



Good corporate governance in state owned enterprises: a legal analysis

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Declaration

I hereby declare that this mini-dissertation submitted for the degree LLM: Mercantile Law, at North-West University – Potchefstroom Campus, is my own original work, is in accordance with the requirements and has not previously been submitted to any other institution of higher education. I further declare that all the sources cited or quoted are indicated and acknowledged through a comprehensive list of references.

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Abstract

This study examines the governance challenges in State Owned Enterprises (SOEs) in relation to South African legislation, governance regulations and best practice codes introduced to ensure that accountability, transparency, and good corporate governance principles are observed by the entities and their role players in the governance structures. The said legislation and regulations coupled with policies, best practices, Memoranda of Incorporation (MOIs), shareholder compacts, and National Treasury Circulars constitute the SOE governance framework within which SOEs operate.

Furthermore, the study seeks to ascertain if the seemingly comprehensive regulatory framework, is adequate to combat corruption, financial mismanagement, and abuses of power happening regularly in the governance of SOEs. The study will establish why seemingly, the law and policy framework, although comprehensive, is not effective in preventing corruption and abuse of public assets in SOEs. Reported governance failures and criminal acts at various SOEs over the last decade allegedly escalated into state capture, a higher level of abuse of public resources and power identified by the Public Protector in her report in 2016. This escalation happened despite the comprehensive legal and regulatory frameworks in the sector. The Commission of Inquiry into Allegations of State Capture (Zondo Commission), through evidence led suggest that national government departments and municipalities are not spared from the effects and consequences of SOE failures as evidenced by load shedding by Eskom, water-shedding, and other crippling service delivery failures.

Keywords

Good governance, state owned enterprises, corporate governance, and fiduciary duty

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I dedicate this dissertation to my family, my wife, my two boys, and my mother.

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List of abbreviations

AGM	Annual General Meeting
AGSA	Auditor General South Africa
AHRLJ	African Human Rights Law Journal
ANC	African National Congress
AU	African Union
CEO	Chief Executive Officer
CGISA	Chartered Governance Institute for Southern Africa
CSR	Corporate Social Responsibility
EU	European Union
IODSA	Institute of Directors South Africa
MOI	Memorandum of Incorporation
NA	National Assembly
NWU	North West University
OECD	Organisation for Economic Cooperation and Development
PFMA	Public Finance Management Act
PER/PELJ	Potchefstroom Electronic Law Journal
PRASA	Passenger Rail Agency of South Africa
PRC	Presidential Review Committee
SAA	South African Airways
SABC	South African Broadcasting Corporation
SCOPA	Standing Committee on Public Accounts
SOE	State Owned Enterprise
UN	United Nations

Chapter 1 Introduction

1.1 Introduction

South Africa has a number of state-owned enterprises (SOEs) operating in different sectors of the economy tasked with ensuring increased economic activities and financial stability in the country.¹ Schedule 1, 2 and 3 of the *Public Finance Management Act, 1 of 1999 (PFMA)* contains lists of the said government enterprises in South Africa. Among these are the South African Broadcasting Corporation (SABC) in broadcasting, the Electricity Supply Commission (ESKOM), and the South African Airways, in the electricity and transportation spheres respectively.² Concerns have been raised in recent times in various media over incidents of corruption and state capture in this part of the public sector.³ This study examines governance in the public sector, particularly the SOE sub-sector in relation to the following mandates: creation of public funds, enhancing service delivery, improving economic growth and conditions of employment in different economic sectors.⁴

In addition, SOEs are critical in driving economic growth and development in the country.⁵ SOEs further help to ensure that the government, as sole shareholder, delivers on its mandate of providing critical and essential services as per its constitutional mandate.⁶ This mammoth responsibility requires high levels of coordinated oversight to ensure accountability and transparency on how public resources are utilised.⁷ South African legislation and other governance regulations have been carefully crafted and enacted to ensure that accountability, transparency,

¹ Thabane, Snyman and Van de Deventer 2018 *PELJ* 1.

² Mbambo 2017 *An Analysis of Corporate Governance in State-Owned Enterprises (SOEs) In Compliance with The King Code Principles of Good Governance i.*

³ Mbele *Corporate governance in State Owned Enterprises* vi.

⁴ Mboweni A 7; Thabane, Snyman and Van de Deventer 2018 *PELJ* 4. *Critical Analysis of Liability of Directors in Light of Unwarranted Shareholder Involvement in South African State-Owned Enterprises*

⁵ Presidential Review Committee on State-Owned Entities *Growing the Economy: Bridging the Gap* 10.

⁶ Presidential Review Committee on State-Owned Entities *Growing the Economy: Bridging the Gap* 7; Du Toit *Governance Oversight Role Over State Owned Entities (SOEs)* 7; PwC 2015 <https://www.pwc.com>.

⁷ AGSA 2016 *General Report PFMA* 51; National Planning Commission *National Development Plan 2030: Our Future Make It Work* 448.

and good corporate governance are promoted.⁸ The said legislation and regulations together with policies, best practices, memoranda of incorporation (MOIs), shareholder compacts, and National Treasury Circulars make up the SOE governance framework within which SOEs are expected to operate.⁹ The most prominent components of this governance framework, are the *Constitution of the Republic of South Africa South Africa, 1996 (the Constitution)*, the *Companies Act 71 of 2008 (the Companies Act)*, the *Public Finance Management Act 1 of 1999 (PFMA)*, the *King IV: Report on Corporate Governance for South Africa 2016 (the King Code)*, and the National Treasury's Circulars.¹⁰ One can thus observe that South Africa has a comprehensive law and policy framework.¹¹

The state is compelled by the Constitution to respect, protect, promote and fulfil an array of socio-economic rights as part of its obligations to the citizenry.¹² In this regard, SOEs are a vehicle through which the state delivers these obligations and rights. Eskom provides electricity to the nation, water boards provide water, while other SOEs such as Transnet, SAA, and PRASA provide transportation of goods and people, all in fulfilment of the mentioned socio-economic rights.¹³ Furthermore, the state provides other services such as healthcare, safety and security, and education among other rights directly through government departments.¹⁴

SOEs were established around the 1920s to provide infrastructural development and the supply of basic materials.¹⁵ The import substitution agenda added impetus to the growth of state corporations. The *Electricity Act No 42 of 1922* created the Electricity Control Board and the Electricity Supply Commission (ESKOM) with the latter

⁸ Cadbury *Report of Committee on Financial Aspects* para 2.5; Institute of Directors Southern Africa 2016 King IV: *Report on Corporate Governance for South Africa* 11.

⁹ National Treasury 2022 <http://www.treasury.gov.za/legislation/regulations/default.aspx>.

¹⁰ Presidential Review Committee on State-Owned *Growing the Economy: Bridging the Gap Volume 1 7*; Institute of Directors Southern Africa 2016 King IV: *Report on Corporate Governance for South Africa* 11.

¹¹ De Visser and Waterhouse *The Legal Framework for Appointment and Dismissal of SOE Boards 4*; Naidoo 2012 *Journal of Public Administration* 27.

¹² Section 7(2) of the *Constitution of South Africa, 1996* (hereafter the *Constitution*).

¹³ Ngang 2014 *AHRLJ* 655-680.

¹⁴ Section 27 of the *Constitution*.

¹⁵ Mekwe A *Critical Review of Corporate Governance Reforms Relating To South African State-Owned Enterprises* 1.

mandated to generate and distribute electricity at the lowest possible costs to the population.¹⁶

Corruption, financial mismanagement, and abuses of power reportedly take place regularly and is alleged to be the cause of SOE failures.¹⁷ It, therefore, seems that the law and policy framework, although comprehensive, is not effective in preventing corruption and abuse of public assets in SOEs.¹⁸ These unlawful acts allegedly escalated unchecked into state capture, a bigger concept of abuse of public resources identified by the Public Protector in her report in 2016.¹⁹ Subsequent to the Public Protector's report the Commission of Inquiry into these allegations of State Capture (Zondo Commission) was established and mandated to investigate all allegations of state capture, corruption and fraud in public entities and government.²⁰ Testimony presented before the Zondo Commission and Public Protector's report showed that despite the SOE governance framework in place, public officials at various levels of government disregard and engage in prohibited activities.²¹ This evidence shows a general disregard of the legal provisions and policies within which such entities operate as happened at SAA with the Airbus Swap deal.²² The question thus arises whether South African law contains measures, if any, to enforce good corporate governance in SOEs to prevent corruption and whether those who are legally responsible for implementing good corporate governance in SOEs are empowered enough to perform their responsibilities. It is also essential to establish if there are adequate enforcement measures in South African law to deal with failure to fulfil legal responsibilities.

¹⁶ Eberhard 2004 <http://www.gsb.uct.ac.za>.

¹⁷ AGSA Consolidated General Report *PFMA: 2016/17* 42; section 4 of *the Prevention of Corruption Act 6 of 1958*.

¹⁸ Brummer and Sole 2008 <https://mg.co.za> ; Lipton and Lorsch 1992 *Bus Law* 59-77.

¹⁹ Zondo 2018 *The Judicial Commission of Inquiry into allegations of State Capture Part 1 Vol 1 i*.

²⁰ Zondo 2018 *The Judicial Commission of Inquiry into allegations of State Capture Part 1 Vol 1 xii*; Cision PRNewswire 2021 <https://www.prnewswire.com>.

²¹ Public Protector 2016 *State of Capture a Report of the Public Protector* 48.

²² Public Protector 2016 *State of Capture a Report of the Public Protector* 97.

1.2 Research Methodology

This study draws from a combination of primary and secondary legal sources to get balanced facts, views, and opinions on the research question. The primary sources will consist of legislation, case law and international instruments. At the helm of the legislation is the Constitution wherein the mandates and expectations on SOEs are laid down. Other pieces of legislation that include, *inter alia*, the Companies Act will be investigated, with emphasis being directed on the provisions pertaining to SOE governance.

Scholarly literature was consulted as secondary sources for this research. These consist of textbooks, journal articles, theses and dissertations covering the subject of this research, where rich expert knowledge and opinions abound. Government-commissioned papers and reviews such as the Presidential Review Commission report provide insights into the challenges facing SOEs and the recommended solutions. Finally, the Auditor-General reports also reveal alleged abuse of resources and the amounts involved because of flouting of legislation in procurement and expenditure. A review is made of other institutions and role players' assessments of the performance of SOEs in the fulfilment of the socio-economic rights of citizens which are embedded in the Constitution.

1.3 Framework and Structure of Study

Chapter 1: Introduction. It will describe the rationale for the study, research methodology and the structure of the thesis. The chapter also identifies the research questions guiding the study.

Chapter 2: Good Corporate Governance in SOEs. This will be a theoretical chapter looking at the scholarship on good corporate governance and translating it to fit within the context of SOEs.

Chapter 3: The South African legal SOE governance framework. In this section, the various legislations, policies etc. on SOE governance will be introduced. This framework will be analysed against the theoretical foundation of Chapter 2. The

analysis will highlight which provisions in the SOE governance framework specifically relate to the implementation of good corporate governance.

Chapter 4: Enforcing good corporate governance in South African SOEs. This chapter will specifically look at the different enforcement “tools” or actions to be taken to ensure that the SOE governance framework is implemented. Furthermore, the consequences for not complying with the prescripts of the SOE governance framework involving good corporate governance will also be investigated.

Chapter 5: Conclusion. A summary of the findings of the research and recommendations on how to address identified challenges are discussed.

Chapter 2: Literature review on corporate governance

2.1 Introduction

Governance has been defined as the exercise of legitimate authority by decision-makers. Furthermore, it constitutes the mechanisms through which decision-makers account for the consequences of the decisions they have taken.²³ It is trite that, governance in broad terms constitutes the interrelatedness of structures, processes, and activities that are performed in the utilisation of power and responsibilities.²⁴ In an SOE or any corporate body, corporate governance can be viewed as the interaction between different sections within an entity in the performance of functions and responsibilities and the exercise of power. Corporate governance mechanisms include the tools that are used in the corporate body to ensure role players in the governance process are held accountable.²⁵

The South African government through the Department of Public Enterprises, has on numerous occasions expressed anticipation that SOEs must operate within strict corporate governance standards. However, it has become apparent over recent years that SOEs are heavily weighed down by governance transgressions, largely influenced by political interventions because of the complex governance structures and regulatory frameworks under which they operate.²⁶

2.1.1 The history of corporate governance in South Africa

Over the recent past, numerous corporate scandals the world over have occurred, both in private and public sectors jolting stakeholders into debating corporate governance widely.²⁷ Public engagements, coupled with wide media coverage on the said scandals have led to the establishment of codes of best practice in different countries of the world under varying names owing to origin. Among these codes, the

²³ Mekwe *A Critical Review of Corporate Governance Reforms Relating to South African State-Owned Enterprises* 10.

²⁴ Khan *A literature review of corporate governance* 1.

²⁵ Agbor 2019 *AJLCL* 52.

²⁶ Mbambo 2017 *An Analysis of Corporate Governance in State-Owned Enterprises (SOEs) In Compliance with The King Code Principles of Good Governance* 16.

²⁷ Mbele *Corporate governance in State Owned Enterprises* 10.

most prominent are the Cardbury, Greenbury, Turnbull, Hempel, and Higgs codes and legislation such as the *Sarbanes Oxley Act* of 2002 in the United States of America (USA).²⁸

South Africa, through the Institute of Directors in South Africa, established the Commission on Corporate Governance resulting in the King I Report in 1994. Subsequent reports amending King I, expanded the scope of the codes to include SOE governance, considering escalating governance challenges in the sector.

The King I Report became the bedrock for policy and the legal and regulatory frameworks for corporate governance in South Africa post-1994. It recommended standards and best practices for boards of directors in listed companies and SOEs, covering both financial and non-financial matters of an entity.²⁹ For instance, King II issued in March 2002 added new sections on sustainability, the role of the board and risk management emphasising the linkage between the social and economic goals of an enterprise.³⁰ Furthermore, the King III Report, issued in 2010, focussed on the transition from a comply or explain position to the apply or explain approach adding impetus to the emphasis on adherence to corporate governance standards. SOEs, in addition to delivering on their mandates, had to apply the standards spelt out in the King III Code.

In King III, the King Committee discarded the need for mere compliance to a more mandatory need for application of the standards of the Code.³¹ The scope of the Code was further expanded to cover both profit and non-profit entities in both the private and public sectors. It was further recommended in King III, that entities should provide integrated reports and separate reports on sustainability in accordance with the Global Reporting Initiative Sustainability Reporting Guideline. As part of the King III Report additions were made as part of the corporate governance

²⁸ Mekwe *A Critical Review of Corporate Governance Reforms Relating to South African State-Owned Enterprises* 10.

²⁹ Mekwe *A Critical Review of Corporate Governance Reforms Relating to South African State-Owned Enterprises* 27.

³⁰ Moyo *South Africa principles of corporate governance: legal and regulatory restraints on powers and remuneration of executive directors* 10.

³¹ Andreasson 2007 *The Political Economy of Corporate Governance in South Africa* 5.

code. These additions included fundamental transactions, business rescue, IT governance and directors' responsibilities in mergers, acquisitions, and amalgamations. Elements of the *PFMA* and *PAIA* were also included in the Code.³²

The King IV Report released in 2016, builds on the previous reports taking into consideration fundamental changes in society and in the business environment. Integrated reporting replaced silo reporting in order to reveal the triple context of business operations and the interconnectedness of resources organisations utilise. King IV takes cognisance of the triple context of stakeholder, management, technology and strategy. Stakeholder management deals with understanding the needs, interests and expectations of different stakeholders and the way management manages them to sustain continuous relationships.³³

The PRC identified SOEs as the foundation on which economic growth and transformation are anchored and hence, they have an important role in resolving socio-economic challenges, the country is facing currently.³⁴ The aspiration of a developmental state should therefore be driven, in part, by the SOE sector. It follows then that SOEs should lead the country towards improving the quality of life, strengthen democracy and promote a just society, through vibrant, viable and effective initiatives. King IV applies to all public entities listed in Schedules 2 and 3 of the *PFMA*. In Principle 3 of Part 6.6 it is stated that SOEs through their public mandates are expected to practise good corporate citizenship, by being accountable to citizens, taxpayers, and funders.³⁵

The Chapter deals with public sector governance principles and good corporate governance principles as they apply to SOE governance serving public interests and the business interests of government. The Chapter then highlight the SOE governance challenges in relation to the principles alluded to above and how their

³² Mekwe *A Critical Review of Corporate Governance Reforms Relating to South African State-Owned Enterprises* 28.

³³ Institute of Directors Southern Africa 2016 *King IV: Report on Corporate Governance for South Africa* 5.

³⁴ Part 6.6 of the Institute of Directors Southern Africa 2016 *King IV: Report on Corporate Governance for South Africa* 111.

³⁵ Institute of Directors Southern Africa 2016 *King IV: Report on Corporate Governance for South Africa* 113.

lack of application leads to failures, corruption, fraud, and a general lack of service delivery to citizens. The chapter develops the study, on how those responsible for the governance of SOEs have failed to apply the principles discussed herein to further the interests of the stakeholders and the citizens.

2.2 Good governance principles

Hereunder, the study outlines the principles of good governance in the public sector in view of the public service mandate of SOEs. They are accountability, democracy, moral and ethical conduct, transparency, and capacity.³⁶ The study explores these principles from an international perspective as revealed in United Nations (UN) treaties, African Union (AU) treaties, the World Economic Forum, and the World Bank wherein issues around human rights, governance, decentralisation and democracy are dealt with.³⁷

2.2.1 Principle 1: Democracy

Democracy encourages people to make decisions on issues that affect them. It is also about seeking consent from the people before decisions that affect them are taken by those who hold power.³⁸ In this study democracy is viewed in relation to good governance in the public sector, in which SOEs are part, taking cues from international law and policies.³⁹ Democracy is part of a governance system that promotes public participation, sensitivity to public needs, protection, and respect for specific human rights such as socio-economic rights embedded in the Bill of Rights.⁴⁰ Some of the mentioned components are explained further in the following sub-sections.

³⁶ Wright *Legal perspectives on the prevention and minimisation of corruption for sustainability in South African municipalities* 60.

³⁷ Department of Environmental Affairs and Tourism *National Framework on Sustainable Development in South Africa* 8, UN Agenda 2030, Aspiration 1 of Agenda 2063, United Nations 2021 https://treaties.un.org/Pages/Content.aspx?path=DB/titles/page1_en.xml, African Union 2021 <https://au.int/en/treaties>.

³⁸ Wright *Legal perspectives on the prevention and minimisation of corruption for sustainability in South African municipalities* 61.

³⁹ De Vos et al *South African Constitutional Law in Context* 86; Botchway 2001 *Florida Journal of International Law* 189; Koenine and Magena 2017 *African Journal of Public Affairs* 63; Adejumo-Ayibiowu 2015 *Journal of Development Studies* 11.

⁴⁰ De Vos et al *South African Constitutional Law in Context* 86, Botchway 2001 *Florida Journal of International Law* 195.

2.2.1.1 Elections

Elections are the cornerstone of democracy because they allow the governed to choose those who should govern them.⁴¹ Representative and participatory democracy is based on government by the consent of the citizens.⁴² Ascension to positions of power should be through a process of free, fair and transparent elections.⁴³ There must be a legal framework to guide the conduct of credible elections.⁴⁴ Properly elected leaders are accountable to the society that elected them.⁴⁵ Ministers, the political figureheads for government and its agencies, in this case SOEs should be elected fairly by communities and receive legitimate mandates.

2.2.1.2 Responsiveness to community needs

Democracy encompasses the responsiveness to the economic and social needs of the community.⁴⁶ An electorate that is democratically inclined embraces participatory processes as a response to their needs.⁴⁷ Communities should, therefore reap the benefits of practising participatory democracy.⁴⁸ SOEs, according to legal scholars in the field, should be responsive to the social and economic rights of the citizens. Inclusion and recognition of diversity inform service provision in sensitive areas. Consideration of values, customs and prevailing conditions is essential in SOE delivery of public mandates. The community needs to be involved in the development of pro-poor policies.⁴⁹

⁴¹ Wright *Legal perspectives on the prevention and minimisation of corruption for sustainability in South African municipalities* 61.

⁴² Botchway 2001 *Florida Journal of International Law* 189.

⁴³ Aa 3(10) and 12 of the African Charter on Democracy, Elections and Governance (2007) AU Doc AU/Dec/147/VII; aa 1(b) and 1(c) of the Protocol on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security UN Doc ASP1/12/01 (2001).

⁴⁴ Aa 2(1) and 4(1) of the *African Charter on Democracy, Elections and Governance* (2007); a 3(1) of the AUCPCC.

⁴⁵ UN Human Rights Committee General Comment no 31 on the *Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (2004) CCPR/C/21/Rev1/Add13 para 8.

⁴⁶ Wright *Legal perspectives on the prevention and minimisation of corruption for sustainability in South African municipalities* 64.

⁴⁷ Botchway 2001 *Florida Journal of International Law* 189.

⁴⁸ Botchway 2001 *Florida Journal of International Law* 190.

⁴⁹ Aa 8(1), 8(2), 10(2), 10(3) and 15 of the *African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development* (2014) <https://bit.ly/3fCBC5a>.

2.2.1.3 Protecting, respecting, and fulfilling human rights

Fulfilment of certain human rights enhances democracy by smoothening the electoral processes.⁵⁰ Such rights include freedom of speech, free media, and the right to vote. These rights ensure that community members participate in elections as candidates and as voters. They also ensure dissenting views, civic participation, and political tolerance subsist increasing transparency. If human rights are promoted in this manner, they contribute to democracy a precondition for good governance.⁵¹

2.2.1.4 Public participation

Good governance requires active and meaningful public participation by the citizens, their representatives and stakeholders including relevant government departments.⁵² Public participation must be apparent in decisions made and policy makers must show proof of such public participation.⁵³

To promote effective public participation authorities must respect and promote rights such as freedom of expression and association and access to information.⁵⁴ SOEs that serve public interests such as the SABC must ensure public participation by all racial and cultural groups while paying attention to the diversity of languages.⁵⁵

Different methods could be used to conduct public participation, these include debates and dialogue, public hearings, referendums, and civil methods.⁵⁶

⁵⁰ Botchway 2001 *Florida Journal of International Law* 195.

⁵¹ Adejumo-Ayibiowu 2015 *Journal of Development Studies* 11; Botchway 2001 *Florida Journal of International Law* 195; Koenance and Mangena 2017 *African Journal of Public Affairs* 63.

⁵² Botchway 2001 *Florida Journal of International Law* 190.

⁵³ Wright *Legal perspectives on the prevention and minimisation of corruption for sustainability in South African municipalities* 64.

⁵⁴ International Guidelines on Decentralisation and Access to Basic Services for All (2009) paras A.10, A.13; *United Nations Agenda 2030 SDG* 16.8, 11.3.

⁵⁵ Aa 30 and 31 of the African Charter on Democracy, Elections and Governance (2007) AU Doc AU/Dec/147/VII; a 13 of the UNCAC; UN Habitat International Guidelines on Decentralisation and Access to Basic Services for All (2009) paras A.10, A.17, A.22.

⁵⁶ Aa 3 and 25 of the International Covenant on Civil and Political Rights (1966) 31 ILM 645.

2.2.2 Principle 2: Moral and ethical conduct

Good governance demands uprightness in morality and ethical conduct in managing state affairs and resources. It is premised on adherence to limits and moral obligations in exercising state power.⁵⁷ To entrench moral and ethical standards, international and regional laws and policies are handy tools used to guide the exercise of public power and prudent use of public resources by public officials entrusted with them.⁵⁸

If the laws are applied properly, the public, to a large extent, gains confidence in government activities.⁵⁹ Media reports of late indicate that the public is not confident in the way public affairs are conducted.⁶⁰ SOEs have not been spared the allegations of immoral and unethical conduct, corruption, and abuse of public funds.

2.2.3 Principles 3 and 4: Transparency and accountability

Good public governance requires that public service be structured in a way that ensures that state power is exercised responsibly and there are mechanisms to review its usage.⁶¹ The same goes for SOEs, whose public service mandate is an extension of the overall government mandates.⁶² It is for this reason that the principles of transparency and accountability should be applied in the governance of SOEs. Transparency means that SOEs should provide information to be public for scrutiny of the decisions they make and the exercise of power.

⁵⁷ Wright Legal perspectives on the prevention and minimisation of corruption for sustainability in South African municipalities 64.

⁵⁸ Koenane and Mangena 2017 *African Journal of Public Affairs* 62.

⁵⁹ A 3(2) of the Inter-American Convention Against Corruption (1996) 35 ILM 724.

⁶⁰ A 3(4) of the Inter-American Convention Against Corruption (1996) 35 ILM 724, Wright Legal perspectives on the prevention and minimisation of corruption for sustainability in South African municipalities 66.

⁶¹ Wright Legal perspectives on the prevention and minimisation of corruption for sustainability in South African municipalities 66.

⁶² Botchway 2001 *Florida Journal of International Law* 161; Gathii 1999 *Buffalo Human Rights Law Review* 107; Esty 2006 *Yale Law Journal* 1515; Adejumo-Ayibiowu 2015 *Journal of Development Studies* 6; Munzhedzi and Makwembere 2019 *Journal of Public Administration* 659; Enaifoghe et al 2020 *Journal of African Foreign Affairs* 35; Koenane and Mangena 2017 *African Journal of Public Affairs* 63; Mlambo and Masuku 2020 *Journal of Public Administration* 549.

In the same vein, accountability is about the government's duty to explain and acknowledge wrongdoings if any in its exercise of power and duties. The community must also be informed to rectify mistakes.⁶³ SOEs are accountable to the public and institutions of government mentioned elsewhere in this study. Transparency in government institutions requires public participation as alluded to above. To promote the concept of transparency and accountability there should be documented formal policies placed in the public domain.⁶⁴ In addition, there should be democratic systems for choosing leaders, publication of financial statements and reports, peer review processes, internal and external auditing of books, declaration of assets and interests, and sanctions for failure to comply with legislation.⁶⁵

2.2.4 Principle 5: Capacity

Public service requires capacitated institutions and role players in terms of politics, finance, and structures to implement and achieve policy goals.⁶⁶ Government institutions must be rendered capable of responding to different policy, legal, economic, political, and environmental situations. To strengthen its hand, the government should formulate measures such as legislation, and strong institutions to enable effective and efficient utilisation of public resources and assets.⁶⁷

Considering the principle of capacity's requirements, the government should promote good economic and corporate governance through among other things, prudent utilisation, and management of public resources within government departments and through SOEs serving public interest mandates.⁶⁸ Enhancing institutional capacity requires investment in training for both elected and non-elected public officials to empower them to perform their functions. Furthermore, training can also be used to

⁶³ A 5(2) of the African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development (2014) <https://bit.ly/3fCBC5a>.

⁶⁴ CIPFA International Framework for Good Governance in the Public Sector 16; UN Habitat International Guidelines on Decentralisation and Access to Basic Services for All (2009) para C.34.

⁶⁵ Aa 16(3) (e) and 16(5) (g) of the African Charter on Values and Principles of Decentralisation, Local Governance and Local Development (2014); CIPFA International Framework for Good Governance in the Public Sector 10, 31.

⁶⁶ CIPFA International Framework for Good Governance in the Public Sector 10, 23.

⁶⁷ Wright *Legal perspectives on the prevention and minimisation of corruption for sustainability in South African municipalities* 70.

⁶⁸ Aa 33(4) and 33(5) of the African Charter on Democracy, Elections and Governance (2007) AU Doc AU/Dec/147/VII.

increase awareness of the effects of corruption on service delivery and the individuals involved. Relevant codes of conduct must be referenced in such training.⁶⁹

2.3 Corporate Governance Theories

For this study, governance can be understood as the interrelationship between the structures, processes, and other activities that have a bearing on the utilisation of power and responsibilities, decision making and how stakeholders and the general population express themselves.⁷⁰ In a nutshell, governance is about the exercise of power by decision-makers and how these decision-makers account for the consequences of their decisions.⁷¹ Good corporate governance can then be seen as encompassing the essential tools through which a corporate entity and its role players are held accountable.⁷² Through corporate governance, enterprises, SOEs included, can determine their objectives and assess their outcomes and achievements to determine if there is value in huge investments of public finances into the sector.

It has been widely reported in the media and scholastic writings that governance failures in SOEs emanate from a lack of a good corporate governance culture because of conflicting roles, political interference, and the lack of political will to implement laws, policies and principles of both good governance in general and good corporate governance. Corporate governance is usually described in line with two main theories according to corporate governance scholars. As alluded to above, public governance principles also apply to SOE governance. The Shareholder and Stakeholder models discussed hereunder, provide useful insights on how business entities are governed. Some SOEs are incorporated entities with the mandate to make a profit for the government in addition to serving the public interest mandates.

⁶⁹ UN Habitat International Guidelines on Decentralisation and the Strengthening of Local Authorities (2009) paras D.5, D.6; aa 7(1) and 7(2) of the UNCAC.

⁷⁰ Chilenga *State-Owned Enterprises: A Policy Analysis of South African Airways (SAA)* 18-19.

⁷¹ Agbor 2019 *AJLCL* 53.

⁷² Du Plessis, Hargovan and Bagaric *Principles of Contemporary Corporate Governance* 6-7.

2.3.1 The Shareholder Model

Milton Friedman, one of the main proponents of the shareholder approach stated that businesses exist to make and maximise profits.⁷³ This theory is anchored on the assertion that business managers, for SOEs that would be the state government, act as agents of its owners, the shareholders (for SOEs this is the general public) and therefore run the business for their principals' benefit.⁷⁴ Management is under the legal and moral obligation to further the shareholders' interests in the business. The only social responsibility for business, according to Friedman, is to adhere to the rules (in South Africa these rules include the *Constitution* and the Bill of Rights). In other words, for SOEs in South Africa, this theory means SOE managers should act in utmost good faith on behalf of the public, engage in fair competition and exclude deceptive and fraudulent conduct in their operations.⁷⁵

In the case of *Dodge v Ford Motor Company* remember to state from which jurisdiction this case was it was held that Henry Ford should run Ford Motor Company in the best interest of the shareholders of the company and not in a charitable way.⁷⁶ The case highlighted the shareholder theory in clear terms, asserting the premise that business is carried out primarily to make profits for its shareholders.⁷⁷ It was found that management was operating the business entity in contrast with the provisions of the charter under which it was created. The shareholder theory was created to protect shareholders and guarantee them remuneration as real owners of companies. As alluded to above, managers are agents, hence the shareholder theory asserts that position is in line with the agency theory which itself agrees that the generation of maximum profits for the shareholders or investors is central. Several weaknesses of the shareholder model have been noted. Chief amongst these is short-termism, the pursuit of profits at the

⁷³ Mekwe A Critical Review of Corporate Governance Reforms Relating to South African State-Owned Enterprises 13.

⁷⁴ Donaldson and Preston 1995 *Academy of Management Review* 65.

⁷⁵ Friedman 1970 *N.Y. Times, Section 6* 30.

⁷⁶ *Dodge v Ford Motor Company* (170 NW 668, 664 Mich 1919) 370.

⁷⁷ Mekwe A Critical Review of Corporate Governance Reforms Relating to South African State-Owned Enterprises 14.

expense of long-term goals.⁷⁸ It is common cause that executive directors who are involved in management may not realise their own mistakes and if they do may be unwilling to correct them.⁷⁹ Non-executive directors, on their part, suffer from their impaired recruitment processes and remuneration.⁸⁰

2.3.2 The Stakeholder Model

Stakeholder theorists argue that the shareholder model does not consider the social, ethical, or moral responsibilities of the entity, as a social institution. Furthermore, stakeholder proponents, argue that firms should not focus on maximising profits only, rather they should serve the interests of all other stakeholders besides shareholders. The same theorists, also affirm the importance of Corporate Social Responsibility (CSR), urging firms to fulfil responsibilities to society.⁸¹ These responsibilities can be classified under economic, legal, ethical, and philanthropic categories.⁸² SOEs should endeavour to promote the interests of all stakeholders in their governance models.

According to the stakeholder theory, managers act as agents for different stakeholders and not exclusively for shareholders, ensuring that ethical rights are respected, and the legitimate interests of the stakeholders are respected. In addition, the legitimate interests, of the stakeholders, that is delivering essential services to the public and profit-making making are considered and balanced within the decisions taken. In corporate governance, the stakeholder theory which is operational in both developed and developing countries is premised on the maximisation of the welfare of all stakeholders rather than shareholders alone. It is argued that an entity consists of social groupings that provide different resources to the business and in return these groups expect their interests to be promoted. Shareholders expect maximum returns as alluded to in the shareholder approach

⁷⁸ Simpson and Taylor Corporate Governance Ethics and CSR 25.

⁷⁹ Blair Ownership and control: rethinking corporate governance for the twenty-first century 6.

⁸⁰ Mekwe *A Critical Review of Corporate Governance Reforms Relating to South African State-Owned Enterprises* 16.

⁸¹ Mekwe *A Critical Review of Corporate Governance Reforms Relating to South African State-Owned Enterprises* 17.

⁸² Blair Ownership and control: rethinking corporate governance for the twenty-first century 2, Freeman 2009 *Managing for Stakeholders*. In *Ethical Theory and Business* 8th ed 56.

section. Communities provide the location and expect the quality of their lives to be improved through the entity's operations. Employees who provide time, skill and expertise expect income in the form of adequate remuneration.⁸³

In the South African context, SOEs have dual roles and therefore apply a hybrid model that suits the shareholder's profit objectives and at the same time includes the principles underlying the stakeholder model to ensure interest groups benefit from the SOEs especially the citizens who foot the bills of failure and bear the brunt of service delivery failures. This approach has not worked perfectly as evidenced by reported failures and state capture. While this approach remains suitable for South Africa, there is room for improvement, through crafting legislation and policies to address gaps and tighten enforcement.

2.3.3 Principles of good corporate governance

Various scholars in the field of corporate governance have written widely about the subject of corporate governance and the ideal or ultimate aspired levels that organisations and role players should strive to achieve. In addition, reports alluded to in the introduction of this study present the ideal principles that should be adopted by organisations to ensure good corporate governance. Below are the summarised principles of good corporate governance in entities. These principles apply to SOEs in the same way they apply to the private sector.

2.3.3.1 Shareholder recognition

Good corporate governance seeks to provide a fair platform for shareholders to be heard at general meetings where they participate. Majority shareholders, use their controlling interests and voting rights to influence decisions on directors' recruitment, selection, and appointment.⁸⁴ Good corporate governance ensures that all shareholders have a voice at general meetings. They also establish and exercise

⁸³ Smith 2003 MIT Sloan Management Review 85.

⁸⁴ Colley et al What is corporate governance? 8.

authority in general meetings and over the entity at large. In the SOEs, the government through the responsible minister exercises the mentioned authority.⁸⁵

2.3.3.2 Stakeholder interests

Stakeholders are groups and persons with an interest in the affairs of the business. They either affect or are affected by the organisation's operations.⁸⁶ The exercise of power in relation to each other is key for corporate governance. Addressing stakeholder interests, outside the profit objectives helps the organisation build goodwill in the communities, thereby, creating growth potential.⁸⁷

2.3.3.3 Board responsibilities

Shareholders should be well versed in the board's responsibilities which include among other responsibilities, strategic roles and crafting the strategic direction of the company. The board delegates some executive duties to management, especially the CEO, who is supposed to protect their interests.⁸⁸ Common law requires the board to perform fiduciary duties and duties of care and diligence.⁸⁹ Directors' duties are partly codified in the *Companies Act*. Fiduciary duties require directors to always act in good faith to benefit the company and not themselves. Acting in their own interests is a breach of trust.

2.3.3.4 Ethical behaviour

Boards should operate ethically according to prescripts in codes to avoid legal problems. Profits should not be pursued at the expense of ethics.⁹⁰ Boards should apply corporate governance core values of integrity and trust. Ethically balanced organisations enjoy goodwill in the markets leading to customer and employee

⁸⁵ Mekwe *A Critical Review of Corporate Governance Reforms Relating to South African State-Owned Enterprises* 20.

⁸⁶ Freeman 1984 *Strategic Management, a Stakeholder Approach* 5, Post et al 2002 'Managing the Extended Enterprise: The New Stakeholder View' *California Management Review* 7.

⁸⁷ Mekwe *A Critical Review of Corporate Governance Reforms Relating to South African State-Owned Enterprises* 21.

⁸⁸ Bouwman 2009 *SA Merc LJ* 509.

⁸⁹ Kneale 2012 *Corporate Governance in South Africa* 12.

⁹⁰ Arjoon 2005 *Corporate Governance an Ethical Perspective* 20.

loyalty.⁹¹ Over the years, it has become clear that no entity is insulated from fraud hence the instilling of prudent business practices in boards and management.⁹²

2.3.3.5 Business transparency

Business transparency promotes trust between stakeholders. Transparency refers to the act of providing clear information to the stakeholders and the owners of the company.⁹³ Furthermore, transparency is premised on the disclosure of accurate financial information willingly and openly.⁹⁴ Transparency is, therefore, a key component of sound corporate governance frameworks as it aids sound decision-making.⁹⁵

2.3.3.6 Efficiency and effectiveness

Effectiveness and efficiency ensure optimum use of resources in an entity. Capital tends to flow towards entities that operate efficiently and produce goods and services with a high rate of return.⁹⁶ Effective governance ensures scarce resources are protected and that managers who fail to use resources efficiently are removed.

2.3.3.7 Accountability

Role players in the governance structures must be held accountable for their wrongful acts or omissions. Accountability supports corporate governance processes aimed at sustainable investment returns for the entity.⁹⁷ Directors are accountable to shareholders while management in turn accounts to the directors. Directors should subject themselves to enquiry by shareholders on key decisions taken by them. In addition, the legal and regulatory framework is key in ensuring accountability in SOE

⁹¹ Dandino Corporate Governance: Something for Everyone Franchising World, 36 41.

⁹² Byrne *Mastering Global Corporation Governance* 11.

⁹³ Mekwe *A Critical Review Of Corporate Governance Reforms Relating To South African State-Owned Enterprises* 23.

⁹⁴ Fung 2014 *Universal Journal of Management* 73-80.

⁹⁵ Trust <http://www.pearse-trust.i.e/blog>.

⁹⁶ Holly *Corporate Governance: What It Is and Why It Matters* 2.

⁹⁷ Calpers 2011 <https://www.calpers.ca.gov>

governance.⁹⁸ The said framework defines the responsibilities of role players and spells out the objectives and expectations of the state as the owner.⁹⁹

2.3.3.8 Sustainability

This concept of corporate governance is concerned with encouraging ethical responsibility, sound corporate governance, employee wellness and minimising adverse environmental impacts. It also promotes corporate social responsibility in the communities where the entity operates.¹⁰⁰

2.4 The Importance of Good Corporate Governance in SOEs

SOEs, according to the United Nations Conference on Trade and Development (UNCTAD), are meant to support the agenda of a developmental state, mainly economic growth, and economic development.¹⁰¹ In the same vein, SOEs are critical for development. Their poor performance concerns their stakeholders in a significant way, and it is trite to believe that only good corporate governance can arrest their decline and collapse.¹⁰²

SOEs remain largely under state ownership in many countries in the global south, although partial privatisation has been adopted over the years. SOEs contributed 20% of investment, 5% to employment, 15% to the GDP in Africa.¹⁰³ State ownership in business entities has been used as an alternative to the use of regulations and it also helps governments to control and stabilise prices in natural monopolies. However, the performance of many SOEs has been a huge disappointment owing to political patronage, rendering support to political

⁹⁸ OECD State-owned Enterprises in Southern Africa *A Stocktaking of Reforms and Challenges* 4.

⁹⁹ Mekwe *A Critical Review of Corporate Governance Reforms Relating to South African State-Owned Enterprises* 24.

¹⁰⁰ Kocmanova 2012 Corporate governance and sustainability 545.

¹⁰¹ Chang H 2007 <http://esa.un.org>.

¹⁰² Mbele *Corporate governance in State Owned Enterprises* 26.

¹⁰³ IFC <https://www.ifc.org>; SOEs in addition deliver critical services in key economic sectors, including utilities, finance, and natural resources.

supporters. Government support through fiscal allocations and bailouts has caused distortions in financial systems and skewed macro-economic fundamentals.¹⁰⁴

The fundamental problem in SOE performance has been identified as poor governance, although some SOEs in other countries where reforms were implemented showed improvement. Challenges resulted in the establishment of the OECD Steering Committee on Corporate Governance for SOEs.¹⁰⁵ It was tasked with developing non-binding guidelines for SOEs.¹⁰⁶

Good corporate governance helps prevent governance scandals, poor management, and the commission of fraud among other challenges in the sector. Organisations that practise good corporate governance reap economic benefits and overall success. It is argued that while good corporate governance may not halt corruption, it can ensure early detection and removal of certain acts of corruption. Risk management has been identified and incorporated as a key part of good corporate governance. SOEs as drivers of certain government mandates, implementing investments towards the provision of infrastructure need to be well run to deliver on the said mandates without fail.¹⁰⁷ SOEs such as ESKOM and Transnet with their huge contribution to the economy and the livelihoods of citizens in general would progress well towards the realisation of citizens' socio-economic rights.

2.5 Conclusion

Corporate governance has been a topical subject over the past decade, owing to challenges in the governance of entities in different jurisdictions. Corporate governance as a concept has been explored by various scholars and experts in the field and varying definitions have been coined describing it as a combination of structures and processes for the exercise of power by different role players using the

¹⁰⁴ Mbele *Corporate governance in State Owned Enterprises* 26.

¹⁰⁵ OECD *Corporate Governance of State-owned Enterprises*. The OECD country reviews and evaluates the corporate governance and regulatory framework for SOEs in individual countries.

¹⁰⁶ Mbele *Corporate governance in State Owned Enterprises* 27. The OECD works to ensure that SOEs operate in a sound competitive and regulatory environment to promote efficient and open markets in both the domestic and international arenas.

¹⁰⁷ Mbele *Corporate governance in State Owned Enterprises* 26.

law and regulations as guides.¹⁰⁸ This is done in the interest of the entity and its stakeholders.

Corporate governance has been described, mainly through two theories, the shareholder theory, and the stakeholder theory. These two theories offer different perspectives from which corporate governance is viewed. The shareholder theory emphasises profit maximisation for the benefit of the shareholders. On the contrary, the stakeholder approach emphasises corporate social responsibility, which is anchored on maximising welfare for all stakeholders rather than narrowly on the shareholders.¹⁰⁹ It could be beneficial if policymakers entrench these approaches in SOE governance frameworks to ensure the dual purpose of SOEs is fulfilled. Stakeholders are serviced while the shareholder draws profits for the fiscus and onward investment in public goods and services.

Good governance principles have been explored in this study as they apply in the public sector to promote a people-centred approach to SOE governance. Democracy is central in this approach as it ensures the election and deployment of fairly elected political heads of government departments, the members of parliament and subsequently ministers. Public participation ensures that decisions taken resonate with the needs of the citizens at any given time and that there is accountability in the use and application of public mandates.

Good corporate governance in SOEs is influenced largely by principles and governance frameworks in use at a particular time. This mix governs interrelationships between structures and role players in an entity.¹¹⁰ The government plays different and sometimes conflicting roles which creates a conducive environment for corruption, fraud, and political interference in the SOEs. Over the past decade, state capture and corruption in SOEs was allegedly committed

¹⁰⁸ See para 2.2 above.

¹⁰⁹ See para 2.3 above.

¹¹⁰ See para 2.2 above.

by ministers, directors and management disregarding corporate governance principles and frameworks.¹¹¹

Owing to weak oversight systems at different levels, SOEs have collapsed, and some became insolvent to the extent of shedding off-going concern status. As a result, service delivery has been impacted negatively and the fiscus drained through bailouts and guarantees. SOE debts have consequently increased greatly. Those tasked with the governance of SOEs should adhere to good governance principles both at government and at corporate levels.¹¹² In the following chapter, the legal and regulatory framework for SOEs are explored and how role players should implement such frameworks to improve service delivery and rid the sector of corruption, fraudulent activities, and impunity.

¹¹¹ See para 2.3 above.

¹¹² See para 2.2 above.

Chapter 3: Analysis of the governance framework for SOEs

3.1 Introduction

SOEs are legal entities that embark on commercial activities in furtherance of government service provision mandates.¹¹³ They perform certain activities on behalf of the state, which is their owner. The organisational structure of each SOE is different. In addition, such entities have distinct traits owing to their different mandates and the sectors they operate in. Furthermore, SOEs differ from other forms of government agencies without any commercial objectives, such as regulatory bodies.¹¹⁴

The fiscal challenges bedeviling many South Africans are partly caused by SOE failures, their inefficiencies, continuous losses, debt burdens, bailouts, adverse credit ratings, and poor quality of products and services.¹¹⁵ However, some SOEs, despite the challenges alluded to, still achieve, to some extent, public policy objectives which in essence then justifies losses and bailouts from the fiscus.¹¹⁶ These SOEs continue to operate despite such losses so that service delivery is not compromised. This is important because many SOEs are the sole providers of those services for that area, electricity supply for instance.¹¹⁷

As discussed in Chapter 2, corporate governance in SOEs consists of procedures, processes, and systems through which SOEs are directed, controlled and held accountable. Good corporate governance for this study is corporate governance exercised in accordance with a set governance framework. In South Africa, the existence of SOEs is rooted in what can be referred to as an SOE governance

¹¹³ Tshikovhi *A Legal Analysis of the Application of Corporate Governance Principles in the Aviation Sector* 13.

¹¹⁴ A state-owned entity is a national government business enterprise established in terms of national legislation fully or substantially funded either from the National Revenue Fund or by way of tax, levy or other money imposed in terms of national legislation and accountable to parliament.

¹¹⁵ Mwaure 2007 *Fordham International Law Journal Vol 31* 34.

¹¹⁶ Provision of electricity by ESKOM countrywide is ongoing despite challenges with the production side at power stations.

¹¹⁷ PwC 2015 <https://www.pwc.com>.

framework, wherein, details on their establishment, control, powers, function, and funding are spelt out. Certain principles such as effective leadership premised on ethics and compliance are built into this governance framework.

Such risks and failure have been widely reported in the media, in the Auditor-General of South Africa (AGSA) reports and the State Capture Report of the Public Protector.

3.2 An overview of the SOE governance framework in South Africa

This section explores the core components of the SOE governance framework in South Africa; international law, policy and best practices; South African legislation and policy on: companies, public governance, and SOEs; circulars of the National Treasury; relevant MOUs; reports and recommendations (i.e., of the Public Protector, Auditor General, Presidential Commission, etc.); and relevant case law.

The OECD Guidelines clearly state the prescripts necessary for sound governance in SOEs and anchoring these is a sound legal framework. In this regard, the OECD has coined six main principles on corporate governance in SOEs and these are:

- (i) An effective corporate governance framework
- (ii) Rights of the shareholders and ownership control
- (iii) The role of the shareholders in corporate governance
- (iv) Disclosure and transparency
- (v) Responsibilities of the board.

The King IV Report contains sixteen principles on good corporate governance and the principles apply to any organisation that has a governing body. It applies to SOEs, incorporated and unincorporated. Compliance with the Code applies compulsorily on an 'apply and explain' basis notwithstanding that methods of adoption and application may vary between organisations.

The Presidential Review Committee (hereafter PRC) indicated that the governance framework constitutes many laws, codes and regulations that inhibit sound corporate governance in public entities.¹¹⁸

Furthermore, legislation and regulations are the pillars of corporate governance as they provide the rules about the ownership and management of the SOEs. The *Constitution* as the supreme law, the *PFMA* and the *Companies Act*, among others, are included in the applicable legislation.¹¹⁹ In addition, regulatory provisions from regulatory bodies such as NERSA (for energy) and ICASA (for broadcasting) significantly affect ESKOM and the SABC. We submit that this mix indicates the complexities of the governance environment for SOEs.¹²⁰

In recent years several SOEs have hogged the limelight and raised alarm in different quarters. It is therefore important to examine the extent of compliance with business ethics, principles, legislation, regulations, and guidelines. SOEs such as the SABC, ESKOM and SAA, among others, have featured prominently in media reports and at the Zondo Commission for failure to apply the legislative and regulatory provisions applicable to their operations. The study, in this section, examines the legal and regulatory framework supporting corporate governance and the extent of compliance with the said framework and subsequently its enforcement.

3.3 International law, policies, and best practices

Through various instruments, international law covers anti-corruption efforts aimed at preventing and alleviating the abuse of public funds and resources.¹²¹ In this section, the relevant international and regional instruments are discussed concerning public administration and anti-corruption.

¹¹⁸ Presidential Review Committee on State-Owned Entities 2016 *Growing the Economy: Bridging the Gap* 11.

¹¹⁹ Mbele *Corporate governance in State Owned Enterprises* 42.

¹²⁰ Mbele *Corporate governance in State Owned Enterprises* 42.

¹²¹ Wright *Legal perspectives on the prevention and minimisation of corruption for sustainability in South African municipalities* 85-87.

3.3.1 United Nations Convention Against Corruption

The United Nations Convention Against Corruption (UNCAC) was formally adopted in December 2000 to curb corruption, to protect democratic values and the rule of law among other internationally recognised principles.¹²² UNCAC objectives include measures against corruption, international synergies, technical support, integrity, sound management of public affairs and combatting corruption.¹²³ Member states like South Africa must enact laws and craft policies to deal with corruption in their different jurisdictions.¹²⁴ South Africa has responded with laws like the Prevention of Corruption Act to operationalise the UNCAC at a national level.

3.3.2 United Nations Convention Against Transnational Organised Crimes

South Africa has recently been at the centre of allegations of being a throughway for money laundering and other forms of organised crimes. In addition some state capture role players such as the Gupta brothers easily evaded justice through international connections and assistance. This convention was adopted to address international criminal activities and corruption. The Convention requires member states to legislate on the prevention, detection, and prosecution of corruption.¹²⁵ The Convention further provides for the prevention and criminalisation of corruption by parties.¹²⁶

3.3.3 African Union Convention on Preventing and Combating Corruption

Adopted in July 2003 by the African Union, the Convention is aimed at protecting the citizens from the vagaries of the scourge of corruption in public administration spheres.¹²⁷ The objectives are to establish anti-corruption standards, prevention, detection, prosecution, and wholesome elimination of corruption in all its forms.¹²⁸ In

¹²² Foreword of the *UNCAC*.

¹²³ Foreword of the *UNCAC*.

¹²⁴ A 1 of the *UNCAC*.

¹²⁵ Preamble of the United Nations Convention Against Transnational Organised Crime (2000).

¹²⁶ Wright *Legal perspectives on the prevention and minimisation of corruption for sustainability* in South African municipalities 86; aa 8 and 9 of the United Nations Convention Against Transnational Organised Crime (2000).

¹²⁷ Preamble of the *AUCPCC*.

¹²⁸ A 2(1) of the *AUCPCC*.

seeking to do this, cooperation and harmonised laws and policies between states is a requirement. States are also required to promote transparency and accountability.¹²⁹

3.3.4 African Charter on the Values and Administration

The African Charter on the Values and Principles of Public Service Administration was adopted in January 2011, to encourage responsiveness of African public services to the changing needs of the citizens.¹³⁰ The Charter seeks to promote sound public administration through certain principles and values suitable for public service administration.¹³¹ In addition, the Charter emphasises the need for public officials to craft strategies and mechanisms to combat corruption.¹³²

3.3.5 SADC Protocol Against Corruption

Member states and contracting parties agreed and adopted the protocol to root out corruption whose effect is destabilisation of service delivery and public administration.¹³³ States noted that corruption undermines governance, accountability, and transparency. Measures proffered include criminalising corruption, creating anti-corruption agencies, strengthening financial and procurement control systems, and encouraging whistleblowing and information sharing.¹³⁴ Furthermore, cooperation and harmonisation of anti-corruption efforts across state boundaries.¹³⁵

¹²⁹ A 2(4) of the AUCPCC.

¹³⁰ Preamble of the African Charter on Values and Principles of Public Service and Administration (2011) <https://bit.ly/3yqQJ9f>.

¹³¹ Preamble of the African Charter on Values and Principles of Public Service and Administration (2011) <https://bit.ly/3yqQJ9f>.

¹³² A 12 of the African Charter on Values and Principles of Public Service and Administration (2011) <https://bit.ly/3yqQJ9f>.

¹³³ Preamble of *the SADC Protocol*.

¹³⁴ Wright *Legal perspectives on the prevention and minimisation of corruption for sustainability in South African municipalities* 90; a 2(1)(a) of the SADC Protocol.

¹³⁵ Aa 2, 3, 4 and 6 of *the SADC Protocol*; a 2(1) (b) and 2(1) (c) of *the SADC Protocol*.

3.4 South African law and policy on corporate governance in companies

3.4.1 The Companies Act 17 of 2008

The primary objective of the *Companies Act* is to provide for the incorporation, registration, organisation, and management of companies.¹³⁶ This Act identifies and recognises SOEs as distinct forms of companies.¹³⁷ SOEs are considered both companies and public entities. SOEs are recognised as profit companies, incorporated to make profits for their shareholder, the government.¹³⁸ However, profits should not be understood as enrichment of the shareholder but interpreted to refer to generating revenue which enables the government to discharge its constitutional obligations. Furthermore, all provisions relevant to public companies apply to SOEs, unless explicitly exempted by the Minister to cure an overlap or duplication between regulations.¹³⁹ The *Companies Act* covers many corporate governance matters, which include the appointment and removal of Boards and executives.¹⁴⁰

Furthermore, the *Companies Act* was the first legislation to incorporate a corporate governance framework in the statutes to put South Africa at par with global trends, providing a framework for the empowerment of stakeholders' welfare and shareholders' profits.¹⁴¹ Stakeholder protection is embedded in the Act through the provision advocating for the creation of the Social Ethics Committees at the board level.¹⁴²

In Chapter 2 of the Act, general transparency and accountability requirements are entrenched while extended requirements are dealt with in Chapter 3.¹⁴³ Both these

¹³⁶ Preamble and s 7 of the *Companies Act* 17 of 2008.

¹³⁷ Section 1 of the *Companies Act*. SOCs are a subset of SOEs and are legal creatures according to the *Companies Act*, as amended by the *Companies Amendment Act* 3 of 2011.

¹³⁸ Section 8 of the *Companies Act*.

¹³⁹ Dullah Omar Institute *The Legal Framework of SOE Boards* 7; S9 of the *Companies Act* creates exemptions pertaining to appointment of board members of SOEs.

¹⁴⁰ Sections 71(1) – (2) and 68 of the *Companies Act*.

¹⁴¹ Mekwe *A Critical Review Of Corporate Governance Reforms Relating To South African State-Owned Enterprises* 25.

¹⁴² Mongalo 2010 *Modern Company Law for a Competitive South African Economy* 20; S76 (3) (b) of the *Companies Act* deals with stakeholder protection. S 72(4) of the *Companies Act* provides for creation of a Social and Ethics Committee.

¹⁴³ Chapters 2 and 3 provides for MOIs, incorporation procedures, company secretaries, auditors, and appointments and removals as part of governance enhancing.

provisions apply to the SOE governance processes. In addition, the Act provides for the creation of positions of director, prescribed officers, company secretary, auditors and audit committees which are key in fostering good corporate governance. In Chapter Two of this study, some of these role players were dealt with in the context of SOEs and how they can enhance corporate governance was also demonstrated how they can contribute negatively if the incumbents decide to pursue personal interests as happened during the state capture period at Denel, SAA and other SOEs. Directors' duties have been codified in the Companies Act; and these include the duty to act with reasonable care, the duty of skill and diligence in the performance of roles and to disclose personal interests in matters to be considered at the board level.¹⁴⁴

3.4.2 The King Code

The King Code sets the tone for good corporate governance principles for governing bodies of entities in South Africa. The IoDSA first issued the King Report on Corporate Governance for South Africa in 1994.¹⁴⁵ Since then the Reports have given South Africa a valuable corporate governance framework. Subsequent reports expanded the scope of coverage to include all types of entities, in the public and private sectors, and profit- and non-profit sectors. Of all the reports issued King III was significant in its coverage of the SOE sector.

Progressively, King IV, built onto the foundation laid by King III in the coverage of SOEs enhancing corporate governance practises. A drawback of the King Codes includes their non-binding nature and lacking the same force as legislation. Furthermore, there is no statutory duty of compliance and sanctions for non-compliance. Only listed companies are obligated by law to comply. However, by merely adhering to the King Code, SOEs practice good corporate governance.¹⁴⁶

It is affirmed, therefore that King III and King IV have created standard codes of conduct for boards of directors. The Code standardises directors' conduct to ensure

¹⁴⁴ Section 75-76 of the *Companies Act*.

¹⁴⁵ Mboweni *A Critical Analysis of Liability of Directors in Light of Unwarranted Shareholder Involvement in South African State Owned Enterprises* 20.

¹⁴⁶ Cassim *et al Contemporary Company Law* 475.

compliance with legislation and best practices relevant to organisations and their sectors. In South Africa, this Code has galvanised awareness of good corporate governance.¹⁴⁷

The King Code agrees with the *PFMA* and other legal instruments,¹⁴⁸ that most of the governance burden lies on the shoulders of the SOE Boards. The Board must, therefore, apply all the sixteen principles of the King Code without fail. Principle 16 emphasises the role of the executive arm of government and its significance as a stakeholder and a shareholder in SOEs, while also exposing the triplicate role of the same. The triplicate role refers to the different capacities of government in the SOE sector where it acts as a stakeholder, shareholder, policy maker and regulator at the same time. These roles are often problematic because they can overlap and conflict with one other. As a solution, the King Code proposes the adoption of a shareholder compact.¹⁴⁹

3.5 South African law and policy on public governance

3.5.1 The Constitution of the Republic of South Africa, 1996

The *Constitution* lays the foundation of the state and defines the structure of the government, and it essentially includes SOEs. SOEs are an essential service delivery vehicle for government mandates and the fulfilment of the citizens' rights embedded in Chapter 2 of the *Constitution*.¹⁵⁰ Section 216(1) provides for the creation of the National Treasury with the mandate to ensure transparency and expenditure control in all spheres of government through recognised and accepted accounting standards and practices.¹⁵¹ It also prescribes uniformity in the classification of expenditure, norms and standards thereof. The *PFMA* came into being to operationalise the Constitutional provisions mentioned above.¹⁵²

¹⁴⁷ Cassim *et al Contemporary Company Law* 474.

¹⁴⁸ Dullah Omar Institute *The Legal Framework for SOE Boards* 39.

¹⁴⁹ Dullah Omar Institute *The Legal Framework for SOE Boards* 40. Detail on these principles is set out in part 6.6 of the King IV Report where the SOE Sector Supplement is discussed in detail.

¹⁵⁰ Chapter 2 of the *Constitution*.

¹⁵¹ Section 216(1) of the *Constitution*.

¹⁵² Mbele *Corporate governance in State Owned Enterprises* 43.

The *Constitution* spells out basic values and principles for public administration like the importance of professionalism; effective use of resources (including being efficient and economic); transparency; and the provision of timely quality information.¹⁵³

3.5.2 The Public Finance Management Act 1 of 1999

The object of this Act is to promote transparency, accountability, and the prudent management of income, expenditure, assets, and debts of the organs of the state.¹⁵⁴ To fulfil its purpose, the *PFMA* requires the appointment of an accounting authority, the Board of Directors (the board).¹⁵⁵ The responsibilities and liabilities of the board are also established in the *PFMA*.

The *PFMA* further establishes a framework for effective financial management and some strategic guidance.¹⁵⁶ To this end, it prescribes the processes for the formulation of budgets, corporate plans, and public procurement.¹⁵⁷ It also requires the appointment of an accounting authority which must be empowered to take on various responsibilities. Furthermore, the *PFMA* provides for the preparation and submission of annual reports and financial statements as part of oversight measures in a sound financial management system.¹⁵⁸

Through the *PFMA*, the National Treasury has the power to decide on the financial management rules, norms, and standards for all spheres of government.¹⁵⁹ The *PFMA* further empowers the National Treasury to oversee organs of state and SOEs while the latter reports to line Ministers for accounting purposes on the delivery of mandates. The Treasury plays an oversight role. Furthermore, SOEs report and account to the Treasury on finance matters, which leads to a dual governance model.

¹⁵³ 195 and 196 of the *Constitution*; Mbambo *An Analysis Of Corporate Governance In State-Owned Enterprises (Soes) In Compliance With The King Code Principles Of Good Governance* 1.

¹⁵⁴ Section 2 of the *PFMA* defines the objective of the Act in terms SOE financial management and gives effect to ss 213, and 215–219 of the *Constitution*.

¹⁵⁵ Section 49 of the *PFMA*.

¹⁵⁶ Section 2 of the *PFMA*.

¹⁵⁷ Refer to Part 2 of the *PFMA* wherein duties and responsibilities of accounting authorities are stated.

¹⁵⁸ Section 55 of the *PFMA*.

¹⁵⁹ Section 6 of *PFMA*.

The powers of the National Treasury on finance matters alluded to above are articulated in the *PFMA*.¹⁶⁰

The *PFMA* plays an important role in promoting good corporate governance in SOEs. It is the principal law governing financial matters for SOEs to ensure sound management of resources, expenditures, debts and returns through prescribing specific processes and procedures for managing public assets and finances.¹⁶¹ The Act provides for an executive authority, the board of directors that is accountable for compliance with the Act.¹⁶² Furthermore, the Act ensures uniformity through the provision of a framework for financial reporting and accountability, and prudent utilisation of public funds. The board is given powers to supervise corporate plans, and shareholder compacts and receive quarterly reports for scrutiny.¹⁶³

The *PFMA* has largely been welcomed as a milestone in SOE governance asserting the strides South Africa is making in the governance of SOEs. It defines in clear terms the accounting authority's obligations and accountability. However, there is still a need to deal with contradictions between different legislation on seemingly similar matters such as the government's role as a shareholder and regulator.¹⁶⁴

3.5.3 Protocol on Corporate Governance in the Public Sector

The Protocol came into being as a legal instrument like the King Code. First published in 1999 to inculcate good corporate governance in the governance infrastructure for SOEs. The intention was to provide for the restructuring of SOEs for efficiency and effectiveness. In 2002 the Protocol was revised to include principles contained in King II. By 2003 the Protocol was adopted as a policy applying to all entities listed in Schedules 2 and 3 of the *PFMA*.¹⁶⁵

¹⁶⁰ Mbele *Corporate governance in State Owned Enterprises* 42.

¹⁶¹ Sections 2 and 3 of the *PFMA*.

¹⁶² Sections 46 and 86 of the *PFMA*.

¹⁶³ Mboweni *A Critical Analysis of Liability of Directors in Light of Unwarranted Shareholder Involvement in South African State Owned Enterprises* 21.

¹⁶⁴ Mboweni *A Critical Analysis of Liability of Directors in Light of Unwarranted Shareholder Involvement in South African State Owned Enterprises* 21.

¹⁶⁵ Dullah Omar Institute *The Legal Framework of SOE Boards* 8-9.

However, it is a policy document that does not have the same force as legislation.¹⁶⁶ One major point of critique is that the protocol is not enforceable in court and has largely been ignored. Despite the flaws, it states that all public entities and external auditors must report on its implementation and compliance together with the *PFMA*.

The Protocol emphasises the need for effective and efficient Boards, thereby burdening the board with the responsibility for SOE performance.¹⁶⁷ The board's prime duty, according to the Protocol, is to monitor management in the implementation of board plans and strategies and must have full and effective control of the SOE.¹⁶⁸ Emphasis is placed on the need for an effective and efficient board, which has complete responsibility towards the performance of the SOE.¹⁶⁹

Furthermore, the Protocol concurs with the *PFMA* regarding the powers and role of the Minister concerning the appointment of the board and key executive members of an SOE. In addition, the executive authority is accorded the power to appoint the board chairperson and the CEO, subject to the MOI, shareholders agreement or shareholders compact. Subsequently, it is unclear who has the final authority to appoint the CEO and other key executives.

3.6 South African SOE founding legislation

In addition to the *PFMA* and the Companies Act, SOEs are governed by their respective founding legislation. These legislations are specifically crafted to bring into existence an SOE and lay down its mandate, functions and how it should be funded and run. Some of these legislations go a step further to prescribe unique procedures for certain governance matters such as the auditing of financial books, and mapping of the strategic direction and leadership by the Board.¹⁷⁰

¹⁶⁶ Department of Public Enterprises 2002 *Protocol on Corporate Governance in the Public Sector* para 5.

¹⁶⁷ Department of Public Enterprises 2002 *Protocol on Corporate Governance in the Public Sector* para 2.

¹⁶⁸ Dullah Omar Institute *The Legal Framework for SOE Boards* 36.

¹⁶⁹ Dullah Omar Institute *The Legal Framework for SOE Boards* 25.

¹⁷⁰ Thabane, Snyman and Van De Deventer 2018 *PELJ* 11-12.

The enabling legislation affords the board of directors vital insights into their roles in these entities. However, in addition to the governance impetus added, there is an added burden of compliance with different governance requirements, specific to SOEs, lack of uniformity, added procedures, limited control and accountability.

The provisions in founding legislation are specific to an SOE entity and will only apply to that SOE. Examples of founding legislation are enunciated below.

3.6.1 The Broadcasting Act 4 of 1999 (SABC)

The *Broadcasting Act 4 of 1999* establishes the SABC as a limited liability company, a State-Owned Company (SOC), subject to be regulated under the *Companies Act*.¹⁷¹ This legislation does not render the SABC a purely independent entity, as it remains government-owned and accountable to the public, subject to ICASA prescriptions such as inclusivity in broadcasting, fairness and honesty. Its main mandate is to serve the interests of the public and society at large through its public broadcasting. Chapter 5 deals extensively with issues of governance.¹⁷² It also prescribes the creation of a broadcasting policy covering a variety of issues including cultural and language diversity. Furthermore, it provides for two (2) executive and twelve (12) non-executive directors, appointed by the president on the advice of the National Assembly.¹⁷³ Most importantly the Act provides for the auditing of financial books of the SABC.¹⁷⁴ On the downside, this Act contains some gaps in governance such as the sweeping powers accorded to the minister in the MOI drafting process without the public participating.¹⁷⁵ The Minister is also permitted to sign the shareholder's compact without public involvement, allocating powers to appoint board members.¹⁷⁶

¹⁷¹ The *Broadcasting Act 4 of 1999*, repealed the *Broadcasting Act, 1976* to establish new broadcasting policy and amend certain provisions of the *Independent Broadcasting Act, 1993* to clarify ministerial powers for policy formulation, regulation, and licensing.

¹⁷² Section 2 of the *Broadcasting Act 4 of 1999*. Part 5 (ss 12-S17 of the *Broadcasting Act*) deals specifically with governance issues at SABC.

¹⁷³ Sections 12 and 13 of the *Broadcasting Act*.

¹⁷⁴ Section 25 of the *Broadcasting Act*.

¹⁷⁵ Section 7(3) of the *Broadcasting Act*.

¹⁷⁶ Qhobosheane *The Impact Of Political Interference In State-Owned Companies: A Case Study On SABC* 53-54.

3.6.2 The South Africa Airways Act 5 of 2007 (SAA)

The *South African Airways Act* created the South African Airways (SAA) from Transnet, forming a public entity governed by the *PFMA*, *Companies Act* and the King Code.¹⁷⁷ The SAA became a SOC in terms of the *Companies Act*.¹⁷⁸ As a consequence is listed under Schedule 2 of the *PFMA*, thrusting its governance under the latter legislation.¹⁷⁹ The Act provides for SAA's registration in the register of companies, how the SOC owns and incurs debts, and acquires rights and accrues obligations as a separate entity. Ownership and accountability are also allocated under the Act. Operations of SAA, its objects and powers are outlined in the Act, so are funding options that include loans, and loan guarantees to finance its activities.¹⁸⁰

3.6.3 The Eskom Conversion Act 13 of 2002 (ESKOM)

The *Eskom Conversion Act* 13 of 2002 converted ESKOM into a public company whose governance now falls under the SOE governance framework.¹⁸¹ The conversion transformed ESKOM into a public company with share capital, incorporated in terms of the *Companies Act*.¹⁸² The powers and duties of ESKOM are defined in the Act, and so is the registration of its MOI, shareholder compacts. The role of the minister is clearly defined in the governance infrastructure of ESKOM.¹⁸³ Provision is also made for funding through borrowing.¹⁸⁴

¹⁷⁷ Section 2(c) of the *South African Airways Act* 5 of 2007, and this Act does not contain specific governance provisions.

¹⁷⁸ Section 4 of the *South African Airways Act*.

¹⁷⁹ Tshikovhi *A Legal Analysis of the Application of Corporate Governance Principles in the Aviation Sector* 32.

¹⁸⁰ Thabane, Snyman and Van de Deventer 2018 *PELJ* 12; S6 of the *South Africa Airways Act* 5 of 2007

¹⁸¹ *Eskom Conversion Act* 13 of 2001.

¹⁸² Section 2 and the preamble of the *Eskom Conversion Act*.

¹⁸³ Section 6 of the *Eskom Conversion Act*.

¹⁸⁴ Section 7 of the *Eskom Conversion Act*.

3.7 National Treasury

3.7.1 Treasury regulations

Treasury Regulations are issued under the *PFMA* and apply to all public sector entities.¹⁸⁵ Their thrust is to promote good corporate governance focussing mainly on financial accountability. They provide for the appointment of auditors and provide for their terms of reference.¹⁸⁶ Furthermore, they deal with funding and the issuance of loans and loan guarantees. National Treasury is the competent body for financial management for the state hence, SOEs as government entities must adhere to the applicable Treasury Regulations and provisions in all their financial dealings. The Regulations apply to all public entities listed under Schedule 2 of the *PFMA*.¹⁸⁷

3.7.2 Guidelines

From time to time Treasury issues Guidelines to guide public enterprises on how they should conduct mainly financial management affairs considering the new legislation, the *PFMA* and local international standards and best practices. In 2000, the Treasury issued the Guideline for Accounting Officers specifically dealing with the *PFMA*, explaining how it was to be applied effectively to enhance the governance of resources.¹⁸⁸ It covers essential areas for the corporate governance of public entities.¹⁸⁹ The areas covered include reporting accountability, responsibilities and planning, corporate management and internal controls, revenue, assets and liabilities expenditure management among other key success areas for role players in the governance structures of public entities.¹⁹⁰ In addition, public institutions must report

¹⁸⁵ Section 76 of the *PFMA*, wherein the treasury must issue regulations and instructions on matters such as cancellation or variation of contracts detrimental to the state, regulate settlement of claims by or against the state among other matters.

¹⁸⁶ Tshikovhi *A Legal Analysis of the Application of Corporate Governance Principles in the Aviation Sector* 30-31.

¹⁸⁷ National Treasury provides guidelines on how funds provided to government must be utilised and accounted for.

¹⁸⁸ National Treasury *Guide for Accounting Officers Public Finance Management Act* 1.

¹⁸⁹ National Treasury *Guide for Accounting Officers Public Finance Management Act* 19-20.

¹⁹⁰ National Treasury *Guide for Accounting Officers Public Finance Management Act* 39-43.

quarterly to their Executive Authorities for monitoring, evaluation, and corrective purposes.¹⁹¹

3.7.3 Circulars and Instructions

In addition to regulations and guidelines, the National Treasury issues circulars to inform accounting officers of public institutions about any matters of significance in financial management. Instructions are mandatory and should be complied with as far as possible. Matters covered relate to financial systems and operations of SOEs and other public institutions.¹⁹² Several governance issues are covered by circulars, among them are approaches to uniform financial reporting, details on actual and projected borrowing, capital investment proposals, reporting fraud and corruption and changes to the composition of the board.¹⁹³

3.8 Constitutive Documents of Companies

3.8.1 Shareholders' Compacts

A shareholders' compact is an agreement regulating the relationship between the shareholders, the executive authority, and the board of directors who are the accounting authority of an SOE.¹⁹⁴ It documents the key performance areas and indicators agreed upon.

Shareholder compacts are provided for in the Treasury Regulations and are a key governance blueprint over and above the governance framework components discussed above.¹⁹⁵ Shareholder compacts spell out in clear terms what roles each

¹⁹¹ National Treasury *Guidelines in the Preparation of Quarterly Reports for Public Entities and Constitutional Institutions* 1-2; s 38(1)(b) of the *PFMA*: accounting officers are responsible for the submission of reports, notices, and other information to parliament and the relevant Executive Authority on a quarterly basis. The Guidelines cover institutions listed under Schedules 2.3A and 3B of the *PFMA*.

¹⁹² Reg 5.3.1, 29.3.1 and 30.2.1 of the *Treasury Regulations*.

¹⁹³ Section 76(4) of the *PFMA*; the National Treasury *Instruction No 2 of 2014/2015*; National Treasury *Circular 2023*, advocates for the creation of a register for the recording of the details of corrupt officials dismissed, resigned or under investigation.

¹⁹⁴ National Treasury 2002 Guideline Framework for Corporate Planning and Shareholder's Compact 4.

¹⁹⁵ See regulation 29.2 of the *Treasury Regulations* of departments, trading entities, constitutional institutions, and public entities in terms of the *PFMA*. The National Treasury is a paramount body of state-owned entities as all monies utilised by the entity are from the Treasury.

party must play and the measurement and evaluation of performance criteria. The said compacts promote good corporate governance through the clarification of roles and responsibilities for the board and the shareholder towards mandates and objectives of the SOE.¹⁹⁶

3.8.2 Memoranda of Incorporation

These are founding documents that are filed with the Companies and Intellectual Property Commission (CIPC).¹⁹⁷ They spell out the responsibilities of role players in the governance structure of an incorporated SOE. They also cover the quantity and value of authorised share capital, board appointments and dismissals, and the relevant procedures.¹⁹⁸ The SABC MOI has been widely condemned for giving the Executive Authority sweeping powers in the appointment and dismissal of board members and key staff compromising corporate governance.¹⁹⁹

3.9 Oversight Reports and Recommendations

3.9.1 Zondo Commission

Pursuant to the Public Protector's State Capture Report of 2016, the Zondo Commission was set up to establish the extent of the allegations of corruption and fraud in the public sector.²⁰⁰ Evidence and findings pointed to governance challenges and oversight gaps among other problems. SOEs were found to have violated their own policy and governance documents in addition to contravening legislation and industry codes, directives and guidelines, instructions, and circulars from the relevant departments such Treasury. SAA was found to have been run by the Board Chairperson with a firm hand and unlawful conduct.²⁰¹ The Commission recommended that appointments to the SOE boards should be based on levels of

¹⁹⁶ Tshikovhi *A Legal Analysis of the Application of Corporate Governance Principles in the Aviation Sector* 15-16.

¹⁹⁷ Section 15 of the *Companies Act*.

¹⁹⁸ Eskom 2022 Report; s 36 of the *Companies Act*.

¹⁹⁹ See para 3.11.2 below.

²⁰⁰ Zondo 2018 *The Judicial Commission of Inquiry into allegations of State Capture Part 1 Vol 1* viii.

²⁰¹ Zondo 2018 *The Judicial Commission of Inquiry into allegations of State Capture Part 1 Vol 1* 9.

expertise, skills, experience and knowledge.²⁰² It was also recommended that proceeds from unlawful conduct be recovered and those who were obligated to report corruption and did not do so should be held accountable.²⁰³

3.9.2 The Auditor General SA Report

The AGSA Report of 2021/2022, indicates a regression in audit outcomes in several SOEs owing to weak controls over financial and performance management. Many SOEs were reported to be in bad financial health, requiring bailouts and guarantees and were unable to deliver on their public mandates to citizens. These reports help give a picture of the governance challenges, where the challenges emanate, and how they could be resolved.

3.9.3 The Presidential Review Committee (PRC) report

The PRC Report identified several SOE governance challenges, like the lack of oversight capacity, inadequate legislative framework, inadequate board recruitment systems, lack of clarity on the division of roles among role players in the governance structures, and duplicity and contradictions in the governance framework.²⁰⁴ It is therefore clear that there are governance challenges, and these challenges cannot be allocated to one source.

3.9.4 State of Capture: A Report of the Public Protector 2016

The Public Protector whose role is enunciated below published a damning report on State Capture allegations after receiving complaints and widespread media coverage of such allegations.²⁰⁵ The allegations were premised on the relationship between the Gupta family and the Executive Members including the President.²⁰⁶ Wherein they influenced Ministerial appointments, and Board of SOE appointments to facilitate

²⁰² Zondo 2018 *The Judicial Commission of Inquiry into allegations of State Capture Part 1 Vol 1* 1056.

²⁰³ Zondo 2018 *The Judicial Commission of Inquiry into allegations of State Capture Part 1 Vol 1* 1111; s 44(2) of the *Prevention and Combating of Corrupt Activities Act* 12 of 2014.

²⁰⁴ Presidential Review Committee on State-Owned Entities *Growing the Economy: Bridging the Gap 8*.

²⁰⁵ See para 3.11.6 below.

²⁰⁶ Public Protector *State of Capture A Report of the Public Protector* 5.

preferential treatment in state contracts, access to state business finance and the ease in acquiring business licences. The above was done in violation of the legal and regulatory framework.²⁰⁷

3.10 Case Law

Over the years issues of governance in SOEs have spilled over to the courts and the courts have in that regard developed case law that continues to assist in plugging gaps in the available laws. Some laws have been amended while SOEs and their key personnel at the governance level have been censured for exceeding their powers or abusing the public mandates and public funds. As detailed below, different role players were reported to have flouted laws and engaged in fraud, corruption and negligent conduct that led to State Capture and near collapse of certain SOEs.²⁰⁸ The SAA Board Chairperson is one such individual who has been declared delinquent by the courts and a precedent set for future and similar misconduct in the SOE sector.²⁰⁹ ESKOM was stopped by the courts from reducing power supply to residents on account of the Lekwa and Ngwathe Municipalities owing ESKOM huge amounts. The court found that electricity supply was linked to rights to healthcare, food, water, and social security.²¹⁰ The abuse of financial guarantees and anti-competitive operations are also a concern in industries where there are private operators. Courts have had to decide on such matters to determine the legality of such financial guarantees.²¹¹

3.11 Role players in SOE Corporate Governance in South Africa

Different actors are tasked with ensuring compliance with the SOE governance framework as discussed above. These include the President, the Minister, the National Assembly and its committees, the Board, the Auditor-General and the Public

²⁰⁷ Section 2 of the *Executive Member Ethics Act* 82 of 1998 requires executive members to act in good faith, meet obligations imposed by law, not to do any other paid work nor use their positions to enrich themselves.

²⁰⁸ *Organisation Undoing Tax Abuse v Myeni* 2020 3 All SA 758 (GP) (hereinafter *Myeni*) para 125.

²⁰⁹ *Myeni* para 285.

²¹⁰ *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd* 2022 ZACC 44 para 189; s 7(2) of the Constitution; s 7(2) of the Promotion of Administrative Justice Act 3 of 2000.

²¹¹ *Comair v Minister of Public Enterprises* 2016 1 SA 1 (GP) para 2.4; *The Premier, Western Cape v President of the Republic of South Africa* 1999 (3) SA 657 (CC) para 53.

Protector. According to the State Capture Report and other reports such as that of the Auditor-General, some of these actors are accused of not having fulfilled their mandate to enforce good corporate governance.²¹² For instance, successive Ministers in the DPE have promised SOE reforms and delivered very little or nothing in that direction.²¹³ At SAA is alleged that Dudu Myeni, the Chairperson of the board acted with corrupt intent, in violation of the law and corporate governance principles to further personal and political agendas through her position.²¹⁴

An overview of these actors and their different roles in the enforcement of the SOE governance framework is enunciated below.

3.11.1 The Board of Directors

The Board plays an oversight role as the governing body of an SOE since it has absolute responsibility for the performance of the SOE and bears full accountability for such performance.²¹⁵ Its role is to implement legislation, policies, and strategic objectives of the government.²¹⁶ Furthermore, the Board carries fiduciary responsibilities in terms of the *PFMA*, the *Companies Act*, founding legislation and the King Code.²¹⁷ The *PFMA* and the *Companies Act* prescribe personal liability of SOE directors jointly and severally for harmful decisions taken by the Board.²¹⁸ In other words, any member of the Board will be held personally responsible should they breach their fiduciary duties toward the SOE.

Wilful acts of non-compliance with the requirements of the *PFMA* by Boards are classified as acts of financial misconduct on the part of SOE Boards and are considered criminal offences.²¹⁹ The same applies to Boards that permit irregular, fruitless and wasteful expenditure by the SOEs they lead.²²⁰ In addition, directors are

²¹² Chilenga State-Owned Enterprises: A Policy Analysis of South African Airways (SAA) 61-63.

²¹³ Qobo 2018 <https://www.dailymaverick.co.za>.

²¹⁴ Erasmus 2022 <https://www.dailymaverick.co.za>.

²¹⁵ Du Toit Governance Oversight Role Over State Owned Entities (SOEs) 10.

²¹⁶ Du Toit Governance Oversight Role Over State Owned Entities (SOEs) 10.

²¹⁷ Tricker *Corporate Governance* 58; Chang *State Owned Enterprises* 14; s 66(1)(2) of The *Companies Act*; Department of Public Enterprises *Protocol on Corporate Governance* para 5.1.1.1.1.

²¹⁸ Section 83 of the *PFMA*; s 424 of the *Companies Act*.

²¹⁹ Sections 50–55 of the *PFMA*.

²²⁰ Dullah Omar Institute *The Legal Framework for SOEs* 32.

individually liable for such financial misconduct and the sanction for such misconduct may be a dismissal, a suspension, or preference of criminal charges against the offenders. If found guilty of any criminal charge a fine or an imprisonment term may be imposed upon conviction.²²¹

The *Companies Act* prohibits the reckless conduct of a company's business. It further provides for directors' personal liability if they breach any fiduciary duties.²²² For example, where a director causes loss or damage by falsely purporting to represent the company without any authority being granted.²²³ In addition, a director will be held personally liable for consenting to publish false or misleading information in financial statements and other official documents.²²⁴ One can observe that the *PFMA*, *Companies Act* and *Legal Succession Act 38 of 2008* provide for an enforcement mechanism through personal civil and criminal liability where directors do not comply with some good corporate governance prescripts as provided for in the SOE governance framework.²²⁵

Despite all the enunciated corporate governance best practices, and legislative provisions, boards have remained the weakest link in the corporate governance structures. This is partly due to members of these boards lacking relevant qualifications and industry experience. At the core of these challenges is the deployment of political appointees into SOE boards with attendant corrupt intentions. In 2012 SAA appointed an acting Chairperson who was later appointed as Acting CEO, holding two positions.²²⁶ When the board reacted to this situation the Minister appointed another acting Chair. The new Acting chair was at the time Chairperson of the Jacob Zuma Foundation. These matters raise questions about her independence and suitability to hold the office owing to her close relationship with the president. It was also revealed that she played truant at board meetings hence her appointment

²²¹ Section 86 of the *PFMA*.

²²² Section 22 of the *Companies Act*; TMJ Attorneys 2022 <https://www.tmj.co.za>.

²²³ Section 77 of the *Companies Act*.

²²⁴ Section 77 of the *Companies Act*.

²²⁵ Thabane, Snyman and Van de Deventer 2018 *PELJ* 9-12.

²²⁶ Zondo 2018 The Judicial Commission of Inquiry into allegations of State Capture Part 2 Vol 2 26.

was not merited.²²⁷ At the Zondo Commission, it was revealed that the newly appointed CEO of Denel, Mr Saloojee got pressurised to accede to the Gupta brothers' requests to ensure Denel does business with their companies outside due processes of approval.

Rolling electricity blackouts by ESKOM raises questions on whether the board has served the utility with skill, care and diligence over the years as required. In 2015 ESKOM got negative credit ratings from Standard and Poor after the CEO and three senior managers were suspended by the board on questionable grounds.²²⁸ The downgrade affected ESKOM's ability to secure loans due to an adverse credit profile. In addition, ESKOM boards change each time a new DPE minister is appointed. The board itself meddles in daily operations in pursuit of self-interests and financial gains.²²⁹

3.11.2 The Executive Authority

The minister is appointed as the executive authority accountable to parliament for SOEs and must perform ownership control duties as the shareholder representative.²³⁰ Ministers, through these duties, exercise executive power in SOEs which are under their portfolios. The purpose of this power should be to ensure effective and efficient service delivery.²³¹ In addition, they practise ownership control to ensure compliance with business targets and the expected return on investment.²³² The executive authority as the shareholder is concerned with the viability of the entity in terms of profitability and sustainable operation.²³³ These tasks can be seen as forming another enforcement mechanism. They are carried out through reviews of the SOE's strategic and business plans against actual

²²⁷ Zondo 2018 The Judicial Commission of Inquiry into allegations of State Capture Part 1 Vol 1 7-20.

²²⁸ Standard and Poor 2015 <https://www.biznews.com>; SAPA 2015 <https://www.businesslive.co.za>.

²²⁹ Thabane, Snyman and Van de Deventer 2018 *PELJ* 21, the board chairperson at one point is reported to have made contractual obligations, placing orders on Eskom's behalf.

²³⁰ The "minister" as defined in s 1 of the *PFMA* and s 1 of the *Companies Act*. See Dullah Omar Institute *Legal Framework for SOE Boards* 11.

²³¹ Section 63 of the *PFMA*.

²³² Ownership control is exercised by the executive authority, line minister, and is regulated by the *Treasury Regulation 29* issued in terms s 76 of the *PFMA*.

²³³ As part of the ownership control role explained in para 3.2.1 above.

performance reported in the annual reports to establish if the SOE complies with good corporate governance as prescribed by the SOE governance framework.²³⁴

As a policy maker, the minister is also in charge of crafting policies to guide the governance of SOEs and promote optimum service delivery.²³⁵ In 2014/15, the SABC reported a loss of R395 million owing to poor corporate governance. During the same period, the minister unilaterally amended the Memorandum of Incorporation, allocating herself sweeping powers to appoint, suspend and dismiss key management officials such as the Chief Executive Officer, the Chief Operating Officer, and the Chief Finance Officer. This arrangement distorted the key concept of good corporate governance, the division of powers between the board and the shareholder at the SABC. As a result, many corporate scandals happened with the minister's favoured officials breaking rules and running down the entity in the process.

At SAA in 2012, the minister of DPE appointed Dudu Myeni as acting Chair despite her unsuitability and compromised independence owing to her close links with the president, the head of the executive authority. As revealed later by many controversial and costly decisions this appointment was bad for good corporate governance at SAA. It weakened the board through the creation of a super powerful and untouchable board chair. It also led to infighting within the board further paralysing the board and its oversight fiduciary duties and responsibilities. Furthermore, the minister during the same year postponed and later cancelled an AGM, where financial statements were to be tabled as per *PFMA* and the *Companies Act* which requires such tabling to take place within six months of the financial year ending.²³⁶ This was an illegal act, compromising good corporate governance by the minister.

At Denel, the Special Investigating Unit (SIU) found that a compromised board was appointed in 2015, without following due processes and soon thereafter the Group CEO and the Group CFO were removed, paving the way for malpractices and

²³⁴ See para 3.2.

²³⁵ Du Toit Governance Oversight Role Over State Owned Entities (SOEs) 5.

²³⁶ Zondo 2018 The Judicial Commission of Inquiry into allegations of State Capture Part 1 Vol 1 19.

maladministration at SOE.²³⁷ Transport Minister Dipuo Peters testifying at the Zondo Commission alluded to the fact that she could not remember stating reasons for dismissing the board. The dismissal was done after she allegedly tried to block investigations by the board on past and subsisting PRASA corruption. The wrongful dismissals were later reversed by the court.²³⁸

3.11.3 The President

The President as the Head of State heads the executive authority which comprises ministers from different departments.²³⁹ Together with the cabinet, the president is responsible for supervising the implementation of legislation and coordinating departmental functions.²⁴⁰ He also appoints and dismisses ministers and supervises them in their executive duties, including those whose portfolios include SOEs.

According to the *Broadcasting Act* 4 of 1999, the President in consultation with the National Assembly, should appoint twelve non-executive members to constitute the SABC board.²⁴¹ The president is therefore a key role player in choosing who will be responsible for the governance of the SABC. In being responsible for key management appointments in the SABC, the President has the authority to enforce good corporate governance by dismissing those who do not comply with the prescripts of the SOE governance framework. Another enforcement mechanism which is at the president's disposal is using the reports received by the cabinet to evaluate the current state of governance in the SOE and based on such evaluation, take appropriate action when corporate governance seems under threat.²⁴²

During the period when allegations of state capture occurred it is alleged that the president was influenced to appoint Ministers recommended to him by the Gupta family members who were closely linked to him.²⁴³ At SAA, the Minister of DPE, Barbara Hogan was replaced by Mr Malusi Gigaba and during his tenure controversial

²³⁷ Martin G 2021 <https://www.defenceweb.co.za>.

²³⁸ Ngatane 2021 <https://ewn.co.za>.

²³⁹ Section 85 of the *Constitution*.

²⁴⁰ Sections 85(2) (a)–(e) of the *Constitution*.

²⁴¹ Section 15A (3) of the *Broadcasting Act*.

²⁴² Measures he could take involve a cabinet reshuffle, removal of the board members and CEOs.

²⁴³ Daily Maverick 2016 <https://www.dailymaverick.co.za>.

appointments, and resignations of board members at SAA ensued.²⁴⁴ Corporate governance principles were disregarded and the minister seemingly played a key part in the flouting of the said corporate governance framework.²⁴⁵ Mr Gigaba himself was to be replaced in May 2014 by Ms Lynne Brown. These changes at the executive authority level by the president affected continuity and good corporate governance and were allegedly carried out at the instigation of the president's partners outside governance structures.²⁴⁶ These individuals are alleged to have intended to benefit their businesses by capturing boards and top management to facilitate approval of contracts outside laid down procedures.

3.11.4 The National Assembly

The National Assembly (NA) has a constitutional obligation to oversee and hold the executive accountable. This oversight obligation includes the NA exercising oversight over the SOEs. Due to the number of SOEs involved, the NA delegates this duty to Parliamentary Committees that specialise in their respective departments.²⁴⁷

The NA, through the Standing Committee on Public Accounts (SCOPA), investigates findings raised by the Auditor-General involving financial prudence and compliance with the *PFMA*. This specifically requires SCOPA to interrogate issues relating to irregular, fruitless and wasteful expenditure in SOEs. In addition, SCOPA must examine risk management and adherence to good corporate governance in SOEs.²⁴⁸ Apart from SCOPA other portfolio committees like the Public Enterprises Committee must also assess service delivery performance of SOEs by using non-financial information submitted in the annual reports.²⁴⁹

In addition to the above roles in corporate governance of SOEs, the NA is responsible for electing the president of the country, representing the people of South Africa through the members of parliament. This ensures that government comes from the

²⁴⁴ CGISA *Best Practice Guide* 3.

²⁴⁵ Zondo 2018 The Judicial Commission of Inquiry into allegations of State Capture Part 1 Vol 1 19.

²⁴⁶ Zondo 2018 The Judicial Commission of Inquiry into allegations of State Capture Part 2 Vol 2 18.

²⁴⁷ Section 55(2) of the *Constitution*. It mainly addresses mandates for the Standing Committee on Public Accounts (SCOPA) and the Portfolio Committee on Public Enterprises.

²⁴⁸ Du Toit Governance Oversight Role Over State Owned Entities (SOEs) 10.

²⁴⁹ Landu 2013 <http://www.parliament.gov.za>; Landu 2021 <https://www.parliament.gov.za>.

people.²⁵⁰ Furthermore, from time to time the president appears in parliament to account for his duties and responsibilities. These include the performance of the executive as its head. If the NA is not satisfied or is alerted to gross dereliction of duty or misconduct, they have two options to remove the president. That is, through an impeachment process or a vote of no confidence motion.²⁵¹ For his alleged role in government and SOE corruption, Zuma was subjected to the processes. However, the intervention by parliament was forced by the courts after the ANC dominated parliament and the speaker sought to shield the president from accounting for his role in state capture.²⁵² This indicates that the NA itself is not immune to political influences and therefore from time to time it fails to perform its oversight role over government and SOEs.²⁵³

On 3 March 2021, the SIU gave a presentation to SCOPA detailing irregular dealings and contracts at Denel after carrying out an investigation on SOE. It was revealed that the DPE Minister had irregularly appointed the board in 2015. She had been given a list outside the official list generated through due process. At PRASA, SCOPA was informed that the acting CEO had manipulated the minutes of board meetings. All these events point to a breakdown in corporate governance despite the availability of governance structures and the governance framework. Former SCOPA chair Mr Themba Godi, lamented inaction by accounting officers and Ministers over non-compliance despite these being revealed in audit reports. He also alluded to the fact that the culture of instability in leadership was hampering the implementation of resolutions and recommendations on good corporate governance in government departments and public entities.²⁵⁴

²⁵⁰ Section 42(3) of the *Constitution*.

²⁵¹ Sections 89 and 90 of the *Constitution*.

²⁵² *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and others*, the Constitutional Court ruled that the national assembly failed to hold President Zuma to account by allowing him not to implement the remedial action of the Public Protector.

²⁵³ Democratic Alliance 2021 <https://www.da.org.za>; Democratic Alliance 2023 <https://www.da.org.za>

²⁵⁴ Zondo 2018 *The Judicial Commission of Inquiry into allegations of State Capture Part 1 Vol 1* 832-834

3.11.5 The Auditor-General

The Auditor-General receives and audits financial statements from public entities (including SOEs) to determine whether legislative standards were adhered to in carrying out financial activities and whether the statements thereof are a true reflection of the financial status of public entities.²⁵⁵ The Auditor-General's powers have been expanded through the Public Audit Amendment Act after concerns were raised over its lack of certain enforcement powers.²⁵⁶ The *PFMA* places the Auditor-General among key role players in the oversight of SOEs. The *PFMA* requires financial statements of government departments and SOEs under their wings to submit audited statements to the Auditor-General within three months of the end of the financial year. The reports enable the Auditor-General to exercise oversight over the financial management and governance of SOEs and to take remedial action. After the audits have been completed the auditor general reports to the legislature on the findings of the audit processes. Audit reports by the Auditor-General are made public for stakeholders and the public to interrogate.²⁵⁷

The AGSA encounters numerous challenges in each financial year audit. Non-compliance by SOEs and government departments is reportedly increasing at worrying levels. The figures involved run into billions of rands. Furthermore, some SOEs are audited by private audit firms appointed by the boards. Some of the privately audited SOEs have been classified as significant risk SOEs due to pronounced non-compliance with legislation. In 2016 the identified significant risk SOEs were Denel, Transnet, and ESKOM. As alluded to above these SOEs have been subjected to state capture corruption as indicated by the Public Protector and evidence presented at the Zondo Commission. It would seem private auditing does not deter corrupt public officials, possibly because some of these firms are incentivised to overlook irregularities in exchange for continued business. The AGSA reports paint a picture of SOEs unwilling to comply even with requests for

²⁵⁵ Section 188 of the Constitution of the Republic South Africa, 1996.

²⁵⁶ Preamble to the *Public Audit Amendment Act 5* of 2018.

²⁵⁷ Section 55 of the *PFMA*.

information and meeting deadlines. Some wilfully conceal information until audits are completed.

3.11.6 Public Protector

The Public Protector is a Chapter 9 institution, that is mandated to investigate any maladministration and improper conduct within public administration in government spheres.²⁵⁸ The Public Protector must after its investigation, report publicly on the findings of the investigations and issue remedial action which is considered binding.²⁵⁹

In the 2016 report, the Public Protector raised serious allegations of corporate governance breaches at SOEs bordering on fraud and corruption.²⁶⁰ For example, the Public Protector dealt with SAA's Airbus Swap deal and the cancellation of the India route at the instigation of certain individuals who had undue influence on the company. It was also revealed in the report that certain individuals were alleged to have influenced the appointment of ministers, board of directors and preferential awarding of contracts and tenders.²⁶¹ This example illustrates that the Public Protector is a key role player in the enforcement of good corporate governance prescripts by SOEs.²⁶²

The public protector helped unravel state capture in government and SOEs.²⁶³ However, the office of the Public Protector is not immune to political influence. Influence may come in the appointment process, determination of what must be investigated and the remedial action to be taken. Advocate Thuli Madonsela was attacked by those she investigated including the then president and his supporters.

²⁵⁸ Section 182(1) (a) of the *Constitution*.

²⁵⁹ Section 182(1) (c) of the *Constitution*; s 8 of the *Public Protector Act* 23 of 1994.

²⁶⁰ Public Protector State Capture: *A Report of the Public Protector* 5.

²⁶¹ Public Protector State Capture: A Report of the Public Protector 8; Gumede SA State Owned Enterprise Boards, Executives and Recruitment Report to the South African Presidential Review Committee on State Owned Enterprises 43.

²⁶² Thabane, Snyman and Van de Deventer 2018 *PELJ* 9 2. In 2014, the office of the South African Public Protector, in a published report found developments at the South African Broadcasting Corporation (SABC), a state-owned company, to be "symptomatic of pathological corporate governance deficiencies.

²⁶³ The Zondo Commission arose from a report by the Public Protector, no. 6 of 2016/2017 dated 14 October 2016 called the "State of Capture" report.

These actions amounted to intimidation meant to dissuade her from holding the president and his executive to account. Her findings were challenged in courts and whitewashed by parliament determined to shield corrupt public officials due to political affiliations.

The strength of the office also depends on the personality, disposition, and integrity of the incumbent. Before Madonsela assumed office, the office was largely unknown. On her departure controversy ensued around her successor who was viewed as biased in favour of the previous administration of former President Zuma.²⁶⁴ She is alleged to have committed acts that undermine the office leading to her suspension and an enquiry on her fitness to remain in the office.²⁶⁵ On her part, she alleges the new administration is targeting her for investigating the president on his campaign funding and the Phala Phala farm saga.²⁶⁶ If the public protector is of questionable integrity it means the office cannot be relied upon to perform its duties of holding public officials accountable including SOE role players.

3.11.7 The Company Secretary

Under enhanced accountability and transparency in the *Companies Act*, provision is made for the appointment of a company secretary in a public company and SOEs. The Company Secretary is a compliance officer who must know the laws and the governance framework of the company and the sector in which the company operates.²⁶⁷ Duties include guiding the board in its duties and responsibilities and making directors aware of applicable laws, regulations, and policies they are expected to implement and apply in their work.

The company secretary is therefore a key official in the corporate governance of entities like SOEs.²⁶⁸ In the Zondo Commission, it was revealed that some company

²⁶⁴ Advocate Busisiwe Mkhwebane was alleged in press reports to be biased towards protecting Former president Zuma. Evans 2016 <https://mg.co.za>.

²⁶⁵ Mail and Guardian 2016 <https://mg.co.za>.

²⁶⁶ News24 2019 <https://www.news24.com>.

²⁶⁷ Section 86(2) (a) of the *Companies Act*.

²⁶⁸ CGISA *Best Practice Guide 7*.

secretaries stood their ground in opposing non-compliance while some aided misconduct.

The *Companies Act* and the King IV Code place the company secretary at the centre of corporate governance matters and therefore play a key role in overseeing compliance matters within SOEs as he has access to information about any misconduct.²⁶⁹

The Company Secretary at PRASA, in 2017 seemingly abandoned good practice when he agreed to act as the Group Chief Executive Officer. As a result, he occupied two positions in contrast with the law and best practice.²⁷⁰ The AGSA also found that governance records, minutes of board meetings, sub-committees and executive committees were not kept, hence the audit process could not verify resolutions and decisions taken. He was later dismissed based on what the Auditor General found and that he had received undue payments over R420 000 which he was asked to pay back to the entity.²⁷¹ Furthermore, the Company Secretary was alleged to have manipulated the minutes of board meetings.²⁷² It was also found in court that PRASA had entered into irregular contracts, where corruption, collusion or fraud had happened during the tendering process.²⁷³ The board chair at the time had laid charges at the Hawks which were never pursued.

In corrupt corporations, company secretaries and compliance officers who perform their duties according to the tenets of good corporate governance do not last in their positions, as happened at Johannesburg Road Agency (JRA).²⁷⁴ The company secretary was removed for making a protected disclosure of irregularities at the Agency.²⁷⁵

²⁶⁹ Institute of Directors Southern Africa 2016 King IV: *Report on Corporate Governance for South Africa* 116.

²⁷⁰ CGISA *Best Practice Guide* 18.

²⁷¹ Kgosana 2018 <https://www.timeslive.co.za>.

²⁷² Payne 2019 <https://www.dailymaverick.co.za>.

²⁷³ PRASA v Swifambo Rail Agency (Pty) Ltd (2015/42219)[2017] ZAGPJHC 177

²⁷⁴ Mathope 2017 <https://citizen.co.za>.

²⁷⁵ CGISA *Best Practice Guide* 20.

3.12 Conclusion

SOEs are governed through different legislative and regulatory frameworks that are meant to ensure good corporate governance is instilled. In addition, there are codes of best practice and protocols put in place to plug gaps in the governance infrastructure to ensure the prevention, and detection of fraud, corruption, inefficiencies and incompetence perpetrated by those entrusted with stewarding the SOEs on behalf of the citizenry.²⁷⁶

The Chapter further discussed legislation such as the *Constitution*, and the *PFMA* which is the prime legislation applicable in the governance of financial matters of government and SOEs. The powers of the accounting authority are spelt out and these include the preparation and submission of reports to the line minister, treasury, AGSA and the National Assembly for scrutiny and oversight at prescribed times.²⁷⁷ It is important to remember that the Treasury (which administers the *PFMA*) is created by the Constitution, to superintend over financial matters of government and SOEs as public entities.

Some SOEs, in addition, are incorporated and governed under the *Companies Act* as public companies, State Owned Companies. It is also under this Act that governance provisions are embedded.²⁷⁸

Most of the SOEs owe their existence to founding legislation which contains provisions on the governance of SOEs, notwithstanding contradictions with the *PFMA* and the *Companies Act* on some matters.²⁷⁹

In addition, there are codes of best practice and protocols addressing the same matters addressed by legislation. Such codes include the King Codes in their successive editions and the Protocol on Corporate Governance. However, these codes and protocols do not have the same force as legislation. Furthermore, they do

²⁷⁶ See para 3.1.

²⁷⁷ See para 3.2-3.3.

²⁷⁸ See para 3.4.

²⁷⁹ See para 3.6.

not have punitive measures or sanctions for non-compliance. The King Code is, however, compulsory for JSE-listed companies.²⁸⁰

In addition, there is case law developed over the years to strengthen and plug gaps in the legal framework for SOE governance and occasionally, the National Treasury issues instructions, guidelines, and circulars to guide role players in SOEs on financial management issues to complement the *PFMA*.²⁸¹

In recent years commission reports and reports from AGSA and the Public Protector have aided the exposure of the manner and extent of corruption and fraud among other unlawful activities by public officials at various levels of the governance and management structures.²⁸² The PRC and the Zondo Commission have provided useful insights and recommendations to improve the state of governance in the SOE sector.²⁸³

In the chapter, it is indicated that South Africa has a seemingly comprehensive governance framework for SOEs, key institutions and key role players who are not performing their different roles effectively. The governance framework is not being applied and enforced effectively due to a plethora of challenges that will be discussed in Chapter 4.

Role players in the governance structures at different levels within the SOEs and externally were identified and their roles explored to ascertain their contributions towards good corporate governance and their roles in failures.²⁸⁴

²⁸⁰ See para 3.5-3.7.

²⁸¹ See para 3.7 and 3.10.

²⁸² See paras 3.9.1 - 3.9.4.

²⁸³ Section 82(2) of the *Constitution*; see paras 3.9.1-3.9.3 and 3.11.5.

²⁸⁴ See para 11.1-11.5

Chapter 4: Enforcing good corporate governance in South African SOEs

4.1 Introduction

In the previous chapter, the study focussed on the governance framework and the role players entrusted with its formulation and implementation. Each component was explored and linked to the role players' duties and responsibilities. This Chapter aims to establish the different enforcement mechanisms available in South African law and policy on how these should function in ensuring that the governance framework is implemented to enhance good corporate governance in SOEs.²⁸⁵ Gaps and failures are also identified considering the collapse of some SOEs as widely reported.

Furthermore, this Chapter also deals with legal principles and policies governing non-compliance in terms of regulatory interventions and remedies from various statutes, codes of good practice, internal codes of conduct and other applicable documents. Good corporate governance is premised on the link between compliance, sound organisational culture and the establishment of vibrant enforcement mechanisms that ensure the governance framework is applied and if not, there are consequences for wilful non-compliance. Consequently, good corporate governance is reinforced by a clear separation of roles of the Board and the shareholder in the governance of SOEs.²⁸⁶ Failure to recognise this separation has largely contributed to governance failures as oversight roles got blurred.

In addition, this chapter specifically looks at the different enforcement tools and actions that must be taken into consideration to ensure that the SOE governance framework is implemented. Furthermore, the consequences of non-compliance with the law and policies will be investigated.²⁸⁷

4.2 Oversight

The cabinet is required to provide parliament with comprehensive reports on activities performed under various portfolios and entities under the control of the

²⁸⁵ See para 1.4.

²⁸⁶ See para 1.5.

²⁸⁷ See para 1.7.

state for oversight purposes. Ministers appear before parliament regularly to present budgets and report on the progress made by their departments and SOEs under their control.²⁸⁸ Concern has been raised over the years that parliament cannot effectively interrogate, the strategic, budgetary, corporate plans and other documents submitted to it for scrutiny. SOEs with their sophisticated legal framework present a bigger challenge for parliamentary oversight.²⁸⁹

Oversight roles on the performance of SOEs mainly reside with the legislature, the line minister and the boards of SOEs.²⁹⁰ Parliament scrutinises annual reports for SOEs while the Boards, as empowered by the *PFMA* are responsible for the implementation of policies and mandates as the accounting authority, delegating some duties and powers to management while playing an oversight role over such delegated duties and responsibilities. In Chapter 3, different role players with oversight functions over SOEs were mentioned and the division of duties in the oversight role was explained. However, the blurred and sometimes overlapping functions of these institutions and individuals prevent effective oversight. The SOE boards, to a large extent, bear responsibility for SOEs' poor performances. The executive authority plays an oversight role as a shareholder representative, together with other role players and institutions such as the Public Protector and the Auditor General among others.

4.3 The Public Protector's role in enforcement

The Public Protector's office as part of the governance framework enforcement mechanisms receives complaints from members of the public and is empowered by the Constitution to investigate such complaints against public officials and institutions and issue remedial action that is binding.²⁹¹

In the case of the president being the subject of a complaint, the Public Protector hands over the report to the National Assembly for action to be taken to hold the

²⁸⁸ Section 92(3) (b) of the *Constitution*.

²⁸⁹ PWC, DBSA 2011 State-owned enterprises: *Governance responsibility and Accountability Public Sector Working Group: Position Paper 3 9*.

²⁹⁰ PWC, DBSA 2011 State-owned enterprises: *Governance responsibility and Accountability Public Sector Working Group: Position Paper 3 8*; s 188 of the *Constitution*.

²⁹¹ Section 182 of the *Constitution*; s 8(1) of the *Public Protector Act, 1994*.

president to account.²⁹² In such instances, actions and options available to parliament are examined later. With relation to any other individuals and institutions the Public Protector's reports are submitted to relevant accounting authorities for action, for instance, for complaints against an SOE, the report is submitted to the Board and the relevant line minister with law enforcement agencies such as the NPA, SAPS obtaining copies on which to base further investigations and prosecutions where applicable.²⁹³

In 2016, the Public Protector investigated the President and other public officials for improper conduct and improper relationships and dealings with the Gupta family members in the appointments and removals of ministers and directors of SOEs and other key officials.²⁹⁴ The extensive investigation touched on a number of SOEs and corrupt practices were unearthed together with tender fraud and generally bad and negligent governance of state entities.²⁹⁵

4.3.1 Powers of the Public Protector

The Public Protector derives powers from the *Constitution* and it empowers the office to strengthen Constitutional democracy through investigations and redressing improper conduct in state affairs.²⁹⁶ In addition, the *Public Protector Act* 23 of 1994 (PPA) empowers the same office to investigate allegations of unethical conduct or violations of the Executive Ethics Code by the President and other members of the executive.²⁹⁷ The *PPA* further empowers the Public Protector to conduct investigations in pursuit of their own initiative and also to investigate maladministration in connection with public institutions in which the state is the majority or controlling shareholder or any public entity as defined in the *PFMA*.²⁹⁸

²⁹² Section 3(1) of the *Executive Members Act*, 1998.

²⁹³ Public Protector State Capture: *A Report of the Public Protector 2016* 25; s 6(4)(c)(i) of the *PPA*.

²⁹⁴ Public Protector State Capture: *A Report of the Public Protector 2016* 28.

²⁹⁵ Public Protector State Capture: *A Report of the Public Protector 2016* 28.

²⁹⁶ Section 181 of the *Constitution*.

²⁹⁷ Section 8 of the *PPA*.

²⁹⁸ Sections 6(4), and 6(5) (a)–(b) of the *PPA*; s 1 of the *PFMA* defines the relevant public entities referred to.

4.4 Ownership Control

The executive authority, the line minister, is empowered by the *PFMA*, to exercise ownership control over SOEs under their departments, representing, the state, as shareholders.²⁹⁹ This is meant to ensure compliance with the *PFMA* and other laws and policies discussed in Chapter 3.³⁰⁰ Like ordinary companies, SOEs ought to be governed under the principle of the separation of ownership and control of the entity, with the state exercising ownership powers while the board of directors is entrusted with control over the entity. According to the *PFMA*, ownership control entails:

- (i) The appointment and removal of board members
- (ii) Casting votes at meetings of the board of directors
- (iii) Controlling all or majority of voting rights at a General Meeting of the entity.³⁰¹

The effective exercise of ownership control by executive authorities over SOEs is therefore a key enforcement tool available for the government to ensure that SOEs are run according to relevant legal and policy frameworks enunciated in Chapter 3. However, over the years, the effective exercise of ownership control has been lacking due to several reasons like ministerial appointments, powerful and politically connected Board members and a lack of capacity due to the deployment of unqualified and inexperienced officials.

4.5 Delinquency Proceedings under section 162 of the Companies Act

Another enforcement tool is found in section 162 of the *Companies Act*. It is stated in the said section of the *Companies Act* that a person with *locus standi* may institute delinquency proceedings against a director. The person can be the company itself, a shareholder, a director, a company secretary, a prescribed officer, a registered trade union, the CIPC and an organ of the state responsible for the administration of any legislation.³⁰² In *Outa v Myeni*, the Organisation Undoing Tax Abuse was granted the

²⁹⁹ Section 63(2) of the *PFMA*.

³⁰⁰ See s 3.6 above.

³⁰¹ Section 1 of the *PFMA* defines ownership control in terms of the listed roles.

³⁰² Section 162 of the *Companies Act*.

extended right of standing, acting in the public interest with leave from the court, while the South African Airlines Pilot Association was correctly before the court as a trade union.³⁰³ This remedy allows the mentioned officials and organisations to hold directors to account and possibly be barred by a court if found to have acted improperly and breached the following grounds:³⁰⁴

- (i) Grossly abused the position of director;
- (ii) Took personal advantage of information or an opportunity contrary to the prescripts of the *Companies Act*;
- (iii) Intentionally or by gross negligence inflicted harm upon the company contrary to the *Companies Act*;
- (iv) Act in a manner that amounted to gross negligence, wilful misconduct, or breach of trust in relation to the performance of the directors' functions within, and duties to the company; and
- (v) Acted in a manner contemplated in sections 177(3)(a), (b) or (c) of the *Companies Act*.³⁰⁵

Delinquency proceedings against directors of Companies, SOEs included, must be based on the stated grounds exclusively.³⁰⁶ Myeni, in *Myeni v Outa*, was found to have grossly abused her position by writing to Airbus in an attempt to overturn a board decision and ministerial approval without authority from the board and the Minister, subsequently, the delinquency action succeeded leading to her banning from practising as a director for a lifetime.³⁰⁷ The basis of the application in the case was premised on the director's conduct while serving as a non-executive director and chairperson of SAA. The judgment should be commended for its strict stance against all-powerful and politically connected directors of state-owned companies. It is a ground-breaking delinquency application wrought by a litigant acting in the public

³⁰³ Section 96 of *Labour Relations Act* 66 of 1995 qualifies the South African Airlines Pilot Association as a registered Trade Union.

³⁰⁴ Section 162(5) (c) of the *Companies Act*.

³⁰⁵ Sections 177(3) (a)–(c) of the *Companies Act* lists unauthorised acts, reckless trading, and fraud as grounds.

³⁰⁶ *Geoffrey v Hesber Impala (Pty) Ltd and Others* (2014/45832) [2016] ZAGPJHC (hereafter Geoffrey) para 60-61

³⁰⁷ Cassim 2021 *SALJ* 8.

interest, and the first judgment in which a lifelong delinquency declaration on a director was imposed.

4.6 Criminalisation of the breach of fiduciary duties: PFMA

It is a statutory requirement under the *PFMA* for Members of SOE Boards to fully comply with the provisions of the said Act in terms of which they must ensure transparency, accountability, and sound management of revenue, expenditure, assets and liabilities of entities governed through the *PFMA*.³⁰⁸ This is over and above the requirements imposed by the *Companies Act* and other legislation applicable to specific SOEs such as enabling and founding legislation.³⁰⁹ This requirement is premised on the enhanced duties of SOE directors wherein as an accounting authority of a particular SOE, the Board is accountable to the executive authority, the designated minister.³¹⁰

Boards must account for the protection of assets and records of an entity and must act with fidelity, honesty, integrity and in the best interest of the entity under their stewardship.³¹¹ When requested, the SOE board must disclose to the Executive authority or the legislature all material facts which may influence its decisions and actions.³¹² At all times the board must prevent financial prejudice and promote the financial interests of the state.³¹³ In addition, board members should not use their vantage positions and access to confidential information to advance personal gain or benefit someone and should declare personal businesses linked to matters under consideration by the Board and withdraw or recuse themselves from such matters.³¹⁴

Failure to comply with provisions of the *PFMA* stated above, that is, fiduciary duties, general responsibilities, duties pertaining to annual reports and financial statements, Board members are liable on conviction to a fine or imprisonment for a period not

³⁰⁸ Cassim 2021 *SALJ* 15; s 2 of the *PFMA*; *Nyathi v MEC for Department of Health, Gauteng* 2008 (S) SA 94 (CC) paras 29 and 54; *Premier Limpopo Province v Speaker of the Limpopo Provincial Government* 2011 (6) SA 396 (CC) paras 26–27.

³⁰⁹ *Outa v Myeni* para 28.

³¹⁰ Cassim 2021 *SALJ* 15; ss 49(2) and 51 of the *PFMA*; the executive Authority for SAA is the Minister of Finance according to GG3835 of 19 December 2014.

³¹¹ Sections 50(1) (a)–(b) of the *PFMA*.

³¹² Section 50(1) (c) of the *PFMA*.

³¹³ Section 50(1) (d) of the *PFMA*.

³¹⁴ Sections 50(2)–(3) of the *PFMA*.

exceeding five years.³¹⁵ For instance, in *Myeni v Outa* the director was found to have acted in breach of the *PFMA*, breaching financial reporting obligations, and acted contrary to duties of good faith and honesty on the Airbus Swap Deal.³¹⁶ In light of these breaches, she was therefore liable for criminal prosecution since the said breaches of the *PFMA* constituted a criminal offence. The court therefore ordered that its judgement and the evidence from the proceedings be referred to the NPA for a decision on the viability of criminal investigations and possible criminal prosecution.³¹⁷ However, on the contrary, the *Companies Act* has a civil remedy rather than criminal liability against similar breaches.³¹⁸

4.7 Liability of Directors under the Companies Act

The *Companies Act* incorporated common-law fiduciary duties of the board of directors through prescribing certain standards of behaviour for directors and delictual consequences for non-compliance.³¹⁹ The *PFMA* prescribes the same and in addition, prescribes criminal liability for non-compliance as alluded to above.³²⁰ Similarly, the Protocol on Corporate Governance in the public sector reinforces the prohibition on directors from using their positions to obtain advantage for themselves or another person. King IV reiterates the position that the leadership of entities should uphold good morals and ethics.³²¹

4.7.1 Remedies for accountability

According to the *Companies Act*, the liability of directors

A director maybe held liable in terms of the common law doctrines regarding the contravention of a fiduciary duty, for any injury, harm or expenses incurred by the company as a result of any infringement by the company due to a contravention by the director of a duty in section 75,76(2) or section 76(3)(a) or (b) in connection with the common law doctrines of delict for any injury, harm or expenses incurred by the company due to breach by the directors of either (i) a duty prescribed in

³¹⁵ Section 86(2) of the *PFMA*.

³¹⁶ Cassim 2021 *SALJ* 16.

³¹⁷ Cassim 2021 *SALJ* 16.

³¹⁸ Section 162 of the *Companies Act*.

³¹⁹ Section 76 of the *Companies Act*.

³²⁰ Mboweni *A Critical Analysis of Liability of Directors in Light of Unwarranted Shareholder Involvement in South African State-Owned Enterprises* 50.

³²¹ De Beers and Tordesillas 2018 *The Corporate Report* 27.

Section 76(3)(c),(ii) any term of this Act not otherwise stated in this Section or (iii) any clause of the company's Memorandum of Incorporation.³²²

This section could be applied to enforce good corporate governance through actions to recover losses that are incurred as a result of the failure of a director to perform fiduciary duties to the SOE.³²³ It is also a breach of fiduciary duties if directors act outside the scope of the company's Memorandum of Association.³²⁴ A director who acts for a company without the necessary authority engages in reckless trading or fails to stop fraudulent transactions and actions attracts liability contemplated in the *Companies Act*.³²⁵ This section ensures that high ethical standards are placed on directors and as controllers of the companies they are ethically responsible in conducting the affairs of the companies and where they fail in their duties, shareholders have remedies at their disposal to enforce accountability.³²⁶

The liability of directors is premised on either the director taking deliberate action that causes detriment to the company or the said director failing to act to prevent a detriment befalling the company.³²⁷

The *Companies Act* empowers the shareholders with powers of removal against the board of directors who act *ultra vires* their powers or cause detriment through their actions or commissions. This can be done through an ordinary resolution at a general meeting.³²⁸ In SOE governance, the shareholder, through executive authority, could apply this remedy to remove errant directors who contravene laws and policies for self-benefit. This remedy could be problematic if other laws are to be considered and take precedence over the *Companies Act*.³²⁹

³²² Mboweni *A Critical Analysis of Liability of Directors in Light of Unwarranted Shareholder Involvement in South African State-Owned Enterprises* 58; s 77 of the *Companies Act*.

³²³ Mboweni *A Critical Analysis of Liability of Directors in Light of Unwarranted Shareholder Involvement in South African State-Owned Enterprises* 58.

³²⁴ Sections 75, 76, 76(2), and 76(3) (a)–(b) of the *Companies Act*.

³²⁵ Section 77 of the *Companies Act*.

³²⁶ Sections 77(3) (a)–(c) of the *Companies Act*.

³²⁷ Van der Linde 2008 SA *Merc LJ* 442.

³²⁸ Section 77(1) of the *Companies Act*.

³²⁹ *SOS Support Public Broadcasting Corporation v SABC (SOC) Limited* (81056/14) [2017] ZAGPJHC 289 para 120.

The board of directors may collectively remove a director on the grounds laid down in the *Companies Act*, such as neglecting duties and becoming unqualified for different reasons.³³⁰ This means that directors can hold each other accountable for the performance of their duties as directors rather than wait for external processes and actions. According to the *Companies Act*, a shareholder or a director may approach a court for relief if:³³¹

- (a) The conduct of the company is oppressive or unfairly prejudices the interests of the applicant;
- (b) The business of the company is being or has been managed in an oppressive or unfairly prejudicial manner to the interests of the applicant; and
- (c) The powers of a director or prescribed officer of the company or a related person related to the company, are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of the applicant;

This provision could be used by the government as a shareholder in SOEs to curtail abuse by the board of directors. Any director of an SOE, who is aggrieved by the way the SOE is being run may act on behalf of the SOE to halt further abuse instead of resigning leaving the SOE in jeopardy as happened during the state capture period in some state entities. All that is required to approach the court is proof that the applicant's interests are affected.³³²

4.8 Derivative action

Derivative action as a remedy, ensures that directors are prevented from abusing their positions and neglecting their fiduciary duties.³³³ Any interested party is entitled to bring such action on behalf of the SOE as an incorporated entity under the *Companies Act*, to safeguard its interest. Examples of interested persons are shareholders, directors, and trade unions and these role players must first be

³³⁰ Section 71(3) of the *Companies Act*.

³³¹ Sections 163(a)–(b) of the *Companies Act*.

³³² Cassim 2012 *Contemporary Company Law* 443.

³³³ Mboweni *A Critical Analysis of Liability of Directors in Light of Unwarranted Shareholder Involvement in South African State-Owned Enterprises* 60.

granted the right to litigate by the court.³³⁴ The derivative action has been unpopular over the years owing to several reasons, one of which is the cost implication to the applicant.³³⁵ However, to enforce compliance it remains a viable option to ensure good corporate governance is practised in SOE governance.

4.9 Whistleblowing and reporting corruption

Whistleblowing and reporting fraud and corruption is the first step in fighting the crimes committed against SOEs through sharing information with relevant role players, law enforcement agencies and regulatory bodies. *The Prevention and Combating of Corrupt Activities Act, 12 of 2004 (PRECCA)*, provides for the reporting of corrupt activities and obliges any person who witnesses such acts to report the said acts if the amount involved exceeds R100 000.³³⁶ In the same Act, corrupt activities are defined and categorised under parts of the legislation.³³⁷ Such divisions include offering and receiving undue and unauthorised gratification. Those in public offices have a legal duty to report, failure to do so constitutes a criminal offence.³³⁸

The Company Secretary, as a compliance officer, also has a legal obligation under the *Companies Act* to report corrupt acts and other breaches to the Board.³³⁹ Failure to report or take measures to rectify breaches attracts liability in the *Companies Act*, in the form of a fine or imprisonment not exceeding 10 years.³⁴⁰ Civil liability is an option available against such breaches causing losses to certain individuals.³⁴¹ Regulation 38 of the *Companies Act*, lists the duty of disclosure as one of the duties of a prescribed officer of a company.

Further to the above, the *Protected Disclosures Act 26 of 2000* protects any individual who makes a protected disclosure, against any civil, criminal or

³³⁴ Sections 165(2) (a)–(d) of the *Companies Act*.

³³⁵ Cassim et al 2012 *Contemporary Company Law* 775; Cassim 2016 *The New Derivative Action in the New Companies Act* 151.

³³⁶ Section 34 of the Prevention and Combating of Corrupt Activities Act 12 of 2004.

³³⁷ Section 3 of *PRECCA*.

³³⁸ Sections 26(1) and 27 of *PRECCA*.

³³⁹ Section 88 of the *Companies Act*.

³⁴⁰ Sections 88, 214 and 218 of the *Companies Act*; CGISA 2021 *Best Practice Guide* 6.

³⁴¹ Section 218(2) of the *Companies Act*.

administrative liability and victimisation of any kind.³⁴² Such disclosures can be made to the CIPC, the Companies Tribunal, regulatory bodies, directors, auditors, and the Board among other persons or organs.³⁴³ In addition, some SOEs have incorporated whistleblowing policies in their internal operating documents such as MOIs. In its MOI, Eskom undertakes to establish and maintain a system to receive disclosures in accordance with the *Companies Act*.³⁴⁴ If all SOEs could have functioning whistleblowing policies the scourge of corruption, fraud and other breaches could be dictated early and dealt with to prevent losses and escalation of such acts.

4.10 Presidential impeachment and motions of no-confidence

The President has been identified as a role player in SOE governance in Chapter 3, for his role in appointing and overseeing the performance of the Executive Authorities for SOEs. Failure to perform his role should attract censure under relevant laws. In light of the above, an impeachment and vote of no confidence are provided for in the Constitution. An impeachment of the president is premised on a serious violation of the constitution by the president and serious misconduct or inability to perform duties of the office of president.³⁴⁵ A two-thirds majority vote is required in the National Assembly for the impeachment to succeed.³⁴⁶ Based on the Public Protector's State Capture Report, opposition parties tried to impeach Zuma for his role in State Capture. This procedure helps the National Assembly to hold the president to account for the abuse of office and any misconduct. It was alleged that Zuma gave the Gupta Family members unfettered power to influence the appointment of Ministers who were Executive authorities of SOEs and members of SOE boards. This on its own was a serious violation and it is trite that such a procedure be used to counter corruption and abuse of power at the Presidency level to prevent the appointment of compromised ministers to head SOEs.

As alluded to in the previous chapter certain ministers were involved in the breaches of the corporate governance framework. Similarly, a vote of no-confidence can be

³⁴² Section 2 of the *Protected Disclosures Act* 26 of 2000.

³⁴³ Section 159 of the *Companies Act*; CGISA 2021 *Best Practice Guide* 7.

³⁴⁴ Eskom Memorandum of Incorporation 39; s 159 of the *Companies Act*.

³⁴⁵ Sections 89(1)(a)–(c) of the *Constitution*.

³⁴⁶ Section 89(1) of the *Constitution*.

used against them. This requires a simple majority vote in the National Assembly leading to a forced resignation.³⁴⁷

Parliament should therefore use these powers in their oversight roles to deal with SOE governance failures occasioned by the former president's failure to use his powers efficiently or wilful misconduct aimed at enriching himself, his family, and associates of any nature.

Political parties are also able to use their own internal processes to deal with errant presidents they have deployed as happened with Thabo Mbeki and Jacob Zuma in the interest of service delivery and safeguarding of public assets, notwithstanding narrow factional and political interests within their political parties.

4.11 Conclusion

The Chapter dealt with the enforcement mechanisms and the remedies against non-compliance with the various governance framework components discussed in Chapter 3 of the study. Within the different legislative and policy frameworks alluded to, there are enforcement procedures, tools and role players involved. It is these components and systems that have been allegedly usurped or deliberately ignored causing a situation of impunity in the governance of SOEs as outlined in the Zondo Commission and the Public Protector's Report.³⁴⁸

The AGSA has also revealed a lot of financial misconduct and non-compliance in the SOEs. All these point to gaps in the oversight and enforcement mechanisms in the governance universe and possible wilful non-compliance aimed at self-enrichment by role players mentioned in Chapter 3 and their associates. The Chapter explored the enforcement and remedies against the president as head of the executive, the executive authority, and the accounting authority of SOEs in relation to provisions of different legislation including the Constitution.³⁴⁹

³⁴⁷ Section 102(2) of the *Constitution*.

³⁴⁸ See paras 4.1–4.3 above.

³⁴⁹ See para 4.10 above.

The president could be impeached or removed through a vote of no confidence while ministers could also be impeached or removed by the President for misconduct or failure to properly play their oversight role over the SOEs under their departments. Parliament plays a key role in these impeachments and the motion of no-confidence processes.³⁵⁰

Directors could be held accountable and sanctioned by revoking certain sections of the *PFMA* and the Companies such as sections 162 and 165 of the *Companies Act* with the former having been applied successfully against Dudu Myeni for her role in the mismanagement of SAA during her tenure as non-executive director and Board Chairperson.³⁵¹

³⁵⁰ See para 4.10 above.

³⁵¹ See paras 4.5–4.7 above.

Chapter 5: Recommendations and conclusions

5.1 Conclusion

In the previous Chapter, we discussed the enforcement mechanisms that are in place to curb corruption, fraud, and mismanagement of SOEs by those tasked with roles of governance in these entities. These mechanisms contain inherent weaknesses and gaps that are easily exploited to the detriment of the SOEs and the citizens who are serviced by the SOE. In Chapter 3, the study discussed the regulatory and governance framework for SOEs, and some of its weaknesses mentioned were contradictions, duplications and ambiguities that render their application and enforcement ineffective. It was revealed that the *PFMA* and the *Companies Act*, for example, have similar provisions on certain matters yet differ on how similar matters should be dealt with.

In Chapter Two, the history of corporate governance and its development was explored and key concepts and theories on which the phenomenon of corporate governance is based were discussed widely and these include good governance principles and models.³⁵² Furthermore, domestic, regional, and international law and protocols on public management and corruption in the public sector were discussed in relation to SOE governance. Despite South Africa being a signatory to anti-corruption protocols, the scourge of corruption remains high in both private and public sectors. It is public sector corruption that is affecting service delivery, viability, and profitability in SOEs. The State Capture phenomenon brought to the fore entrenched corruption and fraud involving procurement and tenders in SOEs, draining the fiscus and reducing economic performance and growth.³⁵³

The involvement of the president and the executive in SOE problems is a cause for concern, and this situation indicates that oversight at the parliamentary level is not as effective as it should be despite the seemingly comprehensive regulatory and policy frameworks.³⁵⁴

³⁵² See para 2.1 above

³⁵³ See para 3.11.

³⁵⁴ See para 3.11.

5.2 Recommendations

5.2.1 Strengthening the role of company secretaries

Company Secretaries should be trusted advisors and compliance officers to the Boards of SOEs.³⁵⁵ They should always remain independent and proactive, assisting directors in their statutory and common law duties such as making accurate annual declarations. Non-submissions should be reported to chairpersons timeously for action to be taken against concerned directors. Company secretaries must ensure that declarations of interest form part of every agenda of Board meetings and such declarations must be captured in the minutes of the meeting.

Furthermore, the minutes compiled by the Company secretary should be accurate and reflective of the business transacted at such meetings in terms of decisions and resolutions taken.³⁵⁶ From the minutes it can be deduced whether the directors exercise the duty of care and diligence to ensure protection by the business judgment rule. Minutes provide proof that directors performed their statutory and regulatory duties efficiently, steering the organisation towards its strategic goals and providing oversight over management's work. They also serve as evidence in court proceedings when the need arises.

In addition, the office of the company secretary should be empowered to provide comprehensive training and adequate induction for new directors on legislation, policies and codes of good practice. A culture of ethical conduct should be inculcated through regular updates and training considering ever-changing laws and policies governing SOEs and companies. Company secretaries should be adequately empowered and protected by whistle-blower laws and internal policies because they are well-positioned to witness corruption and wrongdoing at the apex.³⁵⁷

³⁵⁵ See para 3.11.7.

³⁵⁶ See para 3.11.7.

³⁵⁷ See para 3.11.7.

5.2.2 Board performance evaluations

Effective leadership at the Board level should be placed at the centre of SOE governance through transparent and merited recruitment of non-executive and independent directors and chairpersons. A proper mix of skills, expertise and experience should be considered while avoiding politically connected and powerful individuals. To ensure this happens, background checks for possible conflict of interest, shareholding by directors, disclosure of directorships and CIPC verifications should be conducted in terms of the relevant laws and policies, Codes, MOIs and the Handbook as discussed above. Resignations and removals should be done according to the procedures and exit interviews should be conducted to establish if good directors are not being pushed out as happened in many SOEs during the State Capture period.

Provisions should be made in the law and policies to indemnify and cover litigation costs in legal proceedings by directors seeking to protect the interests of the SOE. Board evaluations should be carried out every financial year against strategic and operational targets of the SOE set out in shareholder compacts, corporate plans, strategic plans, and any other commitments made.

Furthermore, the board of directors for SOEs should be provided with more powers and independence to exercise their powers without interference and must be shielded from political influence and party politics. Positions of CEOs and board chairpersons must be clearly separated to allow good corporate governance to prevail.

5.2.3 Strengthening whistleblowing and reporting crime

The Zondo Commission, in its report on State Capture activities, recommended that the government should introduce new legislation or amend existing ones to ensure comprehensive protection to persons who disclose information on allegations of corruption and fraud in public procurement in line with UNCAC Protocols and domestic laws on the same subject.³⁵⁸ In addition, it was recommended that an

³⁵⁸ Zondo 2018 The Judicial Commission of Inquiry into allegations of State Capture Part 1 Vol 1

agency be established to receive disclosures and offer incentives for such disclosures in the form of payments of part of the recovered proceeds to the persons making such disclosures. Immunity to prosecution or civil litigation should be considered for informants who disclose information that could implicate them too in the crimes committed against SOEs.

In addition, deferred prosecutions could be used to allow companies to self-correct through paying fines, making commitments to desist from wrongdoing, and engaging in remedial action among other measures. The study recommends that the government should implement the recommendations of the Zondo Commission referred to above and the following:³⁵⁹

- (a) Enhancement of transparency;
- (b) Protection for Accounting Officers acting in good faith;
- (c) Amend *PRECCA* by adding section 34A;
- (d) Amend the *Political Party Funding Act 6 of 2018*; and
- (e) Centralise procurement.

5.2.4 Leadership instability and oversight

The study identified challenges in leadership at the very top echelons of SOE governance, that is, at the board, executive authority level and the Presidency. Irregular appointments to Cabinet, Boards of compromised and unqualified individuals, and appointment of politically connected and very powerful Board chairpersons. It was also revealed that appointments and changes of Ministers responsible for certain SOEs during State Capture were meant to facilitate tender fraud and corruption to benefit families and associates. This should be cured through strong oversight over the president and the cabinet he/she leads. A well-balanced parliament with diverse political parties should always be maintained to prevent an all-powerful ruling party that protects the president and his cabinet through its majority in parliament. Citizens should use their voting rights wisely to achieve this.

851; a 32(2) of the *UNCAC*.

³⁵⁹ Zondo 2018 The Judicial Commission of Inquiry into allegations of State Capture Part 1 Vol 1 853-885.

Impeachment and vote of no-confidence proceedings against President Zuma failed due to the ruling party using its majority to protect the president. Recently, the ANC shielded President Ramaphosa from a parliamentary enquiry on the Phala Phala saga using its parliamentary majority. Therefore, the need for an independent and balanced parliament cannot be overemphasised.

5.2.5 Instilling of private sector ethos

It is recommended that SOEs should be exposed to private sector competitive ethos and attitudes of doing business and be exposed to a certain extent to market pressures and consequences for business failure. This could be done through a variety of interventions such as hiring people with private sector work experience in executive management and board levels. Another intervention could be reforming laws to allow minority shareholders to purchase shares and exert influence in the recruitment of Board members and management to avoid political appointments. This arrangement promotes shareholder activism. The new part owners will possess powers identified in Chapter 4 to enforce compliance since their motive will be profit and value addition to state assets.

Through MOIs, shareholder compacts and other company policies the working arrangement between the minister, the minority shareholders, the board, and management could be defined. The presence of directors nominated by the minority shareholders will neutralise the powers of members appointed by the Minister on behalf of the State. However, this arrangement should not interfere with the provision of affordable essential services and the welfare of employees and their socio-economic rights.

5.2.6 Harmonised SOE Legislation

As alluded to in Chapter 3, there is a variety of legislation governing SOEs, giving rise to conflicts, contradictions and duplications causing difficulties in reporting, oversight, and accountability. Oversight channels are rendered complex and cumbersome because of the involvement of many role players operating at cross purposes at times. Oversight becomes a box-ticking exercise without any meaningful outcomes

for compliance and service delivery. Furthermore, compliance with the current legislative and policy regimes in SOEs is proving difficult and impossible hence the propensity for shortcuts and wilful disregard of the same.

To mitigate against this complexity, the government should consider harmonising the different legislations for SOEs to clear the oversight, reporting and accountability lines among other challenges posed by different laws and provisions identified in Chapters 3 and 4.

5.2.7 Public versus commercial mandates

SOE priorities are not usually clear owing to the dual mandates they perform. They serve commercial as well as public interests at the same time. It should therefore be clarified at the outset whether profitability or delivery of affordable public goods takes precedence. The current expectation is that profitability and viability should be achieved together with the provision of affordable public services, and this creates a problem for SOEs. A clear articulation of the position of an SOE in terms of the priority of mandates cannot be overemphasised to allow SOEs freedom to operate.

5.2.8 State ownership

State ownership, roles and functions of the executive authority in relation to an SOE should be clarified, and a clear separation of roles between Ministers and Boards outlined.³⁶⁰ Communication and reporting lines must be drawn and understood by all role players with the Board's role being placed at the centre as the accounting authority.³⁶¹ Ministers must exercise ownership control and avoid interference and meddling in day-to-day SOE operations. Boards must be afforded operational autonomy within the confines of the legal, regulatory and policy frameworks discussed in Chapter 3.

³⁶⁰ See para 4.4.

³⁶¹ Mekwe *A Critical Review of Corporate Governance Reforms Relating to South African State-Owned Enterprises* 77.

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