UNIVERSITY OF KWAZULU-NATAL
COLLEGE OF LAW AND MANAGEMENT STUDIES
SCHOOL OF LAW, HOWARD COLLEGE

Section 76 of the Companies Act 71 of 2008 as a mechanism of enforcement for the King IV Code on Corporate Governance for South Africa

Faatima Seedat
214563659

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Supervisor: Mr Simphiwe Phungula

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ABSTRACT

This dissertation examines the severe problems of corporate governance experienced at Steinhoff International Holdings NV (Steinhoff) and ESKOM Holdings SOC Ltd (Eskom).[1] These failings suggest that South African corporate governance standards are ineffective on account of a poor ethical culture in companies; in particular, members of governing boards have shown a conscious disregard for the rules. Steinhoff, a foreign-based company with a secondary listing on the Johannesburg Stock Exchange, has shown a scant concern for the strictures of the Companies Act 71 of 2008 (2008 Act). As an external company with secondary listing, the King IV Code on Corporate Governance for South Africa[2] (King IV Code) does not apply to Steinhoff. This study recommends a broadening of the definition of 'company' in section 1 of the 2008 Act to include external companies to ensure that companies such as Steinhoff are bound by governance legislation and exercise the enhanced accountability and transparency provisions set out in chapter three[3]. The enforceability of the King Code is also investigated − specifically the use and application of section 76 of the 2008 Act[4] as a mechanism of enforcement, based on the assumption that the King Code is legally enforceable under and in terms of section 76(4), read with section 76(3), section 5, section 7(b)(iii) and section 158(a) of the 2008 Act[5]. The study recommends the inclusion of selected King IV principles into hard legislation to assist and guide boards of governors to practice good governance.

[1] A South African state-owned company.

[2] The King IV Code on Corporate Governance for South Africa is a generally voluntary Code which espouses corporate governance principles to guide governing bodies towards the achievement of good governance.

[3] The Companies Act 71 of 2008.

[4] Ibid.

[5] Ibid.

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ABBREVIATIONS

CEO – Chief Executive Officer

CFO – Chief Financial Officer

COO – Chief Operational Officer

CSA – Coal Supply Agreement

DPE – Department of Public Enterprises

DTE – Department of Trade and Industry

EXCOPS – Eskom Executive Procurement Committee

FSE – Frankfurt Stock Exchange

GAAP – Generally Accepted Accounting Principles

GB – Governing Body

GCEO – Group Chief Executive Officer

GEPF – Government Employees Pension Fund

IoDSA – Institute of Directors in Southern Africa

IT – Information Technology

JSE – Johannesburg Stock Exchange

OCH – Optimum Coal Holdings

OCM – Optimum Coal Mining

OECD – Organisation for Economic Co-operation and Development

PwC – Pricewaterhouse Coopers

SADC – South African Development Community

SIHL – Steinhoff International Holdings NV

SIS – Strategic Intent Statement

SOC/s – State-owned Company/ies

SOE – State-owned Entity

UKZN – University of KwaZulu-Natal

US – United States

USB – University of Stellenbosch

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CHAPTER ONE

Introduction and Background

1. Introduction

1.1 The title of the thesis:

Section 76 of the Companies Act 71 of 2008 as a mechanism of enforcement for the King IV Code on Corporate Governance for South Africa. What is the legal status of the Code and does it require a stricter application?

2. Background

The advance of company law from its genesis of English principles to South Africa's current Companies Act 71 of 2008 (2008 Act) is described in subsection 2.1 below. Subsection 2.2 sets out the development of the King Codes to enable a better understanding of their bearing on the research questions. Subsection 2.3 introduces the factual basis of the current issues which are to be discussed in detail in chapter three.

2.1 The history of company law in South Africa

2.1.1 English company law

Despite modern company law having originated in France – the *'Code de Commerce'* of 1807, culminating in the *'societe anonyme',* the 'public company'[6] − the subject under examination − demands a perusal of English company law, from which South African company law is derived.[7]

The first English organisations to carry the term 'company' were merchant adventurers who traded overseas.[8] Privileges under royal charter date from the 14th century, but it was only with the expansion of trade in the 16th century that such 'companies' became

[6] J T Pretorius… et al *Hahlo's South African Company Law through the cases: A Source Book: A Collection of Cases on Company Law, with Explanatory Notes and Comments* 6 ed (1999) 1

[7] ibid

[8] PL Davies *Gower's Principles of Modern Company Law* 6 ed (1997) 20

common.[9] By the end of the 17th century the primary functions of the company as we now understand them came into being.[10] At this point, however, 'company law' was not codified, but was based on the law of partnership.[11]

The proliferation of companies in the first two decades of the eighteenth century was followed by a financial crash, referred to as the South Sea Bubble.[12] In June 1720, two months before the crash[13], the English Parliament passed the Bubble Act[14] to protect unwary investors, and the public in general; the Act was also intended to prevent companies using the status of incorporation to evade payments of incorporation dues,[15] and to relieve the government of high interest debt.[16] The Bubble Act was repealed in 1825 in line with a constitutional shift in the balance of powers.[17] Thereafter (in 1825) the enactment of the Joint Stock Companies Registration Act of 1844 heralded English company law reform,[18] in which a distinction was drawn for the first time between an incorporated company and an unincorporated partnership with unlimited personal liability of members (provided that the company was first excussed).[19] Moreover, the personal liability of members would cease after three years of the transfer of his shares.[20] The Joint Stock Companies Registration Act of 1844 was amended by the Limited Liability Act of 1855 which introduced the principle of limited liability for all registered companies.[21] The Joint Stock Companies Act of 1856

[9] ibid

[10] PL Davies op cit note 8 at 23

[11] ibid

[12] PL Davies op cit note 8 at 24

[13] For more information on the South Sea Bubble see P L Davies *Gower's Principles of Modern Company Law* 6 ed (1997) 18-26

[14] R Harris 'The Bubble Act of 1720' (2003) 1 *Oxford Encyclopaedia of Economic History* 294 available at *https://works.bepress.com/ron_harris/18/*

[15] ibid

[16] ibid

[17] ibid

[18] J T Pretorius op cit note 6

[19] ibid

[20] ibid

[21] ibid

served as a revision of the Limited Liability Act of 1855,[22] introducing the basic structure of the modern company incorporated by registration with members enjoying limited liability.[23]

2.1.2 The impact of English company legislation on South African Company law

South African company law has, for centuries, followed English company legislation – the English Limited Liability Act of 1855 as incorporated in the Joint Stock Companies Act of 1856 formed the basis of the Joint Stock Companies Limited Liability Act 23 of 1861 (of the Cape), followed by[24] the Cape Companies Act 25 of 1892, built around the English Companies Act of 1862.[25] In the Transvaal, Law 5 of 1874, *De Akte van Maatschappijen met Beperkte Verantwoordelijkheid*, mimicked the 1861 Cape Act and then Law 1 of 1891 adopted the provisions of the Directors Liability Act 1890 of the United Kingdom; The English Companies Act of 1908 functioned as a prototype for the Union Companies Act 46 of 1926.[26]

In the Orange Free State, the Cape Model Law 2 of 1892 was adopted by *De Wet over Beperkte Verantwoordelijkheid van Naamlooze Vennootschappen* of 1891, and Chapter C of the Law Book On Limited Liability of Joint Stock Companies also followed English legislation.[27] In Natal, Cape legislation formed for the basis of the Joint Stock Companies' Limited Liability Law 10 of 1864, augmented by the Winding-Up Law 19 of 1866.[28] After the Union of South Africa in 1910, the provincial company laws were replaced by the Union Companies Act 46 of 1926 (the 1926 Act) modeled on the Transvaal Act of 1909.[29] The 1926 Act has been repeatedly amended, to keep it in line with the trends of English company law.[30]

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22 ibid

23 ibid

24 ibid

25 J T Pretorius op cit note 6 at 1-2

26 ibid

27 ibid

28 ibid

29 ibid

30 ibid

The Van Wyk de Vries Commission of Enquiry[31] into the Companies Act spawned the Companies Act 61 of 1973 (the 1973 Act).[32] The commission found that South Africa could no longer rewrite into its law the corresponding English legislation,[33] resulting in the 1973 Act which signaled that South African company law was now a force of its own despite having previously mirrored English company law.[34] Company law legislation has been amended and consolidated innumerable times;[35] however, the 1973 Act set out the basics of corporate functioning, advancing company law to suit the South African company law ethos; its birth and demise constitute important background to this study.

2.1.3 The demise of the Companies Act 61 of 1973; company law reform, and the Companies Act 71 of 2008

Clear, certain and accessible corporate law is the foundation of a prosperous economy.[36] The replacement of the 1973 Act was necessitated by its bulky, complex, and discordant nature,[37] evidenced by it having been amended 42 times throughout its 37 years of existence, causing it to be cumbersome, excessively technical, archaic, and fraught with conflict over its underlying philosophy and policies.[38] Company law reform began in earnest on the 11 July 2003 (the first round table)[39] when the Department of Trade and Industry (DTI) announced

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[31] For greater detail regarding the Commission of Enquiry into the Companies Act please see M L Benade 'A Survey of the Main Report of the Commission of Enquiry into the Companies Act' (1970) 3(3) *The Comparative and International Law Journal of Southern* Africa 277-308

[32] J T Pretorius op cit note 6 at 1-2

[33] RC Beuthin & SM Luiz *Beuthin's Basic Company Law* 3 ed (2000) 3

[34] J T Pretorius op cit note 6 at 1-2

[35] ibid

[36] FHI Cassim 'Introduction to the New Companies Act: General Overview of the Act' in Cassim (ed) *Contemporary Company Law* 2 ed (2012) 3

[37] ibid

[38] ibid

[39] Proceedings of the Local and International Roundtable on Company Law Reform hosted by the Department of Trade and Industry in Johannesburg (2003) 9

that the formulation of a policy framework would guide the law reform process.[40] The publication of guidelines would be the first step in the drafting of the Companies Act.[41]

Drafting the guidelines for corporate law reform began in September 2003, and ended in May 2004,[42] following which five objectives of company law reform were announced:[43]

1. Encouraging entrepreneurship and enterprise diversity by simplifying the formation of companies and reducing the costs associated with the formalities of forming a company and maintaining its existence, thereby contributing to the creation of employment opportunities.[44]
2. Promoting innovation and investment in South African markets and companies by providing a predictable and effective regulatory environment and flexibility in the formation and management of companies.[45]
3. Promoting the efficiency of companies and their management.[46]
4. Encouraging transparency and high standards of corporate governance and recognising the broader social role of enterprises.[47]
5. Ensuring compatibility and harmonisation with best-practice jurisdictions internationally.[48]

Following public comment, the DTI updated the guidelines for commencement of the drafting process.[49] After a lengthy process of drafting, consultation, and the full parliamentary process, the Companies Bill B61D of 2008 was assented to by the

[40] *South African Company Law for the 21st Century: Guidelines for Corporate Law Reform* available in GN 1183 of GG 26493, 23/06/20049.

[41] T Mongalo 'An Overview of Company Law Reform in South Africa: From the Guidelines to the Companies Act 2008' in T Mongalo (edition ed) *Modern Company Law for a Competitive South African Company* (2010) xvi

[42] T Mongalo op cit note 41 at xviii-xix

[43] GN 1183 of GG 26493, 23/06/2004 (11); The Companies Act 71 of 2008 Section 7

[44] ibid

[45] ibid

[46] ibid

[47] ibid

[48] The Companies Act 71 of 2008 Section 7; for further details on the Guidelines see GN 1183 of GG 26493, 23/06/2004

[49] T Mongalo op cit note 41 at xvxii

President on 8 April 2009 and gazetted on 9 April 2009 as the Companies Act 71 of 2008 (the 2008 Act).[50]

Redundancy issues, modification of 19th century English legal principles, new principles on solvency and liquidity, improved corporate governance, enhanced standards of accountability and transparency, the notion of business rescue, and a changing domestic and international legal landscape caused the demise of the 1973 Act, and the enactment of its successor (2008 Act).[51] It has 225 sections, five schedules, 179 regulations, and three annexures, and came into effect on 1 May 2011.[52] Alongside the 2008 Act, and of major significance, is the King IV Code on Corporate Governance for South Africa.

2.2.1 The journey of the King Code on Corporate Governance

Quoting Sir Adrian Cadbury[53], Anne Simpson[54] explains that corporate governance provides the rules for relations between shareholders, lenders, and other stakeholders in the business community and society at large.[55] A company's reputation for integrity, efficiency and its long-term growth, and profitability is based on the assurance that the principles of corporate governance are in place and are being practised.[56] Responsibility, transparency, fairness, and accountability are key principles by which a company must operate.[57] Corporate governance

[50] T Mongalo op cit note 41 at xxii – xxv; GN 421 of GG 32121, 9/04/2009

[51] F H I Cassim op cit note 36 at 3-4

[52] Notebook on the Companies Act 71 of 2008 available at *https://www.thedti.gov.za/business_regulations/acts/Companies_Act_Notebook.pdf*

[53] Sir Adrian Cadbury is the chairperson of the Cadbury Commission which published the Cadbury Report on Corporate Governance in the United Kingdom (1992)

[54] Anne Simpson is a former manager of the Secretariat at the Global Corporate Governance Forum.

[55] A Simpson 'Forward' in *The Handbook of International Corporate Governance: A definitive Guide* (2004), available at *https://books.google.co.za/books?id=1NHNoDHBJSEC&printsec=frontcover&vq=%22corporate+governance+is+concerned+with+holding+the+balance+between+economic+and+social+goals+and+between+individual+and+communal+goals.%22&source=gbs_quotes#v=onepage&q=%22corporate%20governance%20is%20concerned%20with%20holding%20the%20balance%20between%20economic%20and%20social%20goals%20and%20between%20individual%20and%20communal%20goals.%22&f=false*, accessed on 16 February 2018

[56] ibid

[57] ibid

provides the rules and responsibilities delegated to persons within a company, and the procedures to be followed in handling corporate matters.[58]

South Africa's transition to democracy sparked a renewed interest in corporate governance.[59] The publication of the King Committee Report on Corporate Governance ('The King Code'), initiated by the Institute of Directors of Southern Africa (IoDSA), formally introduced corporate governance in South Africa.[60][61] Whereas developed countries are only concerned with governance issues related to corporate collapse and accounting, developing countries like South Africa face the challenges of economic development and globalisation,[62] and in addition, its corporate strategy must maintain a balance between relevance, being locally acceptable, and meeting international standards.[63]

The King Reports purport to promote high standards of corporate governance.[64] The first King Report ('King I') was released in 1994 to elucidate corporate governance principles which reflected accepted norms and practice.[65] King I encouraged an integrated approach to governance in the interest of stakeholders, dealt with the financial and regulatory aspects of corporate governance and especially the crucial principles of good financial, social, ethical, and environmental practice.[66] King I introduced companies to the realisation that they could not act independently from society and the environment.[67]

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[58] ibid

[59] A Banik et al *Corporate Governance, Responsibility and Sustainability: Initiatives in Emerging Economies* (2016) 79

[60] A Simpson op cit note 55

[61] Institute of Directors & C Pierce *The Handbook of International Corporate Governance: A Definitive Guide* 2004 (310); the Institute of Directors in Southern Africa (IoDSA) is a non-profit organisation which represents those charged with governance (directors, professionals and business leaders) in Southern Africa. For more information about the IoDSA see *https:/www./iodsa.co.za*

[62] D Reed 'Corporate Governance Reforms in Developing Countries' (2002) 37(3) *Journal of Business Ethics* 223-247

[63] A West 'Theorising South Africa's Corporate Governance' (2006) 68(4) *Journal of Business Ethics* 433-448

[64] M E King *Executive Summary of the King Report 2002 (2002)* 6

[65] R Naidoo *Corporate Governance: An Essential Guide for South African Companies* (2002) 1-3

[66] M E King op cit note 64

[67] ibid

The concurrent social and political transformation meant that the recommendations in King I were overtaken by legislation, [68] including the Labour Relations Act 66 of 1995, Basic Conditions of Employment Act 75 of 1997, the Employment Equity Act 55 of 1998, and the National Environmental Management Act 107 of 1998.[69]

King I was also affected by the revision of the listing requirements of the Johannesburg Stock Exchange (JSE) in 1995 and 2000 in order to align it with international best practice.[70] The Insider Trading Act 135 of 1998 was also introduced to provide a closer watch over insider trading.[71] The Public Finance Management Act 1 of 1999 changed the financial management regime in government from being rule-driven to being focused on responsibilities and outputs to increase the rigour of reporting and accountability requirements.[72] The Banks Act 94 of 1990 was comprehensively updated to include the enforcement of a markedly higher level of corporate governance compliance and risk reporting.[73]

The burgeoning need for corporate governance practices in state enterprises resulted in the release of the Policy Framework for State-owned Enterprises by the Department of Public Enterprises (DPE).[74] Information technology (IT) was identified as key to strategy and business decisions,[75] and, on account of its integral function in internal controls and reporting, directors had to be aware of the fiduciary implications of electronic contracting, the integrity of electronic communications and the retention of records.[76] Directors had to be responsible for appropriate skills in the organisations and proper internal controls.[77]

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[68] M E King op cit note 64 at 8

[69] ibid

[70] ibid

[71] ibid

[72] ibid

[73] ibid

[74] ibid

[75] M E King op cit note 64 at 8-9

[76] ibid

[77] ibid

2.2.2 King II

The second King Report (King II) replaced and elaborated on King I in 2002.[78] King II was commissioned partly to deal with the political and economic uncertainty present at the time of the first report (as explained above), and to allow for fluctuations in worldwide corporate governance.[79] A major challenge was to demonstrate that good corporate governance benefited companies.[80] An investor opinion survey of June 2000 reflects support for the proposition that good governance reaped economic benefits.[81] McKinsey & Company[82] conducted a series of surveys in both developed and developing markets to establish how shareholders perceived and valued corporate governance,[83] identifying well-governed companies as having the following characteristics:

- A clear majority of outsiders on the board, of whom none had management ties;
- Formal evaluations of directors;
- Directors who had large stakes in the company should have a large proportion of their pay in stock options;
- Responsiveness to requests from investors for information on the issues of governance.[84]

The survey also found that over 80 per cent of more than 200 global institutional investors were willing to pay a premium for the shares of a well governed company.[85] Moreover, three-quarters of these investors indicated that financial performance and board practices were of equal importance when assessing companies for investments.[86] The survey suggested that shareholder value could thus be increased by good corporate governance regimes.[87]

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[78] R Naidoo op cit note 65 at 1

[79] A West op cit note 63

[80] M E King op cit note 64 at 812.

[81] McKinsey & Company *Investor Opinion Survey* (2000) 2 available at *https://www.oecd.org/daf/ca/corporategovernanceprinciples/1922101.pdf*

[82] ibid

[83] ibid

[84] ibid

[85] ibid

[86] ibid

[87] ibid

Good governance might also make emerging economies a magnet for global capital,[88] in that stakeholders search for evidence of good stewardship by directors (indicating sustainability of the organisation) and shareowners seek measurements with which to assess stewardship, performance, conformance, and sustainability. All this led the King Committee to review the corporate governance practices and standards for South Africa.[89] The following four guiding principles emerged from the review of King I.[90]

1. The 1994 King Report was to be reviewed and its currency assessed against local and international standards since its publication in 1994.[91]
2. The earlier proposal for an inclusive approach with the object of the sustainable success of companies was to be clarified and reviewed.[92]
3. The increasing importance of non-financial aspects was to be recognised, and the reporting on issues related to social and ethical accounting, and safety, health, and environment was to be considered and recommended.[93]
4. A recommendation on how compliance with a new Code of Corporate Governance for South Africa could be measured, based on outcomes was to be proposed − how the success of a company could be measured through a 'balanced scorecard' approach of reporting.[94]

The draft Report was subjected to extensive consultation with task teams and the public in South Africa and internationally.[95] It was found that many of the recommendations of King I remained valid and were therefore repeated in King II; it was noted that South African businesses, in a testing environment of globalisation, political imperatives, and increasing stakeholder interests continued to face challenges.[96] King II,

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88 ibid

89 M E King op cit note 64 at 15

90 ibid

91 ibid

92 ibid

93 ibid

94 ibid; The balanced scorecard measured progress made with regards to strategic targets; communicated their goals; prioritised projects; aligned their daily work with strategy. For further detail see *http://www.balancedscorecard.org/BSC-Basics/About-the-Balanced-Scorecard*

95 M E King op cit note 64 at 16

96 M E King op cit note 64 at 16-17

whilst addressing many of these issues could only recommend priorities for boards and directors to phase in to attain a balanced scorecard approach to corporate governance aligned with international best practice.[97]

The King Committee found that the inclusive approach was fundamental to companies achieving a balance between economic efficiency and society's broader objectives.[98] A board had to define the purpose of the company, the values by which it was run and day-to-day tasks performed, and to identify the stakeholders who were relevant to the business of the company.[99] The board then had to formulate a strategy which combined the above factors and then monitor the application of the strategy.[100] The inclusive approach also required that the board had to identify key risk and key performance areas of the company and devise methods for managing those risks, recording the facts and assumptions for these conclusions. The human capital aspects of the company with regard to succession, morale, remuneration and training had to be monitored, and the board had to communicate strategic plans and ethical codes on an internal and external level. Controls had to be adequate and the management information systems able to cope with the strategic direction of the company, including a 'licence to operate' check being made available in an appropriate language(s).[101] Companies had to acknowledge that they operate in a community in which many of the citizens live on the fringe of society's economic benefits.[102]

King II concluded that successful governance in the 21st century required an inclusive approach by companies in which boards had to apply the tests of fairness, accountability, responsibility, and transparency to all actions or inactions; the board was accountable to the company and responsive and responsible towards all stakeholders; and the correct balance between conformance and performance had to be found.[103]

[97] M E King op cit note 64 at 17

[98] ibid

[99] ibid

[100] ibid

[101] ibid

[102] ibid

[103] M E King op cit note 64 at 17-19

King II identified seven fundamental characteristics of good corporate governance: discipline, transparency, independence, accountability, responsibility, fairness and social responsibility.[104]

1. Discipline: This entailed a pledge by senior management to conform to behaviour universally recognised as correct and proper.[105] This required awareness and acceptance of good corporate governance principles.[106]
2. Transparency measures how well management made relevant information available in a candid, timely, and accurate form, which enabled an outsider to accurately interpret a company's actions, its economic fundamentals, and non-financial aspects of the business.[107]
3. Independence refers to the mechanisms in place to curtail conflicts of interest arising from the dominance of a large shareowner or strong chief executive; the mechanisms referred to external parties (such as the auditors), the composition of the board and appointments to committees of the board. The processes had to be objective and decry undue influence.[108]
4. Accountability: Company decision-makers had to be accountable for their decisions and actions, and mechanisms introduced to achieving this, enabling investors to be in a position to probe and assess the actions of the board and its committees.[109]
5. Responsibility refers to behaviour which permits corrective actions and which sanctions mismanagement; responsible management was crucial to setting the company on the correct path; the board had to be responsive to all stakeholders of the company.[110]
6. Fairness requires all systems to take into account all parties which have an interest in the company and in the company's future.[111]

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[104] W J L Calkoen *The Corporate Governance Review* 3 ed (2013) 304

[105] M E King op cit note 64 at 10-11

[106] ibid

[107] ibid

[108] ibid

[109] ibid

[110] ibid

[111] ibid

7. Social responsibility requires high ethical standards and awareness and consideration for social issues, acting in a non-discriminatory, non-exploitative manner, cognisant of environmental and human rights.[112] Such conduct would reap economic benefits by way of improved productivity and corporate reputation.[113]

2.2.3 King III

After the promulgation of the Companies Act 71 of 2008 (the 2008 Act), King II was replaced by the King Report on Corporate Governance for South Africa 2009 (King III report') and the King Code of Governance for South Africa 2009 (King III).[114] King III came into effect on 1 March 2010,[115] applicable to all bodies in the public, private, and non-profit sectors.[116] The introduction of corporate governance in the 2008 Act, and a mounting interest in comprehensive reporting, made it necessary for the King Committee to release a new version of their report on corporate governance.[117]

The King III report is based on an 'apply or explain' approach, allowing companies to function in accordance with their founding vision without being compelled to follow inflexible standards.[118] Vital principles include leadership, sustainability, integrated sustainability, social transformation and corporate citizenship,[119] concentrating on the effects of business on the environment and society in general and the link between sustainability and ethical standards in businesses and in the community.[120] The King III Report emphasised the following:[121]

1. Alternative dispute resolution.[122]

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[112] ibid

[113] ibid

[114] R Cassim 'Corporate Governance' in Cassim (ed) *Contemporary Company Law* 2 ed (2012) 473

[115] The Institute of Directors Southern Africa *King Report on Governance for South Africa* (King III) (2009) 11

[116] T Nag 'Corporate Governance in South Africa' in A Banik et al *Corporate Governance, Responsibility and Sustainability: Initiatives in Emerging Economies* (2015) 83

[117] M E King 'The Synergies and Interaction between King III and the Companies Act 61 of 2008' in T Mongalo (ed) *Modern Company Law for a Competitive South African Company* (2010); 446-447

[118] The Institute of Directors Southern Africa (King III) op cit note 115 at 4

[119] The Institute of Directors Southern Africa (King III) op cit note 115 at 6

[120] ibid

[121] The Institute of Directors Southern Africa (King III) op cit note 115 at 9

[122] ibid

2. Risk based internal audits – more reliance on internal controls.[123]
3. IT Governance as a major operational risk.
4. The remuneration of non-executive directors to be authorised by shareholders to be set out in a policy.[124]
5. An annual evaluation of the board of directors, the board committees and individual directors should be conducted.[125]

Other Issues introduced by the King III Report include business rescue, and language, gender and terminology. All bodies were encouraged to apply the Code and to report failure to do so.[126]

2.2.4 King IV

The fourth iteration of the King report ('King IV') serves as the yardstick for corporate governance in South Africa.[127] King IV aims to be more accessible to all entities in all sectors in light of the fact that non-profit organisations, private companies, and entities in the public sector had experienced difficulty interpreting and adapting King III to their particular circumstances,[128] King IV is more succinct and contains fewer principles to facilitate ease of interpretation and implementation.[129]

The chairman of the King Committee explained the need for an update and replacement of King III in his foreword to King IV Report:

> "The 21st century has been characterised by fundamental changes in both business and society. These fundamental changes provided the context within which the King Committee set out to draft King IV and have influenced both its content and approach."[130]

King IV is, as before, a voluntary code proposing principles and practices for good corporate governance.[131] A hybrid system of corporate governance has emerged in

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[123] ibid

[124] ibid

[125] ibid

[126] The Institute of Directors Southern Africa (King III) op cit note 115 at 10

[127] Institute of Directors in Southern Africa and The King Committee on Corporate Governance in South Africa *King IV Report on Corporate Governance in South Africa* (2016) 20

[128] Institute of Directors in Southern Africa and The King Committee (King IV) op cit note 127 at 6

[129] Institute of Directors in Southern Africa and The King Committee (King IV) op cit note 127 at 6-7

[130] Institute of Directors in Southern Africa and The King Committee (King IV) op cit note 127 at 2

South Africa in which governance legislation has been developed in line with principles of the King Codes.[132] The King IV Report states that 'adopting good corporate governance practice will be especially important if they (corporate entities) were to rely on the protection afforded by the business judgement rule as provided for in the Companies Act'. [133] This refers to directors being required to prove that steps taken were informed in the absence of material financial interests; were dealt with appropriately in the rational and actual belief that the action was taken in the best interests of the company.[134] The fact that the King IV Code is voluntary and not in itself legally binding does not necessarily preclude legal consequences for non-adherence.[135] As King IV recommends best practices it influences practices of governing bodies.[136] Courts incline to accept such practices as the standard of care and conduct required of those charged with governance duties.[137] Directors have a statutory obligation to act in the best interests of the company with due care, skill, and diligence.[138] Section 76(4) of the 2008 Act provides that a director will have satisfied the duty:

- If s/he has taken reasonably diligent steps to become informed of the matter;
- And if s/he had no material personal financial interest in the matter, [had] no reasonable basis to know that any related person had financial interest in the matter or the director complied with the requirements of section 75 with regards to any such interest;
- And the director made a decision with regard to the matter and had a rational basis for believing and did believe that the decision was in the best interests of the company.[139]

Linda Musakwa posits that legislative compliance is dependent on compliance with corporate governance criteria, and directors are bound to demonstrate such compliance to establish fulfilment of the section 76 duty.[140] This study aims to identify and explain the

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[131] Institute of Directors in Southern Africa and The King Committee (King IV) op cit note 127 at 3-4

[132] Institute of Directors in Southern Africa and The King Committee (King IV) op cit note 127 at 35

[133] Institute of Directors in Southern Africa and The King Committee (King IV) op cit note 127 at 21

[134] ibid

[135] Institute of Directors in Southern Africa and The King Committee (King IV) op cit note 127 at 35

[136] ibid

[137] ibid

[138] The Companies Act 71 of 2008 section 73 *(b)* and section 73 *(c)*

[139] The Companies Act 71 of 2008 section 76(4)

[140] L. Musakwa 'Directors' Duties and the Business Judgment Rule in South African Company Law: An Analysis' (2013) 3(7) *International Journal of Humanities and Social Science* 89-95

mechanisms in the Companies Act of 2008 which require enforcement of the King IV Code alongside the Act. This entails a discussion of the business judgement rule and the way in which it promotes the enforcement of the King IV Code.

2.3 Current issues

Proper corporate governance prevents fraud and concomitant civil or criminal liability of corporate and government entities. The court, in the case of *SA Broadcasting Corporation Ltd v Mpofu*[141] held:

> "Integrity is a key principle underpinning good corporate governance. Put clearly, good corporate governance is based on a clear code of ethical behaviour and personal integrity exercised by the board, where communications are shared openly."[142]

Echoing South Africa's National Development Plan[143], Lynn McGregor, writing for the Hanns Seidel Foundation[144], emphasises that the function of state-owned companies (SOCs) is to provide infrastructure services and improve social and economic conditions. As a sole or important shareholder of an SOC, the government is responsible to ensure that the company is well run so that it delivers on its mandate to provide sound infrastructure and that investments yield adequate results.[145] Good corporate governance requires ethical leadership. Authority and integrity combine to produce successful decisions for the greater benefit of the people. However, the practices and behaviour of the government as shareholder are alleged to have fallen short in the field of corporate governance. In a developing country such as South Africa, understanding the concept and evolution of corporate governance with reference to the King Codes and the 1973 and 2008 (Companies)

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[141] *South African Broadcasting Corporation Ltd and Another v Mpofu* (A5021/08) [2009] ZAGPJHC 25; [2009]4 A11 SA 169 (GSJ)

[142] ibid

[143] The National Development Plan intends to achieve a better future for all South African citizens. See *https://www.gov.za/sites/default/files/Executive%20Summary-NDP%202030%20-%20Our%20future%20-%20make%20it%20work.pdf*

[144] The Hanns Seidel Foundation is committed to the service of democracy, peace, and development. See *https://southafrica.hss.de*

[145] L. Mcgregor *Improving Corporate Governance of South African State-Owned Companies (SOCs) A 'think-piece paper*' (2014) available at *http://www.usb.ac.za/Shared%20Documents/Thinkpiece.Improving%20S.A.%20SOC%20Corporate%20Gove.pdf* accessed on 20 February 2018

Acts enables understanding of the links between corporate governance and economic and social growth and well-being. In the case of Eskom, this study will examine how effectively the 2008 Act dovetails with corporate governance responsibilities, and make recommendations for better governance and accountability; and further investigate the potential benefit of incorporating the King Codes into binding South African law as a means of ensuring good corporate governance.

The King principles which are generally voluntary, are binding on companies with a primary listing on the JSE.[146] In what some are referring to as the biggest corporate failure in the history of the JSE, the share price of Steinhoff International Holdings (Steinhoff) plunged by 91 per cent.[147] Steinhoff is a dual-listed company with a secondary listing on the JSE, raising concern about companies which operate across many jurisdictions. This study seeks to determine the apparent deterioration in corporate governance at Steinhoff. Selected King IV and King III principles will be discussed in relation to Steinhoff's plight to establish what caused the Steinhoff meltdown and what a practical application of the King IV Code might have achieved. The issue of enforceable compliance and the notion that dual-listed companies (without a primary listing on the JSE) should be bound to comply with the guidelines contained in the King Code will be explored.

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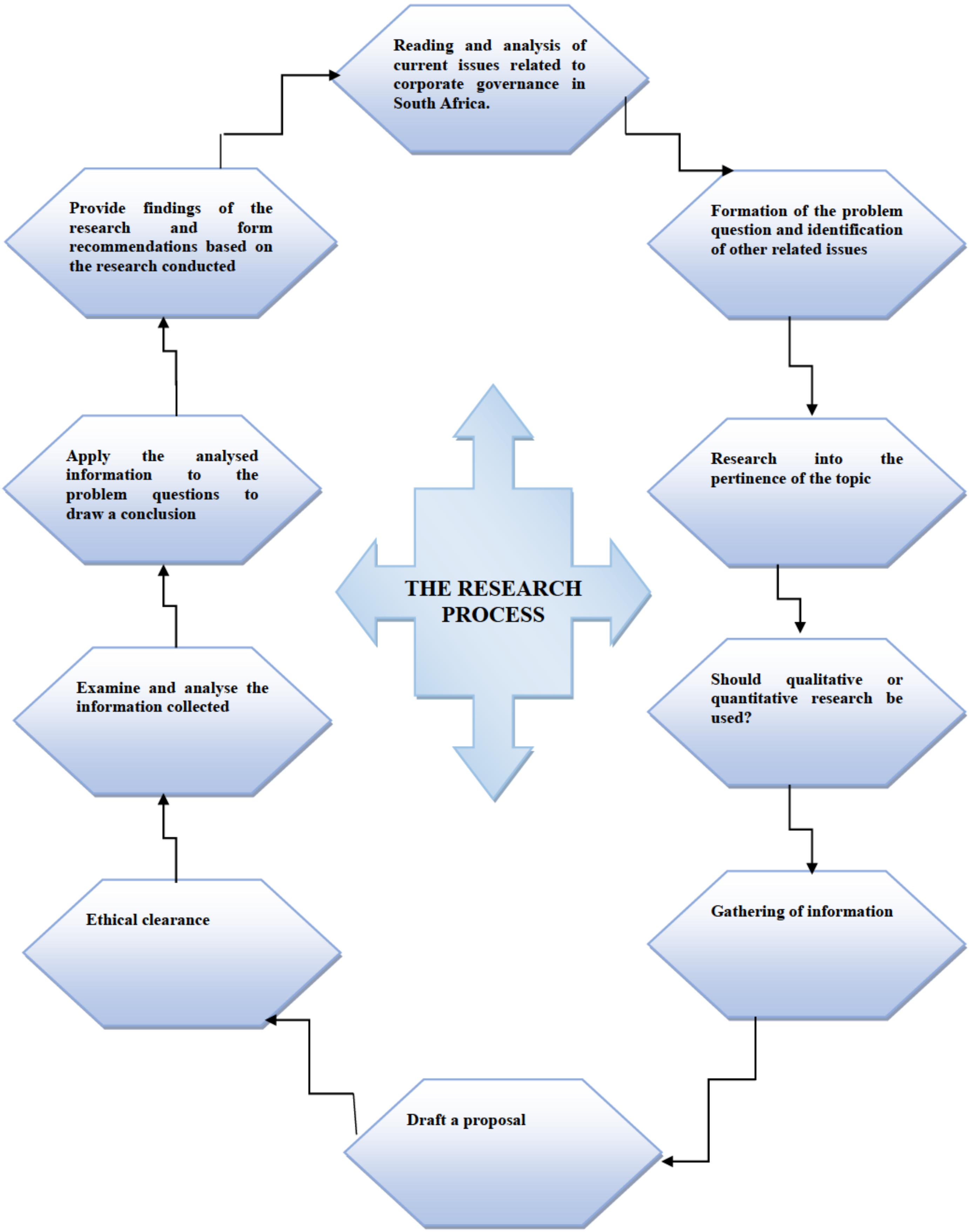
[146] Institute of Directors in Southern Africa and The King Committee (King IV) op cit note 127 at 20

[147] 'Steinhoff on brink of dropping off JSE's top 100 company list' *Fin24* 21 December 2017available at *https://www.fin24.com/Companies/Retail/steinhoff-on-brink-of-dropping-off-jses-top-100-company-list-20171221*, accessed on 15 February 2018

3. *Research Methodology*

Figure 1



Roberts[148] defines research as 'the study of substantive issues and theoretical questions by the application of one or more research methods and the interpretation and dissemination of findings'. This study aims to provide an answer to the questions posed in chapter one. A conclusion and recommendations based on the research conducted will be provided in chapter four. The purpose of this research study is to investigate the enforceability of the King IV Code on Corporate Governance (King IV Code); to identify the mechanism(s) available in the Companies Act which facilitate the enforcement of the King IV Code; and to determine whether a stricter application of the King IV code is required with special focus on state-owned companies and companies with a secondary listing on the JSE. The research is desktop based. The business judgement rule as it appears in section 76 of the Companies Act is analysed[149] and criticised.[150] However, there is a dearth of research on whether the business judgement rule as it appears in the King IV Code should be enforceable. This thesis aims to address this gap in research. Primary sources consulted in this study include case and statute law. Secondary sources used include books, journal articles, newspapers, and other dissertations. Secondary (desktop) research was chosen, as the information pertaining to the research topic did not require fieldwork. A multiplicity of materials in the form of published reports, articles, journal articles, books, government and company survey statistics, company reports, reports and studies of specialist research organisations and magazine and newspaper publications were consulted.

4. Research questions

- What is the legal status of the King IV Code on Corporate Governance? Does it require a stricter application?

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[148] B Roberts *Getting the Most Out of The Research Experience − What Every Researcher Needs To Know* (2007) 4 available at *http://dx.doi.org/10.4135/9781849209212.n2* accessed on 29 August 2018

[149] S Kennedy-Good and L Coetzee 'The Business Judgement Rule Part Two' available at *https://journals.co.za/content/obiter/27/2/EJC85185* ; and see E Jones 'Directors' duties: negligence and the business judgment rule' by available at *https://repository.up.ac.za/handle/2263/3893*

[150] JL van Tonder 'An Analysis Of The Directors' Duty To Act In The Best Interests Of The Company, Through The Lens Of The Business Judgment Rule' available at *https://journals.co.za/content/obiter/36/3/EJC184720* ; and L Coetzee and JL Van Tonder 'Advantages and disadvantages of partial codification of directors' duties in the South African Companies Act 71 of 2008' available at *http://scholar.ufs.ac.za:8080/xmlui/handle/11660/5161*

- Is it possible and effective for section 76 of the Companies Act 71 of 2008 to act as a mechanism of enforcement?
- Does the prevalence of corporate governance failures within state-owned companies and companies with a secondary listing on the JSE indicate that existing legislation is ineffective? What other factors contribute to this issue?
- What may be done to curb the breakdowns in corporate governance?
- How has company law in South Africa developed to become what it is today?

4.1 Issues

The issues to be explored in this study include:

- The possible enforceability of the King Code in the context of the provisions in the Companies Act concerning directors and their duties and responsibilities will be explored i.e. the legal status of the King IV Code in the field of corporate governance, with special focus on the business judgement rule.
- The efficacy of current corporate governance legislation as provided for in the Companies Act with respect to directors and their responsibilities. This issue relates to the sufficiency of the 2008 Act in achieving good corporate governance within state-owned companies and within dual-listed companies which have a secondary listing on the JSE.
- The reasons for the increasing rate of corporate governance failures within state-owned and dual-listed companies with a secondary listing on the JSE, with reference to the cases of Steinhoff and Eskom.
- Whether a stricter application of the King IV Code may be more successful in curbing failures of corporate governance.

4.2 Structure of the thesis

Chapter one will provide an introduction to the study, detailing a brief history of English company law and its impact on South African company legislation from its inception in 1926 to the contemporary Companies Act 71 of 2008. This is followed by a history of the previous King Codes, and reasons why the previous codes were improved upon, culminating in the King IV Code. This chapter will also introduce some of the current issues to be explored in this study. Lastly, the research methodology, issues of focus, the structure of this thesis, and the aims and objectives of this study are set out.

Chapter two provides the theoretical framework of the study and discusses the legal status of the King IV Code, encompassing the types of directors (executive, board committee members, prescribed officers etcetera) and the responsibilities of directors. The legal status of the King IV code, with reference to a discussion of the business judgement rule as provided for in section 76 of the Companies Act 71 of 2008, will be discussed and analysed.

Chapter three first examines the evolution of corporate governance in South Africa; secondly it uncovers the reason for the increasing prevalence of corporate governance failures within state-owned companies and dual-listed companies with a secondary listing on the JSE. Thirdly it evaluates evaluate the efficacy of the Companies Act in confronting failures of corporate governance. The study aims to provide a comprehensive definition of corporate governance, including its history i.e. the origin of the concept, what triggered its emergence and which countries exerted the greatest influence on it. The study will then examine when the concept came to be accepted and practised in South Africa, and what features of South African history were influential.

This chapter will also discuss:

- The King IV Code on Corporate Governance
- Types of directors covered by the King Code
- Current issues and cases with special focus on the spectacular failings of corporate governance within state-owned companies and within dual-listed companies which have a secondary listing on the JSE. The subject will be discussed in relation to aspects of the King IV Code (and King III where relevant).
- The efficacy of current corporate governance laws in South Africa as found in the Companies Act will be discussed in relation to the cases of Steinhoff and Eskom.

Chapter four will provide a conclusion and recommendations based on the research conducted, with particular focus on the enforceability of the King IV Code, aiming to answer whether the King Code should find stricter application − whether it should or should not be legally binding on all corporate entities including SOCs and dual-listed companies with a secondary listing on the JSE. The efficacy of the 2008 Companies Act in relation to corporate governance principles and the recent corporate governance failures will be considered. Furthermore, this chapter will provide recommendations for effective enforcement of corporate governance, prompted by points of failure in the execution of the current system.

5. Aims and objectives

The objectives of this research project are as follows:

- To provide a brief history of South African company law and the English system which influenced it.
- To analyse contemporary corporate law in South Africa as illustrated in the 2008 Act.
- To explore the effectiveness of the current legislation.
- To investigate the enforceability of the King IV Code.
- To examine the high rate of corporate governance failures within state-owned companies and dual-listed companies with a secondary listing on the JSE.
- To consider stricter application of the King IV Code.
- To provide recommendations which may assist in the circumvention of failures of corporate governance.

CHAPTER TWO

Theoretical Framework

1. Introduction

Good governance can be described as the right balance of fairness, accountability, responsibility and transparency on a foundation of intellectual honesty; it is against these principles that directors must arrive at decisions which are in the best interests of their companies.[151] The duties of a director encompass good faith, care, skill, and diligence.[152] Good faith entails that a director applies his mind honestly and acts in the best interests of his company; he may not pilfer any corporate opportunity for himself and must make certain that there is no conflict of interests between him and his company.[153] Acting with care entails the level of care expected of a reasonable person taking care of another's assets; this duty further requires an honest application of mind when making decisions related to the economic activity of the business.[154] When something goes wrong the question will arise: 'Did the director act with care?'[155] Skill presumes that the director applies his practised ability in the best interests of the company.[156] Diligence involves the duty of the director to understand and be fully informed about issues to be decided and to understand and familiarise himself with all necessary information presented to him.[157]

The duties of a director were partially codified in the Companies Act (the 2008 Act).[158] The business judgement rule which was introduced in the 2008 Act provides

[151] M E King *The Corporate Citizen* (2006) ix

[152] M E King op cit note 151 at 29.

[153] ibid

[154] M E King op cit note 151 at 29-30

[155] ibid

[156] M E King op cit note 151 at 30.

[157] ibid

[158] Sections 76, 77(2) & 158(a) of the Companies Act 71 of 2008

the circumstances under which a director will be deemed to have acted in the best interests of his company and with the requisite care, skill, and diligence.[159]

This chapter aims to discuss the legal status and enforceability of the King IV Code and builds on the premise that compliance with King IV practices assumes fulfilment of the duty to have taken reasonably diligent steps to become informed about a matter. In order to better understand the business judgement rule, this chapter will first discuss types of directors and their responsibilities and examine how the business judgement rule and sections of the 2008 Act promote the enforcement of the King IV Code. Furthermore, this chapter draws a correlation between the duties contained in the Companies Act and the King IV Code to explain how the Code has influenced the corporate governance provisions in the Companies Act. It was for this specific purpose that King Code IV was released after the promulgation of the Companies Act 71 of 2008.

2. Types of directors

According to section 76(1) of the Companies Act, a 'director' includes an alternate director and a prescribed officer or a person who is a board member of a company or a member of the audit committee of a company.[160] An alternate director is a person who is elected or appointed as a member of the board of the company in substitution for a particular appointed or elected director for that company.[161] The board refers to the board of directors of a particular company.[162] The 'director' refers to a member of the board, an alternate director, or any person occupying the position of a director or alternate director.[163] An *ex officio* director is one who holds office as director solely as a consequence of holding some other office, status or designation in accordance with that company's memorandum of association.[164] A prescribed officer is one who is the holder of an office that has been designated by the Minister in terms of section 66 of the Act.[165]

[159] S 76(4) of the Companies Act 71 of 2008; *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 5 SA 179 at paras 58 and 73

[160] The Companies Act 71 of 2008 section 76 (1)

[161]The Companies Act 71 of 2008 Chapter One section 1

[162] ibid

[163] ibid

[164] ibid

[165] ibid

The Chief Executive Officer (CEO) of a company manages the general operational aspects of a company.[166] He or she is the leader of the management team which implements the strategies of the board and is usually accountable to the board.[167] The CEO of a company is the highest-ranking executive in the company.[168] Other titles by which a CEO is referred to include: managing director, president, and chief executive.[169] The primary responsibilities of the CEO include managing the operations and resources of the company, being the public face of the company, making major corporate decisions and acting as the main link between the board of directors and corporate operations.[170]

The financial actions of a company are managed by the Chief Financial Officer (CFO),[171] whose duties include financial planning, tracking cash flow, analysing the company's financial strengths and weaknesses and proposing corrective actions.[172] The CFO is also responsible for ensuring that the financial reports of the company are completed in an accurate and timely fashion.[173] His or her tasks largely concern financial matters.[174] The Chief Operating Officer (COO) is responsible for the day-to-day operation and administration of the business,[175] involving execution of business plans and the implementation of plans made by the CEO, especially the specifics required for such implementation.[176]

The executive director is employed by the company[177] and is the manager or senior operating officer of an organisation which is usually a non-profit organisation and is

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166 *Investopedia Online Dictionary* available at *https://www.investopedia.com/terms/c/ceo.asp*, accessed on 28 February 2019

167 M E King op cit note 151 at 34

168 *Investopedia Online Dictionary* op cit note 166

169 ibid

170 ibid

171 ibid

172 ibid

173 ibid

174 ibid

175 'Investopedia Online Dictionary' available at *https://www.investopedia.com/terms/c/coo.asp*, accessed on 28 February 2019

176 'Investopedia Online Dictionary' available at *https://www.investopedia.com/terms/c/chair-of-the-board.asp*, accessed on 28 February 2019

177 M E King op cit note 151 at 35

responsible for carrying out the decisions of the board.[178] The duties of this director include strategic planning, working with the board of directors and operating within a budget.[179] These duties are similar to that of a CEO in a for-profit company.[180] The executive director of a non-profit organisation is also involved in fundraising efforts and promoting the organisation to raise public awareness and boost membership.[181]

The non-executive director is not employed by the company but is regarded as a director.[182] This director is expected to focus on board matters and not executive direction and thereby provide an independent view of company operations. This director's main attributes should be independence, impartiality, experience and special knowledge.[183] Non-executive directors may also be referred to as external directors, independent directors or outside directors; whilst the non-executive director is a part of the board of directors, he or she is not part of the executive team and not engaged in the day-to-day management of the company; other duties include monitoring executive directors, acting in the interests of the stakeholders, policy-making, and planning exercises.[184] As they do not hold managerial positions, they are expected to have enhanced objectivity with regards to the interest of the company as opposed to the executive directors who may be faced with agency or conflict of interest problems.[185] The non-executive director thus challenges the direction and performance of the company.[186] Independent directors are tasked with keeping executive directors and the board as a whole accountable – objectively assessing board strategy, performance and risk, untainted by the distraction of day-to-day operations.[187] The

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178 'Investopedia Online Dictionary' available at *https://www.investopedia.com/terms/e/executive-director.asp,* accessed on 28 February 2019

179 ibid

180 ibid

181 M E King op cit note 151 at 35

182 ibid

183 Institute of Directors (IoDSA) 'What is the role of the Non-Executive Director?' available at *https://www.iod.com/services/information-and-advice/resources-and-factsheets/details/What-is-the-role-of-the-NonExecutive-Director* , accessed on 28 June 2019

184 'Investopedia Online Dictionary' available at https://www.investopedia.com/terms/n/non-executive-director.asp, accessed on 28 February 2019

185 ibid

186 ibid

187 ibid

independent non-executive director is neither employed by nor a shareholder of the company, and only receives his fee as a director.[188]

The board oversees the company as a whole, and the head of the board is referred to as the chairman.[189] While the board may overrule decisions of the CEO, the chairman of the board may not on his sole discretion overturn decisions of the CEO.[190] The chairman of the board acts as a link between the board and upper management of the company in order to ensure that the firm's duties to shareholders are fulfilled.[191] The chairman ensures that the role of the board relates to strategy and not operational activity.[192] However the chairman might be marginally involved in the day-to-day running of the company by serving a remote advisory role and providing ultimate oversight of actions undertaken by the executive.[193] The chairman (with the input of the rest of the board) sets goals and objectives which must be achieved by the executive.[194] The chairman may simultaneously hold the position of a CEO, in which case he or she performs the functions of both offices.[195]

3. Duties of directors

Prior to the 2008 Act, corporate governance duties were undertaken voluntarily in accordance with the King Codes,[196] the first of which created the realisation that companies could not function independently from society and the environments,[197] with greater emphasis on

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188 M E King op cit note 151 at 36

189 M E King op cit note 151 at 34; and 'Investopedia Online Dictionary' available at *https://www.investopedia.com/terms/c/ceo.asp,* accessed on 28 February 2019

190 'Investopedia Online Dictionary' available at *https://www.investopedia.com/terms/c/chair-of-the-board.asp* and *https://www.investopedia.com/terms/c/ceo.asp,* accessed on 28 February 2019

191 ibid

192 M E King op cit note 151 at 41

193 'Investopedia Online Dictionary' available at *https://www.investopedia.com/terms/c/chair-of-the-board.asp,* accessed on 28 February 2019

194 ibid

195 ibid

196 T Mongalo 'An Overview of Company Law Reform in South Africa: From the Guidelines to the Companies Act 2008' in T Mongalo (ed) *Modern Company Law for a Competitive South African Company* (2010)

197 M E King S C *Executive Summary of the King Report 2002 (2002)* 6

accountability and reporting.[198] The 2008 Act[199] embodied certain King Code principles. Section 7(b)(iii) of the Act [200] states that the purpose of the Act is to encourage transparency and high standards of corporate governance, echoing the very purpose of the King Codes i.e. the promotion of high standards of corporate governance in South Africa.[201]

This section aims to discuss the duties covered in section 76, disclosure requirements of section 75 and briefly comment on the parallels between section 76 and the common law; and to draw a correlation between relevant King Code II principles and corporate governance provisions in the 2008 Act. The focus on King II in this section is due to the fact that King III and King IV were released after the 2008 Act; King II is therefore utilised to illustrate its effect on corporate governance provisions in the 2008 Act.

3.1 The duty to act in good faith and for a proper purpose:

King II provides that directors must act independently, exercise utmost good faith, honesty and integrity in their actions related to the company.[202] Section 76(3)(a) provides that a person acting in the capacity of a director of a company must exercise the powers and perform the functions of director in good faith and for a proper purpose.[203] Section 76(3)(a) therefore also covers two common law duties i.e. the duty to act in good faith; and the duty to act for a proper purpose. The chief duty of a person in the position of a director is to exercise his powers and perform his functions *bona fide* and for a proper purpose[204]; the overarching duty is to act in the best interests of the company,[205] a duty qualifying all his other powers.[206]

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[198] Evidenced by the release of the Public Finance Management Act 1 of 1999 or the Insider Trading Act 135 of 1998 or the update of the Banks Act 94 of 1990

[199] GN 421 of GG 32121, 9/04/2009

[200] The Companies Act 71 of 2008

[201] Institute of Directors in Southern Africa and The King Committee on Corporate Governance in South Africa *King II Report on Corporate Governance in South Africa* (2002) (King II)

[202] ibid 54

[203] The Companies Act 71 of 2008 section 76(3) *(a)*

[204] ibid

[205] The Companies Act 71 of 2008 section 76(3) *(b)*; and *Visser Sitrus* supra note 159 at para 80

[206] *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd* 2006 (5) SA 33 at para 16.6

The overarching and paramount fiduciary duty of directors is the duty of good faith, and it is this duty from which other fiduciary duties are derived.[207] Section 76 requires the *bona fide* assessment of a director to have a rational underpinning.[208] Good faith requires subjective honesty which in turn requires sincerity; corporate managers must believe with sincerity that their conduct is in the best interest of the corporation, and that statements made as managers are truthful, and their conduct within the boundaries of decent behaviour.[209] Directors must not breach the generally accepted standards of decency applicable to business conduct, reflecting the reasonable expectations of the company.[210] Good faith requires fidelity to office − meeting the reasonable expectations of shareholders and faithfulness to duties and obligations.[211] Office refers to the position of duty or trust in an organisation and fidelity to office means acting in a manner which might reasonably be expected, given the constitution of the office and the organisation within which the office is embedded.[212]

Directors may not knowingly cause the corporation to disobey the law,[213] despite a rational belief that such transgression would maximise corporate profit or shareholder gain by reasoning that the profit outweighs the cost of the transgression.[214] Society would not thrive if individuals thought themselves free of moral obligations when acting on behalf of an organisation.[215] The obligation of candour involves the obligation not to mislead by making intentionally or recklessly false or misleading statements in their managerial capacity, and extends to honestly inform other corporate members about facts which would be material to those members in making decisions or discharging their duties.[216]

The duty to act for a proper purpose means that directors may not use the powers conferred upon them for a purpose foreign to the power or to gain some private

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[207] FHI Cassim… et al 2 ed (2012) Contemporary Company Law 2 ed (2012) 523

[208] *Visser Sitrus* supra note 159 at para 75-76

[209] MA Eisenberg 'The Duty Of Good Faith In Corporate Law' (2006) 1 *Berkely Law Scholarship Repository* available at *https://scholarship.law.berkeley.edu/facpubs*, accessed on 13 May 2019 at 22

[210] A Ponta 'Good Faith in Corporate Law – An Independent Fiduciary Duty or an Element of the Duty of Loyalty?' (2016) 6(2) *Juridical Tribune* 121

[211] A Ponta op cit note 210 at 122

[212] ibid

[213] MA Eisenberg op cit note 209

[214] MA Eisenberg op cit note 209 at 31

[215] MA Eisenberg op cit note 209 at 32

[216] MA Eisenberg op cit note 209 at 39

advantage.[217] They must not misuse or abuse their powers nor must they use such powers for an improper or impermissible purpose.[218] If the powers of a director (as described in the articles of association, now referred to as the memorandum of incorporation), are executed for an improper or impermissible purpose it will constitute a breach of the director's fiduciary duties in which case the courts may intervene.[219]

3.2 The duty to act in the best interests of the company

King II provides that directors must act in the best interests of the company[220], and never for any sectoral interest.[221] Section 76(3)(b) of the 2008 Act almost identically provides that directors exercise their powers and perform their functions in the best interests of the company.[222] The common law duty to act in the best interest of the company means that fiduciary duties are owed by the director to the company, and this duty does not replace other common law or statutory duties; consequently, should a director be held liable for a breach of a fiduciary duty, he may also be held liable for a breach of the duty of care, skill, and diligence.[223] In the case of *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd*[224], the court held that accepting appointment as a director of a listed company meant acceptance of the compatible duties and obligations, and directors may not simply abandon the company because it is convenient to do so.[225]

3.3 The duty to avoid conflicts of interest

King II explains that conflicts of interest may arise in transactions between the company and its directors, managers or large shareowners.[226] Such conflicts should be avoided by directors,

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[217] *Mills v Mills* [1938] HCA 4; 60 CLR 150 at page 185

[218] JJ du Plessis 'Directors' Duty to Use their Powers for Proper or Permissible Purposes' (2004) 16 *SA Mercantile Law Journal* 310

[219] *Ngurli Ltd v McCann* 1953 (90) CLR 425 at page 439-440

[220] Institute of Directors in Southern Africa (King II) op cit note 201 at 55

[221] ibid

[222] The Companies Act 71 of 2008 Act of 2008

[223] P Delport et al *Henochsberg on The Companies Act 71 of 2008* (2011) 298(7) – online version available on Lexis Nexis

[224] *Minister of Water Affairs v Stilfontein* op cit note 206 at para 16.5

[225] *Minister of Water Affairs v Stilfontein* op cit note 206 at para 16.6

[226] Institute of Directors in Southern Africa (King II) op cit note 201 at 47; 55

and their personal interests should not take precedence over the interests of the company and its shareowners; furthermore, such conflict must be disclosed at the earliest opportunity.[227] Directors must keep information learned in their capacity as director strictly confidential and not divulge it to any third party without the permission of the company.[228] Section 75 and section 76(2)(a) echo this principle.[229]

Section 75 of the 2008 Act requires the director to disclose his personal financial interests,[230] defined as a 'direct material interest of that person, of a financial, monetary or economic nature, or to which a monetary value may be attributed'.[231] Section 75 applies to all directors as defined in the 2008 Act (see paragraph 2 above), including members of board committees and audit committees.[232] Section 75(5) requires directors with a personal financial interest in a matter to be considered at a meeting of the board or knows a related person who holds such an interest, to disclose the interest and any information material to this interest. In such a case, the director must recuse him/herself from the meeting,[233] and refrain from executing any documents in relation to the matter at hand unless specifically requested or directed to do so by the board.[234] In the absence of such disclosure a resolution or agreement approved by the board is *pro tanto* invalid unless validated in accordance with section 75(7) by ordinary resolution or court order in terms of section 75(8).

Section 76(2) *(a)* prohibits the director from using his position as director or information obtained as director to gain an advantage for himself or any other person, or to knowingly cause harm to the company or a subsidiary of the company.[235] This duty applies

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[227] Institute of Directors in Southern Africa (King II) op cit note 201 at 47;55

[228] Institute of Directors in Southern Africa (King II) op cit note 201 at at 55.

[229] The Companies Act 71 of 2008

[230] ibid

[231] S 1 the Companies Act 71 of 2008: Personal financial interest does not include any interest held by a person in a unit trust or collective investment scheme in terms of the Co11ective Investment Schemes Act, 2002 (Act No. 45 of 2002),unless that person has direct control over the investment decisions of that fund or investment; and in s 1the Companies Act 'material' means significant in the circumstances of a particular matter, to a degree that is— (a) of consequence in determining the matter; or (b) might reasonably affect a person's judgement or decision-making in the matter;

[232]The Companies Act 71 of 2008 Section 75(1).

[233] The Companies Act 71 of 2008 Section 75(5)

[234] The Companies Act 71 of 2008 Section 75(5)

[235] The Companies Act 71 of 2008

not only to actual conflicts but also to possible conflicts.[236] This section reflects the common law 'no profit' and 'corporate opportunity' rules.[237] A 'common sense' approach should be used when assessing whether a conflict could have reasonably been contemplated; *bona fides* is not a consideration at that stage.[238] The common law 'no profit rule' is founded on the basis that a person is not allowed to make a secret profit from a person in a relationship of trust and confidence.[239]

A director may procure economic opportunities for a company ('corporate opportunity').[240] However a director is in breach of a breach of fiduciary duty should this corporate opportunity be obtained for his own benefit or for the benefit of a third person − even where the company would have been financially unable to acquire the opportunity or where the other contracting party was unwilling to liaise with the company.[241] The director may only exploit the corporate opportunity for the company, unless the company expressly consents otherwise.[242] South African courts generally apply the 'line of business test'[243] by which the opportunity in question corresponds with existing and prospective company activities and/or the interests of the company.[244]

3.4 The duty of care, skill, and diligence

King II provides that directors, both executive and non-executive, are bound by the duty to exercise the degree of skill care, skill and diligence[245] as may reasonably be expected of someone in their position.[246] The duty of care and skill extends to equipping themselves with

[236] *Phillips v Fieldstone Africa (Pty) Ltd and Another* 2004 (3) SA 465 (SCA) at para 31.

[237] *Regal Hastings v Gulliver* 1942 [1] A11 ER 378; *Da Silva And Others v Ch Chemicals (Pty) Ltd* 2008 (6) SA 620 (SCA).

[238] M Havenga 'Directors exploitation of Corporate Opportunities and the Companies Act 71 of 2008' (2013) 2 *TSAR* at 257-268 citing *Boardman v Phipps* 1967 (2) AC 46, 1966 [3] A11 ER 721 (HL) at page 33.

[239] *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 177-178

[240] K de Klerk 'Corporate Opportunities and A Director's Fiduciary Duty' (2016) *Without Prejudice* 38-40

[241] ibid

[242] ibid

[243] M Havenga 'Corporate Opportunities: A South African Update' (1996) 8(1) *South African Mercantile Law Journal* 54

[244] D Menzies 'Corporate Opportunity' (1961) *Harvard Law Review* 765 at 768

[245] Institute of Directors in Southern Africa (King II) op cit note 201 at 54

[246] ibid

an adequate understanding of the business of the company and the effects thereof on the economy so as to enable the director discharge his/her duties properly.[247]

Section 76(3)(c) of the 2008 Act provides that a director's functions must be accompanied by a reasonable degree of skill, care and diligence performed with the necessary degree of skill, care and diligence as may be reasonably expected of a person who possesses the general knowledge, skill and experience of that director.[248]

A breach of trust is committed when a person who stands in a fiduciary relationship to another acts for his own benefit or to the prejudice of the other.[249] The cause of action for a breach of fiduciary duty is therefore *sui generis* and does not derive from contract or delict.[250] The cause of action is a breach of trust.[251] The cause of action for a breach of the duty of care, however, is based on delict, requiring the elements of wrongfulness, fault, loss suffered and causation to be proved for damages to recoverable by the company.[252]

4. The Business judgement Rule

Chapter nine of King II discusses the business judgement rule and recommends that the Standing Advisory Committee on Company Law consider whether it should be statutorily adopted.[253] According to King II, the business judgement rule protects directors from being held accountable for business decisions made in good faith, without conflict of interest, on an informed basis and rational at the time.[254] The rule is complementary to the duty of care and is not a general shield for directors.[255] The rule implies directors are not liable in damages to shareholders for judgment calls, except where the director has failed to exercise business

[247] ibid

[248] The Companies Act 71 of 2008

[249] *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168

[250] ibid

[251] E Jones 'Directors' Duties: Negligence and the Business Judgment Rule' (2007) 19 *South African Mercantile Law Journal* 334

[252] See discussion in E Jones 'Directors' Duties: Negligence and the Business Judgment Rule' (2007) 19 *South African Mercantile Law Journal* 334-335

[253] Institute of Directors in Southern Africa (King II) op cit note 201 at 70

[254] ibid

[255] ibid

judgement on an informed basis and without the requisite rationality and absence of conflict of interest.[256]

According to Branson, the business judgement rule is not a rule as such as it lacks mandatory content; it is rather a standard for judicial review of business decisions.[257] The business judgement rule does not cover the procedures followed before making a decision, but only the final decision.[258] The courts would not exonerate the director where a decision was made in good faith but without the procedural due care.[259] The business judgement rule may at times appear to excuse, even license, unacceptable behaviour; however, the outcome often depends on the plaintiff failing to establish the necessary facts which would render the defence inapplicable or because the prevailing standards of conduct did not warrant liability.[260]

The business judgement rule is premised on the fact that as human beings, directors are fallible and cannot please every shareholder all the time.[261] It recognises the fallibility of human nature and the need to advance business and judicial economy, which would be impossible if every corporate transaction was challenged on review by disgruntled shareholders..[262] The rule encourages risk taking, prevents judicial second-guessing, permits director behaviour to be swayed by market conditions and encourages competent persons to be directors and not avoid shareholder management.[263]

The business judgement rule is found in section 76(4) of the 2008 Act[264] and is not intended to be a fortress for directors, as those directors who act dishonestly or

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[256] ibid

[257] D M Branson 'The Rule That Isn't a Rule – The Business Judgment Rule' (2002) 36(3) *Valaparaiso University Law Review* 631 available at: *http://scholar.valpo.edu/vulr/vol36/iss3/3*

[258] J Leach *The Correct Understanding of the Business Judgment Rule in Section 76(4) of the Companies Act 71 of 2008: Avoiding the American Mistakes* (unpublished LLM thesis, University of Cape Town, 2014) 14

[259] ibid

[260] SS Arsht 'The Business Judgment Rule Revisited' (1979) 8(1) at page 96 *Hofstra Law Review* available at, *https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1269&context=hlr* accessed on 25 February 2019.

[261] SS Arsht op cit note 260 at 95

[262] ibid

[263] DP Lee "The Business Judgment Rule: Should it Protect Non-Profit Directors" (2003) 103 *Columbia Law Review* 925 at 945-960

[264] The Companies Act 71 of 2008

irrationally may be held liable for a breach of their duty to act in the best interests of the company and with the necessary care, skill, and diligence.[265] According to Linda Musakwa, the question whether a director has taken reasonably diligent steps to become informed about the matter may be considered in the context of the Lex Aquilia,[266] having regard to the demands of public. The determination as to whether diligent steps were taken should follow the general principles of delict, applying the wrongfulness test.[267] Musakwa further mentions that the determination would depend on various factors, such as whether the director's experience and skills, the functions assigned to or delegated by him, the nature of the company and accessibility of pertinent information.[268] The particular circumstances of the decision and the status of the director (subjective factors) will dictate the extent of the steps required; however, the test is objective in that due regard must be given to the *boni mores*, the convictions of the community.[269]

Section 76(4)(ii)(aa) provides that the director must refrain from having a material personal financial interest in the subject matter of a decision and must hold no reasonable basis to know that any related person had such interest in the matter.[270] 'Material' means the interest should be more than insignificant or financially immaterial. By way of example, a director would not be able to rely on the business judgement rule where the board purchased land priced above market value from a fellow director.[271] A decision arising from significant influence exerted by one director over the other would not be protected by the business judgement rule.[272]

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265 L Musakwa 'Shielding Directors against Liability Imputations: The Business Judgment Rule and God Corporate Governance' *Speculum Juris* 2013 27 (1) at page 27 available at http://specjuris.ufh.ac.za/shielding-directors-against-liability-imputations-business-judgement-rule-and-good-corporate, accessed on 7 December 2018

266 L Musakwa op cit note 265 at 29

267 ibid

268 L Musakwa op cit note 265 at 30

269 L Musakwa op cit note 265 at 31

270 The Companies Act 71 of 2008

271 L Musakwa 'Shielding Directors against Liability Imputations: The Business Judgment Rule and Good Corporate Governance' *Speculum Juris* 2013 27 (1) at page **31** available at http://specjuris.ufh.ac.za/shielding-directors-against-liability-imputations-business-judgement-rule-and-good-corporate, accessed on 7 December 2018

272 L Musakwa op cit note 265 at 31

Section 76(4)(iii) of the 2008 Act provides that the director must have a rational foundation for believing that the decision made was in the best interests of the company.[273] A rational belief implies independence with respect to the action in issue.[274] Independence means basing the decision on the merits of the issue and not being governed by extraneous considerations.[275] Musakwa asserts that rational belief is determined by an objective test; a well-informed director who takes a decision which a reasonable person in his/her position would have taken, may be said to have had a rational basis for the decision.[276]

5. Conclusion

The increase in corporate governance failures in major companies in South Africa[277] has caused many to seek reasons thereof; to demand that the parties responsible be held liable, how they might be held liable; and how such events can be prevented from happening again. This section serves to discuss the legal status of the King IV Code in relation to the business judgement rule and the 2008 Act and to determine what particular sections of the 2008 Act apply and how these sections may be used to enforce the King IV Code. The need for corporate governance to be enforced more stringently will be investigated as will become apparent in chapter three.

As discussed in chapter one[278], the King IV Code is a voluntary set of principles guiding good corporate governance practices.[279] The system adopted in South Africa comprises some voluntary corporate governance principles and some embodied in statute law.[280] King IV argues against a 'comply or else' regime or a uniform approach because the activities of businesses are wide-ranging and it would be illogical to apply the

[273] The Companies Act 71 of 2008

[274] L Musakwa op cit note 265 at 31

[275] ibid

[276] L Musakwa op cit note 265 at 32

[277] Such as South African Airways, South African Broadcasting Commission, DENEL, Eskom, Steinhoff, etcetera.

[278] See page 14 onward

[279] Institute of Directors in Southern Africa and The King Committee on Corporate Governance in South Africa *King IV Report on Corporate Governance in South Africa* (2016) at 35

[280] ibid

same principles to all.[281] It might encourage mindless compliance instead of a reasoned application of best practices for respective companies.[282] The King IV report explains that the law is not separate from good governance; the Code's recommendations influence and affect practices adopted and implemented by governing bodies.[283] The more widely such principles are adopted, the more likely a court is to regard such conduct as meeting the required standards of care.[284] In this way, voluntary principles find their way into the common law, ultimately resulting in liability for non-compliance.[285]

In addition, compliance with corporate governance principles is relevant in determining whether a respective director has complied with the business judgement rule.[286] In particular, corporate governance principles may assist the court in deciding what conduct qualifies to exclude a director from liability.[287] It has been argued that section 5 of the 2008 Act must be interpreted more broadly in order to provide for the application of corporate governance codes[288] i.e. section 5 of the Act provides that it must be applied so as to give effect to the purpose set out in section 7(b)(iii) to promote the development of the South African economy by encouraging transparency and high standards of corporate governance.[289] Furthermore, section 158(a) of the 2008 Act provides that a court must develop the common law in order to promote the realisation and enjoyment of the rights contained in the 2008 Act.[290]

It is argued further that corporate governance in South Africa has evolved from being a soft ethical issue to a real factor pertinent to the success of capital markets and a good corporate economy.[291] Significantly, compliance with the duties contained in the King IV Code may allow a director to rely on the protection afforded by the business judgement

[281] ibid

[282] ibid

[283] ibid

[284] ibid

[285] ibid; see Section 77 of The Companies Act 71 of 2008 for the legislation in relation to the liability of directors

[286] See above

[287] See above

[288] L Musakwa op cit note 265 at 35

[289] ibid

[290] The Companies Act 71 of 2008 section 158

[291] L Musakwa op cit note 265 at 35-36

rule as it may show that he took reasonably diligent steps to become informed of the matter[292], and acted in the best interests of the company with the requisite degree of care, skill, and diligence.[293]

Corporate governance principles in the King II Report are consonant with certain provisions of the Companies Act of 2008. The corporate governance principles in the 2008 Act draw both from the common law and the King II report. Whilst the King Code has largely influenced the growth of South Africa's corporate governance regime, it may be legitimately argued the King IV Code should be incorporated into legislation to strengthen this regime and to ensure improved compliance. The investigation conducted in chapter three finds the recommendations in chapter four that the King IV Code provisions may have greater impact if incorporated into legislation.

[292] Institute of Directors in Southern Africa (King IV) op cit note 279 at 35

[293] The Companies Act 71 of 2008 section 76

CHAPTER THREE

Corporate governance and relevant case studies

1. Defining Corporate Governance:

According to Sir Adrian Cadbury, corporate governance is about maintaining equilibrium between economic and social goals and between individual and communal goals; the purpose of governance frameworks is to urge an efficient use of resources and simultaneously to demand accountability for the administration and discharge of those resources.[294] Echoing Sir Adrian Cadbury, Ramani Naidoo, author of *Corporate Governance: An Essential Guide for South African Companies*, explains that corporate governance is the mode by which a company is managed and controlled, embodying a constantly monitored system of checks and balances in order to guarantee an equilateral exercise of power within the company. It is a system that promises compliance by the company of its legal and regulatory requirements, requiring processes which identify, assess, and manage risks to ensure the sustainability of the company; and it develops practices which make the company more accountable to the broader society in which it operates.[295] Corporate governance is answerable leadership – accountable, transparent, and which strikes a balance between economic, social, individual, and collective goals and aligns as closely as possible the interests of individuals, the company, and society as a whole.[296]

Law professor, Roberta Romano, and economists Sanjai Bhaghat and Brian Bolton have said: 'The key focus of U.S. corporate law and corporate governance systems is what is referred to as an agency problem: an organizational concern that arises when owners – in a corporation, the shareholders – are not the managers who are in control.'[297] Corporate governance essentially answers the need for mechanisms which address and simplify issues created by the separation of ownership and control; it seeks legal, economic, and social mechanisms which may alleviate the issue, and which may compel managers of the company

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[294] A Cadbury 'Forward' in Stijn Claessens *Corporate Governance and Development* (2003) vii available at *https://ssrn.com/abstract=642721*, accessed on 5 April 2018

[295] R Naidoo Corporate Governance: An Essential Guide for South African Companies (2002) at 1-2

[296] ibid

[297] S Bhaghat, B Bolton & R Romano *The Promise and Peril of Corporate Governance Indices* (2007) 3-4 available at *https://doi.org/10.2139%2Fssrn.1019921*, accessed on 24 May 2018

(agents) to run the corporation in a manner which benefits all parties concerned (the company, shareholders and stakeholders).[298] Corporate governance is a multifaceted concept. Distinctions may be made between (1) Internal and external dimensions of corporate governance; (2) Shareholder and stakeholder approaches to corporate governance; and (3) Normative and descriptive definitions of corporate governance.[299]

1. Internal and external corporate governance mechanisms: The internal dimensions of corporate governance focus on the role and functions of ownership structure, boards of directors, CEO dichotomy, and director and executive compensation.[300] According to the *African Journal of Business Ethics*, the distinction between internal and external governance centres concerns whether control of corporate governance is within or outside of the corporation; where it is within the board and executive management, it may be regarded as internal, by which a company directs and controls its own affairs.[301] External corporate governance refers to the legal and regulatory setting within which the company functions, including the market.[302] This refers to the control of the company through institutions such as the state, the judiciary and stock exchanges by their determination of the rules, laws and regulations according to which the company must function to protect shareholders and to prevent the failure of the market on account of malpractice.[303] Market control refers to the expectations of shareholders that the companies in which they invest will be managed proficiently, achieving of maximum value and productivity with minimal wasted effort and expense.[304]

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[298] H Wells 'The Birth of Corporate Governance' (2010) 33(4) *Seattle University Law Review* 1252 available at *https://ssrn.com/abstract=1581478*, accessed on 25 May 2018

[299] GJD Rossouw 'Balancing corporate and social interests: Corporate governance theory and practice' (2014) *African Journal of Business Ethics* 28-29 available at *https://doi.org/10.15249%2F3-1-72*, accessed on 16 February 2018

[300] D K Fan, CM Lau & S Wu 'Corporate Governance Mechanisms' in CM Lau & AS Tsui (eds) *The Management of Enterprises* (2002) 211-239 available at *https://doi.org/10.1007%2F978-1-4615-1095-6_10* accessed on 18 May 2018

[301] GJ D Rossouw op cit note 299

[302] GJ D Rossouw op cit note 299 at 29

[303] ibid

[304] ibid

2. Shareholder and stakeholder approach to corporate governance: According to the *African Journal of Business Ethics*, the distinction between (i) the shareholder and (ii) the stakeholder approach to corporate governance depends on 'for whose benefit should the company be governed?'[305]

i. The shareholder value doctrine prioritises shareholder interest in the form of value and profit; and in particular the interests of minority shareholders must be adequately protected. Managers therefore implement strategies to maximise shareholder value.[306] Corporate governance in this sense answers the agency problems of powerless shareholders and autonomous management (the issue of separation of ownership and control).[307]

ii. A stakeholder is defined as 'any group or individual who can affect or is affected by the achievement of the organization objectives'.[308] This approach recognises the importance of those who have a stake in the company,[309] including consumers, employees and communities.[310] The stakeholder notion perceives that the company is responsible to groups other than those who hold shares in the company − those who have a *stake* in the company (own emphasis).[311] There are wide and narrow definitions of a stakeholder.[312] The wide definition includes any identifiable group or individual who can affect the performance of a company, including public interest groups, protest groups, government agencies, trade associations, competitors, unions, employees, customers, and shareowners.[313] The narrow definition of a stakeholder

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[305] ibid

[306] A Chilosi & M Damiani *'Stakeholders vs. Shareholders in Corporate Governance'* (2007) 3 available at *https://doi.org/10.2139%2Fssrn.975293*, accessed on 19 May 2018

[307] H Wells op cit note 298

[308] R E Freeman *Strategic Management: A Stakeholder Approach* (reprint) (2010) 25

[309] R E Freeman The Stakeholder Approach Revisited (2004) available at *https://www.researchgate.net/publication/228946075_The_Stakeholder_Approach_Revisited*, accessed on 29 August 2018

[310] A Chilosi & M Damiani op cit note 306

[311] R E Freeman & D L Reed 'Stockholders and Stakeholders: A New Perspective on Corporate Governance' (1983) 25(3) California Management Review 89 available at https://doi.org/10.2307%2F41165018, accessed on 19 May 2018

[312] R E Freeman & D L Reed op cit note 311 at 91

[313] ibid

includes identifiable persons or groups upon whom the company is dependent. This may include employees, customers, suppliers, key government agencies, shareowners, and certain financial institutions.[314] Corporate strategy takes these bodies into account. In uncertain environments, the company must take external forces into account, which may influence the objectives of the company.[315]

3. Normative and descriptive definitions of corporate governance: A descriptive definition of corporate governance provides an account of practices and ideas that are generally identified with corporate governance.[316] The purpose of the descriptive definition is to understand how the interests of shareholders are managed and represented, with the company viewed as a constellation of interests, some competitive, and others, cooperative.[317] The normative definition of corporate governance focuses on the moral and/or philosophical guidelines allied with the management of the company.[318] A normative definition of corporate governance recommends a standard of corporate governance which should be attained,[319] purporting to answer questions such as 'what are the responsibilities of the company?' and 'why should companies take care of interests other than shareholder interests?'[320]

South Africa follows a stakeholder approach in which not only the interest of shareholders is recognised, but also corporate social responsibility to all stakeholders and local communities.[321]

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[314] ibid

[315] ibid

[316] GJ D Rossouw op cit note 299 at 29

[317] C Fontaine, A Haarman, & S Schmid 'The Stakeholder Theory' 2006 *Semantic Scholar* 14 available at *https://pdfs.semanticscholar.org/606a/828294dafd62aeda92a77bd7e5d0a39af56f.pdf* accessed on 22 May 2018

[318] ibid

[319] GJ D Rossouw op cit note 299 at 30

[320] ibid

[321] ibid

2. *Brief history of corporate governance*[322]

The concept of corporate governance originated in the 16th and 17th centuries in the heyday of the Dutch East India Company, Hudson's Bay company and other large organisations in which tension was created between owners and managers i.e. the agency issue of ownership and control.[323]

The 19th century brought with it an economic boom in the United States dominated by massive industrial enterprises.[324] However toward the end of the 20th century, Russia, the greater Asian region and Brazil encountered profound financial crises in which the behaviour of the corporate sector and deficiencies in corporate governance threatened the stability of the global financial system.[325] Early in the 20th century, the need for transformation in the corporate economy was recognised; although the exact nature of the changes was not known, it was accepted that the change would include a separation of ownership and control.[326]

A surge of outrageous wrongdoing in the United States and Europe in the last two decades of the 20th century undermined confidence in the corporate sector and renewed global interest in corporate governance as a means to protect shareholders and to address deficiencies at board level.[327] The events revealed failures in the regulatory system and the way in which companies were being run, and in the result the Cadbury Report[328] was

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[322] For a more detailed history of corporate governance see BR Cheffins *The History of Corporate Governance* (2012) 1 available at *http://ssrn.com/abstract=1975404*

[323] B R Cheffins *The History of Corporate Governance* (2012) 1 available at http://ssrn.com/abstract=1975404, accessed on 16 February 2018

[324] H Wells op cit note 298 at 1253

[325] S Claessens *Corporate Governance and Development* 1-3 available at *http://documents.worldbank.org/curated/en/913921468159897693/Corporate-governance-and-development*, accessed on 22 February 2018

[326] H Wells op cit note 298

[327] A Banick… et al *Corporate Governance, Responsibility and Sustainability: Initiatives in Emerging Economies* (2016) 78-79

[328] The creation of *'The Report of the Committee on the Financial Aspects of Corporate Governance (1992)'* (known as the Cadbury Report on Corporate Governance) was a reaction to the increasing lack of investor confidence in the accountability and honesty of listed companies. For a copy of the report see *http://www.ecgi.org/codes/documents/cadbury.pdf*

published. [329] Policymakers grew accustomed to the notion of corporate governance as the corporate world became aware of the potentially disastrous consequences of a feeble corporate governance system.[330]

3. *Corporate Governance and the King IV Code*

South Africa's transition to democracy in 1994 brought the idea of corporate governance to the forefront. The King Committee Report on Corporate Governance (King I) was published followed by King II, King III and King IV in 2002, 2009, and 2016 respectively, placing South Africa on the global corporate governance map.[331]

King IV took into account the many fundamental changes in business and society of the 21st century,[332] noting especially that organisations functioned within the environment, society, and the economy and that they were affected by the way in which organisations generated revenue, impacting in turn on the organisations themselves.[333] The challenge of guiding the organisation toward sustainable operations (using less) to match the needs of a growing impoverished population took hold.[334] The duty of care became increasingly important and complex.[335] King IV reflected the relevance of these changes,[336] adopting an outcomes-based approach.[337] According to Parmi Natasen and Prier du Plessis the King IV Code signalled the message that corporate governance was a process that would assist organisations in accomplishing desirable goals.[338] King IV has organised recommended practices in line with the governance roles and responsibilities and thus represents a model

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[329] S Claessens op cit note 325

[330] ibid

[331] A Banick op cit note 327

[332] Institute of Directors in Southern Africa and The King Committee on Corporate Governance in South Africa *King IV Report on Corporate Governance in South Africa* (2016) page 3

[333] Institute of Directors in Southern Africa (King IV) op cit note 332 at 3-4

[334] Institute of Directors in Southern Africa (King IV) op cit note 332 at 4

[335] ibid

[336] Institute of Directors in Southern Africa (King IV) op cit note 332 at 4-6

[337] Institute of Directors in Southern Africa (King IV) op cit note 332 at 27

[338] P Natasen and P du Plessis 'Making Corporate Governance Universal' 23 January 2019 available at *https://www.iodsa.co.za/news/435112/Making-corporate-governance-universal.htm,* accessed on 1 November 2019

for governance in any area.[339] The King Codes have revolutionised corporate governance in South Africa.

4. Corporate governance failures at Steinhoff International Holdings NV and Eskom Holdings SOC Ltd

The purpose of including an analysis of the two companies (Steinhoff and Eskom) in this thesis seeks to discover the reason for the failures, the effectiveness of the 2008 Companies Act in addressing corporate governance deficiencies and how the King IV Code may assist in such cases if strictly applied.

4.1 *Steinhoff International Holdings NV: background*

Steinhoff International Holdings NV (hereinafter referred to as 'Steinhoff' or 'SIHL') is a wholesale, manufacturing and logistics company founded by Mr Bruno Steinhoff over 50 years ago; its ability to adapt to economic, social and political change over a period of five decades enabled the business to expand successfully.[340]

The first decade (1964-1974): In 1963, Mr Steinhoff presented his furniture to retailers across Germany, and within two years negotiated exclusive rights to represent suppliers in Saxony and Hesson.[341] In 1966, the company thrived on the opportunities presented by the German government's promotion of industrial growth and pan-European trade,[342] and in 1968 added railway access and furniture production to the traditional trading and import business.[343] In 1973, deliveries went up five-fold, turnover reached DEM 40 million and the company employed 105 people.[344]

The second decade (1974-1984): The company bypassed the Cold War restrictions and sourced furniture from the Soviet bloc's East Germany, Bulgaria, Romania, Denmark, Czechoslovakia, and Russia − as well as Italy, the Netherlands. In 1974 Steinhoff

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339 Institute of Directors in Southern Africa (King IV) op cit note 332 at 22

340 '50 Years of Steinhoff' available at *http://steinhoffinternational.com/50-years-video.php* accessed on 26 July 2019

341 ibid

342 ibid

343 ibid

344 ibid

opened a second factory. Its strategy to source furniture from the East and sell to a discounted market in the West proved successful; turnover rose to DEM 250 million, and the company employed 320 people.[345]

The third decade (1984-1994): Investments in infrastructure and technology strengthened the competitive advantage of the business.[346] A revolutionary paperless and fully automated warehouse and management system controlled the receiving, packing, storing, retrieving, and dispatching of furniture in 1987.[347] The year 1990 saw the conversion of Europe into a single market, enabling capital and services to move freely between countries.[348] Seven upholstery factories and a bedding factory were purchased by Steinhoff making it one of the largest producers of upholstered furniture in the German market.[349] By 1993, Steinhoff owned factories in Germany, Poland, Ukraine and Hungary and the business achieved a turnover of DEM 600 million and employed 3 000 people.[350]

The fourth decade (1994-2004): Claas Daunt, a German tax attorney, formed a partnership between Steinhoff Europe and Johannesburg furniture manufacturer GommaGomma. Steinhoff Furniture, Steinhoff Europe, and Steinhoff Africa were established with a consolidated listing of Steinhoff International on the JSE in 1998.[351] Costs were effectively managed by efficient distribution and logistics resulting in lower prices for their furniture range.[352] The group consisted of 87 factories and 26 distribution and sourcing locations in 10 countries by the end of the fourth decade.[353]

The fifth decade (2004-2014): The fifth decade was punctuated by continued development and exponential growth at an international level.[354] Steinhoff expanded into

345 ibid

346 ibid

347 ibid

348 ibid

349 ibid

350 ibid

351 ibid

352 ibid

353 ibid

354 ibid

Asia for low-cost sourcing and an import and sourcing division was established in China. Bruno Steinhoff retired as the executive chairman in 2008.[355]

Steinhoff today is a global retail group selling household goods, furniture, and general merchandise with more than 40 brands in over 30 countries.[356] The company boasts approximately 12 000 retail outlets, 26 manufacturing facilities, 130 000 employees and 150 000 containers shipped annually.[357] In South Africa, brands include PEP, Ackerman's, Russells, UNITRANS, Incredible Connection, HiFi Corp, and yet others.[358] Steinhoff has its headquarters in South Africa with a secondary listing on the JSE.[359] In 2015 Steinhoff acquired a primary listing on the Frankfurt Stock Exchange in Germany.[360] It is registered and has its corporate seat in Amsterdam in the Netherlands.[361]

4.2 *Steinhoff – what went wrong?*

On 5 December 2017, Steinhoff announced in a statement that new information related to accounting irregularities had surfaced, necessitating further investigation.[362] The company then requested PricewaterhouseCoopers (PwC) to conduct an independent investigation.[363] At the same time the then CEO, Markus Jooste resigned and Dr. Christo Wiese was appointed Executive Chairman (Delegated Supervisory Chairman) on an interim basis.[364] On top of all this the company announced a delay in the release of the audited 2017 consolidated financial

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[355] ibid

[356] Steinhoff International NV home page 'Welcome to Steinhoff' available at *http://steinhoffinternational.com/index.php,* accessed on 16 July 2019

[357] Steinhoff International NV home page 'About Steinhoff' available at *http://steinhoffinternational.com/who-we-are-and-what-we-do.php* accessed on 16 July 2019

[358] Steinhoff International NV 'Welcome to Steinhoff' op cit note 356

[359] 'Listing of Steinhoff NV' 7 December 2015 available at *https://irhosted.profiledata.co.za/steinhoff/2017_feeds/SensPopUp.aspx?id=262528*, accessed on 3 October 2018

[360] ibid

[361] Steinhoff 'Corporate Information' available at *http://www.steinhoffinternational.com/corporate-information.php,* accessed on 3 October 2018

[362] Stock Exchange News Service 'Steinhoff announces investigation into accounting irregularities' available at *www.sharenet.co.za/jsepdf/SENS_20171206_S392997.pdf* accessed on 27 September 2018

[363] ibid

[364] ibid

statements.[365] Steinhoff also informed investors that the company's 2015 and 2016 consolidated financial statements would have to be restated and could not be relied upon.[366] Between 28 March 2016 and 5 December 2016, Steinhoff shares fell from R95.66 per share[367] to R45.65 a share.[368] A day after news of accounting irregularities and the resignation of Mr Jooste the share price plunged 61 per cent[369] to R17.61.[370] Steinhoff shares today[371] are trading at R2.40 per share, approximating to a 97 per cent[372] fall over five years (2014-2018) from its high at the end of March 2016.[373] In 2015, Steinhoff revealed in a press release that the offices of a subsidiary (SIHL) in the town of Westerstede, Germany were searched as part of a tax investigation.[374] The investigation related to the propriety of arm's length valuations and accounting in terms of German GAAP principles.[375] News reports are replete with allegations of tax evasion, fraud and the unusual pace and nature of acquisitions by Steinhoff.[376] Magda Wierzycka, CEO of the Sygnia Group and financial commentator, suggests that the reference to fraud implied more than creative accounting'.[377]

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[365] ibid

[366] 'Restatement of Financial Statements of Subsidiary Companies' available at *http://www.steinhoffinternational.com/downloads/2018/Restatement-of-financial-statements-of-subsidiary-companies-2Jan2018.pdf page 1-2*, accessed on 27 September 2018

[367] 'Steinhoff International Holdings NV Company Profile' available at *https://www.jse.co.za/current-companies/companies-and-financial-instruments/instrument-profile?instrumentmasterid=2452*, accessed on 26 September 2018.

[368] ibid

[369] R45.65 – R17.61 = 28.04/45.65 = 0.61 = 61 per cent

[370] 'Steinhoff International Holdings NV Company Profile' op cit note 367

[371] (At the time of writing) i.e. 27 September 2018

[372] R95.66 – R2.40 = 93.26/95.66 = 0.97 = 97 per cent

[373] 'Steinhoff International Holdings NV Company Profile' op cit note 367

[374] 'Steinhoff Press Release' 4 December 2015 available at *http://www.steinhoffinternational.com/sens.php*, accessed on 3 October 2018

[375] ibid

[376] See in general: 'Articles Relating to Steinhoff' available at *https://www.news24.com/Tags/Companies/steinhoff*, accessed on 3 October 2018; A Kell et al 'Investors dump Steinhoff on CEO Fraud Report' 24 August 2017 available at *https://www.fin24.com/Companies/Retail/steinhoff-slumps-on-report-ceo-is-being-probed-in-fraud-case-0170824*, accessed on 3 October 2018; and S Planting 'Steinhoff Listing Shrugs off Tax Woes' available at *https://citizen.co.za/business/business-news/899507/steinhoff-listing-shrugs-off-tax-woes/*, accessed on 3 October 2018

Research conducted by investigative financial research group Viceroy Research[378] alleges several dishonest activities relating to at least two off-balance sheet related party entities of Steinhoff.[379] They are Campion Capital and Southern View Finance.[380] Viceroy suggests that Steinhoff used these vehicles to artificially inflate interest revenue.[381] Furthermore, it is alleged that the company moved JD Consumer Finance and Capfin (loss-making and predatory consumer loan providers) to off-balance sheet entities.[382] The profitable portions of JD Consumer Finance and Capfin were negotiated for repurchase whilst off-balance sheet, related party entities under Campion Capital incurred losses.[383] Viceroy alleges that Steinhoff was using acquisition premiums to repay Campion's outlays.[384] In short, Steinhoff issued loans and investments to off-balance sheet entities to enable the off-balance sheet entities to purchase loss-making Steinhoff subsidiaries, thereby obscuring losses made by Steinhoff and inflating earnings; and should it be necessary, trading assets and securities back and forth for the same price (round-tripping).[385]

Viceroy, also revealed that forestry assets were acquired which had the likely effect of enriching Steinhoff management.[386] In 2001, Steinhoff had purchased forestry assets through a subsidiary (Kluh Investments) created for that purpose.[387] Kluh separated from the Steinhoff group that same year.[388] In 2004, Steinhoff purchased those forestry assets from

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377 'There were clear warning signs at Steinhoff. All of which fund managers missed' 7 December 2017 radio interview B Whitfield with M Wierzycka on *Radio 702* available at *http://www.702.co.za/articles/283808/there-were-clear-warning-signs-at-steinhoff-a11-of-which-fund-managers-missed*, accessed on 1 October 2018

378 Viceroy Research is a financial investigation and research body, see *https://viceroyresearch.org/*

379 'Viceroy unearths Steinhoff's skeletons – off-balance sheet related party entities inflating earnings, obscuring losses' available at *https://viceroyresearch.org/2017/12/06/steinhoffs-skeletons-off-balance-sheet-entities-inflating-earnings-obscuring-losses/*, accessed on 1 October 2018 page 1

380 ibid

380 ibid

381 ibid

382 ibid

383 ibid

384 ibid

385 'Viceroy unearths Steinhoff's skeletons…' op cit note 379 at 4

386 'Viceroy unearths Steinhoff's skeletons…' op cit note 379 at 32

387 ibid

388 ibid

Kluh for more than 10 times the original selling price.[389] Viceroy believes that this transaction is concerning because Steinhoff actually operated the plant regardless of it being nominally owned by Kluh i.e. like parties (Steinhoff members) on either side of the deal.[390]

The Viceroy Research Group report finds that a web of undisclosed related-party transactions were used to artificially inflate net income at a time when Steinhoff's acquired companies were struggling to stay afloat.[391] Viceroy also claims that related parties appeared to be involved in the acquisition of forestry assets and the JD Group share sale.[392]Viceroy concludes that intra-managerial transactions, a deficiency of transparency, non-independent governance and poor cash flow made it difficult to determine from an external point of view what the real profit being generated by the company was, in effect making the company 'borderline un-investable'.[393]

SIHL'S former Chief Financial Officer, Ben La Grange, has mentioned that third party transactions related to Markus Jooste and inflated profit contributions from different parts of the business are what corrupted Steinhoff's financial statements.[394] La Grange claims that two main issues led to the downfall of SIHL:[395]

- First, profits were inflated mainly by contributions made by a non-existent external buying group which was funded by loans from Steinhoff – loans were issued to the group which then took products purchased by different brands and negotiated with suppliers to give extra rebates to the group − these contributions would be reflected as profits on the income statement and the loans would be reflected as such on the balance sheet.[396]

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[389] ibid

[390] ibid

[391] 'Viceroy unearths Steinhoff's skeletons…' op cit note 379 at 35

[392] 'Viceroy unearths Steinhoff's skeletons…' op cit note 379 at 14-23; 32-33; 35

[393] 'Viceroy unearths Steinhoff's skeletons…' op cit note 379 at 35.

[394] J Kew and J Bowker 'We're not friends −Steinhoff ex-CFO blames Jooste, auditors for accounting scandal' 29 August 2018 available at *https://www.fin24.com/Companies/Retail/were-not-friends-steinhoff-ex-cfo-blames-jooste-auditors-for-accounting-scandal-20180829*, accessed on 2 October 2018

[395] L Omarjee '#Steinhoff: Seven things you need to know from La Grange's testimony' 29 August 2018 available at *https://www.fin24.com/Companies/Retail/steinhoff-seven-things-you-need-to-know-from-la-granges-testimony-20180829*, accessed on 2 October 2018

[396] ibid

- Secondly, certain transactions involved overpayment for assets acquired at inflated values; and
- Several transactions which were taken to be valid transactions with valid parties were in fact manipulated by the former CEO, Markus Jooste.[397]

4.3 *Forensic investigation report by PricewaterhouseCoopers Advisory Service (Pty) Ltd (PwC Report)*

This investigation was prompted by the supervisory board of SIHL into allegations of accounting irregularities and non-compliance with laws pertinent to Steinhoff's financial statements.[398] The 3 000-page report details a web of transactions and conduct which they believe had the effect of toppling the Steinhoff empire. Whereas the whole document is legally privileged and confidential, a summary of the report has been published.[399]

PwC has found that a senior management executive, together with a group of former Steinhoff executives and non-Steinhoff executives engaged in various transactions that had the effect of substantially inflating profits and asset values of the Steinhoff group over an extended period.[400] Fictitious transactions were entered into with third party entities which appeared to be independent from SIHL but which were apparently closely related to or controlled by the group of people referred to above[401]; furthermore, fictitious income was created at an intermediary Steinhoff holding company level which would then be allocated to underperforming Steinhoff entities as contributions which had the effect of either increasing income or reducing expenses of the respective entities; intercompany loans and receivables were facilitated by the receipt of cash for contributions by another Steinhoff group company or non-Steinhoff companies funded by Steinhoff. [402]

Three principal groups, together with other corporate entities, were found to be counterparties to the Steinhoff Group in respect of the investigated transactions, and it was found further that confusion between entities was caused by using similar entity names and

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[397] ibid

[398] Pricewaterhouse Coopers *Overview of Forensic Investigation* (PwC overview) (2019) 1

[399] PwC overview op cit note 398 at 2

[400] PwC overview op cit note 398 at 2-3

[401] PwC overview op cit note 398 at 3

[402] ibid

changing company names.[403] The parties, as identified are: The Campion/Fulcrum Group, The Talgarth Group and the TG Group.[404] Major transactions found by the PwC were categorised into (1) profit and asset creation; (2) asset overstatement and reclassification; (3) asset and entity support; and (4) contributions.

1. Profit and asset creation: Certain Steinhoff Group entities received income from or recorded sales to entities which were thought to be independent of the Steinhoff Group but which now seem to be closely related to or controlled by the Steinhoff Group or certain former employees thereof.[405] These transactions resulted in profit and asset creation and the entities associated with these assets include the Talgarth Group (Talgarth and Triton), Campion/Fulcrum Group (TG Group, GT Global Trademarks and SVF SA) and Tulett Holdings.[406] The income was not paid to Steinhoff from many of these transactions and as a result, loans and receivables with little or no economic substance were owed to the company and this ultimately was never settled.[407]
2. Asset overstatement and reclassification: The receivables which resulted from the income created by the above-described transactions were then settled in set-off arrangements or reclassified as different assets; set-off was facilitated by using intergroup payments and by the assignment of debts; the effect of this was that the loans were moved between entities which were part of the Steinhoff group and entities which were seemingly independent; the movements of loans were accounted for as repayments by the original party.[408] The impression that non-recoverable receivables had been settled was created by reclassification, and this resulted in other asset values being inflated; the reclassification into different assets was done, for example, by cash equivalents, increases in the value of trademarks, increases in the value of acquired goodwill and increases in the value of fixed properties.[409]

[403] PwC overview op cit note 398 at 4

[404] ibid

[405] PwC overview op cit note 398 at 5

[406] ibid

[407] ibid

[408] PwC overview op cit note 398 at 6

[409] ibid

3. Asset and entity support: The inflated asset values were then supported by an increase in rent paid in terms of intergroup rental contracts; increases in royalties under intergroup loyalty agreements for trademarks; and the orchestration of intergroup payments and assignment of debts which would demonstrate settlement of cash equivalents;[410] inflated costs were included in the results of the operating entities, thereby increasing the cost bases and in certain cases adding to the losses made by these companies – the losses made by these companies could not support the acquired goodwill; and the operating entities did not contribute to the Steinhoff Group results.[411]
4. Contributions: Onward distributions of the irregular income to various Steinhoff operating entities were made by means of contributions and thereby mitigated losses made by the operating entities; these contributions would be settled in cash by other Steinhoff Group entities giving an external and internal impression that they were of substance.[412] The effect of these contributions was threefold: the operating entities appeared to be more profitable than they actually were; forecasts to support the price paid for acquired entities were met; and operating entity budgets would be met.[413] Ordinarily, contributions from a Steinhoff Group entity to a Steinhoff operating entity would eliminate on consolidation and, prior to elimination these contributions served to support the profitability, liquidity, solvency, and value of acquired goodwill of the operating company.[414] However, the irregular income was not eliminated on consolidation due to it being recorded as originating from supposedly independent entities; the effect of this was an inflation of the Steinhoff Group profits.[415]

4.4 *The Companies Act 71 of 2008 in relation to Steinhoff*

According to section 1 of the Companies Act 2008, a foreign company is an entity which is incorporated outside South Africa, irrespective of whether it is a profit or non-profit entity and irrespective of whether it is carrying on business or non-profit activities within South

[410] ibid

[411] ibid

[412] PwC overview op cit note 398 at 7

[413] ibid

[414] ibid

[415] ibid

Africa; and an external company is a foreign company that is carrying on business, or non-profit activities within South Africa, subject to the terms imposed by 23(2) of the 2008 Act.[416] Chapter two part C provides for the transparency, accountability and integrity of companies,[417] applicable to public companies, state-owned companies, companies which are required to have their financial statements audited, and companies which voluntarily opt in through their memorandums of incorporation.[418]

Section 23 provides for the registration of external companies with the Companies and Intellectual Property Commission (CIPC) and registration of the address of its head office.[419] The external company must register with the CIPC within 20 business days after commencing business or non-profit activities within the Republic as an external profit/external non-profit company.[420] The qualifications to section 23(1) are found in section 23(2) which provides that a foreign company is not to be regarded as conducting business or non-profit activities in South Africa unless that foreign company is engaged in, or has engaged in:

- Holding shareholder or board meetings of the foreign company or conducting the internal affairs of the company;
- Establishing or maintaining any bank or financial accounts;
- Establishing or maintaining offices or agencies for the transfer, exchange or registration of the foreign company's own securities;
- Creating or acquiring any debts, mortgages or security interests in any property;
- Securing or collecting any debt, or enforcing any mortgage or security interest;
- Acquiring any interest in any property; and/or
- Entering into contracts of employment.[421]

Section 23(3) stipulates that each company or external company must maintain at least one office in the Republic and register the address of its office.[422] Section 23(6)

[416] The Companies Act 71 of 2008 Section 1

[417] The Companies Act 71 of 2008

[418] The Companies Act 71 of 2008 Section 34 and Section 84

[419] The Companies Act 71 of 2008

[420] ibid

[421] ibid

[422] ibid

specifies that if an external company fails to comply with subsection (1) within 12 months, the Commission may issue a compliance notice; and if it fails to register within 20 days of the notice, it must to cease carrying on its business or activities.[423] Section 33(2) provides that every external company must file an annual return in the prescribed form within the prescribed period after the anniversary of the date on which it was registered in terms of section 23(1).[424]

Steinhoff has its registered office in the Netherlands (Amsterdam) and its business office in South Africa (Stellenbosch).[425] SIHL falls within the definition of an external company by virtue of it being incorporated in the Netherlands (foreign company) and carrying on business within the republic (SIHL engages in section 23(2) activities). The above sections of the Companies Act 2008 therefore apply to SIHL. The above recitation of the selected sections of the Companies Act of 2008 serves to demonstrate the paucity of provisions of the Companies Act of 2008 which apply to Steinhoff. The parameters which determine the obligations of external companies, and the obligations imposed on external companies provide cause for concern in that that the 2008 Act drastically reduces number and weight of the obligations, duties, corporate governance principles and the potential liability of external companies (in comparison to regulations of other countries).

The collapse in the share price of Steinhoff has reportedly cost the Government Employees Pension Fund (GEPF) approximately R20 billion.[426] The GEPF manages and administers pensions and other benefits for government employees in South Africa.[427] It must ensure that all funds are responsibly invested and accounted for and that benefits are paid out efficiently, accurately and timeously.[428] As at 31 March 2017, the GEPF owned about R28 billion in Steinhoff − about 10 per cent of the entire Steinhoff

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[423] ibid

[424] ibid

[425] Steinhoff ‘Corporate Information’ op cit note 361

[426] S Mchunu ‘Steinhoff scandal cost Government Employees Fund R20bn’ 1 February 2018 available at *https://www.iol.co.za/business-report/companies/steinhoff-scandal-cost-government-employees-fund-r20bn-13041991*, accessed on 16 July 2019

[427] GEPF ‘Who is GEPF?’ available at *http://www.gepf.gov.za/index.php/about_us/article/who-is-gepf*, accessed 16 July 2019

[428] ibid

shareholding, and about[429] one per cent of the total assets of the fund.[430] As at January 18 2018, the value of the Steinhoff shares owned by the GEPF was R3.1 billion.[431] The GEPF has 1.2 million active members and provides income for approximately 400 000 pensioners.[432] The 400 000 pensioners had no choice about their investments in Steinhoff, as external companies do not feature within the South African regulatory framework.[433] It is a matter of concern that a company such as Steinhoff, much as it affects the lives of ordinary South Africans and the South African State, is not bound by any law or provision that would encourage or ensure transparency and accountability.

4.5 *King III in relation to Steinhoff*

Prior to listing on the Frankfurt Stock Exchange (FSE) on 7 December 2015[434], Steinhoff had its primary listing on the JSE,[435] whose requirements include an obligation to comply with the King Code and the then-operational King III Code on Corporate Governance.[436] This necessitates a brief discussion of selected King III principles which are relevant to the case of Steinhoff. Despite the Steinhoff crisis occurring after it moved its primary listing, an analysis suggests that much of its questionable activity took place long before 2015.[437]

A problem highlighted by the University of Stellenbosch Management Review (USB review) was the inability of shareholders and stakeholders to have anticipated the accounting problems ahead.[438] The USB review asks: 'Where was the board?' [439] Principle

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[429] GEPF Press Release Statement: 'GEPF Position on Steinhoff Shareholding' available at *http://www.gepf.co.za/index.php/pressreleases/article/statement-gepf-position-on-steinhoff-shareholding*, accessed on 16 July 2019

[430] GEPF 'Who is GEPF?' op cit note 427

[431] S Mchunu op cit note 426

[432] GEPF 'Who is GEPF?' op cit note 427

[433] See above discussion for applicable sections.

[434] 'Steinhoff International Holdings − Listing of Steinhoff' 7 December 2015 available at *http://www.steinhoffinternational.com/sens.php*, accessed on 3 October 2018

[435]. 'Listing of Steinhoff NV' op cit note 359

[436] Johannesburg Stock Exchange 'JSE Limited Listings Requirements' 3.84

[437] For a timeline of Steinhoff acquisitions and the events before and after the Steinhoff share price collapse please see the 'Business Perspectives on the Steinhoff Saga' (2018) *University of Stellenbosch Management Review* 11-12

[438] University of Stellenbosch Management Review *Business Perspectives on the Steinhoff Saga* (2018) 15

2.1 of King Code III clearly cites the board is the focal point for and custodian of corporate governance.[440] King III states explicitly that the board is responsible for the provision of effective leadership based on an ethical foundation.[441] The ethical values of responsibility, accountability, fairness and transparency are highlighted as the characteristics of responsible leadership.[442] A responsible leader engages in business ethically (in a substantive rather than facile sense of compliance for compliance sake).[443] One of the values underpinning good corporate governance is accountability, which this translates as the board being able to justify its decisions and actions to shareholders and stakeholders.[444] Transparency requires that the board disclose information in such a way as to enable stakeholders to make an informed analysis of the company's performance and sustainability.[445] King III requires directors to be independent in character and judgement, representing an appropriate balance of power and authority with no single individual or set of individuals dominating the decision-making process.[446] The integrity of the integrated report must be underwritten by the board,[447] embodying a holistic representation of the company's performance in terms of its sustainability and finances.[448] Financial disclosure is imperative in the integrated report so as to enable stakeholders to make an informed assessment of the company's economic value – such disclosure must give stakeholders insight into the prospects of future value of the company and of the risks which may affect such value creation.[449] The positive and negative impacts of the company's operations on stakeholders must be highlighted.[450]

[439] ibid

[440] The Institute of Directors Southern Africa *King Report on Governance for South Africa* (King III) (2009) 11.

[441] The Institute of Directors Southern Africa (King III) op cit note 440 at 1.1

[442] The Institute of Directors Southern Africa (King III) op cit note 440 at 1.1 - 1

[443] The Institute of Directors Southern Africa (King III) op cit note 440 at 1.1- 4

[444] The Institute of Directors Southern Africa (King III) op cit note 440 at 14.2

[445] The Institute of Directors Southern Africa (King III) op cit note 440 at 14.4

[446] The Institute of Directors Southern Africa (King III) op cit note 440 at 2.18 – 63 & 66

[447] The Institute of Directors Southern Africa (King III) op cit note 440 at 2.12.

[448] The Institute of Directors Southern Africa (King III) op cit note 440 at chapter 9 – 9.1 - 1

[449] The Institute of Directors Southern Africa (King III) op cit note 440 at chapter 9 – 9.2 - 9

[450] The Institute of Directors Southern Africa (King III) op cit note 440 at chapter 9 – 9.2 - 11

4.6 *King IV in relation to Steinhoff*

The following quotes (a-c) (direct and indirect) have been extracted from news articles and are listed to give anecdotal background to the relevant King principles that follow.

a) 'Investors find Steinhoff impossible to analyse from one year to the next, given its frenzied deal-making . . .' – Marcus Jooste[451]

b) Christo Wiese (former chairman at Steinhoff) averred that the Steinhoff crisis was a 'bolt out of the blue'; and that he became aware of the problems a mere three days before accounts were to be finalised.[452]

c) Len Konar (former director at Steinhoff) stated that non-executive directors of Steinhoff were misled, and when information was sought it was either not forthcoming or it was presented in an untruthful manner.[453]

The (Stellenbosch) Management Review points out that despite the impressive credentials of members of the Steinhoff board, they nevertheless appeared to govern the company in a collective sense.[454] In December 2015, Steinhoff NV announced the termination of its listing of ordinary shares on the main board of the JSE and the concurrent commencement of shares trading with a primary listing on the Frankfurt Stock Exchange (FSE). Steinhoff NV would retain a secondary listing on the JSE.[455] The effect of the change meant that Steinhoff ceased to be bound by the King Code,[456] as it commits itself to the laws and obligations which govern business practises in countries within which it operates.[457] However, by virtue of the change in listing (and being classified as a foreign external

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[451] Business Day *'Steinhoff not Christo Wiese's Parking Place for Assets' available at https://www.businesslive.co.za/bd/companies/2017-09-22-steinhoff-not-christo-wieses-parking-place-for-assets/,* accessed on 9 September 2018

[452] G Davis 'Wiese: Steinhoff scandal came like a bolt from the blue' available at *https://ewn.co.za/2018/01/31/wiese-steinhoff-scandal-came-like-a-bolt-from-the-blue* , accessed on 2 October 2018

[453] Financial Mail 'We were bamboozled' January 2018 available at *https://www.pressreader.com/south-africa/financial-mail/20180125/281608125858054* , accessed on 30 July 2019

[454] University of Stellenbosch Management Review op cit note 438 at 15

[455] 'Steinhoff International Holdings - Listing of Steinhoff' op cit note 434

[456] Johannesburg Stock Exchange *JSE Limited Listings Requirements* at 18.4

[457] 'The Steinhoff Code of Ethics' available *http://www.steinhoffinternational.com/corporate-responsibility/04-code-of-conduct.php* accessed on 29 July 2019

company) Steinhoff was permitted to bypass ordinarily applicable provisions of the Companies Act 71 of 2008 and vital principles of the King IV Code. The share price collapse in December 2017 raises the following questions: What caused such a collapse? Why did investors and stakeholders not foresee or anticipate the problem? Was the board negligent in performing their duties? The following King IV principles are cited to establish what a practical application of the King IV Code could have achieved in Steinhoff's case and what it could have prevented.

Principle one of the King IV Code provides that the governing body should lead ethically and effectively; furthermore, the governing body must answer for the execution of their responsibilities even when such duties are delegated.[458] Collective responsibility must be assumed by members of the governing body for setting the direction of the company, overseeing and monitoring execution by management and ensuring accountability for organisational performance.[459] Furthermore, steps must be taken to ensure that the governing members have sufficient working knowledge of the organisation, its industry, the capital it employs and the laws, rules, codes and standards which are applicable to the organisation.[460] The governance role must be transparent.[461] The Steinhoff Code of Conduct explicitly prohibits any act of fraud, corruption, money laundering, dishonesty, or deception.[462] When called to Parliament the former CEO, Mr Jooste, said he had no knowledge of irregularities at Steinhoff and partially blamed a former partner and the fact that the group's annual financial statements (2017) were not released on time.[463] As discussed above the Steinhoff crisis is alleged to have been partially caused by actions taken by Mr Jooste himself. However, none of the questions at the parliamentary hearing such as the non-sharing of information and the overstatement of assets and profits were substantially addressed by Mr Jooste. Whilst the true picture of what transpired at Steinhoff is yet to unfold, and allegations of misconduct verified

[458] Institute of Directors in Southern Africa (King IV) op cit note 332 at 3

[459] Institute of Directors in Southern Africa (King IV) op cit note 332 at 43

[460] ibid

[461] Institute of Directors in Southern Africa (King IV) op cit note 332 at 44

[462] Steinhoff International Holdings NV 'Code of Conduct' available at *http://www.steinhoffinternational.com/downloads/2017/Code%20of%20conduct_drafted%20by%20SIHL.pdf* accessed on 16 September 2018 4

[463] P du Toit 'ANALYSIS: Steinhoff's Markus Jooste's three-tiered defence' 5 September 2018 available at *https://www.fin24.com/Companies/Retail/analysis-steinhoffs-markus-joostes-three-tiered-defence-20180905-2* accessed on 16 September 2018

and clarified, the parliamentary hearings exposed an enduring lack of consensus amongst governing members, exposing a clear lack of transparency and willingness to take responsibility for what has taken place at Steinhoff.

Principle five of the King IV Code directs the governing body to ensure that its reports enable stakeholders to make informed assessments of the organisation's performance and its short, medium, and long term prospects.[464] The board must install controls to ensure the integrity of all company reports and disclosures. The governing body must guarantee that reports such as the annual financial statements are legally compliant and meet the legitimate and reasonable information needs of material stakeholders; and this includes a duty to ensure the integrity of external reports.[465] By early January 2018, the record of Steinhoff's unreliable financial results extended to 2015[466]. The archive of the Steinhoff reports is replete with the phrase 'information not reliable' in an emboldened red font.[467]

The King IV Code provides that effective and objective discharge of governance roles and duties by the governing body depends on the appropriate balance of knowledge, skills, diversity, experience, and independence.[468] Theo Botha posits that the issue of the tenure and independence of directors is a chief weakness in the King IV Code,[469] suggesting that succession planning is an effective way of combating the loss of institutional memory and experience of long-serving directors.[470] He adds that the failure to plan for succession is what may have resulted in Steinhoff's 'herd' scenario: board members became too comfortable with each other and the smooth running of board meetings, and their familiarity (with each other and the business) was not in the best interests of corporate

[464] Institute of Directors in Southern Africa (King IV) op cit note 332 at 3

[465] Institute of Directors in Southern Africa (King IV) op cit note 332 at 48

[466] J Cronje 'A Steinhoff guide for dummies − updated for 2018' 8 December 2017 available at *https://www.fin24.com/Companies/Retail/a-steinhoff-guide-for-dummies-20171208* accessed on 10 September 2018

[467] Steinhoff 'Annual Reports' available at *http://www.steinhoffinternational.com/annual-reports-archive.php* accessed on 29 July 2019

[468] Institute of Directors in Southern Africa (King IV) op cit note 332 at 50

[469] Pressreader 'Activist Theo Botha on why Steinhoff's shadow falls on King Codes' available at *https://www.pressreader.com/south-africa/sunday-times-1107/20180218/282578788516137*, accessed on 30 July 2019

[470] ibid

governance.[471] Zinkin distinguishes regulation from good governance, asserting that good results depend on the complexity with which the business strategy is devised and its effective implementation.[472] Informed decision-making and the ability to convert strategy into action is the key to effective implementation.[473] This depends on good succession planning and talented management with the right people in the right place at the right time.[474] Whilst King IV *and* King III make provision for succession planning, it does not feature in Steinhoff's `corporate responsibility report' (emphasis added).[475] In an interview, Mr Jooste mentioned that the first office he worked in was owned by Christo Wiese (former independent non-executive director and supervisory board director) and his very first introduction to Claas Daun (former chairman of the supervisory board and independent non-executive director) was in 1992. When asked what it was that made the Steinhoff story so different, Mr Jooste is recorded to have said: 'To be in a business where 10 of the other execs are your best friends, that is unique.'. Family appointments are another feature of Steinhoff – Heather Sonn was appointed as supervisory director and Jacob Wiese appointed as supervisory board director.[476] Whilst Steinhoff may have committed itself to principles such as independence, objectivity and diversity on paper,[477] one must question how independence could have been maintained, and decisions properly assessed when board members were on friendly or familial terms.

[471] ibid

[472] J Zinkin *Challenges in Implementing Corporate Governance: Whose Business Is It Anyway?* (2010) 111-117

[473] ibid

[474] ibid

[475] Institute of Directors in Southern Africa (King IV) op cit note 332 see Recommended practises principle 7; and Part 5.3 Recommended practices 37; 60; and 81; and The Institute of Directors Southern Africa (King III) op cit note 440 – see Chapter 2.46; Chapter 2.60; and Chapter 2.61; and 'Steinhoff International Corporate Responsibility 2015' available at *http://www.steinhoffinternational.com/corporate-responsibility/downloads/SHF-CR-full-2016.pdf*, accessed on 16 September 2018

[476] 'Steinhoff's Corporate Governance Report' available at *http://www.steinhoffinternational.com/corporate-responsibility/04-corporate-governance.php*, accessed on 16 September 2018

[477] ibid

5. *Eskom (SOC) Ltd background (Eskom)*[478]

In 2002, Eskom was converted into a public company (Eskom Holdings Ltd) with the sole shareholder being the South African government and the Minister of Public Enterprises being the shareholder representative.[479] Eskom commits itself to compliance with the letter and spirit of the King Code on Corporate Governance for South Africa and the Protocol on Corporate Governance in the Public Sector 2002.[480]

As much as 95 per cent of the electricity used in South Africa is generated by Eskom.[481] It is then transmitted and distributed to the residential sector and the mining, industrial, commercial, and agricultural industries. Power stations and major power lines continue to be built to meet ever-rising increase in demand.[482] Electricity is bought and sold with countries of the South African Development Community (SADC). In all, 45 per cent of the electricity used in Africa is generated by Eskom.[483] According to its business vision, Eskom operates with integrity (honesty of purpose, conduct, respect for people and discipline in actions), innovation and excellence (exceptional standards, performance, and professionalism).[484] In accordance with government policy, Eskom has adopted Strategic Intent Statement (SIS) objectives which outline medium and long-term goals for the company.[485] Some of the objectives include the provision of reliable and affordable electricity and to ensure a financially viable and sustainable company.[486]

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[478] For a detailed history of ESKOM and its growth see *http://www.eskom.co.za/sites/heritage/Pages/default.aspx*, accessed on 2 August 2019

[479] 'Legislation' available at *http://www.eskom.co.za/OurCompany/CompanyInformation/Pages/Legislation.aspx*, accessed on 2 August 2019

[480] ibid

[481] 'Company information overview' available at *http://www.Eskom.co.za/OurCompany/CompanyInformation/Pages/Company_Information.aspx* accessed on 2 August 2019

[482] ibid

[483] ibid

[484] 'Business Vision' available at *http://www.Eskom.co.za/OurCompany/CompanyInformation/Pages/Business_Vision.aspx*, accessed on 2 August 2019

[485] ibid

[486] ibid

5.1 *Eskom – what went wrong?*[487]

After the Portfolio Committee on Public Enterprises (the Committee) expressed concerns about the quality and effectiveness of leadership at the electricity utility, a meeting was held between the Committee and Eskom regarding the reappointment of the former Group Chief Executive Officer (GCEO), Brian Molefe, and the determination of his retirement package by the board.[488] These issues reflected that weakened governance and management structures were leading to the compromise of Eskom's primary mandate and the board's inability to discharge its fiduciary duties.[489] The failure to fully comply with governance rules, laws, codes and conventions is evidenced in the committee's report[490]:

a) Irregular procurement, mismanagement and non-compliance with policies had made Eskom potentially unsustainable.
b) Highly skilled, qualified, and experienced staff members were removed in violation of human resource management policies and procedures and, in some cases, this occurred without due consideration or application of already established recruitment policies.
c) Mr. Molefe resigned, was reappointed, and provided with a retirement package in violation of the Eskom Pension Fund Rules.[491]

The Committee was also requested by the National Assembly House Chairperson: Committee Oversight to investigate the allegations of state capture as reported in the media.[492] The State of Capture Report published by the Public Protector brought to light procurement irregularities in the relationship between Eskom and Tegeta Exploration and Resources (Pty) Ltd (Tegeta).[493] A web of companies, regulatory interventions, and personal relationships were used to give Tegeta access to lucrative contracts and to acquire

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[487] For reasons of practicality, this project will not account in detail problems at Eskom. For a more detailed background and evidence, please see the *Report of the Portfolio Committee on Public Enterprises on the Inquiry into Governance, Procurement and the Financial Sustainability of Eskom*, Dated 28 November 2018

[488] L Mnganga-Gcabashe *Report Of The Portfolio Committee On Public Enterprises On The Inquiry Into Governance, Procurement And The Financial Sustainability Of Eskom* (2018) 4

[489] ibid

[490] ibid

[491] ibid

[492] ibid

[493] L Mnganga-Gcabashe *Report Of The Portfolio Committee* op cit note 488 at 13; Tegeta Exploration and Resources (Pty) Ltd provides mining services.

and profitably operate Optimum Coal Holdings (OCH).[494] Evidence pointed to undue preferential treatment of Tegeta,[495] in particular a 'prepayment' to Optimum Coal Mine[496] (OCM) by Eskom for the benefit of Tegeta.[497] Business rescue practitioners found that the money paid by Eskom had never been received by OCM, implying that the payment was used by Tegeta to purchase Optimum Coal Holdings when it would otherwise not have had the money to do so.[498]

A coal supply agreement (CSA) (initially a contract between Eskom and Optimum Collieries,) was ceded to OCM.[499] Disputes arose between Eskom and OCM over the latter's inability to supply the coal as agreed.[500] A fourth addendum was added to the CSA[501] and was tabled for approval by the Eskom board.[502] Against expectations, the board did not approve the addendum but referred it to then Acting CEO, Brian Molefe who rejected it and terminated the dispute settlement process.[503] Subsequently, Oakbay Investments (Pty) Ltd made an offer to purchase OCM for R2 billion.[504] Thereafter, Eskom purported to levy a penalty of R2.17 million from OCM for failing to meet the coal quality requirements set out in the CSA.[505] This amount was irregularly high and calculated out of line with the normally applicable methodology.[506] Several stoppage notices were issued under the direction of the then Minister of Mineral Resources, Mr Joseph Zwane.[507]

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[494] L Mnganga-Gcabashe *Report Of The Portfolio Committee* op cit note 488 at 13; Optimum Coal Holdings Proprietary Limited is a company which mines and supplies coal.

[495] L Mnganga-Gcabashe *Report Of The Portfolio Committee* op cit note 488 at 13

[496] Optimum Coal Mine Proprietary Limited is a subsidiary company of Optimum Coal Holdings Limited.

[497] L Mnganga-Gcabashe *Report Of The Portfolio Committee* op cit note 488 at 14

[498] ibid

[499] L Mnganga-Gcabashe *Report Of The Portfolio Committee* op cit note 488 at 16

[500] ibid

[501] ibid

[502] L Mnganga-Gcabashe *Report Of The Portfolio Committee* op cit note 488 at 17

[503] ibid

[504] ibid

[505] ibid

[506] ibid

[507] ibid

Eskom made a counter offer to Oakbay to procure OCM as well as the other subsidiaries of OCH.[508] Tegeta (which is owned by Oakbay) offered to purchase OCH shares for R1 billion, but this was rejected.[509] The Minister of Mineral Resources at the time, Mr. Zwane then allegedly met the Glencore[510] CEO along with major Eskom shareholder Elgasolve (Pty) Ltd (owned by Salim Essa), and Rajesh Gupta.[511] A month later an offer to purchase the OCH shares for R2.15 billion was made by Tegeta to Glencore,[512] and a sale of shares and claims agreement was entered into between Tegeta, OCH, Oakbay and Glencore for the sale of OCH shares for R2.1 billion.[513] Transfer of ownership was subject to suspensive conditions which required approval from various bodies.[514] Despite approvals being outstanding, Tegeta agreed to provide funding for OCM's operating expenses.[515]

Pending fulfilment by Tegeta of the suspensive conditions necessary, Eskom undertook to purchase of coal from Tegeta at a specific price and quantity, and also issued an irregular guarantee to Tegeta for an 'in principle' agreement to supply coal worth R1.68 billion.[516]

A contract between Eskom and Exira Resources Limited (Exira) to supply coal to the Arnot power station expired in December 2015; Tegeta was awarded a contract to provide coal to make up Arnot's supply deficit in 2016.[517] The decisions to create lucrative opportunities for Tegeta were irregular[518] because Tegeta was not among the companies that responded to the request for proposals in 2015.[519] Secondly, this contract was allegedly due to expire in 2023.[520] Thirdly, according to then CEO Molefe and CFO Anoj Singh, Exarro was

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[508] L Mnganga-Gcabashe *Report Of The Portfolio Committee* op cit note 488 at 18

[509] ibid

[510] Glencore Plc is a British multinational natural resources company. See *https://www.glencore.com for* more information.

[511] L Mnganga-Gcabashe *Report Of The Portfolio Committee* op cit note 488 at 18.

[512] ibid

[513] ibid

[514] ibid

[515] ibid

[516] ibid

[517] ibid

[518] ibid

[519] L Mnganga-Gcabashe *Report Of The Portfolio Committee* op cit note 488 at 19

[520] ibid

paid R1 133 per ton by Eskom while the market price as at April 2015 was R687.07.[521] The representations by Mr Molefe and Mr Singh would appear to be inconsistent with other records.[522] Tegeta was awarded several more lucrative contracts by Eskom to supply coal to the Arnot power station.[523] It also came to light that Tegeta extracted a ‘middleman’ fee from such arrangements without adding any value and with Eskom’s full knowledge.[524]

Tegeta obtained necessary approval for the OCM sale from the Department of Mineral Resources within months, when approval would have ordinarily taken one to three years. The fourth addendum was signed and the cession of the CSA to Tegeta was confirmed.[525]

Before Tegeta obtained legal ownership of OCH, Eskom made irregular and significant payments to Tegeta in the amount of R1.16 billion (R1 161 953 248.41) which Tegeta used in part to pay four per cent of the total price of OCH.[526] Despite this payment, Tegeta was still owed R600 million which it attempted to pay by obtaining a bridging loan from the Consortium of Banks. The loan request was denied.[527] It then offered to sell Eskom 1 250 000 tons of coal from OCM for R611 250 000, excluding VAT. Following submissions to the Eskom Board Tender Committee a prepayment to Tegeta for the amount of R586 787 500 was approved.[528] However the agreed higher price per ton meant the prepayment amounted to R659 558 079.38 including VAT.[529] A day later, a payment of R2 084 210 261.10 was made by Tegeta for the OCH shares despite having declared days earlier that that they were in deficit in the sum of R600 million in respect of the transaction.[530] Tegeta went on to enter into contracts with OCM for coal at a price which ensured a middleman fee (whilst not adding any value).[531] The dealings with Tegeta represent

521 ibid

522 ibid

523 ibid

524 ibid

525 L Mnganga-Gcabashe *Report Of The Portfolio Committee* op cit note 488 at 19-20

526 L Mnganga-Gcabashe *Report Of The Portfolio Committee* op cit note 488 at 20

527 ibid

528 ibid

529 ibid

530 ibid

531 ibid

a minor illustration of Eskom's conduct − part of a maze of corruption and unethical behaviour.[532]

5.2 *The Companies Act 71 of 2008 in relation to Eskom*

The Eskom Conversion Act 13 of 2001 established Eskom as a public company incorporated in terms of the Companies Act 61 of 1973, and by virtue of its incorporation in accordance with the 1973 Act it meets the definition of a 'company' in terms of the 2008 Companies Act and is therefore bound by the 2008 Act.[533]

The Portfolio Committee found that the procurement process and the exercise of public power by Eskom served the interests of private individuals and businesses[534] and was an abuse of public resources and a violation of Eskom's constitutional mandate to ensure that its processes were equitable, transparent, fair, competitive, and cost-effective.[535] Section 76(2) of the 2008 Act directs that directors should not use their position, or any information obtained as director, to gain personal advantage or advantage for any person other than company or a wholly-owned subsidiary of the company; or to knowingly cause harm to the company or a subsidiary of the company. The Committee also found that certain Eskom board members had conflicts of interest and may have acted unlawfully with senior management to create a network to influence Eskom's processes to their own advantage.[536]

Section 75(5) of the 2008 Act provides that directors must disclose a personal interest in a matter, or that of a related person, before that matter is considered at a meeting; and must not take part in the consideration of the matter; and such director must not execute any document on behalf of the company in relation to the matter unless specifically requested or directed to do so by the board.[537] However, the report alleged that no regard was given to this provision on numerous occasions (see report) when the Eskom board disregarded members' personal and related persons interest in matters and failed to take appropriate steps. Directors and senior employees were found to have flouted their responsibilities under the

532 See fu11 report

533 ESKOM Conversion Act 13 of 2001; section 2 and The Companies Act 71 of 2008; section 1.

534 L Mnganga-Gcabashe *Report Of The Portfolio Committee* op cit note 488 at 122

535 ibid

536 ibid

537Section 75(5) (*g*).

2008 Act (and other legislation) exploiting confidential information for personal gain or to improperly benefit third parties.[538] Evidence suggests that Eskom members acted without integrity, honesty and fidelity and failed to take into account the best interests of Eskom.[539] Responsible board members did not investigate allegations of corruption, improper conduct, and the failure to comply with the supply chain management system.[540] This caused a significant loss of public funds, job losses in companies which were in competition with companies benefiting from favoured treatment, and potential environmental damage.[541]

The committee has found that the Eskom board failed to maintain clear lines of accountability and responsibility – board members disrupted operational management and the roles of group executives were often usurped.[542] This resulted in information inequality[543] in which legal support services and decision-making authorities were side-lined to enable board members to act on extraneous considerations to benefit private companies.[544] External and independent reviews and investigations (including The Dentons Investigation, National Treasury's Investigation into Select Coal Contracts) brought to light unusual, unauthorised and unlawful actions or irregular expenditure, but were curtailed, undermined, censored or ignored by the Eskom board.[545] The Committee has also expressed concern that the Eskom transformation policy, aimed at empowering emerging black businesses, was used to corrupt procurement processes so as to serve the interests of companies and individuals, particularly those linked to the Gupta family.[546] The central purpose of the Companies Act[547] is to encourage transparency and high standards of corporate governance, as companies play an important role in the social and economic life of the South African nation.[548] Responsible management of companies promotes investment in the South African market;[549] encourages

[538] L Mnganga-Gcabashe *Report Of The Portfolio Committee* op cit note 488 at 122

[539] L Mnganga-Gcabashe *Report Of The Portfolio Committee* op cit note 488

[540] ibid

[541] ibid

[542] L Mnganga-Gcabashe *Report Of The Portfolio Committee* op cit note 488 at 125

[543] ibid

[544] ibid

[545] L Mnganga-Gcabashe *Report Of The Portfolio Committee* op cit note 488 at 125-126

[546] L Mnganga-Gcabashe *Report Of The Portfolio Committee* op cit note 488 at 127

[547] Companies Act 71 of 2008.

[548] The Companies Act 71 of 2008 Section 7 *(b) (iii)*

[549] The Companies Act 71 of 2008 Section 7 *(c)*

the use of companies in a manner which enhances the economic welfare of South Africa;[550] encourages responsible management of companies[551]; promotes the development of companies within all sectors of the economy;[552] and provides a predictable and effective environment for the efficient regulation of companies.[553]

The committee report referred to the shocking reality that the Eskom board and executive members involved were not held accountable for their inaction and role in the collapse of corporate governance and poor financial performance of Eskom. [554] Law-abiding and competent executives and staff of Eskom were subjected to indiscriminate and unsubstantiated actions, leading to an atmosphere of fear and mistrust as Eskom's internal policies and procedures were applied in bad faith to victimise them.[555] Furthermore, evidence presented to the committee suggests that the governance structures at Eskom were undermined, by which external persons appear to have usurped decision-making processes at Eskom.[556]

The committee was of the view that the laws, regulations, codes and other agreements which formed the basis of the governance structure at Eskom were distorted, circumvented, misused and applied in a non-uniform and non-transparent manner, and consequently had failed to support Eskom. Its financial crisis and governance issues were a result of a governance framework that had failed to protect Eskom from external interference and corporate capture.[557]

5.3 *King IV in relation to Eskom*

According to the King IV Report, good corporate governance is necessary to protect and advance the interests of the country and its citizens and is also crucial for the success of the state owned entities (SOEs).[558] The King IV Code applies directly to Eskom by virtue of

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550 The Companies Act 71 of 2008; Section 7 *(e)*

551 The Companies Act 71 of 2008; Section 7 *(i)*

552 The Companies Act 71 of 2008; Section 7 *(f)*

553 The Companies Act 71 of 2008; Section 7 *(l)*

554 L Mnganga-Gcabashe *Report Of The Portfolio Committee* op cit note 488 at 127

555 L Mnganga-Gcabashe *Report Of The Portfolio Committee* op cit note 488 at 130

556 L Mnganga-Gcabashe *Report Of The Portfolio Committee* op cit note 488 at 130-131

557 L Mnganga-Gcabashe *Report Of The Portfolio Committee* op cit note 488 at 136

558 Institute of Directors in Southern Africa (King IV) op cit note 332 at 111

Schedule 2 of the Public Finance Management Act 1 of 1999, in terms of which Eskom is a major public entity.[559]

Principle one provides that members of the governing body (GB) should act ethically and effectively; this encompasses integrity, competence, responsibility, accountability, fairness, and transparency, which must be collectively cultivated to ensure effective leadership that leads to the achievement of strategies objectives and positive outcomes.[560] Integrity entails acting in good faith and in the best interests of the company, avoidance of conflicts of interest according to ethical standards beyond mere legal compliance, setting the tone for an ethical organisational structure.[561] Competence entails members of GBs ensuring they have sufficient knowledge of the organisation, its industry, its capital and the laws, rules and codes applicable to it, and must act with due care, skill and diligence, take reasonable steps to become informed about matters and continuously develop competence to ensure effective leadership.[562] Responsibility entails that members of GBs should be accountable for organisational performance; should capture opportunities in a responsible way and in the best interests of the company; and should take responsibility for expecting, preventing and ameliorating the negative outcomes of the organisation's activities.[563] Accountability entails that members should answer for the execution of their responsibilities even if such responsibilities are delegated.[564] Fairness entails that the organisation must be directed in a way which does not have an adverse effect on the environment, society or future generations.[565] Transparency entails that the GB exercise its governance role and responsibilities openly.[566] The 'Supplement for State-Owned Entities' points out that these characteristics are in line with section 195 of the 1996 Constitution according to which public administration must adopt the values and principles enshrined in the Constitution, which include a high standard of professional ethics.[567]

[559] ibid

[560] Institute of Directors in Southern Africa (King IV) op cit note 332 at 43-44

[561] Institute of Directors in Southern Africa (King IV) op cit note 332 at 43

[562] ibid

[563] ibid

[564] Institute of Directors in Southern Africa (King IV) op cit note 332 at 44

[565] ibid

[566] ibid

[567] Institute of Directors in Southern Africa (King IV) op cit note 332 at 112

Principle three provides that the GB should ensure that their organisation is and is seen to be a responsible corporate citizen – in part achieved by compliance with the Constitution, the law, leading standards and adherence to its own codes of conduct and policies.[568] By virtue of their public interest mandates, SOEs are charged with good corporate citizenship.[569] SOEs are accountable to South Africa's citizens for discharging their responsibilities in accordance with their mandates as they are partially funded by taxpayer money.[570] The recommended practices should give expression to their public interest mandate.[571]

Principle four of the sector supplement advises that where the minister responsible for policy is different to that of the executive authority (or shareholder) as is the case with an SOE, industry/sector policy is set on a countrywide basis, and the role of the executive authority is to set policy parameters for a specific SOE within this framework. In order for a strategic plan for the SOE to be developed within these confines, the accounting authority (or governing body) must seek common understanding between the entity and the executive authority.[572] Priorities of the SOE must be balanced in order to fulfil their mandate and remain financially sustainable.[573] Furthermore, it is recommended that (even where legislation does not require it) strategic objectives, key performance measures, targets and potential trade-offs should be agreed in writing between the entity (represented by its accounting authority/governing body) and the shareholder in order to obtain clarity and alignment.[574]

Principle five provides that the GB should ensure that the reports issued by the organisation enable stakeholders to make informed assessments of the organisation's performance and its short, medium- and long-term prospects. The reports must honest and meet legal requirements and/or the legitimate and reasonable information needs of material stakeholders.[575]

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[568] Institute of Directors in Southern Africa (King IV) op cit note 332 at 45

[569] Institute of Directors in Southern Africa (King IV) op cit note 332 at 113

[570] ibid

[571] ibid

[572] ibid

[573] ibid

[574] ibid

[575] Institute of Directors in Southern Africa (King IV) op cit note 332 at 48

Principle six provides that the GB should serve as the focal point and custodian of corporate governance in the organisation.[576] The accounting authority is entrusted with assets and interests other than its own, from which the fiduciary duties of the accounting authority are derived and its status as the custodian of corporate governance.[577]

Principle 13 provides that the GB should comply with applicable laws and adopt non-binding rules, codes and standards to support the organisation being ethical and a good corporate citizen. The governing body should exercise ongoing oversight of compliance.[578]

Principle 14 provides that the GB should ensure that the organisation remunerates fairly, responsibly and transparently so as to promote the achievement of strategic objectives and positive outcomes in the short, medium and long term.

5.4 *Conclusion*

Good corporate governance is an indication of a healthy economy and is one of the pillars of economic development.[579] Social media, scrutinised budgets, scandals, and legislation targeting corruption have increased the demand for accountability.[580] Those in authority are challenged by the rapidly expanding boundaries of accountability and social responsibility.[581] Studies assert that channels of communication are opened and accountability mechanisms are strengthened by proper governance frameworks, and consequentially the public becomes more confident about the delivery of defined outcomes and about accountability for the results achieved.[582] Companies must practise good stewardship of public wealth, good public engagement and better outcomes for citizens.[583] Governance structures and practice must not

[576] Institute of Directors in Southern Africa (King IV) op cit note 332 at 49

[577] Institute of Directors in Southern Africa (King IV) op cit note 332 at 114

[578] Institute of Directors in Southern Africa (King IV) op cit note 332 at 63-64

[579] Rami Wadie 'Corporate Governance in the Public Sector: It's Time! ' *Forbes Middle East* November 2013 at 18, available at *https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Risk/gx-me-ccg-corporate-governance-in-the-public-sector.pdf* accessed on 4 February 2019.

[580] ibid

[581] ibid

[582] ibid

[583] ibid

only be sound, but must also be seen to be sound.[584] The existence of good governance is determined by the political will to govern well,[585] starting with every state official.[586] Governance fails with the abuse of power, dishonesty, fraud and violation of the legal system.[587] It has become apparent that South African leadership has not taken the issue of governance seriously enough, with flagrant disregard shown for corporate governance practices. Adverse findings by investigations show that despite promises of improvement, there is no will to take positive actions to turn the poor governance situation around.

The objective of King IV is to achieve an ethical culture, good performance, effective control and legitimacy by means of the governing body exercising ethical and effective leadership.[588] Principles such as integrity, competence, responsibility, accountability, fairness and transparency epitomise ethical leadership.[589] The negative consequences of the organisation's activities and outputs are expected and prevented by the application of ethical leadership.[590] Ethical and effective leadership ought to complement and reinforce each other; effective leadership focuses on the achievement of strategic objectives and positive outcomes.[591] A discussion of the relevant corporate governance provisions and King principles as they apply to Steinhoff and Eskom suggests that a proper application of these principles would yield a positive outcome and prevent crises – the King Code is after all designed to inculcate practices which anticipate and prevent harm to the organisation causing damage to the environment, society and the economy.[592] Governing bodies should view compliance not solely as an obligation but also a source of rights and protection.[593]

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[584] ibid

[585] FC Prinsloo 'Good Governance in South Africa: A Critical Analysis' (2013) 3 *Stellenbosch University* available at *https://www.researchgate.net/publication/262948283_Good_Governance_in_South_Africa_A_Critical_Analysis* accessed on 4 February 2019

[586] FC Prinsloo 'Good Governance in South Africa…' op cit note 585 at 14

[587] FC Prinsloo 'Good Governance in South Africa…' op cit note 585 at 3

[588] Institute of Directors in Southern Africa (King IV) op cit note 332 at 22

[589] Institute of Directors in Southern Africa (King IV) op cit note 332 at 20

[590] ibid

[591] ibid

[592] ibid

[593] Institute of Directors in Southern Africa (King IV) op cit note 332 at 30

According to Keay and Loughrey, the key questions when assessing the process of accountability are to whom directors are accountable, for what and how.[594] The Anglo-American answer is the shareholder value theory which provides that directors must do that which will ultimately benefit the shareholders of the company.[595] However, King IV advocates a stakeholder-inclusive approach by which the governing body must take into account the legitimate and reasonable needs, interests, and expectations of all material stakeholders.[596] This approach supports the interdependence of stakeholders and shareholders and affords priority to all sources of value creation within the organisation and not just the interests of the providers of financial capital.[597] A balance of interests is achieved over time by prioritising and even trading off interests; ultimately whatever is done must be done in the best interests of the organisation over the longer term.[598] Whether the organisation is effectively able to strike this balance is indicated by the quality of stakeholder relationships.[599] The best interests of the company are therefore not always the best interests of the shareholders and the interests of shareholders do not necessarily take precedence over other stakeholders.[600] Directors thus owe their duties to the company and the company alone; the 'company' represents various parties and interests i.e. shareholders, employees, consumers, the environment and the community. In acting in the best interests of the company, therefore, directors must act in the best interests of all of these entities.[601] Keay and Loughrey mention that accountability as a process requires accounting to a third party audience who can ask questions and pass judgment, from which consequences might follow.[602] Directors must provide accurate information regarding their actions and decisions.[603] Accountability for organisational performance is ensured by reporting and

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594 AR Keay and J Loughrey 'The Framework for Board Accountability in Corporate Governance' (2015) 35(2) *Legal Studies* 252 – 279 available at https://doi.org/10.1111/lest.12058, accessed on 25 July 2019

595 ibid

596 Institute of Directors in Southern Africa (King IV) op cit note 332 at 25

597 ibid

598 ibid

599 ibid

600 Institute of Directors in Southern Africa (King IV) op cit note 332 at 26

601 I Esser and JJ Du Plessis 'The Stakeholder Debate and Directors' Fiduciary Duties' (2007) 19(3) *SA Mercantile Law Journal* 346-363

602 AR Keay and J Loughrey op cit note 594

603 ibid

disclosure.[604] The process of explanation by the board should include the background to its actions, a clear rationale for those actions, and actions taken to mitigate risks; this requirement acts as a check on the decision-making of the board.[605] This is provided for in King IV.[606] Following disclosure the board must be questioned about their decisions and judged on their responses.[607] Queries as to how governance roles were executed by the board must be addressed by the directors at the annual general meeting.[608] The provision of information could be due to a statutory or other requirement or the demand for information following a court hearing.[609] The importance of transparency speaks for itself,[610] in that greater corporate transparency facilitates more informed investment decisions by investors, and it enables regulators to detect more easily illegal behaviour and to protect investors' interests. Reducing information asymmetry between investors and the firm reduces costs of capital.[611] Firms, regulators and investors all therefore have incentives to promote corporate reporting transparency.[612]

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[604] Institute of Directors in Southern Africa (King IV) op cit note 332 at 21

[605] AR Keay and J Loughrey op cit note 594

[606] Institute of Directors in Southern Africa (King IV) op cit note 332

*specific recommendations on disclosure may be found under each King IV principle.

[607] AR Keay and J Loughrey op cit note 594

[608] Institute of Directors in Southern Africa (King IV) op cit note 332 at 72

[609] AR Keay and J Loughrey op cit note 594

[610] AJ Felo 'Corporate Reporting Transparency, Board Independence and Expertise, and CEO Duality' 2010 page 2 *SSRN available at https://ssrn.com/abstract=1373942*

[611] ibid

[612] ibid

CHAPTER FOUR

Conclusion

1. Introduction

Chapter four of this dissertation assesses the findings of the research conducted and aims to provide an answer to the research questions posed in Chapter One.

Corporate governance motivates, compels and persuades corporate managers to keep the promises they make to investors by reducing conduct which does not meet the legitimate expectations of investors.[613] Decision-makers of a company may be tempted to make decisions or take actions at odds with interests of stakeholders; such as extravagant or risky investments, making insufficient effort and/or self-dealing.[614] The management of a company should be focused on running the company in the most efficient and effective manner, making reporting in accordance with requisite accounting standards straightforward.[615] The danger lies in management devoting energy towards drafting financial reports which suit the interest of management rather than the overall performance of the firm.[616]

2. Section 76 of the Companies Act and the legal status of King IV

The King IV Code is a code of principles which is generally voluntary. Companies with a primary listing on the JSE, however, are bound by some of the King IV principles by virtue of the JSE listing requirements. This dissertation argues that King IV may in fact be legally enforceable due to the following provisions:

- Section 5 of the Companies of 2008 provides that the Act must be applied in such a way as to give effect to the purposes set out in section 7.

[613] JR Macy *Corporate Governance: Promises Kept, Promises Broken* (2008) 1

[614] O Marnet *Behaviour and Rationality in Corporate Governance* (2008) 14

[615] O Marnet op cit note 614 at 14-15

[616] O Marnet op cit note 614 at 15

- One of the purposes of the Companies Act of 2008 as set out in section 7(b)(iii) is to encourage the growth of the South African economy by encouraging transparency and high levels of corporate governance.
- Section 158(*a*) of the Companies Act 2008 provides that courts must develop the common law to achieve the realisation and enjoyment of the rights contained in the 2008 Act.

Section 76(4) read with section 76(3) of the Companies Act of 2008 contains the business judgement rule, which provides that a director who has taken reasonably diligent steps to become informed about the matter at hand will have satisfied the requirements of section 76(3). The business judgement rule itself exonerates directors who have acted in the best interests of the company and with the requisite degree of care, skill, and diligence having taken reasonably diligent steps to become informed of the relevant matter. Compliance with the King principles may meet such requirements, providing the King IV Code with a route to enforcement. Mindless compliance does not suffice: the board must consider the best governance practises for its decisions, and apply its mind as to how the company should be governed.[617] The consequences of poor governance (whether due to dishonesty, negligence or unacceptable processes) is the dwindling support of stakeholders.[618] A duty to practise good quality governance is required as opposed to merely adopting a 'tick-box' approach.[619] Good governance requires intellectual honesty, accountability, transparency and responsibility.[620]

3. Corporate governance collapse

The functioning of corporate governance involves performance monitoring, the creation and maintenance of structures and systems, and leadership.[621] There are many factors which affect the manner in which people govern: values and beliefs, their ability to make decisions and how well they implement those decisions.[622] While expertise, knowledge and skills are necessary for efficient governance, something more is required since the decisions that

[617] Institute of Directors in Southern Africa and The King Committee on Corporate Governance in South Africa *King IV Report on Corporate Governance in South Africa* (2016) 12

[618] Institute of Directors in Southern Africa (King IV) op cit note 617 at 14

[619] ibid

[620] Institute of Directors in Southern Africa (King IV) op cit note 617 at 15

[621] L McGregor *The Human Face of Corporate Governance* (2000) 10

[622] ibid

directors take affect the quality of life and destinies of many human beings.[623] The quality of decisions and the impact of those decisions on other people is dependent on the type of person taking the decision.[624] Lynn McGregor posits that when considering governance, the key question is not really whether or not a code of governance is followed but rather whether the people charged with governance consider themselves responsible for and accountable for the impact which their decisions have on other people.[625] Whereas some directors are concerned with whether the choices they make benefit as many people as possible, some are more occupied with their own self-interest.[626] The potential for constructive or destructive behaviour is inherent in human beings and by extension all leaders possess the potential to use or abuse their powers, depending on the conscious and subconscious choices that are made.[627] The decisions of business leaders can affect the quality of life of large populations, have the power to affect the physical environment, the goods and services used and the manner in which we communicate with each other.[628]

The corporate crises at Steinhoff and Eskom reveal that the companies failed to effectively and practically execute corporate governance provisions. The question is whether the failures were due to the legislation itself, the voluntary nature of the King Code, or some other reason. The discussions in chapter three suggest that the crises may be largely attributed to the poor ethical culture within these companies. Poor oversight by the board, lack of integrity, lack of responsibility and accountability, lack of transparency, group think, and dominant CEOs are all factors that led to the crises. Governing bodies disregarded the rules for effective corporate governance despite them being readily available and easily accessible to all companies. Furthermore, persons in positions of power failed to act consistently and with integrity. Marnet posits that high levels of monitoring may be the best way to minimise agency problems; however, this may come with rising cost. Furthermore, excessive monitoring might be counterproductive.[629] The writer believes, however, that a higher level of monitoring has become a necessary and prudent response to the collapses of

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623 ibid

624 ibid

625 ibid

626 ibid

627 ibid

628 L McGregor op cit note 621 at 12

629 O Marnet op cit note 614 at 18

governance. Whilst a person cannot be forced to act with integrity, there are governance instruments available to guide governing bodies towards good corporate governance.

4. Eskom

The discussion on the corporate governance crisis at Eskom in chapter three suggests that the board of the company had a certain disdain for the fundamental rules of corporate governance or did not appreciate their significance. Furthermore, it would appear that political influences weighed heavily on the organisation. Eskom is subject not only to the Companies Act 2008 but the Eskom Conversion Act[630], Public Finance Management Act[631], the King IV Code, and the Protocol on Corporate Governance in the Public Sector.[632] However, despite these imposing pieces of legislation and corporate governance guidance principles, Eskom has failed to fulfil its duties. The fault at Eskom lies not with the legislation or codes on governance but rather with their execution and on the lack of moral fibre of those in control. Development depends on good governance[633] and a symptom of poor governance is corruption.[634] Corruption is the abuse of power for private gain and it involves high economic and social costs, including increased transaction costs, reduction of public revenues, the distortion of resource allocation, the retardation of investment and economic growth and a weakening of the rule of law.[635] Strategies to promote governance and eliminate corruption require a strong political will at the highest levels of government.[636] In the case of Eskom, it is the view of the writer that the execution of legislation is the primary issue. Underlying the failure to execute is corruption at a political level and the mere unwillingness to properly follow the rules and regulations. Privatisation may be a solution to political interference and poor performance. The sole shareholder of the State-owned company is the government itself and vests in the Minister of Public Enterprises. Those in control of the company are not

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[630] 13 of 2001

[631] 1 of 1999

[632] South Africa Department of Public Enterprises *Protocol on Corporate Governance* (2002)

[633] K Botchwey et al *Fighting Corruption: Promoting Good* (2000) available at *https://read.thecommonwealth-ilibrary.org/commonwealth/governance/fighting-corruption-promoting-good-governance_9781848597228-en#page11* accessed on 20 August 2019 page 5

[634] ibid

[635] K Botchwey… et al op cit note 633 at 5-6

[636] K Botchwey… et al op cit note 633 at 6

shareholders and might not have sufficient interest in the sustainability and prosperity of the company; thus, as incentives are low, the operating costs of the company are high, the quality of goods produced is low, and an appreciation for good corporate governance practice is almost non-existent. The writer is of the view that state-owned companies require a wide-scale overhaul of their institutional culture. Greater oversight, accountability, and transparency are necessary and need to be seen as necessary by those in power. It is a simple matter to state that all government dealings and actions must be openly available and that the people must be able to access and more importantly understand what and how government makes and executes their decisions and in what way money is spent. In an atmosphere of disdain, the country will only find itself deeper in the sea of legislation without any tangible effect. Performance might be improved if performance is measured. Furthermore, offending employees of state-owned entities should be identified and sanctioned to deter future offenders. Ethics programmes may be conducted on a regular basis to remind governing bodies of the required conduct, mindset and values.

5. Steinhoff

Despite presenting a healthy façade, Steinhoff has been engaged in questionable activity for years. The question is whether a dual-listed company with a secondary listing on the JSE should be bound by South African governance codes i.e. the King IV Code and the Companies Act 71 of 2008. The experience of Steinhoff and the effect thereof on South African citizens urges a positive answer. This thesis advocates a stricter and wider enforcement of legislation in companies which have an impact on the citizens of South Africa. With its headquarters in South Africa, public investments in the Steinhoff, and companies such as Incredible Connection, HiFi Corp and its other major brands in South Africa and employing South African citizens, Steinhoff should not be permitted to bypass the legislation which applies to South African companies. The Companies Act 71 of 2008 should be widened to include application and enforcement against companies with a secondary listing on the JSE. In particular, the definition of a company in section 1 of the Act should be widened to include external companies. Companies such as Steinhoff International would then be bound by governance legislation and the enhanced accountability and transparency provisions found in chapter three.[637] To conclude, the writer believes there is merit in

[637] The Companies Act 71 of 2008

incorporating certain principles of the King IV Code as a supplement to company legislation. King IV principles which should be included in the 2008 Act are:

- Principle seven[638] (composition of the governing body);
- Principle eight[639] (committees of the governing body);
- Principle 10[640] (appointment and delegation to management);
- Principle 14[641] (remuneration governance);
- Principle 16[642] (stakeholders);
- Principle s17[643] (institutional investors).

Furthermore, continuous training on the King IV Code should be provided to all parties involved in governance, including those in the upper echelons of power. This would enhance the understanding and rationale of the proper use of power, the Code and ethical principles and what it requires to be professionally responsible and accountable.

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[638] Institute of Directors in Southern Africa (King IV) op cit note 617 at 50-53.

[639] Institute of Directors in Southern Africa (King IV) op cit note 617 at 54-57

[640] Institute of Directors in Southern Africa (King IV) op cit note 617 at 58-60

[641] Institute of Directors in Southern Africa (King IV) op cit note 617 at 64-67

[642] Institute of Directors in Southern Africa (King IV) op cit note 617 at 71-73

[643] Institute of Directors in Southern Africa (King IV) op cit note 617 at 73.

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The Union Companies Act 46 of 1926

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17 November 2020

Miss Faatima Seedat (214563659)
School of Law
Howard College Campus

Dear Miss Faatima Seedat

Project title: Section 76 of the Companies Act 71 of 2008 as a mechanism of enforcement for the KING IV Code of Corporate Governance for South Africa

Approval Notification – Amendment Application

This letter serves to notify you that your application and request for an amendment received on 21 October 2020 has now been approved as follows:

- Change in Title.

Any alterations to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form; Title of the Project, Location of the Study must be reviewed and approved through an amendment /modification prior to its implementation. In case you have further queries, please quote the above reference number.

PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

All research conducted during the COVID-19 period must adhere to the national and UKZN guidelines.

Best wishes for the successful completion of your research protocol.

Yours sincerely,

…[redacted]………………………
Prof Shannon Joy Bosch
Academic Leader Research
School of Law

UNIVERSITY OF
KWAZULU-NATAL
INYUVESI
YAKWAZULU-NATALI

Miss Faatima Seedat (214563659)
School Of Law
Howard College

Dear Miss Faatima Seedat,

Protocol reference number: 00003305
Project title: The Enforcement of the King IV Code on Corporate Governance for South Africa: Is there a need to enforce the King IV Code in a way similar to that of the Companies Act 71 of 2008?

Exemption from Ethics Review

In response to your application received on 14 August 2019, your school has indicated that the protocol has been granted **EXEMPTION FROM ETHICS REVIEW.**

Any alteration/s to the exempted research protocol, e.g., Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through an amendment/modification prior to its implementation. The original exemption number must be cited.

For any changes that could result in potential risk, an ethics application including the proposed amendments must be submitted to the relevant UKZN Research Ethics Committee. The original exemption number must be cited.

In case you have further queries, please quote the above reference number.

PLEASE NOTE:
Research data should be securely stored in the discipline/department for a period of 5 years.

I take this opportunity of wishing you everything of the best with your study.

Yours sincerely,

[redacted]

Dr Annette Singh
Academic Leader Research
School Of Law

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