility Journal* 449.

³ Thabane and Snyman-Van Deventer 2018 *PER/PELJ* 4 *supra* n 1.

⁴ Thomas 2012 *Social Responsibility Journal* 450 *supra* n 2.

⁵ Kikeri "Corporate Governance in South African State-Owned Enterprises. An incomplete transition. Overcoming the legacy of exclusion in South Africa"

3<<http://documents.worldbank.org/curated/en/798071529303940965/127288-WP-P161945-PUBLIC-Corporate-Governance-in-South-African-SOEs.doc> accessed on 24 May 2019.

ministerial interference led to board/shareholder fallout.⁶ Although corporate governance failures within South African state-owned enterprises have been in the forefront recently, there has not been a clear exposition of the nature of such failures nor has there been an attempt to outline such practices against the best corporate governance practices required from publicly funded entities.⁷

It is submitted that South African state-owned enterprises should conform to the best corporate practices in an effort to remedy the current situation within these institutions. In terms of the Organization for Economic Co-operation and Development (OECD) guidelines, good corporate governance practice involves the state acting as an informed and active owner, which ensures state-owned enterprises are government in a transparent and accountable manner, with a high degree of effectiveness and professionalism.⁸

Various state-owned enterprises such as Eskom, the South African Broadcasting Corporation and Telkom have experienced substantial board and executive management disputes and fallouts regarding the separation of authority between the boards of directors and the different shareholder ministries.⁹ Often when corporate failures occur within these institutions, the minister removes the board of directors and appoints a new board, Cheteni and Khamfula assert that this creates a difficulty in establishing accountability within state-owned enterprises as managers and the boards of directors are not held accountable for any loss incurred in relation to state property.¹⁰ It is submitted that there is an apparent lack of accountability regarding the failure of these enterprises.

Several line ministries exercise the government's ownership rights which include voting rights, nominating and appointing board members, providing oversight on the performance of the board, holding the board accountable for results and the line minister

⁶ Thabane and Snyman-Van Deventer 2018 *PER / PELJ* 4 *supra* n 1.

⁷ Thomas 2012 *Social Responsibility Journal* 449 *supra* n 2.

⁸ Kikeri <<http://documents.worldbank.org/curated/en/798071529303940965/127288-WP-P161945-PUBLIC-Corporate-Governance-in-South-African-SOEs.docx>> 6 accessed on 24 May 2019.

⁹ Thabane and Snyman- Van Deventer 2018 *PER / PELJ* 5 *supra* n 1.

¹⁰ Cheteni and Khamfula "State –Owned Enterprises in South Africa: A Pinocchio Paradox" 2018 *Africa Growth Agenda Journal* 4.

is empowered with the executive authority over the relevant state-owned enterprise as an agent of the shareholder.¹¹

It is submitted that a good working relationship between the shareholder and the board of directors is crucial for good governance with these institutions. The South African government policy emphasizes the need for accountability in state-owned enterprises, also noting the current contradictory practices and identifying the need for state-owned enterprises to conduct business independently from government.¹² The study will argue that following government policy and establishing accountability mechanisms will assist in restraining shareholder interference and thus creating an enabling environment where the board of directors is able to discharge their duties while being accountable to the shareholder for any transgressions on their part.

2. Problem statement

It is crucial that state-owned enterprises be managed in a prudent responsible and clear manner, given the significant function they play in attaining the socio-economic objectives of the state.¹³ It is submitted that South Africa like many other countries has been dedicated to ensuring the success of state-owned enterprises, however, the lack of good corporate governance and corruption within institutions such as Eskom, the South African Broadcasting Corporation and the Public Investment Corporation has negatively impacted the performance of these enterprises. Direct foreign investment is adversely impacted by the perceptions of corruption within these state-owned enterprises.¹⁴ The study will argue that the various role players involved in the corporate governance of these institutions contribute to the lack of accountability for the failures of the enterprises, due to fact that responsibility can easily be passed around between the role players.

¹¹ Kikeri < <http://documents.worldbank.org/curated/en/798071529303940965/127288-WP-P161945-PUBLIC-Corporate-Governance-in-South-African-SOEs.docx> > 6 accessed on 24 May 2019.

¹² Thomas 2012 *Social Responsibility Journal* 450 *supra* n 2.

¹³ *Ibid.*

¹⁴ *Ibid* at page 449.

Thus, this dissertation aims to consider the accountability and liability of the board of directors in the governance of state-owned enterprises. It will also investigate the role of government as a shareholder within South African state-owned enterprises. The study further seeks to establish whether there is a clear division between the role board of directors and the shareholder. The dissertation will explore possible remedies that can be employed as a means of holding directors accountable for their conduct.

3. Research questions / problems

The concentration of the study is to critically analyse whether the board of directors should be held accountable and liable for corporate failures within South African state-owned enterprises?

To answer this question, the following sub-questions were formulated:

- What does the role of the board of directors and government as the shareholder within state-owned enterprises entail?
- Is there a distinct division between the duties of the board of directors and the shareholder's functions?
- How can the board of directors be held accountable and liable for corporate governance failures within state-owned enterprises?

4. Methodology

In analysing the liability of the board of directors in state-owned enterprises, primary and secondary sources will be used. The study will involve a literature study of primary and secondary sources such as South African legislation, law journals, textbooks and newspaper articles and internet sources will also be utilized in the research.

The dissertation will provide an exposition of the regulatory framework with regards to the state-owned enterprises, with specific reference to the duties of the board of directors and

the shareholder's role. The study will also involve a conceptual analysis of the corporate governance practices within state-owned enterprises.

The study will critically analyse the application and interpretation of section 76, section 77, section 162, section 163 and section 165 of the Companies Act 71 of 2008.

This research will adopt a doctrinal approach by evaluating and analyzing how the above-mentioned sections have been developed and applied over the years and to what extent, if any, have they been effective. It will further explore the possibility of the need to reform legislation with specific reference to state-owned enterprises.

5. Literature review

In recent years the debate regarding good corporate governance in state-owned enterprises has gained a lot of momentum. At the center of good corporate governance is the board of directors. Corporate governance refers to customs, policies, processes, laws and institutions that direct the manner in which organizations are controlled.¹⁵ It is submitted that corporate governance relates to the practices that are used to control the operations of organizations. Good corporate governance therefore requires the shareholders, the board of directors, the executives and the employees of state-owned enterprises to exhibit trustworthiness, openness, values and honor in the administration of the corporate affairs of these institutions.¹⁶

“Section 1 of the Companies Act defines the term state-owned company, as an enterprise that is registered in terms of this Act as a company, and either is listed as a public entity in terms of Schedule 2 or 3 of the Public Finance Management Act 1 of 1999 and is owned

¹⁵ Khan “A Literature Review of Corporate Governance” 2011 *International Proceedings of Economics Development and Research* 1.

¹⁶ Kanyane and Sausi “Reviewing State-owned enterprises governance landscape in South Africa” 2015 *African Journal of Business Ethics* 30.

by a municipality, as contemplated in the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000)".¹⁷

The board of directors is tasked with establishing the vision, the undertaking and ethics of the company, developing the strategy and structure of the company, delegating authority and responsibility to management and with exercising accountability to the shareholder and also being accountable to related stakeholders.¹⁸

It is submitted that the board of directors being tasked with the strategic vision of the company is also responsible for ensuring good corporate governance within the company. In state-owned enterprises the functions of the board of directors are not as cut and dry as in other profit companies, this is mainly attributed to the fact that government as the shareholder sets and drives the strategy of South African state-owned enterprises.¹⁹ This in turn may create confusion with regards to the scope of the role of the government as a shareholder and the role of the board directors.

The legislature created a distinct spectrum in relation to the scope of the role of the board of directors in terms of section 66(1) of the Companies Act 71 of 2008. The section provides that the affairs of the company must be controlled by the board of directors, which is bestowed with the authority to act on behalf of the company.²⁰ This section explicitly confers the authority to control the business of the company to the board of directors, which it is submitted that it also includes the power to employ the executive management.

The Companies Act further provides that the shareholder is empowered in terms of section 66(4) (b) of the Act ²¹ to elect the directors of the company. Both these sections are applicable to state-owned enterprises. Thus the Companies Act has to some extent

¹⁷ Section 1 of the Companies Act 71 of 2008.

¹⁸ Jan and Sangmi "The Role of Directors in Corporate Governance" 2016 *Imperial Journal of Interdisciplinary Research* 711.

¹⁹ State-owned enterprises: Governance responsibility and accountability. Public Sector Working Group: Position Paper 3. Institute of Directors Southern African: 3.

https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/879CAE6C-7B90-49F5-A983-28AECBCE196F/PSWG_Position_Paper_3_Governance_in_SOEs.pdf> accessed 11 May 2019.

²⁰ The Companies Act 71 of 2008.

²¹ *Ibid.*

set the tone regarding the role of both the directors and the shareholder. The study thus seeks to establish whether within the governance of state-owned enterprises there is a clear division of the separation of authority between these two governing bodies.

The problematic area in relation to governance with state-owned enterprises relates to the rules, procedures and the bodies that administrate the relationship between state-owned enterprises and government as their owner and shareholder.²² There is an apparent lack of harmonized plans and a great challenge on the part of government to manage the different roles as policy creator, regulatory body and shareholder within the state-owned enterprises.²³

Consequently, it is submitted that this results in situations where government disregards the terrain of the board of directors by getting involved in the operational issues of these enterprises. It has been established through literature that good corporate governance is essential in ensuring that state-owned enterprises perform optimally. Hence it is submitted that the importance of reforming corporate governance within state-owned enterprises is emerging.

The question that arises then is who should be accountable for the corporate failures that occur in South African state-owned enterprises. In this regard the study will seek to address the question regarding the liability of the board of directors, while also taking into account the interference by government as the shareholder in these institutions. The study will also explore mechanisms that may be used in order to ensure that accountability is created within these institutions.

²² Kikeri Corporate governance in South African state owned enterprises. An Incomplete Transition: Overcoming the Legacy of Exclusion in South Africa.

<http://documents.worldbank.org/curated/en/798071529303940965/127288-WP-P161945-PUBLIC-Corporate-Governance-in-South-African-SOEs.docx>> accessed 28 May 2019.

²³ Kanyane and Sausi 2015 *African Journal of Business Ethics* 37 *supra* n 16.

6. Structure of the study

Chapter 1

Corporate failures within state-owned enterprises are a worldwide epidemic and South Africa is no exception. State-owned enterprises are established to provide strategic goods and services to the country's citizens, whether natural or intellectual and require suitably qualified and experienced directors and Chief Executive Officer's to look after the affairs of the entities.²⁴ This chapter will provide an introduction to the topic by outlining the definition of corporate governance and providing an overview of state-owned enterprises and their significance.

Chapter 2

This chapter will provide an overview of the legislative and theoretical framework relating to state-owned enterprises in South Africa. It will provide an exploration of the provisions contained in the Companies Act, the Public Finance Management Act, the provisions contained in the King Code report and the Protocol on Corporate Governance in the Public sector. This chapter aims to examine the theoretical framework that underlies the concept and structural functioning of state owned enterprises. It will also outline the legislative and regulatory framework governing state- owned enterprises.

Chapter 3

This chapter provides an overview of the corporate failures in South African state-owned enterprises. A critical analysis on the existence of effective corporate practices within state-owned enterprises will be conducted and the consequences of the existence or non-existence of good corporate governance will be evaluated. This chapter will further provide a brief analysis of the corporate failures at some of the South African state-owned enterprises such as the South African Broadcasting Corporation and the Public

²⁴ *State-owned enterprises: Governance responsibility and accountability. Public Sector Working Group: Position Paper 3.* Institute of Directors Southern African
<https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/879CAE6C-7B90-49F5-A983-28AECBCE196F/PSWG_Position_Paper_3_Governance_in_SOEs.pdf> 2 accessed on 11 May 2019.

Investment Corporation, as well as evaluate the regulatory framework of these corporations.

Chapter 4

This chapter will outline the role of the board of the directors and the role of government as a shareholder in state-owned enterprises. The board of directors has the duty to ensure that the state-owned enterprises meet the strategic objectives as agreed with the line minister, while at the same time reaching their commercial goals.²⁵ The power of the board of directors of state-owned enterprises is often usurped by Government, as government sets and drives the strategy of state-owned enterprises; appoints and dismisses the Chief Executive Officer and approves financial and major capital expenditures of state-owned enterprises.²⁶ It will further examine the role of the board of directors and the minister as an agent of the shareholder.

This chapter aims to outline the extend of the liability of the board of directors in state - owned enterprises. It will analyse the possible deterrent remedies as provided for in terms of the Companies Act 71 of 2008. It will further examine the effectiveness of these remedies and the shortcomings.

Chapter 5

This chapter will provide a brief summary of the findings and conclusions on chapters 1 to 4. Furthermore, it will attempt to provide recommendations on the remedies that may be employed in order to hold directors accountable for the corporate failures in South African state-owned enterprises.

²⁵ *State-owned enterprises: Governance responsibility and accountability. Public Sector Working Group: Position Paper 3.* Institute of Directors Southern African: 8

<https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/879CAE6C-7B90-49F5-A983-28AECBCE196F/PSWG_Position_Paper_3_Governance_in_SOEs.pdf> accessed 18 May 2019.

²⁶ *Ibid.*

Chapter 2: The legislative framework and the governance oversight of South African state-owned enterprises.

1. Introduction.

This chapter will explore the legislative framework of South African state-owned enterprises and the governance oversight of these institutions. It will provide a brief outline and analysis of the various forms of legislation that govern state-owned enterprises as well as explore what the governance oversight of state-owned enterprises entails. International practice dictates that the cornerstone of good corporate governance in state-owned enterprises is a solid legal framework.²⁷ Section 195 of the constitution acknowledges the significance of good corporate governance by stating that

“Public administration must be governed by democratic values and principles as contained in the constitution including (a) a high standard of professional ethics must be promoted and maintained, (b) efficient, economic and effective use of resources must be promoted.”²⁸

The leading legislation in relation to state-owned enterprises is the Companies Act 71 of 2008. State-owned enterprises are further regulated by different founding legislations, the prescripts of the Public Finance Management Act²⁹ are also necessary in order to ensure good corporate governance. Other forms of legislation such as the Public Audit Act,³⁰ the treasury regulations apply to state-owned enterprises, however, they will not be dealt with for the purposes of this study.³¹

²⁷ Kikeri “An incomplete Transition: Overcoming the Legacy of Exclusion in South Africa” <http://documents.worldbank.org/curated/en/798071529303940965/127288-WP-P161945-PUBLIC-Corporate-Governance-in-South-African-SOEs.docx> 5 accessed on 08 July 2019.

²⁸ Section 195 (1) (a) - (b) of the Constitution of the Republic of South Africa Act 108 of 1996.

²⁹ The Public Finance Management Act 1 of 1999.

³⁰ The Public Audit Act 25 of 2004.

³¹ Kikeri “An incomplete Transition: Overcoming the Legacy of Exclusion in South Africa” <http://documents.worldbank.org/curated/en/798071529303940965/127288-WP-P161945-PUBLIC-Corporate-Governance-in-South-African-SOEs.docx> 5 accessed on 08 July 2019.

2. The Companies Act.

The Companies Act refers to state-owned enterprises as state-owned companies.³²

“The Act defines a state-owned company as an entity that is registered as a company and either (a) is listed as a public entity in Schedule 2 or 3 of the Public Finance Management Act 1 of 1999, (b) is owned by a municipality, as contemplated in the Local Government: Municipality Systems Act 32 of 2008.”³³

The Companies Act³⁴ does not contain specific or unique provisions that regulate only to state-owned enterprises; however, all provisions contained in the Act are applicable to state-owned enterprises unless specifically excluded by the Act³⁵.

It is submitted that the failure by the legislature to make provision for specific sections within the Companies Act addressing state-owned enterprises has severely impacted the legislative framework for state-owned enterprises. It renders the Act less effective due to the fact that it does not anticipate nor does it address issues that are specific to state-owned enterprises, such as the evolving and social mandates of state-owned enterprises, the significance of accountability of state-owned enterprises, outlining the function of the shareholder in achieving the objectives of the state-owned enterprises.³⁶

State-owned enterprises are often burdened with having to balance the commercial goals and public policy objectives.³⁷ An additional distinctive feature of state-owned enterprises is having government as a shareholder; also taking into account the additional roles that government plays as a regulator and a policy creator.³⁸ Consequently it is argued that

³² Section 1 of the Companies Act 71 of 2008.

³³ *Ibid.*

³⁴ Act 71 of 2008.

³⁵ Section 8 of the Companies Act 71 of 2008.

³⁶ Kikeri “An Incomplete Transition: Overcoming the Legacy of Exclusion in South Africa”

<http://documents.worldbank.org/curated/en/798071529303940965/127288-WP-P161945-PUBLIC-Corporate-Governance-in-South-African-SOEs.docx> 5 accessed on 07August 2019.

³⁷ *Ibid.*

³⁸ “State-owned enterprises: Governance responsibility and accountability”https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/879CAE6C-7B90-49F5-A983-28AECBCE196F/PSWG_Position_Paper_3_Governance_in_SOEs.pdf accessed on 16 July 2019.

due to the unique nature of state-owned enterprises, unique challenges arise within these institutions and these challenges require dedicated legislation that aims to resolve them.

As an alternative to incorporating specific provisions dealing with state-owned enterprises within the Companies Act, the legislature could develop a singular state-owned enterprises legislation that outlines the government's objectives and role as the shareholder and it should be in line with the governance provisions of the Companies Act.³⁹

The presidential review commission which was established in 2014 to examine the performance of state-owned enterprises identified the need for state-owned enterprises legislation in terms of the second recommendation of the report.⁴⁰ The proposed government shareholder management bill has been in the pipe line for a number of years and is still waiting to be tabled before parliament.⁴¹ It is thus submitted that the department of public enterprise is on the right track with attempting to create specific legislation aimed at state-owned enterprises.

3. The Protocol on Corporate Governance in the Public Sector.

The Department of Public Enterprise, in an attempt to provide a system of uniformity amongst the various state-owned enterprises and to create some guiding framework drafted the Protocol on Corporate Governance in the public sector, which echoes the principles contained in the King II Report on Corporate Governance.⁴² In 2003 the cabinet

³⁹ Kikeri "An Incomplete Transition: Overcoming the Legacy of Exclusion in South Africa" <<http://documents.worldbank.org/curated/en/798071529303940965/127288-WP-P161945-PUBLIC-Corporate-Governance-in-South-African-SOEs.docx>> accessed on 17 July 2019.

⁴⁰ "The Presidential Review Commission on State-Owned Entities" <<https://www.gov.za/documents/report-presidential-review-committee-prc-state-owned-entities-soes>> accessed on 08 August 2019.

⁴¹ October "Government at odds with civil society over new SOE law" <<https://www.dailymaverick.co.za/article/2019-07-08-government-at-odds-with-civil-society-over-new-soe-law/>> accessed on 10 August 2019.

⁴² "Protocol on Corporate Governance in the Public Sector" <https://www.gov.za/sites/default/files/gcis_document/201409/corpgov0.pdf> accessed on 18 July 2019.

accepted the provisions of the protocol on corporate governance and all public entities were instructed to comply with the provisions contained in the protocol.⁴³

The protocol on corporate governance in the public sector aims to provide guidance to the public sector on the best corporate governance practices, while also taking into account the distinctive mandate of the state-owned enterprises.⁴⁴ It is submitted that the protocol on corporate governance in the public sector is subordinate to both the Companies Act⁴⁵ and the king report on corporate governance for South Africa, as it is a still a government policy which has not been legislated.

It is asserted that the inception of the protocol on corporate governance in the public sector is recognition by government that state-owned enterprises require unique and focused regulations that address their unique nature and challenges. It is also submitted that the enactment of the protocol would enhance good corporate governance because the contravention of the protocol would be rendered unlawful unlike the current state.

Government's relationship with state-owned enterprises is comparable to the relationship between a holding company and the subsidiaries, the relationship entails, a financial interest in the performance of the state-owned enterprises, establishing reporting and accountability measures in order to ensure oversight by government and corrective action in instances where the state-owned enterprise digresses from the strategic direction provided by government.⁴⁶

Thus the study asserts that these unique features have the potential to pose a challenge in balancing the functions of the board of directors and the shareholder involvement. It is further averred that the creation of the protocol was a good initiative on the part of the

⁴³ "Governance Oversight Role Over State-Owned Entities"

<<http://www.treasury.gov.za/publications/other/soe/governance%20oversight%20Role.pdf>> accessed on 15 July 2019.

⁴⁴ "Protocol on Corporate Governance in the Public Sector"

<https://www.gov.za/sites/default/files/gcis_document/201409/corpgov0.pdf> accessed on 18 July 2019.

⁴⁵ The Companies Act 71 of 2008.

⁴⁶ "Protocol on Corporate Governance in the Public Sector"

<https://www.gov.za/sites/default/files/gcis_document/201409/corpgov0.pdf> accessed on 18 July 2019.

government; it has created a form of guidelines while there is currently no legislation that is specifically addressing corporate governance in relation to state-owned enterprises.

4. The King Report on Corporate Governance.

The Institute of Directors in South Africa published the first king report on corporate governance for South Africa in 1994.⁴⁷ It is submitted that the report has established a framework for corporate governance in South Africa, since the release of the first report three further versions were released. In contrast with King I and II code, King III enlarged the territory of application by affirming that it applies to all entities regardless of whether they fall within the public, private or non-profit sectors.⁴⁸

Consequently, the provisions of the King III and IV are applicable to state-owned enterprises and they can be used in order to enhance the governance practices in these institutions. It is asserted that compliance with the provisions of the King reports is voluntary due to the fact that the king reports have not been legislated and there are no punitive consequences for non-compliance. There is no statutory obligation imposed on state-owned enterprises to adhere to the provisions of the king reports and the code, only listed companies are obliged to comply with these provisions.⁴⁹ By complying and observing the principles of the king reports, state-owned entities will have practiced good corporate governance.⁵⁰

It should, however, be noted that although the King III and IV are significant sources that may be employed by state-owned enterprises to improve the corporate governance within these institutions, the king code does not contain specific provisions relating to

⁴⁷ The King Report on Corporate Governance in South Africa <https://www.iodsa.co.za/page/kingIII> accessed on 09 July 2019.

⁴⁸ "King Code of Governance Principles for South Africa" [https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/94445006-4F18-4335-B7FB-7F5A8B23FB3F/King III Code for Governance Principles .pdf](https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/94445006-4F18-4335-B7FB-7F5A8B23FB3F/King%20III%20Code%20for%20Governance%20Principles.pdf) > accessed 10 July 2019.

⁴⁹ Cassim *et al Contemporary company law* (2012) 475.

⁵⁰ "State-owned enterprises: Governance responsibility and accountability" [https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/879CAE6C-7B90-49F5-A983-28AECBCE196F/PSWG Position Paper 3 Governance in SOEs.pdf](https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/879CAE6C-7B90-49F5-A983-28AECBCE196F/PSWG%20Position%20Paper%203%20Governance%20in%20SOEs.pdf) > accessed 15 July 2019.

state-owned enterprises; hence the application of the reports might be quite limited in some instances. The South African legislator has developed the minimum standards for corporate governance and the King reports enhances the legislative governance provisions.⁵¹

It is affirmed that the King III and IV have highlighted the significance and have established the standard of code of conduct regarding the conduct of the boards of directors.⁵² The Code standardizes the director's conduct with the aim of ensuring compliance the legislative requirements and also ensuring that it complies with the best practices that are relevant to the specific company.⁵³ It is submitted that these reports even though they are only codes for best practices, have played a significant role in creating awareness and encouraging good corporate governance within South Africa.

5. The Public Finance Management Act

The Public Finance Management Act ⁵⁴ is another piece of legislation that plays a vital role in ensuring proper corporate governance in state-owned enterprises.⁵⁵ The Public Finance Management Act is the principal legislation governing financial matters of state-owned enterprises.⁵⁶ This Act applies to public institutions and it aims to secure sound management of resources, expenses, liabilities and the returns of public institutions by providing for specific processes and procedures to manage government's resources.⁵⁷

⁵¹ "Company Law: The Importance of the King IV'S Principles on Corporate Governance" <<https://www.strausdaly.co.za/2018/05/22/company-law-importance-king-ivs-principles-corporate-governance>> accessed on 17 July 2019.

⁵² The King Report on Corporate Governance in South Africa <<https://www.iodsa.co.za/page/kingIII>> accessed on 12 July 2019.

⁵³ Cassim *et al* (2012) 474 *supra* n 49.

⁵⁴ Act 1 of 1999.

⁵⁵ "Governance Oversight Role Over State-Owned Entities" <<http://www.treasury.gov.za/publications/other/soe/governance%20oversight%20Role.pdf>> accessed on 18 July 2019.

⁵⁶ "Protocol on corporate governance in the public sector" <https://www.gov.za/sites/default/files/gcis_document/201409/corpgov0.pdf> accessed on 19 July 2019.

⁵⁷ Section 2 and 3 of the Public Finance Management Act 1 of 1999.

Section 46 and 86 of the Act provides that each entity governed by this Act must have an executive authority which is the board of directors in the case of state-owned enterprises which is accountable for the purposes of the Act.⁵⁸ The Public Finance Management Act⁵⁹ bestows the authority to the executive authority for supervisory powers such as the corporate plans, shareholder's compacts and quarterly reports.⁶⁰

The Act has significantly assisted in creating uniformity amongst state-owned enterprises, it provides framework for financial reporting and accountability in order to ensure that public funds are utilized in the correct manner.⁶¹

It is asserted that the South African government has made great strides in developing legislation and regulations that govern state-owned enterprises; however, there is still a lot of work that needs to be done. The various laws and lack of dedicated legislation focusing on South African state-owned enterprises has adversely affected the governance of state-owned enterprises and it has created a lot of confusion in relation to the government's role as shareholder.⁶²

The assertion is that the Public Finance Management Act⁶³ has been a welcomed addition to the governance of state-owned enterprises and the strict adherence to the act ensures that proper financial management is achieved which directly impacts on the overall

⁵⁸Kanyane "Legislative and Regulatory Framework Review , The Role of State-Owned Enterprises in Skills Development and Job creation , State-Owned Enterprises contribution to Enterprise and Socio-Economic Development and the Qualitative Review of State-Owned Enterprises Landscape in South Africa " <<http://www.hsrc.ac.za/en/research-outputs/view/6231>> accessed on 05 August 2019.

⁵⁹ Act 1 of 1999.

⁶⁰ "Governance Oversight Role Over State-Owned Entities" <<http://www.treasury.gov.za/publications/other/soe/governance%20oversight%20Role.pdf>> accessed on 15 July 2019.

⁶¹ Kikeri "An Incomplete Transition: Overcoming the legacy of exclusion in South Africa" <<http://documents.worldbank.org/curated/en/798071529303940965/127288-WP-P161945-PUBLIC-Corporate-Governance-in-South-African-SOEs.docx>> accessed on 20 July 2019.

⁶² *Ibid.*

⁶³ Act 1 of 1999.

governances of state-owned enterprises. The accountability and obligations of the accounting authority are explicitly outlined by the Act.⁶⁴

6. State-owned enterprises enabling legislation

In addition to the Companies Act,⁶⁵ South African state-owned enterprise must comply with the provisions of the enabling and founding legislation. There are numerous enabling legislations within the various sectors just to mention a few the Broadcasting Act,⁶⁶ which was enacted to create and develop a broadcasting policy for South Africa.⁶⁷ The Public Investment Corporations Act⁶⁸ was enacted to establish the public investment corporations limited.⁶⁹

The South African Airways Act⁷⁰ was created to facilitate the transfer of shares from Transnet to the South African Airways limited.⁷¹ These enabling Acts make provision for the mandate of the particular state-owned enterprises, the corporate status of the entity and the powers to appoint the board of directors.⁷²

The enabling Acts are the most insightful resources for the board of directors to understand their role within these various institutions. However, provisions of these enabling Acts are not the same across the various state-owned enterprises; they create added procedural requirements, while limiting the control and accountability of state-

⁶⁴ Fourie “Institutional Mechanisms and Good Corporate Governance: A perspective on the South African Public Sector” 2009 *Journal of Public Administration*117.

⁶⁵ 71 of 2008.

⁶⁶ 153 of 1993.

⁶⁷ The Broadcastings Act 153 of 1993.

⁶⁸ 23 of 2004.

⁶⁹ Section 2(1) of the Public Investment Corporation Act 23 of 2004.

⁷⁰ 5 of 2007.

⁷¹ Section 2(a) of the South African Airways Act 5 of 2007.

⁷² National Treasury Presentation on Governance Over State-owned Entities

<http://www.treasury.gov.za/publications/other/soe/Presentation%20on%20Governance%20over%20State%20Owned%20Entities.pdf> accessed on 15 July 2019.

owned enterprises.⁷³ It is submitted that these founding Acts are of limited assistance in ensuring that good corporate governance is achieved across the various state-owned enterprises as they are not identical in nature. The wide range of various founding legislation and with the non-existence of dedicated legislation to state-owned enterprises has adversely affected the governance and weakened the state's role as shareholder.⁷⁴

Another important instrument in the governance of state-owned enterprises is the shareholder compact. The shareholder compact is an agreement that is used to outline the performance anticipations and it also provides a framework in relation to the relationship between the shareholder and the board of the state-owned enterprise.⁷⁵ It is asserted that the shareholder compact should be used as a tool to stabilize the relationship between the shareholder and the boards of state-owned enterprises and ultimately improving the state of corporate governance within these institutions.

Furthermore, it is submitted that this document can assist in outlining the role of the boards in relation to the shareholder's expectations of the boards performance, which will also assist in drawing a clear line between the functions of the boards and the role of the government as the owner.

7. The oversight role of governance within state-owned enterprises by the state

The oversight of the governance of state-owned enterprises is bestowed to parliament, the cabinet and the board of directors of the state-owned enterprise.⁷⁶ The first level of oversight over state-owned enterprises rests with the board of directors which has a

⁷³ Kikeri "An Incomplete Transition: Overcoming the Legacy of Exclusion in South Africa"

<<http://documents.worldbank.org/curated/en/798071529303940965/127288-WP-P161945-PUBLIC-Corporate-Governance-in-South-African-SOEs.docx>> accessed 28 July 2019.

⁷⁴ Kikeri "An Incomplete Transition: Overcoming the Legacy of Exclusion in South Africa"

<<http://documents.worldbank.org/curated/en/798071529303940965/127288-WP-P161945-PUBLIC-Corporate-Governance-in-South-African-SOEs.docx>> accessed 28 July 2019.

⁷⁵ "Governance Oversight Role Over State-Owned Entities"

<<http://www.treasury.gov.za/publications/other/soe/governance%20oversight%20Role.pdf>> accessed on 19 July 2019.

⁷⁶ *Ibid.*

monitoring and oversight role.⁷⁷ The board is directly responsible of ensuring that the state-owned enterprise achieves the strategic objectives as well as the commercial targets.⁷⁸

Government has multiple roles to play in relation to the functioning of state-owned enterprises. State-owned enterprises are accountable to government as the shareholder and the government provides other various oversight roles in relation to state-owned enterprises.⁷⁹ The constitutional oversight over state-owned enterprises is provided by parliament as it assesses the performance of state-owned enterprises through the standing committee on public accounts.⁸⁰

State-owned enterprises account for their financial returns and the execution of their mandate to the relevant line minister as the shareholder representative.⁸¹ The minister is responsible for providing oversight in relation to the achievement of service delivery and ensuring the achievement of the financial goals.⁸² The functions of the shareholder oversight are divided amongst the various government departments due to the different ministerial heads that state-owned enterprises report under while some departments

⁷⁷ “How Governance failures messed up Prasa” < <https://mg.co.za/article/2017-03-15-how-governance-failures-messed-up-prasa> > accessed on 30 July 2019.

⁷⁸ “State-owned enterprises: Governance responsibility and accountability” https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/879CAE6C-7B90-49F5-A983-28AECBCE196F/PSWG_Position_Paper_3_Governance_in_SOEs.pdf > accessed on 20 July 2019.

⁷⁹ *Ibid.*

⁸⁰ Kikeri “An Incomplete Transition: Overcoming the Legacy of Exclusion in South Africa < <http://documents.worldbank.org/curated/en/798071529303940965/127288-WP-P161945-PUBLIC-Corporate-Governance-in-South-African-SOEs.docx> > accessed on 18 July 2019.

⁸¹ “Governance Oversight Role Over State-Owned Entities” < <http://www.treasury.gov.za/publications/other/soe/governance%20oversight%20Role.pdf> > accessed On 19 July 2019.

⁸² “State-owned enterprises: Governance responsibility and accountability” https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/879CAE6C-7B90-49F5-A983-28AECBCE196F/PSWG_Position_Paper_3_Governance_in_SOEs.pdf > accessed on 20 July 2019.

concentrate on policy implementation.⁸³ The accountability relating to the financial returns is governed by the prescripts of the Public Finance Management Act.⁸⁴

It is submitted that proper financial management is an essential element of good corporate governance, especially within state-owned enterprises.

Government also functions as a policymaker, it has the authority to create and direct policy through the cabinet.⁸⁵ The cabinet determines the suitable and preferred policy in line with the objectives of government.⁸⁶ Government evaluates service delivery policies, the performance of these institutions in line with their objectives and it also functions as a regulator for the various sectors ensuring that state-owned enterprises conform to rules and regulations that are within the different sectors.⁸⁷

The study asserts that this separation of functions is a good practice to ensure that there are some form of checks and balance in relation to the shareholder oversight. It is important to note that even though the shareholder oversight is divided amongst the various parts of the state. The shareholder is still not involved in the operations of the state-owned enterprises, the oversight is provided in relation to the financial management, the policy implementation and the regulation of the various state-owned enterprises.

⁸³ "Governance Oversight Role Over state-owned entities"

<<http://www.treasury.gov.za/publications/other/soe/governance%20oversight%20Role.pdf>> accessed on 20 July 2019.

⁸⁴ *Ibid.*

⁸⁵ Kikeri "An Incomplete Transition: Overcoming the Legacy of Exclusion in South Africa"

<<http://documents.worldbank.org/curated/en/798071529303940965/127288-WP-P161945-PUBLIC-Corporate-Governance-in-South-African-SOEs.docx>> accessed on 22 July 2019.

⁸⁶ "State-owned enterprises: Governance responsibility and accountability"

<https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/879CAE6C-7B90-49F5-A983-28AECBCE196F/PSWG_Position_Paper_3_Governance_in_SOEs.pdf> accessed on 08 August 2019.

⁸⁷ "Governance Oversight Role Over State-Owned Entities"

<<http://www.treasury.gov.za/publications/other/soe/governance%20oversight%20Role.pdf>> accessed on 12 August 2019.

It is probable that clashes arise within the oversight of state-owned enterprises due to the various roles that the government plays as a shareholder, policy creator and regulator.⁸⁸ The roles of government often coincide consequently good governance is adversely affected.⁸⁹ The regulator role of the government might cause challenges in that particular policies will advance certain political agendas rather than the shareholder interests.⁹⁰

The study asserts that government is currently unable to effectively perform the oversight function as required. The parliament does not possess the required capacity to dissect the financial, reports and to effectively monitor the performance of state-owned enterprises.⁹¹ Senior managers and executives of state-owned enterprises act as owners of these institutions due to the powers available at their disposal and the lack of checks and balances by the oversight structures.⁹²

The various functions of government as shareholder, policy maker and regulator should be clearly outlined, so that each role-player is aware of their specific responsibility and this will eliminate the overlapping of functions consequently improve the oversight function.⁹³

⁸⁸ Kikeri "An Incomplete Transition: Overcoming the legacy of exclusion in South Africa"
<<http://documents.worldbank.org/curated/en/798071529303940965/127288-WP-P161945-PUBLIC-Corporate-Governance-in-South-African-SOEs.docx>> accessed on 12 August 2019.

⁸⁹ "State-owned enterprises: Governance responsibility and accountability"
<https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/879CAE6C-7B90-49F5-A983-<28AECBCE196F/PSWG Position Paper 3 Governance in SOEs.pdf 9>> accessed on 08 August 2019.

⁹⁰ State-owned enterprises: Governance responsibility and accountability"
<https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/879CAE6C-7B90-49F5-A983-<28AECBCE196F/PSWG Position Paper 3 Governance in SOEs.pdf 9>> accessed on 08 August 2019.

⁹¹ *Ibid.*

⁹² Cheteni and Khamfula "State-Owned Enterprises in South Africa: A Pinocchio Paradox" 2018 *Africa growth Agenda Journal* 6 *supra* n 10.

⁹³ "State-owned enterprises: Governance responsibility and accountability"
<<https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/879CAE6C-7B90-49F5-A983-28AECBCE196F/PSWG Position Paper 3 Governance in SOEs.pdf>> accessed on 09 August 2019.

8. The role of the Companies and Intellectual Property Commission

The study affirms that government is not the only role player who has an oversight function in relation to state-owned enterprises. It is asserted that the Companies and Intellectual Property Commission as mandated to monitor proper compliance of the provisions of the Act,⁹⁴ has an active role to play in achieving this function.

Section 185⁹⁵ establishes the companies and intellectual property commission, the functions of the commission include the monitoring of compliance with the Companies Act,⁹⁶ accepting and commencing complaints relating to infringements of the Act,⁹⁷ handing out and implementing compliance notice,⁹⁸ transferring alleged transgressions in terms of the Act to the National Prosecuting Authority where applicable⁹⁹ and handover matters to court and take part in proceedings before court or the companies tribunal.¹⁰⁰ It is submitted the Companies and Intellectual Property Commission has been mandated to play an active role in ensuring compliance with the provisions of the Companies Act.

To this effect there have been instances where the Commission has taken some steps in relation to state-owned enterprises such as addressing letters to certain boards of directors in relation to remedial actions that have been taken by these institutions to address the findings by the Auditor General.¹⁰¹ In 2013 the Commission issued a compliance notice to the board chairperson South African Airways for misrepresenting a board resolution.¹⁰² A writ of execution to the value of R201 050.08 has since been issued in 2018 emanating from the compliance notice that was issued by the Commission.¹⁰³

⁹⁴ Section 187(1) (b) of the Companies Act 71 of 2008.

⁹⁵ Section 185 of the Companies Act 71 of 2008.

⁹⁶ Section 187(1) (b).

⁹⁷ Section 187(1) (c).

⁹⁸ Section 187(1) (g).

⁹⁹ Section 187 (1) (h).

¹⁰⁰ Section 187(1) (i).

¹⁰¹ <https://chartsec.co.za/documents/2014SpeakerPresentations/day2/5_LanavanZyl.pdf>15 accessed 10 August 2019.

¹⁰² < http://www.cipc.co.za/index.php/download_file/view/59093/1379/> accessed on 10 August 2019.

¹⁰³ < <https://www.dailymaverick.co.za/article/2019-09-19-justice-department-wants-former-saa-chair-dudu-myeni-to-pay-up-after-that-fundamentally-misleading-letter/>> accessed on 27 November 2019.

These interventions by the Commission indicate some willingness from the Commission to monitor the compliance of the Companies Act within state-owned enterprises.

However, it is submitted that these interventions are not enough to assume that the Commission is complying with its mandate as provided for in the Companies Act. It is further asserted that the Commission as the custodian of the Companies Act should be proactive in ensuring that state-owned enterprises are complying with the provisions of the Act, it is empowered with more powers than just issuing compliance notices.

9. Conclusion

The study has provided an exposition of the various legislation and policy documents that form part of the governance structure of state-owned enterprises. It is apparent from the previous sections that the South African government has made some strides in developing a corporate governance framework. The central piece of legislation relating to state-owned enterprises is the Companies Act¹⁰⁴, of which it was submitted that it lacks specific provisions that address challenges unique to state-owned enterprises.

The study asserts that the best recourse for the South African government would be to develop legislation that specifically caters for state-owned enterprises as recommended by the presidential review commission and to also consider the enactment of the protocol on corporate governance in the public sector as means of strengthening the governance framework in the public sector.

The study has also outlined the significant role that the Public Finance Management Act¹⁰⁵ plays in promoting proper governance with the public sector by imposing strict financial management prescripts. An analysis of the various oversight role of the government was explored and additionally the study asserted that the Companies and Intellectual Property Commission also has a dynamic oversight role to play in ensuring that state-owned enterprises comply with the governance provision of the Companies Act.

¹⁰⁴ Act 71 of 2008.

¹⁰⁵ Act 1 of 1999.

The reporting structure of state-owned enterprises which consists of these institutions reporting to different ministers is possibly be a contributing hindrance to good governance within these institutions, due to the monitoring of the governance of state-owned enterprises not being coherent. Howard and Seith-Purdie assert that in order for good governance framework to be efficient, capable monitoring systems must be developed in order to ensure the efficiency of such.¹⁰⁶

The study acknowledges the progress that government has made in attempting to address governance with legislation and policies. It further welcomes the proposed government shareholder management bill which is aimed at legislating state-owned enterprises. It is affirmed that government should improve the oversight role and hold these institutions accountable for any failure to comply with the governance prescripts.

¹⁰⁶ Thomas 2012 *Social Responsibility Journal* 453 *supra* n 2.

Chapter 3: An insight into the corporate governance culture within South African state-owned enterprises.

1. Introduction

This chapter provides an overview of the corporate failures within South African state-owned enterprises. The chapter further provides a brief analysis of the nature of the corporate failures within the most significant South African state-owned enterprises such as the South African Broadcasting Corporation and the Public Investment Corporation, as well as evaluating the regulatory framework of these corporations. A critical analysis on the existence of effective corporate governance practices within state-owned enterprises will be conducted and the consequences of the existence or non-existence of good corporate governance will be evaluated. The purpose of the study is to analyse the current corporate culture within state-owned enterprises in order to establish the liability of the board of directors.

Corruption and corporate governance contraventions within in state-owned enterprises have become an international problem.¹⁰⁷ Good corporate governance is crucial in state-owned enterprises due to the magnitude of these institutions in South Africa.¹⁰⁸ In recent years the global corporate scandals and failures have necessitated the need of further

¹⁰⁷ Thomas 2012 *Social Responsibility Journal* 448 *supra* n 2.

¹⁰⁸ "Corporate governance state-owned enterprises reform" <https://www.oecd.org/policy-briefs/south-africa-state-owned-enterprise-reform.pdf> 2015 accessed on 21 August 2019.

advances in relation to corporate governance and this has also placed emphasizes on the lack of functional accountability measures within corporations.¹⁰⁹

Some of the major challenges that have been identified in South African state-owned enterprises include board negligence when dealing with the affairs of the company, irregularities relating to tender processes, non-compliance with the fiduciary duties, bribery and corruption, excessive concurrent board appointment and conflicts of interests amongst the executives, the board and the line ministers.¹¹⁰

2. An overview of the governance within South African state-owned enterprises.

2.1 The South African Broadcasting Corporation

The South African Broadcasting Corporation is a state-owned enterprise that was created to function as the national public broadcaster.¹¹¹ The Corporation is governed by the Broadcasting Act,¹¹² which provides that the purpose of the Act was to create and improve the broadcasting policy for the advantage of the public interest in the Republic.¹¹³ The state is the sole shareholder of the Corporation¹¹⁴ and the Minister of Communication exercises the ownership function on behalf of the government.

The Broadcasting Act¹¹⁵ outlines the governance of the Corporation in part five of the Act. The Act specifically dictates that twelve non-executive directors must be appointed by the President upon the recommendation of Parliament and it further provides that the Group Chief Executive Officer, the Chief Financial Officer and the Chief Operations Officer should form part of the board.¹¹⁶ It is evident from the said provisions that the legislature

¹⁰⁹ Cassim *et al* (2012) 473 *supra* n 49.

¹¹⁰ Thomas 2012 *Social Responsibility Journal* 451 *supra* n 2.

¹¹¹ Thabane and Snyman- Van Deventer 2018 *PER / PELJ* 17 *supra* n 1.

¹¹² The Broadcasting Act 4 of 1999.

¹¹³ *Ibid.*

¹¹⁴ *Ibid* at Section 8A (2).

¹¹⁵ Act 4 of 1999.

¹¹⁶ *Ibid* at Section 12 and 13.

had intended for the appointment and the composition of the board of the Corporation to be independent.

The Public Protector released a report in 2014 which is titled “*When Governance and Ethics Fail.*” It emphasized various corporate governance shortfalls within the South African Broadcasting Corporation such as the irregular recruitment of the Chief Financial Officer which was orchestrated by the Minister of Communications, the failure of the board of directors to provide strategic direction and oversight to the Corporation and the irregular employment and salary advancement of the Chief Operations Officer.¹¹⁷ It is submitted that the Ministerial interference in relation to the recruitment of the of the Chief Financial Officer is unwarranted and it is a breach of good corporate governance, in that the role of the shareholder should be limited to providing oversight and monitoring the performance of the board.

Thomas provides that the role of government as a shareholder should be confined to setting objectives and performance targets for the state-owned enterprise, appointing directors, monitoring the performance of the Corporation and the board, while the board on the other hand is empowered with the authority to direct and oversee the performance of the Corporation.¹¹⁸ It is asserted that the corporate governance failures highlighted in the report by the Public Protector set out a picture of a Corporation that does not adhere to the principles of good corporate governance and further the board of directors has been complacent with the transgressions of good corporate governance principles and practices.

A further detrimental development which took place within the Corporation was the amendment of the organization’s Memorandum of Incorporation by the Minister of Communications, in terms of which the Minister amended the memorandum to empower herself with the authority to appoint and to remove the executive directors of the board.¹¹⁹

¹¹⁷ The Public Protectors Report “When Governance and Ethics fail” 2014 <https://www.gov.za/documents/when-governance-and-ethics-fail-investigation-allegation-maladministration-systemic> accessed on 08 September 2019.

¹¹⁸ Thomas 2012 *Social Responsibility Journal* 450 *supra* n 2.

¹¹⁹ Thabane and Snyman- Van Deventer 2018 *PER / PELJ* 18 *supra* n 1.

In contrast to good corporate governance practice which dictates that the executive directors are accountable to the board of directors.¹²⁰ In *SOS Support Public Broadcasting Coalition v South African Broadcasting Corporation SOC Limited*¹²¹ both applications were in relation to the legality of the powers vested in the Minister in terms of the amended Memorandum of Incorporation.¹²² The court reiterated that the Minister acts as the shareholder representative and not a member of the board of directors and consequently does not have the authority to act on behalf of the Corporation or to manage the business of the Corporation.¹²³ In respect of the first application the court ordered that the appointment of the executive directors shall be conducted solely by the non-executive directors and the board shall have the powers to discipline the executive directors.¹²⁴ In the second application the court provided that the board of the Corporation may not be removed unless the provisions of section 15 of Broadcasting Act¹²⁵ are complied with.¹²⁶

According to Cassim the decision of the court is a welcomed clarification with regards to the confusion of the powers of the Minister over the Corporation's board of directors and the conflicting provisions of the Companies Act¹²⁷ and the Broadcasting Act,¹²⁸ the court also emphasized the need of for the Corporation's board of directors to remain independent as it reports to the Parliament and not the Minister.¹²⁹

¹²⁰ "State-Owned Enterprises: Governance responsibility and accountability"

https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/879CAE6C-7B90-49F5-A983-28AECBCE196F/PSWG_Position_Paper_3_Governance_in_SOEs.pdf accessed on 12 September 2019.

¹²¹ *SOS Support Public Broadcasting Coalition v South African Broadcasting Corporation SOC Limited and others, SOS Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation SOC Limited and Others* 2017 ZAGPJHC 289.

¹²² *Ibid* at par 4.

¹²³ *SOS Support Public Broadcasting Coalition v South African Broadcasting Corporation SOC Limited supra* n120 at par 122.

¹²⁴ *Ibid* at par 146.

¹²⁵ The Broadcasting Act 4 of 1999.

¹²⁶ *SOS Supporting Public Broadcasting Coalition v South African Broadcasting Corporation SOC Limited supra* n 120 at par 146.

¹²⁷ The Companies Act 71 of 2008.

¹²⁸ The Broadcasting Act 4 of 1999.

¹²⁹ Cassim "Removing Directors of State-Owned Companies - *SOS Support Public Broadcasting Coalition v South African Broadcasting Corporation SOC Limited*" 2019 *Obiter* 161.

The above exposition indicates that the South African Broadcasting Corporation has developed a well-thought out legislation that caters for the unique nature of the Corporation. However the Minister's lack of understanding of the role of the shareholder has jeopardized the principles of good corporate governance and in some instances the Minister has violated the provisions of the Broadcasting Act¹³⁰ by unreasonably interfering in the recruitment of the executives of the Corporation and thus taking away the function of the board of directors to manage the affairs of the Corporation.

It is further asserted that the board was also complacent and failed to execute their fiduciary duties towards the Corporation by allowing corporate governance transgressions which include the unwarranted salary increases of the Chief Executive Officer, impropriety in relation to procurement processes, irregular appointments of some executive management to take place under their leadership as mentioned in the Public Protector's report.¹³¹

2.2 The Public Investment Corporation

The Public Investment Corporation is a state-owned enterprise, with government as the sole shareholder and the Minister of Finance acting on behalf of government as the shareholder representative.¹³² The Public Investment Corporations Act¹³³ established the Corporation in 2005.¹³⁴ The board is bestowed with the authority to control and to direct the business of the Corporation.¹³⁵ The board of the Corporation further derives its powers from the board charter and the Memorandum of Incorporation.¹³⁶ The Public

¹³⁰ Section 13(11) of the Broadcasting Act 4 of 1999.

¹³¹ The Report by the Public Protector "When Governance and Ethics Fail 2014": <https://www.gov.za/documents/when-governance-and-ethics-fail-investigation-allegation-maladministration-systemic> accessed on 10 September 2019.

¹³² <https://www.pic.gov.za/who-we-are/about-us> accessed on 05 September 2019.

¹³³ The Public Investment Corporation Act 23 of 2004.

¹³⁴ <https://www.pic.gov.za/who-we-are/about-us> accessed on 05 September 2019.

¹³⁵ Section 8 of the Public Investment Corporation Act 23 of 2004.

¹³⁶ <https://www.pic.gov.za/Pages/board.aspx> accessed on 06 September 2019.

Investment Corporation is the major sole investor in stocks on the Johannesburg Stock Exchange and trades for the benefit of the public sector entities.¹³⁷

It is asserted that this state-owned enterprise has a unique feature in that government is the sole shareholder and it also provides investment services to the government departments. In recent years the Corporation has faced various allegations of impropriety including the Chief Executive Officer being accused of breaching the Corporation's IT governance protocol and orchestrating investment deals that personally benefit him or people related to him, which finally led to a Commission of enquiry being established.¹³⁸

In 2018 the Commission of enquiry into the Public Investment Corporation was established and mandated to investigate allegations of impropriety at the Corporation.¹³⁹ The enquiry established seventeen terms of reference, which include an enquiry into whether certain investment transactions breached the Public Investment Corporation policy and also whether the board or the executives unduly benefited from any transactions or unduly benefitted another person using his or her position in the Corporation.¹⁴⁰ The terms of reference also provide that an analysis should be conducted into the effectiveness of the board of directors of the Corporation and their conduct with regards to any impropriety at the Corporation.¹⁴¹

On the 1st of February 2019 the board of the of the Corporation resigned stating that the enterprise has been destabilized due to the various allegations levelled against some of the board members.¹⁴² The resignation of the board came at the time while the commission of enquiry was still proceeding. Nonetheless the resignation of the board of

¹³⁷ Davis *et al* *Companies and other business structures in South Africa* (2011) 29.

¹³⁸ <https://citizen.co.za/news/south-africa/investigation/2135528/quagmire-of-allegations-pile-up-against-dan-matjila/> accessed on 06 September 2019.

¹³⁹ South Africa 2018 Commission of Enquiry into Allegations of Impropriety Regarding the Public Investment Corporation *Government Gazette* no 41797:30 of 17 October.

¹⁴⁰ <http://hnesslive.co.za/bd/opinion/editorials/2019-01-22-editorial-pic-inquiry-will-be-the-most-challenging-of-all/ttps://www.busi> accessed on 09 September 2019.

¹⁴¹ South Africa Department of Justice and Constitutional Development 2018 Rules Governing proceedings of the Judicial Commission of enquiry into allegations of impropriety regarding the Public Investment Corporation *Government Gazette* no 42117:809 of 18 December.

¹⁴² <https://citizen.co.za/news/south-africa/government/2075810/this-is-why-the-pic-board-resigned> accessed on 12 September 2019.

directors is a welcomed gesture in that given the important role that this state-owned company performs in realizing the socio-economic goals of the state, it is vital that these institutions be governed with sensible accountability, transparency and ethically.¹⁴³

The Minister of Finance in July 2019 appointed the new board of directors and disregarded the tradition of having the deputy Minister of Finance as the chairman of the Public Investment Corporation board.¹⁴⁴ It is submitted that the Minister's decision is correct due to the fact that this practice only existed in relation to the Public Investment Corporation and that there is no rationale to support the practice and it is further asserted that this practice does not promote good corporate governance practices in that the appointment will be purely a political appointment to the board. To date the report of the Commission has not been released. It is asserted that the negative reports and allegations regarding the management and the board of the Corporation adversely affect the stability and ethical leadership of the Corporation.

Perceptions of corruption and non-adherence to good corporate practices adversely impact foreign investment in the country¹⁴⁵ Ethics and integrity are the basis of corporate governance and the board should ensure that their conduct and that of the management is ethical.¹⁴⁶ The report on the findings and the recommendations of the Commission is eagerly awaited.

2.3 The South African Airways

The South African Airways is a state-owned enterprise which is regulated in terms of the South African Airways Act.¹⁴⁷ The Act does not contain any specific provisions outlining the corporate structure of the Airline; hence the enterprise is bound to comply with the provisions of the Memorandum of Incorporation, the Companies Act¹⁴⁸ and the King III

¹⁴³ Thomas 2012 *Social Responsibility Journal* 450 *supra* n 2.

¹⁴⁴ <http://www.sabcnews.com/sabcnews/politicians-should-not-have-been-appointed-to-pic-board-mboweni> accessed on 10 September 2019.

¹⁴⁵ Thomas 2012 *Social Responsibility Journal* 449 *supra* n 2.

¹⁴⁶ Cassim *et al* (2012) 476 *supra* n 49.

¹⁴⁷ The South African Airways Act 5 of 2007.

¹⁴⁸ The Companies Act 71 of 2008.

report on Corporate Governance in relation to the corporate structure of the board of the directors.¹⁴⁹ The enterprise functions as the national airline carrier and over the last several years it has experienced a number of corporate governance challenges.¹⁵⁰

Upon the establishment of the Airline in 2007 the executive authority was conferred to the Minister of Public Enterprise and in 2014 this authority was transferred to the National Treasury, the Minister of Finance became the shareholder representative.¹⁵¹ The Airline has experienced boardroom turmoil for a while in that there has been an extraordinary governance instability due to the high number of board restructuring and Chief Executive Officer's resignation and dismissals.¹⁵²

The Airline further experienced a great challenge in retaining leadership staff, given that in a period of three years the Airline changed five Chief Executive Officers.¹⁵³ Since 2009 a culture of ousting Chief Executive Officers and the board of directors has been practiced at the enterprise, with a number of different Ministers of the Department of Public Enterprises having opposed the numerous Chief Executive Officer's and the board of the Airline and subsequently pushing them out due to the preference of their own political candidates.¹⁵⁴ It is asserted that this has negatively impacted on the governance of the entity in that it has created a lack of stability within the management of the entity. The said conflicts emphasize an internal governance challenge in relation to proper and stable leadership which is an essential element of an effective corporate governance system.¹⁵⁵

¹⁴⁹ The South African Airways Annual Report 2015/2016

<https://www.flysaa.com/documents/51855150/51859528/SAA+IAR+2015.pdf/a2f72b91-0dde-4c5f-b3aa-6ed7dc6f4726> accessed on 16 September 2019.

¹⁵⁰ Thabane and Snyman- Van Deventer 2018 *PER / PELJ* 15 *supra* n 1.

¹⁵¹ Makoni "The Challenges of Acting CEO'S in state-owned enterprises: The case of the South African Airways" 2015 *Corporate Board: Role, Duties and Composition* 21.

¹⁵² Padayachee "King IV is here Corporate Governance in South Africa Revisited" 2016 *New Agenda* 21.

¹⁵³ Mhlanga "Factors negatively impacting on the performance of state airlines in Southern Africa: A case study of four state carriers" 2017 *African Journal of Hospitality, Tourism and Leisure* 5.

¹⁵⁴ Makoni 2015 *Corporate Board: Role, Duties and Composition* 21 *supra* n 149.

¹⁵⁵ Thabane and Snyman- Van Deventer 2018 *PER / PELJ* 16 *supra* n 1.

The Minister, as the shareholder representative, is tasked with holding the board of the state-owned enterprise accountable, the Minister is also entitled to appoint and dismiss the board of directors.¹⁵⁶ The Airline was unfortunately unable to avoid political interference given that some of the board members were political appointees and the Minister of Public Enterprise interfered by abruptly dismissing half of the board at one instance.¹⁵⁷ The reported conflict between the shareholder representative and the board of the Airline due to political preferences indicates an apparent breach of good corporate governance practice by the Minister as the shareholder representative.¹⁵⁸ When appointments are made in terms of political affiliations the capability and impartiality of the board members is compromised in that they might place the interests of the political party ahead of the interests of the enterprise.¹⁵⁹ It is therefore argued that it is undesirable to have political appointees as part of the board of directors of state-owned enterprises as this might cause a conflict of interest.

In the 2015/2016 financial year end the Airline functioned with a board complement of seven board members and only four of those members were non-executive directors two further board members subsequently resigned later in 2015.¹⁶⁰ Consequently after the resignation of the two directors the Airline board was left with the minimum number which is five members as prescribed by the Memorandum of Incorporation.¹⁶¹ According to Cassim the main objective of appointing non-executive directors is to bring an independent and unbiased perspective and the non-executive directors play an important role in relation to monitoring the executive directors.¹⁶²

¹⁵⁶ Section 71 of the Companies Act 71 of 2008.

¹⁵⁷ Mhlanga 2017 *African Journal of Hospitality, Tourism and Leisure* 6 *supra* n 151.

¹⁵⁸ Makoni 2015 *Corporate Board: Role, Duties and Composition* 22 *supra* n 149.

¹⁵⁹ Thomas 2012 *Social Responsibility Journal* 450 *supra* n 2.

¹⁶⁰ The South African Airways Annual Report 2015/2016

<https://www.flysaa.com/documents/51855150/51859528/SAA+IAR+2015.pdf/a2f72b91-0dde-4c5f-b3aa-6ed7dc6f4726> accessed on 16 September 2019.

¹⁶¹ The South African Airways Annual Report 2016/2017.

https://www.flysaa.com/documents/51855150/0/SAA_IAR+2017.pdf/22db54be-b1f5-404a-99fd-d12f3fe9e56b accessed on 18 September 2019.

¹⁶² Cassim *et al* (2012) 478 *supra* n 49.

It is thus asserted that the board of the South African Airways was clearly compromised during this period due to the small number of members on the board and only having four non-executive directors. Furthermore, another concerning issue with this situation is the level of independence the four board members are able to maintain during such circumstances, it thus not unforeseen that the Airline would be open to various challenges including the maintenance of good corporate governance practices.

Other corporate governance challenges that are not unique to the South African Airways but rather affect other state-owned enterprises include the involvement of the executive management and some of the board members being associated with tender irregularities and the lack of suitable qualifications of the executive management and certain board members.¹⁶³

It is asserted that the board is essentially tasked with providing oversight to the state-owned enterprise and the functions of presiding over procurement processes should preferably be left in the terrain of the management of the Airline.¹⁶⁴

The situation with the inadequate number of board members has since improved at the Airline; the current board complement consists of eleven non-executive directors and two executive directors.¹⁶⁵ This is an encouraging development within the Airline and it can possibly be viewed as a positive step in moving towards proper governance of the Airline.

It is evident from the above exposition that the Airline has been rocked by various corporate challenges and that there have been failures from both the board of directors and the shareholder in ensuring that proper governance practices were executed within the enterprise. What remains a concerning is the lack of accountability in relation to the transgressions that have transpired within the Corporation.

The Organisation Undoing Tax Abuse has since taken it upon itself to attempt to hold the former chairperson of the board for the corporate transgressions that occurred during her

¹⁶³ Thabane and Snyman-Van Deventer 2018 *PER/PELJ* 15 *supra* n 1.

¹⁶⁴ Mc Kay "Getting rid of the rot in Transnet" 2019 *Finweek* 9.

¹⁶⁵ The South African Airways Annual Report 2016/2017.

https://www.flysaa.com/documents/51855150/0/SAA_IAR+2017.pdf/22db54be-b1f5-404a-99fd-d12f3fe9e56b
accessed on 18 September 2019.

tenure. The organisation has lodged an application to declare her as a delinquent director based on the corporate transgressions which include providing false information to the Minister of finance regarding a board resolution that related to the purchase of aircrafts and interfering with the Emirates deal that was already approved by the board.¹⁶⁶ It remains to be seen whether the application will be granted and if there will be any form of accountability for such major contraventions.

2.4 Eskom

Eskom is one of South Africa's major state-owned enterprises as it is the largest supplier of electricity in the country.¹⁶⁷ Eskom was transformed from a legal body to a public company in 2002 in terms of the Eskom Conversion Act 12 of 2001.¹⁶⁸ Section 2 of the Act provides that the state is the sole shareholder of the share capital in Eskom holdings.¹⁶⁹

Over the past several years Eskom has experienced various challenges at the center of these challenges is a series of corporate governance failure challenges. The corporate governance issues include allegations that the board was incorrectly appointed and failed to adhere to the principles of the King III report on good Corporate Governance, that the board also failed to uphold their duty to act in the best interests of the company, that there was also a lack of internal controls in place to minimize or eliminate any conflicts of interest and that the Minister of Public Enterprise as the shareholder representative failed to provide oversight by ensuring that conflicts of interests were avoided.¹⁷⁰

¹⁶⁶ OUTA < <https://outa.co.za/projects/transport/dudu-myeni> > accessed on 28 November 2019.

¹⁶⁷ Thabane and Snyman- Van Deventer 2018 *PER / PELJ* 20 *supra* n 1.

¹⁶⁸ < <http://www.eskom.co.za/OurCompany/CompanyInformation/Pages/Legislation.aspx> accessed on 19 August 2019.

¹⁶⁹ Section 2 of the Eskom Conversion Act 13 of 2001.

¹⁷⁰ Dassah "Theoretical analysis of state capture and its manifestation as a governance problem in South Africa" 2018 *The Journal for the Transdisciplinary Research in South Africa* 6.

Other major governance challenges that have come to the forefront in recent years within the entity include the scrutiny of procurement processes at the entity due to allegations of corruption and misrepresentations, the former Group Chief Executive Officer having been found to have benefitted from a number of coal deals that were concluded under his tenure at the Corporation and the generous retirement amount he obtained from the Corporation.¹⁷¹

In 2016 the Public Protector released a report named “*The state capture*” which found that the board of Eskom was appointed improperly and not in line with the principles of the King III report on corporate governance and that there were no mechanisms in place to address potential conflicts of interest and bias, the report highlighted the close relationship that the Group Chief Executive Officer and other senior personnel at Eskom had with the Gupta family, the report further held that the Minister of Public Enterprises failed to intervene in order to resolve or prevent such conflicts of interest within the entity.¹⁷² The report further held that the Eskom board failed to exercise the duty of care and contravened the provisions of the Public Finance Management Act¹⁷³ in the various transactions that occurred between the entity and the Gupta owned company Tegeta.¹⁷⁴

It is evident from the findings of the Public Protector that both the Minister of Public Enterprises and the board of directors were not diligent in the execution of their functions and that they elected to flout the governance framework of the entity.

The Public Protector’s report also outlined a trail of suspicious transactions that took place at the entity which benefitted the Gupta owned company Tegeta such transactions include the awarding of certain contracts and prepayment to Tegeta and the subsequent acquisition of Optimum Coal Mine shares by Tegeta.¹⁷⁵ It is asserted that these

¹⁷¹ Cheteni and Khamfula 2018 *Africa Growth Agenda Journal* 6 *supra* n 10.

¹⁷² The Public Protector Report on the State Capture 2016 <http://saflii.org/images/329756472-State-of-Capture.pdf> accessed on 20 September 2019.

¹⁷³ The Public Finance Management Act 1 of 1999.

¹⁷⁴ The Public Protector’s Report on the State Capture 2016 <http://saflii.org/images/329756472-State-of-Capture.pdf> accessed on 20 September 2019.

¹⁷⁵ The Public Protector’s Report on the State Capture 2016 <http://saflii.org/images/329756472-State-of-Capture.pdf> accessed on 20 September 2019.

occurrences at the entity are indicative of a corrupt entity which lacks proper corporate governance practices while proper corporate governance framework exists to guide the entities governance.

Following the findings of the Public Protector in the state capture report, the Portfolio Committee on Public Enterprise in 2017 took a resolution to establish an enquiry into the governance, procurement and financial sustainability of Eskom. The enquiry was tasked with investigating the appointment of board members and management, the retirement and reappointment of the Group Chief Executive Officer, allegations into procurement irregularities and allegations of impropriety of the acting Chief Executive Officer.¹⁷⁶

The committee found that the board of Eskom failed to provide the required oversight in relation to the executives of the entity and the payout of the former Group Chief Executive Officer.¹⁷⁷ The matter was latter challenged in a court case in which the *Democratic Alliance v the Minister of Public Enterprise*¹⁷⁸ the applicants sought relieve to review and set aside the decision by the Minister of Public Department to appoint and or reinstate the former Group Chief Executive Officer to his previous position after he had left the entity and allegedly entered into an early retirement agreement with Eskom.¹⁷⁹

The court held that the pension payout had no rationale and that it was unlawful and it further ordered the Group Chief Executive Officer to repay the pension pay out he received.¹⁸⁰The court further held that the Minister and the board of the power utility were unreasonable in not taking into account the Public Protector's allegations in relation to the Group Chief Executive Officer Mr. Molefe, while proceeding to reappoint him to his former position as there was no legal basis for the reappointment. ¹⁸¹

¹⁷⁶ The Final Report of the Portfolio Committee on Public Enterprises on the Enquiry into Governance, Procurement and Financial Sustainability of Eskom Dated 28 November
<https://www.parliament.gov.za/storage/app/media/Links/2018/November%202018/28-11-2018/Final%20Report%20-%20Eskom%20Inquiry%2028%20NOV.pdf> 6 accessed on 20 September 2019.

¹⁷⁷ *Ibid*.

¹⁷⁸*Democratic Alliance v the Minister of Public Enterprise and others; Economic Freedom Fighters v Eskom and others; Solidarity Trade Union v Molefe and others* 2018 ZAGPPHC 1.

¹⁷⁹ *Ibid* at par 1.

¹⁸⁰ *Ibid* at par 82.

¹⁸¹ *Ibid* at par 80.

The Portfolio Committee on Public Enterprises further found that Minister Brown failed to provide oversight in relation to the conduct of the board which resulted in gross governance transgressions and failure to uphold the fiduciary duties owed to the company.¹⁸² Lastly there was failure of maintain clear separation of accountability and responsibility between the management, the board and the shareholder.¹⁸³The Committee made various recommendations which include the evaluation of the entity's rules and processes, as well as the guidelines and processes of the Ministry of Public Enterprises in order to evaluate their compliance with other regulatory legislation,¹⁸⁴ the board should prevent the renewal of contracts that have adverse financial impact on the entity.¹⁸⁵

In 2018 Eskom made an application to court to review and set aside its illegal resolutions which resulted in the payment of R1.7 billion to Mc Kinsey and Company Africa Pty Ltd, Trillian Management Consulting (Pty) Ltd and Trillian Capital Partners.¹⁸⁶ The contention made by Eskom was that Trillian benefited from a payment of R30, 6 million and there was no work performed by the company and on the other hand Trillian alleges that Eskom gained value from work that the company performed.¹⁸⁷

The court found that there was no legal nor contractual obligation in relation to the payment made to Trillian, that there was an existence of a corrupt relationship between senior Eskom employees who were expected to act in good faith for the benefit of the Enterprise and the directors of Trillian and consequently Trillian should not benefit from

¹⁸² Final Report of the Portfolio Committee on Public Enterprises on the Enquiry into Governance, Procurement and Financial sustainability of Eskom date 28 November 2018.

<https://www.parliament.gov.za/storage/app/media/Links/2018/November%202018/28-11-2018/Final%20Report%20-%20Eskom%20Inquiry%2028%20NOV.pdf> accessed on 21 September 2019.

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

¹⁸⁶ *Eskom Holdings SOC Limited v McKinsey and Company Africa Pty Ltd and others* 2019 ZAGPPHC 185.

¹⁸⁷ *Ibid* at par 48.2.

the illegal conduct.¹⁸⁸ The court ordered Trillian to repay the payment it received amounting to R595 228 913.29.¹⁸⁹ It is asserted that this is an encouraging step by the new leadership in attempting to redirect the enterprises corporate governance practices and in attempt of financially stabilizing the company.

The above exposition reflects that various corporate governance violations occurred at the entity, procurement policies and processes were contravened and the Public Finance Management Act.¹⁹⁰ The board of directors failed to ensure that the entity adheres to good corporate governance practices and the Minister as the shareholder representative failed to take any form of action to remedy the corporate governance deficiencies at the institution. In terms of the King III report, “The board should ensure that the company complies with applicable laws and considers adherence to non-binding rules, codes and standards”.¹⁹¹ One of the significant issues mentioned by the Portfolio Committee is the lack of separation between the functions of the executive management, the board of the entity and the shareholder representative. It is submitted that this the major contributing factor to the lack of accountability within state-owned enterprises.

2.5 Transnet

Transnet is a South African state-owned enterprise which offers freight services through various methods within South Africa.¹⁹² The enterprise was established in terms of the Legal Succession Act to the South African Transport Services Act.¹⁹³ The Memorandum of Incorporation prescribes that eight out of the fourteen board members must be non-

¹⁸⁸ *Ibid* at par 55.8.

¹⁸⁹ *Ibid* at par 70.7.

¹⁹⁰ The Public Finance Management Act 1 of 1999.

¹⁹¹ Principle 2.9 of the King III Report on Corporate Governance in South Africa.

<https://www.pwc.co.za/en/publications/king3.html> accessed on 22 September 2019.

¹⁹² Thomas 2012 *Social Responsibility Journal* 450 *supra* n 2.

¹⁹³ The Legal Succession Act to the South African Transport Services Act 9 of 1989.

executive directors.¹⁹⁴ The National Treasury launched an investigation into various allegations at both Eskom and Transnet.

Subsequent to the investigation by the National Treasury, a forensic audit firm was appointed to conduct a detailed investigation into the allegations at the two state-owned enterprises.¹⁹⁵ The various allegations with regards to Transnet were in connection to alleged impropriety with regards to the procurement of locomotives at the entity and the appointment of certain suppliers at the state-owned enterprise.¹⁹⁶ There was also an allegation that approximately over R92billion was laundered through to the Gupta owned Homix Company.¹⁹⁷

The forensic report indicated that the board and the executives of Transnet contravened the procurement policies, the provisions of the Public Finance Management Act,¹⁹⁸ the shareholder compact and principles of good corporate governance by not complying with the requirement of obtaining the shareholder approval in order to enter into the agreement relating to the purchase of the locomotives.¹⁹⁹ Instead of the Minister of Public Enterprise who was Malusi Gigaba holding the board accountable for their conduct of breaching the abovementioned framework he proceeded to give the approval without proper procedures being followed.²⁰⁰ The Minister further went a step further by signing the service level

¹⁹⁴ Transnet Corporate Governance 2017.

<https://www.transnet.net/InvestorRelations/AR2017/Transnet%202017%20Corporate%20Governance%20Report%20final.pdf> accessed on 21 September 2019.

¹⁹⁵ "Final Report: Forensic Investigation into Various Allegations at Transnet and Eskom"

http://www.treasury.gov.za/comm_media/press/2018/Final%20Report%20-%20National%20Treasury%20-%20Procurement%20of%20Locomotives%2015112018.pdf accessed on 23 September 2019.

¹⁹⁶ *Ibid.*

¹⁹⁷ D McKay 2019 *Finweek 1 supra* n 162.

¹⁹⁸ Section 54 of the Public Finance Management Act 1 of 1999.

¹⁹⁹ "Final Report: Forensic Investigation into Various Allegations at Transnet and Eskom"

http://www.treasury.gov.za/comm_media/press/2018/Final%20Report%20-%20National%20Treasury%20-%20Procurement%20of%20Locomotives%2015112018.pdf accessed on 23September 2019.

²⁰⁰ *Ibid.*

agreement as a witness.²⁰¹ It is asserted that this is improper as the shareholder representative should not be involved with the procurement processes of the entity.

The main deficiencies that exist in most of the South African state-owned enterprises consists of corporate governance breaches, lack of understanding of the state's oversight role and weak monitoring of policy implementation.²⁰² The court recently attempted to provide some form of guidance in relation to the oversight role and the shareholder representatives' function, the court held that it is Parliament, not the Minister that represents the public interest and performs an oversight role on behalf of the public.²⁰³ Hence it is asserted that the Minister is required to operate only within the shareholder interests' domain.

3. Conclusion

This chapter has provided an outline and analysis of the corporate governance transgressions that have plagued South African state-owned enterprises. What was evident from the above exposition is that the executive management, the boards and the shareholder Ministers do not have a thorough understanding of their roles and functions within the entities. There has been a drastic disregard of the corporate governance framework within the various state-owned enterprises and this is largely due to the failure of the board to adhere to their fiduciary duties.

The most concerning aspect about the governance of state-owned enterprises is that even though there has been evidence of wrongdoing on the part of the executive management, the boards of directors and the shareholder Ministers there has been little accountability. Most of the Ministers and the board members were just removed without actual consequences being implemented.

²⁰¹ *Ibid.*

²⁰² Qobo <https://www.dailymaverick.co.za/opinionista/2018-02-27-governance-of-state-owned-enterprises-reforming-the-unreformable/> accessed on 21 September 2019.

²⁰³ *SOS Supporting Public Broadcasting Coalition v South African Broadcasting Corporation SOC Limited supra* n 120 at par 126.

Chapter 4: The potential liability of the board of directors

1. Introduction

This chapter will outline the role of the board of the directors and the role of government as the shareholder in state-owned enterprises. It will seek to establish whether there is a clear division between the functions of the board of directors and the Minister as the shareholder representative. The final part of the chapter will provide an analysis of the potential remedies that may be utilized in order to improve the quality of the governance within state-owned enterprises.

According to Cassim corporate governance practices consist of the analysis of management systems to establish whether the directors have performed their functions and to also provide assistance to directors in the performance of their functions.²⁰⁴ Good corporate governance consists of appreciating the connection between compliance, governance, organizational culture and establishing appropriate mechanisms that enhance good corporate governance.²⁰⁵ Consequently it is asserted that there is no one fits all solution for all entities, however, as reflected in the previous chapter that the governance issues are similar across all the various state-owned enterprises.

Good corporate governance should be reinforced through the understanding of proper management, a clear separation of the roles of the board and the shareholder in the

²⁰⁴ Cassim *et al* (2012) 473 *supra* n 49.

²⁰⁵ Thomas 2012 *Social Responsibility Journal* 455 *supra* n 2.

governance of state-owned enterprises, assessable performance as prescribed in the shareholder compact, ensuring the accountability of the executive management, the board of directors and the line ministers.²⁰⁶ State-owned enterprises like regular companies should be governed with the principle of the separation of ownership and control of the entity, with the state retaining ownership as the shareholder and the board of directors being entrusted with the control of the entity.²⁰⁷

2. The role of the board of directors in the governance of state-owned enterprises.

South African company law relies on two sources which cater for the nature and extend of directors duties, which are the Companies Act²⁰⁸ and the common law as reflected in various case law and both sources apply side by side.²⁰⁹ Section 66 (1) of the Companies Act²¹⁰ bestows the authority to manage the business of the company on the board of directors and also gives the board the powers to act on behalf of the company.²¹¹

The board of directors is the only body that is empowered to undertake actions on behalf of the company and these actions must be in the best interests of the company.²¹² In terms of the Protocol on Corporate Governance in the Public Sector the board of a state-owned enterprise is empowered with the absolute responsibility and accountability for the

²⁰⁶ State-owned enterprises: Governance responsibility and accountability

<https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=2ahUKEwjHipzri4XmAhWVrHEKHfNOBwQQFjABegQIBBAC&url=https%3A%2F%2Fcdn.ymaws.com%2Fwww.iodsa.co.za%2Fresource%2Fcollection%2F879CAE6C-7B90-49F5-A983->

[28AECBCE196F%2FPSWG Position Paper 3 Governance in SOEs.pdf&usg=AOvVaw0QitQbUXHN1i0CLOsyHFqA](#)

Accessed on 23 August 2019.

²⁰⁷ Makuta "Towards good corporate governance in state-owned Industries: the accountability of directors" 2009 *Malawi Law Journal* 68.

²⁰⁸ The Companies Act 71 of 2008.

²⁰⁹ Cassim *et al* (2012) 523 *supra* n 49.

²¹⁰ The Companies Act 71 of 2008.

²¹¹ *Ibid.*

²¹² Section 76 of the Companies Act 71 of 2008.

performance of the entity, hence it is the board's duty to provide the entity with strategic direction and to recruit the Chief Executive Officer in consultation with the line Minister.²¹³

The relationship between the company and the board of directors is essentially governed by the memorandum of incorporation which is binding on the company and the individual directors.²¹⁴ In the case of state-owned enterprises the relationship between the board and the shareholder is regulated by the shareholder compact which constitutes the mandate from the government shareholder.²¹⁵ The Memorandum of Incorporation may make provision of additional powers of the board or it may limit the authority of the board, hence it is submitted that this document should be the first source of reference when attempting to ascertain the powers of the board of directors.

It is asserted that the board of directors is the highest decision making body within state-owned enterprises and thus are responsible for ensuring effective governance within state-owned enterprises. The board is tasked with overseeing the daily functioning of the state-owned enterprise.²¹⁶ As a result the board must have full knowledge and be aware of the issues that take place within the entity. Cassim recommends that directors should understand the nature and extent of their duties because taking office as a director creates a legal obligation to comply such duties.²¹⁷

In terms of the common law the boards of directors owe their fiduciary duties exclusively to the company and these duties do not substitute any other duty that the directors might owe to the company.²¹⁸

The Companies Act²¹⁹ reinforces the common law fiduciary duties of the directors by prescribing the standards of behavior for directors in section 76 of the Act. The board has also been bestowed with fiduciary duties in terms of the Public Finance Management

²¹³ Protocol on Corporate Governance in the Public Sector

https://www.gov.za/sites/default/files/gcis_document/201409/corpgov0.pdf accessed on 17 October 2019.

²¹⁴ Section 15 (6) (c) of the Companies Act 71 of 2008.

²¹⁵ Protocol on Corporate Governance in the Public Sector

https://www.gov.za/sites/default/files/gcis_document/201409/corpgov0.pdf accessed on 17 October 2019.

²¹⁶ Cassim *et al* (2012) 411 *supra* n 49.

²¹⁷ Cassim *et al* (2012) 509 *supra* n 49.

²¹⁸ Delpont *Henochsberg on the Companies Act 71 of 2008* (2019) 306.

²¹⁹ The Companies Act 71 of 2008.

Act²²⁰ as stated in the Protocol on Corporate Governance within the Public Sector.²²¹ A director is prohibited from using his position to gain an advantage for himself or another person and the director must not cause any harm to the company.²²² The King IV prescribes that the leadership of entities should set the tendency and lead morally and efficiently by ensuring that the entity upholds good ethics.²²³

“section 76(3) of the Companies Act provides that a director must act in good faith and for a proper purpose, in the best interests of the company and with a degree of care, skill and diligence that maybe reasonably be expected of a person carrying out the same functions in relation to the company as carried out by that director and who having the general knowledge, skills and experience of that director.”²²⁴

This section reinforces the common law fiduciary duty of care and skill .In addition to the provisions of the Companies Act²²⁵ the Protocol on Corporate Governance asserts that the board should identify and manage possible conflicts of interest between the management, board and the government, the board may not receive any form of personal benefit for themselves.²²⁶ The former Group Chief Executive Officer of Eskom was found having benefitted from various deals that were concluded by the company during his period as the Chief Executive Officer.²²⁷

The board has a duty to display care to ensure reasonable safeguarding of the resources and accounts of the entity, conduct themselves ethically with loyalty, trustworthiness and to act in the best interests of the enterprise in the handling the monetary activities of the

²²⁰ The Public Finance Management Act 1 of 1999.

²²¹ Protocol on Corporate Governance in the Public Sector

https://www.gov.za/sites/default/files/gcis_document/201409/corpgov0.pdf accessed on 17 October 2019.

²²² Section 76(2) of the Companies Act 71 of 2008.

²²³ De Beer and Tordesillas “Corporate governance outcomes: ignore behavior at your peril” 2018 *The Corporate Report* 27.

²²⁴ Section 76(3) of the Companies Act 71 of 2008.

²²⁵ The Companies Act 71 of 2008.

²²⁶ Protocol on Corporate Governance in the Public Sector

https://www.gov.za/sites/default/files/gcis_document/201409/corpgov0.pdf accessed on 17 October 2019.

²²⁷ Cheteni and Khamfula 2018 *Africa Growth Agenda Journal* 6 *supra* n 10.

enterprise.²²⁸The codification of these duties in the Companies Act²²⁹ now renders them obligatory and directors cannot contract outside the scope of these duties.

Section 78(2)²³⁰ states the following:

“...any provision in an agreement, memorandum of incorporation or a board resolution which aims to discharge a director from a duty in terms of section 75 or 76 or nullify, limit or restrain any legal consequences emanating from a breach of trust on the part of the director as being void.”²³¹

The essence of effective corporate governance entails the adequate balance between the fiduciary duties of the directors and ensuring shareholder value by achieving the profit making objectives of the company.²³² It is thus submitted that the board should seek to exercise effective control over the enterprise and to achieve the economic performance goals of the company and this will inevitably result in good corporate governance.

In terms of the Organization for Economic Co-operation and Development guidelines the board of directors plays a central role in the governance of state-owned enterprises and it also bears the ultimate responsibility through its fiduciary duties for the performance of state-owned enterprises.²³³ It is critical to ensure that the board composition consists of individuals who are qualified and possess a mixture of technical skills.²³⁴ It is submitted that the board as a collective should have a balanced set of skills, knowledge and technical expertise in order for the board to effectively function and discharge its duties.²³⁵ It is therefore, goes without saying that the board selection for state-owned enterprises

²²⁸ Section 50 of the Public Finance Management Act 1 of 1999.

²²⁹ The Companies Act 71 of 2008.

²³⁰ *Ibid.*

²³¹ Section 78(2) of the Companies Act 71 of 2008.

²³² Seretta *et al* “Core Corporate Governance Dilemmas facing boards: A South African Perspective” 2009 *South African Journal of Economic and Management Sciences* 196.

²³³ “Ownership and governance of state-owned enterprises: A Compendium of national practices pg. 12 < <http://www.oecd.org/corporate/ca/Ownership-and-Governance-of-State-Owned-Enterprises-A-Compendium-of-National-Practices.pdf> accessed on 19 August 2019.

²³⁴ Thomas 2012 *Social Responsibility Journal* 453 *supra* n 2.

²³⁵ Makuta 2009 *Malawi Law Journal* 63 *supra* n 204.

should be conducted in an open and transparent manner and ensuring that the most suitable candidates get appointed.

It is affirmed that the Companies Act²³⁶ places the authority and responsibility of the governance of the state-owned enterprises on the board of directors in terms of section 66(1).²³⁷The board of directors is answerable to the shareholder in relation to the performance of the entity and it may be removed by the shareholder.²³⁸It follows that the board of directors should be vested with the power to appoint and remove the Chief Executive Officer through a transparent recruitment process, shielded from political interference.²³⁹ The potential risks is that a state appointed Chief Executive Officer might be heavily influenced by or receive instructions from the political circles, circumventing the role of board of directors. ²⁴⁰

The Companies Act²⁴¹ prescribes that the board of directors has the authority to appoint the Chief Executive Officer, however, in relation to state-owned enterprises the implementation of this provision is proving to be a challenge in that the line Minister on behalf of government approves the appointments of the Chief Executive Officer and consequently overriding the appointment power of the board.²⁴² It is submitted this has the potential to negatively affect the effective governance of these institutions.

3. The role of the line Minister in the governance of state-owned enterprises.

Government as a shareholder is empowered in terms of the Companies Act²⁴³ to appoint the board of directors and some founding legislation of state-owned enterprises such as

²³⁶ The Companies Act 71 of 2008.

²³⁷ *Ibid.*

²³⁸ Cassim (2012) *et al* 416 *supra* n 49.

²³⁹ Guidelines on the governance of state-owned enterprises for South Africa

<https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=15&ved=2ahUKEwj0v4CnooXmAhUNsXUIHYKtBRAQFjAOegQICBAC&url=https%3A%2F%2Fwww.oecd.org%2Fdaf%2Fca%2FSOE-Guidelines-Southern-Africa.pdf&usg=AOvVaw2iy4ZILKVweHOvyP9RpVM> accessed on 22 August 2019.

²⁴⁰ *Ibid.*

²⁴¹ The Companies Act 71 of 2008.

²⁴² Kanyane and Sausi 2015 *African Journal of Business Ethics* 6 *supra* n 16.

²⁴³ The Companies Act 71 of 2008.

the Broadcasting Act²⁴⁴ also contain provisions relating to the appointment of the board of directors and the board composition which include executive and non-executive directors who are also inclusive of the Chief Executive Officer.²⁴⁵

Generally, the line Minister of the relevant state-owned enterprise acting on behalf of government appoints and removes the board of directors together with the Chief Executive Officer even though the board may make recommendations in relation to filling the Chief Executive Officer vacancy, the Minister has the final decision making power.²⁴⁶ In the case of Eskom Clause 14.3 of the Memorandum of Incorporation provides that the Minister solely has the authority to appoint or remove the Chief Executive Officer and the Chief Executive Officer shall report to the board.²⁴⁷

The main concern with such a provision is that it renders the role of the board in relation to the Chief Executive Officer ineffective, due to the fact that he merely reports to the board and on the other hand the board does not have actual powers to discipline the Executive. Makuta submits that this compromises the concept of separate legal personality in the directors are deprived of their powers to decide to whom they are delegating the responsibility of the day to day operations and this power is incorrectly shifted to the shareholder.²⁴⁸ It is submitted that this is a problematic situation that might hamper the effective management of the business of the company by the board of directors.

It is asserted that this common practice is undesirable due to the fact that the board and not the Minister acting as the shareholder is empowered with the authority to manage the affairs of the company and the recruitment of the Chief Executive Officer is part of

²⁴⁴ The Broadcasting Act 4 of 1999.

²⁴⁵ "State-owned enterprises: Governance responsibility and accountability https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=2ahUKEwjHipzri4XmAhWVrHEKHfNOBwQQFjABegQIBBAC&url=https%3A%2F%2Fcdn.ymaws.com%2Fwww.iodsa.co.za%2Fresource%2Fcollection%2F879CAE6C-7B90-49F5-A983-28AECBCE196F%2FSPSWG_Position_Paper_3_Governance_in_SOEs.pdf&usg=AOvVaw0QitQbUXHN1i0CLOsyHFqA accessed on 28 October 2019.

²⁴⁶ Thomas 2012 *Social Responsibility Journal* 450 *supra* n 2.

²⁴⁷ *Democratic Alliance v the Minister of Public Enterprise and Others, Economic Freedom Fighters v Eskom Holdings and Others, Solidarity Trade Union v Molefe and Others* 2018 ZAGPPHC 1.

²⁴⁸ Makuta 2009 *Malawi Law Journal* 66 *supra* n 204.

managing the affairs of the company. There are other various problematic consequences created by the situation where the Minister instead of the board of directors appointing the Chief Executive Officer.

There is an indication that in instances where the shareholder Minister makes the appointment instead of the board, the Chief Executive Officer believes that he or she is accountable to the Minister instead of the board of directors and this undermines the board's authority over the management of the state-owned enterprise.²⁴⁹ It is thus asserted that this will inevitably result in the shareholder acting in the capacity of the board by managing the business of the company, instead of providing oversight to the board.

The appointment process of board members of state-owned enterprises has been widely facilitated through political negotiations which include the line Minister, the governing party's deployment committee deciding on their own preferred candidate for appointment.²⁵⁰ The Protocol on Corporate Governance within the public sector prescribes that the board in agreement with the line Minister must appoint the Chief Executive Officer.²⁵¹ The implication is that the line Minister should be in support of the proposed appointment, which is not a desirable situation in that the board should be independently empowered to make such an appointment.

The shareholder's function and involvement should be limited to ensuring that skilled and well qualified directors are appointed to provide appropriate leadership and execute their functions independently, diligently and professionally.²⁵² The shareholder's role in state-owned enterprises entails setting out performance objectives for the board to achieve. State-owned enterprises should have the independence to achieve their objectives as outline in the shareholder compact and government as the shareholder is responsible for

²⁴⁹ Thabane and Snyman-Van Deventer 2018 *PER/PELJ* 13 *supra* n 1.

²⁵⁰ <https://www.businesslive.co.za/bd/national/2019-04-09-appointment-process-of-soe-board-members-under-scrutiny/> accessed on 16 October 2019.

²⁵¹ Protocol on Corporate Governance in the Public Sector

https://www.gov.za/sites/default/files/gcis_document/201409/corpgov0.pdf accessed on 17 October 2019.

²⁵² Makuta 2009 *Malawi Law Journal* 69 *supra* n 204.

ensuring that there is a transparent structure that enables the sustainability of the enterprise.²⁵³

The assertion that the Minister as the shareholder representative should not be involved in the appointment of the executive management is affirmed in the matter between the *SOS Support Public Broadcasting Corporation and Others v South African Broadcasting Corporation and others*²⁵⁴ where the powers of the Minister in terms of the Memorandum of Incorporation to appoint, discipline and suspend the executive directors were challenged in contrast to the provisions of the Broadcasting Act.²⁵⁵ The issue before the court was whether section 71²⁵⁶ could be applied to remove the directors of the Corporation in contrast to the provision of section 15 or 15 A of the Broadcasting Act.²⁵⁷

The court held the view that the power of the Minister to remove the executive directors undermines the independence of the Broadcaster.²⁵⁸ This decision is an indication that the court also recognizes the importance of the independence of the boards of state-owned enterprises and the importance of the Minister not overreaching into the functions of the board.

Government as a shareholder has a role to play within the attainment of good corporate governance; it should ensure that the board of directors is held accountable in terms of the established corporate governance structures and practices that are required to ensure that the entity functions accordingly.²⁵⁹ The shareholder representative ought to be attentive and responsible enough to ensure that the boards of state-owned enterprises

²⁵³ Thomas 2012 *Social Responsibility Journal*: 453 *supra* n 2.

²⁵⁴ 2017 ZAGPH 289 *supra* n 120.

²⁵⁵ The Broadcasting Act 4 of 1999.

²⁵⁶ The Companies Act 71 of 2008.

²⁵⁷ The Broadcasting Act 4 of 1999.

²⁵⁸ *SOS Support Public Broadcasting Coalition and others v South African Broadcasting Corporation and others* *supra* n 120.

²⁵⁹ Governance Oversight Role over State-Owned Enterprises

<http://www.treasury.gov.za/publications/other/soe/governance%20oversight%20Role.pdf> accessed on 16 October 2019.

are conducting business in the best interests of the company and that they are functioning as true stewards of governments' interests.²⁶⁰

It has been stated that the board of directors does not owe its duties to the shareholder Minister but rather to the state-owned enterprise. The Minister as a shareholder has various remedies as contained in the Companies Act²⁶¹ that could be employed as a means of holding the board of directors accountable for their transgressions against the company. In instances like Eskom where the Chief Executive Officer unduly benefited from the company is a typical example of where executives act as owners of these institutions due to the extended powers that they have bestowed on themselves and also due to the lack of proper checks and balances from the board of directors and the shareholder Minister.²⁶² Kanyane and Sausi recommend that government should act as an active shareholder by holding directors responsible for their duty to provide tactical direction to state-owned enterprises.²⁶³ This situation can only be remedied by the Ministers creating a culture of accountability by making it common practice of utilizing the remedies discussed below.

4. Remedies to hold directors accountable

Section 77 of the Companies Act²⁶⁴ establishes the liability provision for directors of companies. The section prescribes that....

“..... a director maybe held liable in terms of the common law doctrines regarding the contravention of a fiduciary duty, for any injury, harm or expenses incurred by the company as a result of any infringement by the company due to a contravention by the director

²⁶⁰ Thabane and Snyman-Van Deventer 2018 *PER/PELJ* 8-9 *supra* n 1.

²⁶¹ Act 71 of 2008.

²⁶² Cheteni and Khamfula 2018 *Africa Growth Agenda Journal* 6 *supra* n 10.

²⁶³ Kanyane and Sausi 2015 *African Journal of Business Ethics* 39 *supra* n 16.

²⁶⁴ The Companies Act 71 of 2008.

of a duty declared in section 75,76(2),or 76(3)(a)²⁶⁵ or (b) or in connection with the common law doctrines of delict for any injury, harm or expenses incurred by the company due to any breach by the directors of either (i) a duty prescribed in section 76(3)(c), (ii) any term of this Act not otherwise stated in this section or (iii) any clause of the company's Memorandum of Incorporation."²⁶⁶

It is asserted that this section can be used in order to recover any loss that resulted from the failure of a director to uphold his or her fiduciary duties. It is asserted that non-adherence with the provisions of the memorandum of incorporation and any other mandate of the company amounts to a breach of the fiduciary duties.²⁶⁷

Where director acts on behalf of the company while knowing that he lacks the required authority²⁶⁸ or complied with the carrying of the company in a reckless trading²⁶⁹ or participated or failed to prohibit a fraudulent action by the company.²⁷⁰ Such conduct also attracts liability in terms of section 77.The above mentioned provision evidently places a high ethical standard on the conduct of the directors. The provisions have reinforced the position that controllers of companies must be ethical and responsible when conducting the affairs of the company and if they fail to do such then the shareholders of the company are empowered with remedies to ensure accountability.

The underlying basis of the liability of directors emanates either from the director positively taking some form of action that causes detriment to the company or the director failing to take action to prevent detriment to the company.²⁷¹

Section 71(1)²⁷² empowers the shareholder with a very important remedy against the board of directors, which is the power to remove the directors from office at any time by

²⁶⁵ Section 77(2) (a).

²⁶⁶ Section 77(2) (b).

²⁶⁷ Delport (2019) 302 *supra* n 215.

²⁶⁸ Section 77(3) (a).

²⁶⁹ Section 77(3) (b).

²⁷⁰ Section 77(3) (c).

²⁷¹ Van der Linde "The Personal liability of Directors"2008 SA *Merc LJ* 442.

²⁷² *Ibid.*

an ordinary resolution.²⁷³ Cassim notes that the Act does not prescribe under which circumstances is the shareholder entitled to remove the board and furthermore the capacity of the shareholder to remove the board applies regardless of any provisions in the Memorandum of Incorporation or agreement between the shareholder and the director.²⁷⁴ It is submitted that this might be problematic in the context of the politically charged environment of South African state-owned enterprises.

This can be viewed in the matter between the *SOS Support Public Broadcasting Corporation and Others v South African Broadcasting Corporation and others*²⁷⁵ the court held that the provisions of section 71 cannot prevail over the provisions of the Broadcasting Act²⁷⁶ as it was specifically created to govern the Corporation; the removal process under the Companies Act²⁷⁷ compromises the constitutional independence of the South African Broadcasting Corporation.²⁷⁸

In this instance the provision of section 71²⁷⁹ were in contradiction with the founding legislation of the Corporation and as a result the provisions of the Companies Act²⁸⁰ could not prevail. It is asserted that the shareholder's powers were limited in favor of the independence of the Corporation, which is a welcomed decision due the corporate governance failures that have occurred at the Corporation and also as a means of minimizing political interference.

The board of directors as a collective is also empowered to remove a director if one of the grounds provided for in section 71(3)²⁸¹ are met.²⁸² Section 71(3) provides that a director may be removed if a shareholder or another director claims that another member of the board has become unqualified or ineligible or weakened or a director has neglected

²⁷³ *Ibid.*

²⁷⁴ Cassim *et al* (2012) 441 *supra* n 49.

²⁷⁵ 2017 ZAGPH 289 *supra* n 120.

²⁷⁶ Act 4 of 1999.

²⁷⁷ The Companies Act 71 of 2008.

²⁷⁸ *SOS Supporting Public Broadcasting Coalition and others v South African Broadcasting Corporation and others* *Supra* n 120.

²⁷⁹ The Companies Act 71 of 2008.

²⁸⁰ *Ibid.*

²⁸¹ *Ibid.*

²⁸² Cassim *et al* (2012) 443 *supra* n 49.

or performs his functions in a negligent manner.²⁸³ Hence the board of directors as a collective should hold each other accountable for the performance of their functions as directors of the company. This is a useful provision aimed at encouraging accountability amongst the board members and ensuring the adherence of directors' duties.

“section 163 dictates that a shareholder or a director may approach a court for relief if (a) the conduct of the company is oppressive or unfairly prejudices the interests of the applicant,²⁸⁴(b) the business of the company is being or has been managed in an oppressive or unfairly prejudicial manner to the interests of the applicant,²⁸⁵(c) the powers of a director or prescribed officer of the company or a related person related company, are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant”.²⁸⁶

It is asserted that this remedy ought to be utilized by government as a shareholder in order to limit the abuse by the board of the directors and any other board member can also approach the court on behalf of the company. According to Cassim the remedy may be utilized even in instances where the applicant's rights are not affected but their interest are affected by the conduct of the company or its controllers.²⁸⁷ As a result, it makes easier for the applicants to utilize the remedy; they just need to prove that their interests have been negatively impacted.

The derivative action as provided for in the Act is also an effective remedy in order to ensure deterrence of directors abusing their position and neglecting their fiduciary duties. Any interested party may bring action on behalf of the company in order to safeguard the interests of the company. The section provides that a person may request the company to initiate legal proceedings or take the necessary steps to protect the legal interest of the company, if such a person is a shareholder, director, trade union or has been granted

²⁸³ Section 71(3) of the Companies Act 71 of 2008.

²⁸⁴ Section 163(1) (a) of the Companies Act 71 of 2008.

²⁸⁵ Section 163(1) (b) of the Companies Act 71 of 2008.

²⁸⁶ The Companies Act 71 of 2008.

²⁸⁷ Cassim *et al* (2012) 761 *supra* n 49.

such a right by the court.²⁸⁸ The section is wider enough to cater for various types of interest parties utilize the remedy for the benefit of the company. It is submitted that this is significant in that it makes it easier for interested parties to protect the interests of the company.

This remedy is employed on behalf of the company in order to safeguard the well-being of the company and not to protect the rights of the applicant. The action is brought by another person to safeguard the company's interests; the applicant derives his or her rights of the remedy from that of the company.²⁸⁹ Cassim has pointed out the flawed element of the remedy relating to the costs implication for the applicant; she submits that in order for potential litigants not to be discouraged the courts should indemnify the bona fide applicant who is acting in the best interests of the company.²⁹⁰

Furthermore, the Act provides that a shareholder, director or trade union may apply to court to for relief to restrain the company from any conduct that is in contravention with the provisions of the Act.²⁹¹ This provision is of importance in that it directly ensures that companies comply with the Companies Act.

The Companies Act²⁹² empowers either a shareholder, prescribed officer of the company or registered trade union to make an application with the High Court to declare a director delinquent or to place such a person under probation.²⁹³ In terms of subsection 5 of section 162 the court will be able declare a person to be a delinquent if amongst other grounds such a person has harmed the company, abused their position as a director, has personally gained advantage for himself by virtue of his position as a director of the company.²⁹⁴

²⁸⁸ Section 165(2) (a) - (d) of the Companies Act 71 of 2008.

²⁸⁹ Cassim *et al* (2012) 775 *supra* n 49.

²⁹⁰ Cassim *the New Derivative Action under the Companies Act: Guidelines for Judicial Discretion* (2016) 151.

²⁹¹ Section 20(4) of the Companies Act 71 of 2008.

²⁹² Act 71 of 2008.

²⁹³ Section 162(2) of the Companies Act 71 of 2008.

²⁹⁴ Section 162(5) (c) of the Companies Act 71 of 2008.

This remedy may also be utilized by person outside the company such as any organ of state as provided for in section 162(4) of the Act.²⁹⁵ The consequence of a director being declared as a delinquent director means that this person is prohibited from being a director of a company.²⁹⁶ This is the view that was expressed by the court that the declaration of a delinquent director automatically necessitates his or her removal from office as a director.²⁹⁷

This will be useful within the context of state-owned enterprise in that it will prevent the current situation of reshuffling incompetent directors from one state-owned enterprise to the next, without any actual consequences. Section 162 of the Act is aimed at safeguarding companies and interested parties against directors who failed to manage the affairs of the entity or have failed to adhere to their fiduciary duties as directors.²⁹⁸ Cassim submits that the section assists in improving the principles of good conduct and integrity of directors and it establishes accountability on the part of directors to the company and the stakeholders of the company.²⁹⁹

5. Conclusion

The chapter provided an analysis of the director's duties and the role of the Minister within the governance of state-owned enterprises. It also highlighted the discrepancies contained in the different legislation with regards to which governing body should appoint and dismiss the Chief Executive Officer. The chapter further provided an analysis of the remedies that ought to be utilized in order to create accountability within these enterprises.

It is of significance for Government to take note that the board of the state-owned enterprises has the ultimate responsibility for the functioning of these entities as provided

²⁹⁵ The Companies Act 71 of 2008.

²⁹⁶ Cassim "Delinquent Directors under the *Companies Act* 71 of 2008: *Gihwala v Grancy Property Limited* 2016 ZASCA 35" 2016 *PER / PELJ* 2.

²⁹⁷ *Kukuma v Lobelo* and Others 2012 ZAGPJHC 60 at par 21.

²⁹⁸ Cassim 2016 *PER / PELJ* 2 *supra* n 293.

²⁹⁹ *Ibid.*

for in the Companies Act.³⁰⁰ Consequently the chapter has indicated that there is an existence of remedies to curb the willful disregard of corporate governance provisions, however, there appears to be a lack of willingness on the part of government to enforce such accountability.

Chapter 5: Summaries and Conclusion

1. Introduction

The study set out to consider the accountability and liability of the board of directors in the governance of state-owned enterprises. It sought to investigate the role of government as a shareholder within South African state-owned enterprises. The study further sought to establish whether there is a clear division between the role board of directors and the shareholder. The dissertation explored possible remedies that can be employed as a means of holding directors accountable for their failure to uphold their conduct.

2. Chapter summary

Chapter 2 provided an exposition and an analysis of the various legislations applicable to the governance of state-owned enterprises and also recognized a gap in relation to legislation that is specifically developed for state-owned enterprises.

Chapter 3 provided an outline and analysis of the current corporate failures within some of the major South African state-owned enterprises. The chapter recognized and emphasized the lack of understating of the various functions between the management, the board of directors and the shareholder Minister in relation to the governance of these entities. The failure by government to hold the board of directors accountable for the corporate failures of state-owned enterprises was also highlighted.

Chapter 4 outlined the role of the board of the directors and the role of government as the shareholder in state-owned enterprises. The study has sought to establish whether there is a clear division between the functions of the board of directors and the shareholder Minister. The chapter further sought to propose and recommend the remedies as

³⁰⁰ Section 66 of the Companies Act 71 of 2008.

contained in the Companies Act³⁰¹ that ought to be employed as a means of holding directors of state-owned enterprises accountable for their conduct.

3. Recommendations

One of the major challenges that were identified is the lack of specific legislative framework addressing issues unique to the State-owned enterprises. The study thus asserts and recommends that the best recourse for the South African government would be to develop legislation that specifically caters for state-owned enterprises as recommended by the presidential review commission and to also consider the enactment of the protocol on corporate governance in the public sector as a means of strengthening the governance framework in the public sector. The specific legislation should address the apparent inconsistencies, gaps and repetitions that exist amongst the different legislation that are applicable to state-owned enterprises.³⁰²

The corporate governance defects that have been identified in South African state-owned enterprises include board negligence when dealing with the affairs of the company, irregularities relating to tender processes, non-compliance with the fiduciary duties, bribery and corruption, excessive concurrent board appointment and conflicts of interests amongst the executives, the board and the line ministers.³⁰³

It is respectfully submitted that the adherence to the king reports and the Guidelines on the governance of state-owned enterprises provided by the Organization for Economic Co-operation and Development in relation to the appointment of the executive directors, will ensure that the eradication of the numerous corporate governance contraventions

³⁰¹ Act 71 of 2008.

³⁰² Kanyane “Streamlining the state-owned entities landscape within the overarching legislative framework” 2018 <https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=2ahUKewiH7a3kz4_mAhWRVBUIHUwJD98QFjABegQIBRAB&url=https%3A%2F%2Fwww.semanticscholar.org%2Fpaper%2FReviewing-State-Owned-Entities%25E2%2580%2599-Governance-in-South-Kanyane-Sausi%2Fb190adb57b267d8dc08085dc44dc278281277598&usg=AOvVaw118yyVHrGaAKPM0WHpF4zr accessed on 14 November 2019.

³⁰³ Thomas 2012 *Social Responsibility Journal* 451 *supra* n 2.

that were identified within various enterprises. For instance, the failure of the board of directors of the South African Broadcasting Corporation to provide strategic direction and oversight to the Corporation and the irregular employment and salary advancement of the Chief Operations Officer.³⁰⁴

It is recommended that the most effective manner to rectify this situation would be to hold the board of directors accountable by employing the use of the provisions contained in section 77(2).³⁰⁵ The study recommends that government as a shareholder should be proactive in establishing accountability in relation to the directors of state-owned enterprises; remedies such as the declaration of delinquent directors and the probation of directors by the court are suitable remedies to deter directors from being negligent within their roles as directors.

The study further revealed that another governance issue that has plagued South African state-owned enterprises is the failure of clear separation of functions between the Minister as a shareholder and the board of directors as custodians of the company. This failure in relation to state-owned enterprises has led to unnecessary Ministerial interference such as in the instance of the South African Broadcasting Corporation where the Minister orchestrated the appointment of the Chief Executive Officer in un-procedural manner and in the case of Eskom a failure to provide oversight by the Minister.³⁰⁶ There is a fundamental need for clarification of the roles of the different stakeholders in relation to the governance of these entities.³⁰⁷

The study has attempted to provide some guidelines in relation to the parameters of the role of the Minister in contrast with the role of the board. It is recommended that the shareholder compact should clearly provide for the role of the shareholder and the role of the board of directors and that this document should be utilized in facilitating the

³⁰⁴ The Public Protectors Report “When Governance and Ethics fail”
https://www.gov.za/sites/default/files/gcis_document/201409/when-governance-fails-report-exec-summary17feb2014.pdf accessed on 16 November 2019.

³⁰⁵ The Companies Act 71 of 2008.

³⁰⁶ The Public Protectors Report “When Governance and Ethics fail”
https://www.gov.za/sites/default/files/gcis_document/201409/when-governance-fails-report-exec-summary17feb2014.pdf accessed on 16 November 2019.

³⁰⁷ Kanyane and Sausi 2015 *African Journal of Business Ethics* 39 *supra* n 16.

relationship between the shareholder and the board of directors and not only in relation to performance but it should also cater for the governance of the state-owned enterprises.

4. Conclusion

The study has emphasized the need and importance of good corporate governance within South African state-owned enterprise. It is evident from the exposition of the study is that there has been no consequence management within state-owned enterprises. The boards of directors have been let to abuse their powers without any form of accountability. Even though there is still a significant need for legislative development in relation to the governance of state-owned enterprises. There are provisions that are already in operation to safeguard against the corporate governance transgression that have been identified throughout the study.

The Companies Act³⁰⁸ has expressly outlined the duties and liability of directors and it went a step further by also providing for the remedies that can be employed to ensure that director comply with their duties as prescribed. It is Government's duty to take action in holding the boards of state-owned enterprises responsible for the corporate transgressions that have occurred under their leadership.

Word count: 19 852.

³⁰⁸ Act 71 of 2008.

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