Assessing corporate governance practices at ESKOM

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Mini-dissertation accepted in fulfilment of the requirements for the degree *Master of Business Administration*
at the North-West University

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Graduation: May 2026

Declaration

I, Mthokozisi Thami Knowledge Zondi, declare that this dissertation is my original work, and as such, has not been submitted in full or partially to any other university for a degree. All contributions and sources cited in this study have been duly acknowledged through complete references. This mini dissertation is intended only for partial fulfilment of the requirement for the degree for Master of Business Administration at the North-West University (NWU).

Acknowledgments

I would like to acknowledge the NWU for selecting me for the rare opportunity to be part of the MBA class of the specific year.

The research team from the NWU Business School dedicated support from the rainy season up to the sunshine.

My research supervisor, Mr Albert van Zyl, took me through all the stages of my research development, who was very supportive and objective throughout this journey. His expertise is unmatched.

The NWU Business School's management for creating a sustainable environment and the atmosphere that was conducive to the provision of teaching and learning for both students and the carefully selected academic team.

The NWU Business School's central administration office for consistence direct support and guidance including quality educational accessories that truly stimulated the moral during difficult times of the course.

My partner, Samkele Mdaka, for all her dedicated support for all the above to gain my positive cooperation, focus and resilience to achieve the completion of this study.

Dedication

I dedicate this mini dissertation to my career in progress towards possible successful enrolment for a DBA. This course was suggested as basic requirement therefore to be completed at the best university.

To the corporate world in South Africa, this is a dedicated contribution towards an evolving world that is willing to improve in the management of the critical state organs in South Africa.

List of Abbreviations

ACFE: Association of Certified Fraud Examiners

AGSA: Auditor-General of South Africa

ANC: African National Congress

BJR: Business Judgement Rule

EU: European Union

IDEA: Institute of Democracy and Electoral Assistance

IoDSA: Institute of Directors South Africa

KING IV: King IV Report on Corporate Governance for South Africa

MOI: Memorandum of Incorporation

NDP: National Development Plan

NEPA: National Electric Power Authority

NESO: National Energy System Operator

OECD: Organisation for Economic Corporation and Development

PFMA: Public Finance and Management Act 1 of 1999

POPIA: Protection of Personal Information Act 4 of 2013

SOC: State Owned Company

SOE: State Owned Entity

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1. Chapter 1
1.1. Introduction and Background

Corporate governance was formally institutionalised in South Africa with the publication of the King I Report on Corporate Governance in 1994, followed by further iterations thereto up until the present (at the time of compilation of this study) King IV Report on Corporate Governance (King IV) in 2016. Corporate governance has however over the same period proven to be a thorny issue considering the numerous examples of corporate failures, lack of performance, requests for financial bailouts and accompanying erosion of trust brought about by the apparent lack of ethical governance of many State-Owned Enterprises (SOE) in South Africa. King IV (2016:20) defines corporate governance as "the exercise of ethical and effective leadership by the governing body towards the achievement of the following governance outcomes: ethical culture, good performance, effective control and legitimacy". This aligns with the UK Cadbury Report (1992:2-5), which describe corporate governance as the series of rules that are used to govern and direct companies where the companies' governing bodies use them to align the company norms and standards. Naidoo (2016:2) further state that ethical corporate governance practices are not just brainstormed or created without being validated. Good corporate governance practices are achieved by the governing body of the company that priorities acting with due care and skill with the best interest of the company both as individual directors and when they serve as collectively in governing bodies.

Section 49 of the Public Finance Management Act 1 of 1999 (PFMA) defines SOEs as organisations that are owned by government or where the government is a sole or majority shareholder. Mamaile (2020:163) state that SOEs are government owned enterprises pursuing both commercial and developmental growth with only the state as the major shareholder. These SOEs are found at all governmental levels of the state (i.e., national, provincial and local government) and are primarily regulated by the Constitution of the Republic of South Africa, 1996 (the Constitution), the Companies Act 71 of 2008 (the Companies Act), and the PFMA. Other material like the Protocol on Corporate Governance, and the King Code of Corporate Governance also guide the governance of SOEs (Nwoke 2019:427). Section 9(1) of the Companies Act binds SOEs to the provisions thereof, subject to section 5(4) and (5), except to the extent that the Minister has granted an exemption in terms of subsection (3). Section 7 of the Companies Act

sets out the purposes of the Act, in particular s(7)(*b*) which purposes, inter alia, the improvement of the countries' manufacturing and trade by "encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation", and thereby giving statutory recognition to corporate governance, and section 7(c) which states that the purpose of the Act, inter alia, is to "encourage the efficient and responsible management of companies". The Companies Act, specifically, provides guidelines on the establishment, powers and functions of SOEs' board of directors (Serongoane, 2021:46).

South Africa has approximately 700 SOEs, several of which are marred by political intervention, competing agendas, incompetence, free riding, soft budget constraints, and agency issues (Adebayo, 2021:174). Evidence shows that SOEs have not been performing according to expected standards as stated in their constitutional mandate (Flepisi and Mlambo, 2021:57), being the provisioning of critical goods and services for economic development in South Africa, which was brought about by various internal issues and irregularities (Zondi and Robinson, 2021:40). These issues include a high degree of politicisation, and a lack of transparent accountability measures which escalated the risk of financial loss as well as reduced investor confidence (Flepisi and Mlambo, 2021:58).

The effectiveness of SOEs was compromised due to ideological divergences both within and beyond the then governing African National Congress (ANC) tripartite coalition (Kgobe and Chauke, 2021:26). In testimonies to the Judicial Commission of Inquiry to Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State (the Zondo Commission), for instance, ANC deployers' interference was identified along with the involvement of major corporations in exerting influence over politicians to secure deals within SOEs, like Eskom (Semosa and Legodi, 2023:16). The oversight role over SOEs that rests with the National Parliament was furthermore compromised by the then ruling party, the Executive, and the boards of directors of these entities (Serongoane, 2021:60). Eskom, the subject of this study, has failed to align its practices with the principles of ethical and effective corporate governance and has consequently faced significant criticism in the media (Kgobe and Chauke, 2021:34).

The media has drawn attention to their deficiencies of inadequate governance, accusations of fraudulent activities, as well as deficiency in achieving financial stability

(Ting and Byrne, 2020:60). According to the PFMA, sections 83(4) and 84, the board must act in the best interests of the SOE in managing its financial affairs and ensure the reasonable protection of key resources (Phalatse, 2020:22). In respect of Eskom, these objectives encompassed the augmentation of its generating capacity, the facilitation of private sector investment, promoting supplier competition, and fostering energy supply diversification (Phalatse, 2020:22). In cases of an immediate crisis, the government exhibited a lack of urgency and failed to undertake any substantial corrective measures (Kissides, 2020:106).

Principle 11 of King IV necessitates the management of "risk in a manner that supports the organisation in setting and achieving its strategic objectives" (Serongoane, 2021:67). According to Kgobe and Chauke (2021:49) many South African entities, however, have demonstrated a trend of ignoring risk until damage is done. This often comes at a stage where immediate interventions have no impact and political cover ups already have been advanced to prevent accountability to those who are directly or indirectly implicated (Rena and Christensen, 2020:57). An example is the discovery of irregular activities long after SOEs such as Eskom incurred large amounts of debt or only after initiating investigations through for instance unrelented media publications (Rena and Christensen, 2020:47). This was followed by the findings of the October 2016 State Capture Report of the then Public Protector, where she recommended that a judicial commission of inquiry conduct a full investigation (PARI, 2022:1). This eventually led to the establishment of the Zondo Commission in January 2018 (PARI, 2022:1).

Basheka (2021:116) demonstrated that it was no longer contestable that South Africa as a country, in its diversity, faced complexities in the delivery of public services. One major area widely fingered as the cause for this malaise, was corruption. According to Basheka (2021:116) the Zondo Commission stated that "while good governance was seen in contemporary times as a solution to the problems of most South African societies, there was an apparent absence of legislated and analytical frameworks to guide how best the good governance prescriptions could be applied in addressing corruption". Given the relevance of SOEs to developing countries' economies, the international community has focused its attention on setting tailored corporate governance standards for SOEs, which included principles like transparency and integrity (Basheka, 2021:116). For example, the G20 adopted High-Level Principles for Preventing Corruption and Ensuring Integrity in

SOEs in 2018 (Nimara, 2022:88), while the European Union has put limitations on state provision of grants and subsidies to SOEs.

1.2. Theoretical framework of the study

The psychologist Kurt Lewin commented, "there is nothing so practical as good theory, theories define expectations about causal relationships, they enable counterfactual reasoning; they are dynamic and can be updated based on contrary evidence or feedback" (Maggot *et al.*, 2022:77). Corporate theories are the genesis of value-creating strategic actions, theory yields better choices and when the company is armed with a well-crafted corporate theory, its search for value will be more than a random work (Maggot *et al.*, 2022:77). This study will be aligned with the below theoretical framework of concepts.

Table 1: Conceptual framework of the study

Agency theory	Stakeholder theory	Resource dependancy theory
• Delegation of work • Power of ownership • Accountability • Control powers between principal and the agency • Role of the board of directors • Roles of the CEO • Individualism • Opportunism	• Policies • Economic dimension • Social and economic values • Stakeholder concessions • Effectiveness • Perfomance • Customers • Suppliers • Funders • Employees	• Access to state resources • Company as the juristic person • Prioritises public interest • Powersharing between centers of control • Social corporate responsibility • Socio-economic upliftment

1.2.1. Agency theory

Agency theory is used to understand the relationships between agents and principals. The agent represents the principal in a particular business transaction and is expected to represent the best interests of the principal without regard for self-interest (Jensen and Meckling, 1976:345). In SOEs the agent is represented by the board of directors

appointed by the relevant government officials, and the principal is represented by the citizens (Pete, 2020:904). However, unlike the private sector, citizens do not have a direct relationship with the SOE's board of directors, as it reports directly to the relevant cabinet Minister or delegate (Pete, 2020:904). Changing the directors who do not meet the set targets is done by the responsible Minister (Abang'a *et al.*, 2020:45).

1.2.2. Stakeholder theory

The theory of instrumental stakeholders assesses to what extent the management of the entity helps to meet traditional objectives, obtaining profit for sustainability of the entity (Abang'a *et al.*, 2020:66). When referring to SOEs, the stakeholders include customers, suppliers, employees, financiers, managers, and the public. Both international bodies, like the Organisation for Economic Co-operation and Development (OECD), and codes for corporate governance, like King IV, recognise the importance of interested parties' involvement, as stakeholders need, for instance, access to information revealing the actions carried out by SOEs such as the timely publication of annual reports (Guler *et al.,* 2023:82) or electorates who need audited annual financial reports to assess the appropriate use of resources (Abang'a *et al.*, 2020:77). The funders of government or external parties like the International Monetary Fund, the World Bank, or rating agencies have similar interests in disclosing the performance of such entities (Abang'a *et al.*, 2020:145).

1.2.3. Resource dependency theory

The resource dependency theory was introduced by Pfeffer *et al.* in 1978, and according to this theory (Hill, 1992:131), the way of functioning of an organisation is influenced by external factors. The theory is often used in studies aimed to understand the relationship between an organisation and the environment (Hermanus *et al.,* 2022:78). According to Shithomola (2019:62) independent directors who are politically affiliated are the source of funds for political activities as well as in creating elements critical in accessing external funding for the SOE. By applying the principles of the resource dependency theory on SOEs where government as a sole or a major shareholder control the allocation and mobilisation of resources, e.g. in the case where the government is corrupt, deviated political goals are achieved at the expense of the SOE's main objectives (Shithomola, 2019:62). Eskom's basic mandate is to deliver services that support social development and social security including economic growth.

1.2.4. Conclusion

Corporate governance have been examined, specifically the agency theory, which is an inward-looking theory, aligning the complex relationships between the board of directors and senior management (Panda & Leepsa, 2017:77). This theory demonstrates that there is a distinct separation of ownership and control between the principal and the agent (Panda & Leepsa, 2017:77). In addition, Crutchley and Hansen (1989:38) documented that although there is a business, and personal relationships between the principal and agents however their inability to work objectively affected Eskom's ability to achieve its primary objectives. This was identified through the conflicted interests of agents who work in SOEs, where the state is a majority shareholder like in the case of Eskom. Agents who were found to be corrupt and allowed their networks to infiltrate SOEs to enrich themselves and those around them at the expense of such SOEs (Panda & Leepsa, 2017:77).

1.3. Problem statement

Lack of ethical leadership make one of the significant causes of Eskom's primary failures affecting the effectiveness of the institution as the most critical electricity generating powerhouse in South Africa (Salakhetdinov & Agyeno, 2020:30). Corporate governance, and ethical and effective leadership, has failed in Eskom which was caused by many factors including political infiltration aimed at enriching individuals and serving political parties' patronage agendas, while turning the electrical grid to a cash cow (Salakhetdinov & Agyeno, 2020:30). Eskom has for an extended period faced significant challenges related to its increasing dependency on borrowing and of its own capital dept spiralling out of control due to corruption and mismanagement (PARI, 2022:1). This debt has primarily accumulated due to escalating primary energy expenses, heightened obligations for debt servicing, rising labour expenditures, and notably, severe mismanagement and corruption (Kissides, 2020:45). Political interference is disguised where office bearers from the then ruling party who are appointed or employed as board members and executives, have failed to prioritise revenue collection to ensure a sustainable electricity supply to avoid backlash from party constituencies and increase voter confidence at the expense of the power utility (Pete, 2020:925). This study will examining corporate governance failures experienced by Eskom within the context of selected relevant corporate governance principles. This study argues that politicians that

are overseeing policy formulation is one of the critical issues which limit SOEs' sustainability because many are selected because they are specialists in that sector, but they are only deployed to these sectors due to partisan or majority rule. There needs to be broader interventions regarding the issue of the manipulation of corporate governance ethics which should serve as a remedy to tackle the problem. In addition to the above-mentioned, for Eskom to be fully sustainable, there must be a clear understanding of the factors contributing to SOE incapacity to produce adequate energy supply i.e., corruption, and mismanagement or misuse of powers (Basheka, 2021:116). According to Basheka (2021:116) the Zondo Commission stated that "while good governance was seen in contemporary times as a solution to the problems of most South African SOEs, there was an apparent absence of legislated and analytical frameworks to guide how best the good governance prescriptions could be applied in addressing ethical failures e.g., corruption and failure to act".

1.4. Research question

The research question is: What improvements can be made to enhance corporate governance in South African SOEs, through an analysis of corporate governance failures experienced at Eskom?

1.5. Research objectives

This study will be aligned to the following primary and secondary objectives.

1.5.1. Primary objective

The primary objective of this study is to improve corporate governance mechanisms of South African SOEs through an analysis of corporate governance failures experienced at Eskom.

1.5.2. Secondary objectives

The secondary objectives are to:

i. Analyse key corporate governance principles and regulations binding SOEs governance structures to the effective governance of South African SOEs, with a focus on Eskom;
ii. Identify key corporate governance failures experienced by Eskom;
iii. Develop recommendations on how SOEs in South Africa may evolve towards an enhanced degree of good corporate governance.

1.6. Scope and field of the study

This study will focus on the background and reasons for corporate governance failures at one South Africa SOE, being Eskom. The field of this study is corporate governance within South African SOEs.

1.7. Empirical research

Formplus (2019:54) state that empirical study employs tested evidence to be used in the compilation of the research outcomes. This evidence may be collected from scientific data, observation methods or data from secondary sources. The raw data contain related information to the subject, to be analysed and interpreted for the purpose of obtaining substantiated researched information for the study being undertaken (Semosa and Legodi, 2023:225).

1.8. Research design

A research design is a procedure which the study is going to follow with the aim of obtaining answers for the research questions at hand, including how data will be collected and analysed (Creswell, 2019:47). It is a blueprint that outlines in more detail how the chosen research method will be applied, including the research instruments to be used to collect data, the data sources, sampling of respondents and ethical issues to be considered (Creswell, 2019:47). This study focuses on exploring and analysing information solely derived from secondary data.

1.9. Research methodology

A descriptive research project is non-experimental research that includes describing the current situation of a subject matter while understanding how a range of factors impedes the current state of the subject matter (Creswell, 2019:49). This research is qualitative in nature since the sources of information were derived from public available secondary sources of information. The primary data of this research study are analysed from primarily different South African secondary sources such as legislation, relevant codes of governance, integrated reports, newsletters, journals, academic papers, reports from judicial commissions of enquiry, etc.

1.10. Significance of the study

This study will support a wider body of researched information and can be used as a reference, as the primary objective is to identify corporate governance failures of South

African SOEs through an analysis of corporate governance practices led to the slow demise of Eskom ability to generate adequate energy supply.

to improve corporate governance practices in South African SOEs, within the ambit of relevant legislation and the King Code. The study may assist corporate governance practices of SOEs to align with the principles of the King Code. The findings of this research should be beneficial to the exercise of good corporate governance at Eskom and may also assist SOEs in South Africa to improve on their expected roles and functions. This study may further assist in aligning SOEs with the application of legislation and effective risk management practices where the governing body should govern risk in a way that supports the organisation in setting and achieving its strategic objectives i.e., SOE management frameworks, with improved financial management of SOEs**.**

1.11. Ethical considerations

Research requires compliance with various applicable legislation and prescripts regarding access to information and the management of the use of information. The research approach adopted for this study does not pose a risk for purposes of ethical clearance, as public available open-source secondary data will be used. It was however presented to the relevant Scientific Committee and Ethics Committee of the Faculty of Economic and Management Sciences of the North-West University, and the necessary approval was obtained. Adherence was paid to the provisions of the Protection of Personal Information Act (POPIA), 4 of 2013.

1.12. Layout of the study

Chapter 1: introduction, background and problem statement

This chapter focus on the introduction, background, theoretical framework, problem statement, significance of the study, research question, research objectives, research aim and research paradigm.

Chapter 2: Research methodology

This chapter expands on the research methods that has been employed in this study, as alluded to in Chapter 1, including searching and scoping of information relevant to the research topic.

Chapter 3: Theoretical framework, legislative and corporate governance practices relevant to South African SOEs

The focus of this chapter is to lay a foundation for significant corporate governance terms which incorporates key interpretations of relevant Acts and standards, the importance of good corporate governance to SOEs, and the nature of companies, specifically SOEs, and the role of the shareholder in SOEs. This chapter further elaborate on principles guiding corporate governance practices, director duties and the span of control that comes with a role of being a director which further involve the duty of care and skill that take effect within the scope of practice of the individual director, how the courts view and rule on the matters that are influenced by poor decisions made by directors and the business judgement rule.

Chapter 4: Analysis of selected corporate governance failures at Eskom

Chapter four is centred around discussions of important aspects which contributed to the setbacks of Eskom corporate governance practices, including, amongst others, the manipulation of supply chain management regulations, evidence of state capture, and issues regarding the ignorance of the governing body and the executive to take action and to further introduce mitigating procedures in order to rectify the corporate governance practices failures and financial misconduct experienced at Eskom.

Chapter 5: Findings, limitations, conclusions and recommendations

Chapter five represents the findings of the research study, its limitations, the conclusions and includes proposed recommendations for Eskom and SOEs in general, in achieving good governance practices.

1.13. Conclusion

This study must be aligned with the processes as outlined in this chapter; the premise of all analysis and discussions should follow the objectives created for the purpose of answering the questions asked to support the research topic. The main aim of the study is to assess the corporate governance practices at a South African SOE, being Eskom, from the aspects that have contributed to the many challenges that have led to the evident maladministration thereof.

2. Chapter 2 Research methodology

2.1. Research methods, data search and thematic analysis

A descriptive research study is non-experimental research that incorporates describing the status quo of a researched topic while understanding how a range of factors impedes the current state of the subject matter (Creswell, 2019:49). This research is qualitative in nature since the sources of information will be derived from open-source secondary sources of information. The data was sourced from different secondary sources such as legislation, relevant codes of governance, integrated reports, newsletters, journals, academic papers, judicial commissions of enquiry, etc.

A Google Scholar search through databases of the NWU library was conducted for articles that are cantered on the phenomenon under interrogation. To get relevant articles from the internet, the researcher used the following study focus related search terms: SOE, corporate governance, corporate governance failures, corruption, and Eskom. Both classical and contemporary literature, published in English, were used. Generally, the study focused on material published between 2016 and 2024, focusing on the state capture period. Studies that broadly examined the impact of corruption on Eskom was included. Data saturation was reached when there was no more new information identified from multiple similar sources.

This study is purely based on existing sources of researched literature to support arguments that are aligned with King IV Principles 1, 2 and 11, namely promoting ethical and effective leadership, respectively, and that the governing body should govern risk in a way that supports the organisation in setting and achieving its strategic objectives (IoDSA, 2016:43,44). Secondary sources of researched information were examined to ascertain how being a majority shareholder, i.e. the state, impacted the undermining of corporate governance principles at Eskom. By way of a desktop literature study using unobtrusive research methods, a realignment will be provided of SOEs with the principles of ethical leadership and reaffirm the important role played by SOEs in fulfilling their expected roles. A thematic data analysis was employed to analyse the collected data, encompassing the processes of identifying, analysing, and representing patterns within the data sourced. The selection of thematic analysis as the chosen method was based on its versatile nature, straightforwardness, and ability to operate independently from theoretical frameworks. According to Clarke and Braun (2006:97) this methodology

makes it easier through a thorough and more detailed interpretation of secondary research data. According to Attride-Stirling (2001:305) the step-by-step approach of thematic analysis is held within six different but joint stages. These stages incorporate a first stage of becoming familiar with the data, coding the data, identifying relevant themes, reviewing, and refining themes, defining and labelling the themes, and finally, recording the ideal themes (Caulfield, 2023:22-23).

Figure 1: Phases of thematic analysis



These stages are clearly unpacked in detail by Caulfield (2023: 22-23) as follows: the understanding of the process begins with going through the text and capturing of first information, and paging through information to get a better understanding. For this mini dissertation the searched information was investigated, analysis was employed to scrutinise the collected data, encompassing the processes of identifying, analysing, and representing patterns within the data sourced e.g., by accessing the NWU data research support or the use of Research gate or paid Google sources, the entering of identified key words for the study i.e., corruption at SOEs, ethical failures at Eskom, political interference at Eskom etc. Coding refers to the noting of all information that was highlighted for the use, by making short notes that become sentences and putting together the trends of shortened labels that have a potential to describe the overall content. These codes evolve to a more combined narrative of the key elements of data where similar meanings are highlighted through the entire process. Generating themes include a detailed interpretation of all the codes that have been developed which encompasses an analysis of the codes created, highlighting joint patterns within them, and beginning to form or shape intended themes.

Themes are more intense and wider than codes, a joining together of different codes amount to a single theme. The continuity of specific identified codes from the searched source results in the full establishment of the theme. The assessment of themes includes the analysis of identified themes in relation to the topic of the study, creating comprehensive meanings which must be aligned with the study objectives. Giving

meanings and subtopics to the selected themes amount to the creation of meaningful ascendancy of the clear expression of information for each theme. The final stage includes the academic inscription of information. The research outcomes of the study addresses identified themes from how they have come together to answer the research question. To determine the integrity of this study, Lincoln and Guba's (1982:3-8) criterion of four elements was applied: credibility, transferability, dependability and confirmability. The four criteria are interpreted as follows:

- Credibility refers to “the confidence that can be placed in the truth of the research findings” (Korstjens and Moser, 2018:121). It measures the truthfulness of the research by minimizing researcher bias through peer review, diverse article selection and transparent analysis (Noble and Smith, 2015:34). The sources of data used for this study were obtained from the paid internet websites for articles, E books, NWU journal and article data base

- Transferability is described as “the degree to which the results of qualitative research can be transferred to other contexts or settings with other respondents” (Korstjens and Moser, 2018:121). It allows readers to assess the applicability of findings to other contexts. This study achieves this by providing a detailed description of the research setting and methodology. For this study, secondary information was used therefore the transferability was not tested because of non-engagement of the subject.

- Dependability is defined as “the stability of findings over time” (Korstjens and Moser, 2018:121). It ensures the stability of findings over time. Due to the in-depth nature of critical literature reviews, replicability by another researcher might be unlikely. However, the study maintains dependability by providing thorough documentation of research procedures.

- Confirmability refers to “the degree to which the findings of the research study could be confirmed by other resources” (Korstjens and Moser, 2018:121). It assesses the extent to which other researchers could confirm the findings. This study achieves confirmability through cross-checking of data by the researcher, under the supervision of the study leader, until consensus is reached. This was

achieved using automated checks of sources through available software to detect errors and manual comparisons by verifying the study content with source documents referenced.

2.2. Ethical considerations

Research requires compliance with various applicable legislation and prescripts regarding access to information and the management of the use of information. The research approach adopted for this study does not pose a risk for purposes of ethical clearance, as public available open-source secondary data was used. The research proposal was submitted to the relevant scientific and ethical structures in place at the NWU for approval. POPIA was enacted with the purpose of protecting identified personal information from harm. The Act prescribes how, when and by whom such information can be lawfully processed. No personal information was processed in this research as no interviews were conducted.

2.3. Contribution of the study

Eskom is a major provider of electrical energy to industry and the public; hence it is a strategic utility. Improving the governance of Eskom will provide in the foundational aspects to build public confidence and the improvement of the general performance of Eskom. The findings of this study will confirm whether current corporate governance practices in Eskom are enough to comply with the ethical principles the standards set by relevant legislated Acts and codes that need to be fully practiced improving corporate governance practices and prevent ethical dilemmas and failures. This study research will also provide necessary reference or guidance towards the development of suitable and ideal intervention strategies to strengthen the corporate governance practices applied at Eskom. Future scholars may refer to this study as it contributes to the body of literature on corporate governance practices of SOEs.

2.4. Conclusion

This chapter discussed the research methodology used by the researcher for the study where secondary sources of data were used as the primary source of data. The chapter further discussed the ethical considerations and the significance of this study. Finally, the need for ethical consideration when collecting data has also been expressed including the contribution and limitations of this study.

3. Chapter 3: Application of theoretical framework and corporate governance legal aspects binding SOEs governance structures

3.1. Introduction

According to Basheka (2021:116) the Zondo Commission stated that “while good governance was seen in contemporary times as a solution to the problems of most South African societies, there was an apparent absence of legislated and analytical frameworks to guide how best the good governance prescriptions could be applied in addressing corruption”. The main deliberations of this section of the study will centre around identifying the backbone for significant good corporate governance practices and related terms of reference. It will further discuss the key meaning of terms such as ‘corporate governance’ both from an overseas and local perspective. This chapter also apply theories that have an influence on corporate governance, the application of relevant principles of corporate governance from King IV and the nature of the company as a juristic person. It ends with an elaboration and description of the ethical framework which guide and premise the governance of Eskom, within the context of South African law.

3.2. Corporate governance ideals pertaining to SOEs and the state of corporate governance in SOEs in South Africa

According to the KING IV Principle 16; in the execution of its governance role and responsibilities, the governing body should adopt a stakeholder inclusive approach that prioritises the needs, interests and expectations of material stakeholders, in the best interest of sustainable stakeholder support i.e. the governing body should approve a stakeholder relationship framework that articulates and give effect to its direction for sustainability of internal and external stakeholder relationships (IoDSA, 2016:71). Ethical corporate governance principles incorporate the efficiency of operations which are aligned with values such as leadership integrity, transparent processes, and the management of company performance through responsible stakeholder reporting and risk management systems (IFAC, 2020:84). According to the AGSA (2018:4) the risk management protocol creates a guideline which ensures good governance in that the Executive Authority should exercise strategic control over the SOE in line with its accountability to Parliament and the public. In the case of Eskom where the state remains the majority and sole shareholder, the effective oversight role must be performed and

aligned with principles of good governance. The leadership and governance of SOEs must be able to carry out their duties unfetteredly and effectively. SOE's governing bodies must practice their roles with integrity and be directly held accountable for their actions (OECD, 2020:55). Eskom is an SOE, with its sole shareholder being the government of the Republic of South Africa as stated in section 50 of the PFMA, read with section 75 of the Companies Act (IoDSA, 2016:114). As a public entity, Eskom is mainly governed by the provisions of the PFMA and the Companies Act. Certain governance principles are further incorporated from King IV including ethical leadership, ethical culture and responsible corporate citizenship (IoDSA, 2016:112). King IV moved from the principle of apply or explain, to apply and explain (IoDSA, 2016:37), as is set out in the table below.

Table 2: Explanation as to the apply and explain regime of King IV (IoDSA, 2016:37)

Apply principles: all principles are placed as aspirations and ideals that the organisations should strive for in their journey towards good corporate governance practices and in realising the governance outcomes. The principles are basic and fundamental to good governance and application thereof is therefore assumed.	**Explain principles:** explanation should be provided in a form of a narrative for accounting, with reference to practices that demonstrate application of the principle. The explanation should address which recommended or other practices have been implemented, and how these are achieved or give effect to the principle.

The final King V Report was released by the IoDSA on 31 October 2025 and will be effective from 1 January 2026. Its framework reemphasises a focus on ethical and effective leadership to achieve four governance outcomes: ethical culture, performance, conformance, and legitimacy (IoDSA, 2025:1). King V has however not been incorporated in this study, as it had not been issued when this study was conducted and has not been in operation during the period relevant to the study. In South Africa, the Department of Public Enterprises developed principles on corporate governance for the Public Sector where SOEs are guided towards ethical corporate governance practices and as an

enabler for effective delivery of services aimed at improving social security and sustainability (DoPE, 1997:7).

Makole (2022:21) state that the consistent development and review of corporate governance codes, and legislative frameworks for efficiency and effective monitoring of SOEs in South Africa should be adequate for achieving ethical leadership and oversight which could see SOEs able to achieve socio-economic aspirations of the country. However, evidence like state capture have revealed that corporate governance practices of Eskom have been widely undermined by the series of internal and external failures which contributed to the lack of operational efficiency and effectiveness (Flepisi and Mlambo, 2021:57). Eskom has been declared technically bankrupt and not financially sustainable due to evidence of financial misconduct that have been caused by undue political influence which contributed to corporate governance failures that have severely affected the SOE's ability to achieve its own primary objectives (OUTA, 2018:19). According to the 2020 International Conference on Public Administration and Development Alternative, the period of 2017/18 financial year, Eskom recorded a huge irregular expenditure bill of about R19,6 million that resulted in them receiving government bailouts from the National Treasury and was due to identified and persistent corporate governance failures and corruption (IPADA, 2020:66).

3.3 Application of theories on governance and the nature of corporate relationships

Agency theory

Agency theory revolves around three main assumptions: (1) there is goal incongruence between parties, hence the need for separation of power (ownership) and control (2) agent and principal are self-interested utility maximisers (3) there is information asymmetry between parties (Squires & Elnahla, 2020:126). It is the belief in the use of an empirically well-established refinement that self-interest is constrained by standards of reciprocity and fairness to go beyond the assumption of limited self-interest that underlies the agency theory (Nguyen, 2019:77). The logical conclusion is that, through both positive and negative reciprocal acts, judgments of fairness mediate the correlations found in traditional agency theory. This mediating variable offers a new, frugal explanation for the extreme outcomes discovered in other investigations (Cuypers et al., 2021:145. Jensen

and Meckling (1976:305) defined the agency relationship and identify agency costs which include monitoring expenditures by the principal like auditing, budgeting, control and compensation systems. The Agency Theory only recognise one party as the principal, those are the business shareholders and the other role players are considered as playing the part of a stakeholder. In the case of conflict of interest it is when corporate governance principles are manipulated by leaders or company directors to achieve personal interests at the expense of the company's primary objectives. According to this theory, the main objectives of principals as main role players in the company leadership is to place the company objectives above their own greed and this will support the company efficiency in achieving its objectives while maximising revenue and profit returns (Shleifer and Vishny, 1997:783). The only criterion used by the agency theory to measure performance of the principals is for the company to meet all measures of best performance and achieve company goals without audit queries and maximise shareholder value (Nguyen, 2019:69).

Fama (1980:301) observed that human behaviour is self-serving at times when direct supervision is laxed where In the case of Eskom political interferences were evident where the board chairperson as appointed by the state influenced the procurement processes to fulfil a political agenda over the primary objectives of the SOE, as will be alluded to in the following chapter. As well as instances where the external auditors' recommendations were not implemented by covering up the activities of those who may be implicated in wrongdoing (Bloomberg, 2023:33).

The Stakeholder Theory

Freeman and Reed (1983:88) define Stakeholder Theory as the system that is linked to the company ethics and operating frameworks that supports the existence of the company as a juristic person, conforming to standards that promote operational activities that priorities social wellbeing. According to this theory corporate governance is primarily concerned with how effective various governance systems are in enhancing long-term investment and commitment amongst the various stakeholders. Gnan *et al.,* (2013:907) believed that the Stakeholder Theory developed gradually since 1970 as was presented by Freeman and Reed (1983:88) in his general theory of firms that promote corporate accountability which recognises sustainable stakeholder relationships where in the case of Eskom all stakeholders were failed when the SOE failed to generate adequate levels

of power supply and their dependency to Eskom impacted negatively on their business performance reliability. The main challenge with the traditional stakeholder model of SOEs in South Africa revealed that is difficult to ensure that SOEs like Eskom achieve their broad objectives due to them reporting to members of the executive who may turn out to be compromised political deployments of the then ruling party in government (Abang'a & Wang'ombe, 2020:160).

The Resource-Dependency Theory

Gnan *et al.* (2013:907–937) state that the Resource Dependence Theory (RDT) provides an alternative perspective to economic theories of mergers and board interlocks. It provides an understanding of the type of inter-organisation relations that are inked to market failures. In the case of Eskom, the inability for the grid to generate adequate power supply affected the country's ability to sustain economic growth (Abang'a & Wang'ombe, 2020:160). The theory is based on the premise that management of organisations strive to ensure that the organisations survive and their own autonomy is enhanced at the same time maintaining stability in the organisation's exchange relations (Drees *et al*, 2013:177). According to Gnan *et al.* (2013:937) there are three important aspects that guide the RDT as follows: the social corporate responsibility of each organisation must be upheld from the company internal systems, sustainable stakeholder prioritisation and empowerment; and the main focus on demand and control as the main critical aspects of the RDT that separates this theory from the rest.

3.4. Statutory and regulatory framework that underpins SOEs

In pursuance of section 216(1) of the Constitution the main functions of National Treasury are to establish monitoring mechanisms to ensure adherence to prescribed principles of regular expenditure for both transparency and expenditure control in each sphere of government (Serongoane, 2021:45). The PFMA's objective is to rationalise budget allocation and to support service delivery goals by promoting good financial management and to sustain the financial management in the sectors of government (Shimothola, 2019:80). PFMA Sections 50 and 75 aimed at guiding efforts towards effective corporate governance practices and promote stakeholder confidence in the governing body leadership for effective implementation of the provisions of the act including the shareholder legitimacy for the ability to measure accurate projection of financial target setting. The main objective of PFMA sections 50 and 75 can be in brief presented as

follows: to regulate money flow in state entities and regulate the applicable mandates based on the level of financial delegation per level of administration. Through this Act the determination of those who abuse power and exploit state resources for their personal benefits are identified and held accountable (Shimothola, 2019:80). This research study consistently highlights that SOEs have been accused of poor implementation of laws and guidelines, because the boards and management of SOEs ignored legislation like the PFMA aimed at ensuring sustainability, ethical accountability and efficient and effective corporate governance practices. Ideally, every SOE must seek to uphold the implementation of the PFMA by further recognising the primary objectives of the entity where stakeholder value is upheld as a priority.

The Companies Act further regulates the SOEs in that they must have a legitimate governing body which have a full responsibility to oversee the SOE and provide feedback to the shareholders (section 66). Furthermore Section 66 of the Companies Act gives the opportunity of a formal assessment of acceptable corporate governance practices where the governing body's practices must be within the premise of acting in good faith, promote the best interests of the company and act with a reasonable degree of care, skill, and diligence (sections 75–77). Section 159 (1)(a) is applicable where the governing body fails to execute the reasonable degree of care, skill and diligence, the third party is protected by law to report any noted abuse of powers by the governing body where the SOE is found to be disadvantaged. Section 159 (2)(b) of the Companies Act aims to protect whistle-blowers by granting them "privilege in respect of the disclosure; immunity from any civil, criminal, or administrative liability for that disclosure; and compensation for any damage suffered as a result of the disclosure." In the Zondo Commission privacy was maintained regarding the broadcasting of whistle blowers as names and original voice recordings were modified accordingly (Serongoane, 2021:46). Employees are well placed to act as surveillance mechanisms who could effectively inform their institutions on corrupt and other detrimental forms of behaviour that counter the efficiency and productivity of the SOE (Nwoke, 2019:427). Furthermore, protection provided to whistle-blowers must be expressly communicated to encourage employees to report corruption.

Aside from these two pieces of legislation, other acts, regulations, and guidelines exist that are applicable to the governance of SOEs, such as the Preferential Procurement Policy Framework Act 5 of 2000 (aimed at promoting economic transformation), Treasury

Regulations and policy guidelines (focusing on efficient, risk and accountability regarding the comprehensive implementation of PFMA, SCM principles by government entities), the Public Audit Act 25 of 2018 (which expands the Auditor General's powers to enforce accountability), the Employment Equity Act 55 of 1998 (which aims at achieving workplace equity by eliminating unfair discrimination resulted from the disparities of the past), and the Skills Development Act 97 of 1998 (to boost national workforce skills, improve workplace productivity and boost chances of employment) (Serongoane, 2021:46). In terms of governance issues, the King IV Report is a set of voluntary principles and good practices of corporate governance. If the King IV Report conflicts with any legislation, the legislation will prevail. However, for entities with a primary listing on the Johannesburg Stock Exchange, certain aspects of the King IV Report are binding by virtue of the listing requirements that impose obligations on issuers to comply therewith (Serongoane, 2021:47). King IV further rationalise the practicality of the ethical principles provided by carefully interpreting each principle and its application. These principles and their application can be used as a reference but not as the replacement of any law, they provide guidance to corporate governance practices and they are provided along with the rational for the application of each principle which must be carefully implemented against the weight of the need whenever necessary (Nwoke, 2019:450). It should be noted that although King IV is not legally binding, this does not mean that there are no legal consequences arising from non-compliance (IoDSA, 2016:7). According to Naidoo (2016:367) the court will consider King IV when evaluating what is regarded as best practice in a particular situation, especially where governance duties are involved. Failure to meet corporate governance practice, and by implication the principles set out in the King IV Report, may invoke liability of the board in certain circumstances for example, SABC v Mpofu (2009): The court used the King Code as a yardstick to criticise the SABC board for failing to follow good governance practices regarding the suspension of the CEO, noting that public enterprises must adhere to these standards.

Regarding Principles 1 and 2 of the King IV Report, namely promoting ethical and effective leadership respectively, to sustain acceptable levels of corporate governance practices the PFMA compel entities to consider placing a clear responsibility on the specific level of governance for the implementation and accountability of the PFMA section 49 (Serongoane, 2021:48).

Interpretation of the directors' responsibilities to act in the best interest of the company, PFMA section 50 enforces the accurate alignment of the company objectives with policies where governing bodies are expected to implement these policies in a transparent and in an objective manner (Serongoane, 2021:48).

3.5. The enhanced role of the shareholder in the governance of SOEs

Naidoo (2016:369) also contended that both private entities and in SOEs, their practices are aligned to the same ethical principles of corporate governance which are connected to the roles of the shareholders, thus strengthening the shareholders' role to align company policies with the company direction. The shareholders' responsibility in governance is to select and appoint the governing body and auditors; then, having achieved that primary mandate, the shareholder plays an oversight role to hold the governing body accountable for the proper corporate governance practices of the SOE (Naidoo, 2016:98). Selected governing body members must act in the best interest of the SOE and adhere to the main company objectives that priorities shareholder benefits by market value, added profit orientated investments; and prioritising the allocation of adequate working capital. Naidoo (2016:367) further contend that the role of governance is therefore transferred to the governing body by the shareholder, this is primarily because of the guided principle that the director must act within the best interest of the company through the duty of care and skill, with open and inclusive participation in the collective decision making process that is taken at the highest level of authority by the governing body.

This takes into consideration that although the decisions of the board are collective in nature, the individual directors remain individually accountable in terms of their fiduciary duties to the company (Naidoo, 2016:369). The risk of capital investment has been arranged to be on the account of the shareholder whether in private or state enterprises. (Naidoo, 2016:105). Furthermore, in Eskom, the Minister, as the state representative, has the power to demand that the governing body accounts to corporate governance practices and direct oversight, this is because the board plays the governance role on behalf of the shareholder which is represented by the Minister (Naidoo, 2016:370).

In South Africa some predicaments affecting SOEs are predominantly linked to the responsibility of the state as the majority shareholder. The main highlighted responsibilities such as the selection of the governing body through the Minister's powers

have proven to have some adverse outcomes to the ethical effectiveness of SOEs such as Eskom (Semosa and Legodi, 2023:240. The evidence of poor corporate governance practices at Eskom is directly linked to the aforementioned predicaments, related to the dubious appointments procedures where ethical principles were deliberately ignored to fulfil the hidden agenda of the Minister (Adebayo, 2020:56). To effectively address these predicaments that affected Eskom, it is advised that the office of the Minister must conform to active shareholder values over a passive shareholder attitude, this consensus can be achieved through the shareholder meeting with the governing body collectively identify gaps with procedural steps taken against poor performing governing body members, followed by the collective re alignment of ethical practices (Bester & Dobovsek, 2021:87).

3.6. Directors' duties, decision-making and liability

The focus will be on the duty of care and skill, as partially codified in section 76(3) of the Companies Act, this is because the focus of the study is mainly on corporate governance practices, Ethical failures in Eskom, the Act stipulated on the decision-making abilities of the individual directors of a company; including how the courts deal with the issue of bad decision-making directors; unpacking the evidence of the impact of the actions or non-action of the governing body showing far reaching outcomes regarding the strategic focus of a company. SOE Directors in South Africa, as accounting authorities under the PFMA, are legally bound to manage SOEs with utmost care, ensuring asset protection, financial prudence, and good governance, accountable to the shareholder (state) for performance which is in line with the normative guidelines stated from the agency theory, with duties mirroring Companies Act requirements for registered entities, though civil society groups like OUTA that are pushing for stronger "delinquent director" tools for non-compliant SOEs not registered as companies (OUTA, 2018:77). This deliberation is limited to South African case law to isolate and demonstrate how the judiciary has dealt with the subject matters of this chapter.

3.6.1. Directors' fiduciary duties

Section 1 of the Companies Act makes provision for company directors as affiliated members of the governing body to the company that they are serving, as contemplated in section 66, that the director of a company includes any person appointed in the position designated as a director or alternate director, or by whatever name designated but acting

in the capacity that is sharing the role which is equal to the director role. The IoDSA (2016:43) phrased that a director is an official who has been chosen and appointed to serve on the governing body of a company, who has been given roles to exercise clear judgement on corporate issues in the best interest of the company. The IoDSA (2016:43) further elaborates that the directors' most elementary form of official oversight is to monitor and evaluate performance of senior management.

Naidoo (2016:136) continues to acknowledge the challenges directors encounter, which outlined that a director finds him/herself in a precarious position during the collective engagements as the board where views differ, the director must record all diverging views and place on record with the company secretory while also acting as if he/she has for trust for collective management resolutions. Naidoo (2016:199) further contend that an individual who is nominated and appointed to serve as a company director should have independent judgment skills and a level of skill in the following critical areas: financial management to steer the future strategic direction of the company and the tone set by the governing body. Naidoo (2016:200) further elaborate that an inherent risk is found at the level of the board of directors where the decisions of the board might be unduly influenced either by individual or external forces, which have highlighted the agency problem at Eskom which led to ethical failure.

3.6.2. The duty to act in the best interest of the company

Naidoo (2016:367) states that the fiduciary duties of directors of SOEs are placed in line with section 50,75, and 77 of the Companies Act, and the Protocol (Prot. 5.2.3.1) further makes provisions that enforce that directors of SOEs are also required to conform to their fiduciary duties by adhering to the common law and to meet the same standards like directors of private owned companies. The Companies Act, per section 76(3)(b), indicate that a company director shall practise in the best interests of the company although the Act does not precisely unpack the meaning of the phrase.

The IoDSA (2016:43) has unpacked the phrase "the best interests of the company" as members of the governing body must adhere to the obligation that places the company objectives in the best interest of the execution of their duties skill and care, in cases where the conflict cannot be avoided, the principles of disclosure shall be adhered to by making the governing body aware of the details at the earliest opportunity, and then ultimately follow the guidelines.

The IoDSA (2016:43) further states that directors should ensure that they avoid conflicts of interests, which may compromise their fiduciary duties. In line with this principle, the Companies Act, in section 76, stipulates that a director of a company must not use the advantage of being privy with information accessed while occupying a position in the capacity of a director to gain an advantage or to knowingly cause harm (Naidoo, 2016:368). The director further has a duty to relay the information to the governing body which he/ she believes may either materially or immaterially effect the company (Naidoo, 2016:369). Thus, the role of a director is to practise his duties in the best interests of the company can be further assessed at the wider scale in line with the agency theory, for example, if a director is manipulating specific protocols and uses his rank to self-service his/her own interest that compromises the company's ability to achieve its primary objectives, or if the director fails to disclose to the governing body the information available to him that may expose the company to financial and or reputational risk, that director will be in gross violation of the execution of his duties in the best interests of the company and that director may be regarded at fault and the courts may investigate and rule whether the director be regarded as a delinquent director (IoDSA, 2016:44).

3.6.3. The duties to act for a proper purpose and to act in good faith

Section 76(3)(a) of the Companies Act legislates the duty of the proper purpose and good faith which the director must practice his/her responsibilities in good faith and for a proper purpose. Naidoo (2016:201) further recorded that when directors execute their duties within the duty of proper purpose, it allows the director to apply his/her decision-making powers for the benefit of the company for the roles that were prescribed only to serve the governing body in the best interest of the company. This outlines that the roles of the directors should not be abused for unethical self-gains whereas in the case of Eskom, corporate governance processes were deliberately ignored with the evidence of the third-party influence which was identified as political interference with a direct deviation from the agency theory norms (Mathebula and Masiya, 2022:146). Naidoo (2016:204) further stated that objectivity and subjectivity guides the evaluation of this duty, in that a director could support a board resolution in a subjective manner thinking that it is/was in the best interest of the company, when objectively he/she could be in breach of this purpose, therefore, the test for the duty of proper purpose is objective in nature. The IODSA (2016:51) supports this ethical approach until the courts determine whether the primary

purpose of the director's actions were proper or not. The IoDSA (2016:51) further contended that where a director is found to have been acting subjectively, and in good faith therefore depending on the court's findings whether the primary purpose of the director's actions was proper or not proper in nature, that director may have been acting in the best interest of the company.

Naidoo (2016:204) specifically state some critical aspects that premise the directors in acting in good faith including applying independent and unfettered discretion when concluding whether the matter was in the best interest of the company. Directors should base their opinions on honesty, confidentiality and to prevent temptations of personal gain or being conflicted.

3.6.4. The duty to avoid conflict of interests

Measures to avoid a conflict of interest are recorded under the Companies Act, section 75, which stipulates that directors shall disclose all personal financial interests, or that of a related person, in a matter being specified by the disclosure principles as considered by the governing body. The director must outline the specific nature of the submitted conflict interest together with material information, and further excuse himself in that particular meeting, stop from participating in any discussions or vote in any issue linked with the conflict of duty. This places the interest of the company above everything else and help in the avoidance of potential liability of the company. The Companies Act further makes provisions for a director of a company that he/she must not use his rank as the director to manipulate any company processes or must not use any information gained during the acting period in the capacity as a director as to obtain an unfair advantage for self-gains. Wiese (2019:70) also contended with the aforementioned provisions that created to ensure that the company does not suffer from any avoidable losses, nor damages from the bad decisions of the directors and to mitigate for the possible breach of duty of care and skill, it is further recommended that directors consider conforming to the following; complete and submit a declaration of interest which will indicate the interests of the directors before they commence acting in their roles; and make a declaration before a meeting starts if that meeting's agenda conflicts with the personal interests of the director (Naidoo, 2016:215).

3.7 The duty of care, skill and diligence

The reason for the enacting of the duty of care in legislation was to directly support the directors from embarking on committing to decisions which would later be detrimental to the company (Steven and De Beer, 2016:250). Steven and De Beer (2016:250) further stated that when a director executes his/her roles within the provisions of practising in good faith and in the best interest of the company, that must execute his duties within the provision's duty of care and skill. Old English judicial resolutions upheld that should the director make judgements in the best interest of the company; any misjudgements of the situation may not be regarded as gross negligence unless in such instances where gross negligence could be procedurally confirmed. Steven and De Beer (2016:252) further state that, more focus was centred on trustworthiness rather than on the ground of fitness to hold office when making decisions. Naidoo (2016:205) state that the rationale of this law posed a risk that directors could pay less focus to the outcomes of the company because they usually lack enough information regarding the operations.

3.7.1. The duty of care and skill according to the common law

According to Mupangavanhu (2019:140) South African law regarding the director's duty of care and skill is similar to the English law version, the English resolutions of this directors' duty is duly found to be user friendly with their impressions also found in the South African jurisprudence. According to Margo J, directors must perform their duties with the level of care, skill and diligence that a reasonably prudent person would exercise in a similar position, this involve staying informed about the company affaires.(Cassim *et al.*, 2022:555). This was the subjective approach that was used by the judiciary at the time. This was used as the criteria to evaluate the qualifications and experience of the director, which meant that if he/ he possessed any special expertise, the company should have benefitted from it, and the decision of the judiciary would be in accordance with this. In addition, the subjective test caused that the director's lack of skill and necessary competencies were protected from liability. A further analysis of the subjective approach was that it separated trustworthiness as the core but accommodated less competent directors from their poor decisions and actions, causing them to ignore the need to improve themselves (Cassim *et al*., 2022:555).

Cassim *et al* (2022:557) further contended that there are three legal prepositions of the common law as per *Re City Equitable Fire Insurance Co Ltd* includes that (1) a director

are not liable for gross negligence unless their conduct is "gross" and they are entitled to rely on the honesty of their colleague, (2) directors must act with care and skill, and diligence that is reasonable for them to exercise, (3) directors are not expected to be experts in every aspect of the business, they can rely on the expertise and the knowledge of others.

3.7.2. From a lenient to a stringent approach of the duty of care and skill

The common-law duty of care and skill was implemented with more leniency during the use of the Anglo-Commonwealth jurisdictions. It was than identified that when a director found to have breached the duty of care and skill, the judiciary applied a more relaxed approach and the ascending views from the courts was that these cases should be viewed in two fronts which affect both the director and the company shareholders who have appointed these directors where they were also to be held accountable for the company performance (Gray *et al*., 2021:215). Melepheny (2023:25) also contended that the lenient approach was crafted in a manner that the managers that were identified as poor performing and the redress of such cases would be done by the same shareholders who appointed them. Most directors were appointed on part time basis, and some were appointed due to their reputation and influence in the community without any qualification as experienced businesspeople because the qualification was not a prerequisite requirement (Cassim *et al.,* 2022:554). However, the subjective approach reached the period where it needed to be reviewed in the wake of corporate governance scandals that had occurred, for instance in the case of Enron, Parmalat, Masterbond, Saambou Bank and Fidentia. The result was that the subjective approach was not fit to address the needs of companies in modern society, including the impact of decision-making which compromised the wellbeing of societies and environments within which these companies operated (Gray *et al*., 2021:215) The dual standard approach was established, which incorporated both the subjective approach as well as an objective approach, i.e., that the duties of the director could be evaluated through the standard of conduct of the notional reasonable person. According to Thompson *et al.* (2018:264) the ideal ethical principles of the objective standard approach incorporate the following: “directors must be under a systematic review process and they need to be kept abreast concerning updated company policies and frameworks; “directors must be under a systematic review process

against their key performance standards that are aligned with updated company frameworks and policies; directors have a responsibility to monitor and align corporate practices to be within updated operational methods; and directors should continuously interrogate the company financial statements for the early identification of early warning signs of potential financial risks and act early rather that when the damage is already done".

3.7.3. Codification of the duty of care and skill into South African legislation

Section 76(3)(c) of the Companies Act partially codified this duty in that: subject to subsections (4)(5), (i) a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director (ii) with the degree of care, skill and diligence that may reasonably be expected of a person (iii) carrying out the same functions in relation to the company as those carried out by that director; and (iv) having the general knowledge, skill and experience of that director. Thompson et al., (2018:244) stated that the advantage of partial codification includes that it does not prohibit common-law growth of the duty, instead it enhances the development of the duty through various juristic cases. Therefore, common-law principles to govern over various situations which may arise; and flexibility is not compromised, as there are no incentives to find loopholes and common-law can be consulted in complicated cases.

3.7.4. The application of the duty of care and skill

A South African court case that centred around the duty of care and skill was Fisheries Development Corporation of SA Ltd v Jorgensen and Others (Thompson *et al.*, 2018:266). In this case, Margo J submitted the following South African perspectives regarding the duty of care and skill; The duty of the director is more relying on the nature of the services of the company including any other the roles that is assigned to him, There is a difference between a full-time director and non-executive director, the non-executive director is not bound to pay considerable attention on the affairs of the company which is considered as periodical participation in nature. The non-executive director is further not compelled to attend governing body meetings, although there is an expectation that he/she might attend. Moreover, the director may rely on consultations, guidance offered, and advice solicited from colleagues. However, the director should further verify the

information provided from consultations but should use that in empowering the exercise of his own final judgement on any corporate matter (Gray *et al*., 2021:215).

3.7.5. Challenges of the duty of care and skill

Thompson *et al.* (2018:281) opines that while the similar standards are made available to support the director's fiduciary duty, as well as the duty of care and skill, there is a potential risk that the distinction between these two duties will be blurred in South African law. These are the challenges that come with the partial codification of the duty of care and skill in the Act and may result in the precarious legal position experienced by directors, shareholders and stakeholders. Issues around clarity, simplicity and applicability will never be resolved, and time, effort and legal fees in disseminating the law to extract the aligned legal principles will also be found as a challenge (Thompson *et al.*, 2018:264). The subjective and objective applicability within the codification of the Act cannot be applied across the business world, because the duties of directors vary from one entity to the next.

3.8. Decision making

3.8.1. Memorandum of Incorporation (MOI)

According to section 50 of the Companies Act, The MOI can be viewed as the 'internal' constitution of a company which may also include rules against which the company is expected to operate, including being regarded as the founding document of the SOE. The MOI elicits the objectives of the company, which incorporates the legal and privilege rights and responsibilities of the directors and all shareholders and their association to the company (KPMG, 2022:3).

According to Naidoo (2016:66) the MOI is a significant backbone document that provides a guide on how to govern a company. It is compiled in a way that protects the interest of the shareholders in the company. The MOI and any rules contained therein are legally binding: (a) between the company and each shareholder; (b) among the shareholders of the company; and (c) between the company and— (i) each director or prescribed officer of the company; or (ii) any other person serving the company as a member of a committee of the board, in the process of their respective functions within the company. According to Phiri (2022:41) it is imperative to note that the threshold of the decision-making power of an SOE, according to the MOI, lies with the governing body and its resolutions are

binding on an interim basis until it has been ratified by the stakeholder (i.e., the Minister). A challenge which has been identified is that section 15(6) of the Act only states that the MOI is only binding in the absence of the legal provisions, and that the court shall determine the level of its applicability case by case.

3.8.2. Standard of conduct in decision- making

Bravo-Urquiza (2021:55) states that the governing body is ultimately responsible for the monitoring of all decisions and to detect and prevent corporate governance failures. This section will extend focus on the relationship between the stakeholder, the board, the board's subcommittees, including the predicaments recorded in the monitoring and evaluation at these governance levels. According to Naidoo (2016:370) the directors of a single owned SOE like Eskom are required to keep the shareholder continually informed of relevant developments.

The Protocol 5.1.15 of Corporate Governance in the public sector provides that in compliance with the aforementioned, directors should follow a disclosure principle which is similar to the continuous disclosure requirements for companies listed under the JSE Listings Requirements i.e., once a board becomes aware of any information that may have a material effect on its value, they are required to promptly advise the shareholder. In the case of wholly owned SOEs, the board must submit quarterly or six-monthly reports to the shareholder detailing progress against, and any changes to, the corporate plan (Naidoo, 2016:371). This report should also incorporate details of any material losses through criminal conduct and any irregular expenditure, fruitless and wasteful expenditure that was incurred during the financial year and any criminal or discipline procedures taken as remedial actions (Naidoo, 2016:371).

Pucheta (2019:301) further confines that the subcommittees rigorously interrogate the agenda items and make well informed submissions to the board for its ratification and can further recommend resolutions on certain matters; but only when the board delegates such powers to this sub-level of governance, in essence, the board remains responsible for all such delegated powers as the central responsible level of authority and accountability. According to Nadler (2022:18) the CEO, or Accounting Officer, is regarded as having a decisive role over the board through providing evidence-based guidance, as well as representing the administrative and financial day-to-day management of the

company. The functional relationship between the board and CEO includes that the board delegates its resolutions to the CEO and his/her executive management team for institutional implementation through the company secretary.

Adams (2020:28) documented that there remain predicaments in the monitoring and evaluation of the resolutions of the board. The factors that contribute to these challenges include: interference from the respective shareholder; bureaucracy in the SOE which negatively impacts on corporate governance practices in the SOE; politically appointed board chairpersons and directors who are not versed and knowledgeable on their duties and responsibilities; frequent turnaround and appointments of CEOs in SOEs; the stakeholder's department playing a triplicate role in the SOE as majority shareholder, policy maker and regulator; and the board being treated as political tools who is expected to do the bidding of government, which raises an agency problem. It is submitted that although the Executive Authority is accountable to the Legislature and at cabinet level in terms of the decisions of the board; including the direction, predetermined- and financial outcomes of the SOE for a specific financial year, the final decisions and accountability to the Executive Authority relating to the SOE in terms of strategy, performance and culture lays with the main board of directors.

3.9. The Business Judgement Rule

3.9.1 Introduction and history of the BJR

The development of the business judgement rule in the USA (specifically the ALI formulation), the South African business judgement rule was incorporated as part of the duty to act with care, skill and diligence, with the enduring influence of English law is prevalent in the fact that South African courts have demonstrated their preparedness to refrain from interfering with the business decisions of a company (Mupangavanhu, 2019:133). This rule was strengthened due to the large number of public liability suits and legal lawsuits brought and made against directors of companies. The directors were found in contempt due to allegations of both negligent and bad judgements that were made, including cases where directors were found to have been acting in their own interest at the expense of the company. According Mupangavanhu (2019:5), the BJR is regarded as an advocate for directors and is subjected to the provision in the American Law

Institute Principles of Corporate Governance (the ALI Draft), including the formulation of the rule by the Delaware courts. The rule is seen as a cornerstone concept in Delaware corporate law where the BJR is regarded as a tool used by the judiciary for judicial review of the standard of conduct rather than being a standard of conduct (Oost, 2020:120).

3.9.2. Codification of the BJR in South African legislation

According to Hofmeyr (2025:9) section 76(4)(a) of the Companies Act provides for the South African business judgement rule. This section provides that: (4) In respect of any matter arising in the exercise of the roles or the performance of the functions of the director, 4(a) a particular director of a company will have satisfied the obligations of subsection (3)(b) and (c) (i) to have taken reasonably diligent steps to become informed about the matter; (ii) either the director had no material personal financial interest in the subject matter of the decision, and had no reasonable basis to know that any related person had a financial interest in the matter; or (iii) the director complied with the requirements of section 75 and (iv) the director made a decision or supported the decision of a committee or the board, with regard to that matter, and the director had a rational and objective basis for believing, and did believe, that the decision was in the best interest of the company. It is important to note that the BJR is activated the moment the director is able to demonstrate that he/she satisfied the requirements of section 76(4), which is subjected to section 76(3) of the Act, which indicates that directors must act in the best interest of a company, including executing his/her function with a degree of care, skill and diligence.

Section 76(4)(a) of the Companies Act therefore provides that the application of the BJR is appropriate when it has been established that the director has taken reasonable and diligent steps to become informed about a subject matter and had no material personal financial interest linked the decision taken, on the matter in which made to believe that the decision which was taken was rational and in the best interest of the company (Mupangavanhu, 2019:5). Naidoo (2016:212) contended that, provided a director satisfies the provisions contained in section 76(3) and 76(4), he or she will not be held liable for any damages that may be incurred due to decisions taken, the director can successfully raise a defence and will not be in breach of the director's duty of care and skill. According to Watkins & Burton (2017:100) this comparative approach is particularly

relevant as section 5(2) of the Companies Act allows for a court to consider foreign company law when interpreting a provision of the Act. This section complements section 5(1) of the Act, which directs that the Act must be interpreted and applied in a manner that gives effect to the purposes set out in section 7. Section 7 mentions the evolution and utilisation of companies to enhance the economic welfare of South Africa. The rule is core to corporate governance and section 7(b)(iii) of the Companies Act highlights that "high standards of corporate governance" must be pursued.

3.9.3 Rationale of the BJR

Why would such a rule be implemented when the decisions of the board of directors could lead to an adverse outcome for the company, and threaten its financial position as a going concern? The BJR entails that the judiciary will not second-guess the resolutions and actions of any board of directors that can demonstrate that those decisions were reasonable and resulted in unfavourable outcomes for the business itself (Naidoo, 2016:212). The 'reasonableness' measure which the directors must demonstrate to the courts includes that the decisions that were taken were from an informed position, either with reference to prescripts from documentation that were supplied to them and thereby informed the decision-making process, or through advice received from a senior or professional employee of the company (Naidoo, 2016:212). According to Naidoo (2016:213) companies are risk- dependent, the success of the business cannot be guaranteed, therefore, if directors constantly face the prospect of liability when companies post adverse outcomes based on decisions taken, no one will be willing to take risky decisions for that company, which is a requirement for business growth.

3.9.4. The application of the BJR

In this regard it is important to remember that the scope of the business judgment rule under section 76(4)(a) is explicitly limited by section 76(3)(b), which arguably pertains to the fiduciary obligation to act in the company's best interests, rather than including all fiduciary duties. This calls into question whether this omission was made on purpose or whether it was an oversight (Mupangavanhu, 2019:174). The first part of the standard necessitates that a director must act reasonably. Section 76(3)(c) therefore provides for a dual subjective-objective standard, because it still imposes that the director's skill, knowledge and experience be seen as subjective elements. Cassim *et al.* (2022:563) contends that this new threshold, established by statutory law, is marginally more

stringent than it was under common law. Also, this new standard, in comparison to its common law counterpart, is regarded by experts to be a notably more realistic reflection of contemporary commercial practices (Naidoo, 2016:213). In other words, where a director acts without authority, recklessly or fraudulently or is party to the publication of false or misleading information about the company, he may still be held liable despite the statutory protection offered by Section 76(4). The inclusion of the BJR in the Act has been criticised in some quarters on the basis that directors may be encouraged to indulge in riskier conduct than they might previously have done because they cannot be second-guessed by the courts when they have acted in accordance with their fiduciary and statutory duties of care, yet, there is no empirical evidence to support this view (Naidoo, 2016:214).

There are still arguably few South African examples where our courts have held directors liable for breach of their fiduciary duties; however, the Act envisages that our courts may have specific recourse to international precedent to develop our company law (Naidoo, 2016:214). Mupangavanhu (2019:143) contended that the belief that the statutory of the BJR in the Companies Act has the potential to lighten the duty of care, skill, and diligence, this rationale for the introduction of the statutory business judgement rule is also shared by Cassim who contended that the introduction of the business judgement rule assists in the alleviation of the less subjective approach to the more rigorous analysis of the duty of directors. To elaborate further, the rule permits directors to make business decisions without the apprehension of personal liability for adverse results, provided they act in good faith and believe their judgments serve the company's best interests (Cassim, 2019:163).

3.9.5. The relationship between the duty of care and the BJR

There are specific preconditions that need to be satisfied before being considered for protection by the BJR. The preconditions are set in section 76(4) of the Act stating that, if it has been found that that these preconditions have been complied with, only then that the director will be considered for the protection from liability by the BJR. Therefore, there is a strong participative link between both the duty of care and the BJR. Neethling (2021:30) further states that the rule has been developed alongside the duty of care and skill, and because the BJR is the prerequisite which qualifies the test for breach of duty

of care and skill, that the link between the rule and the duty of care and skill is further solidified.

3.9.5.1 Critique of the BJR

Some of the critiques which have been raised against the BJR include that the rule does not have any teeth in keeping erring directors liable for adverse company outcomes due to poor decision making, which creates more problems than solutions (Neethling, 2021:30). Beja (2021:70) opines that the purpose of successful liabilities against directors, could result in upcoming potential directors flocking away from corporations' boards of directors.

The South African judiciary already followed a pattern of not second-guessing the decisions of directors in similar vein to the Delaware judiciary. South African courts have a low referenced history of succeeding against directors in terms of their duty of care and skill. The courts of Delaware are departing from the traditional shielding which the rule cater for as it is assumed that the BJR does not cater to the needs of a modern society. However, it should be specified that the BJR does not shield directors from the decisions that were motivated in bad faith, not being properly advised and not for proper company purpose (Beja, 2021:73).

3.9.6. Liability of directors in terms of decision-making

According to section 77(2)(6) of the Companies Act, directors may account individually and or jointly for any identified misconduct (Hofmeyr, 2025:18). A director of a company may be held accountable to any loss sustained by the company in accordance with the specific provisions in the common law or as directed in section 75, 76 (2)(3) or from any provisions of the company's MOI relating to breach of a fiduciary duty Hofmeyr, 2025:18). According to Beja (2021:30) the duty of care and skill utilises the law of delict to hold company directors to account, and to make good the harm suffered by the wronged party. Neethling (2021:40) further states that a challenge present in the South Africa jurisprudence is that although the delictual principle is based on English tort law, it is modified to the South African Roman Dutch "*chassis of delict"*, whereby the success rate of the remedy is a rare occurrence. Talbot (2021:530) states that a director who fails to observe his/her duty of care and skill will be liable to the company for any loss suffered because of such failure. In addition, a director's liability will be based either on delict, or if there is a contract between the director and the company, on the breach of contract. As

stated earlier in the discussion that the liability of the duty of care and skill is based on the principle of *Lex Aquila*, either as fault according to *dolus* or *culpa*, which results in the loss to the plaintiff. It is motivated that, should the basis for liability be accepted as aquilian, a challenge is present that it would be unnecessary to distinguish between a director's fiduciary duties and his/her duty of care and skill (Mupangavanhu, 2019:140)

3.10. Conclusion

In summary, the duty of care and skill was established to prevent directors from making decisions which could be detrimental to the company corporate practices therefore, the total application for the BJR also supports that the director is advocated from judicial review if he/she can make verifiable reference supporting that he/she performed his/her duties in the best interest of the company by making decisions based on evidence and in an informed manner. The duty of skill and care has evolved, from incorporating a lax subjective standard which shielded incompetent directors, to a dual approach standard which includes an objective standard which forces directors to familiarise themselves with the company on which they serve and commit to only on well informed decisions. This chapter further paid close attention on the governance role of the directors together with their fiduciary relationship to the company. The comprehensive definition of the director as the subject and as a role was provided, and it was also mentioned that the director should mostly maintain objectivity in decision-making, while also ensuring due diligence by ensuring financial prosperity within the company and setting the tone and understanding of the atmosphere in which the company operates.

4. Chapter 4: corporate governance challenges at Eskom – examination of selected cases

4.1. Introduction

Corporate governance that is aligned to the principles of leading ethically and effectively is significant in corporate governance practices as it strengthens the achievement of operational and financial objectives (IoDSA, 2016:43). According to the Portfolio Committee on Public Enterprises (2018:105) over the past decade, corporate governance practices at Eskom have deteriorated step by step in respect of, amongst other, irregular financial expenditure, procurement and contract management, revenue collection and lack of consequence management. This chapter will discuss and elaborate on aspects that led to the corporate governance failures at Eskom, such as the nature of the incident, supply chain management contraventions, including the inability of the board and Minister to introduce mitigating actions to rectify the governance and financial irregularities discovered. The deliberations are centred around the findings from official investigative reports on Eskom's governance failures which severely affected the efficiency of the SOE's objectives.

The mandate of the Zondo Commission was very wide. It required that the Commission should investigate all fraud and corruption in every municipality, all state departments from all levels of state administration, and SOEs or organs of the state (PARI, 2022:1). In blowing the whistle the media played a critical role through newspapers and television revealing the extent of irregular financial decisions leading to wider allegations of state capture which led to the establishment of the Zondo Commission (Schauseil, 2019:2). The strong allegations of state capture in South Africa were uncovered involving influential business figures and entities, such as the Guptas, forming close relationships with the Eskom governing body including top government officials to have allegedly gained control of Eskom (Peté, 2021:906). Eskom as an institution was undermined by allegations of corrupt operations amounting to state capture where principals as critical stakeholders were implicated. Eskom played a crucial role in state capture, as individuals allegedly used their influence to appoint compliant boards and executives and create an environment that would facilitate corrupt practices (Schauseil, 2019:5).

Eskom governance practices facilitated state capture, individuals who were in higher positions in governance of the SOE allegedly used their influence to appoint compliant boards and executives and to create an environment conducive for them to be able to facilitate irregular practices (Schauseil, 2019:5). One of the whistle blowers mentioned in their testimony that state capture links directly to the mismanagement of state resources, Whistle blower 2's testimony revealed that corruption sits in the operational world *[…corruption is in the operational world, and that is how you get a specific contract or to get a specific panel... state capture is where you feather the minister's nest and take over the decision making for that minister…]*. Whistle blower 3 further mentioned in his testimony that state capture is *[…simple form it was just finding a way to influence the outcome of State tenders to redirect some of the state resources into private hands and political hands…]* (February, 2019:10).

The selection of the 2014 Eskom Board was a contentious issue in the Zondo Commission report. It extended the focus to the 2014 Board of Directors of Eskom and the deployment of Lynne Brown as Minister of Public Enterprises. Minister Brown was deployed following the removal of Malusi Gigaba who had been in that role since November 2010 (Judicial Commission Inquiry into State Capture Report: Part IV, Vol. 3, 2018:561). The Zondo Commission further exposed her role in selecting Eskom officials for appointment and ignoring adherence to proper procedures mandated by the Department of Public Enterprises (DPE). On 21 October 2019 the then Chief Director Legal and Governance from the DPE, focused his attention the list of appointees to the Eskom Board (Judicial Commission Inquiry into State Capture Report: Part IV, Vol.3, 2022:561). According to the Zondo Commission (2022:573) "The personal details were screened and found not on the database of the DPE for suitable individuals to be considered for appointment on SOE boards. Minister Brown ignored the two considerations of persons from the DPE database and preferred instead to have an advertisement published calling for nominations." When Minister Brown presented the situation at Eskom to the Zondo Commission, she appeared to be unsure of the sequence of events claiming that the existing database "did not provide her with the desired effect" (Judicial Commission Inquiry into State Capture Report: Part IV, Vol. 3, 2022:573). In contrary the Zondo Commission found Minister Brown's sentiments to be far from the truth because concerns were raised by Minister Simphiwe Makhathini about the lack of

necessary competencies and expertise possessed by the people she selected at the time (Judicial Commission Inquiry into State Capture Report: Part IV, Vol. 3, 2022:573). Minister Brown further explained, “In advertising the vacancies on the Board of Eskom, she did not seek to attract only a particular group of people but to open up the process, which she said clearly had unintended consequences for her” (Judicial Commission Inquiry into State Capture Report: Part VI, Vol. 3, 2022:573). “On the amount of all the evidence at hand, Ms Lynn Brown’s posture of innocence should be rejected, the evidence simply revealed that she was part of a syndicate group to capture Eskom because her aforementioned responses were inconsistent with the contents of her affidavit that she signed on 9 August 2020 where she created the impression that she followed DPE processes when appointing board members of SOEs, and her appointment of the December 2014 Eskom Board followed those procedures (Judicial Commission of Inquiry into State Capture Report: Part IV, Vol. 3, 2022:573).

According to the Judiciary Commission of Enquiry into State Capture Report part IV Vol 3 (2022:608) “A striking feature of Ms Brown’s evidence was her tendency to claim inability to coordinate pertinent facts and to pass the decision-making buck to officials in the DPE or to the Eskom board. Her attempt to pretend that she left decision making to officials regarding the appointment of members of Boards falls to be rejected.” The Zondo Commission was determined given the amount of evidence connecting newly appointed board members with direct links to the Gupta family and associates, it became an obvious that Ms Brown deliberately appointed Gupta associates in the Eskom Boards according to the Judiciary Commission of Enquiry into State Capture Report part IV Vol 3 (2022:608).

Deployed in May 2014, as the new Minister was confronted with the scrutiny for the appointment of new Board members. Minister Brown immediately appointed eight new members in the Eskom board in December 2014. The State Capture report revealed that six new members of the board had a direct link with the Gupta family (Portfolio Committee on Public Enterprises, 2018:105). The Public Protector’s Inquiry exposed that the Gupta family associate, Mr. Salim Essa, acted as a conduit to align the Board appointments and acted as an anchor man between the Guptas and Minister Lynne Brown (Portfolio Committee on Public Enterprises, 2018:106). On 31 March 2015, Mr Tsotsi terminated his services with the SOE during the onset of these allegations emanating from the draft

Board announcement prompting former Board member Dr. Baldwin “Ben Ngubane” to be appointed Chair of Eskom (Portfolio Committee on Public Enterprises, 2018:106). Minister Brown’s tenure is clouded by the prevalence of major incidences involving “unauthorised, unusual or irregular expenditure” (Portfolio Committee on Public Enterprises, 2018:117). The key issues to be discussed include attention to the, the New Age Contract, the Tegeta Contract, the Trillian Contract, and the Brian Molefe resignation and pension issue.

4.2. The New Age contract

4.2.1. Introduction

According to the findings in a report of the Portfolio Committee on Public Enterprises (2018:21) on the inquiry into governance at Eskom, the New Age was found to be a media company which offer services in printed and televised media. They were a service provider to several national and provincial government departments including Eskom. The report further stated that the acting Chief Executive Officer (CEO) as the principal agent of Eskom for that period, Mr Colin Matjila, submitted to the Eskom board that they needed to be decisive and finalise a sponsorship deal with TNA which would allow Eskom fielding 12 broadcasted business briefings for R14,4 million (Portfolio Committee on Public Enterprises, (2018:21).

The board, executives and legal unit of Eskom reportedly declined the deal, however, despite all those objections, the processing of the deal was approved by the CEO (Portfolio Committee on Public Enterprises, 2018:115). The Zondo Commission (2021: Vol 1:112) found that the Gupta-owned newspaper outlet *The New Age* (TNA) was primarily a vehicle for state capture at Eskom and government departments, securing millions in unlawful contracts and sponsorships. The Commission further found that all contracts between TNA and SOEs such as Eskom were irregular, as they were concluded without following regular vetting processes, often defying section 54 of the PFMA. Top Eskom leaders, including former Eskom acting CEO Collin Matjila, were implicated as "facilitators" who pushed through with these irregular contracts, often exceeding their authority to do so. The report used the TNA scandal as a prime example of how state capture survived by exploiting the unprincipled governance and installing compliant officials within key state institutions to serve private interests (Zondo Commission Report; Vol 1:106).

4.2.2. Supply chain management irregularities

The report of the Portfolio Committee on Public Enterprises exposed that Mr Matjila endorsed the TNA contract ignoring the SOE's supply chain management (SCM) procurement principles that determined the level of his delegated authority as ineligible for the task i.e., any quotes over and above R5 million required that approval be given by the Board Tender Committee (BTC) of Eskom. The evidence revealed that the CEO deliberately ignored the relevant procedures amounting to a an SCM procurement irregularity (Portfolio Committee on Public Enterprises, 2018:118). The report further showed that various members of the board, including senior employees of Eskom abused their positions and were conflicted in their dealings on this matter, to the benefit of TNA (Portfolio Committee on Public Enterprises, 2018:115). According to Zondo Commission (2021:Vol 1:9) at Eskom, more junior staff members were allowed to approve finance decisions already verbally endorsed by their specific senior leaders by preparing recommendations that made it look like proper processes were being followed and that the superiors were merely approving a proposal by their subordinates, rather than driving the process themselves.

4.2.3. Failure by the Eskom Board to act

The irregularities of the TNA deal were identified as an audit query by the internal audit division of Eskom amounting to irregular expenditure activity. It was also further picked up through a forensic investigation of Sizwe Ntsaluba Gobodo (SNG) that was commissioned by the board (Portfolio Committee on Public Enterprises, 2018:115). The forensic investigation report recommended that legal action be considered against the CEO, however, the board did not implement the recommendations to act in respect of allegations which included unethical corporate governance practices and improper conduct (Portfolio Committee on Public Enterprises, 2018:125). The Portfolio Committee on Public Enterprises identified corporate governance failures where the board failed:

- To discharge its duties in the best interest of the SOE;
- To act within applicable ethical principles, including the PFMA and the Companies Act; and

- To institute audit recommendations as appropriate steps considering the media excitement on state capture, improper and derelict conduct, and gross manipulation of SCM principles guiding SOE procurement processes.

Furthermore, it was revealed that the board did not disclose the forensic investigation report into governance failures at the SOE in 2015, which led to governance impairment in terms of leadership, operational and SCM processes (Portfolio Committee on Public Enterprises, 2018:126).

4.2.4. Failure by the Minister to act

The Portfolio Committee on Public Enterprises (2018:115) stated that when former Minister Lynne Brown resumed office in 2014, she did not prioritise acting on the recommendations of SNG that corrective actions should be taken against the CEO, notwithstanding that some board members proposed that the Minister should remove the CEO and that criminal charges be laid against him.

4.2.5. Corporate Governance gaps identified in the TNA matter

In the TNA matter governance gaps were identified when the CEO approved the awarding of this TNA contracts which was found to be beyond his finance delegation as prescribed from the PFMA, i.e., the CEO initially did approach the board however decided to conclude on the deal at the level of his office (Portfolio Committee on Public Enterprises, 2018:123). The financial delegation fell outside the scope of the CEO, as the BTC had to approve the deal in principle and thereafter had to send it to the Eskom board for ratification before implementation. The Portfolio Committee on Public Enterprises further contended that the main issue of ethical governance failure was that even when the board declined to approve the deal, there was no consequence management on the part of the Minister to hold the CEO accountable. In addition, several Eskom board members were conflicted in the TNA contract which further breached their fiduciary duty of acting in the best interest of the SOE and statutory obligations in respect of avoiding conflicts of interests (The Portfolio Committee on Public Enterprises (2018:115).

4.3. The Tegeta contract

4.3.1. Introduction

Evidence provided in 2016 showed that Tegeta was a company that was treated with special leniency and favourable treatment from Eskom regarding the awarding of their

coal contracts with Eskom (Portfolio Committee on Public Enterprises, 2018:42). This company was liked to Oak Bay Investments as their sister company a Gupta-owned company. This preferential treatment was to the fall of Glencore, who had a well reputable relationship with Eskom over several years. The obvious advantage provided to Tegeta caused Glencore to sell all the shares of its coal supplying subsidiaries, i.e. Optimum Coal Holdings (OCH) and Optimum Coal Mine (OCM), to Tegeta (Portfolio Committee on Public Enterprises, 2018:47). The evidence provided during the Eskom inquiry exposed that Tegeta had a long-standing attempt to win coal contracts with the SOE dating back to 2010 (Godinho & Hermanus, 2018:20). These attempts included submissions from Arctos Trading and Idwala Coal which were declined because at the time these companies did not meet the technical and environmental standards required (Godinho & Hermanus, 2018:20). Godinho and Hermanus explain (2018:20) that "While former CEO of Dames and former Divisional Executive and Head of Primary Energy, Kiren Maharaj, maintained a clear resistance advocating for the SOE regular processes despite external pressure to award contracts to these companies, including the sudden removal of the Eskom governing body in 2014 and 2015, and with the appointment of the new Minister and the new board the circumstances seemed to have been soften up in favour of Tegeta." In May 2014, Goldrige reached out to Eskom on behalf of Tegeta to propose to supply coal from Brakfontein and Vierfontein. Following the outright resistance of Kiren Maharaj to support this proposal she was suspended by Koko in July 2014 (Godinho & Hermanus, 2018: 20).

4.3.2. SCM irregularities

The guarantee front payment made to Tegeta by Eskom revealed irregularities and was in direct contravention of the SCM processes of Eskom as financial guarantees could only be approved by the Minister (Portfolio Committee on Public Enterprises, 2018:53). Similarly, the coal supply agreement between Eskom and Tegeta circumvented the SCM regulations of Eskom and was later-on found to be fruitless and wasteful expenditure (Portfolio Committee on Public Enterprises, 2018:51). The preferential pricing of coal purchases from Tegeta by Eskom exacerbated the financial disadvantage to Eskom since two of the cancelled coal-supplying contracts with other suppliers would have cost the SOE much less per ton, and the prices did not match quality of coal supplied by Tegeta (Fundizi & National Treasury, 2018:2). The Public Protector of South Africa (2016:131)

further revealed that Eskom paid R19,68 per gigajoule of coal for six months and thereafter the charge for the same gigajoule of coal was reduced to R15,50 per gigajoule for the same product**,** these contractual agreements were entered into between the senior management teams of Tegeta and Eskom, which transcended the Medium-Term Mandate of the board which was not approved by the board. It was reported that the irregularity was noted when Senior Management Team of Eskom misinterpreted the minutes of the board on the matter. The board only noted the matter, and SMT mistook it for approving the matter (Public Protector of South Africa, 2016:299). The Zondo Commission believes that the timing and urgency of this operation showed that there were financial decisions being made that did not serve the interests of Eskom (Judicial Commission of Inquiry into State Capture Report: Part IV, Vol. 4, 2018:1048). The Zondo Commission further states (2018:1049) that Eskom was acting in the interest of the Guptas' deal to acquire Glencore coal interests. The Zondo Commission noted that Zwane, Koko, Singh and Brian Molefe were key facilitators of the capture of Eskom.

4.3.3. Failure by the Eskom Board to act

The Organisation Undoing Tax Abuse (OUTA) (2018:22) averred that some of the Eskom board members were conflicted on the Tegeta matter by acting as proxies for shareholders of Tegeta business interests, or interests connected to the Gupta family and their associates who were the ultimate beneficial owners of Tegeta. Said board members did not recuse themselves from the BTC meeting of 7 March 2016 where the coal supply agreement was discussed, although they had a direct conflict of interest. Furthermore, there was an additional governance risk in that the conflicted members were privy to board documents and minutes which had the potential to give Tegeta an unfair advantage over its competitors. It was further found that the Special Board Tender Subcommittee met on 11 April 2016 and approved the prepayment to Tegeta. This meeting was only used by the senior management team of Eskom to rubber stamp the agreements that were already concluded between the two companies (Public Protector of South Africa, 2016:300). The Public Protector reported that the general board of Eskom had no knowledge of the true nature of the Tegeta prepayment when approval was granted, following the initial approval by the SBTC which presents a governance breach as there should have been a fluid flow of information between the board and its subcommittees and vice versa (Public Protector of South Africa, 2016:326). According to Naidoo

(2016:207) King IV requires that the board shall approve a protocol in terms of which non-executive directors may have to request additional information or set up meetings with management (Naidoo, 2016:207). It is of ethical significance for proper lines of communication to be maintained therefore management should never feel that the directors are prying or that they do not trust the information they have received; equally, directors have a clear right, on request, to access all information they require (not just that considered relevant by management) and they should never feel that the information they receive is being filtered in any way (Naidoo, 2016:207).

Furthermore, it was shown that most of the members of the board of Eskom had business links with companies and individuals who conducted business with Eskom (Fundizi & National Treasury, 2018:4). As a result of the apparent governance irregularities, the board and senior management team of Eskom caused damage to the credibility and legitimacy of Eskom therefore the board of Eskom did not exercise the required duty of care which is in violation of section 50 of the PFMA (Portfolio Committee on Public Enterprises, 2018:72).

4.3.4. Failure by the Minister to act

The Public Protector submitted that the Eskom board was improperly appointed by the Minister and said appointments were not in line with the principles of good governance because they were primarily made to create conditions that supported the thrive of state capture. The Minister had the power to put mechanisms in place by appointing the board; the board should address and mitigate matters of conflict and manage any bias which may arise. Contrary the board took no action on conflicting issues. Moreover, the Minister was noted to adopt a passive role when these issues were reported to his office, including reports that noted irregularities at the board-level, which directly and indirectly implicated the Minister over the ongoing mismanagement and corruption at Eskom (Public Protector of South Africa, 2016:19).

4.3.5. Corporate governance gaps identified in the Tegeta matter

Tegeta received favourable and preferential treatment from Eskom which placed its competitors in a disadvantaged position. Furthermore, Eskom made unusual advance payments to Tegeta without a detailed and signed service level agreement from Treasury, these gaps amount to evidence of unauthorised, and irregular expenditure (Fundizi & National Treasury, 2018:2). The senior management team of Eskom were non-compliant

with and contravened the medium-term mandate of the board, which posed a serious governance gap for Eskom when they concluded the deal with Tegeta (Fundizi & National Treasury, 2018:5). There were also signs of negligence on the part of board members, including that they were ill-informed on the actual value of the Tegeta contract which indicates that they did not conduct proper oversight (Fundizi & National Treasury, 2018:5). Once again, the Minister and the board failed to introduce appropriate consequence management and act against relevant individuals.

4.4. The Trillian contract

4.4.1. Introduction

On the 2nd of December 2016, Minister Lynne Brown replied to questions in the National Parliament regarding Trillian contract. The Minister denied knowing the existence of everything that was asked. The National Parliament then proceeded to reveal the cumulative evidence of the association of the Minister with noted contract irregularities (Portfolio Committee on Public Enterprises, 2018:72). In contrast to the reply, it appeared that in July 2017 Trillian was paid more than R500 million by Eskom for consulting work conducted by McKinsey (Budlender, 2017:27). McKinsey and Trillian were collectively paid R1,6 billion, while Trillian was paid a separate total sum of R600 million in respect of three invoices submitted for work concluded on and in contrary to an Eskom issued statement on 18 May 2017 whereby it confirmed that Trillian was listed as a supplier of Eskom, but that there was no record of money that was paid to it by the SOE (Budlender, 2017:32).

4.4.2. SCM irregularities

The payments made to Trillian is an indication that major SCM breaches and weaknesses were present in Eskom at the time (Budlender, 2017:32). It was further shown that Trillian did not tender for the work that was invoiced and that Eskom had no contract with Trillian to perform the work (Portfolio Committee on Public Enterprises, 2018:98). The SCM processes were not approved by National Treasury as the Chief Financial Officer (CFO) assured Trillian that they will be awarded contracts, even though no bidding took place, which represented a SCM and governance breach as relevant approval processes appear to have been circumvented (Portfolio Committee on Public Enterprises, 2018:98). Eskom did not receive value for money from Trillian nor McKinsey, as it was contended

that the work could have been done by the staff of Eskom themselves and there were *prima facie* evidence that the payments to Trillian were criminal in nature, which included possible fraud and money laundering (Portfolio Committee on Public Enterprises, 2018:83). The corporate culture at Eskom was such that certain individual verbal instructions from executives and senior managers were enough to supersede documented regulations and rules within the SOE (Portfolio Committee on Public Enterprises, 2018:99). The Zondo Commission revealed that on closer observations these contracts “involved a group created to facilitate favourable advantage to Trillian Management Consulting (Pty) Ltd, a subsidiary of Trillian Capital Partners (Pty) Ltd, in which Mr Salim Essa, as a close confidante of the Gupta family, constituted a majority shareholding of 60%” (Bohler *et al.,* 2022:658). Regiments and Trillian were planted to be consultants for Eskom, but the companies were already implicated in the state capture investigations (Bohler *et al.*, 2022:659). The Zondo Commission revealed that Eric Wood was placed as the director and had a strong relationship with Salim Essa who he referred to as the “rainmaker” because it was alleged that he secured contracts with this SOE (Bohler *et al.*, 2022:659).

The Zondo Commission (2018:911) further noted “Mr. Wood led a division of Regiments that had partnered with McKinsey and Company Africa (Pty) Ltd (McKinsey).” This was in advance preceded by the procurement work, which was transferred officially to Trillian on 1 March 2016, with Salim Essa being the main shareholder during the same period (Bohler *et al.,* 2022:659). At this point McKinsey’s profit share grew to over R1 billion (Judicial Commission of Inquiry into State Capture Report: Part IV, Vol. 4, 2018:912). In 2014, Regiments attempted to get consulting services with Eskom and pressure was “applied by the then Public Enterprises Minister Malusi Gigaba’s advisor, Mr Thamsanqa Msomi, on Eskom’s new Group CFO, Ms Tsholofelo Molefe, who had been deployed into that position in January 2014” (Bohler *et al.,* 2022:659). Msomi complained that there was “insufficient transformation in the awarding process of Eskom contracts, " and that he had hoped that she would improve the situation that adopt equity and transparency. He then arranged for her to meet a supposedly complained supplier, which turned out to be Mr Salim Essa” (Bohler *et al.*, 2022:659). Following this meeting there was a turning point of events that developed when Salim Essa returned offering the services of Regiments Capital (Judicial Commission of Inquiry into State Capture Report: Part IV, Vol. 4,

2018:913). Tsholofelo Molefe stated that the Eskom Chair, Zola Tsotsi, deemed that the financial sustainability plan developed by her was inadequately robust and Minister Brown demanded a more robust plan within a three-month period (Judicial Commission of Inquiry into State Capture Report: Part IV, Vol. 4, 2018:913). The acting Group CEO Colin Matjila organised an out-of-office meeting with Ms Molefe suggesting that they seek an external service provider (Judicial Commission of Inquiry into State Capture Report: Part IV, Vol. 4, 2018:913). This provider later revealed out to be Regiments Capital, spearheaded by Salim Essa.

According to the Zondo Commission Report (Vol 1, 2018:913) “Mr Matjila rigorously pushed hard to get a contract quickly ratified for Regiments, whilst Ms Molefe objected taking up their external services because of the lack of a transparent and competitive tender process, as well as her perception that they were not the best bidder based on affordability their services were over-priced.” She investigated that still “the work offered by Regiments was not the revised financial sustainability plan that Mr Tsotsi recommended, but was limited to outlining a few initiatives that could be taken to extract cash in Eskom’s balance sheet; which was work that Ms Molefe felt Eskom had the capacity to do” (Judicial Commission of Inquiry into State Capture Report: Part IV, Vol. 4, 2018:913). Ms Molefe indicated that Regiments delayed submitting their offer and subsequently submitted the contract for Eskom to sign (Judicial Commission of Inquiry into State Capture Report: Part IV, Vol. 4, 2018:913). The Board gave a mandate in writing to Ms Molefe to break her resistance stating that Regiments was permitted to test the viability of their proposed financial options for Eskom in a high-level desktop exercise, for which Regiments was paid R1 million for that.” This marked a significant moment where Ms Molefe was eventually suspended in March 2015, on spurious grounds and she was constructively forced out of the organisation (Judicial Commission of Inquiry into State Capture Report: Part IV, Vol. 4, 2018:913).

4.4.3. Failure by the Eskom Board to act

On the 29th of September 2017, the governing body of Eskom recommended a need to put the CFO on the special leave other senior managers were also affected were also put on a special leave (Portfolio Committee on Public Enterprises, (2018:99). Their names often appear on stakeholder reports implicating them of the manipulation of policies under their watch, there was the absence of proof that the governing body ever attempted to

curb the obvious manipulation of Eskom SCM principles including the deliberate misrepresentation of financial statements to the gross manipulation of evidence including the making of false media statements (Portfolio Committee on Public Enterprises, 2018:99). It was further revealed that the governing body allowed the continuity of the manipulation of SCM regulation for the benefit of Trillian and never acted on time.

The Board Tender Committee together with the risk assessment bodies of Eskom were supplied with evidence based on audits reports which exposed unethical corporate governance practices in Eskom and at the centre of all those revelations the Eskom risk assessment bodies very unpopular by terminating the continuity of auditing services that were taking place (Portfolio Committee on Public Enterprises, 2018:84). Furthermore, it was exposed that the BTC ratified the McKinsey tender, which was in direct violation of their obligation to act at the best interest of the SOE furthermore, evidence revealed poor corporate governance practises where the BTC meeting minutes were not officially approved by the governing body Chairperson (Portfolio Committee on Public Enterprises, 2018:103).

4.4.4. Failure by the Minister to act

Advocate Budlender further opined that the Minister's representations made in the parliamentary committee were both fraudulent and misleading (Budlender, 2017:26). The Portfolio Committee further revealed that due to the Ministers misrepresentation of facts, this was the continuity of the obvious manipulation of facts by the SOE senior managers (Portfolio Committee on Public Enterprises (2018:101). The Minister also decided not to take any actions against the CFO regarding all financial irregularities that took place in Eskom and make him a direct accomplice (Portfolio Committee on Public Enterprises, 2018:101).

4.4.5. Corporate Governance gaps identified in the Trillian matter

The Minister's reports revealed that she was grossly misled by the CFO when attempted to respond to questions as posed to her by the parliament committee, as to how the SCM processes found to be grossly manipulated. The Minister further ignored that the CFO had to enter into unofficial deals to give business contracts reassurances SMT of Trillian (Portfolio Committee on Public Enterprises, 2018:101). Eskom was found to have made irregular payments to Trillian however the records showed that there was never an official process followed, and these payments revealed further symptoms of financial

mismanagement therefore the governing body decided to put the CFO on special leave. The governing body failed to act early until the interest into state capture allegations drew major interest from all stakeholders (Portfolio Committee on Public Enterprises, 2018:101). The Minister failed to act against the CFO who was in contravention of his fiduciary duty of care, proper purpose and acting in the best interest of the SOE (Budlender, 2017:26).

4.5. Eskom Holdings Soc Limited vs McKinsey and Company Africa (Pty) Ltd and Others

In 2019, the just appointed governing body had escalated their submissions to the high court requesting that all the recommendations from the previous board are nullified regarding the McKinsey and Trillian matter and scrap the contracts that were irregular entered to between Eskom and McKinsey. Incorporated in the governing body court submissions was for Trillian to be given an order to reverse all irregular proceeds of those deals by Eskom (Eskom Holdings SOC Limited v McKinsey and Company Africa, 2019:185). The court held that:

- The Eskom governing body practices at the time were found to be unethical in nature and this involve all payments that were authorised during its tenure;
- The facts regarding what transpired were deliberately misrepresented to the new governing body and there was no trace of original documents to be found;
- Eskom senior management officials displayed a gross violation of their employment obligations. Senior officials displayed egregious conduct which grossly undermined their expected fiduciary duties;
- There was no evidence if Trillian conducted any work for Eskom with failure to provide invoices;
- The payments processed by Eskom were all irregular with the violation of PFMA and SCM prescripts;
- Payments made by Eskom emanated only from verbal instructions that created a deviation from SCM principles in terms of regular expenditure;
- The identified irregular meetings between Eskom SMT and Trillian were not in accordance with ethical corporate governance practices.

4.6. Brian Molefe resignation and pension matter

4.6.1. Introduction

Mr Brian Molefe was employed as the CEO of Eskom from 2014 until the Public Protector raised allegations of him being embroiled in state capture activities. He announced his resignation on 11 November 2016 which was overturned by himself when in the same month he decided to file a request for early retirement from Eskom when he eventually resigned on the 1st of January 2017 (Portfolio Committee on Public Enterprises, 2018:128). Mr Molefe faced allegations pertaining to the role he played in the facilitation of the fraudulent Tegeta tender that contributed to major governance failures and financial misconducts (Public Protector of South Africa, 2016:17). In a twist of events another investigation had to be initiated from the allegations of whether Mr Molefe resigned or retired from his post as Eskom CEO. This matter was intriguing when the Chairperson of the governing body of Eskom indicated that the CEO had retired, while this was found to be once again irregular when all the Eskom regulations that guide the years of pensionable services stated that a person can only retire after he/she has spent 10 years of regular and uninterrupted service with the company. In contrary Mr Molefe's services with Eskom were less that the stipulated norm. Eskom went on to proceed with the pension payout of the sum of money recorded to Mr Molefe which raised many objections from the civil and political organisations (Public Protector of South Africa, 2016:86). According to OUTA (2021:145) Eskom's governing body in direct cooperation with the Minister decided to revoke the retirement of the CEO and reinstated him back to his position as the CEO of Eskom. This followed the court enquiries where the Pretoria High Court decided to set aside the decision to pay out pension to Mr Molefe, the court made critical findings on the Eskom irregular corporate governance practices and the gross violation of rules and regulations governing the SOE which still revealed the extent of ethical failure at Eskom.

4.6.2. Procedural irregularities

Mr Anton Minnaar, the Eskom Executive Support Manager at the time, took a decision to contact the Eskom Pension and Provident Fund to request an estimation of Mr Molefe's early retirement benefits should the CEO decide to opt for early exit from the SOE (OUTA, 2021:147). When the irregular application was instituted for the early exit of Mr Molefe to

the Eskom pension administrators, the administrator decided to put wrong codes and deliberately fabricate the CEO's employment service records, which then indicated that the CEO had 10 years of service and was employed on a permanent basis by Eskom (OUTA, 2021:147). The Portfolio Committee on Public Enterprises (2018:136) ruled that the CEO was ineligible for the pension payout, as it was established that all the policies were manipulated in favour of the successful unlawful pension payout where an unlawful transaction that was executed by Mr Minnaar and the Chairperson of the Board. The Portfolio Committee further submitted through its findings that the SOE's senior managers deliberately misrepresented the facts and took advantage of the governing body and the pension administrators. Matojane, J made the following telling remark: "What is most disturbing is the total lack of ethical governance and shame to people in leadership positions who abused public funds with naked greed for their own benefit without a moment's consideration of the impact of their actions to the lives of ordinary citizens who live in absolute squalor throughout the country without proper delivery of basic services" (Portfolio Committee on Public Enterprises, 2018:137).

4.6.3. Governance decisions of, and failures by, the Eskom Board

The Chairperson of the governing body, Dr Ben Nugubane and the CEO Mr Molefe directed submitted the request for early retirement of Mr Molefe to the office of the Minister in 2017. That was deliberately done ignoring that the CEO was not entitled to the early retirement benefits and thereafter, the Chairperson of the governing body went ahead to convince the rest of the leadership to endorse the CEO's request (Public Enterprises (2018:136). The governing body of Eskom eventually endorsed the request submitted by its leadership on the 21st of November 2016. However, the governing body endorsement of that request was not aligned with the policies as guided by the Eskom pension administrators which stipulates that a person applying must first be an affiliated member of the scheme and Mr Molefe was not such a member of the Eskom pension scheme (Public Enterprises (2018:136). It was submitted by the Portfolio Committee that the Board had not acted in the best interests of the SOE. This was in contravention of the section 50(1) of the PFMA together with Companies Act, section 76(3)(b), which states that a director, including the board itself, "must act in the best interest of the public entity" (Portfolio Committee on Public Enterprises, 2018:136). Moreover, Matojane, J implicated the Board in contributing towards governance irregularities in Eskom in respect of this

matter by indicating that its decision to approve the CEO's retirement package, as well as his later reinstatement as CEO, was *ultra vires* and non-compliant to the 2016 MOI of Eskom (Portfolio Committee on Public Enterprises, 2018:136). The decision regarding the reinstatement of the Eskom CEO, left the Minister not informed on the legality of the decision which exposed another irregularity which was in contravention of section 14.3.4 of the 2016 MOI which directed that: "The Minister shall be noted as a party to any contract of employment between the Company and the Group Chief Executive" (Portfolio Committee on Public Enterprises, 2018:137).

4.6.4. The failure of the Minister to act

It was revealed by the Portfolio Committee that the Minister wrongfully and irresponsibly undermined the submissions from the office of the Public Protector irrationally by ignoring the findings that were made by the Public Protector on the matter and subsequently, the Minister deliberately used the expired 2014 MOI and ignored the 2016 MOI which was then in force when she decided on the approval of the recommendations made by the governing body to reinstate Mr Molefe to his Eskom CEO position (Portfolio Committee on Public Enterprises, 2018:144). Motajane, J further attested from his court findings that the Minister indeed acted beyond acceptable norms by deliberately not considering the Public Protector's earlier findings.

4.7. Findings of Judge Matojane on the pension payout matter

In the matter of Economic Freedom Fighters v Eskom Holdings Limited and Others and Solidarity Trade Union v Molefe and Others (2018:80*)*, Matojane, J issued some revelations which implicated Eskom's corporate governance practices. At the forefront was the findings which indicated that Mr Molefe attended and participated in a meeting that was set to discuss his own application for early retirement as Eskom CEO. According to his fiduciary duties, Mr Molefe was supposed to recuse himself and refrain from participating and by failure to do that there was a violation of Section 75 of the Companies Act, which provides as follows:

"(5) If a director of a company has a personal financial interest in respect of a matter to be considered at a meeting of the board, or knows that a related person has a personal financial interest in the matter, the director; (a) must disclose the interest and its general nature before the matter is considered at the meeting; (b) must disclose to the meeting any material information relating to the matter, and known to the director. (6) If a director

of a company acquires a personal financial interest in an agreement or other matter in which the company has a material interest, or knows that a related person has acquired a personal financial interest in the matter, after the agreement or other matter has been approved by the company, the director must promptly disclose to the board, or to the shareholders in the case of a company contemplated in subsection (3), the nature and extent of that interest, and the material circumstances relating to the director or related person's acquisition of that interest." Pinnock (2018:88) argues if such a situation arises, it constitutes a disregard and failure to comply with section 75 of the Companies Act and could potentially lead to the invalidity of the board resolution, and possibly even the entire transaction. In another court issue that involved Democratic Alliance v Minister of Public Enterprise and Others (2018:33) Matojane, J substantiated his judgements regarding the failure of Eskom corporate governance practices that resulted in the pension pay out of Mr Molefe. The remarks were the following:

- There was a strong conclusion that the pension pay-out saga was an internally organised scheme by Eskom's governing body to deliberately approve Mr Molefe's early retirement and allocate pension benefits that he was not entitled to.
- Eskom's pension administrators deliberately allocated fabricated information to Mr Molefe's Eskom profile, which in turn gave Mr Molefe 10 years of permanent service with the SOE to make him eligible for early retirement, even at 50 years of age.

4.8. Conclusion

This chapter paid more attention to Eskom's major failures of the SOE's corporate governance practices since 2015, which affected the SOE capacity to achieve its main service delivery objectives. It is significant to note that there were many breaches of SCM processes including deliberate ignorance from the governing body to act. Eskom's directors violated their own fiduciary duties and ignored policies and procedures just to achieve undue access to the SOE's finances. Service provider contracts were approved at junior level of Eskom management. Furthermore, contracts were endorsed for companies that were paid without any work or services rendered to the extent that some companies did not even have valid service level agreements with the SOE. The governing body of Eskom further attempted to conceal SCM documentation which highlighted corporate governance irregularities through a forensic investigation. In addition, the

corporate culture at Eskom was that the verbal instructions from the senior managers superseded all policies, regulations and legislations. The Eskom governing body was used as rubber-stamps to approve already verbally concluded deals. The Minsters office turned a blind eye and did not intervene when expected to do so. The evidence of progressive negative corporate governance practices at Eskom affected the operational efficiency of the SOE.

Chapter 5: Findings, recommendations, conclusions and limitations of the study

5.1. Introduction

This study primary objective was to improve the corporate governance mechanisms of South African SOEs through an assessment of corporate governance failures experienced at Eskom, specifically during the period of state capture. This was achieved through a critical analysis of publicly available secondary data on the theory, aim and nature of corporate governance, the regulatory framework of South African SOEs and selected corporate governance failures at Eskom.

5.2. Findings and conclusion

The aim was of this study was to assess corporate governance practices at Eskom with the primary objective to improve the corporate governance mechanisms of South African SOEs through an analysis of undermined principles of corporate governance that contributed to failures experienced at Eskom.

5.2.1. Policy manipulation

Symptoms of governance ethical failures were observed when Eskom's corporate governance practices failed to apply and explain corporate failures which states that the governing body should comprise the appropriate balance of knowledge, skills, experience, diversity and independence to objectively and effectively discharge its' governance role and responsibilities objectively and effectively to the extent to which the Zondo Commission and other sources also unearthed non-accountability within Eskom. The Zondo Commission used existing accountability frameworks such as applicable corporate governance guidelines, the PFMA, the Companies Act, etc. to determine the events and characters involved in misconduct at Eskom.

5.2.1. Lack of regulated monitoring systems

The are several identified various conflicts of interest between public and private actors. The findings showed that unethical corporate governance practices at Eskom were evidenced through the capture of Eskom as was coordinated through several schemes which led to the erosion of Eskom. The Zondo Commission determined that several Eskom executives and staff members had undisclosed relationships with several private companies doing business with Eskom.

SOEs in South Africa and across the world play a critical role in advancing the socioeconomic goals of governments and their respective stakeholders. Thus, governments continue to invest in SOEs in crucial and strategic sectors such as transport, communication, energy, financial services, health and infrastructure development as they are important for economic growth and stability. In pursuit of these goals, SOE boards are perceived as the nerve centres of the success of the SOEs they lead. Based on the crux of this mini dissertation, boards play an essential role in setting the tone and implementing long-term strategies for their organisations.

5.2.3. Political interference

There is a high turnover in board members and CEOs in Eskom lead to predicaments such as operational and financial instabilities, poor governance, low productivity, inefficiencies and eradication of public trust. The high political influence trend in Eskom has created a volatile corporate environment devoid of organisational stability and derailed the affected institution from realising its core mandate. This trend has also contributed to the erosion of human capital, loss of institutional memory, shambolic succession, poor service delivery and low staff morale.

Company boards are entrusted with various complex roles ranging from strategic, governance and compliance, leadership, stakeholder management and monitoring and evaluation. The importance of these roles requires stable corporate practices that create an environment that enables CEOs to serve their full term in office. In the absence of corporate stability and governance where CEO turnover is high, the likelihood of optimally fulfilling this role is very low. This implies that political leaders in both shareholding and policy ministries must solely focus on their constitutional and legislative oversight mandate without overstepping their authority. Such a positive environment will likely allow CEOs to realise organisational goals and freely fulfil the multiple roles entrusted to them.

5.2.4. Shareholder abuse of power

The Parliament Portfolio Committee made several submissions that indicated that the board failed to ethically lead Eskom and were deliberately in breach of their fiduciary duties and was therefore found to be non-compliant with the relevant legislative prescripts guiding the sustainability of ethical corporate governance practices of Eskom. The power the single shareholder have allowed for turning of the blind eye to unethical and inadequate corporate governance practices identified at Eskom which negatively

impacted the SOE from achieving its primary mandates. The state as the shareholder failed to advocate for primary objectives of the SOE therefore also been found as a contributing factor to the financial drain of the SOE and extensive delays experienced in the construction and maintenance of power plants, affecting the ability of Eskom to produce reliable power for both the citizens and the business community of South Africa leading to economic strangulation. Mupangavanhu, (2019:55) highlighted that often corrupt and fraudulent behaviour in SOEs is predominantly uncovered by chance and often too late because management disregards control measures and often colludes in circumventing these measures to benefit in some way.

5.3. Recommendations

It is recommended, based on the findings of this study, that Eskom, in particular, and SOEs, in general, should consider:

- Implementing a regulated performance management system that is legally binding to prevent deliberate manipulations, which may act as a baseline for how Eskom must operate, as recommended by the Presidential Review Committee.
- Creating legally binding monitoring framework which directly articulates with the performance management system that must strengthen the position and the role of the Minister to avoid the identified gaps where the minister found not to be aware of many issues where the best interest of the SOE was found to be undermined by the political party priorities.
- Depoliticise Eskom's management and the governing body to enhance objective corporate governance practices at Eskom, as per the recommendations of the Zondo Commission and Moerane Commission; this will allow SOE executives and the board to operate independently and be directly held accountable to good corporate governance practices.
- Consider the limitation or privatisation of SOE majority shares or encourage public-private partnerships to reduce the influence of the state as single shareholder.

5.4. Limitations and recommendations for further study

This research relied on publicly available secondary sources for a specific period relating to Eskom, as an example of a South African SOE, and is therefore limited in respect of its scope, data that is only in the public domain or relate to events that falls outside the

specified period. This research recommends further studies to be undertaken to determine other corporate governance, legislative or regulatory variables not covered in this study in line with the research objectives. A further study may be conducted with a change in research methodology and a larger sample size focusing on Eskom. In addition, more than one SOE may be used in further studies to enhance the understanding of corporate governance and performance of SOEs on a wider scale. Further research could also be conducted to evaluate possible other causes than poor corporate governance that may impede the performance of SOEs. For this study, secondary information was used therefore the transferability was not tested because of non-engagement of the subject.

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