# IMPOSING PERSONAL LIABILITY ON ACCOUNTING AUTHORITIES FOR SOEs FINANCIAL LOSSES UNDER SOUTH AFRICAN LAW

**By**

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**30 JANUARY 2024**

DECLARATION

Declaration by the candidate

I, **Michael Celumusa Buthelezi**, declare that:

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(ii) This dissertation has not been submitted for any degree or examination at any other university.

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Signature: 

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**DEDICATION**

I dedicate this Thesis and Doctorate to my three sons, Enamile, Enuleka and Enelani

**ABSTRACT**

The primary aim of this study was to explore the legal feasibility to hold board members (accounting authorities or directors) of State-Owned Enterprises personally liable in delict to the State-Owned Enterprises for financial losses occasioned by breach of their *fiduciary* and constitutional duties. Various shareholder ministers have been collusive in the losses sustained at State-Owned Enterprises . The culture of impunity that dominated the State-Owned Enterprises , especially during the second decade in South Africa, orchestrated to ensure non-enforcement of accountability measures. A culture of impunity and lack of accountability within the sector of SOEs, both civilly and criminally, has led to the near collapse of State-Owned Enterprises in South Africa and also entrenched a patronage network which the law giver will have to pay attention to in the future. As part of exploring the desirability and legal feasibility to hold accounting authorities personally liable using the common law delictual remedy, the researcher revisited various legal instruments available for oversight over State-Owned Enterprises and other jurisdictions.

This study concluded that the law in South Africa and in other jurisdictions, like Canada, the UK, the US and China provides for civil liability for damages arising from a breach of a director's *fiduciary* duties. According to the findings of this study, the common law remedy under the *Lex Aquilia* is the most appropriate tool for achieving the accountability of top officials in SOEs. The research also argued for the activation of the enforcement institutions to uphold the constitutional principle of accountable public administration. In this regard, this study recommended the creation of a new SOEs Unit will be an agent of the National Treasury responsible for all the affairs of the country's strategic SOEs and their subsidiaries, including litigating on their behalf. In a nutshell, the study recommends that the Department of Public Enterprises (DPE) should be dissolved and replaced by an SOEs Unit to be situated in the National Treasury.

This research has found that there is fragmentation among South African institutions and instruments

of oversight of the organs of the state, from parliamentary committees to Chapter nine institutions, such as the Public Protector and the Auditor General. Other institutions, such as the SIU and its Special Tribunal, operate parallel to these other institutions. The fragmentation is also seen among various legislations meant to fight acts of corruption and the like, such as PCCAA and the POCA, as well as the SIU and Special Tribunals Act 74 of 1996.

This study has argued for the integration of the Auditor General and the SIU, including its Special Tribunals. The argument was to reconfigure the SIU (and the Special Tribunals) into a chapter nine institution as units of the Auditor General. The incorporation of the Special Investigating Unit and its Special Tribunal(s) into the Auditor-General of South Africa as its Unit responsible for civil recoveries on behalf of state organs to improve the oversight mechanisms and ensure efficient recovery of losses of State-Owned Enterprises. In this regard, the proposal was that the SIU and the Special Tribunals should operate in the same manner as the Competition Commission, as well as its Competition Tribunal and the Competition Appeal Court. It was argued that moving the SIU and the Special Tribunal into the office of the Auditor General would yield positive advantages, such as the saving on costs. Integrating the SIU and the Special Tribunal into the office of the Auditor General would yield positive advantages, such as the saving on costs and efficiency in oversight and recovery of losses, as the Auditor General does annual auditing. The Auditor General would also be able to use the provisions of the SIU and Special Tribunals Act to recover damages on behalf of State-Owned Enterprises. Most importantly, integrating the SIU and Special Tribunals into the office of the Auditor General would ensure their independence, taking them away from the control of the State President and executive.

Regarding the Public Protector, this study argued that despite the advantages offered by the powerful sword in the hands of the Public Protector in the form of its remedial action, the Public Protector process is hamstrung by a lack of adequate financial resources to carry out its investigations. Also, the research has also argued that the remedial action that the Auditor General may take, in terms of the

Public Audit Act 25 of 2004, in contrast with the remedial action of the Public Protector, which is wide enough to make any appropriate order, is inadequate. In particular, the Auditor General remedial action does not hold accounting authorities personally liable to compensate State-Owned Enterprises for financial losses stemming from a breach of directors' *fiduciary* and constitutional duties. The study has also bemoaned the fact that the SIU process is only open to the State President who has the constitutional prerogative to authorise the SIU recovery process and not open to the public.

Hence, this study has proposed that the SIU process should operate in the same manner as in the case of the Public Protector, in which the process allows members of the public to participate by lodging complaints, especially against public office-bearers of SOEs. Additionally, the law should also permit members of the public to litigate on behalf of the State-Owned Enterprises , which suffers financial loss, against accounting authorities and third parties, with or without the SIU, in the Special Tribunal. As it was argued, all this process should take place in the SIU and Special Tribunals, reconfigured under the directorate of the Auditor General.

Ultimately, this study recommended that the Department of Public Enterprises (DPE) should be dissolved and replaced by an SOEs Unit to be based in the National Treasury. In a nutshell, the study recommends creation of a new SOEs Unit will be an agent of the National Treasury responsible for all the affairs of the country's strategic SOEs and their subsidiaries, including litigating on their behalf.

**ABBREVIATIONS AND ACRONYMS**

| | |
|---|---|
| 4IR | 4th Industrial Revolution |
| ABSIP | Association of Black Securities and Investment Professionals |
| ACSA | Airports Company South Africa |
| AGSA | Auditor-General |
| AFS | Annual Financial Statements |
| AIDC | Alternative Information & Development Centre |
| ANAO | Australian National Audit Office |
| ANC | African National Congress |
| BCLR | Butterworth Constitutional Law Reports |
| BHP | Broken Hill Proprietary Company |
| BJR | The business judgment rule |
| CAC | Competition Appeal Court |
| CC | Constitutional Court |
| CEO | Chief Executive Officer |
| CEPAL (ECLA) | Comisión Económica para América Latina (Economic Commission for Latin America) |
| CFST | Cross Functional Sourcing Team |
| CJ | Chief Justice |
| COO | Chief Operating Officer |
| CRO | Chief Restructuring Officer |
| CRRC | China Railway Rolling Stock Corporation |
| CPO | Chief Procurement Officer |
| CSI | Corporate social investment |
| WCC | Western Cape Court |
| DA | Democratic Alliance |
| DBSA | Development Bank of Southern Africa |
| DOI | Digital Object Identifier |
| DPCI | Directorate for Priority Crimes Investigation |
| DPE | Department of Public Enterprises |
| DStv | Digital Satellite Television |
| DST | Digital Setbox Terrestrial |
| EAP | Energy Action Plan |

| | |
|---|---|
| ECG | Eastern Cape High Court, Grahamstown |
| ECGI | European Corporate Governance Institute |
| Ed | Edition |
| EFF | Economic Freedom Fighters |
| E-LOCO | Electric-Locomotive |
| EOH | Enterprise Outsourcing Holdings |
| ESCOM | Electricity Supply Commission |
| FGCS | Federal Government Corporations |
| FXCM | Forex Capital Markets |
| GCEO | Group Chief Executive Officer |
| GDP | Gross Domestic Production |
| HAWKS | Directorate for Priority Crimes Investigation |
| HR | House of Representatives |
| HSF | Helen Suzman Foundation |
| ICT | Information Communications Technology |
| IMF | International Monetary Fund |
| Inc. | Incorporated |
| IoDSA | Institute of Directors in Southern Africa |
| J | Judge |
| JDR | Juta's Daily Reports/Juta's Unreported Judgments |
| JSE | Johannesburg Stock Exchange |
| JCORPFIN | *Journal of Corporate Finance* |
| KZD | KwaZulu-Natal Durban |
| LAWSA | Law of South Africa |
| LLM | Master of Laws |
| M&A | Mergers and Acquisitions |
| MCG | MultiChoice Group |
| Merc LJ | Mercantile Law Journal |
| MJSS | Mediterranean Journal of Social Sciences |
| MLP | Music Legends Project |
| MM | Mbombela High Court, Mpumalanga |
| M-Net | Electronic Media Network |
| NA | National Assembly |
| NGBE | National Government Business Enterprise |

| | |
|---|---|
| NDP | National Development Plan |
| NDPE | National Department of Public Enterprises |
| NECOM | National Energy Crisis Committee |
| NPC | Non-Profit Companies |
| NPOs | Non-Profit Organisations |
| OECD | Organization for Economic Cooperation and Development |
| OUTA | Organisation Undoing Tax Abuse |
| PCCA | Prevention and Combating of Corrupt Activities Act |
| PIC | Public Investment Corporation |
| PLC | Public Limited Company |
| POCA | Prevention of Organised Crime Act |
| PP | Public Protector |
| PTT | Presidential Task Team |
| PQRCED | Professional Qualification Review Committee for External Directors |
| MJE | Montenegrin Journal of Economics |
| PRASA | Passenger Rail Agency of South Africa |
| R.S.C. | Revised Statutes of Canada |
| SAA | South African Airways |
| SAAT | South African Airways Technical |
| SAJHR | South African Journal on Human Rights |
| SASAC | State-owned Assets Supervision and Administration of the State Council. |
| SONA | State of the Nation Address |
| SABC | South African Broadcasting Corporation |
| SAFA | South African Football Association |
| SAICA | South African Institute of Chartered Accountants |
| SAJEMS | South African Journal of Economics & Management Science |
| SALJ | South African Law Journal |
| SANRAL | South African National Road Agency Limited |
| SAPO | South African Post Office |
| SARCC | South African Rail Commuter Corporation |
| SAR&H | South African Railways and Harbours Administration |
| SATS | South African Transport Services |
| SCA | Supreme Court of Appeal |

| | |
|---|---|
| SCC | Supreme Court of Canada |
| SCOPA | Standing Committee on Public Accounts |
| SCR | Supreme Court Reports |
| SEC | U.S. Securities and Exchange Commission |
| SGCS | States Government Corporations |
| SMEs | Small, Medium Enterprises |
| SOC | State-Owned Company |
| SOE | State-Owned Enterprise |
| SOX | Sarbanes-Oxley |
| SR | Sustainability Report |
| SROC | Senior Remuneration Oversight Committee |
| SSRN | Social Science Research Network |
| TFR | Transnet Freight Rail |
| TNPA | Transnet National Ports Authority |
| TPM | Team Production Model |
| TSCI | Transnet Corporate Social Investment |
| TV | Television |
| UK | United Kingdom |
| UKGI | UK Government Investments |
| USC. | The United States Code |
| ZAGPJHC | Johannesburg Local Division of the High Court |
| ZAKZDHC | KwaZulu-Natal Durban Local Division |
| ZAKZPHC | KwaZulu-Natal Pietermaritzburg High Court |
| ZANWHC | North-West High Court |

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# CHAPTER ONE

# BACKGROUND AND CONTEXT

## 1.1 INTRODUCTION

South Africa is a developmental state, with a constitutional responsibility not only to administer governance but also to provide basic services to promote social justice, equality, and human dignity of all its citizens.[1] However, the country faces a profound structural challenges; namely, an exceptionally high unemployment rate and a narrow tax base, which render government revenues inadequate to meet its extensive service delivery obligations.[2] In addition to its core functions, the state must also provide for millions of citizens who are either unemployed or underemployed, many of whom rely on social grants for basic survival. As a developing country, South Africa struggles to attract private investment in sectors where returns are uncertain, or infrastructure risks are high.[3] Consequently, vast portions of the economy, particularly in underserved or rural areas, remain under-resourced. The private sector, driven by profit motives, is often reluctant or unable to provide long-term, high-risk infrastructure and public goods essential for inclusive development.[4] Within such a context, the state plays a vital role in creating enabling conditions for economic participation while also shielding vulnerable populations from the excesses of unfettered capitalism. To bridge this gap, the democratic government has assigned a unique developmental mandate to State-Owned Enterprises

[1] Constitution of the Republic of South Africa, 1996, sections 1(d), 195.

[2] National Treasury *Budget Review* (2024), ch 2. Available at https://www.treasury.gov.za (accessed 11 April 2025).

[3] N Matsiliza (2024). Corporate Governance in the South African Public Agencies: Implications for Oversight and Accountability Mechanisms. 10.5772/intechopen.110391.

[4] Organisation for Economic Co-operation and Development (OECD) *State-Owned Enterprises in the Development Process* (2015), at 31–32.

(SOEs), since 1994. South Africa has over 700 SOEs operating across critical sectors such as energy (Eskom), telecommunications (Telkom), broadcasting (SABC), transport (PRASA), aviation (SAA), fuel (PetroSA), and postal services (SAPO).[5] These State-Owned Enterprises are owned and managed by the state through various departments and ministries, are expected to deliver essential services efficiently and equitably.[6] SOEs fall under the broader framework of constitutional governance, owing to their public ownership and funding model. Executives, directors, and managers of SOEs are paid from the public purse and operate under statutory mandates, rendering them accountable to both the public and Parliament.[7] Oversight legislation, such as the PFMA, positions SOEs within a network of public accountability and *fiduciary* responsibility. Various government ministers act as the political heads overseeing the boards of directors of these enterprises, ensuring alignment with national policy goals.[8] SOEs are strategically positioned to influence nearly every facet of daily life and economic activity. As such, the productivity, governance, and financial sustainability of SOEs are as important as their foundational mandates. Their failure or success has direct implications for the fulfilment of the state's constitutional obligations.

The National Development Plan (NDP) underscores the central role of SOEs in achieving national development objectives.[9] The NDP recognises SOEs as an instrument for delivering economic infrastructure and social equity, while also noting the need for better governance, financial discipline, and operational viability. The National Development Plan advocates for clear mandates, professional

[5] Department of Public Enterprises *Annual Report (SOE Overview Report) 2021/2022* (2022) 3.

[6] Public Finance Management Act 1 of 1999 (PFMA) , section 49; Companies Act 71 of 2008, section 76.

[7] PFMA section 83; Constitution section 195(1)(f); the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector and Organs of State ('State Capture Commission') State Capture Commission Report Part III (2022) 198, available at *https://www.statecapture.org.za/site/information/reports,* accessed 26 August 2022.

[8] Department of Communications and Digital Technologies *Annual Report* (2023) 8.

[9] Planning Commission (NDP) *National Development Plan 2030: Our Future – Make it Work* (2012) 167–170 available at https://www.gov.za/sites/default/files/gcis_document/201409/ndp-2030-our-future-make-it-workr.pdf (accessed 26 August 2022).

management, and strong accountability mechanisms as prerequisites for realising the developmental potential of SOEs.[10] The NDP further recognises that SOEs are essential to reversing apartheid-era spatial inequalities and fostering urban integration through investment in transport, housing, and communication infrastructure.[11] As extensions of the state, SOEs are mandated not only to provide essential services but also to facilitate transformation and economic inclusion.[12] Their failure or success has direct implications for the fulfilment of the state's constitutional obligations.

Thabane and Snyman-van Deventer affirm that SOEs function at the very coalface of citizens' lives and play a foundational role in economic stability and social development.[13] Thabane and Snyman-van Deventer refer to several key strategic SOEs, including the Development Bank of Southern Africa (DBSA), Denel, Airports Company South Africa (ACSA), and the Public Investment Corporation (PIC), to underscore their argument that State-Owned Enterprises have a significant role to play 'in the growth, development, and stability of the South African economy.'[14] Additionally, some of these enterprises often own large tracts of land in urban centres, land that could be repurposed for low-income housing or infrastructure expansion, making SOEs not only service providers but also latent development partners.[15]

Yet, despite this developmental vision to complement the developmental role of the state, in practice South African SOEs have often competed with public service needs rather than advancing them. Over the past two decades, many of South Africa's SOEs; most notably Eskom, South African Airways (SAA), the Passenger Rail Agency of South Africa (PRASA), and the South African Broadcasting

[10] Ibid, 172.

[11] Ibid 173; see also Development Facilitation Act 67 of 1995.

[12] Constitution of the Republic of South Africa, 1996, s 195(1).

[13] T Thabane & E Snyman-van Deventer 'The Role of SOEs in South Africa's Development' (2020) *Stellenbosch Law Review* 31(1) 87.

[14] Ibid.

[15] Public Works & Infrastructure *Strategic Infrastructure Report* (2022); Department of Public Enterprises *Annual Report* (2023) 4.

Corporation (SABC) have suffered acute financial mismanagement, governance breakdowns, and repeated operational failures.[16] These strategic SOEs have become fiscal burdens rather than developmental catalysts.[17] For example, despite repeated turnaround strategies, South African Airways entered business rescue in December 2019 after years of financial instability.[18] Their dependency on government guarantees and repeated financial rescues diverts funds away from other urgent public priorities such as education, housing, and rural infrastructure. While policy debates and commissions of inquiry have often centred on corruption and political interference, a less examined but equally critical issue is the accountability of those entrusted with managing SOE affairs. High-level executives frequently exit under clouds of misconduct, yet legal consequences remain rare.[19] This lack of accountability has contributed to a cycle of inefficiencies contributing to financial losses in the form of irregular, wasteful and fruitless expenditure, with little deterrent effect for negligence or reckless conduct by accounting authorities and board members. Individuals at the helm of SOEs, such as board members and executive heads of SOEs are designated as "accounting authorities" and bear *fiduciary* responsibilities similar to those of company directors, in terms of the PFMA.[20] Despite this, the enforcement of personal liability provisions in cases of maladministration or financial loss has been minimal, inconsistent, and frequently obstructed by political and institutional inactivity.[21]

The recurring financial collapse of SOEs and the state's costly bailouts raise fundamental questions

[16] Auditor-General South Africa (AGSA) *Consolidated General Report on National and Provincial Audit Outcomes* (2022) ch 3, available at https://www.agsa.co.za/portals/0/reports/pfma/2021-22/2022_pfma%20consolidated%20general%20report.pdf (accessed 12 august 2022).

[17] Auditor-General South Africa *Consolidated General Report on National and Provincial Audit Outcomes* (2023) ch 4, available at https://www.agsa.co.za/Portals/0/Reports/PFMA/2021-22/2022_PFMA%20Consolidated%20General%20Report.pdf (accessed 12 December 2024).

[18] Business Rescue Plan for South African Airways (2020) ch 1–2.

[19] See M Mpete & C Maier (2024). Challenges faced by CEOs in executing turnaround strategies in state-owned enterprises in South Africa. *South African Journal of Business Management, 55*(1), a4220. https://doi.org/10.4102/sajbm.v55i1.4220

[20] Public Finance Management Act 1 of 1999 (PFMA), section 49(2)(a); Companies Act 71 of 2008, section 76.

[21] State Capture Commission *Report Part IV* (2022) 287–289.

about the practical enforceability of accountability mechanisms.[22] Public frustration has grown over the apparent impunity of those at the helm of failing SOEs, prompting renewed calls for legal reform.[23] This study is born against that backdrop and poses a central question: To what extent does the current South African legal framework enable the imposition of personal liability on accounting authorities for SOE financial losses, and how might it be strengthened to enhance accountability and governance? Put differently, does the existing South African law provide for a delictual remedy against an accounting authority to compensate a SOE that suffers a loss due to a breach of the director's *fiduciary* duty, as is now clearly spelt out in the constitutional principles? This research begins by acknowledging the constitutional and policy imperatives behind the creation and operation of SOEs. It examines why, despite sound policy frameworks, SOEs have failed to consistently deliver on their mandates. A key area of focus is the failure to impose personal liability on SOE accounting authorities for financial losses, despite provisions in laws such as the PFMA. Chapter One provides the necessary context and rationale for this study. The chapter also outlines the structure of the research, which aims to explore the legal, institutional, and normative challenges in enforcing accountability within South Africa's SOE governance landscape.

This chapter (chapter one) sets the tone and provides a background to the study and problem of mismanagement in South African SOEs. The chapter also provides a rationale for the research as well as an overview of the structure of the research and an outline of the chapters that appear thereafter.

## 1.2 STATEMENT OF THE PROBLEM

The significance of State-Owned Enterprises and the strategic role that they play in the social and economic development of the country have been alluded to by President Ramaphosa during the annual

[22] National Treasury *Medium Term Budget Policy Statement* (2023) 22, available at https://www.treasury.gov.za/documents/mtbps/ accessed 12 August 2023.

[23] Public Service Commission *Report on State-Owned Enterprises Governance Failures* (2021) at 10–11, available at https://www.psc.gov.za/documents/docs/reports/2021/SOE_Governance_Failures_Report.pdf (accessed 12 July 2022).

state of the nation address, for 2022. As such, State-Owned Enterprises play (or at least should) a vital role in the government's fulfilling its mandate of service delivery, because in most cases, State-Owned Enterprises provide services that are required by the community. In other words, service delivery is often provided through State-Owned Enterprises. Rail infrastructure, for example, is the engine for social and economic development. The government has a constitutional duty to provide and maintain infrastructure. This government's constitutional obligation includes, among others, providing rail freight infrastructure and long-distance passenger rail. As its vehicle to discharge this constitutional obligation, the government uses Transnet Ltd. The government supplies electricity using Eskom, whereas transportation is provided through PRASA and SAA, for example.

In addition, the State-Owned Enterprises are also expected to contribute to the development of the South African society by generating revenue for the National Treasury to use for the upliftment of the society, such as building of schools and running health facilities, as well as providing for all other needs of the South African society.[24] However, the country's failure to tap into the 'transformative or developmental' potential of State-Owned Enterprises tends to detract from the objectives highlighted in the NDP.[25] On the other hand, a comparison of the companies in the private sector and those run by the state in South Africa, reveals a disturbing contrast in norms and productivity. Privately run enterprises are generally sustainable and profitable while companies owned and run by the state are never profitable undertakings.[26] Despite the provisions of the PFMA that seeks to inculcate a culture

[24] J Gudo (2024). Civil Society Organisations and State-Owned Enterprises in South Africa: Promoting Accountability and Corporate Governance. 10.4324/9781003390701; see also J Gudo 2020. *The Use of Legal Provisions to Advance State-Owned Enterprises in South Africa*. PhD diss., University of Cape Town, 51. Available at https://open.uct.ac.za › download (accessed on 12 April 2025).

[25] The NDP supra note 9, 132.

[26] For example, in the aviation industry, the SAA is operating at a loss, year in and year out, whereas Comair, this 2019 financial year, has made a profit for 74 years in a row (Comair Limited Integrated *Annual Report, 2019, available at https://www.sharedata.co.za/data/003636/pdfs/comair_ar_jun19.pdf,* 24 October 2019; See also T Heiberg 'Comair posts earnings jump after settlement', *Moneyweb* 17 September 2019, available at *https://www.moneyweb.co.za/news/companies-and-deals/comair-posts-earnings-jump-after-settlement/*, accessed 22 October 2019). Between the years 2018 and 2020, the government has had to bail out the SAA due to financial distress, to keep it operating (see W Roelf 'SAA in line for R4bn boost as it enters rescue process – Gordhan', *Moneyweb/Reuters*

of responsible handling of public money, wastage of public funds, in the form of irregular, wasteful and fruitless expenditure, continues unabated in the public sector.[27] At all levels, government run entities continue to suffer from inefficient and ineffective management. As a result, State-Owned Enterprises continue to incur losses due to irregular, wasteful and fruitless expenditure, in contravention of the PFMA and other laws. Instead of being self-sustaining, SOEs continue to rely regularly on the Treasury to bail them out.[28] The state injects huge amounts of capital in its companies in the form of bailouts and guarantees. For instance, in the middle of 2016, it was reported that SOEs received guarantees to the tune of over R500 billion.[29] The government's financial support gives SOEs a head start in comparison to private companies.[30] Consequently, in terms of access to financial resources, South African SOEs are placed at an advantaged position compared to private companies. The difference between state owned companies and their counterparts in the private sector lies in the way the SOEs are managed. Largely, the failure to realise the full potential for South African state-owned entities is due to the breakdown in good governance.[31] In other words, the primary problem behind the inefficiency in the State-Owned Enterprises has been with their governance, especially at board level.

Moreover, golden handshakes and other pay-outs have become a regular response to financial

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*05* December 2019, available at *https://www.moneyweb.co.za/news/south-africa/saa-in-line-for-r4bn-boost-to-continue-operating-minister/, Moneyweb/Reuters*, accessed on 12 February 2020).

[27] The media is infested with reports about the wastage of public money in many parts of the government. Damning evidence has also come to the open in the judicial commission of inquiry into the allegations of State Capture *(*available at *https://sastatecapture.org.za*/. For a detailed summary of the evidence of the rot in the South African strategic SOEs, see P Holden *Zondo At Your Fingerprints* (2023) 73-272)).

[28] The SABC, the SAA, and the Eskom have been bailed out more recently in 2019 and 2020. The SAA is currently under voluntary business rescue, in terms of Chapter 6 of the Companies Act 71 of 2008.

[29] The then-Minister of Finance Pravin Gordhan, speaking at a business breakfast hosted by technology firm EOH and Radio702, in 2016.

[30] For instance, in 2013 Comair challenged a pending bailout/guarantee for SAA *(Comair Limited v The Minister of Public Enterprises* (2016 (1) SA 1 (GP)). It argued that the bailout amounted to unfair competition. Although the action was unsuccessful, it had merits with it.

[31] *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* 2016 (3) SA 580 (CC) (*EFF1).*

hardships. For example, between 2009 and 2014, the SABC paid a staggering R42,6 million in avoidable disbursements.[32] However, the losses that the public purse suffered were not limited to irregular, wasteful and fruitless expenditure incurred by SOEs. The losses extended to huge shrinkage in revenue, because of diminished growth on the part of public enterprises.[33]

The State President has also expressed concern over the negative effect that corruption and the infiltration of State-Owned Enterprises by criminal networks and the resultant looting, have had on key State-Owned Enterprises.[34] President Ramaphosa sums up the negative effects of the looting of SOEs, especially during the latter years of state capture in the following terms: '[the state capture, with their looting of State-Owned Enterprises] has weakened the ability of the state to deliver services and to meet the expectations and constitutional rights of people.'[35] Indeed, the widespread corruption and theft of public funds from State-Owned Enterprises has hampered the government's capacity to fulfil its constitutional mandate of service delivery to the citizens, especially the poor and vulnerable of the country's population. Lamentably, mismanagement has occurred under the watch of appointed boards of state-owned entities and their accounting authorities. As a result of endemic maladministration in key State-Owned Enterprises , some have made a call for the privatisation of poorly run SOEs and questioned the need for the government to keep State-Owned Enterprises.[36]

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[32] News24Wire 'R43 million in 'golden handshakes' for SABC execs', *BusinessTech* 17 September 2015, available at *https://businesstech.co.za/news/media/98663/r43-million-in-golden-handshakes-for-sabc-execs,* accessed 20 March 2016.

[33] S Smit, CM Thompson & SP Viguerie 'The do-or-die struggle for growth' *McKinsey Quarterly* (1 August 2005) available at https://www.mckinsey. Retief, com/featured-insights/the-do-or-die-struggle-for-growth (accessed 11 April 2025); T Muzata & T.B. Phume 'Costs of Corporate Governance Failures: Evidence from South Africa' (2022) 17(3) *African Journal of Business & Economic Research* 67.

[34] During the State of the Nation Address (SONA) 2022, the President, Ramaphosa, acknowledged the findings of the Judicial Commission Inquiry into State Capture Report that the state capture has had 'devastating effects' on South Africa's strategic SOCs like Denel, South African Airways (SAA), and Transnet, to name a few (Available at https://www.gov.za/speeches/president-cyril-ramaphosa-2022-state-nation-address-10-feb-2022-0000). SONA 2022 was delivered on 10 February 2022.

[35] Ibid.

[36] F G Netswera, O M Fagbadebo & N Dorasamy (eds), *State-owned enterprises in Africa and the economics of public service delivery* (AOSIS Books 2022) https://library.oapen.org/handle/20.500.12657/61945; S.Y. Tong (2009). Why privatize or why not? Empirical evidence from China's SOEs reform. *China Economic Review*, 20(3), 402- 413.

Their argument is premised on two considerations: first, that getting rid of non-performing SOEs will generate revenue for the government through sales and then through taxes from these entities on the hands of private owners. The second consideration is the obvious benefit that dispensing with uneconomical State-owned entities will save the government/National Treasury the trouble of providing endless guarantees and bailouts. In turn, this will free up valuable revenue for the government to provide for services to the community.

Nonetheless, experience from other jurisdictions has shown that services provided through private service providers are usually out of reach of the poor.[37] Thus, it is the poor and vulnerable South African citizens who suffer the financial burden to access these services. In turn, the government may have to fork out more money to subsidise the poor citizens. Hence, privatising non-performing SOEs while the public still needs their services may prove to be only a partial solution towards saving the wastage of public money. Instead, the real solution lies with fixing the rot in our State-Owned Enterprises ; namely, poor management and/or governance which is the main (if not the sole) cause for the failure of SOEs.[38] In the writer's view, the call for these entities to be sold/privatised is a covert admission that the entities have a value to offer. It also lends weight to the conspiracy theories that there is a deliberate attempt to sabotage SOEs so that they fail and be sold to certain individuals.[39] However, the debate about the privatisation of dysfunctional SOEs falls beyond the scope of this investigation. It suffices to conclude that instead of privatising struggling state companies, the state should fix the management of State-Owned Enterprises and strengthen consequence management

[37] S Phalatse 'The Roots of a Crisis and Avenues Forward' *Institute for Economic Justice (IEJ)* (2020) 29, available at *https://www.iej.org.za/eskom-the-roots-of-a-crisis-and-avenues-forward/,* accessed 09 July 2022.

at 38-41.

[38] Planning Commission, The role of state-owned enterprises in achieving economic transformation and inclusive growth Paper 3/4 *Institutional Governance Review* (2020), para 15. Available at https://www.nationalplanningcommission.org.za/[rest-of-link] accessed 12 August 2022.

[39] This argument has been raised about the dubious sale of SAA's 51% stake to an unknown consortium for an undisclosed amount, save for a claim that the Takatso Consortium will invest R3 billion over three years. (For example, see B Curson 'SAA sale sets off a storm of controversy' *Moneyweb* 16 Jun 2021, available at *https://www.moneyweb.co.za/news/south-africa/saa-sale-sets-off-a-storm-of-controversy/,* accessed 26 July 2022.

measures in case of manifest dereliction. Chief among the consequence management measures should be to hold accounting authorities to the highest standard of accountability, by enforcing or imposing personal liability, against individual members of boards, in delict to compensate for any loss arising from breaches of constitutional and *fiduciary* duties, owed the company. In this regard, the NDP document aptly asserts that moving forward, the country's vision is for State-Owned Enterprises to be well-governed, efficient, and financially sound by 2030.[40] Efficient State-Owned Enterprises , according to the NDP, are crucial to meet areas of responsibility that neither the government nor the private sector can service.[41] Still, the NDP claims that the mandate for a state entity may have become obsolete because the reason for the initial creation of a state-owned enterprise may no longer be relevant due to the lapse of time and changes in the market.[42] This view should be understood to mean that the governance of State-Owned Enterprises should adapt to the terms of their mandate and not run counter to it. In other words, state owned entities need to be managed like their counterparts in the private sector so that they become profitable and contribute to the state coffers.

Cumulatively, all the factors mentioned above undermine the management and profitability of SOEs. Ultimately, loss of profitability of SOEs weakens the country's prospects of contributing to social development and potential of uplifting the conditions of life of the citizens trapped in poverty. This situation was highlighted by the former Minister for Public Enterprises, Pravin Gordhan, in his testimony before the Commission investigating state capture. Regarding mismanagement, he remarked that corruption 'robs our people of billions that could be used for their benefit.'[43] Referring to losses during the period between 2009 to 2017, Gordhan underlined that ordinary people were robbed of schools, clinics and education facilities. Ultimately, the inefficiency in SOEs damages the

[40] The NDP supra note 9 at 438.

[41] Ibid.

[42] The NDP supra note 9 at 439.

[43] Pravin Gordhan, *State Capture Commission Transcripts* (2018), 19 & 64, available at *https://www.statecapture.org.za/site/files/transcript/29/19*_November_2018_Sessions.pdf, accessed 12 July 2021.

economy, increases joblessness, neglects the youth, and intensifies the marginalisation of women.[44] The uncomfortable reality means that despite the inefficiencies in SOEs, no official has been held to account for the losses incurred by the public companies, and by extension, the treasury and public purse. Generally, where there has been wrongdoing on the part of public servants, the usual sanctions are confined to internal disciplinary processes or a dismissal, i.e., if the employee has not resigned in anticipation of reprisals.

The culture of impunity in the face of losses in state owned companies becomes extended to internal disciplinary proceedings in that once the accused officers resign, internal disciplinary proceedings at SOEs, are usually discontinued. In such cases, the errant officers are seldom pursued through to criminal prosecution, even though the criminal prosecution route remains one of the options available under the PFMA[45] and the common law. Moreover, a delictual remedy for damages under the *Lex Aquila is* rarely ever pursued against accounting authorities, if at all, even though such a remedy would suffice to compensate for losses incurred by an SOE. Of particular concern is the fact that no individual is held accountable for such losses.

Thus, the main issue revolves around South Africa's failure to apply delictual remedies against derelict accounting authorities of SOEs and other public officials in SOEs. In other words, the question should be asked why accounting authorities, in South Africa, should not be personally liable to compensate an SOE, where it suffers a loss due to wilful failure with reference to the *fiduciary* duty that they owe towards the company. To state it differently, does any obstacle exist, either at common law or in legislation, to enable a company to apply for a delictual remedy against an accounting officer (or director) to recover the loss that it has suffered, after a breach of the duty of care that the officer or director owed it?

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[44] Ibid.

[45] Section 86 (ch 10, Part 1) of the PFMA, creates offences and penalties for accounting officers who commit financial misconduct. This is in addition to disciplinary proceedings, in terms of sections 81-85 (ch 10, Part 2) of the same Act.

The concern about the culture of impunity, condoned by regular bailouts or guarantees to SOEs, without benefits to the citizens, justify the motivation for this study. Moreover, already, our courts have not hesitated to impose personal liability on public representatives to pay legal costs out of their own pockets, where officials have engaged in litigation to defend unreasonable past conduct. This notable trend by the courts has motivated the researcher to explore the possibility of using delictual principles to hold public representatives or officials involved in the mismanagement of financially strapped SOEs for losses caused in breach of their public constitutional duty. Such an approach has a two-fold benefit. First, it ensures that public representatives are not let off but can be held to account for the dereliction of their *fiduciary* duty to the SOEs. Second, it is hoped that the extension of the delictual liability to the public domain will lead to the review of the rights and duties of public functionaries placed in a position of trust and responsibility.

## 1.3 RATIONALE FOR THE STUDY

The financial mismanagement and operational failures of SOEs is rife in South Africa, and billions of rand are lost due to corruption, negligence, and poor oversight despite numerous undertakings by successive administrations to turn around key SOEs.[46] Individuals entrusted with managing public funds, both in government and at the helm of SOE management (accounting authorities) have often evaded personal responsibility for these financial losses, reality is that, despite an existing legal framework designed to ensure accountability. This research seeks to address this glaring gap in accountability by exploring the legal basis for imposing personal liability on accounting authorities who fail in their *fiduciary* and constitutional duties, using the Lex Aquilia, a delictual remedy for recovering compensation for SOE losses. The culture of impunity prevails in disregard of the constitutional values that govern public administration and the constitutional imperative of the rule of

[46] Mpete & Maier op cit note 19.

law underscore the importance of accountability in governance in state organs.[47] The need for this study is significant. Apart from legal scholarship, this research has practical implications for public policy and governance, not only in South Africa, but for other jurisdictions. While existing literature highlights the board members personal liability can serve as an effective deterrent to reckless financial management in SOEs. Accountability through personal liability could serve as a powerful tool in improving financial discipline, reducing corruption, improved SOE performance and restoring public trust in SOEs. Policymakers can also use the findings to refine legislation governing financial oversight, while judicial decision makers may find guidance on how personal liability of accounting authorities should be enforced. Legal practitioners will also benefit from a clearer framework for advising on financial accountability in the public sector.

Most importantly, this research is about economic justice for the millions of South Africans who rely on well-functioning public institutions for employment and service delivery.[48] Every rand lost to mismanagement is a rand taken away from service delivery, infrastructure, and economic development. This study aims to contribute to a more transparent, responsible, and accountable public sector by exploring ways to hold derelict accounting authorities personally liable.

## 1.4 AIMS AND OBJECTIVES OF THE STUDY

### 1.4.1 The Aims

The writer aims to critically analyse the existing legislation, the common law rules and policy guidelines that govern the functioning of SOEs in South Africa, in relation to accountability of SOE accounting authorities (board members) for breach of their *fiduciary* duties towards the company. The research will include a comparative study of legislation in Australia, Canada, China, the UK, and the US, with a view to propose legal and policy framework changes to the law to improve the performance

[47] Sections 1(c) and 195 of the Constitution of 1996).

[48] Gudo op cit note 24.

of SOEs in South Africa.

1.4.2 The Objectives

1) To determine whether there is any space for improvement in the existing South African legal and policy framework regarding the accountability of accounting authorities of SOEs and their liability to compensate a SOE for the losses suffered as a result of the breach of the directors' *fiduciary* duty.
2) To assess if the existing South African statutory and common law remedies can be used to recover compensation from an accounting officer responsible for causing losses to SOEs.
3) To assess and analyse the measures employed by China, Australia, the UK, the US, and Canada to prevent wastage of public funds through inefficient running of SOEs.
4) To propose measures to improve the law and policy guidelines to ensure efficient functioning of SOEs, so that SOEs can pay in more resources into the state coffers and thereby play a more positive role towards fulfilling the government's constitutional mandate to improve service delivery.

## 1.5 RESEARCH QUESTIONS

### 1.5.1 Main research question

The main research question is: Does the existing South African law provide for a delictual remedy against an accounting authority to compensate a SOE that suffers a loss due to a breach of the director's *fiduciary* duties, as is now vividly spelt out in the constitutional principles?[49]

[49] Section 195 of the Constitution, 1996.

### 1.5.2 Research sub-questions

1) What are other legal instruments available to SOEs to hold board members (accounting authorities) liable to the company for loss caused by failure in the exercise of their statutory duties?
2) Are the existing common law and statutory remedies for holding public officials liable to compensate SOEs for wrongdoing, in breach of their *fiduciary* duties, and the exercise of their functions adequate?
3) Who exercises *locus standi* to enforce the law against the accounting authorities of SOEs if the state organs are reluctant to hold them accountable?
4) Why have the board members (accounting authorities) not been held accountable for financial losses incurred by SOEs because of a breach of directors' *fiduciary* duties? And
5) How best can the existing law remedies be used to recover damages for losses incurred by SOEs because of a breach of *fiduciary* and other statutory duties by accounting authorities in the exercise of their functions?

## 1.6 RESEARCH METHODOLOGY

Henn *et al* point out that there is a distinction between research method and research methodology.[50] According to the authors, method refers to the range of techniques (or approaches) available to a researcher when collecting evidence about the social world, while the research methodology refers to the research strategy as a whole, which the entire thesis seeks to adopt.[51] This study adopts the qualitative research approach and doctrinal (legal) research methodologies as a method to achieve its objectives. According to Hammarberg *et al*, 'qualitative studies involve the systematic collection,

[50] M Henn, M Weinstein & N Foard, '*A Critical Introduction to Social Research'* 2 ed (2006) *Sage Journals* 10, available *https://www.researchgate.net/publication/284142306_A_Critical_Introduction_to_Social_Research,* accessed 31 January 2020.

[51] Ibid.

organization, description and interpretation of textual, verbal or visual data', as opposed to quantitative studies, which generally employ 'standardized measures and statistical analysis',[52] to gather data about a phenomenon. The quantitative approach involves a holistic picture, analysing words, viewing detailed reports of participants and conducting the research in a natural setting.[53] As its components, the qualitative research is both descriptive and reflective.[54] As its core, the goal of this research is to explore the feasibility of holding accounting authorities of SOEs personally liable for the loss that the companies incur through financial mismanagement (in irregular, wasteful and fruitless expenditure) in breach of their *fiduciary* and constitutional duty of care to the employing entity. To attain this objective, the study explores the problem against the existing law and evaluates the efficacy of the proposed legal review of liability law in South Africa. The analysis of the South African legal system compares the South African practice with the legal system in select foreign jurisdictions identified above. In this way, the study will benefit from a credible international benchmark.

### 1.6.1 Qualitative Research method

The primary reason for adopting the qualitative research methodology has been driven by the nature of the issues under investigation. The nature of the issues means that the existing law, in the form of statutes and case law, should be investigated and evaluated in the process of exploring the culture of widespread mismanagement in SOEs. In light of the above, qualitative research is best suited for the study, as it involves '…understanding the aspect of social life and its approaches which produce

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[52] K Hammarberg, M Kirkman & S de Lacey 'Qualitative research methods: When to use them and how to judge them' (2016) 31(3) *Human Reproduction* 498–501, available at *https://doi.org/10.1093/humrep/d*ev334, accessed 20 January 2020. For a detailed description of qualitative research, see M H Kumar, 'Qualitative Research Methodology in Social Sciences and Related Subjects' (2018), 7(1) *Journal of Economic Development, Environment and People* 23-48, available at *https://mpra.ub.uni-muenchen.de/85654,* accessed 20 January 2020.

[53] J W Creswell & T C Guetterman 'Educational Research: Planning, conducting, and evaluating Quantitative and Qualitative Research', 7 ed (2018), available at *https://www.researchgate.net/publication/32445…*, accessed 20 January 2020. See also J R Neethling *Advanced Research Methodologies* (unpublished MA Com (Economics) thesis, North-West University, 2020).

[54] J Agee 'Developing qualitative research questions: a reflective process' (2009), 22(4), *International Journal of Qualitative Studies in Education'* 431-447, available at *10.1080/09518390902736512,* accessed 20 January 2020; See also B Hancock, 'An Introduction to Qualitative Research', available at: *www.rds-yh.nihr.ac.uk* ›, accessed 20 January 2020.

information rather than statistics as data for analysis.'[55] The authors assert that qualitative research methods aim to answer questions such as the 'what', 'how' or 'why' of a phenomenon, as opposed to the quantitative research questions which remain confined to 'how many or 'how much'.[56] The most important benefit of the qualitative research method is that the researcher, can enjoy the leeway to use 'structured interviews, cultural immersion, case studies and observation...' In this way he or she can dig deeper for rich descriptive data concerning a phenomenon.[57] Also, the researcher is able to produce the best research if he takes time to gather and diligently analyse the data regarding the phenomenon.[58] Hence, although the nature of this study dictates that the researcher should use the qualitative research method, the study will be enhanced qualitatively through this approach.

### 1.6.2 Documentary Research

In this work, documentary research will be undertaken by considering the following:

1. The Constitution: Constitutional provisions that have a bearing on the mandate of public officials entrusted with the management of SOEs and the mandate of government about development and service delivery.
2. National legislation and policy documents that regulate the running of SOEs in South Africa so that any gaps that may exist in the legislation will be identified. Legislation includes primarily the

[55] Md. S Rahman 'The Advantages and Disadvantages of Using Qualitative and Quantitative Approaches and Methods in Language 'Testing and Assessment' Research: A Literature Review' (2017) 6(1) *Journal of Education and Learning*, *available https://files.eric.ed.gov/fulltext/EJ1120221.pdf*, accessed 31 January 2020.

[56] M Dowd 'Advantages & disadvantages of qualitative & quantitative research' (2018), available at *https://www.theclassroom.com/advantages-disadvantages-of-qualitative-quantitative-research-12082716.html,* accessed 31 January 2020.

[57] Ibid.

[58] Dowd (op cit) regards this tedious process of gathering and processing the information/data as a disadvantage for using qualitative research. However, this writer regards such as an advantage of this research method, although it may be disadvantageous to the researcher, as it has the potential to enhance the research.

Public Finance Management Act,[59] the Companies Act,[60] and the Public Service Act.[61] Policy documents include the King II Report on Corporate Governance (2002), King III and the King IV (2016) Reports on Corporate Governance (2009).

3. The Common law of delict will be considered to ascertain if any of its principles can be used to hold accounting authorities for SOEs personally accountable, or if not, whether the Common law needs to be developed in line with the Constitution.
4. Reports of the Auditor-General, the Public Protector and other institutions that will shed light on the state of South Africa's SOEs will be used to better understand the nature of the problem and its negative impact on the development and delivery of services by the South African government.
5. South African Law reports and the case law in the selected countries, namely, China, Australia, the UK, the US, and Canada.
6. Media reports and newspaper articles and radio reports. And
7. Academic articles and textbooks.

The thesis will also explore international and foreign legislation, as well as the policies relating to the management of SOEs in China, Australia, the UK, the US, and Canada.

1.6.3 Data gathering and analysis.

The research method for this thesis will be desk-top based and will adopt the qualitative approach. It will be based on the Constitution, national and comparative legislation, case law, reports, policy documents, journal articles, textbooks, and further sources, such as media articles that shed light on the issues surrounding the accountability of officials responsible for the management of SOEs.

[59] Act 1 of 1999 ("PFMA").

[60] Act 71 of 2008.

[61] Act 103 of 1994.

## 1.7 THE THEORETICAL FRAMEWORK

This study is anchored in three complementary theoretical framework domains; namely, *fiduciary* duty and corporate governance theory, the principles of delictual liability, and comparative legal analysis. Each of these lenses contributes distinct analytical tools for assessing how and why accounting authorities might be held personally accountable for financial losses incurred by SOEs. *Fiduciary* duty scholarship offers a foundation for understanding directors' core obligations of loyalty and care.[62] Delictual liability principles provide an avenue for considering personal fault and harm to the enterprise, particularly in systems that incorporate both *fiduciary* and tort-based accountability for directors.[63] Finally, comparative law enriches the analysis by highlighting how different jurisdictions negotiate the tension between managerial autonomy and.[64] Together, these perspectives furnish both a conceptual scaffold and a normative orientation for the inquiry undertaken in this thesis.

## 1.8 SCOPE AND LIMITATIONS OF THE STUDY

This study covers the period ending 31 October 2023. As such, this research topic is a qualitative study, based on desktop literature, without conducting quantitative research. There are over 700 [SOEs] in South Africa. However, the study is conducted only around a few key SOEs. Immediately, that narrow sampling may provide a diagnostic that may not apply in other SOEs, save for only the major ones that feature prominently in this thesis. Still, such limitation may be mitigated by the fact that the focus of this study is aimed at holding wrongdoing accounting authorities responsible for the loss of SOEs, rather than aiming at uncovering the problems facing all SOEs. As such, it is hoped that

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[62] M. A. Eisenberg (2006). *The Structure of the Corporation: A Legal Analysis* (revised edition). Beard Books; P. L. Davies & S Worthington. (2020). *Gower and Davies' Principles of Modern Company Law* (11th ed.). Sweet & Maxwell.

[63] J. J. Du Plessis et al. (2021). *Principles of Contemporary Corporate Governance* (4th ed.). Cambridge University Press; H Hansmann & R Kraakman (2000). "The Essential Role of Organizational Law." *Yale Law Journal*, 110(3), 387–440.

[64] R Kraakman, J Armour, P Davies, L Enriques, H Hansmann, G Hertig & E Rock (2017). *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd ed.). Oxford University Press; P.-H. Conac, L Enriques & M Gelter (2007). "Constraining Dominant Shareholders' Self-Dealing: The Legal Framework in France, Germany, and Italy." *ECFR – European Company and Financial Law Review*, 4(4), 491–528.

the recommendations that will be proposed in this research will apply to all SOEs, irrespective of the nature of the services they provide. Second, the research also provides a comparative analysis about the governance of SOEs and personal liability of board members in selected jurisdictions regarding the liability of accounting authorities for negligent or intentional failure in their duties. The countries identified so far are Australia, Canada, China, the UK, and the US. Australia offers a valuable comparative perspective due to its sophisticated legal and institutional framework for the governance of State-Owned Enterprises. Its adoption of the Commonwealth Governance Policy, along with a strong emphasis on transparency, merit-based appointments, and parliamentary oversight, reflects a mature approach to public sector accountability.[65]

The Australian model underscores the importance of separating political influence from commercial operations while ensuring that SOEs remain aligned with public interest objectives. In contrast to South Africa's often politicised SOE environment, Australia's practices provide a benchmark for assessing the impact of clear legal mandates, performance monitoring, and corporate governance standards on SOE efficiency and integrity. Canada is included in the sample because of its dual commitment to public accountability and corporate professionalism within its Crown corporations. Canada operates a decentralised yet well-regulated system where governance frameworks are tailored to the mandates of each enterprise, supported by a culture of ethical leadership and public service.[66] The Canadian experience demonstrates how balancing autonomy with accountability through tools like ministerial directives, independent audits, and public performance reports can strengthen governance without undermining state control.[67] This provides a comparative reference point for South Africa, particularly in considering how to structure oversight mechanisms that respect both

[65] Australian Government, *Commonwealth Governance Structures Policy* (Department of Finance, 2021) https://www.finance.gov.au/government/commonwealth-governance-structures-policy accessed 20 June 2025.

[66] D. J. Savoie, *Breaking the Bargain: Public Servants, Ministers, and Parliament* (University of Toronto Press 2003) 154.

[67] Canada School of Public Service, *Crown Corporations and Accountability* (2020) https://www.csps-efpc.gc.ca accessed 20 June 2025.

efficiency and democratic legitimacy. On the other hand, the inclusion of the People's Republic of China for comparative analysis, is both deliberate and instructive. China presents a unique case of a highly centralised model of state-owned enterprise (SOE) governance, operating under a framework of state capitalism that blends market mechanisms with firm political control.[68] Unlike liberal democracies where SOEs are often insulated from direct political intervention, China's model embeds party structures within corporate governance, particularly through the Chinese Communist Party's influence over board appointments and strategic direction.[69] This distinct approach provides valuable insights into how accountability is structured and enforced in environments where legal norms are tightly interwoven with political mandates. Given South Africa's own challenges with ensuring effective oversight, political neutrality, and developmental outcomes in its SOE sector, China's model offers both contrasts and cautionary lessons. Therefore, including China in the comparative framework enriches the study's ability to critically reflect on alternative governance paradigms and the implications they may hold for reform in South Africa.

The United Kingdom provides a relevant case study given its influence on South Africa's legal tradition and its evolving model of managing public enterprises. With a history of privatisation followed by strategic reinvestment in certain sectors, the UK has developed hybrid governance mechanisms that aim to combine public value with corporate effectiveness.[70] Key features such as non-political board appointments, the role of the UK Government Investments (UKGI), and robust parliamentary scrutiny processes highlight the UK's focus on institutional integrity.[71] For South Africa, which also struggles with the legacy of public-sector inefficiencies and corruption, the UK

[68] B Naughton, *The Chinese Economy: Transitions and Growth* (MIT Press 2007) 85.

[69] L.-W. Lin & C J Milhaupt 'We Are the (National) Champions: Understanding the Mechanisms of State Capitalism in China' (2013) 65(4) *Stanford Law Review* 697, 720.

[70] C Hood, *The Tools of Government* (Macmillan 2007) 102.

[71] UK Government Investments (UKGI), *Corporate Governance Code for Central Government Departments* (2023) https://www.ukgi.org.uk accessed 21 June 2025.

model offers practical insights into depoliticising governance and enhancing the *fiduciary* accountability of SOE directors. The United States, meanwhile, although not typically reliant on SOEs for service delivery to the same extent as other jurisdictions, presents a compelling case for inclusion due to its clear statutory demarcations and strong legal remedies available for director misconduct.[72] The US public corporations, including federally owned entities, like Amtrak and the Tennessee Valley Authority, are subject to strict federal oversight, performance-based management, and enforcement of *fiduciary* duties.[73] The US legal system prioritises personal liability and corporate accountability, underpinned by a culture of litigation and judicial independence. For South Africa, the US case illustrates how legal and institutional enforcement mechanisms can deter mismanagement and reinforce director responsibility in state entities.

Collectively, the selected jurisdictions offer a diverse and instructive comparative framework. Each represents a unique configuration of legal tradition, political influence, and corporate governance in the administration of SOEs. By examining systems that range from decentralised liberal democracies to centralised state-capitalist regimes, the study can draw on a spectrum of accountability mechanisms, *fiduciary* standards, and director liabilities. These examples illuminate not only the global variation in holding SOE boards to account, but also provide concrete lessons, both affirming and cautionary, for South Africa's pursuit of a reformed, transparent, and developmentally oriented SOE governance model.

Still, financial resources presented a limitation, in that the research consists partially of a comparative analysis that explores the law in jurisdictions such as China, the UK and Australia. The research may provide findings without the writer having to visit the countries physically to explore the law in those

[72] C J Milhaupt 'Governance Challenges of Listed State-Owned Enterprises' (2017) *Cornell International Law Journal* available at https://scholarship.law.cornell.edu/cilj/vol50/iss3/3 (accessed 18 April 2025).

[73] US Government Accountability Office (GAO), *Governance of Government Corporations* (Report GAO-20-301, 2020) https://www.gao.gov accessed 21 June 2025.

jurisdictions first hand. However, the study has been much boosted by the institution of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector and Organs of State ('State Capture Commission') and its subsequent reports.[74] Through its investigations, findings and recommendations, the State Capture Commission has made information available to the public, which has benefitted this study as well. From its investigations, the State Capture Commission has made definitive findings about irregularities around State-Owned Enterprises . The findings of the commission on state capture have served to confirm numerous media reports on state capture. In this way the eventual availability of the evidence from the State Capture Commission has eliminated a major limitation of the study. The study required enormous time and human resources to research the challenges facing State-Owned Enterprises , affecting even private entities, as well as individuals in possession of information around state capture. With the establishment of the State Capture Commission, the burden to individually seek every piece of the information fell away.

## 1.9 SIGNIFICANCE OF THE STUDY

- Contribution to legal scholarship on SOE governance and financial accountability of board members.
- Potential policy recommendations to improve financial management in SOEs.
- Enhancement of legal mechanisms to recover financial losses in SOEs.
- Strengthening public trust in State-Owned Enterprises and government financial management.

## 1.10 DEFINITION OF KEY TERMS

*Accountability:* Accountability is a core principle of democratic and ethical governance, where individuals or institutions entrusted with power or responsibility are expected to explain and justify

[74] The Commission was established in January 2018, following the recommendations of the Public Protector (Public Protector, South Africa, (Report no 6 of 2016/17) *State of Capture' Report* supra note 74' (2016) paras 8.1–8.8, available at *www.publicprotector.org, accessed* 24 September 2022.

their actions, decisions, and use of resources to those affected or overseeing them. [75] It reflects a commitment to transparency, responsibility, and trustworthiness, ensuring that power is exercised with integrity and in service of the public good.[76] Mulgan defines accountability as a relationship where one party, typically a public official or institution, is required to explain and justify their actions to another party, who has the right to question and pass judgment, and possibly impose consequences.[77] Mulgan emphasizes that accountability involves external scrutiny, answerability, and the potential for sanctions, distinguishing it from internal responsibility or mere transparency.[78]

*Accounting authorities*: An accounting authority refers to a board, a controlling body of a public entity (including SOEs) or even the chief executive officer or any other person designated as such where the entity does not have a board or a controlling body.[79] In simple terms, accounting authorities refer to the individual boards of directors (and board members) of public entities in their role as representative functionaries responsible and accountable for the oversight over the management of public entities in terms of the PFMA.

*Agency (agency-based) model:* Agency theory, was first articulated by Ross and Mitnick (in 1973), explains the governance tensions that arise when one party, the agent, acts for another, the principal.[80] The theory emphasises conflicts born of the separation between ownership and management and recognising that these conflicts now extend to creditors and both minority and majority shareholders.[81] It holds that such principal, agent divergences can precipitate organisational failure unless checked by

[75] Parliament of the Republic of South Africa, Oversight and Accountability Model Asserting Parliament's Oversight Role in Enhancing Democracy (undated) https://www.parliament.gov.za, accessed 24 April 2025.

[76] Ibid.

[77] R Mulgan 2000. 'Accountability': An ever-expanding concept? *Public Administration*, 78(3), 555–573. Available at: https://doi.org/10.1111/1467-9299.00218, accessed 24 April 2025.

[78] Ibid.

[79] Sections 1 and 49 of the PFMA.

[80] M Dimmock & A Fisher *Ethics for A-Level* (2017) Cambridge Open Book Publishers available at https://www.openbookpublishers.com/books/10.11647/obp.0103 (accessed 14 April 2025).

[81] Ibid.

clear contractual incentives and robust governance arrangements, lessons that are especially pertinent for strengthening boards accountability and performance in State-Owned Enterprises.

*Aristotelian Virtue Ethics:* This is an agent-centred moral theory that asks, *"how should I be?"* and locates right action in stable character traits or psychological dispositions instead of isolated acts.[82] For Aristotle, virtue is a disposition shaped by practical reason and the "golden mean," a suitably calibrated response to emotions and situations that is neither excessive nor deficient and thereby reliably produces the right action at the right time for the right purpose.[83]

*Bailout:* A bailout is defined as 'the act of a business, an individual, or a government providing money and resources (also known as a capital injection) to a failing company.[84] Generally, bailouts are traditionally advanced in industries (sectors) or businesses that are facing financial distress and are no longer viable or have sustained huge losses. A bailout may be provided in the form of cash injections or grants, a loan, a purchasing of bonds or stocks.[85] Typically, bailouts are aimed at assisting companies or industries whose collapse would be catastrophic for a country's economy. This is done to assist a company to avoid defaulting on its financial commitments. The company may be required to pay back the money; but in the South African context, bailouts are merely non-repayable grants from the government, as the shareholder responsible for State-Owned Enterprises. Hence, in the context of this investigation, bailouts ought to be understood to refer to non-repayable financial assistance rendered to a state-owned enterprise.

*Developmental State*: A developmental state refers to a state with an economic system in which the government plays a more interventionist and active role in the country's economy through, among others, legislation, policy, special statutory administrative agencies and infrastructure to facilitate

[82] Ibid

[83] Ibid.

[84] *Https://www.investopedia.com/terms/b/bailout.asp,* accessed 20 January 2020.

[85] Ibid.

development.[86] A developmental state is characterised by a partnership or cooperation between the state or government and private businesses where the state plays an essential role in channelling the state resources, such as tax credits and breaks, import controls, export promotion and other incentives to create an environment in which private businesses will thrive.[87] This in turn will create, among others, job opportunities and increase tax revenue, considered vital for the country's social and economic development.

*Director:* As contemplated in section 66 of the PFMA, a director refers a member of the board of [an enterprise], an alternate director or any person occupying the position of a director, regardless of their designation. In terms of section 66 (7),[88] a person becomes entitled to serve as a director of a company when the person has been appointed or elected, in accordance with this part; or holds an office, title, designation or similar status or holds an office, title, designation or similar status entitling that person to be an ex-officio director, entitling that person to be an *ex officio* director of the company, subject to subsection (5)(a); and has delivered to the company a written consent to serve as delivered to the company a written consent to serve as its director.[89]

*Executive authority:* 'Executive authority' refers either to the Cabinet Minister who is responsible to account to Parliament (in relation to the national department) or member of the Executive Council (in relation to a Province) who is accountable to the provincial legislature for the department in question

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[86] C Ng, 'The 'Developmental State' and Economic Development' (2008) *E-International Relations*, available at *https://www.e-ir.info/2008/06/15/the-developmental-state-and-economic-development,* accessed 26 May 2022; E P Caldentey 'The Concept and Evolution of the Developmental State', (2008) 37(3) *International Journal of Political Economy* 27–53, available at *10.2753/IJP0891-1916370302,* accessed 26 May 2022; A Bolesta 'China As A Developmental State' (2007) 3(5) *Montenegrin Journal of Economics (MJE), Economic Laboratory for Transition Research (ELIT),* 105-111, available at *http://repec.mnje.com/mje/2007/v03-n05/mje_2007_v03-n05-a16.pdf*, accessed 26 May 2022.

[87] Ibid, For the characteristics of a developmental state, see, for example, Caldentey op cit note 82 & Bresser-Pereira about different models of a developmental state (L C Bresser-Pereira 'Models of the Developmental State' (2019) 128, *CEPAL Review*, available at *https://www.cepal.org/sites/default/files/publication/files/44978/rvi128_bresser.pdf,* accessed 26 May 2022).

[88] PFMA.

[89] Section 66 of the PFMA.

or the Cabinet member who is accountable to Parliament (in relation to a national public entity) for that public entity or in whose portfolio it falls; or the member of the provincial Executive Council (relation to a provincial public entity) who is accountable to the provincial legislature for that public entity or in whose portfolio a provincial public entity falls.[90]

*Fiduciary duty:* Simply put, a *fiduciary* duty is circumstances-based. One would be endowed with a *fiduciary* duty when he or she stands in a position of trust to another person or class of persons.[91] The duty entails that a person placed in a position of trust (entrusted with a *fiduciary* duty) ought to always 'act in the best interests of the beneficiaries ([those to whom he owes a *fiduciary* duty]) … and … may not act to his own advantage at the cost of the beneficiaries'[92] or to the detriment of those to whom a duty is owed. A *fiduciary* duty may arise in any branch of the law, be it criminal law, the law of contract, the law of persons and family or the law of delict.[93] Examples are found in certain relationships between parent and child; teacher and learner; attorney and client; medical practitioner and patient; husband and wife; insurer and insured; employer and employee; trustee and beneficiary under a deed of trust or shareholders and board of directors in company law. The list is open and will depend on the nature of the relationship.[94]

*Fruitless and wasteful expenditure:* Fruitless and wasteful expenditure is the expenditure that could have been avoided with reasonable care being taken and for which no value or benefit has been derived.[95] Examples include, unnecessary interest, paying for inflated prices as well as unnecessary

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[90] Section 1 of the PFMA.

[91] *Law Society of [t]he Cape of Good Hope v Randel* [2015] 4 All SA 173 (ECG), para 44.

[92] Ibid para 47.

[93] Ibid, para 44.

[94] *Randel*, para 47.

[95] Section 1 of the PFMA; AGSA *2016/17 PFMA Report*, 108, available at https://www.agsa.co.za/portals/0/reports/pfma/201617/gr/09.2%20fruitless%20and%20wasteful%20expenditure.pdf, accessed 28 August 2023.

litigation costs.[96]

*Government guarantee:* A government guarantee serves as a surety whereby the government guarantees the debts of a state-owned entity. Unlike a bailout, a guarantee assists an ailing entity to borrow, at the back of an undertaking by the government that, should the state company be unable to repay its debts when they are due, the government will take over such debts. As in the case of bailouts, there will usually be conditions imposed by the government as terms for providing such a guarantee.[97] A guarantee is provided for a fixed period, in a certain amount of money to meet a debt or loan. However, the guarantor may extend the period for a further term.

*Irregular expenditure:* An irregular expenditure is the expenditure that does not comply with the applicable legislation, i.e., the PFMA, the State Tender Board Act 86 of 1968, or other legally prescribed procedure.[98] The PFMA uses phrases 'expenditure … incurred in contravention or of or that is not in accordance with a requirement of any applicable legislation…'[99] However, unauthorised expenditure does not form part of irregular expenditure.[100]

*Minister:* Minister means the member of the cabinet responsible for companies in terms of section 1 of the Companies' Act 71 of 2008.

*National government business enterprise:* A national government business enterprise (NGBE) is a legal entity controlled by the national executive, with financial authority for business activities, providing goods or services according to business principles, and financed from sources other than the National Revenue Fund or statutory money through taxes, levies, or other statutory means, which

[96] See *AGSA 2016/2017 Report,* supra note 106.

[97] *Comair Limited v South African Airways (Pty) Ltd* [2017] 2 All SA 78 (GJ) ("Comair"), para 2.

[98] *AGSA PFMA Report* supra note 106 at 94.

[99] Section 1 of the PFMA.

[100] Ibid.

accounts to parliament.[101]

*Public entities:* A national public entity is similar to the NGBE, but includes any entity, such as a board, a company, and corporation, provided the entity was (i) established in terms of national legislation; (ii) [is] fully or substantially funded either from the National Revenue Fund, or by way of a tax, levy or other money imposed in terms of national legislation; and iii) [accounts] to Parliament.'[102]

*Public official:* A public official is any person who holds public office or is in civil service. Public office is an office that is created by the Constitution, statute, or regulations according to a statute.

*State-owned Enterprise:* A *State-owned Enterprise* (SOE) is a wholly or partially owned State corporation (or public entity or government business enterprise) which falls under the direct control or supervision of relevant government department, in line with the nature of the services they offer. SOEs are also known as State-Owned Companies (SOCs) are either created by statute, regulation, or proclamation. State-Owned Enterprises fall under the direct control or supervision of relevant government departments, in line with the nature of the services they offer. There are both national/central and provincial State-Owned Enterprises .[103]

## 1.11 ORGANIZATION OF THE THESIS

This thesis comprises eight chapters organised as below: aims, research questions, and methodology:

**Chapter 1:** Background And Context.

The first chapter outlines the background and context to the study and sets out the problem of mismanagement of SOEs in South Africa. In addition, the chapter discusses the rationale behind the research, the aims, research questions, and the research methodology. Further, the chapter gives an

[101] Section 1 of the PFMA.

[102] Ibid.

[114] Ibid.

overview of the structure of the research.

**Chapter 2:** Challenges of State-Owned Enterprises in South Africa.

The second chapter identifies the systematic problems and challenges beseeching strategic SOEs in South Africa as well as the underlying causes of these malfeasances. Primarily, in chapter 2, it is argued that the accounting authorities are at the centre of the pandemic perplexing SOEs in the country.

**Chapter 3:** Theoretical Framework.

Chapter 3 discusses the theoretical framework for the study. The study is grounded on three inter-related theories, namely, the *fiduciary* duty and corporate governance theories, the principles of delictual liability, and comparative legal analysis. This chapter elaborates on these in some detail.

**Chapter 4:** Legal Framework Governing SOEs.

This chapter provides an in-depth examination and discussion of the legal framework governing SOEs in South Africa, with a special focus on the nature of the duties of accounting authorities of SOEs in terms of the PFMA, Companies Act, and the Constitution**.** Chapter four also discusses the explores the role, functions, and duties of boards of directors in general, but with specific reference to accounting authorities of SOEs. Insight is also sought from the King II, III and IV Codes – the King Codes.[104] The chapter also examines the international perspective of the directors' duties and governance of SOEs, focusing on the five selected jurisdictions. Additionally, Chapter 4 also examines the 'business judgment rule' (the so-called statutory exemption) principle, both in South Africa and in other identified jurisdictions. Lastly, the chapter will examine the institutions of oversight of SOEs in South Africa.

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[104] The King Code (Report on Corporate Governance) is a groundbreaking code of corporate governance in South Africa issued by the King Committee on Corporate Governance, established by the Institute of Directors of Southern Africa. Three reports were issued in 1994 (King I), 2002 (King II), and 2009 (King III). King Reports available at *http://library.ufs.ac.za/dl/userfiles/documents/Information_Resources/KingII%20Final%20doc.pdf (King II) & http://www.library.up.ac.za/law/docs/King_Code_2009.pdf* (King III) accessed 16 April 2014.

**Chapter 5:** Legal Framework for Accountability of SOE Boards.

Chapter 5 is a discussion of legal framework (i.e. available legal instruments) for the accountability of board members of SOEs for the deliration of their *fiduciary* duties, both in South Africa and the selected jurisdictions. The chapter also discusses the enforcement, remedies and , for holding accounting authorities to account in South Africa, and in other jurisdictions. This chapter will also explore the legal feasibility and practical implications of enforcing personal liability against accounting authorities of SOEs and the question of the exercise of *locus standi in judicio* within the South African perspective. In other words, the question whether members of the public sue on behalf of a SOE that has suffered financial loss. Lastly, the fifth chapter examines whether the business judgment rule) is compatible with the constitutional principle of accountable public administration, as envisaged by section 195 of the Constitution, 1996. Whether the rule is indeed found to be compatible with the Constitution, a possible rationale for limiting its application in respect of directors of SOEs remains to be explored.

**Chapter 6:** Accountability of SOE Directors In Other Jurisdictions.

The chapter moves from the South African legal framework into a comparative analysis of how selected foreign jurisdictions hold SOE directors and accounting authorities liable for negligent or intentional breaches of their fiduciary and statutory duties. The study considers Australia, Canada, China, the UK, and the US, to identify effective practices and enforcement mechanisms that could inform reforms to strengthen South Africa's own legislative and institutional frameworks, for improved accountability. These jurisdictions were chosen for their mix of common and civil law traditions, strong governance records, and economic ties with South Africa.

**Chapter 7:** Analysis and Discussion

This chapter will present the discussion of the study findings and considers whether the existing South African law about the governance of SOEs and accountability of their board members for causing them financial losses needs to be strengthened or whether it needs to be changed.

**Chapter 8:** Conclusion and Recommendations.

Chapter eight of the thesis proposes recommendations based on the findings of the study and whether the law should be developed to protect State-Owned Enterprises against possible dereliction of duty by accounting authorities. The concluding chapter will also propose areas for future research.

# CHAPTER TWO

# CHALLENGES OF STATE-OWNED ENTERPRISES IN SOUTH AFRICA

## 2.1 INTRODUCTION

In his 2018 State of the Nation Address (SONA), President Cyril Ramaphosa candidly acknowledged the depth of crisis facing South Africa's State-Owned Enterprises (SOEs).[105] President Ramaphosa identified not only financial and operational inefficiencies of South African SOES, but also deep-rooted structural and governance failures that have rendered many SOEs unstable and unproductive.[106] The SOEs, originally envisaged as drivers of inclusive development, have instead become persistent liabilities for the state, draining the public purse while failing to deliver on their foundational mandates.[107] The collapse, or near collapse, of several prominent SOEs, including Eskom, South African Airways (SAA), and the South African Broadcasting Corporation (SABC), exemplifies the systemic challenges that have come to define public sector enterprise in South Africa. Their survival has depended less on strategic reform or operational turnaround than on repeat bailouts from the National Treasury.[108] Where such funding has been withheld or delayed, these enterprises have relied heavily on borrowing, often underwritten by government guarantees – burdening the state further with contingent liabilities.[109] SAA's financial trajectory is a case in point, with years of mismanagement culminating in billions in government guarantees to sustain operations and ultimate business rescue.[110]

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[105] State of the Nation Address by President Cyril Ramaphosa, 16 February 2018.

[106] Ibid.

[107] Ibid

[108] National Treasury, *Budget Review*, 2020, pp. 86–91.

[109] IMF Country Report No. 20/33: *Republic of South Africa*, 2020.

[110] M.H. Kanyane "State-Owned Enterprises and Accountability in South Africa," *African Journal of Public Affairs*, Vol. 11(3), 2019, pp. 75–88.

The challenges facing South African strategic SOEs emanate from the fact that accounting authorities had not guarded against mismanagement and wasteful operations.[111] The rot lies deeper: with persistent managerial incompetence, political meddling, and a profound erosion of institutional autonomy.[112] Among the recurring challenges across SOEs are chronic governance instability, financial insolvency, systemic corruption, and bloated workforce structures.[113] These are not isolated symptoms, but part of a broader pattern of institutional decline. Enterprises like Eskom, SAA and the SABC were allowed to decay under the protective cover of state guarantees and political patronage.[114] The root causes of these pathological challenges are disturbingly consistent: unchecked political interference in the appointment and removal of board members; the cadre deployment practices of the ruling party; persistent breaches of corporate governance norms; and a paralysed parliamentary oversight framework that too often serves political rather than public interests.[115]

The president's call for 'decisive intervention' in 2018 was not merely rhetorical, but a recognition of the urgent threat these institutional failures pose to the fiscal integrity and performance of the South African state. Academic authors echo these concerns. For instance, Motswaledi and Maseng warns that South African SOEs have become "instruments of political patronage," eroding their developmental purpose.[116] Similarly, Van der Walt and Fourie argue that the blurred distinction

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[111] See, for example, S Mantshantsha 'Eskom puts R11.5bn tag on Billiton power deal' *Businessday* 12 August 2013, available at *http://www.bdlive.co.za/business/energy/2013/08/12/eskom-puts-r11.5bn-tag-on-billiton-power-deal*, accessed 26 August 2022. Therein it is reported that Eskom's potential loss on its uncompetitive contracts with Billiton totalled R11.48bn since the contract for Eskom to supply power to Billiton was entered.

[112] H. Bhorat et al., *Betrayal of the Promise: How South Africa is Being Stolen*, 2017.

[113] J Netshitenzhe "A Developmental State in Africa: The Case of South Africa," *Mapungubwe Institute Lecture Series*, 2019.

[114] D.P. Van der Nest (2017). "Public Sector Governance and Accountability: The Case of Eskom," *Journal of Public Administration*, Vol. 52(2), pp. 210–228.

[115] Public Affairs Research Institute (PARI), *The Appointment and Removal of Board Members in South African SOEs*, 2018.

[116] T. R. Motswaledi & Maseng, J. O. (2024). *An examination of political patronage and maladministration on state-owned entities with specific reference to South African Airways: A literature study*. *Journal of Politics and Law, 17*(3), 1–74. https://doi.org/10.5539/jpl.v17n3p74.

between ownership and management of SOEs has facilitated corruption and blurred accountability.[117] The Zondo Commission's findings on state capture only reinforce this narrative, exposing a staggering breakdown of institutional integrity within key SOEs.[118] Notably, Eskom, SAA, and SABC are amongst the top state-owned entities in South Africa but have failed to perform efficiently, both in terms of service provision and revenue generation. On numerous occasions they have had to be rescued repeatedly by the government. Thus, these state entities have been draining the Treasury of resources instead of contributing to its revenue. Dependence on the Treasury for financial rescues has delivered negative consequences. The under-performance of the strategic SOEs has stunted growth, not only through non-production but also by taking from the public purse instead of giving to it. Instead of being assets, generating income for the public fund, the SOEs have become liabilities. The underperformance has negatively impacted service delivery and, by extension, development. For this reason, the writer has seen fit to use these entities, as examples, to analyse the challenges facing State-Owned Enterprises in South Africa. The writer has singled out some SOEs for exceptionally poor performance, yet other SOEs too, have not performed any better either. These too, will also be examined in this thesis.

This research focuses on the most visible and impactful SOEs to traverse a broader institutional crisis – a crisis marked by weak internal governance, blurred lines between public interest and political expediency, and a lack of consistent oversight mechanisms on the part of government.[119] This chapter provides a foundational overview of these challenges. It offers a critical interrogation of the nature, persistence, and impact of governance and operational failures in SOEs. This chapter also unpacks the underlying political and structural dynamics that entrench such failures. The argument proceeds on

[117] G Van der Walt & D Fourie (2015). "State-Owned Enterprises: Governance, Accountability and Reform," *Administratio Publica*, Vol. 23(3), pp. 121–137.

[118] Judicial Commission of Inquiry into Allegations of State Capture (Zondo Commission), Final Report, 2022.

[119] K H Mophethe *Developmental Governance: Accountability and Participatory Governance at SOEs in South Africa* (unpublished [LLM/PhD] thesis, University of Free State, 2023) tps://scholar.ufs.ac.za › items

the premise that without substantive institutional reform and/or enforcement action, South African SOEs will continue to underperform, compromising not only the state's economic obligations but its democratic legitimacy. The chapter begins with identifying and examining the main challenges of State-Owned Enterprises in South Africa.

## 2.2 MAJOR CHALLENGES OF STATE-OWNED ENTERPRISES

Our State-Owned Enterprises are facing unique challenges. Thabane and Snyman–Van Deventer deal with the pandemic facing State-Owned Enterprises in South Africa.[120] The two authors provide a detailed analysis of the problems besetting the country's SOEs. Ultimately, they lay the blame for many problems of SOEs at the doorstep of lack of ownership by both directors and the 'so-called shareholder or shareholder representatives, the Ministers from responsible government departments, such as Public Enterprise, for example.[121] However, this study identifies four main challenges facing State-Owned Enterprises in South Africa. It identifies the lack of proper corporate governance; corruption in procurement systems; financial instability; and overstaffing. These factors are discussed directly below. The exposition begins with the lapse of good corporate governance.

### 2.2.1 Good Corporate Governance Failure

Few State-Owned Enterprises in South Africa can be said to be operating at optimal level.[122] This phenomenon has been a lingering occurrence for years now. In recent years, there would have been a handful of profitable strategic state entities. The problem is multi-faceted. To begin with, the challenges facing our State-Owned Enterprises are not only financial but multifaceted in nature.

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[120] Thabane & Snyman Van Deventer op cit note 13.

[121] Ibid.

[122] Either there are acting executives; no board or there is an interim board; board members or top executives are suspended; *en masse* resignation or only the chairperson remains in the place of a board, as was the case at SABC under Maghuve; incompetent chairpersons or recycling of rogue executives or chairpersons (usually after destroying one entity, as it was the case in respect of Dr Ben Ngubane moving from SABC to Eskom or Mr Brian Molefe who was transferred from Transnet to Eskom; or the crisis is manifested in the form of an entity needing bailouts or government guarantees to keep afloat, etc.

Accordingly, in most cases, the central problem has been the failure of good governance, mismanagement and lack of the requisite skills to satisfy the job demands necessary to manage these entities, particularly, on the top management side.[123] The overarching thread running through the problems facing SOEs is the failure of corporate governance. The failure of governance has manifested itself in various forms, such as financial mismanagement, corruption in procurement processes, and interference in the executive functions of companies by non-executive board members. Questionable characters and unqualified or incompetent individuals have often been appointed to Boards of state-owned corporations, as non-executive directors or even in positions of power, such as executive directors or other senior positions.[124] Generally, there is a culture of complacency regarding attaining the profitability and optimal performance of State-Owned Enterprises among those placed at the helm of their management. Overall, the failure in corporate governance has resulted in a breach of constitutional and statutory duties owed to the entity.

The testimony of many witnesses appearing at the Judicial Commission of Inquiry into State Capture (State Capture Commission), as reflected in subsequent Reports, have confirmed what has always been public knowledge about the failure of corporate governance in State-Owned Enterprises . For example, Part I volume 1 of the Commission's Report points to many examples of the collapse of good governance at the SAA, as well as the SA Express, for almost a decade.[125] Similarly, Part II of the Commission's Report paints a similar picture of the failure of good corporate governance at

[123] As an example, SABC was ruined, among others, under the stewardship of Mr Hlaudi Motsoeneng, who did not even possess a matriculation senior certificate, as a Chief Operations Officer (COO). During his tenure, SABC lost millions in revenue. See the Final Report of the Ad hoc Committee (24 February 2017) para 22.2.2, available at *https://pmg.org.za/page/https://pmg.org.za/tabled-committee-report/2898?via=homepage-feature-card*, accessed 26 August 2022)

[124] Regarding the appointment of unqualified persons to lead SOEs, see also Thabane & Snyman van Deventer (op cit note 13).

[125] State Capture Commission Report Part I vol. 1, paras 977-1088, available at *https://www.statecapture.org.za/site/information/reports,* accessed 26 August 2022.

Transnet.[126] Classic cases in point include Ms Ellen Tshabalala as the chairperson of the SABC; (the late) Ms Dudu Myeni and Ms Kwinana as chairpersons of SAA and SAAT, respectively; and (the late) Dr Ben Ngubane, as the chairperson of Eskom, to name a few.

At the South African Broadcasting Corporation, for example, Ms Ellen Tshabalala, during her stint as the chairperson of the board, became party to the signing of the MultiChoice (MCG)/SABC deal giving away the public broadcaster's archived material on terms that led to the abandonment of encryption of SABC network and data (Set-Top-Box).[127] The MCG/SABC agreement cost the SABC millions of rand in terms of the archived material value and prospective revenue that could have been generated post-digital migration.[128] However, the non-executive directors of the SABC board did not act alone in flouting the provisions of good corporate governance. Ms Tshabalala colluded with some unprincipled members of the SABC executive management.[129] For instance, at the centre of the MCG/SABC agreement, were Mr Hlaudi Motsoeneng, the COO, the Group CEO, Ms Mokhobo and Mr J Matthews (head of the News).[130] The Chairperson of the Board and the COO had allowed themselves to be used by persons outside the corporation, to achieve interests other than those of the SABC.[131] The sweetener for the deal was the R25 million upfront payment that MCG made toward the creation of the ANN7 news channel[132] and the hosting of the ANN7 channel on the MCG

[126] State Capture Commission Report Part II Vol. 1, paras 17, 39-42, 84, 189, 525 & 643, available at *https://www.statecapture.org.za/site/information/reports*, accessed 26 August 2022.

[127] State Capture Commission Report Part V vol. 2, paras 1406 & 1426.7., available at *https://www.statecapture.org.za/site/information/reports*, accessed 26 August 2022.

[128] Ibid.

[129] Ibid.

[130] Ibid.

[131] Ibid paras 1396, 1436, 1439 and 1440. It appears from the objective facts surrounding the MCG/SABC deal, that the MCG had paid a bribe through the ANN7 TV Channel, the brainchild of former President Zuma, in which his son had a 30% stake in Infinity Media, the owners of ANN7 TV Channel (State Capture Commission Report Part V vol. 2 supra note 123, para 1382).

[132] State Capture Commission Report Part V vol. 2 supra note 123, para 1440.

platform,[133] despite contrary conclusions by the Commission.[134]

In respect of the SAA, Ms Myeni assumed the reigns as the chair of SAA[135] from 2009 to September 2012,[136] from Ms Cheryl Carolus. Under Carolus, the SAA board operated with eleven non-executive directors and several committees[137] and the national airline was on course to recovery.[138] However, during Myeni's tenure (and Kwinana's), the Board was rendered dysfunctional and only functioned with four non-executive directors.[139] During her tenure as the chairperson of the SAA board, Ms Myeni became intimately 'involved [in] the appointment of [the company's] executives'.[140] This manoeuvre was in breach of good corporate governance principles. At times, Myeni removed executives who refused to carry out her unlawful orders.[141] Surely, it would be unfair to attribute all the reverse fortunes of the national airline to the leadership of Myeni, as SAA had been experiencing problems since the unhappy years of democracy, under Coleman Andrews.[142] However, Ms Myeni's era at the national airline had been brazen. The Commission of Inquiry Into State Capture found that Ms Myeni was a liability to the SAA and that 'she caused [the airline] severe harm and financial

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[133] Ibid, paras 1436 & 1439.

[134] Ibid, paras 1440 & 1480.

[135] Ms Myeni, meanwhile, went to SAA with a questionable record from her previous position at uMhlathuze Water Board (See, for example, Zingisa Mvumvu 'How Dudu Myeni's water board 'laundered more than R2m in 40 days' *SowetanLive* 18 February 2020, available at *https://www.sowetanlive.co.za/news/south-africa/2020-02-18-how-dudu-myenis-water-board-laundered-more-than-r2m-in-40-days/,* accessed 30 July 2022. Myeni also had a poor track record regarding attendance as a board member at SAA (Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State Report *("State Capture Commission Report")*: Part I, vol. 1 (2022), para 68 available at https://www.statecapture.org.za/site/files/announcements/6405/part_1_volume_i.pdf, accessed 13 August 2022).

[136] State Capture Commission Report Part I vol. 1 supra note 125 paras 16 & 17.

[137] Ibid para 30.

[138] Ibid paras 16-7.

[139] Ibid paras 131-5.

[140] State Capture Commission Report Part I vol. 1 supra note 125, para 435.

[141] Ibid para 435.

[142] A Vermeulen & B Williams 'SAA ran at a loss under Coleman Andrews' *Independent Online (iol)* 10 June 2001, available at *https://www.iol.co.za/news/south-africa/saa-ran-at-a-loss-under-coleman-andrews-67904,* accessed 26 August 2022. Mawande AmaShabalala 'Coleman Andrews collapsed SAA,' Dudu Myeni tells state capture probe', *Timeslive* 05 November 2020, available at *https://www.timeslive.co.za/politics/2020-11-05-coleman-andrews-collapsed-saa-dudu-myeni-tells-state-capture-probe/*, accessed 26 August 2022.

loss'[143] The Commission also discovered that together with Kwinana, her fellow board member and the chairperson of SAA Technical (SAAT), Ms Myeni 'caused sustained damage to [the] national airline.'[144] Even to this day, SAA has not recovered from the mismanagement under her leadership, notwithstanding that the airline had undergone a business rescue process, in terms of chapter 6 of the Companies Act.[145] So, as the chairperson of the company board, Myeni almost single-handedly grounded the SAA.

At times, some members of the board even divulged information to bidders while the adjudication process was pending. In this manner, these members got themselves involved in a conflict of interests.[146] Breach of good corporate governance at SAA has manifested itself with some high-ranking board members selectively visiting some suppliers while the tender process was still open.[147] In some instances, board members rejected recommendations for awards that were legitimately awarded by the (SAA and SAAT) Cross Functional Sourcing Team (CFST)[148] or withdrawing awards on false pretexts.[149] In these instances, the breach of good corporate governance became evident when the boards interfered in the duties of the executives.[150] At the same time the board interfered when it overturned the decision of the executive management in favour of certain individuals when they ought to have been overseeing the executives. As in the case of other state-owned entities, the leaders of SAA boards did not act alone in their clandestine activities. They acted in collusion with some senior employees of the entity, some of whom were beholden to the non-executive members of the SAA

[143] State Capture Commission Report Part I vol. 1 supra note 125, para 845.

[144] Ibid para 15.

[145] Act 71 of 2008.

[146] State Capture Part I vol. 1 supra note 125, paras 626-7.

[147] Ibid paras 624-5. In the process, board member(s) even signed a Memorandum of Understanding (MOU) for a working partnership.

[148] State Capture Part I vol. 1 supra note 125 para 628 (as another example, see also paras 175 & 186).

[149] Ibid, para 627 & 159-74.

[150] State Capture Commission Report Part I vol. 1 supra note 125, para 157.

board.[151] These employees had been appointed into key positions, such as that of the CFO and the CEO by the two chairpersons of the SAA and SAAT boards.

On the other hand, Dr Ben Ngubane was deployed as the chair of the Eskom board in December 2014.[152] Under Dr Ngubane's stewardship, the rot at Eskom went out of control. Eskom facilitated the sale of Optimum Coal Holdings' to Tegeta Exploration and Resources company owned by the Guptas. Chief among the illicit deals Ngubane preapproved, was an R1,68 billion payment to Glencore.[153] The board approved the deal meant for Tegeta Exploration and Resources in breach of the principles of good corporate governance. The Board approved the deal before the approval of Eskom's Investment and Finance Committee, instead of the latter approval and then the board.[154] The preapproval was then converted into a guarantee which paved the way for Eskom to make a prepayment of R659 million to Tegeta Exploration[155] to buy Optimum Coal Holdings from its mother company Glencore.[156] The board concluded the whole deal in breach of good corporate governance in that under Dr Ngubane there was collusion between the executive management of Eskom and the board. under Dr Ngubane,[157] the Group Chief Executive Officer (GCEO), Mr Matshela Koko, the CFO cum CEO, Mr Anoj Singh, (later) Mr Brian Molefe (the new CEO) and other senior executives were hands-on in facilitating the deal for the benefit of the Gupta Tegeta Exploration company.[158] The board should have held the executive accountable but failed in its constitutional and *fiduciary* duty. They even sought to eliminate

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[151] Ibid paras 268 & 295.

[152] Eskom 'Previous Eskom Leadership: Chairmen …', available at *https://www.eskom.co.za/heritage/dr-baldwin-ben-ngubane/,* accessed 14 August 2022. See also State Capture Commission Report Part IV vol. 3, paras 1277-8.

[153] State Capture Commission Report Part IV vol. 3 supra note 148, para 1250.2.

[154] Ibid, paras 1613 &1721. See also Greg Nicolson *'How Eskom board whisked through an R1.68bn agreement that benefited the Guptas' Daily Maverick* 07 December 2020, available *https://www.dailymaverick.co.za/article/2020-12-07-how-eskom-board-whisked-through-a-r1-68bn-agreement-that-benefited-the-guptas/*, accessed 26 August 2022.

[155] State Capture Commission Report Part IV vol. 3 supra note 148, paras 1281.4-1281.4.2.

[156] Ibid paras 1613 & 1721.

[157] Ibid paras 1793-4.

[158] State Capture Commission Report Part IV vol. 3 supra note 148, paras 1610-1736 (see paras 1718, 1728 & 1736).

the application of the PFMA.[159] This transaction was a breach of good corporate governance at its best. The consequence was an unlawful and wasteful expenditure at the expense of Eskom, which incurred a financial loss of R659 million, for coal it did not need.[160]

In the next section, the focus shifts to corruption and how it affects the stability of public enterprises.

### 2.2.2 Corruption

As pointed out already, South Africa is ranked 69 out of 176 countries in the latest Transparency International Corruption Perceptions Index, with a score of 4.3 out of ten.[161] Moreover, there is a widespread culture of corruption, which manifests itself primarily in the state supply chain management and the procurement processes of companies.[162] As a result, the country's strategic State-Owned Enterprises have seen several of their personnel engage in the pursuit of personal gain at the expense of the entities, and ultimately taxpayers. Corruption has been at the core of embezzlement of the resources of State-Owned Enterprises. For example, the report of the Commission of Enquiry into State Capture, indicated that corrupt actors in the state capture syndicate, infiltrated Transnet's procurement system by taking control over strategic appointments and governance bodies.[163] In that manner, the rogue elements managed to change Transnet's procurement mechanisms which led the

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[159] Nicolson op cit note 150.

[160] State Capture Commission Report Part IV vol. 3 supra note 148, para 1748.

[161] See, for example, *Swifambo Rail Leasing (Pty) Limited v Passenger Rail Agency of South Africa* 2020 (1) SA 76 (SCA), Mr Montana, Minister Dipua Pieters, Mr Mthimkhulu and Mr Letsoalo defrauded Prasa to benefit Montana (and/or his associates) and the ANC, among others, (State Capture Commission Report Part V vol. 2, paras 1786-93); Dr Ngubane, Mr Koko, Mr Brian Molefe and Mr Salim Essa abused their positions of trust for the benefit of the Guptas and Mr Essa, (State Capture Commission Report Part IV vol. 3 paras 1279-83. The situation has been the same in other SOCs, such as the SABC and the SAA/SAAT as discussed in this chapter.

[162] See *Swifambo* supra note 161, paras 1-16; State Capture Commission Report Part V vol. 2 supra note 157, paras 1784 & 1786; State Capture Commission Report Part IV vol. 3 op cit note 157, para 1721 (Eskom executives and 'he board' buying coals that the enterprise did not need, through a middleman); SAA and SAAT (State Capture Commission Report Part I vol. 1 supra note 125, paras 347-51 (The SAA board using services of a middleman to be transaction advisor for SAA loan consolidation for R15 billion government guarantee, although having internal committee responsible for sourcing funding). All the office-bearers mentioned here acted in breach of their fiduciary, statutory and constitutional duties owed to the State-Owned Enterprises.

[163] State Capture Commission Report Part II vol. 1, para 17.

SOE to resort to the use of confinements instead of the stipulated lawful open tender system. In this way the criminal elements within Transnet were able to alter bid criteria in favour of certain suppliers.[164] The key role players at Transnet included Mr Brian Molefe, Mr Siyabonga Gama and Mr Anand Singh. Minister Gigaba too had a hand in the appointments of Mr Brian Molefe, Mr Anoj Singh GCFO), and the reinstatement (as CEO of TFR) and his subsequent promotion of Mr Gama to the position of the company's Group Chief Executive Officer (GCEO).[165] These individuals were instrumental in the conclusion of a corrupt agreement to purchase 1065 oversized locomotives for more than R60 billion.[166] The locomotives were acquired amid a cloud of corruption, primarily benefiting the Gupta network.[167] Transnet executives were also responsible for awarding a total of more than R41, 204 billion worth of contracts to the Gupta companies or for the benefit of Mr Essa.[168] These acts of corruption have largely contributed to the financial hardships of Eskom.

Similarly, the SAA was brought to the ground by years of systemic corruption, which, put a strain on the national airline's financial resources, especially during the leadership of Ms Myeni and Ms Kwinana.[169] It bears noting that the corruption and mismanagement in the key State-Owned Enterprises occurred under the watch of accounting authorities and officers. Thus, accounting authorities are largely to blame for the financial strain and collapse of some State-Owned Enterprises . In most instances, the corruption occurred at the hands of appointed boards of directors – both executive and non-executive.[170] Meanwhile, at SABC, executives such as Mr Hlaudi Motsoeneng, the COO, and other senior office-bearers, including the GCEO, Ms Mokhobo and the board chairperson,

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[164] Ibid.

[165] State Capture Commission Report Part II vol. 1 supra note 159 para 20.

[166] Ibid para 21.

[167] Ibid paras 21 & 30.

[168] Ibid para 18.

[169] Ibid.

[170] This is a picture that has emerged from the evidence and the reports of the State Capture Commission of Enquiry, chaired by Zondo CJ. See also in this regard Holden op cit note 27.

Ms Tshabalala, for example, had a hand in selling the corporation's archived materials to the MultiChoice Group for far below its market value.[171] As a result of this transaction, the public broadcaster got locked in a contract with the MultiChoice Group, which sabotaged the state broadcaster's ability to generate required revenue.[172] Furthermore, the senior executives and some board members became party to an agreement to host the Guptas' *The New Age* (TNA) Newspaper breakfasts.[173] In terms of the deal, the SABC was by default made to bear the operational costs for the hosting of breakfasts.[174] Hence, the TNA breakfasts benefited only Infinity Media at the expense of the public broadcaster and the taxpayers.[175] In addition, the senior executives were also party to the giveaway sale of valuable archival material to Infinity Media's ANN7, the Gupta's TV station.[176] The material was sold at a discount and without any due diligence mechanisms to safeguard the interests of the public broadcaster in case of a re-airing of the material.[177]

Elsewhere, Eskom entered into an agreement with Glencore. In terms of this deal, the power utility was locked into an expensive contract to purchase low quality coal.[178] This deal saw the price of coal remain high despite a sharp decrease in international demand and price for coal.[179] Eskom also bankrolled Tegeta Exploration to purchase a coal mining company at a negotiated R659 million prepayment, to supply the entity with coal.[180] As a result of this transaction, Eskom was made to buy

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[171] State Capture Commission Report Part V vol. 2 supra note 123, para 1426.7.

[172] Ibid paras 1426.7 & 1426.9.

[173] Ibid para 1389.

[174] Ibid paras 1390 & 1393.

[175] Ibid paras 1390, 1393 & 1525.

[176] State Capture Commission Report Part V vol. 2 supra note 123, paras 1366-88.

[177] Ibid, para 1382.

[178] State Capture Commission Report Part IV vol. 4, paras 261 and 473 – 474. Also, #SABCNews 'Glencore to pay a fine after pleading guilty to bribery, price manipulation' *#SABCNews* 31 May 2022, available *at https://www.youtube.com › watch › v=qxplgDzBMjA,* accessed 11 August 2022.

[179] State Capture Commission Report Part IV vol. 4 supra note 174, paras 261 & 473-4. Also, #SABCNews supra note 366.

[180] State Capture Commission Report Part IV vol. 4 supra note 174, paras 2378 & 2473.

its own coal from the Tegeta Exploration at a price far above market value.[181] The transaction thus worked to the benefit of Tegeta Exploration, belonging to the Guptas, rather than Eskom.[182]

The above examples merely illustrate the extent to which the boards of directors and most senior manages of SOEs were prepared to overlook the *fiduciary* and constitutional duty owed towards state entities. Under the rubric of corrupt and derelict managers of state entities, should be added the calculated bypassing of tender processes in favour of confinements, in breach of the provisions of the PFMA and the conducting of fake tender processes in violation of principles of good corporate governance. In the process, state entities lost billions of rand in irregular expenditure as well as wasteful and fruitless transactions.

The following section discusses the problem of financial instability in state corporations.

### 2.2.3 Financial Instability

Financial instability presents a further key challenge afflicting State-Owned Enterprises in South Africa. In his first state of the nation address in 2018, President Ramaphosa conceded that some of the country's State-Owned Enterprises lack sufficient revenue streams for their operational activities.[183] State entities such as the SABC and Denel have struggled to meet the salaries of their employees (including suppliers in the case of SABC). As a result, SOEs have had to rely on government guarantees and bailouts.[184] In spite of the continuing bailouts, several strategic state-owned corporations are over indebted. Eskom is in debt to the tune of R392.1 billion.[185] During the 2019 SONA, President Ramaphosa indicated that the power utility had only funds to meet financial

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[181] Ibid para 2474.

[182] Ibid para 2493.

[183] SONA, 2018 supra note 303.

[184] See National Treasury, Budget 2022, 88, available at *http://www.treasury.gov.za/documents/national%20budget/2022/review/FullBR.pdf,* accessed 20 August 2022.

[185] Eskom_InterimAFS2021_1762_20211214_MH_WEB.indd, available at *https://www.eskom.co.za/wp-content/uploads/2021/12/Eskom_IFS2021.pdf,* accessed 20 August 2022.

commitments till the end of October 2019.[186] As a result, Eskom's over-indebtedness constituted a serious threat to the fiscus because of the government guarantees to cover Eskom's debts.[187] According to the President, Eskom would require R23 billion per year for the next ten years.[188] The President described the financial position at the utility as one of grave concern,[189] requiring government support on an urgent basis.[190]

In recent years the entity, like some of its counterparts, has had to be bailed out by the government to avoid collapse. During the 2021/2022 financial year, the government had had to bail it out to the tune of R31,7 billion.[191] The power utility had also survived on government guarantees to keep it afloat.[192] In the 2021/2022 financial year, Eskom's government guarantee stood at R350 billion, and the corporation had to date used R281,6 billion of the amount. On the other hand, the SAA, went into business rescue in August 2019 when it was heavily indebted to the tune of R12,7 billion.[193] Moreover, the government had had to 'sell' a 51% stake of shares in the resuscitated South African Airways.[194] Contributing factors to the shortage of operational finances in public entities have varied. Among them is the dual mandate for some of the strategic state entities, such as the SABC and Eskom. Regarding the SABC, the corporation's public mandate consumes financial resources, while generating less revenue in return. Additionally, revenue from bad debts has contributed to the financial strain of these

[186] President Cyril Ramaphosa SONA, 2019, available at *https://www.gov.za/sona2019*, accessed 26 August 2022.

[187] Ibid.

[188] Ibid.

[189] Ibid.

[190] Ibid.

[191] National Treasury Budget 2022 at 95, available at https://www.treasury.gov.za, accessed 27 August 2022.

[192] Ibid.

[193] Reuters Staff Factbox 'The struggles of South African state airline SAA', *Reuters* 05 December 2019, available at *https://www.reuters.com/article/ozatp-uk-safrica-saa-background-idafkbn1y90i9-ozatp,* accessed 05 August 2022.

[194] Pravin Gordhan's Media Statement, 11 June 2021, available at *https://dpe.gov.za/wp-content/uploads/2021/06/media-statement-dpe-takatso-consortium-and-saafinal-11-june-2021.pdf*, accessed 05 August 2022.

state entities.[195] Some entities such as Eskom and the SABC (in the case of TV licence fees) are owed billions of rand by their debtors. To correct the situation, the management has not been able to devise effective debt collection mechanisms.

Eskom is facing a unique problem of its own too. The power utility is owed R45,4 billion of which municipalities' share is 77,8%.[196] The debt has been growing. As the reports show, that the debt grew R7.5 billion from the end of March 2018.[197] Despite using a court process, Eskom has unsuccessfully tried to recover what defaulting municipalities owe it.[198] Remarkably, what municipalities owe Eskom is the equivalent of the money that Eskom requires per year to remain operational.[199] If one considers what the utility needs and how much it is owed, especially by municipalities, the conclusion becomes unavoidable that municipalities must settle their debts to stabilize Eskom's operation.

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[195] National Treasury Budget 2022, supra note 180 at 93. See also *Newcastle Municipality v Eskom Soc Ltd* [2020] ZAKZPHC 4 (KZP) unreported case no 4102/2019P (30 January 2020).

[196] National Treasury 'Annual Financial Statements' (2021/22) 3, available at *https://oag.treasury.gov.za/Publications/01.%20Annual%20Financial%20Statements/03.%20For%20Prov.%20And%20Nat.%20Departments/02%20%20MCS%20and%20related%20material%20for%20year%20ending%2031%20March%202022/FAQs%20MCS%20AFS%202021 22%20Published%20March%202022.pdf,* accessed 05 August 2022). For example, two municipalities (Ngwathe Municipality, in the Free State and the Lekwa Municipality, Mpumalanga) combined owe the power utility R2,8 billion for electricity supplied to it by Eskom (News24wire 'Eskom vs municipalities that owe billions: ConCourt to rule on 'human catastrophe'' *News24wire* 24 May 2022, available at *https://www.engineeringnews.co.za/article/eskom-vs-municipalities-that-owe-billions-concourt-to-rule-on-human-catastrophe-2022-05-24,* accessed 30 August 2022.

[197] Ibid.

[198] *Eskom Holdings Soc Ltd v Lekwa Ratepayers Association; Eskom Holdings Soc Ltd v Vaal River Development Association (Pty) Ltd* 2022 (4) SA 78 (SCA); *Maluti-A-Phofung Municipality v Eskom Holdings SOC Limited* [2021] ZAFSHC 3 (FS) *unreported case no* 2719/2020 (15 January 2021*); Eskom Holdings Soc Limited v Maluti-A-Phofung Municipality; In re: Maluti-A-Phofung Municipality v Eskom Holdings Soc Limited* [2015] ZAFSHC 203 *unreported case no* 4723/2014)(10 September 2015); *Matjhabeng Local Municipality v Eskom Holdings Limited; Mkhonto v Compensation Solutions (Pty) Limited* 2018 (1) SA 1 (CC); *Newcastle Municipality* supra note 383; *Maluti-a-Phofung Municipality v Eskom Holdings SOC Limited* [2020] ZAFSHC 213 (FS) unreported case no 2719/2020 (9 October 2020); *Eskom Holdings SOC Ltd v Resilient Properties (Pty) Ltd; Eskom Holdings SOC Ltd v Sabie Chamber of Commerce and Tourism; Chweu Local Municipality v Sabie Chamber of Commerce and Tourism* 2021 (3) SA 47 (SCA). See also Yana van Leeve and Lisa de Waal 'Court tells Eskom to explore all the options before cutting the lights to beleaguered municipalities on the brink of financial collapse' (2021) *Dispute Resolution Alert*, available at *https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/news/publications/2021/Dispute/Downloads/Dispute-Resolution-Alert-12-January-2021.pdf*, accessed 19 August 2022.

[199] In 2019, Eskom was given R59 billion over 2 years, while at the same time, municipalities owed a staggering R21 billion. This figure of R21 billion grew to over R45 billion rand, 2019 and to a staggering R70 billion in September 2023 (National Treasury) (Eskom Annual Report, 2019; National Treasury 'Media Statement – Eskom Municipal Debt Relief Support Programme: Date for Submissions Extended' (10 October 2023) available at https://www.treasury.gov.za/comm_media/press (accessed 12 April 2025))

Ironically, municipalities have failed to pay Eskom, yet most of them collect revenue from the residents who pay for electricity.[200] Some municipalities use the money they collect from electricity sales for other things.[201] Eskom has also entered into agreements with defaulting municipalities to make it easy for them to effect payments.[202] However, it is said that out of the 51 agreements only six municipalities are abiding by the terms of the payment agreement.[203] What compounds this financial challenge is the court's intervention interdicting Eskom from disconnecting services to defaulting municipalities.[204] The courts have reaffirmed Eskom's right to receive payment for electricity, but have held that the power utility ought to be mindful of its constitutional obligations as it is the only organ of the state tasked with the provision of electricity supply services.[205] So, in light of Eskom's constitutional obligation to the citizens, termination of the electricity supply proves to be a last resort.[206] This dilemma may constrain a provincial government to deduct what is owed or part thereof from municipal grants. Alternatively, in the interim, this may have to be deducted from the provincial allocation. Still, a long-term measure must be devised to avoid a repeat of the current crisis of municipalities owing Eskom exorbitant amounts of money. Judgments such as the *Newcastle Municipality* mean that Eskom must continue supplying electricity to defaulting municipalities at the risk of its existence.[207]

There is however an inter-ministerial Task Team that has been established to assist Eskom and

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[200] *Lekwa Ratepayers Association* supra note 194, par 14; *Resilient Properties* supra note 194, para 7.

[201] Ibid, para 8.

[202] *Newcastle Municipality* supra note 383, para 15.

[203] The courts have held that signing an agreement for payment per se is not sufficient to help Eskom. Instead, the power utility ought to explore all available options before cutting off power supplies or taking defaulting municipalities to court (*Resilient Properties* supra note 385, para 25).

[204] See for example *Lekwa Ratepayers Association* and *Resilient Properties* cited supra note 194.

[205] *Lekwa Ratepayers Association* supra note 193, para 8.

[206] *Newcastle Municipality v Eskom Soc Ltd* (KZP) unreported case no 7349/19P (8 October 2019) paras 8-9. *Resilient Properties* supra note 194, paras 20-6.

[207] *Newcastle Municipality,* supra note 202.

municipalities to meet this challenge.[208] When delivering his SONA on 20 June 2019, President Ramaphosa declared that the days of non-payment for electricity are over.[209] Hence, radical measures are needed to assist Eskom to recover what is due to it. However, the courts have made it clear that the needs to be cooperation by the national, and provincial spheres of government to clear the municipalities' debts owed Eskom in terms of intergovernmental cooperation mechanisms.[210] This will be in line with section 41 of the Constitution, 1996, and Intergovernmental Relations Framework Act.[211] In this regard, the courts have held that Eskom must explore all avenues before terminating the electricity supply and/or approaching courts.[212] Perhaps, to assist Eskom, the other two spheres of government, that is, the national and provincial governments need to come to the party and pay a portion of the defaulting municipalities directly to Eskom to settle whatever is owed to Eskom. Eskom is also crippled by the Achilles heel of a regular long-term deal with BHP Billiton, awarded in terms thereof Eskom contracted to supply BHP Billiton electricity at a dramatically reduced rate.[213] This prejudicial deal between Eskom and BHP Billiton has adversely Impacted revenues for Eskom and may have also created a negative attitude for the public regarding paying for electricity.

Meanwhile, the SABC has not been able to develop an efficient method to collect license fees from defaulting members of the public. Also, with delay in digital migration has robbed SABC of revenue that the entity would have generated from additional TV channels.[214] The protracted delays in digital migration have also deprived incorporation of revenue it would have derived through the encryption

[208] *Resilient Properties supra note 194*, paras 29 – 34.

[209] SONA, 2019, available at *https://www.gov.za/sona2019,* accessed 26 August 2022.

[210] See *Resilient Properties supra note 194*, paras 24-9.

[211] Act 13 of 2005; see chapter 4 of the Act. *Maluti-a-Phofung Municipality* supra note 194, paras 25 & 31.

[212] *Maluti-a-Phofung Municipality* supra note 194, para 2 and 17. See also *Resilient Properties* supra note 194, paras 20 & 26.

[213] *BHP Billiton PLC Inc v De Lange* 2013 (3) SA 571 (SCA), paras 1-4.

[214] State Capture Commission Report Part V vol. 2 supra note 123, para 1426.

of its material.[215]

Overstaffing is another challenge facing some of the strategic public corporations. The next part of this chapter examines the issue of overstaffing.

### 2.2.4 Overstaffing

Another problem crippling some SOEs is overstaffing. Eskom is one such typical example in this regard. In the 2021 financial year, Eskom employed 42 749 individuals.[216] According to the World Bank, in 2018 Eskom only needed a workforce of about 14 244 employees.[217] So, at 28 505 more employees than it needs, Eskom's workforce is bloated.[218] Experts have suggested that these public entities with bloated staff complements, such as Eskom, need to retrench excess employees to save the entities from collapse.[219] It boggles the mind how Eskom ended up with so many extra employees when the power utility has been deteriorating.[220] Experts argue that retrenchments of excess staff will not only save these SOEs from possible collapse but that retrenchment would yield positive spinoffs in the form of stimulating employment in the country. For example, the economist Dr Iraj Abedian points to the example of Telkom, which managed to turn its fortunes around by laying off surplus

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[215] Ibid.

[216] Eskom *Integrated Report* (2021) 106, available at https://www.eskom.co.za/wp-content/uploads/2021/08/2021 IntegratedReport.pdf, accessed 20 August 2022.

[217] C Trimble, M Kojima, I. P. Arroyo & F Mohammadzadeh (Policy Research Working Paper no 7788) 'Financial viability of electricity sectors in Sub-Saharan Africa: Quasi-fiscal deficits and hidden costs' (2016) *World Bank Open Knowledge Repository,* available at *https://openknowledge.worldbank.org/handle/10986/24869*, accessed 27 August 2022. See also K Wilkinson 'Eskom and the viral infographic: do the numbers add up?*' AfricaCheck* 09 July 2018, available at *https://africacheck.org/fact-checks/reports/eskom-and-viral-infographic-do-numbers-add accessed*, 27 August 2022).

[218] Eskom Integrated Report supra note 212 at 7, 41 & 107. Agency Staff 'De Ruyter takes the first step to trim Eskom's bloated workforce' *Techcentral* 15 February 2020, *available* at *https://techcentral.co.za/de-ruyter-takes-first-step-to-trim-eskoms-bloated-workforce/175252/,* accessed 20 August 2022.

[219] Eskom is heavily indebted and is on 'life support' of government guarantee as its guarantees exposure currently stands at R327.9 billion (*National Treasury Budget* 2022, supra note 187. In 2017, Eskom's staff costs stood at R36.8 billion (Wilkinson op cit, note 213).

[220] Eskom Integrated Report 2021, op cit note 212 at 41.

employees.[221] Dr Abedian points out that the employees who were retrenched by Telkom were able to secure alternative employment in a matter of months after retrenchment since they possessed special skills.[222] The same economist argues that Eskom needs to follow the Telkom course. However, his proposal is bound to set the shareholder on a collision cause with trade unions, who have constantly rejected any lay off option. Nevertheless, the SABC has followed the example of Telkom and laid off 621 employees in 2021 amidst protests from the employee unions.[223]

Last, but not least important, the next part of this section explores the challenges of ageing infrastructure, which has a bearing on the performance of some of the State-Owned Enterprises.

### 2.2.5 Ageing Infrastructure

Some state-owned entities are struggling because the ageing infrastructure constantly breaks down. For example, Eskom's load shedding is exacerbated by regular breakdowns of generators because of years of neglect to maintain them properly.[224] Meanwhile, before it went into business rescue, the SAA, operated with all the aircraft which consumed a lot of fuel. In turn, excessive petrol consumption led to an increase in the operational costs of the airline. It becomes clear that the ageing infrastructure became a liability to the entities involved. It is submitted that the boards and management of these state entities are to blame for this problem as ageing infrastructure is a result of lack of proper planning on the part of management. It should always ensure that the corporations invest in the maintenance and/or improvement of the infrastructure. Whereas this failure may not incur liability *per se*, it nonetheless does illustrate how incompetent those entrusted with the running of State-Owned

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[221] See also News24wire 'Telkom retrenchments confirmed: 7,800 workers to be let go' *Businesstech* 9 June 2015, available at *https://businesstech.co.za/news/telecommunications/90288/telkom-retrenchments-confirmed-7800-workers-to-be-let-go/*, accessed 27 August 2022. Natasha Odendaal 'Thousands of Telkom employees accept voluntary retrenchments' *EngineeringNews* 31 July 2015, available at *https://m.engineeringnews.co.za/article/thousands-of-telkom-employees-accept-voluntary-retrenchments-2015-07-31/rep_id:4433* accessed 27 August 2022.

[222] SAFM Radio interview, 28 May 2019.

[223] SABC Annual Report (2021/22), 93, available at *http://web.sabc.co.za/digital/stage/corporateaffairs/sabc_annual_report_2021_-_2022.pdf,* accessed 27 August 2022.

[224] National Treasury Budget, 2022 supra note 187 at 8.

Enterprises can be.

The underlying root causes of the challenges facing SOEs are examined below.

## 2.3 UNDERLYING CAUSES OF THE PROBLEMS OF SOES

This study identifies six main underlying causes of the challenges confronting state-owned entities in South Africa. First, it is the statutory power of appointment and removal of members of boards of public entities; second; is the cadre deployment policy and its practice; third is undue political interference; fourth, unstable leadership of State-Owned Enterprises; fifth, statutory fragmentation in respect of the oversight/management of public corporations; and sixth, failure of parliamentary oversight. These causes are discussed here in this section, in the same sequence as above. The section begins with the statutory power to appoint and dismiss members of boards of state entities.

### 2.3.1 The Appointment and Removal of Members of Boards

The power to appoint and dismiss members of the boards is one of the main causes of the challenges facing state owned companies in South Africa. Generally, strategic State-Owned Enterprises in South Africa have been plagued by the problem of boards which, for one reason or another, rarely finish their terms. Different pieces of legislation, in respect of the various state entities, place the power to appoint and remove board members on the respective minister who is the policy head for the relevant state-owned enterprise. For example, the power to appoint and remove members of the board of control for Transnet/Prasa rests with the Minister of Public Transport.[225] However, sometimes the legislation vests the power to appoint and remove members of boards on the minister of public enterprises. For example, the power to appoint the members of the board for the National Ports Authority of South Africa vests on the shareholding minister (Minister of Public Enterprises).[226] The

[225] Section 24 of the Legal Succession to the South African Transport Services Act 9 of 1989, read with section 17 of Transnet Limited Amendment Act 52 of 1991.

[226] Section 15 of the National Ports Act 12 of 2005.

shareholding minister is required to call upon nominations and then appoint board members from the nominees.[227] Meanwhile, the law may also place the powers to appoint and remove board members on the State President. Such is the case for instance, in the case of the board for the SABC.[228] Concerning the Eskom board, the relevant legislation does not make any provisions for the appointment and removal of board members, as well as executives.[229] However, after the coming into effect of the Eskom Conversion Act,[230] Eskom is also governed by the Companies Act[231] and the PFMA, [232] as a SOE.[233] Another public entity in the position of Eskom is the South African Airways (SAA). In terms of the SAA Act, the national airline is listed under the Public Finance Management Act, the same way as Eskom.[234] Section 9 of the SAA Act amended the PFMA Act by listing SAA under the Act as a public entity, operating in terms of the Companies Act.[235] Thus, the appointment and dismissal of the members of the board are in terms of section 63 of the PFMA, read with section 1 of the same Act. Section 63 vests the affairs of public entities falling under the PFMA on the executive authority responsible for a public entity, be it national or provincial.[236] The PFMA defines executive authority, concerning a national public entity, as the Cabinet member accountable to parliament for a particular entity or the cabinet member who is responsible for the portfolio in which

[227] Ibid.

[228] Sections 13 and 15 of Broadcasting Act 4 of 1999.

[229] See Dullar Omar Institute for Constitutional Law, Governance and Human Rights ("Dullar Omar Institute"), 'Legal Framework of SOE Boards: Appointment and Dismissal of Board Members and Executives of Eskom, Prasa and SABC', available at *https://dullahomarinstitute.org.za/women-and-democracy/board-members-of-state-owned-enterprises-towards-transparent-appointments/reports/wandrag_legal_framework_paper_2_revision_4_04_07_2019.pdf,* accessed 22 August 2022.

[230] Act 13 of 2001.

[231] Act 71 of 2008.

[232] Act 1 of 1999.

[233] Eskom is listed under Schedule 2 of the Act as a public entity.

[234] The South African Airways Act 5 of 2007.

[235] Act 61 of 197 (now Act 71 of 2008). See also sections 4 and 5 of the South African Airways Act 5 of 2007.

[236] Section 63(2) of the PFMA.

the public entity falls.[237] Thus, viewed in this light, the executive authority can be the shareholding minister (Public Enterprises) or the policy minister (such as the minister of communications). Meanwhile, 'national public entity' refers to a national government business enterprise (state-owned enterprise), including other entities established by national legislation.[238]

On the other hand, the Act defines 'ownership control', in respect of an entity as the competence to exercise the powers such as the appointment and removal of members of boards of public entities and other executives.[239] Therefore, the provisions of the PFMA mean that the powers to appoint and dismiss the members of the board of management for Eskom and SAA vest with the Minister of Public Enterprises. Alternatively, Eskom may fall under the Department of Minerals and Energy, while SAA falls under the Department of Public Transportation, in terms of the provisions of the PFMA.[240] At the same time, these entities may be under the control of the National Treasury.[241] It is therefore correctly lamented that the provisions of the PFMA[242] in this regard create uncertainty and room for political abuse of powers regarding the appointment of members of boards, as well as executives like the CEOs.[243] Vesting the power to appoint and dismiss board members on the Minister weakens corporate governance and creates instability in state entities, as in the case of political interference. The power to appoint and remove board members may usually lead to political interference, disguised as a legitimate exercise of the minister's statutory power.[244] This power to appoint and remove members of boards harbours the real likelihood to compromise the board, as the appointed members

[237] Ibid.

[238] Ibid.

[239] Ibid.

[240] Act 1 of 1999.

[241] See for example State Capture Commission Report Part I vol. 1 supra note 125, par 839.

[242] Section 63 (read with section 1) of the PFMA.

[243] See Dullar Omar Institute supra note 225.

[244] *Molefe v Minister of Transport* [2017] ZAGPPHC 120 (GP) unreported case no 17748/17 (10 April 2017), paras 1-18. In this case, the minister of public transport, Dipua Pieters, claimed to have been legitimately exercising powers vested in her to appoint and remove members of PRASA's board of control.

are left at the mercy of the Minister. As was seen in the Eskom case, the Eskom board was appointed in 2014, which its efficacy was severely compromised because of infiltration by the Gupta loyalists.[245] Inadvertently, board members, especially, the chairperson, kowtow to the Minister or political head. In turn, this exposes board members to corruption, where they carry out unlawful orders of 'their handler', the political head.[246] When a member disagrees with the appointed minister, the minister may use his power to remove the member whom he perceives as 'insubordinate' (or anyone who disagrees with the appointed minister), as was the case with Dr Popo Molefe at PRASA.[247]

The distress of State-Owned Enterprises has also been caused by the abuse of power by the shareholder representatives and proxies for the executive. For example, in the case of PRASA, Dr Molefe had to take the minister for public transport, Ms Dipua Pieters to court to interdict her from disbanding a properly functioning board.[248] Meanwhile, several members of the SABC interim board resigned *en masse*, in December 2018 amid allegations of interference by the then Minister of Communications and Digital Technologies, Ms Stella Ndabeni-Abrahams.[249]

Furthermore, instability in the leadership of strategic South African state entities occurs due to internal power struggles between board members and the company executives. This pattern was much the case in SAA, especially, during the era of Ms Myeni as the board chairperson. For example, following the resignation of Ms Carolus and Mr Siza Mzimela, as the board chairperson and the CEO, respectively, Mr Vuyisile Kona was appointed acting chairperson of the board.[250] Meanwhile, Mr Monwabisi

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[245] State Capture Commission Report Part IV vol. 3 op cit note 148, para 12.

[246] The evidence related during the hearings of the State Capture Commission of Inquiry and its final Reports have revealed how some board members and some executives were used by appointed ministers to perpetuate corruption (for example, in the case of Transnet, with Mr Gama and Eskom, in the case of Dr Ngubane and Mr Molefe).

[247] *Molefe* supra note 244 para16.

[248] Ibid.

[249] SABCNews 'President accepts SABC board members' resignations' *@SABCNews* 6 December 2018, available at *https://www.sabcnews.com/sabcnews/president-accepts-sabc-board-members-resignations/,* accessed 06 August 2022. See also Dullar Omar Institute supra note 432.

[250] State Capture Commission Report Part I vol. 1 supra note 125, para 65.

Kalawe was appointed the new CEO of SAA.[251] However, Mr Kona was pushed out of the national carrier having lasted barely five months, amid allegations that he had bypassed the board by reporting directly to the then President, Zuma.[252] His successor, Mr Kalawe also faced turbulent times at SAA, because of strained relations with the board chairperson, Ms Myeni.[253] Mr Kalawe resigned following suspension, disciplinary proceedings, and a protracted labour court battle with the board, as well as an arbitration.[254] Another SAA senior executive, Dr Masimba Dahwa, the Chief Procurement officer, suffered the same fate as Dr Dahwa, until he resigned.[255]

The next focus shifts to cadre deployment as a further major root cause of problems facing State-Owned Enterprises and its effect, especially during the years following the 2009 elections.

### 2.3.2 Cadre Deployment practice

Especially during the state capture era, SOEs became battlefields for control considering their strategic position in the command structure and the enormous resources allocated to them by the state. Not surprisingly, the governing ANC's cadre deployment policy provided for the deployment of cadres to the boards of State-Owned Enterprises. The State Capture Commission noted that the cadre deployment policy reserves strategic positions for exclusive occupation by selected cadres.[256] Strategic centres of authority identified in the policy included parastatals in the form of SOEs and

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[251] Staff Reporter 'Monwabisi Kalawe appointed as new SAA head' *Mail & Guardian* 19 April 2013, available *https://mg.co.za/article/2013-04-19-monwabisi-kalawe-appointed-new-saa-ceo/*, accessed 20 August 2022; Dorine Reinstein 'Is Kalawe SAA's next CEO?' *Tourism-Update* 12 April 2013, available at *https://www.tourismupdate.co.za/article/kalawe-saas-next-ceo*, accessed 20 August 2022.

[252] State Capture Commission Report Part I vol. 1 supra note 125, paras 69-73. Also, Eyewitness News 'SAA is set to appoint Kalawe as CEO', *EWN* 10 April 2013, available at *https://ewn.co.za/*, accessed 20 August 2022).

[253] Megan Van Wyngaardt *'Kalawe resigns as SAA CEO' Polity.org* 24 April 2015, available at *https://www.polity.org.za/article/kalawe-resigns-as-saa-ceo-2015-04-24*, accessed 23 August 2022). See also State Capture Commission Report Part I vol. 1 supra note 125, para 769.

[254] Wyngaardt op cit. At resignation, Mr Kalawe was paid a substantial 'golden handshake' (See Andiswa Maqutu 'Former SAA CEO and private investigator charged in SAA case' *Bizcommunity* 10 May 2016, available at *https://www.bizcommunity.com,* accessed 23 August 2022.

[255] State Capture Commission Report Part I vol. 1 supra note 125, par 259 (see also paras 166-77 & 203–255).

[256] Public Service Commission, para 405.

their boards.[257] The authority of the deployment committee is rooted in the governing African National Congress (ANC).[258] It has become public knowledge that the governing party's deployment committee has the power to instruct ministers and other appointing agents in government and organs of state to appoint their predetermined candidates.[259] Once instructed, the office-bearer has no discretion, but to appoint the candidate.[260] Any dissent is viewed in a serious light as 'ill-discipline'.[261] In turn, ill-discipline is viewed in a serious light in terms of the Party's code of conduct.[262] A dissenter is regarded as disloyal to the party.[263]

The party's cadre deployment policy has been criticized by the DA and other opposition parties for some time.[264] The criticism against the practice is not unfounded, given its unconstitutionality and the conflation of the lines between the state and the governing party. In this way, cadre deployment has facilitated the appointment of unqualified and unsuitable party loyalists,[265] to key positions in State-Owned Enterprises . Once there, the loyalists have been able to pursue agendas that are unrelated to the maximal performance and objectives of the affected state entities. Hence, any appointee who dares

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[257] Ibid para 405-6.

[258] Ibid para 421-22.

[259] Ibid paras 417-19.

[260] Ibid para 413.

[261] Ibid para 421-22.

[262] Ibid para 423.

[263] Ibid, para 423.

[264] See *Schreiber v African National Congress* [2023] ZAGPJHC 78 (GJ) unreported case no 2021/26339 (2 February 2023). In this case, a DA MP sought a court order declaring the decision of the ANC to refuse him access to its documents pertaining to cadre deployment unlawful. The documents in issue relate to the period between 1 January 2013 and 28 February 2021 (*Schreiber* para 6). The application was in terms of the Promotion of Access to Information Act (PAIA) 2 of 2000. The main issue before the court was whether the DA member could show that the documents were required for the exercise of a particular right (para 9). Ultimately, the court held that the MP, as a member of Parliament, has a duty of oversight over the appointments to, and performance of, organs of state (par 17). Accordingly, the court held that the information that the MP requested was necessary for him to protect certain rights (par 16). In September the SCA dismissed leave to appeal against the decision of the high court, citing a lack of prospects of success (*Schreiber v African National Congress* [2023] ZAGPJHC 725 (GJ) unreported case no 2021/26339 (24 July 2023); Leon Schreiber, 'DA defeats ANC's latest desperate attempt to hide cadre deployment records,' *DA.org* 04 September 2023, available at *https://www.da.org.za/2023/09/da-defeats-ancs-latest-desperate-attempt-to-hide-cadre-deployment-records,* accessed 20 September 2023; SABCNews 'ANC's cadre deployment bid dismissed' *YouTube* 04 September 2023, available at *https://www.youtube.com/watch?v=na8w1eakydq,* accessed 20 September 2023).

[265] Ibid, paras 430, 430.1, 430.2 & 442.

to deviate commits political or career suicide.[266] For example, it cost Ministers Ms Barbara Hogan[267] and Mr Ngoako Ramatlhodi[268] their cabinet positions during the state capture era. In addition, the policy of cadre deployment has intensified instability in state companies.

The State Capture Commission has correctly held that the policy of cadre deployment runs at odds with the constitutional values of the 'supremacy of the constitution and the rule of law', which are foundational pillars of the South African democracy.[269] Thus, the cadre deployment policy builds a parallel agency that is responsible for the appointment of persons into critical positions in organs of state, especially public entities. In this wise, a more powerful appointing authority is created to supersede constitutionally mandated appointing institutions which are rendered irrelevant or redundant. The State Capture Commission has impugned the unconstitutionality of the cadre deployment policy, as far as it applies to public service appointments and State-Owned Enterprises , as opposed to elected positions in government.[270] In light of the above, the cadre deployment policy is out of harmony with the nonpartisan public service principle envisaged in section 197 of the Constitution, 1996. The policy favours appointments based on loyalty to the governing party.[271] In his State Capture Commission Report, Zondo CJ states that nowhere does section 197 of the Constitution,1996 make provision 'for political criteria to enter into decisions about appointments to fixed positions within the public administration'.[272] Therefore, it may be concluded that the cadre deployment policy is irreconcilable with the principles stated in section 197 of the Constitution,

[266] For instance, regarding the removal of Mr Norman Baloyi by Minister Lynn Brown from the Eskom board, see State Capture Commission Report Part IV vol. 3, paras 1287-88.

[267] Ibid paras 1258.8 & 1259.

[268] Ibid, para 1258.9.

[269] Section 1(c) of the Constitution, 1996.

[270] State Capture Commission Report Part VI vol. 2, at 155-75 (see paras 290-445).

[271] Ibid paras 574 & 666.

[272] Ibid para 575. As Zondo CJ observed, the only exception is provided in respect of appointments made on grounds of policy considerations, as in the case of special advisers and the like (State Capture Commission Report Part VI vol. 2 supra note 266 para 575 & footnote 513).

1996.[273] As illustrated in the *Mlokoti* judgment, the application of the policy is also unfair to those candidates legitimately contesting for positions in the public administration.[274]

Moreover, it becomes clear from the policy document of the governing party that the practice of cadre deployment is not about promoting the interests of the strategic state corporations, but, among others, to entrench the party's leverage over State-Owned Enterprises.[275] In his Commission of Enquiry into State Capture Report, Zondo CJ correctly holds that the cadre deployment policy was abused to facilitate corruption.[276] It is now public knowledge that through the policy, incompetent and corrupt individuals were deployed in positions of power.[277] President Ramaphosa has also confirmed this view in his weekly newsletters. For instance, in his March 2021 newsletter, he declared that the practice of deploying incompetent persons into key positions has led to poor performance,[278] mismanagement and corruption in critical state institutions.[279] In his 2020 August newsletter, President Ramaphosa decried the fact that the abuse of the deployment policy had resulted in poor management of public institutions and wastage of public funds.[280] He pointed out that the cadre deployment policy was abused to perpetuate a culture of nepotism in the public sector.[281] In this way, cadre deployment has been at the core of the culture of impunity and lack of consequence management in the wake of the looting of taxpayers' money from state entities.

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[273] State Capture Commission Report Part VI vol. 2 supra note 266 para 576; & *Mlokoti v Amathole District Municipality* 2009 (6) SA 354 (ECD), referred in para 576 of the Commission Report, Part VI vol. 2 (supra note 266).

[274] *Mlokoti* supra. In this case, the high court castigated the ANC councillors in the Amathole district municipality who had decided to vote for the appointment of their preferred candidate instead of the one recommended by the panel as the best candidate for the job.

[275] State Capture Commission Report Part VI vol. 2 supra note 266, para 401.

[276] Ibid para 432.

[277] Ibid para 442.

[278] And, by extension, public companies owned by the state.

[279] State Capture Commission Report Part VI vol. 2 supra note 266, para 430.2.

[280] Ibid.

[281] Ibid.

In a further weekly Newsletter, President Cyril Ramaphosa used strong language to describe the practice of cadre deployment and its consequences. He referred to the policy as leading to 'poorly qualified individuals [who are] *parachuted* into positions of authority through *political patronage.*'[282] Elsewhere, the President lamented the hiring and promotion of people to 'key positions' for which they are unsuited and/or unqualified.[283] The truth of the President's words is borne out in the appointment of incumbents such as Ms Faith Muthambi as the Minister for Communications and the appointment of Mr Motsoeneng to the key position of Chief Operating Officer (COO) at the public broadcaster.[284] The appointments of Dudu Myeni and Dr Ben Ngubane as chairpersons of the SAA and SABC board respectively provide a case in point.[285] Despite the years of decline of the SABC and being without the necessary qualifications, Mr Motsoeneng had a long spell at the SABC. According to public information he did not even possess a matriculation certificate.[286] By the time Mr Motsoeneng left the public broadcaster, it was bankrupt and unable pay its service providers. Unsurprisingly, the SABC board fought hard to defend his appointment, even to the point of setting up a sham disciplinary committee to exonerate him.[287] The board was even prepared to keep him in the position, contrary to a court decision that upheld the Public Protector's finding that his appointment had been unlawful. In line with this finding, the court ordered that the SABC initiate disciplinary proceedings against Mr Motsoeneng.[288]

On the other hand, Ms Myeni led the SAA board for several years. By virtue of being chair person,

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[282] President Ramaphosa's Newsletter, 2020, as quoted in the State Capture Commission Report Part VI vol. 2 supra note 266, para 430.1.

[283] As quoted in the State Capture Commission Report Part VI vol. 2 supra note 266, para 430.2.

[284] *South African Broadcasting Corporation Soc Ltd v Democratic Alliance* (*"SABC v DA"*) 2016 (2) SA 522 (SCA), para 9.

[285] Ibid para 6 & 9.

[286] Public Protector South Africa (Report no 23 of 2013/14) *'When governance and ethics Fail'* (2014), para XXV(c)(2)(*aa*) & (*cc*). Available at *www.publicprotector.org*, accessed 20 September 2022. 'When Governance and Ethics Fail' Report supra note 55.

[287] *SABC v DA* supra note 284 *paras* 4-6 & 9.

[288] Ibid.

she presided over the disastrous performance of the national carrier.[289] Ms Myeni's final term as the SAA board chairperson was a result of a compromise between the national treasury under former Minister Pravin Gordhan and then State President, Mr Jacob Zuma.[290] At the time, the SAA was in financial distress and needed a bailout to keep it afloat.[291] At that time, the rift between Mr Zuma, the then President and Finance Minister Nhlanhla Nene, had reached a point of no return. The rift emanated from their differences regarding Ms Myeni's leadership at the helm of the SAA.[292] Not surprisingly, Minister Nene was unceremoniously removed as Minister,[293] only to be replaced by an unknown Mr Des Van Rooyen. In response to the public outcry on the appointment of a lack lustre Minister of Finance, Des van Rooyen was replaced by Minister Gordhan who himself had been replaced by Minister Nene as the new Minister of Finance after the 2014 national elections.[294]

A further example to illustrate the abuse of the cadre deployment policy was the complete disaster that played itself out at Eskom regarding Mr Brian Molefe. Mr Molefe caused a stir when he 'resigned' from Eskom within 18 months of his stay there, having been deployed to Eskom from Transnet. The Board of Directors unlawfully approved a 'pension pay out' of more than R30 million as if Mr Molefe had served Eskom pre-eminently for years. When he was not appointed Minister of Finance, Mr Molefe resigned from parliament and sought to revoke his resignation on his return to Eskom.[295] It took a court's intervention to stop Mr Molefe's reappointment at Eskom and his early retirement on a

[289] State Capture Commission Report Part I vol. 1 supra note 125, paras 65-67. Ms Myeni became chairperson from December 2012 to 2017. She oversaw a disastrous era for SAA and the country (see State Capture Commission Report Part I vol. 1 supra note 125, para 147.6; *OUTA v Myeni* supra note 1383 para 132).

[290] State Capture Commission Report Part I vol. 1 supra note 125, para 148.5.

[291] Ibid.

[292] Ibid para 149.

[293] State Capture Commission Report Part I vol. 1 supra note 125, para 150.

[294] Ibid, para 148.5.

[295] *Democratic Alliance v Minister of Public Enterprise; Economic Freedom Fighters v Eskom Holdings Limited; Solidarity Trade Union v Molefe* [2018] ZAGPPHC 1 (GP) unreported cases nos 33051/2017; 34568/2017 & 34042/2017 (25 January 2018) (*'DA v Minister of Public Enterprise'*), paras 1-9 & 18-22.

full pension.[296]

It bears recording that the policy of cadre deployment has also proved problematic for another reason. The beneficiaries of the cadre deployment policy were of necessity trapped in a state of indebtedness to the governing party or the person or persons who had helped them to secure their appointments.[297] In that compromised position, the beneficiaries of deployment to state-owned entities were ever careful not to disobey orders emanating from their benefactors in order to protect personal interests, rather than to advance the legitimate interests of the company.[298] In that way, cadre deployment officially created a patronage network.[299] The policy of cadre deployment accounts for the lack of political will on the part of the responsible authority, such as the standing portfolio committees tasked with overseeing State-Owned Enterprises , and holding deployed cadres to account for their contribution to the losses caused to public entities. Moreover, the cadres who get deployed and redeployed irrespective of performance record, have often left behind a trail of mismanagement and devastation of state-owned corporations. At times, certain individuals have been deployed from one state company to the next, often without having achieved any good for the previous entity. Others have been kept at the helm of dysfunctional entities for years. The results have been negative for the public administration, and more so for State-Owned Enterprises.

The State Capture Commission Report has laid bare the devastating effects of cadre deployment in public entities. In most cases, there have been no consequences at all for the financial losses caused

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[296] Ibid, paras 80-84.

[297] State Capture Commission Report Part I vol. 1 supra note 125, paras 292-94, in respect of Mr Musa Zwane (CEO) and Ms Phumeza Nhantsi (CFO) at SAA Group. The pair were hired by Ms Myeni and Ms Kwinana. See also State Capture Commission Report Part IV vol. 3 supra note 241, paras 1258.5 & 1258.6, regarding the appointment of Mr Brian Molefe as GCEO for Transnet (2010) and Eskom (2014). When President Zuma got Mr Molefe to be appointed at Transnet, Mr Molefe had not scored sufficient points to be appointed in the position. Hence, it is inevitable that he would be beholden to those who had ensured his appointment and be willing to do their bidding, as Mr Molefe did at Transnet and Eskom when he promoted the interests of the Gupta family. Meanwhile, Dr Dahwa who headed SAA as CPO was eventually prosecuted for refusing to execute unlawful orders of Ms Myeni and Ms Kwinana (State Capture Commission Report Part I vol. 1 supra note 125, paras 220, & 235-6).

[298] State Capture Commission Report Part VI vol. 2 supra note 266, para 430.

[299] Ibid.

to the entities. No wonder the State Capture Commission has criticised cadre deployment, showing its unconstitutionality in no uncertain terms.[300]

The next part focuses on the problem of political interference and its role in destabilising the South African State-Owned Enterprises.

2.3.3 Political Interference.

Political interference is a further root cause of problems and challenges facing State-Owned Enterprises in South Africa. When Mr Phakamani Hadebe (erstwhile CEO for Eskom) announced his resignation from the power utility at the beginning of July 2019, he cited reasons of ill health.[301] However, speculation was rife that the real reason for Mr Hadebe's resignation was constant interference with the board of Eskom on the part of Minister of Public Enterprises, Mr Gordhan.[302] The Commission of Enquiry into State Capture has made findings of political interference (or improper interference) in the affairs and operations of most strategic state corporations by various members of the executive (including the State President himself).[303] Political interference in the affairs of State-Owned Enterprises comes in direct and indirect forms. Direct political interference occurs when politicians, particularly from the governing party, and executives such as ministers and, in some instances, the State President himself, improperly interfere in the management and operations of boards of directors and or executive functions of public entities. For example, a cabinet minister may instruct the board, usually in private, to implement or not to implement a particular decision, for reasons not connected with the interests of that entity.

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[300] Ibid, paras 574-78, 630 & 656-57.

[301] Association of Black Securities and Investment Professionals (ABSIP) statement 'Phakamani Hadebe's resignation as Eskom CEO met with shock' *EWN* 25 May 2019, available at *https://ewn.co.za/2019/05/25/phakamani-hadebe-s-resignation-as-eskom-ceo-met-with-shock,* accessed 05 August 2022.

[302] B Dlulane 'Gordhan's interference with Eskom Board led to the CEO's resignation' *ENW* 26 May 2019, available https://ewn.co.za/2019/05/26/gordhan-s-interference-with-eskom-board-led-to-ceo-s-resignation-economist, accessed 05 August 2022.

[303] State Capture Commission Report Part I vol. 1 supra note 125, paras 149-150; 241-42 & 436, for example.

An example of direct interference involves the former Minister of Communications and Digital Technologies, Ms Stella Ndabeni-Abrahams. The Board had resolved to retrench some of the redundant employees of the SABC as part of the corporation's strategy to resuscitate the ailing public broadcaster.[304] Barely six months into its tenure on the SABC board, Ndabeni-Abrahams allegedly interfered with the operations of the SABC and the new board, in their attempts to turn around the fortunes of the struggling state broadcaster.[305] As the country was preparing for the general elections, Minister Ndabeni-Abrahams publicly opposed the decision of the Board, apparently for political reasons. The Minister's dubious conduct led to the resignation of several SABC Board members.[306]

In the case of indirect political interference, politicians use proxies inside the Board of directors of State-Owned Enterprises to achieve their ulterior ends. Examples of such interference abound. A case scenario of indirect political interference, for example, would also include how former President Zuma took control of SAA through the proxy of Myeni as chairperson of the board.[307] Another classic example of indirect political interference is the attempt to remove the board of the PRASA under the chairmanship of Dr Popo Molefe, in March 2017.[308] A court of law had to reinstate the Board after the Minister for Transport, Pieters had disbanded it before its period had expired.[309] Before disbanding the board, the Minister attempted to impose Mr Collins Letsoalo as Acting GCEO for PRASA, apparently for purposes of taking over from the board.[310] In other words, Mr Letsoalo's presence in PRASA would have given the Minister a proxy inside the entity. Minister Pieters' attempt to disband

[304] C Gilli, 'SABC cuts 303 employees despite Ndabeni-Abrahams' intervention', *Mail & Guardian* 2 February 2021, available at https://www.pressreader.com/south-africa/mail-guardian/20210205/281621013019772, accessed 19 August 2022.

[305] Ibid. Cf: Mpete & Maier op cit note 19.

[306] SABC (statement) 'Resignation of SABC Board members' *SABCNews* 06 December 2018, available at *https://www.sabc.co.za/sabc/resignation-of-sabc-board-members/,* accessed 19 August 2022.

[307] State Capture Commission Report Part I vol. 1 supra note 125, para 825 and 835.

[308] *Molefe* supra note 244.

[309] Ibid.

[310] Ibid paras 15-6.

the board was direct political interference, whereas her imposition of Mr Letsoalo to take over the work of the board and clean up corruption was an example of indirect political meddling into the affairs of a state corporation.[311]

Even under 'the new dawn' administration of President Ramaphosa, for example, SOEs continue to experience incidents of direct political interference. For instance, in 2020 Mr Fikile Mbalula, when he was Minister of Transport (and the Cabinet), instead of finalising appointment of a new board for Prasa, terminated the appointments of interim board.[312] In its stead, Minister Mbalula appointed his special advisor, Mr Bongisizwe Mpondo, as the entity's administrator, contrary to the provisions of section 24 of the Legal Succession Act 9 of 1989.[313] Minister Mbalula also unlawfully designated the CEO/Acting CEO as the entity's accounting authority.[314] Not long thereafter, in December 2021 'the board of Prasa' dismissed Mr Zolani Matthews as Prasa's CEO, citing his failure to secure security clearance because of allegedly not disclosing his UK citizenship.[315] Matthews had gotten appointed Prasa CEO in February 2021 was only in CEO's position for less than a year.[316] The board decision to terminate Matthews appointment was set aside on arbitration.[317] However, the board is considering

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311 Ibid, para16.

312 *#Unitebehind v Minister of Transport* [2020] 4 All SA 593 (WCC), paras 1, 10 & 24-41.

313 Ibid.

314 Ibid, para 34.

315 Prasa (press release) 'Prasa Board terminates the Group CEO's contract of employment' SANews 02 December 2021, available at *https://www.sanews.gov.za/south-africa/prasa-board...,* accessed 28 August 2023. The real reason, though, for Matthews's removal appears to be a political fallout with the Prasa board chair Leonard Ramatlakane and the labour union, Numsa. Mr Ramatlakane himself was dismissed from the board on allegations of corruption, in June this year, 2023 (see Tanduxolo Jika 'Prasa delays [the] return of Zolani Matthews as CEO', *BusinessDay* (online) 21 April 2022, available at *https://www.businesslive.co.za/bd/national/2022-04-21-prasa-delays-return-of-zolani-matthews-as-ceo/* accessed 28 August 2023; Payne Suné, 'Prasa board chairperson Leonard Ramatlakane fired after agency accommodation scandal', available at *https://www.dailymaverick.co.za/article/2023-06-06-prasa-board-chair-ramatlakane-fired-after-accommodation-scandal/,* 28 August 2023); Thapelo Lekabe 'Axed Prasa CEO Zolani Matthews treated workers with 'total disdain', says Numsa,' *Citizen* 3 December 2021, available at *https://www.citizen.co.za/news/south-africa/numsa-welcomes-zolani-matthews-dismissal-as-prasa-ceo-3-december-2021*/, accessed 28 August 2023).

316 PRASA Press release, supra.

317 Jika op cit note 311.

a court review of the arbitrator's award reinstating Matthews.[318] These two examples of ministerial interference demonstrate how deeply entrenched the problem of political interference in SOEs is.

At times, indirect political interference in the affairs of State-Owned Enterprises was effected through the amendment of policy or regulations supported at ministerial level. The attempt by former minister Faith Muthambi, to wield more ministerial powers over the affairs of the SABC to take charge of the entity, gives one a clear illustration of political interference.[319] In some other instances, the interference could be covert, such as was the case with the digital migration of the SABC into the digital terrestrial platform.[320] Some executives in this case colluded with internal persons in the SABC and its board, such as the COO, the CEO and the chairlady to stall digital migration.[321] Moreover, after an improper deal between the SABC and MultiChoice, the government reneged on its initial decision about digital migration and the encryption of the SABC network and data (Set-Top-Box decoders) to protect the corporation's material from being freely accessible.[322] The interference had the effect of robbing the public broadcaster of much needed revenue as well as the opportunity to increase its channels.[323] Increasing the broadcaster's channels would have generated more revenue for the public broadcaster.

Another subtle form of indirect political interference with the management of the affairs of SOEs in South Africa occurs in the apparent exercise of authority by the executive or in dealing with the challenges of state-owned entities. For example, the President of the Republic announced that Eskom would be unbundled into the energy generation, distribution and the transmission divisions – three

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[318] Ibid

[319] State Capture Commission Report Part V vol. 2 supra note 123, para 1401.

[320] See *Electronic Media Network Ltd v eTV (Pty) Ltd* 2017 (9) BCLR 1108 (CC), paras 20 and 25; State Capture Commission Report Part V vol. 2 supra note 123, para 1401.

[321] State Capture Commission Report Part V vol. 2 supra note 123, para 1426.7.

[322] Ibid, para 1426.7.

[323] Ibid, para 1426.

entities - in an effort to solve the challenges of Eskom.[324] To this effect, the President announced that a Chief Restructuring Officer would be appointed[325] and Eskom dully announced Freeman Nomvalo, SAICA chief executive as the CRO in 2019.[326] It was envisaged that the CRO would work with the management and the Eskom board to unbundle Eskom. The key responsibilities for the incumbent of this new position include presiding over the restructuring (unbundling) of the national power utility. This intervention is problematic in at least two ways.

The intervention creates three centres of power because each entity of Eskom will have its own board of directors. Second, the CRO is tasked with the responsibility which is the function of the board and the executive management of the utility. This inadvertently amounts to a vote of no confidence on the Eskom board and the management of the power utility, which is also an unnecessary duplication of personnel. In addition, the move adds further financial strain on the cash-strapped and over-indebted national power utility. In essence, the unbundling and the creation of the CRO position is not a solution for the problems associated with corruption, failure of good corporate governance, leadership instability and political interference.

The political interference may also assume both direct and indirect forms. An example to illustrate a dual form of political interference in the operations of a public (or state) corporation came in the appointment of Eskom's board member, Mr Colin Matjila, by Minister Malusi Gigaba in April 2014.[327] Minister Gigaba's conduct to instruct the Eskom Board to appoint Matjila amounted to a violation of the principles of good corporate governance. In addition, the appointment was an improper

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[324] SONA, 2019, available at *https://www.gov.za/sona2019,* accessed 26 August 2022.

[325] Finance Minister Tito Mboweni Budget Speech, 2019, available at *https://www.gov.za/speeches/budget_vote,* accessed 20 February 2019). The creation of the CRO position had been recommended by the Presidential Task Team (PTT) which was appointed in 2018 for the purpose of advising the government about interventions to deal with the problems of Eskom (SONA 2019 supra note 320).

[326] *Https://www.news24.com/fin24/economy/eskom/just-in-saica-chief-exec-freeman-nomvalo-appointed-as-eskom-cro-20190730,* 28 August 2023.

[327] State Capture Commission Report Part I vol. 1 supra note 130, para 434.

interference in the affairs of Eskom.[328] Regarding Matjila's appointment, the State Capture Commission has made a key finding that, that appointment opened the doors for the capture of the public utility by the Gupta state capture network.[329] In this case, it can be said that the Minister's decision had nothing to do with the interests of Eskom nor that of the public, but was for the benefit of third parties (the Gupta family), as Mr Matjila immediately thereafter awarded Eskom contracts for the benefit of Gupta companies.[330]

Generally, undue political interference has manifested itself through the Presidential reshuffling of a Minister who seems to uphold a high standard of ethics.[331] From the above, it becomes clear that political interference has come from persons outside of the government. At times these have 'captured' the head of state to chop and change board members and senior executives of state entities for their personal gain, as was seen in the case of Transnet and Eskom.[332] Political interference was also seen

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[328] Gigaba was the Minister for Public Enterprises at the time (State Capture Commission Report Part I vol. 1 supra note 125, para 434).

[329] State Capture Commission Report Part I vol. 1 supra note 125, para 434.

[203] Ibid.

[331] Several examples illustrate the existence of political interference by the second arm of the state, namely, the executive (especially the State President) through the exercise of the presidential prerogative for instance to reshuffle ministers at will. Executive interference through cabinet reshuffle was not peculiar to ministers responsible for state-owned companies, but it was mostly directed at ministries responsible for strategic departments, as was the case with the replacement of Finance Minister Nhlanhla Nene who was replaced by an unknown Minister Des Van Rooyen in 2017 (State Capture Commission Report Part I vol. 1 par 148.5) Also, an attempt by former President Zuma to replace Minister Gordhan (in his second stint) as finance Minister, with Mr Brian Molefe (the then deputy secretary-general for the African National Congress (ANC), Ms Jessie Duarte, confirmed the attempt to appoint Mr Molefe, during the press conference following the dismissal of Minister Gordhan. Ms Duarte confirmed that then President Zuma had intended to replace Minister Gordhan with some other person and that the ANC National Executive Committee (NEC) objected to the preferred President's choice (Reuters Staff '*South Africa's Zuma has appointed capable ministers - top ANC member says', Reuters* 31 March 2017*,* available at *https://www.reuters.com/article/safrica-politics-duarte-idusl5n1h827t, accessed* 28 August 2023; also, SABCNews 'Jessie Duarte Reacts to Cabinet Reshuffle' *SABCNews* 31 March 2017, available at *https://www.youtube.com/watch?v=NFO1_fJyT58,* 28 August 2023. Another example concerns the replacement of the deputy finance minister, Mr Mcebisi Jonas, with the less-known Mr Sifiso Buthelezi. Mr Buthelezi. In respect of ministers responsible for state-owned companies, the (then) State President, Zuma, replaced Minister Yunis Carrim with Ms Faith Muthambi, when the plans to migrate to the digital terrestrial platform were on track, only for Minister Muthambi to renege on the deadline for migration and the locking of SABC Set-Top-Boxes (or encryption). Minister Muthambi made encryption optional, contrary to the government policy that the cabinet had agreed upon before her term as Minister of Communications (State Capture Commission Report, Part V vol 2 supra note 262, para 1408*,* 1410, 1433 & 1575). The State President also replaced credible Minister Barbara Hogan as Minister of Public Enterprises with controversial 'Gupta Ministers', Mr Malusi Gigaba and then Ms Lynn Brown (State Capture Commission Report, Part V vol. 2 supra note 262 1575 & Part IV vol. 3 supra note 148, para 1258.8-59).

[332] State Capture Commission Report Part IV vol. 4 supra note 174, paras 2493-4.

in other departments, such as the Department of Communications, the holder Ministry for the SABC,[333] as well as in the Department of Public Enterprises, the shareholder representative in respect of most strategic state entities.[334] For example, according to the evidence on record, at Eskom the chairperson of the board, Dr Ngubane once suspended an executive, Mr Koko, during a board meeting, only to retract the suspension after getting a telephonic instruction not to suspend Mr Koko.[335] The latter is only an anecdotal example of political interference taking place in State-Owned Enterprises , but which, none the less, harmed the performance of state owned companies. Political interference in the affairs and management of State-Owned Enterprises has also been evident when the minister removes and replaces a board on the slightest point of disagreement with board members, especially with a chairman.[336] The failure to reach common accord usually occurs if the board chairperson is a strong ethical personality, as was seen in the case of Dr Popo Molefe.[337]

This part of the study has uncovered the prevalence of political meddling in the affairs of State-Owned Enterprises. As was seen, political meddling has hurt public entities and opened the way for instability and exposed the entities to exploitation and corruption, amongst other things. The interference has compromised controls meant to protect the financial resources of the entities. In turn, the instability caused by political interference contributed to the financial losses that state companies have incurred. The forthcoming part discusses the leadership instability and its effect on the performance of the public entities.

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[333] State Capture Commission Report Part V vol. 2 supra note 123, para 1409.

[334] The Ministry of Communications has had 10 ministers since 2010, the highest turnover of ministers by any standard (State Capture Commission Report Part V vol. 2 supra note 123, para 1409). It is thus easy to see why there has been instability in the public broadcaster, considering the instability in the holder and shareholder ministry.

[335] State Capture Commission Report Part IV vol. 3 supra 148 para 1283.2-83.3.

[336] *Molefe* supra note 244 paras 1, 5, 8, & 16-18.

[337] Dr Popo Molefe touted himself as a person with a firm commitment to good governance, ethical leadership, the responsible use of public funds and courage to confront malfeasance. (BB1. PS Molefe statement and annexures, par 4.1.) His appointment as the chairman of the Board of Transnet by Minister Gordhan, upon replacing Minister Brown as the minister of Public Enterprises, despite the former Transport minister Dipua Pieters attempts to remove him from PRASA Board bears testimony to Dr Molefe's calibre.

### 2.3.4 Leadership Instability

Too often, the governance of State-Owned Enterprises has been characterised by unstable boards and squabbles, usually between the boards and the shareholder Ministers and/or policy ministers. A good example to illustrate leadership instability would be the tension between the then Minister for Public Transport, Dipua Pieters, and the chairperson of the board of Transnet and Prasa, Dr Molefe.[338] As discussed in this chapter, the Minister went as far as placing her own choice, Mr Letsoalo, as the Acting GCEO,[339] despite the availability of suitably qualified candidates recommended for the position.[340] At times leadership instability has been caused by political interference as well as friction between the members of boards of state companies and the executive. For example, the battle between the Ministers of Finance, Mr Gordhan (thereafter, Mr Nene) and President Zuma about the retention of Ms Myeni as chairperson of SAA.[341] Ms Myeni was retained as chair of the board despite the poor performance of the SAA under her chairpersonship. An additional example of political interference was the role that the Gupta family played in the appointment of members of state companies, and the removal of those not complying with their orders.[342] Also closely related to this is the instability in the departments where ministers were removed with ease and too often.[343] This chopping and changing of the Ministers was possible as a result of interference in the affairs of government by external persons.[344] Undue interference in the appointment of members of the boards has been another factor that has weakened the leadership of State-Owned Enterprises. This is seen in the way the 2014 Eskom board of control was appointed and constituted.[345]

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[338] *Molefe* supra note 244, para 2119.

[339] Ibid paras 15-6.

[340] Ibid para 15; State Capture Commission Report Part V vol. 2 supra note 123, para 2119.

[341] State Capture Commission Report Part I vol. 1 supra note 125, para 149.

[342] State Capture Commission Report Part IV vol. 3 supra note 148, paras 1255 and 1258.7.

[343] Ibid, paras 1258.9 & 1259.

[344] Ibid, paras 1255 & 1258.7.

[345] Ibid, paras 1255-1346.

The instability in the leadership of state-owned entities is also linked to the instability of political heads (departmental ministers), in respective departments.[346] Thus, the constant changing of ministers has a negative effect on the stability of the governance of State-Owned Enterprises. For instance, between 2014 and 2019, the Department of Public Transport had three Ministers.[347] Meanwhile, to date, the Department of Communications has changed hands ten times since 2011.[348] A new minister may introduce new ideas and bring a different preference in the leadership of boards. Therefore, armed with the statutory powers to appoint and remove members of boards, the new minister may create an untenable situation for the board. In turn, command members may resign *en masse* allowing the new minister to reconstitute a new board. At this point, it becomes possible for the new minister to get rid of any members he deems unsuitable. A new board would not accommodate members who are not preferred by the incumbent political head. For instance, in the same period, 2014 to 2020, PRASA saw four different boards and eight CEOs.[349] At the centre of the problem facing State-Owned Enterprises , is the legitimate power vested in the executive (the ministers) to appoint and remove members of boards.

Lastly, sometimes external struggles have contributed to the instability of the leadership of state-owned corporations. Often, the reason for the friction is a result of battles for the control of the entity. The result has been the creation of instability in the leadership of state entities. An ideal example was the struggle between then Finance Minister, Mr Pravin Gordhan and then President Zuma, concerning the board of the SAA and Ms Myeni. The Minister would not release the bailout money to the struggling airline unless Ms Myeni was removed as chairperson of the board.[350] However, on the other

[346] State Capture Commission Report Part V vol. 2 supra note 123, para 1789.1.

[347] Ibid para 1789.1.

[348] Ibid para 1409.

[349] Ibid para 1789.1 (see footnote 2080 thereof); *#Unitebehind* op cit note 308, para 12.

[350] State Capture Commission Report Part I vol. 1 supra note 125, paras 833-4.

hand, the President was unyielding and wanted the new board chaired by Ms Myeni.[351] As a result, the airline was held to ransom with dire consequences for financial viability and governance stability of the national carrier. In turn, these dire consequences cost the taxpayers dearly.

In the next section, the writer examines the fragmentation of state-owned entities, in respect of policy and the power of a holder ministry, as well as the impact of fragmentation on their stability.

### 2.3.5 Regulatory Fragmentation

Strategic state-owned entities are housed in different departments. Depending on their services and their enabling legislation,[352] State-Owned Enterprises may be straddled between the police ministry and the Department of Public Enterprises (NDPE) or even housed in the presidency or at the National Treasury. For instance, in December 2014 the National Treasury took over oversight of the SAA from the NDPE.[353] In the case of Eskom, President Ramaphosa announced in his State of the Nation Address, in February 2023, the appointment of the Minister of Electricity to be based in the Presidency.[354] The Minister of Electricity was duly announced as Ramokgopa and was said to be given some of the powers/responsibilities of the Minister of Energy and Minerals. His tasks involved full oversight responsibilities of all aspects concerning the government response to the electricity crisis and the work of the National Energy Crisis Committee.[355] The President reiterated that the Minister of Public Enterprises would remain the shareholder representative for Eskom, with all his current

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[351] Ibid, para 835-6.

[352] Some SOCs are regulated by their enabling legislation, others fall under the PFMA, and still, other SOCs are managed in terms of the Companies Act or even both the Companies Act and the enabling piece of legislation.

[353] State Capture Commission Report Part I vol. 1 supra note 125, para 839.

[354] President Ramaphosa SONA 2023, available at *https://www.stateofthenation.gov.za/assets/downloads/State-of-the-Nation-Address-2023.pdf,* accessed 28 August 2023.

[355] Ibid. The National Energy Crisis Committee was established in January 2022 to deal with the loadshedding crisis. Available at (The Presidency, 'Confronting the Energy Crisis: Actions to End Load Shedding and Achieve Energy Security ('Energy Action Plan'), available at https://www.thepresidency.gov.za/download/file/fid/2532, accessed 28 August 2023; President Cyril Ramaphosa, 'Energy Action Plan, available at *https://www.youtube.com/watch?v=ohg6POoyS68*, accessed 28 August 2023).

responsibilities.[356] The president's rationale for creating the new ministry of electricity was said to be urgent the need 'to deal more effectively' with the challenge of loadshedding.[357] The functional responsibilities of the new Minister involve working with the Eskom board and management on a full-time basis to end loadshedding through, inter alia, the implementation of the Energy Action Plan.[358] Already, one can see the possible conflict between the new Minister and the two other Ministers responsible for energy and minerals and for the country's Public Enterprises. The fragmentation inadvertently leads to tension between Ministers and inconsistent management of SOEs, especially regarding the appointment and dismissal of members of boards. It also impacted the effectiveness of the oversight of the entities. This result is undesirable.

In the light of the above, it may be argued that the National Treasury is best placed to manage at least strategic state entities since all State-Owned Enterprises ultimately account to the national Treasury. The reason is that all state-owned entities look up to the National Treasury for financial assistance, especially when they encounter a financial crisis. However, in In his 2023 SoNA, President Ramaphosa announced that the government would implement the recommendations of the Presidential SOE Council which recommended the establishment of a state-owned holding company, the SOE Holding Company.[359] The Minister of Public Enterprise, Gordhan reiterated the establishment of the new holding company during his 2023 departmental vote in May this year.[360] The Minister intimated that a Shareholder Bill was being deliberated on and would soon be presented to

[356] SONA 2023 supra note 350. The Minister of Public Enterprises' responsibilities include steering the restructuring of Eskom and the implementation of the just energy transition programme and overseeing the establishment of the transmission company, and the proposed SOE Holding Company to be responsible for the oversight of South African SOEs. (SONA, 2023 supra note 350)

[357] SONA 2023 supra note 350. The establishment of the National Energy Crisis Committee was announced in January 2022 (On 25 July 2022, President Cyril Ramaphosa addressed the nation and announced a bold set of actions to deal with the loadshedding crisis and achieve energy security for the country (Energy Action Plan, supra note 351).

[358] SONA 2023 supra note 350. Meanwhile, the Energy Action Plan was announced on 25 July 2022 to deal with the loadshedding crisis (Ibid).

[359] SONA 2023, supra note 350.

[360] Minister Pravin Gordhan Speech (DPE 2023 budget vote'), available at *https://www.gov.za/speeches/minister-pravin-gordhan-public-enterprises-dept-budget-vote-202324-23-may-2023-0000,* accessed 28 August 2023.

parliament after the necessary public consultations had been conducted.[361] The South African SOE Holding Company is intended to create a clear demarcation between the ownership of SOEs and their management.[362] The proposed SOE Holding Company is intended to foster the effective oversight of South African State-Owned Enterprises through a centralised shareholder model.[363] Moreover, the company is meant to ensure professionalised appointments of boards of SOEs, while also inculcating market discipline for South African State-Owned Enterprises. Accordingly, the Minister proclaimed that the boards of SOEs would be expected to subscribe to the strategic direction outlined in Strategic Intent, Shareholder Compacts, Memoranda of Incorporation and SOE Performance Appraisal System.[364]

Despite such a bold declaration that suggests the end of boards' impunity, there are no details about how the intended objectives would be achieved. It submitted that the envisaged SOE holding company on its own is unlikely to address the fundamental issue of lack of political will as well as political interference in the affairs of State-Owned Enterprises that is at the core of all the challenges of South African SOEs. Instead, the proposed state-owned holding company will only address the problem of fragmentation of SOEs, while transferring the problem of impunity and lack of accountability to a different shareholder. To address the source of the lack of accountability of accounting authorities, the SOE Holding Company will still need insulation from political meddling such as placing it under a stable government department such as the National Treasury.

The final part of this section discusses the effect of lapse in government (parliamentary) oversight on the problems and challenges facing State-Owned Enterprises.

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[361] Ibid. See also Sabinet 'Draft Shareholder Bill on SOEs in the Pipeline' *Sabinet* 23 May 2022, available *at https://legal.sabinet.co.za/articles/draft-shareholder-bill-on-soes-in-the-pipeline/,* accessed 28 August 2023.

[362] DPE 2023 budget vote, supra note 356.

[363] SONA 2023 supra note 350.

[364] DPE 2023 budget vote, supra note 356.

### 2.3.6 Failure of Parliamentary Oversight

The law places State-Owned Enterprises under the overall oversight of different parliamentary portfolio committees, depending on the nature of the service that the company provides. In other words, SOEs account to parliament through the various portfolio committees.[365] In some instances, oversight committees have appointed *ad hoc* committees to conduct inquiries into the affairs of state corporations.[366] For instance, there have been two classical Parliamentary Portfolio Committees set up to inquire into the affairs of State-Owned Enterprises. The enquiries had been conducted by the *ad hoc* committee of the National Assembly (NA), in the case of the SABC, in 2017.[367] Another classic inquiry was by the Portfolio Committee on Public Enterprises into the affairs of Eskom, in 2018.[368] The former was particularly classic, in that it demonstrated the power that the parliamentary committees must wield to oversee the management of State-Owned Enterprises. It demonstrated what could be achieved in holding boards of public corporations and the incumbent office-bearers to account for and prevent the mismanagement of state entities. The converse also holds. The inquiry into the SABC Board demonstrated how a lack of political will on the part of elected public representatives, especially of the governing party, can eventually lead to the collapse of state entities, such as Eskom and the SABC. A lapse in parliamentary oversight has led to the squander of public resources, contrary to the public administration, as envisioned by section 195 of the Constitution,

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[365] Generally, the executive and SOCs account for the SCOPA. However, each SOC account for a parliamentary committee that exercises oversight, depending on the ministry on which the SOC falls, depending on the industry under which the company falls.

[366] An *ad hoc* committee is appointed through a National Assembly Resolution. For example, the investigation into the affairs of the SABC was in terms of the National Assembly resolution of 3 November 2016.

[367] The 2017 investigation into the fitness of the SABC board was established by the National Assembly resolution of 3 November 2016, in terms of section 15 of the Broadcasting Act 4 of 1999 (SABC Report available at *https://pmg.org.za/tabled-committee-report/2898/, accessed* 20 February 2019*)*. It is noteworthy that at the time of the investigation, all board members, except for the chairperson, had already resigned from the board. Therefore, in essence, there was no longer a board in existence.

[368] The Portfolio Committee on Public Enterprises conducted an oversight inquiry into governance, procurement, and the financial sustainability of Eskom, in terms of per its Resolution of 21 June 2017 ('Eskom Report' available at *https://www.parliament.gov.za/storage/app/media/links/2018/november%202018/28-11-2018/final%20report%20-%20eskom%20inquiry%2028%20nov.pdf*, accessed 20 February 2019).

1996.[369] It is a lack of political will to exercise oversight that lies at the centre of the laxity of the parliamentary oversight committee. Had there been the required political will to oversee the operations of state entities through parliamentary processes, billions of rand of public money would have been saved. Thus, the SABC, the SAA, and Eskom would not have been plunged into the financial crisis that they are currently facing.

Mismanagement of public entities proves to be a two-edged sword against the ultimate shareholders of SOEs – South Africans. Not only do SOEs get dysfunctional and unproductive, but they also require constant bailouts and/or guarantees by the Treasury.[370]

## 2.4 CONCLUSION

The National Development Plan has decried the lack of stability and effective governance structures dealing with State-Owned Enterprises . Largely, the failure to realise the full potential of the country's state companies is due to the breakdown of good corporate governance. The root cause of the challenges facing state-owned entities is poor management or governance. Failure of good corporate governance has seen State-Owned Enterprises limping from one crisis to the other, with no accountability on the part of their accounting authorities. The inefficiency of the state entities has harmed the country's citizens in more than one way. On the one hand, State-Owned Enterprises have failed to contribute revenue to the fiscus, which is considered necessary for the uplift of the life of the South African population. On the other hand, it can be said that, through the never-ending bailouts and government guarantees, state corporations have 'stolen' resources from the Treasury. The revenue lost through bailouts and government guarantees could have been used to build more schools,

[369] Section 195 commits to the public administrator that 'promote a high standard of professional ethics as well as efficient economic and effective use of resources'.

[370] In terms of the 2022 Treasury Budget, the government has set aside R416, 8 billion in guarantees, for which Eskom accounts for R327.9 billion (National Treasury, Budget 2022 supra note 180, 88. Also, National Treasury Budget Review (2023) 10-11 & 89-97, available at *http://www.treasury.gov.za/documents/national%20budget/2022/review/FullBR.pdf,* accessed 05 March 2023.

hospitals, clinics, and roads, to name a few essential infrastructures, to improve the lives of the ordinary citizens of the country.[371] The lost revenue has also robbed South Africans, especially the poor communities, of the opportunity of economic and social development, and the promised 'better life for all'. All the malfeasance in key state entities occurred under the watchful eye of the Boards of directors. However, individual wrongdoers responsible for malperformance and causing the losses that State-Owned Enterprises incur, often escape without being held accountable.

The fact that wrongdoers are often let off unchallenged, breeds a culture of impunity. The prevalence of the culture of impunity, despite the availability of legal instruments, to hold the accounting authorities accountable for how they have exercised their constitutional obligations, has destroyed state corporations.[372] Thabane and Snyman–van Deventer assert that '[t]he country needs to put measures in place …' to tackle the challenges of State-Owned Enterprises, to ensure their optimal performance, so that they may fulfil their constitutional mandate and contribute to service delivery, as well as economic development of the country.[373] In seeking a remedy against mal administration of State-Owned Enterprises and the resultant losses suffered by them, it becomes urgent to find a way of dealing with the individual wrong doers. Chief among the drastic measures necessary to curb the decline of South Africa's state-owned corporations, is the need to enforce individual personal liability of all accounting authorities found to be complicit in wrongdoing. Delictual liability against directors of public entities is explored in detail in chapter seven below.

[371] President Cyril Ramaphosa SONA 2018, available at *https://www.gov.za/state-nation-address#2018,* accessed 26 August 2022).

[372] *EFF1* op cit, note 33.

[373] Thabane & Snyman van Deventer op cit note 13, para 5.

# CHAPTER THREE

# THEORETICAL FRAMEWORK

## 3.1 INTRODUCTION

The governance of State-Owned Enterprises (SOEs) in South Africa embodies a persistent tension between commercial autonomy and the imperative of public accountability. The country's recent experience with pervasive mismanagement and financial misconduct in major SOEs has brought renewed urgency to debates about the personal liability of those entrusted with their stewardship. This chapter engages critically with the theoretical foundations that inform this debate, examining whether existing frameworks of *fiduciary* duty and corporate governance provide an adequate basis for holding accounting authorities personally accountable for financial losses. Building on the comparative insights of Hill[374] and Hutchison,[375] this discussion underscores that *fiduciary* obligations are not homogenous across jurisdictions, nor are they immune to ideological contestation. Ireland[376] and Kershaw[377] trace the evolution of *fiduciary* duties from their equitable origins to their present entanglement with market logics, illustrating how these duties have shifted in response to broader transformations in corporate capitalism. The analysis also draws on Keay's seminal work on the enforcement of directors' duties, which highlights the persistent challenge of reconciling shareholder

[374] J. G. Hill 2020. Shifting Contours of Directors' Fiduciary Duties and Norms in Comparative Corporate Governance. *UC Irvine Journal of International, Transnational, and Comparative Law*, 5(1), 2-20.

[375] C Hutchison "To Whom Are Directors' Duties Owed? Evidence from Canadian M&A Transactions" (2023) 68:2 *McGill Law Journal* 123.

[376] I Paddy. 1999. "Company Law and the Myth of Shareholder Ownership." *Modern Law Review* 62 (1): 32–57. doi:10.1111/1468-2230.00190. kar.kent.ac.uk

[377] D Kershaw (2012). The path of corporate fiduciary law. *New York University Journal of Law and Business*, 8, 395–485. unswlawjournal.unsw.edu.au.

primacy with broader stakeholder interests.[378] Further, the chapter considers the critique advanced by Lyman Johnson,[379] who argues that the normative force of *fiduciary* duties is often diluted by judicial deference and the business judgment rule, resulting in accountability gaps that may be especially problematic in the context of public enterprises exercising public power.

Against this backdrop, the chapter situates South Africa's unique constitutional context, where SOE boards are constrained by principles of transparency, responsiveness, and accountability (sections 1 and 195 of the Constitution, 1996), as a crucial lens through which any theoretical framework must be evaluated.

## 3.2 THE FRAMEWORK

This study is grounded in three interrelated dimensions; namely, *fiduciary* duty and corporate governance theories, the principles of delictual liability, and comparative legal analysis. Collectively, these frameworks provide both a doctrinal and normative foundation for assessing whether accounting authorities should bear personal liability for financial losses incurred by State-Owned Enterprises (SOEs). These theories are discussed in this part.

### 3.2.1 *Fiduciary* duty and corporate governance theory

At the centre of *fiduciary* duty and corporate governance theory lies the principle that directors and accounting authorities owe a *fiduciary* duty to the entities they oversee.[380] The *fiduciary* duty theory and corporate governance principles entail that company directors act with utmost good faith, care,

[378] A Keay 2011. "Incomplete Contracts, Contingent Fiduciaries and a Director's Duty to Creditors." *Melbourne University Law Review* 32 (1): 141–169.

[379] Johnson, LPQ, 2011. *Reality Check on Officer Liability*. *Business Lawyer*, 67, pp. 75–109.

[380] FHI Cassim, et al. *Contemporary Company Law*, 3rd ed. (Juta, 2019) 561–563; Davies, P. & Worthington, S., *Gower: Principles of Modern Company Law*, 11th ed. (Sweet & Maxwell, 2022) 523–525; OECD, *G20/OECD Principles of Corporate Governance* (2015), Principle VI; Companies Act 71 of 2008 (South Africa), s.76; King IV Report on Corporate Governance for South Africa, 2016, Part 5.3.

and loyalty.[381] Any failure to adhere to these duties constitutes a breach of fundamental governance obligations.[382] For the purposes of this research, this theoretical framework asserts that *fiduciary* breaches by SOE board members, in the form of irregular, wasteful, and fruitless expenditure, constitute legally actionable misconduct.[383] The *fiduciary* duty and corporate governance theory provides a doctrinal basis for establishing personal accountability for accounting authorities in cases of financial harm to an SOE, resulting from their negligent or intentional wrongdoing.[384] The *fiduciary* duty theory is integral to demonstrating that accounting authorities have legal and ethical obligations towards SOEs, given that this study interrogates whether accounting authorities should be held personally liable.[385] Moreover, *fiduciary* duty theory highlights the disparity between private sector governance, where *fiduciary* breaches often attract personal liability,[386] and the comparatively lenient approach apparent in the South African public sector.[387]

The *fiduciary* duty serves as a cornerstone of modern corporate governance, ensuring that directors act *bona fide* and in the best interests of the company rather than for personal gain. Professor Hill provides a comprehensive comparative analysis of these duties across different legal systems, focusing

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[381] P Davies & S Worthington, *Gower: Principles of Modern Company Law*, 11th ed. (Sweet & Maxwell, 2022) 523–525; OECD, *G20/OECD Principles of Corporate Governance* (2015), Principle VI.

[382] M Havenga, "The Business Judgment Rule: Should We Follow the Australian Example?" (2000) *12 South African Mercantile Law Journal* 25, 27–28; A Keay, "The Enlightened Shareholder Value Principle and Corporate Governance" (2013) 36 University of New South Wales Law Journal 336.

[383] M Havenga, supra note 382; A Keay, "The Enlightened Shareholder Value Principle and Corporate Governance" (2013) 36 *University of New South Wales Law Journal* 336.

[384] FHI Cassim et al., *Contemporary Company Law*, 3rd ed. (Juta, 2019) 569–570; *Strydom v Snowball Wealth (Pty) Ltd* 2022 (2) SA 527 (SCA) paras 28–30; OECD, *State-Owned Enterprises and the Principles of Good Governance* (2018), 30–31.

[385] King IV Report on Corporate Governance for South Africa, 2016, Principle 1 and Principle 6; Institute of Directors in Southern Africa, *King IV Practice Notes* (2017); Tricker, B., *Corporate Governance: Principles, Policies and Practices*, 4th ed. (Oxford University Press, 2019) 76–78.

[386] A Keay, "The Duty of Directors to Exercise Care and Skill" (2014) 30 Journal of Contract Law 1, 4–5; *Daniels v Anderson* (1995) 37 NSWLR 438 (CA) 500; OECD, *Accountability and Transparency in the Corporate Governance of State-Owned Enterprises* (2010).

[387] Auditor-General South Africa, *PFMA 2021–2022 Audit Outcomes*, 8–10; Madonsela, T. *State of Capture' Report supra note 74' Report* supra note 74 *Report*, Public Protector South Africa (2016) paras 5.2–5.5; M Ngidi, "Directors' Fiduciary Duties and Liability in the Public Sector" (2003) 15 *SA Mercantile Law Journal* 303.

on how *fiduciary* obligations and corporate governance codes interact within broader regulatory regimes.[388] Hill frames her analysis within the context of La Porta *et al.*'s influential "law matters" hypothesis, which contends that the effectiveness of corporate governance, and consequently the development of capital markets, is shaped by the robustness of legal protections afforded to investors.[389] While Hill acknowledges broad commonalities in *fiduciary* duties among common law jurisdictions such as the United States, the United Kingdom, and Australia, she underscores important jurisdictional divergences that have material implications for directors' conduct and liability. For instance, Delaware law is grounded almost exclusively in equitable principles, whereas UK and Australian regimes embed statutory duties that interact dynamically with common law *fiduciary* principles.[390] This duality reflects divergent approaches to balancing managerial discretion with accountability.

Hill notes further that the scope of legal protections available to directors, most notably the business judgment rule and exculpation provisions, varies considerably.[391] In the United States, these protections are extensive, functioning as strong shields against liability for honest errors of judgment.[392] By contrast, UK and Australian law adopt more circumscribed versions of these doctrines, with statutory provisions such as the UK Companies Act 2006 imposing explicit duties of care, skill, and diligence.[393] Enforcement mechanisms also differ. Whereas the United States and the United Kingdom predominantly rely on private enforcement through derivative litigation, Australia has developed a more assertive public enforcement model led by the Australian Securities and

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[388] J G. Hill, *The Shifting Balance of Power Between Directors and Shareholders in the US and the UK* (2007) 5 ECGI Law Working Paper, J G. Hill, *The Shifting Balance of Power Between Directors and Shareholders in the US and the UK* (2007) 5 ECGI Law Working Paper, available at https://www.ecgi.global › publications › working-papers, accessed 10 April 2024.

[389] R La Porta *et al.,* "Law and Finance" (1998) 106 *Journal of Political Economy* 1113.

[390] Hill, op cit 384, 1.

[391] Ibid.

[392] Ibid.

[393] Companies Act 2006 (UK), section 174; Corporations Act 2001 (Australia), section 180.

Investments Commission (ASIC).[394] This reflects a policy choice to treat directors' obligations as integral to protecting the public interest, rather than merely the private interests of shareholders. Beyond *fiduciary* obligations, Hill interrogates the increasing significance of non-binding corporate governance codes and stewardship principles. As the author observes, these governance codes, though formally voluntary, have become highly influential normative frameworks that shape expectations of directors' conduct.[395] The codes often reinforce *fiduciary* obligations, for example, by promoting the appointment of independent directors to mitigate conflicts of interest. However, Hill rightly observed that corporate governance codes can also generate tensions, particularly in jurisdictions where traditional *fiduciary* duties focus primarily on shareholder interests, while contemporary codes increasingly incorporate broader stakeholder and societal considerations.[396] The South African governance practice, particularly under the King IV Report on Corporate Governance, similarly embraces a stakeholder-inclusive approach, which may challenge more orthodox interpretations of *fiduciary* duties.[397] Hence, this tension identified by Hill is not unique to the jurisdictions that the author examines. Still, while Hill's comparative analysis is valuable, it remains primarily theoretical. The absence of empirical evidence to illustrate how jurisdictional differences translate into corporate practices or governance outcomes is a notable limitation for Hill's scholarship. Incorporating case studies or statistical data would strengthen her argument by demonstrating the practical impact of divergent legal frameworks.

Styhre, meanwhile, offers a critical perspective on the conceptual foundations of *fiduciary* duties.[398]

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[394] Australian Securities and Investments Commission (ASIC) *Annual Report 2023* (2023) available at https://asic.gov.au/about-asic/corporate-publications/asic-annual-reports/annual-report-2023/ (accessed 14 August 2025).

[395] OECD, *G20/OECD Principles of Corporate Governance* (2015) Paris OECD Publishing available at https://www.oecd.org/corporate/principles-corporate-governance/ (accessed 14 July 2022).

[396] Hill, op cit 384.

[397] Institute of Directors in Southern Africa, *King IV Report on Corporate Governance for South Africa 2016*, available https://www.ecgi.global/publications/codes/king-report-on-corporate-governance-for-south-africa-2016-king-iv-report.

[398] A Styhre *Management and Neoliberalism: Connecting Politics, Economy and Society* (2014), New York: Routledge.

The author interrogates the assumption that fiduciaries must act solely in the best interests of beneficiaries without regard to self-interest, and how this assumption has been contested by the contractual theory of the firm. According to the proponents of the contractual perspective, private contracts provide a more effective means of monitoring agency costs and disciplining managers to align their interests with those of shareholders.[399] Within this context, Styhre suggests that the contemporary resurgence of shareholder primacy has diminished the centrality of *fiduciary* duties.[400] Nonetheless, this author correctly concludes that *fiduciary* obligations remain a potentially powerful legal mechanism for addressing governance failures and restoring accountability.[401] Styhre's analysis resonates with the views of Easterbrook and Fischel, who assert that *fiduciary* duties operate as residual claims-filling devices, supplementing incomplete contracts and providing normative guidance in unforeseen circumstances.[402]

Considered together, both Hill and Styhre scholarships illustrate the inherently contested nature of *fiduciary* duties in corporate governance. Their work underscores the reality that *fiduciary* obligations are not static or uniform; but that they, rather, reflect evolving societal expectations, legislative developments, and scholarly debates about the optimal balance between managerial discretion and accountability. For South Africa, this insight is particularly salient considering ongoing discussions about the role of directors' duties under the Companies Act 71 of 2008 and the King IV principles, which collectively shape a governance environment that aspires to reconcile shareholder interests with broader societal and stakeholder considerations.[403]

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[399] M. C. Jensen & W. H. Meckling "Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure" (1976) 3 Journal of Financial Economics 305. https://doi.org/10.1016/0304-405X(76)90026-X.

[400] Ibid.

[401] Styhre, op cit note 394.

[402] F.H. Easterbrook & D.R. Fischel, 1991. *The Economic Structure of Corporate Law*. Cambridge, Mass.: Harvard University Press.

[403] Companies Act 71 of 2008; King IV, above n 8.

On the other hand, Ribstein argues for a precise delineation of *fiduciary* duties and suggests that *fiduciary* duties ought to be confined to relationships involving an open-ended delegation of control without corresponding economic rights, such as the relationship between a trustee and a beneficiary.[404] Ribstein warns that extending *fiduciary* obligations beyond these contexts can lead to increased litigation and unnecessary constraints, such as the efficient structuring of business relationships.[405] Elsewhere, Ribstein challenges the notion that partners inherently owe *fiduciary* duties to one another.[406] The author suggests that, since partners typically do not delegate open-ended control to their co-partners, imposing *fiduciary* duties by default may not be appropriate.[407] As an alternative, Ribstein advocates for the enforceability of contracts that modify or eliminate *fiduciary* duties, suggesting that parties are often best positioned to determine the nature of their obligations.[408] This approach respects the autonomy of contracting parties and acknowledges their ability to tailor relationships to their unique circumstances.[409] Ribstein's arguments are grounded in a thorough understanding of both legal principles and economic theory, providing a solid foundation for his contractarian perspective**.** By advocating for contractual flexibility, Ribstein offers practical solutions for businesses seeking to tailor relationships to their unique needs, promoting efficiency and innovation. His critique of traditional *fiduciary* duty frameworks encourages a re-evaluation of established norms, fostering a more dynamic and adaptable legal landscape.

In essence, Ribstein's scholarship invites us to reconsider the balance between *fiduciary* obligations and contractual freedom and advocates for a framework that prioritises the intentions and agreements

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[404] LE Ribstein, Fencing Fiduciary Duties (January 10, 2011). *Boston University Law Review*, Vol. 91, pp. 857-878, 2011, Illinois Program in Law, Behavior and Social Science Paper No. LBSS11-02, Illinois Public Law Research Paper No. 10-20, Available at SSRN: https://ssrn.com/abstract=1737948.

[405] Ibid, 899.

[406] L.E. Ribstein, Critique of Mandatory Fiduciary Duties in Partnerships: In "Are Partners Fiduciaries?" 2005, 209.

[407] Ibid.

[408] Ribstein, op cit note 400, 907.

[409] Ibid.

of the parties involved, while also acknowledging the complexities inherent in various business relationships. However, Ribstein's theoretical emphasis on contractual freedom, may neither be adequate nor practicable for SOEs, especially within the South African constitutional order, in which accounting authorities exercise a public power in term of the Constitution in the public interest.[410] As such, accounting authorities are enjoined by constitutional imperatives, like accountability principle to demonstrate the highest ethics, in the public interest.[411]

Likewise, reducing *fiduciary* obligations contractual freedom could increase the risk of opportunistic behavior, particularly in complex relationships where not all contingencies can be anticipated and addressed contractually. Such could further perpetuate impunity of accounting authorities, contrary to the constitutional imperatives of a responsive and accountable public administration envisioned in section 195 of the Constitution, in the case of South African SOEs. Also, not to be overlooked, a contractarian approach to corporate governance in State-Owned Enterprises may place greater burden on courts to interpret and enforce contracts, which could lead to delays, inconsistent outcomes and increased litigation costs, which the public sector could ill-afford.

On the other hand, Alces[412] challenges Ribstein's view that *fiduciary* duties are becoming obsolete in modern business law, proposing instead that narrowly defined *fiduciary* obligations remain normatively valuable and widely applicable.[413] Whereas Ribstein downplays *fiduciary* principles amid evolving contractual governance, Alces argues that precisely defined *fiduciary* duties can still function effectively across various business relationships.[414] Alces' approach is conceptually instructive in the South African context, where the quest to impose personally liability on accounting authorities of

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[410] Section 1(c) of the Constitution, 1996; *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National (*3) SA 580 (CC) (*EFF1*) par 1.

[411] Ibid.

[412] K.A Alces, 2014. *Larry Ribstein's Fiduciary Duties*. *University of Illinois Law Review*, 2014(5):1765–1781.

[413] Ibid.

[414] Ibid, 1770 & 1775.

SOES demands a clear, enforceable standard of *fiduciary* duty, as any ambiguity in *fiduciary* enforcement undermines board members' accountability. By critically assessing Ribstein's theories and proposing an alternative approach, Alces encourages a re-evaluation of how *fiduciary* obligations can be defined and applied in contemporary legal contexts. However, her framework is limited by the absence of empirical grounding and practical implementation strategies,[415] which weakens its usefulness for reforming public sector governance, like South Africa's SOEs, in a legally accountable manner.

Meanwhile, Hutchison, delves into the ongoing debate regarding the scope of directors' *fiduciary* duties within corporate law.[416] This author scrutinises "*fiduciary* out" clauses in Canadian M&A agreements, which permit directors to withdraw from committed transactions to fulfill their *fiduciary* duties. This discourse centres around the question whether these duties are owed exclusively to shareholders or if they extend to a broader range of stakeholders that include creditors, employees, and environmental interests.[417] Hutchison's study reveals that these provisions predominantly focus on maximizing shareholder value, with an overwhelming majority, 98.9% in one sample, explicitly prioritizing shareholders' financial interests.[418] This author draws parallels between Canadian and US M&A agreements, noting that both jurisdictions exhibit similar language in their *fiduciary* out provisions.[419] This similarity suggests a shared emphasis on shareholder value despite differing legal frameworks.[420] By analyzing over a thousand M&A agreements, Hutchison provides robust empirical evidence to support his findings, enhancing the credibility of his conclusions.[421] This author

[415] Ibid, 1778–1780.

[416] C Hutchison op cit note 375.

[417] Ibid.

[418] Ibid, 145.

[419] Ibid,

[420] Ibid, 150.

[421] Ibid, 140.

effectively bridges theoretical debates on *fiduciary* duties with practical observations from the field, offering an explicit understanding of how legal standards are applied in real-world scenarios.[422] In short, Hutchison's theory sheds light on the apparent disconnect between the theoretical breadth of *fiduciary* duties in Canadian corporate law and their practical application, which remains predominantly shareholder centric. This observation invites ongoing dialogue and research into the alignment of corporate governance practices with the broader spectrum of stakeholder interests. Still, Hutchison offers limited exploration into the implications for other stakeholders. Future research could examine how directors might balance these competing interests within the existing legal framework.

Another author, Licht, examines traditional corporate law principles, such as the duty of loyalty and duty of care, and reinterprets them through the lens of impartiality.[423] Licht rejects the dominance of shareholder-centric models, in his reconceptualisation, and advocates for a broader and ethically grounded perspective of *fiduciary* duties.[424] This author favours the concept of stakeholder impartiality as an alternative to the prevailing shareholder primacy and stakeholder models in corporate governance.[425] Licht argues that the *fiduciary* obligations of corporate managers should be rooted in a balanced and impartial approach that respects the interests of all stakeholders, without favouring one group over another.[426] Drawing from classical philosophical traditions, the author criticises the binary framing of corporate objectives, where companies are seen as serving either shareholders exclusively or all stakeholders collectively.[427] Instead, Licht proposes a model that

[422] Ibid, 155.

[423] AN Licht 'Stakeholder Impartiality: A New Classic Approach for the Objectives of the Corporation. In: Laby AB, Russell JH, eds. Fiduciary Obligations in Business'. Cambridge University Press; 2021:301-317, p. 308.

[424] Ibid, 304.

[425] Ibid.

[426] Ibid, 303.

[427] Ibid, 305.

integrates ethical considerations with corporate decision-making.[428] In terms of this approach, Licht contends decision-makers, when acting as fiduciaries, should adopt a position analogous to an impartial judge to ensure that no stakeholder, whether shareholders, employees, consumers, or broader society, is unduly privileged or marginalised.[429] Drawing from Aristotelian ethics and other philosophical traditions, this author presents a compelling intellectual foundation for stakeholder impartiality.[430] Legally, the author skilfully bridges legal doctrine with normative ethical theory, strengthening the case for corporate decision-making that prioritises fairness and balance.[431] Practically, Licht suggests concrete legal and policy reforms that could institutionalise stakeholder impartiality in corporate governance frameworks.[432]

By introducing stakeholder impartiality, Licht provides a fresh conceptual framework for corporate objectives and moves beyond existing debates.[433] Licht's school of thought is enriched by insights from law, ethics, and economics, making it both theoretically robust and practically relevant.[434] Unlike extreme shareholder or stakeholder models, Licht's proposal seeks an equitable middle ground, and this makes his theory more adaptable to real-world corporate governance challenges.[435] Overall, Licht presents a thought-provoking contribution to corporate law by advocating for stakeholder impartiality as a guiding principle for corporate *fiduciary* duties. His combination of legal doctrine, ethics, and corporate governance theory offers a powerful critique of traditional models while instantaneously proposing a balanced and ethically coherent alternative.

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[428] Ibid, 305.

[429] Ibid, 310.

[430] Ibid, 307. For the explanation of the Aristotelian ethics philosophy, see the definitions section in chapter 1 of this thesis.

[431] Licht op cit, 312.

[432] Ibid, 315.

[433] Ibid, 306.

[434] Ibid, 309.

[435] Ibid, 313.

However, while the theory of stakeholder impartiality is compelling, Licht offers limited discussion on how such principles could be enforced in legal and regulatory frameworks, particularly in jurisdictions with strong shareholder rights traditions, as well as the private corporations.[436] The theory underestimates the extent to which entrenched corporate structures and investor expectations might resist a shift toward stakeholder impartiality.[437] Additionally, while the discussion is well-developed, a more detailed comparative analysis across different legal systems could strengthen the argument for stakeholder impartiality as a globally viable model.[438] While Licht's theoretical foundation is strong, further exploration of practical implementation and legal adaptability would enhance its applicability. Despite these limitations, though, Licht's hypothesis provides a significant stepping stone toward redefining corporate objectives in a way that is both just and sustainable. By engaging with both legal doctrine and ethical theory, Licht presents a sophisticated argument for rethinking corporate *fiduciary* duties in a way that aligns with broader societal values. This theory would also resonate with South African constitutional doctrinal imperatives within the public enterprises which enjoin public office-bearers, like board members of SOE, to always display the highest ethics in discharging their constitutional duties.[439] They swear allegiance to the Constitution, the supreme law, in the interests of all South Africans, rather than being loyal to either the company or the shareholders.[440]

Meanwhile, Gubler[441] proposes a bold reinterpretation of *fiduciary* duty by arguing that corporate

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[436] Ibid, 316.

[437] Ibid, 317.

[438] Ibid, 314.

[439] Sections 195(1)-(2), 1(c) & 2 of the Constitution, 1996.

[440] Ibid. The fiduciary duties of directors of SOE in South Africa are more than mere duties, but they are constitutional obligations and as Constitutional Court held in Glenister, the constitutional supremacy "requires that 'the obligations imposed by [the Constitution] must be fulfilled."'" (*Glenister v President of the Republic of South Africa* ("*Glenister*") 2011 (3) SA 347 (CC), para 34,) Cf: *Mbambisa v Nelson Mandela Bay Metropolitan Municipality* 2025 (3) SA 112 (SCA), paras 50-52.

[441] ZJ Gubler (2024) "The Neoclassical View of Corporate Fiduciary Duty Law," *University of Chicago Law Review*: 91(1), article 3. Available at: https://chicagounbound.uchicago.edu/uclrev/vol91/iss1/3.

directors owe their obligations not to present shareholders or stakeholders, but to a hypothetical 'permanent investor', a conceptual figure characterised by an indefinite holding period and a consistent commitment to long-term corporate value.[442] This 'permanent equity maximisation norm' shifts the *fiduciary* compass from short-term profit to enduring capital preservation, recasting the corporation's legal identity around its perpetuity rather than immediate returns. His model provides a compelling lens through which to interpret doctrinal tensions in corporate jurisprudence. It helps reconcile *Dodge v Ford Motor Co*,[443] which prioritises shareholder wealth maximisation,[444] with *Goodwin v Agassiz*,[445] which denies duties to individual shareholders in the context of insider trading.[446] By focusing *fiduciary* obligations on the enduring interest of the enterprise, Gubler offers a coherent normative foundation for director autonomy where such discretion preserves corporate sustainability. This model is reconcilable with Litch approach and carries a particular significance in the South African context where *fiduciary* breaches by accounting authorities in SOEs have resulted in catastrophic financial losses for SOEs , including their collapse – contrary to the SOE's "enduring interests" that Gubber advocates. It is for the preservation of such enduring public enterprises' interest and public interests, that the PFMA imposes personal liability on board members of SOEs for financial misconduct or negligent breaches of duty.[447]

Still, Gubler's emphasis on long-term value provides a normative framework that could guide courts in determining whether directors' conduct was consistent with a duty to preserve the enterprise's ongoing viability, rather than serving short-term or politically expedient interests. However, the

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[442] Gubler Z J 'A New Theory of Fiduciary Duty for Corporate Law' (2020) 112 Geo LJ 1017 at 1020–1022.

[443] *Dodge v Ford Motor Co* 170 NW 668 (Mich 1919).

[444] Ibid, 684.

[445] *Goodwin v Agassiz* 186 NE 659 (Mass 1933).

[446] Ibid, 661.

[447] See section 83(1)–(2) of the Public Finance Management Act 1 of 1999; also, L Muswaka "Shielding Directors against Liability Imputations: The Business Judgment Rule and Good Corporate Governance." *Speculum Juris* 27(1) (2013): 25-40.

abstract figure of the 'permanent investor' risks ignoring grounded realities, including the constitutional and public mandates of SOEs.[448] From a humanised corporate governance perspective, a transformative model must integrate stakeholder obligations, including duties to the public (communities and the fiscus that are critical in a developmental state) and employees. Gubler's model, while illuminating, therefore demands adaptation to South Africa's unique SOEs governance ecosystem.

On the other hand, Koh dissects the extent to which directors remain bound by *fiduciary* duties, even after leaving office – a question that has long occupied corporate law scholars.[449] This author critically examines whether the *fiduciary* obligations imposed on directors should extend beyond their tenure of office, and under what circumstances should such obligations be enforced.[450] Koh's discussion is framed within common law principles, while incorporating comparative insights from other jurisdictions. The author argues, ultimately, that while some post-resignation duties, such as those preventing directors from exploiting corporate opportunities unfairly, are justifiable, the scope of these obligations must be carefully delineated to balance corporate interests with individual freedom.[451] The author advances a vigorous discussion of the theoretical foundations of *fiduciary* obligations, tracing their origins to equity and trust law.[452] Koh extricates between the different *fiduciary* responsibilities that arise during a director's tenure, on one hand, and those that may persist afterward, on the other.[453] A significant strength of her argument is its comparative approach. Koh engages case law from jurisdictions, such as the UK, Australia, and Canada, to illustrate how different legal systems have

[448] Mpete & Maier op cit note 19.

[449] P Koh "Once a Director, Always a Fiduciary?" *The Cambridge Law Journal* 62(2), 2003, 403–43. *JSTOR*, http://www.jstor.org/stable/4509003. Accessed 27 Mar. 2025.

[450] Ibid, 403.

[451] Ibid, 429.

[452] Ibid, 406.

[453] Ibid.

treated post-resignation duties.[454] By engaging with multiple legal systems, Koh transcends a purely domestic focus and offers insights applicable across common law jurisdictions.[455] The author does not merely advocate for one, but critically weighs both sides of the debate, considering both corporate protection and directors' autonomy.[456] This approach enriches the analysis and provides a broader perspective on the issue. Koh balances legal analysis with policy arguments, highlighting the economic consequences of extending *fiduciary* obligations indefinitely. The author warns against over-regulation that may deter talented individuals from taking up directorships due to excessive legal constraints post-resignation.[457]

While Koh's arguments are compelling, they are primarily theoretical. The author presents a sophisticated and well-reasoned discussion on the persistence of *fiduciary* duties beyond a director's tenure. It is particularly strong in its comparative analysis and theoretical grounding. However, future research could benefit from empirical studies and a more structured framework for judicial application. A study incorporating empirical data on how often former directors face *fiduciary* related litigation would strengthen the conclusions.[458] Her she study was published in 2003 and, as such, does not account for recent shifts in corporate governance, particularly in relation to director accountability in the digital age.[459] Also, Koh does not propose a concrete legal framework for determining when post-resignation *fiduciary* duties should apply.[460] Nonetheless, her theory remains a foundational framework in corporate *fiduciary* law and offers critical insights for scholars, legal practitioners, and policymakers. Most importantly, Koh offers practical insight regarding the extent to which board

[454] Ibid, 417.

[455] Ibid, 420.

[456] Ibid, 433.

[457] Ibid, 431.

[458] Ibid, 435.

[459] Ibid, 440.

[460] Ibid, 437.

members of SOEs could be held liable for the loss left behind when they resigned from an enterprise.[461]

Moreover, DeMott,[462] through her critique of metaphoric understandings of *fiduciary* duty offers valuable insight for South Africa's evolving approach to the personal liability of derelict accounting authorities within State-Owned Enterprises.[463] Her insistence on a doctrinally and functionally grounded conception of *fiduciary* relationships invites a re-evaluation of how legal responsibility is attributed to directors and accounting officers under both public and private law frameworks.[464] In the South African context, where the failure of SOEs has often been attributable to gross mismanagement and breaches of *fiduciary* obligations by accounting authorities, DeMott's approach supports a move away from vague moralistic rhetoric toward clearer, enforceable legal standards.[465] Specifically, the South African legal framework, through legislation, such as the PFMA, imposes *fiduciary* duties on accounting authorities akin to those in private company law.[466] However, enforcement has often been inconsistent, partly due to the conceptual ambiguity surrounding *fiduciary* breaches and the threshold for personal liability. DeMott's functional methodology enables a clearer articulation of the nature and scope of these duties, framing them as specific obligations embedded in institutional mandates to safeguard public resources, rather than merely as duties of care and loyalty in the abstract.[467]

DeMott's theory is especially relevant to the current discourse, as advocated in this study, about extending or enforcing delictual liability to accounting authorities who act negligently or in bad

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[461] As seen in this study, the extent of the losses that South African SOEs suffered was uncovered years after most of those responsible were no longer serving as board members.

[462] DA DeMott 'Fiduciary Obligation, Agency and Partnership: Duty of Loyalty and Duty of Care' (2009) 94 *Cornell Law Review* 811.

[463] Ibid, 814–816.

[464] Ibid.

[465] Ibid., at 818–821.

[466] Public Finance Management Act 1 of 1999, sections 50–51; see also National Treasury, *PFMA Treasury Guidelines* (2020), which restate these fiduciary obligations.

[467] DeMott (2009), op. cit note 462, at 824.

faith.[468] By urging legal systems to define *fiduciary* obligations with greater precision, DeMott provides theoretical support for grounding personal liability in failures of oversight, diligence, or good faith decision making, thus aligning with delictual elements such as fault, wrongfulness, and causation.[469] This approach resonates with the Constitutional Court's affirmation in *Glenister v President of the Republic of South Africa*[470] that public officials must act accountably and in good faith to protect constitutional values, including efficient public administration.[471]

Moreover, DeMott's analysis reinforces the importance of institutional context. In South Africa, where SOEs serve critical public functions and are custodians of vast public funds, *fiduciary* duties cannot be assessed in isolation from their public purpose. Her framework thus supports the development of a uniquely South African *fiduciary* jurisprudence that incorporates principles of public accountability, constitutionalism, and transformation, that would enable courts and oversight institutions to hold derelict officials personally liable not only for private misgovernance, but also for undermining the constitutional mandate of the state.[472] Thus, DeMott's scholarship empowers a doctrinally coherent and functionally responsive pathway for holding accounting authorities accountable, bridging *fiduciary* principles and delictual liability within the public law context of South Africa's State-Owned Enterprises.

Miller and Gold advance a reconceptualisation of *fiduciary* relationships by shifting the analytical lens from traditional beneficiary-focused duties to *fiduciary* roles rooted in the pursuit of abstract institutional purposes.[473] Their central thesis distinguishes between *fiduciary* service, involving duties

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[468] FHI Cassim, et al. *Contemporary Company Law* (Juta, 2021), at 518–520; also see *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) on accountability of public office bearers.

[469] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), para 58.

[470] *Glenister s*upra note 438.

[471] *Ibid* paras 189–194.

[472] See *Glenister* supra note 438, para 34; EFF1 supra note 31, para 1; & *Mbambisa* supra note 438 para 50-52.

[473] PB Miller & AS Gold "Fiduciary Governance." *William & Mary Law Review* 57(2) (2015): 513–582, at 515.

owed to specific beneficiaries, and *fiduciary* governance, where fiduciaries are charged with promoting the objectives of an impersonal purpose, such as the public interest or institutional integrity.[474] This distinction, situated at the intersection of private and public law, is particularly salient in the governance of purpose-driven entities such as charitable purpose trusts, public purpose corporations, and conventional corporations.[475] The framework by the two author holds profound relevance for South African State-Owned Enterprises, where accounting authorities exercise *fiduciary* powers in service of constitutional and statutory mandates, rather than direct beneficiaries. For instance, as this study argues throughout, boards members of SOEs are expected to promote public purposes aligned with developmental objectives, including job creation, transformation, and economic participation.[476] In locating *fiduciary* duties in a governance-based model, Miller and Gold provide a conceptual foundation to evaluate accountability where the principal, such as "the public" or "the state" is rather diffuse or abstract.

Critically, the contribution by the two authors assists in clarifying the normative content of *fiduciary* obligations in the absence of identifiable beneficiaries – one of the central challenges in holding SOE boards personally liable. The authors argue that *fiduciary* governance entails robust accountability mechanisms, even where no direct beneficiaries exist, because the *fiduciary* still owes duties to promote the institution's purpose with loyalty and care.[477] This resonates with the obligations imposed by the constitution,[478] and South Africa's PFMA, which mandates accounting authorities to act with fidelity, honesty, integrity, and in the best interests of the public entity.[479]

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[474] Ibid., at 519.

[475] Ibid., at 519–522.

[476] See Republic of South Africa, Department of Public Enterprises, *Strategic Plan 2020–2025*, which outlines the developmental and transformation objectives of SOEs.

[477] Miller & Gold (2015), op. cit., at 525–530.

[478] Section 195 of the Constitution, 1996.

[479] *Public Finance Management Act 1 of 1999*, sections 50 and 51; also see National Treasury, *Framework for Governance of State-Owned Enterprises*, 2019.

However, while Miller and Gold acknowledge the accountability problem in governance contexts, their framework leaves open key practical questions when transposed into jurisdictions grappling with systemic SOE misgovernance like South Africa. Most notably, the authors stop short of articulating how personal liability should be enforced when fiduciaries deviate from institutional purposes, especially in environments where oversight is weak or politicised. In the South African context, where SOE failures have caused billions in public purse losses – the conceptual recognition of *fiduciary* governance must be coupled with enforceable standards of personal liability grounded in delictual principles.[480] Without this, the model risks becoming normatively elegant but practically inert.

Miller and Gold's theoretical innovation significantly enriches the discourse on *fiduciary* responsibility in public enterprises. it offers clarity by affirming that fiduciaries serve the institution, not transient stakeholders or political masters. The abstraction inherent in "purpose-driven" mandates can serve as both a shield and a sword. Still, if the purpose itself is vague or manipulable, fiduciaries may evade liability by asserting compliance with ill-defined mandates. This reinforces the need for South African courts and regulators to develop clearer tests for when *fiduciary* governance duties are breached, particularly in cases involving negligence, bad faith, or wilful dereliction. Consequently, to fully realise its transformative potential within South Africa's SOE landscape, Miller and Gold's model ought to be integrated with a legal architecture that prioritises accountability for harm, including the extension of personal delictual liability for derelict members of boards who fail in their governance obligations.

On the other hand, Barclift, a critique of conventional corporate governance theory, offers a

[480] See CA Manzini, *An Evaluation of Directors' Liability in South African Law* (LLM dissertation, University of Johannesburg, 2020) <*https://ujcontent.uj.ac.za › esploro › outputs › graduate*> accessed 11 April 2025; Pamela Mboweni, *A Critical Analysis of the Liability of Directors in Light of the Unwarranted Shareholder Involvement in South African State-Owned Enterprises* (LLM dissertation, University of Pretoria, 2019) < https://repository.up.ac.za › bitstreams › download> accessed 11 April 2025; C Okpaluba (2017). The Constitutional Principle of Accountability: A Study of Contemporary South African Case Law. Southern African Public Law. 33. 10.25159/2522-6800/2955. Neethling J & Potgieter JM, *Law of Delict* 8 ed (2020).

provocative departure from binary conceptions of director accountability by proposing 'fuzzy logic' as a more responsive tool to the complexities of modern corporate behavior.[481] Barclift persuasively argues that rigid legal classifications obscure the often overlapping responsibilities within corporate structures, particularly in moments of governance failure, such as corporate scandals.[482] Applied to South Africa's SOEs, where systemic mismanagement by accounting authorities has led to catastrophic financial losses, Barclift's framework calls for greater legal recognition of the continuum between compliance and delinquency, challenging the binary of lawful versus unlawful conduct that currently frustrates effective accountability. However, the absence of empirical grounding and the limited integration with public governance frameworks somewhat weakens applicability of Barclift's scholarship in the public law context of SOEs.[483]

In contrast, Valsan & Yahya present a more restrained, financially grounded analysis that resists expanding *fiduciary* obligations beyond shareholders, even in near-insolvency scenarios, arguing instead for creditor self-protection through debt covenants.[484] Their application of the Fisher Separation Theorem (a theory which suggests that value maximization serves all stakeholders)[485] risks oversimplifying the ethical and governance obligations public sector entities bear under South Africa's constitutional framework. In SOEs, accounting authorities are bound not only by *fiduciary* and financial duties, but also by public trust obligations grounded in the Constitution and statutes, such as the PFMA.[486] Both Barclift and Valsan & Yahya theories offer conceptual tools to refine governance theory. However, for South Africa's accountability crisis, Barclift's call for fluid accountability

[481] ZJ Barclift "Fuzzy Governance: Applying Fuzzy Logic to the Corporate Fiduciary Duty Debate" (2006) 1(3) *Charleston Law Review* 1.

[482] Ibid, 5, 7 & 12.

[483] Ibid, 20 & 22.

[484] R Valsan & M Yahya, 'Shareholders, Creditors, and Directors' Fiduciary Duties: A Law and Finance Approach,' 2 *Virginia Law & Business Review* 1, 25 & 44 (2007).

[485] Ibid., 38–39.

[486] Constitution of the Republic of South Africa, 1996, section 195; PFMA, sections 50–51.

categories[487] is more aligned with the demand for personal liability of derelict SOE officials, especially when traditional models obscure gradations of misconduct.

Still, Eckstein and Parchomovsky[488] argue that corporate *fiduciary* law is doctrinally incomplete due to its exclusive focus on vertical duties owed by directors to shareholders, neglecting horizontal *fiduciary* duties among shareholders themselves.[489] The authors propose a framework that would impose duties on controlling or majority shareholders to prevent minority oppression through tactics like freeze-outs, coercive buyouts, and selective disclosure.[490] Drawing from comparative jurisdictions, including Canada and the UK, the authors demonstrate that courts in those systems have recognized *fiduciary*-like obligations in shareholder relationships.[491] While normatively innovative, the proposal suffers from conceptual vagueness regarding the threshold of control that triggers *fiduciary* obligations, and its potential to overregulate intra-shareholder dynamics is underexplored.[492] In the South African context, where SOE governance often suffers from elite capture and dominant stakeholder abuse, this model could reinforce accountability mechanisms but must be balanced against constitutional and statutory safeguards like the Companies Act 71 of 2008 and PFMA.[493]

Crespi, meanwhile, takes a critical view of the traditional shareholder-centric agency model and advocates for the Team Production Model (TPM), which reconceptualises the corporation as a union of multiple stakeholders, namely, employees, creditors, and shareholders, jointly each contributing to collective success.[494] Contrasting with the agency model, Crespi argues that *fiduciary* duties should

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[487] Barclift "Fuzzy Governance" op cit, note 481, 5, 7 & 12.

[488] A Eckstein & G Parchomovsky 'Toward a Horizontal Fiduciary Duty in Corporate Law' (2019) 128 *Yale Law Journal* 955–960.

[489] Ibid.

[490] Ibid, 961–973.

[491] Ibid, 974–980.

[492] Ibid, 981–987.

[493] See sections 76–77 of the Companies Act 71 of 2008 & section 50 of the PFMA.

[494] G S Crespi "Redefining the Fiduciary Duties of Corporate Directors in Accordance with the Team Production Model of Corporate Governance" (2003) 36 *Creighton Law Review* 623, 624–627.

be reconceived to reflect the multi-contributor nature of corporate enterprise.[495] While his normative framework is compelling, it lacks empirical grounding and underplays legal constraints posed by established doctrines.[496] In the South African context, this model offers theoretical support for expanding director liability in SOEs to include harm to broader stakeholders, yet practical application remains constrained by statutory duties under the PFMA and entrenched shareholder-centric jurisprudence.[497] The practical application of Crespi's TPM within the South African context, particularly as a basis for holding derelict accounting authorities of SOEs personally liable, is significantly constrained by two key factors, that is, the statutory framework of the PFMA and the persistence of shareholder-centric jurisprudence inherited from private company law principles.

The PFMA imposes strict *fiduciary* duties on accounting authorities of SOEs, such as duties of care, skill, diligence, honesty, and acting in good faith.[498] However, these duties are framed primarily with reference to safeguarding public financial resources, ensuring compliance with applicable legislation, and achieving financial accountability to the state. The PFMA does not explicitly recognise broader stakeholder interests, such as employees, suppliers, or affected communities, as constituting part of the *fiduciary* mandate.[499] This narrow construction limits the practical adoption of TPM principles, which require directors (or accounting authorities) to balance and integrate multiple stakeholder interests in decision-making. Under the PFMA, a dereliction of duty is typically actionable, only where it amounts to an *irregular*, *fruitless*, or *wasteful expenditure*, not necessarily where financial losses *per se,* or even broader stakeholder harms (e.g. mass retrenchments, community dislocation, or

[495] Ibid, 631–636.

[496] Ibid, 643–645.

[497] PFMA, section 50; see also F.H.I. Cassim *Contemporary Company Law* (2nd ed, Juta 2012), 520–524.

[498] Section 50(1).

[499] PFMA, sections 50–51; see also *National Treasury Regulations* (issued in terms of section 76), available at *http://www.treasury.gov.za/legislation/pfma/regulations/default.aspx,* accessed 05 March 2023.

environmental degradation) occur without breaching financial or regulatory norms.[500] Thus, TPM's expanded conception of *fiduciary* responsibility finds no direct statutory support under current South African public financial law applicable to SOEs.

Moreover, South African corporate law, in general, under the heavy influence of the UK and US traditions, continues to reflect an agency-based model, where directors owe duties primarily to the company *qua* shareholders.[501] This is evident in key decisions like *Howard*,[502] where the court emphasised directors' accountability to the company's interests, often equated with shareholder interests.[503] Despite progressive developments, such as section 7 of the Companies Act 71 of 2008, which seeks to promote wider stakeholder involvement, judicial interpretation has largely remained conservative, favouring shareholder protection over pluralist governance models. Also, in the case of SOEs, this shareholder-centric reasoning is compounded by the fact that the state is the sole shareholder, and courts tend to interpret *fiduciary* responsibility in terms of preserving state assets, instead of balancing the interests of multiple contributors as TPM suggests.[504] Thus, the TPM's emphasis on collaborative governance and stakeholder inclusivity conflicts with the current legal culture, which resists expansive interpretations of *fiduciary* duty beyond state financial interest.

Accordingly, drastic reformation is needed in South Africa's SOE governance crisis, as the rigid structure of the PFMA and the courts' adherence to shareholder-centric reasoning would hamper the practical application of Crespi's TPM that offers a promising normative framework for reconceptualising *fiduciary* duty to account for multiple stakeholders. Reform efforts would require both statutory amendments to expand the scope of *fiduciary* obligations under public law and

[500] Auditor-General South Africa, *Consolidated General Report on National and Provincial Audit Outcomes*, 2022–23.

[501] Cassim "*Contemporary Company Law"* op cit not 497, 509–515.

[502] *Howard v Herrigel* 1991 (2) SA 660 (A)

[503] *Howard v Herrigel* 1991 (2) SA 660 (A), at 678H–679A.

[504] See Crespi op cit 494.

jurisprudential shifts toward embracing stakeholder-inclusive corporate governance.

### 3.2.2 Delictual Liability Framework

The South African law of delict, rooted in the *Lex Aquilia*, provides for the imposition of liability where a wrongful conduct results in harm.[505] Delict is defined as an unlawful and culpable act that causes damage or loss to another.[506] Under this framework, an individual who commits a delict may be required to compensate the aggrieved party. In the context of SOEs, breaches of *fiduciary* duties by accounting authorities could be conceptualised as delicts, warranting remedial measures where financial losses ensue. For purposes of this thesis, delictual liability framework offers a structured legal approach for evaluating whether existing statutory and common law remedies adequately address the accountability of directors of SOE, known as board members or accounting authorities. By analysing the key elements of delict, namely, the conduct, wrongfulness (encapsulating a legal duty of care and breach thereof), culpability (fault in the form of intent or dolus and negligence or culpa), causation, and damages (i.e., loss or harm), the study assesses whether the current absence of personal liability in the public sector is an oversight or a deliberate policy choice.

As this research investigates the feasibility of employing delictual remedies to recover losses from accounting authorities, this framework is essential. Delictual liability facilitates a systematic examination of whether a breach of *fiduciary* duty directly results in quantifiable financial harm and whether legal redress should be imposed through compensatory mechanisms. One needs to take cognizance that the South African delictual framework is not static and over the years the law of delict has been adapted to needs of the evolving societal needs. author notes how South African common

[505] Neethling & Potgieter, op cit note 480, 4 & 255.

[506] Ibid, at 4.

law, particularly its law of delict, has evolved under the influence of the nation's Constitution.[507] The author offers comprehensive analysis of the interplay between constitutional mandates and common law development. Roederer effectively illustrates how the Bill of Rights serves as a catalyst for legal transformation, ensuring that private law evolves in a manner consistent with democratic values and human rights.[508] Roederer emphasizes the transformative role of the Bill of Rights in reshaping private law to better reflect constitutional values.

### 3.2.3 Comparative Legal and Policy Analysis

Also relevant for the study is the Comparative Legal and Policy Analysis theoretical framework. One of the core objectives of the study is to benchmark South African law against international standards. A comparative legal approach enables an examination of how different jurisdictions, namely Australia, Canada, China, the United Kingdom, and the United States, address personal liability and accountability within State-Owned Enterprises . This analysis extends beyond statutory and common law provisions to consider governance practices and policy outcomes. By juxtaposing South Africa's legal framework with international models, this study identifies strengths, weaknesses, and potential best practices. Comparative analysis provides insight into whether alternative regulatory frameworks offer more effective mechanisms for holding accounting authorities accountable and whether these models can be adapted to the South African legal landscape. The comparative legal and policy analysis helps to determine whether South Africa's regulatory approach aligns with global best practices or constitutes a regulatory outlier in terms of personal accountability. Thus, this component is essential for identifying potential legislative reforms and governance improvements.

Accordingly, by incorporating these three dimensions, the theoretical and conceptual framework

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[507] C.J. Roederer 'Working the Common Law Pure: Developing the South African Law of Delict (Torts) in Light of the Spirit, Purport and Objects of the South African Constitution's Bill of Rights' (2009) 26 *Arizona Journal of International & Comparative Law,* 427-503.

[508] Ibid, 460.

facilitates a comprehensive analysis: Doctrinally, it examines the obligations imposed by *fiduciary* duty and the legal remedies available under delictual liability. Normatively, this approach interrogates the prevailing culture of impunity and evaluates whether public policy should be reformed to enforce personal liability. Comparatively, a comprehensive analysis provides a lens for assessing international practices and deriving insights for potential reform in South Africa.

This integrated framework guides the structure of subsequent chapters as follows:

Chapter 4 is legal framework that governs SOEs in South Africa, encompassing the *fiduciary* duties of corporate directors at common law, the business judgment rule, the governance of SOEs in terms of statutes, as well as the appointment, removal and remuneration of SOE members of boards. *fiduciary* duties, accountability mechanisms, and legal principles underpinning director liability. This chapter will also undertake a comparative examination of governance of SOEs in other jurisdictions forming part of the study.

Chapter 5 and chapter 6 (Legal framework for accountability of SOE board members) will employ doctrinal analysis to assess whether South African law sufficiently incorporates delictual liability to impose personal liability of derelict accounting authorities, for financial losses of SOEs. This exercise will revisit the essential requirements for liability in delict's Lex Aquilia. Additionally, the enforcement mechanisms within the South African context also be examined. The same doctrinal framework will be compared with the legal framework for accountability in other jurisdictions.

Chapter 7 (the Analysis and Discussion) will present the discussion of the study findings, locally as well as internationally, and consider whether the existing South African law about the governance of SOEs and accountability of their board members for causing them financial losses needs to be strengthened or whether it needs to be changed. Meanwhile, chapter 8 provides a conclusion an propose potential legislative and other reforms to enable accountability through personal liability, using delictual principles, for derelict board members of SOEs in South Africa. Ultimately, this

theoretical and conceptual framework forms the foundation for arguing that imposing personal liability on accounting authorities is both legally justifiable and necessary for enhancing SOE governance and safeguarding public funds in South Africa.

## 3.3 CONCLUSION

The theoretical foundations explored in this chapter reveal the complex and evolving nature of *fiduciary* duties and corporate governance, particularly in the context of State-Owned Enterprises (SOEs) in South Africa. These enterprises, though expected to operate with commercial efficiency, are not ordinary corporations. They wield public power, manage public resources, and are bound by a constitutional mandate to act in the public interest. It is within this tension, between market-oriented governance principles and constitutional imperatives, that the issue of personal liability for accounting authorities must be situated. At the heart of the discussion is the question of whether existing theories of *fiduciary* obligation are adequate to ensure meaningful accountability in public institutions. *Fiduciary* duties are more than just legal artefacts, they are moral and institutional expectations rooted in trust, discretion, and responsibility. When these duties are neglected in SOEs, the consequences are not limited to shareholders or investors; they affect entire communities, the economy, and the legitimacy of the state itself.

This chapter has argued that while private-sector governance models provide useful comparative insights, they cannot be transposed onto the public sector without being scrutinised. South Africa's constitutional framework demands a higher level of accountability, transparency, and ethical leadership – qualities that must be reflected in both the theoretical and practical understanding of *fiduciary* responsibility. The unique position of SOEs within South Africa's developmental state vision requires an approach that balances efficiency with accountability, and discretion with oversight. Thus, theories that seek to limit *fiduciary* duties to narrow contractual terms are ill-suited to a governance context where public trust and constitutional values must guide decision-making. In the

public sector, *fiduciary* duties cannot be reduced to mere obligations between contracting parties; they must reflect a broader commitment to integrity, justice, and stewardship.

Thus, this chapter has laid the groundwork for a reimagined understanding of *fiduciary* responsibility in SOEs – one that speaks directly to South Africa's socio-political context, its legal commitments, and the lived realities of governance failure. The next chapters will build on this foundation by interrogating the constitutional, statutory, and policy frameworks that should give effect to this reimagined accountability regime, and by considering the pathways through which personal liability can be meaningfully implemented to protect SOEs and public resources and restore public trust.

# CHAPTER FOUR

# LEGAL FRAMEWORK GOVERNING SOEs IN SOUTH AFRICA

## 4.1 INTRODUCTION

This chapter unpacks the legislative framework that governs the SOEs in South Africa. Thereafter, the chapter will deal with South African legislation that is pertinent to the governance of SOEs, as well as other relevant policy documents; namely, the DPSA Handbook for the Appointment to Boards;[509] the SOE Board Evaluation Framework, 2021;[510] the DPE Protocol on Corporate Governance;[511] as well as the King IV Report.[512] Then, the fiduciary duties of directors and the duty to exercise and skill are canvassed, in this chapter, both in terms of the common law and legislation.[513] The directors' duties are also explored in relation to the five jurisdictions selected for this study. Then, the chapter will investigate business judgment rule, in general, and most importantly, its applicability to SOEs, especially, in South Africa. Chapter four also dissects the main institutions of oversight in in South Africa, i.e., parliamentary portfolio committees, the executive authority (that is, the shareholder representative), and two important Chapter Nine institution; namely, the Public Protector and the Auditor-General of South Africa ('Auditor-General' or 'A-G'). Oversight institutions in respect of the

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[509] DPSA *'Handbook for the Appointment of Persons to Boards of State and State Controlled Institutions, 2009'* ("the Handbook for the Appointment to Boards"). Available at *https://dpe.gov.za/wp-content/uploads/2021/03/handbook-board*-member-*appointments-cab-approved-3.pdf* (20 July 2022).

[510] *DPE State-Owned Company Board Evaluation Framework: A Strengthened Board Evaluation Framework Towards Improved SOC Board Effectiveness* ("Board Evaluation Framework"), available at *https://dpe.gov.za/wp-content/uploads/2021/03/dpe-soc-board-evaluation-framework-version-2.1-25-march-2021.pdf,* accessed 20 July 2022.

[511] *DPE Protocol on Corporate Governance in the Public Sector*, available at https://www.gov.za/ sites/default/files/gcis_document/ *201409/corpgov0.pdf*, accessed 20 July 2022.

[512] King IV Report on Corporate Governance for South Africa, 2016, 38. Available at https://www.adams.africa/wp-content/uploads/2016/11/King-IV-Report.pdf, accessed 30 August 2022).

[513] The legislation considered here is the Companies Act of 2008 & the PFMA, as well as the Constitution, 1996.

selected jurisdictions, making up the sample for this study, are covered in chapter five of this research that deals with the accountability of board members of SOEs. In addition, chapter four engages the appointment and removal of board members in South Africa, and the remuneration of SOE directors. The discussion of these is essential as both the appointment & removal and remuneration impact on the performance and the call for personal liability of derelict board members. The final part of this chapter is the conclusion.

## 4.2 THE GOVERNANCE OF SOEs IN SOUTH AFRICA

In terms of the law, companies, both private and public (SOEs), are managed through boards of directors made up of individual directors. A board of directors is made up by a group of individuals who are elected by the company's shareholders to represent the interests of the company and to ensure the efficient functioning of the company. Section 66 of the Companies Act of 2008 empowers the company board of directors to manage the business and affairs of the company. This section gives a company board of directors all the authority and powers necessary to perform any functions of the company.[514] Effectively, section 66 of the Companies Act places company directors (and the boards) in charge of the affairs of that company. Thus far, it can be concluded that section 66 of the Companies Act of 2008 acts as the source of the directors' powers and authority. Section 66 empowers and gives authority to the directors to conduct the business of the company. As such, the section forms the foundational basis for the duties of company boards (inclusive of directors). In essence, section 66 of the Companies Act, 2008 effectively means that the company's decision-making powers vest in the board of directors.

In the case of State-Owned Enterprises, most of their governance is mainly in terms of the PFMA.[515]

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[514] Section 1 of the Companies Act 71 of 2008.

[515] The PFMA defines a state-owned enterprise as the 'national government business enterprise', which the Act defines as '(1) a juristic person under the ownership control of 'the national executive', 2) which has been assigned financial and operational authority to carry on a business activity, 3) operates its principal tax business services in accordance with

The affairs of national State-Owned Enterprises are managed through accounting authorities as provided for in terms of the PFMA. Section 49 of the PFMA obliges every public entity (inclusive of State-Owned Enterprises listed under Schedule 2 and 3 of the Act) to have designated accounting authorities.[516] Accordingly, section 49 of the PFMA places the management of public entities in the hands of accounting authorities, which are generally their appointed boards of directors. The accounting authorities (i.e., boards of State-Owned Enterprises) are made up of individual directors (or individual board members).[517]

The next discussion examines some founding legislations for some of the strategic State-Owned Enterprises in South Africa. The objective of such exercise is to understand how these impact on the powers of board members.

### 4.2.1 The Enabling Legislation

State-Owned Enterprises are generally governed by boards, i.e., accounting authorities that are constituted in terms of the companies' respective legislations. Still, other state entities are regulated by the Companies Act,[518] as in the case of Eskom, SAA and Transnet, for example. The governance

ordinary business principles, and 4) is financed fully or substantially from sources other than the national revenue fund or by way of levy or other statutory money.'(section 1 of the PFMA). To qualify as a state-owned enterprise (state-owned enterprise), the operation must meet the four listed criteria. Further, the PFMA classifies 'a government business enterprise' as a 'national public entity' (section 1 of the PFMA). National entities include other state entities, provided they 1) 'are established in terms of a national legislation, and 2) are fully or substantially funded either from the National Revenue Fund, or by way of tax, levy or other money imposed in terms of national legislation; and accountable to parliament.'(section 1 of the PFMA) In terms of the PFMA, 'a national public entity' includes a board, a commission, company, corporation, fund or other entity which is established in terms of the national legislation, that falls outside of the scope of a national government business enterprise (section 1 of the PFMA)

[516] Section 49(1) of the PFMA. In terms of the Act, an accounting authority may be the entity's board or another controlling body. Alternatively, accounting authorities may be individual public officials when designated as such by the Act (section 49 of the PFMA). Alternatively, still, in the absence of such a board or controlling body, the accounting authority would be the public entity's Chief Executive Officer (CEO) or any other person who oversees the entity. (Section 49(2)(a) and section 49(2)(b) of the PFMA. This section also allows for the relevant treasury (national treasury in respect of national public entities) to approve an accounting authority for such entity.

[517] In this study, for convenience, the phrase 'accounting officers' is used to denote individual board members, and the two terms are used interchangeably. However, in a narrow sense, accounting officers as defined in the Public Finance Management Act refers to the public officials responsible for the management of the affairs of state departments, in terms of section 1 of PFMA.

[518] Act 71 of 2008.

structure of these entities must be formulated as provided for in the Companies Act.[519] Section 66 of the Act expressly places the management of the affairs of every company under a board of directors.[520] The company board (accounting authority, in the case of State-Owned Enterprises) is responsible for exercising the powers and performing any functions, except for those powers and functions excluded under the Companies Act[521] or by the company's Memorandum of Incorporation.[522]

The Companies Act specifically provides for how the company board of directors may be constituted.[523] In the case of a public company, a company board may have a minimum of three (3) directors.[524] Additionally, the board may appoint any number of committees to which its authority may be delegated, unless the company's Memorandum of Incorporation precludes such delegation of authority.[525] Individual directors are also competent to serve on any number of committees, but their vote can only be counted once.[526] The composition of committees may also include persons who are not directors of the company, provided such persons are not subject to legal disqualification to serve as directors.[527] Non-directors serving in the committees are, however, not eligible to vote in the committee(s).[528]

The next focus falls on the King III Code of Good Corporate Governance.[529]

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[519] Ibid.

[520] Section 66(1) of the Companies Act 71 of 2008.

[521] Act 71 of 2008.

[522] Section 66(1) of the Companies Act 71 of 2008.

[523] Section 66 of the Companies Act 71 of 2008.

[524] Section 66(2)(b) of the Companies, 2008.

[525] Section 72(1) of the Companies, 2008.

[526] Section 72(12) of the Companies, 2008.

[527] Section 72(2) of the Companies, 2008.

[528] Section 72(2)(a)(ii) of the Companies, 2008.

[529] King IV Report supra note 512, 38.

4.2.2 Other Policy Documents

Several government documents deal with the operations of State-Owned Enterprises and matters about their governance. In this section, three key government documents are highlighted. They are *the Handbook for the Appointment of Persons to Boards,*[530] *the [SOE] Board Evaluation Framework, 2021*[531] and the Protocol on Corporate Governance in the Public Sector (the Protocol)[532] The fourth policy document, the Guide for State Owned Companies Remuneration and incentives for executive directors, prescribed officers and non-executive directors, are discussed separately under remuneration of board members in 4.4. below.

*4.2.2.1 The Handbook for the Appointment of Persons to Boards*[533]

The Handbook for the Appointment of Persons to Boards of State and State Controlled Institutions, 2009 ("the Handbook"), is published by the Department of Public Service and Administration. It is another important document that has a bearing on the governance of public institutions as the Handbook for the Appointment of Persons to Boards of State and State Controlled Institutions. The Handbook is a holistic document, intending to give effect to the provisions of section 195 of the Constitution, 1996. It applies in all aspects of the affairs of public administration and regulates the affairs of State-Owned Enterprises.[534] The Handbook defines state-controlled institutions as including national (as well as provincial) public entities, and government enterprises.[535] On the other hand, the Handbook defines a 'public entity' and a 'government enterprise' in the same way as defined in the PFMA.[536] As its objectives, the Handbook seeks to give effect to the values of the Constitution, 1996,

[530] *DPSA Handbook for the Appointment to Boards,* op cit note 509.

[531] *Board Evaluation Framework,* supra note 510.

[532] *DPE Protocol* op cit note 509.

[533] *DPSA Handbook for the Appointment to Boards,* op cit note 509.

[534] Ibid, Clause 1 (4)–1(8).

[535] Ibid, Clause 1 (12).

[536] Ibid, Clause 1 (12.1)–(12.2).

set out in section 195 of the Constitution, while providing uniformity in the appointments of office-bearers in the public administration.[537] The Handbook is also intended to provide a step-by-step guide on the appointment process of public officials.[538]

The Handbook also gives effect to the provisions of the PFMA, with regards to the control powers that the shareholder representative exercises over public entities.[539] The Handbook restates the ownership control powers of the executive authorities. Such powers include the appointment and removal of board members of state and state-controlled entities.[540] This policy document restates the *fiduciary* duties of board members.[541] The Handbook restates the directors' common law *fiduciary* duty and its origins,[542] and also revisits the *fiduciary* duty and the duty of skill and care to the company, as well as what each duty entails.[543] The Handbook goes on to canvass two of the four common law *fiduciary* duties of company directors; namely the duty to act in the best interest of the institution[544] and the duty to act independently (including the application of the King Code (King II then) on the latter duty.[545] The Handbook also restates the *fiduciary* duties of members of boards and accounting authorities (and board members) of state-owned entities, as provided for in section 50(1) of the PFMA Act 1 of 1999.[546] In terms of the Handbook, government enterprises are obligated to comply with their *fiduciary* duties in relation to the Companies Act (1973) now 2008.

In addition, this policy document obliges the public entities to prepare enabling legislation that

[537] Ibid, Clauses 1 (7) & 1 (8).

[538] Ibid, Clause 1 (8)(f).

[539] Ibid, Clauses 2 (1)–(2).

[540] Ibid, Clause 2 (3)(a).

[541] Ibid, Clause 1 (8)(a).

[542] Ibid, Clause 2 (9).

[543] Ibid, Clause 2 (10)(a) and (b).

[544] Ibid, Clause 2 (11).

[545] Ibid, Clause 2 (12) – (14).

[546] Ibid, Clause 2 (6)(a) – (c) and 2(7)(a) – (d).

specifies *fiduciary* duties, corporate governance and public purpose mandate(s) and to draft a code of ethical conduct.[547] The Handbook also endorses the principles of corporate governance specified in the King Code and the Protocol on Corporate Governance; and shareholders Compact, which specifies the public purpose and mandate of the corporate plan.[548]

The existence of the DPSA Handbook for the Appointment of Persons to Boards of State and State Controlled Institutions, which covered every aspect of the South African public administration and the management of state-controlled institutions, is evidence that board members of State-Owned Enterprises have been aware of their constitutional responsibilities, at least as far back as 2009. Hence, there is no excuse for the widespread dereliction of directors' duties and massive fleecing of the financial resources of SOEs, seen in the last decade.

In the following section, the study gives a brief overview of a further policy document that is intended to improve the performance of state entities and their boards; namely the State-owned Company Board Evaluation Framework (DPE – [SOE] Board Evaluation Framework, 2021.[549]

*4.2.2.2 The [SOE] Board Evaluation Framework,* 2021[550]

The State-owned Company Board Evaluation Framework (DPE – SOC Board Evaluation Framework), 2021[551] lays out a legislative framework that governs the operations and management of SOEs in South Africa. The Framework starts by reviewing the legal framework applicable to state-owned entities, their history, the duties of directors and the whole governance structure of SOEs. The Evaluation Framework enumerates the benefits that are associated with a good corporate governance

[547] Ibid, Clause 2 (5)(a)(i) and (ii).

[548] Ibid, Clause 2 (5)(b) and (ii).

[549] DPE *State-Owned Company Board Evaluation Framework* supra note 510.

[550] Ibid.

[551] Ibid.

system.[552] Also, the Framework adopts the principles of the King Code, discussed below. The [SOE] – Board Evaluation Framework envisages increased board effectiveness through the evaluation of the boards of SOEs.[553] The Framework defines board effectiveness as connoting a board that 'makes evidence-based decisions' which are procedural and based on result-oriented processes.[554]

Of particular importance for this study is the increased transparency and accountability at all levels and the reduced fiscal burden and its positive effect on the budget because of increased net contribution.[555] The Framework placed great emphasis on effective evaluation of boards through a framework that is not just focused on just ticking the boxes when evaluating boards. The approach that the framework adopts follows worldwide key trends.[556] Clause 2 reviews the fundamentals of this review framework. These fundamentals are effective strategic leadership; effective oversight and accountability for performance; effective management of board strategies and operations, delegations, stakeholder relationships and ethical conduct. These central principles of the framework document stem from Principle 9 of the King IV report. The primary objective of the [SOE]-Board Evaluation Framework policy is to render the valuation of directors of State-Owned Enterprises to fall in line with international trends. It talks to the King IV Report and is intended to focus the King IV Report on State-Owned Enterprises as the King Code is a general policy intended for both private and public companies. The [SOE]-Board Evaluation Framework seeks to achieve its stated objectives by stipulating standards of evaluation tools. Most importantly, the framework stipulates the requirements of effectiveness that the evaluation tools can assess about the State-Owned Enterprises ' boards. In addition, this policy Framework restates the concept of board effectiveness, which is founded on

[552] Ibid clause 1 (1)–(8).

[553] Ibid clause 2.

[554] Ibid.

[555] Ibid clause 1 (4).

[556] ibid Clause 1 (1)–(8).

effective strategic leadership; effective oversight and accountability; and effective management of board structures and operations; delegations, stakeholder relationships and ethical leadership.[557]

The Framework seeks to shift from the traditional approach to evaluation of boards, by focusing on the creation of value by the state-owned enterprise under the leadership of the board.[558] In this wise, the board is perceived to be a central vehicle of effectiveness.[559] This is a shift from a mere focus on the board's composition and functioning, which generally ultimately degenerates to a box ticking exercise.[560] The document adopts the principles of the King IV Report as they apply in various aspects of the operations of State-Owned Enterprises, such as on the composition of boards;[561] the evaluation of both their own performance, committees, chair and its individual members, as envisaged in Principle 9 of the King IV Code.[562] Most notably, the Board Evaluation Framework introduces a new command feature, namely a shareholder management process in the form of annual board handover reports. This feature provides for five key areas of the content of the annual board handover report, namely: an overview of the SOE performance to date; key challenges and the lessons that the board has learned; a risk forecast for the coming year and the board's consideration for mitigation thereof.[563] The Evaluation Framework also outlines the progress matrix for 'effective leadership of governing structures and board performance enablers.'

Ultimately, the Board Evaluation Framework sets out the evaluation process and minimum standards for boards of State-Owned Enterprises (accounting authorities and its members). The next focus moves to the Protocol on Corporate Governance in the Public Sector, 2002 as a further policy

[557] DPE Evaluation Framework, supra note 510 at para 2.

[558] Ibid para 2.

[559] Ibid Clause 14.3.4.

[560] Ibid Clause 14.3.5.

[561] Ibid Clause 14.3.4.

[562] Ibid Clause 14.3.5.

[563] DPE Evaluation Framework supra note 510, Clause 14.3.5.

document for the DPE.[564]

*4.2.2.3 DPE Protocol on Corporate Governance*

The DPE Protocol on Corporate Governance in the Public Sector, 2002, specifically deals with issues of corporate governance in relation to the management of the affairs of State-Owned Enterprises in South Africa. It is a revised document following the first document published in 1997. Another revision of the document was halted in 2015 on the release of the King IV Report. The principles of the Protocol were intended to apply to all entities listed in Schedules 2 and 3 of the PFMA, and their subsidiaries, whether listed or unlisted.[565] The Protocol is a complete and holistic document that covers all aspects of corporate governance of public enterprises. It incorporates the principles of the earlier King Codes, which institutionalised corporate governance in South Africa when the King I was published in 1994. The Protocol dissects the governance of state companies, starting with the boards and directors, the roles of the boards, the chairpersons, the CEOs and the company secretaries.[566] It outlines the roles of executive and non-executive directors of State-Owned Enterprises.[567] The Protocol gives guidance on the appointment and removal of directors.[568] Regarding this area of focus, the Protocol recognises the key role that the boards play in the performance of the company and the need for the shareholders to ensure the appointment to boards of persons, among other things, of integrity, accountability and competence.[569] The Protocol also provides for the mandate of the board[570] and for the annual assessment of its performance.[571] It deals with the remuneration of directors,[572]

[564] DPE Protocol supra note 509.

[565] Ibid, Clause 4.4.1– 4.4.2 of the Protocol, 2002.

[566] Ibid, Clause 5 of the Protocol, 2002.

[567] Ibid, Clause 5.1.5 of the Protocol, 2002.

[568] Ibid, Clause 5.1.6 of the Protocol, 2002.

[569] DPE protocol of 2002, op cit, note 509, Clause 5.1.6.1.

[570] Ibid, Clause 5.1.13.

[571] Ibid, Clause 5.1.7.

[572] Ibid, Clause 5.1.10.

their termination of office[573] and their disqualifications.[574]

The Protocol also includes provisions about the committees of the boards,[575] as well as the relationship between the board(s) and the shareholders.[576] The Protocol document contains a host of other provisions for the governance of public entities. This policy has been overtaken by events, namely the subsequent release of the King IV Report in 2016 and the [SOE] Board Evaluation Framework, 2021.[577] Although the latter policy framework is dedicated to evaluating the performance of the accounting authorities and board members, it incorporates most, or even all the contents of the Protocol. However, the Protocol has not been repealed but still contains valuable guidelines applicable to State-Owned Enterprises . For the present study, it is important to touch on some of these provisions. First, the Protocol canvases matters of financial governance in state-owned entities, as provided for in the PFMA.[578] It sets out the *fiduciary* duties of accounting authorities.[579] The Protocol highlights the *fiduciary* duties of directors as provided for in terms of section 50 of the PFMA, and the common law.[580] Significantly, Clause 5.2.3.1 of the Protocol, 2002, states that directors of SOEs are required 'to meet the same obligations as directors of private sector companies. Thus, there is no room for lowering the standards of directors (or board members) of state-owned corporations, merely because they serve public entities. In terms of this provision of the protocol, their standard is the same. Thus, it can be argued that the ethical standard is higher in the case of directors of state-owned entities, if one considers the demanding nature of the constitutional duty expected from public office-bearers.[581]

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[573] Ibid, Clause 5.1.8

[574] Ibid, Clause 5.1.11.

[575] Ibid, Clause 5.1.12.

[576] Ibid, Clause 5.1.14.

[577] Supra, note 753.

[578] DPE Protocol, supra note 509, Clause 5.12.

[579] Ibid Clause 5.2.2 defines accounting authority in the same way as defined in the PFMA.

[580] Ibid, Clause 5.2.3.1.

[581] See, in this regard, the unanimous judgment penned by Mogoeng CJ in *EFF1* op cite note 31, para 1.

Furthermore, the Protocol expressly enjoins accounting authorities to always seek 'to prevent irregular, wasteful and fruitless expenditure.'[582] Hence, boards and their members have an express legal obligation to prevent financial losses to State-Owned Enterprises, due to irregular, wasteful and fruitless expenditure. Should a company incur a loss in that regard, it will be evidence of a breach of the director's legal responsibility. For that reason, accounting authorities (and office-bearers thereof) will have to account for the manner they managed the affairs of the state-owned corporation. Following closely on the obligation to prevent irregular, wasteful and fruitless expenditure, attention needs to be paid to the provision on the liability of board members.[583]

In that regard, the Protocol makes specific reference to the provisions of section 83 of the PFMA, and section 424 of the Companies Act 71 of 2008. These sections deal with the personal liability of directors and will be dealt with in chapter 5 of this study. For the moment, it suffices to mention that clause 5.2.5.2 of the Protocol provides for directors' joint and several liability in event of dereliction of their duties.

At this juncture, the study will shift focus to discuss the duties of directors through the King IV Code Report, 2016.

*4.2.2*.5 The King IV Report

The King IV Report deals with the principles of corporate governance in South Africa. The King Code applies to both private and public companies in South Africa. The evolution of the King Code dates to 1994 with the release of the King I Report. In 2002 King II superseded King I, while King III annulled King II in 2009. The King IV Report was released in 2016 and replaced the King III Report with effect from 1 April 2017.[584] However, the King IV Report is said to be building on the King III

[582] DPE Protocol supra note 509, Clause 5.2.3.2.

[583] Ibid, Clause 5.2.4.

[584] King IV Report supra note 733 at 38.

Report. By revising it to place it in line with international trends in governance practices, the King IV Report tightened the requirements for compliance, and revised corporate governance structures, to name a few points.[585]

The King IV Report contains 17 principles for affirming good corporate governance in respect of private and public companies. The King IV Report contains a Code as well as supplements for SMEs, NPOs, SOEs, Municipalities and Retirement Funds sectors.[586] Of the 17 principles for corporate governance, only 16 apply in respect of state-owned entities. Having said this, this part of the thesis only touches on some of the 16 principles and practices that have a bearing on the governance of State-Owned Enterprises in South Africa, in so far as they are informed by the relevant part of the supplement.[587]

Part 5.1 of the King IV Report is dedicated to leadership, ethics and corporate citizenship. Principle 1 of the Code deals specifically with leadership and states as follows:

*'[T]he board should lead ethically and effectively'.*

The recommended practices enjoin members of the governing body to, individually and collectively, cultivate and exhibit in their conduct, characteristics of integrity, competence, responsibility, accountability and fairness. Against the foregoing, it can be concluded that these are the five pillars upon which ethical and efficient leadership is premised. As recommended in the King IV Code, the principle of integrity, among others, requires that board members act in good faith and in the best interest of the organization that they serve. Board members are also expected to avoid conflict of interest. Consequently, board members are expected to disclose conflict of interest, in cases where it is inevitable. Also, in terms of the King IV prohibition, those serving as board members should do

[585] King IV Summary Guide, available at *https://home.kpmg/za/en/home/insights/2016/10/king-iv-summary-guide.html,* accessed 30 August 2022.

[586] Ibid.

[587] Part 6.6 of the King IV Report is dedicated to state-owned companies. In contrast, Part 5.1 is dedicated to the general principles making up the King IV Code and contains the explanatory practices, each with its numbering.

more than a mere legal duty of ethical compliance. Instead, they must do more than they are required by the law to do. Lastly in this regard, the King IV Report recommends that the members of boards of state-owned entities should lead by example by setting the tone for an ethical organizational culture. Regarding compliance, members of boards are required to skill themselves regarding the working knowledge of their organization, the industry, and the laws regarding the standards that apply to it. The code also enjoins board members of State-Owned Enterprises to act with care, skill and diligence in taking informed decisions. As a result, as seen in this light, there is no room for negligence on the part of members of boards, in the exercise of their duties. In the final analysis, the first Principle of King IV and its pillars, especially the first and second pillars of integrity and competence, talk to the common law duties of directors, as incorporated in the Companies Act of 2008.

Responsibility, as another pillar of ethical leadership, requires that those making up accounting authorities (as a board) take collective leadership in directing the company by implementing its policies and strategies. As King IV states, it is the responsibility of members of the boards of state-owned entities to anticipate, prevent or minimize the risk inherent in the activities of the company. At the same time, any risks and opportunities taken should be balanced. In taking opportunities, boards must proceed in the best interests of the company. As for accountability, the report imposes a responsibility on members of boards to be willing to account for the manner they exercise their responsibility. Fairness, on the other hand, includes directing the entity in such a way that it does not cause adverse consequences on the environment, society or future generations. The concept of fairness is wide enough to bind those entrusted with the management of state-owned entities to ensure that they avoid the wastage of public funds, i.e., through conduct that may lead the country to incur unnecessary debts and economic collapse.

Meanwhile, the fifth pillar of ethical leadership is accountability. Accountability is self-explanatory and is related to transparency. However, transparency means that whatever the board does must be in

the open, whereas accountability denotes that those in positions are held responsible and accountable for their decisions.

Principle 2 of King IV is about organizational ethics. This principle obligates an accounting authority to take the lead in establishing and inculcating the company's ethical culture. The board is required to take responsibility for the implementation of ethics in the whole organization (including the employees). In the country, we have seen the opposite of this element of accountability and transparency over the past decades. As emanating from the evidence led before the commission of Inquiry and its subsequent Reports, board members have been unexamplary in displaying unethical conduct. In many instances, they have forced employees in key positions to act unethically.[588]

Principle 3 of the King IV Code deals with responsible corporate citizenship. This principle requires the accounting authority of a state-owned entity to ensure that the organization they serve is a responsible corporate citizen and that it is perceived to be so. As part of this principle, the recommended practices include the responsibility of the accounting authorities to set the direction for the entities' responsible corporate citizenship.[589] Also, as a practice, boards of state-owned corporations must take the lead for responsible corporate citizenship of their entities, by ensuring that state-owned entities comply with the Constitution, the law, the leading standards, and the company's own codes of conduct and its policies.[590] This practice is also in line with the lofty constitutional duty placed on those responsible for managing organs of the state, in terms of section 195 of the Constitution and what the Constitutional Court held in *the EFF1* judgment.[591] The recommended practice also means that accounting authorities (board members) need to appreciate that state-owned corporations are not islands, but that they are part of the society that they serve. Public entities are also

[588] This is also explored further in chapters 5 and 7 still to come.

[589] Principle 3, Recommended Practice 11 of the King IV Report, supra.

[590] Ibid.

[591] *EFF1* supra, note 33, para 1.

part of the big scheme of things and provide a vehicle through which the government must discharge its constitutional mandate to develop the South African economy and achieve social development. In this way, members of boards of state-owned corporations will align themselves (and their entities) with the mandate of the government and avoid the wastage of public money in the way already witnessed in the past decade. Some public entities such as SAA[592] and Sasol,[593] for example, have been implicated in unlawful conduct in contravention of the country's competition law. Such conduct has had disastrous consequences for the company[594] and the public in general and, is not in harmony with the principle of a responsible corporate citizen.

Part 5.2 of King IV deals with strategy, performance and reporting. Principle 4 imposes a duty on an accounting authority to appreciate that the entity's 'core purpose, its risks and opportunities, strategy, business model, performance and sustainable development are all inseparable elements of the value creation process.' As one of the recommended practices, the board (through its board members) ought to assume responsibility for the entity's performance, by setting the entity's direction and steering the company towards the achievement of its core purposes and values contained in its strategic plan.[595] In the case of state entities, the government and shareholder minister set the policies and strategies, while the boards implement these. Currently, the Minister of Public Enterprises is busy working on shareholder agreements for strategic state companies. It is this shareholder compact which is envisaged to chart the way for individual State-Owned Enterprises . Thus, the boards (accounting authorities) must be familiar with the strategies contained in the Shareholder Compacts and implement

[592] *South African Airways (Pty) Ltd v Comair* Ltd 2012 (1) SA 20 (CAC).

[593] *Nationwide Poles v Sasol (Oil) Pty Ltd* [2005] ZACT 17 (CT) unpublished case no 72/CR/Dec03 (31 March 2005); Sasol Oil (Pty) Ltd v *Nationwide Poles CC* [2005] ZACAC 5 (CAC unpublished case no 49/CAC/Apr05 (13 December 2005); *Sasol Chemical Industries Limited v Competition Commission* 2015 (5) SA 471 (CAC).

[594] *Comair* supra note 93. *Nationwide Airlines (Pty) Ltd (In Liquidation) v South Africa Airways (Pty) Ltd* 2016 (6) SA 19 (GJ). SAA has had to be ordered to pay compensation to its rivals, Comair and Nationwide (which got liquidated owing to SAA's anti-competitive conduct) for contravening section 8 of the Competition Act 89 of 1998. These awards against SAA came at a time when the entity was struggling financially and eventually went for business rescue with the millions still owing for its anti-competitive practices.

[595] Recommended Practices 1 of Principle 4.

them as recommended in this 4th Principle of the King IV Report.

Further, Part 5.3 deals with the governing structures and delegation. Principle 6 places the board at the centre of the company. It provides that an accounting authority 'should serve as the focal point and custodian of corporate governance in the state-owned [enterprise].' Among the practices recommended, King IV recommends that the board exercise its leadership role by: 'steering the entity and setting its strategic direction; approving policy and planning that give effect to the direction provided; overseeing and monitoring of implementation and execution by management, and ensuring accountability for the [SOE's] performance [using] … reporting and disclosure.' [596] Also, significantly, this part of the King IV Code deals with matters of board composition and the election process for members of the boards. As regards the composition of the board, Principle 7 of the King IV Report states that the board 'should comprise the appropriate balance of knowledge, skills, experience, diversity and independence' that is necessary for the objective and effective discharge of the board's governance role and responsibilities. In this regard, the Code recommends certain practices about the board's composition. Among them, the Code enumerates some seven factors that should be considered in determining the requisite number of board members.[597] The Principle also recommends that at least, the CEO and one other executive, such as the chief finance officer, be appointed to the board. The above listed yardsticks are seemingly standard in relation to the South African State-Owned Enterprises , where the group CEO is usually a member of the board. However, it is not normal for the CFO to be part of the boards in South Africa. The Code recommends that the board assumes responsibility for the mix in the composition of the boards. The Code also recommends that the board establish succession for its membership, by identifying, mentoring and developing future

[596] Principle 6 Recommended Practice 1(a) – (d).

[597] Principle 7 Recommended Practice 7(a) – (f). Among these is 'regulatory requirements', which shows the supremacy of the enabling legislation that applies in a respective state-owned enterprise (Principle 7 Recommended Practice 7(f)).

candidates.[598] However, with respect to boards of SOEs, it is not always feasible as the appointment is made by the Minister as the executive authority. The board may only contribute indirectly by providing recommendations to the minister, based on their experience while serving on the respective board.

As indicated earlier, the Code deals with the nomination, election and appointment of board members.[599] The King IV Code places the responsibilities of the nomination process on the accounting authority.[600] However, this arrangement becomes unworkable for State-Owned Enterprises , since the appointment is the responsibility of the Minister or the President (in the case of the SABC board). It also generates a conflict of interests within the context of South African state companies, which have been characterized by abuse of power by incumbents and the governing party.[601] The Code provides for thorough independent vetting and verification of prospective candidates before nomination.[602] Most importantly, the King IV Report recommends that the terms and conditions for members' service in the boards should be formalized in writing, upon the election of the member.[603] This is a crucial recommendation as it appears that board members of State-Owned Enterprises serve without any formal mandate. It is perhaps because of such provisions that the Minister of Public Enterprises has been more vocal about the Shareholder Compact in recent times.

To mitigate the problem of independence and its inherent conflict of interests, the Code recommends that board members should declare their financial interests on an annual basis.[604] In addition, the Code

[598] Principle 7 Recommended Practice 13.

[599] Principle 7 Recommended Practices 14 – 24.

[600] Principle 7 Recommended Practice 14.

[601] This has been discussed in chapter 3 of this thesis as found by the State Capture Commission in its Report.

[602] Principle 7 Recommended Practices 18–20.

[603] Ibid, 21.

[604] Ibid 25–30.

makes recommendations regarding the chairperson of the board and his responsibilities.[605] Most importantly, the Code recommends that the chairperson of the board should be appointed by the board,[606] contrary to the practice in South Africa where the shareholder minister appoints the chairpersons of boards of State-Owned Enterprises. The Code also recommends that the board should appoint a deputy chairperson to lead in the absence of the chair.[607] This provision sounds in line with the pieces of some legislations that govern State-Owned Enterprises where the deputy chairpersons are appointed by the members of the boards. It is submitted that the chairperson must be appointed by the board, or an independent committee charged with the appointment of board members in a transparent process.[608] Principle 8 of the King IV Report concentrates on the committees of the boards. Principle 8 falls outside the purview of this report, save to state that the Code requires the board to put in place arrangements to ensure the delegation of authority in a manner that ensures and promotes independence of judgment.[609] Of importance for the present purpose is Principle 9, which deals with the evaluation of the performance of the accounting authority, and the recommended practices thereof.[610] Principle 9, enjoins the board, as the accounting authority, to ensure that its performance, that of its committees, the chairperson's and that of individual board members, will be evaluated accordingly.[611] The board is also required to ensure continuous support for its performance and effectiveness.[612] In this regard, the Code recommends measures for conducting such evaluations of the board and its members.[613] Following the above, King IV Principle (9), the Department of Public

[605] Ibid 31–8.

[606] Ibid 31.

[607] Ibid 32.

[608] See Principle 7, Recommended Practice 15 in this regard, which deals with the election of all board members.

[609] Principle 8, Recommended Practices 39–50.

[610] Principle 9, Recommended Practices 71–75.

[611] Principle 9.

[612] Ibid.

[613] Principle 9, Recommended Practices 71–4.

Enterprises has developed the State-Owned Company Board Evaluation Framework of 2021.[614]

The next focuses on the common law and statutory duties of directors.

## 4.3 THE DUTIES OF DIRECTORS

Companies are managed and function through directors. The relationship between a company director and the company is governed by common law principles. At common law the two main duties of directors are namely, the *fiduciary* duty and the duty of care and skill. The duties of directors play an important role regarding corporate governance. Primarily, the directors' duties serve to limit the powers of directors. At the same time, they also serve to foster good corporate governance.[615] In terms of the common law, the focus rests on some *fiduciary* duties of directors. The *fiduciary* duties of directors encompass first, a duty to exercise the powers of a director for a proper purpose; second, a duty not to exceed their powers; third, the duty to exercise independent and unfettered discretion;[616] fourth, a duty to avoid a conflict of interests (and self-dealing) in contracts; and last, a duty not to make secret or incidental profits. Furthermore, it should be added, directors and other officers owe the company the duty that they will serve it with care, skill, and diligence. The director's *fiduciary* duties and the duty to exercise care and skill are discussed in greater detail in this part of the study.

### 4.3.1 Duties Under the Common Law

#### *4.3.1.1 Fiduciary Duties*

A *fiduciary* duty would arise in all branches of law, depending on the circumstances of the case and the nature of the relationship between the parties.[617] The duty arises from a relationship of confidence

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[614] DPE Evaluation Framework, supra note 510. The Evaluation Framework is discussed in 2.6.2 below.

[615] Mongalo T, *Corporate Law & Corporate Governance: A Global Picture of Business Undertakings in South Africa* (Juta 2003), at 158-9.

[616] *PPWAWU National Provident Fund v Chemical Energy Paper Printing Wood & Allied Workers Union* 2008 (2) SA 351 (W).

[617] *Law Society of [t]he Cape of Good Hope v Randell* [2015] 4 All SA 173 (ECG), para 44.

and good faith between the director, on the one hand, and the beneficiaries embodied in the company and/or shareholders, on the other.[618] Generally, the existence of a *fiduciary* duty depends on the circumstances of each situation. [619] The duty arises in a relationship such as that between the shareholders and the board of directors of a company; an employer and employee; trustee and beneficiary under a deed of trust or a medical practitioner and his patient; and attorney and client, to name a few. [620] In Randell the high court held that a *fiduciary* duty only arises where the circumstances are such that 'the legal convictions of society recognize and give a legal protection to a relationship' between two or more parties wherein the other party stands in a position of trust to another or other persons.[621] As such, a director stands in a *fiduciary* relationship to a company. [622]

The company director is a trustee of that company and is endowed with a *fiduciary* duty.[623] At common law, a director owes *fiduciary* duties to the company and its shareholders for the protection of the company and the shareholders, as well as the public interest.[624] The Supreme Court of Appeal held in Phillips[625] that the duties owed by the directors also extend to every individual who assumes a position of trust within the company. This duty may therefore include the senior management of a company. The duty attaches to the directors and board members individually.[626] Both executive and non-executive directors, collectively and individually, owe a *fiduciary* duty to a company, which is a composite of duties. As part of his common law *fiduciary* duties, a director should always act in the

[618] LexisNexis *Law of South Africa (LAWSA)* 2 ed (2014) 4(2), 176-7 para 129

[619] *Randell* supra note 617, para 47.

[620] Ibid para 44.

[621] Ibid para 44.

[622] LAWSA op cit note 618, at 176 para 129.

[623] *Construction SA (Pty) Limited v Injectaseal CC 1988* (2) SA 54 (T) at. 66D. See also *Randell* supra note 611, para 44.

[624] LAWSA op cit note 618.

[625] *Phillips v Fieldstone Africa (Pty) Ltd* [2004] 1 All SA 150 (SCA).

[626] *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 (2) SA 173 (T) at. 173.

best interest of the company.[627] The directors' *fiduciary* duty embodies more than good faith. The duty includes that of utmost good faith (uberrimae fides) as well.[628] This means that the directors are held to the highest standard of responsibility for the way they manage the affairs of the company. In other words, being a company director imposes a duty of loyalty to the company to a superlative degree, whether it is a private or a public company. Adherence to the highest standard of responsibility applies even more so when a director is entrusted with a public entity because of the level of accountability that the Constitution places on the managers of a company owned by the state.[629]

Directors, both executive and non-executive, must individually and collectively exercise their powers in a *bona fide* manner and in the best interest of the beneficiary company for which they are the trustee.[630] This onerous expectation leaves no room for conflict of interests on the part of directors. In that way, the interests of directors or other third parties may never supersede the interests of the company they manage. In consequence, the *fiduciary* duties that company directors owe a company enjoin them to always manage the affairs of the company honestly and to proceed with their duties to the company with utmost good faith.[631]

In terms of the common law, there are four fundamental tenets of *fiduciary* duty that directors owe a company. They are (i) a duty not to exceed the powers of a director; (ii) a duty to exercise directors' powers for a proper purpose; (iii) a duty to exercise independent and unfettered discretion; and (iv) a duty to avoid conflict of interests. The four *fiduciary* duties of directors are discussed here below.[632]

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[627] However, the Companies Act of 2008, has amplified this part of the common law and provided the requirements for the common law defence of the '*business rule'* principle available to directors as a limitation of their liability to the company. The criteria that the Companies Act 71 of 2008 provides are discussed under the section that deals with the duties of directors in terms of the Companies Act, 2008, in this part of the study.

[628] Mongalo op cit note 615, at 160.

[629] *EFF1* supra & section 195 of the Constitution, 1996.

[630] Mongalo op cit note 615, 161.

[631] *Howard v Herrigel* NO *1991* (2) SA 660 (A), 678.

[632] *Randell* (supra note 611) enumerates eight fundamental tenets of the fiduciary duty of directors of companies, and they are couched in a prohibitory form. Hence, a fiduciary duty encompasses a duty that trustees (company directors) may not:

(i) A duty not to exceed powers

At the common law, a company director is prohibited from acting beyond or from exceeding the limits of powers or capacity which are legally afforded to him. Instead, directors are expected to act within their powers and act for a proper purpose.[633]

(ii) A duty to exercise directors' powers for a proper purpose

In the *Randell case,* the court held that those in a position of trust, that is, those who have been sworn to a *fiduciary* duty, should always seek to promote the best interests of the beneficiaries of the trust (or the shareholders in the case of a company).[634] A director's *fiduciary* duty, to exercise powers for a proper purpose, entails acting *bona fide* in the interest of the company. Directors of a company must always seek to advance the best interest of the company. The priority of the best interest of the company means that those interests may, at times, conflict with the interests of the shareholders.[635] Thus, the directors must, at all the times, pursue the advantage for the company and avoid the pursuit of their personal advantage at the cost of the company or its beneficiaries (the shareholders).[636] In a nutshell, directors' actions must always be to the best interest of the company and must be of benefit to the company. To use directors' powers in a way contrary to the objectives for which the powers were conferred to the directors, amounts to a breach of the *fiduciary* duty, even if the directors thought

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'exceed their powers; exercise their powers for an improper purpose; fetter their discretion; place themselves in a position where their personal interests conflict with their duties to the beneficiaries; make a secret profit; compete with any business of the [company]; make personal use of or abuse confidential information; or favour one beneficiary to the detriment of another or others. …' (para 49) Thus, from the fundamental tenets of a fiduciary duty listed in *Randell*, (para 49) directors must, as a rule, only use their powers for the 'proper purpose', among other things, as part of their fiduciary duties. Directors may not use their powers for any purpose, such as for their own ulterior motives or purposes not connected with the best interest of the business (the company) (para 49). These are not different from the four fiduciary duties discussed in this section. Instead, they represent an amplified version of the common law fiduciary duties as seen in the discussion of the four fiduciary duties.

[633] The Companies Act, 2008, did not expressly codify the duty not to exceed the powers of a director. See, however, sections 19(b)(ii) and 20(1) of the Companies Act of 2008 in this regard, which deal with acts of a company that were performed outside of the purpose/objectives of the company as expressed in the Memorandum of Incorporation of a company.

[634] *Randell* supra note 617, para 47.

[635] LAWSA, op cit note 618, at 176 para 129.

[636] See *Randell* supra note 617, para 47.

they were acting honestly.[637]

(iii) A duty to exercise independent and unfettered discretion

Additionally, the common law requires directors of a company to exercise independent discretion and judgment in the discharge of their functions and duties. This requires a measure of independence from the directors in their decision-making or the exercise of their judgment. Furthermore, such judgment must be unbiased.

(iv) A duty to avoid conflict of interests

Directors of a company are in law required to always avoid a conflict of interests between their personal interests (and other third parties) on the one hand, and the interests of the company that they serve, on the other.[638] Consequently, directors may not procure personal benefit in the execution of their duties of directors. The only benefit directors are allowed is only what they are legally entitled to, such as remuneration (executive directors) and allowances (in the case of non-executive directors). Also, directors must not place themselves in conflict by engagements wherein their personal interests may conflict with those of the company.[639] Directors are also precluded from deriving a secret profit by their office.[640] A contravention of the rule against conflict of interests amounts to a breach of the *fiduciary* duty.

In addition, directors have a common law duty to disclose any personal interest in the business of a company and may not make a secret profit or possible incidental profit at the cost of the company. Also, in terms of the common law, a director is required to disclose any personal interest, including

[637] Mongalo op cit 615, at 164 (cf footnote 98).

[638] See *Randell* supra note 611, para 47.

[639] *Aberdeen Rly Co. v Blaikie Bros* (1854) 1 Macq461 at 471-2; *Robinson v Randfontein Estate Gold Mining Co. Ltd* 1921 AD 168.

[640] See *Robinson* supra note 633.

financial interests, in any contract with the company.[641] Closely associated with the latter duty, at common law directors are prohibited from misappropriating corporate opportunities that present themselves to the company and are not allowed to compete with the company that they are managing.[642] Concerning a duty to avoid conflict of interests, in *Robinson*[643] the court held that 'where one man stands to another in a position of confidence involving a duty to protect the interest of that other, he is not allowed to make a secret profit at the expense of the other or please himself in a position where his interest conflicts with his duty'.[644] Therefore, a director has to prevent conflict of interests within the business dealings of a company and to refrain from making any secret profit or possible incidental profit at the cost of the company.[645]

The duty of care and skill is explored in some detail in the next section below.

4.3.1.2 The Duty to exercise care and skill

In addition to the *fiduciary* duty, company directors owe the company a duty to exercise care and skill in the performance of their functions. Thus, in this part, this duty is examined in terms of the common law, the Companies Act and the Public Finance Management Act.

(i) Under the Common Law

As in the case of the fiduciary duty, the duty of care and skill is in respect of both common law and statute.[646] Directors' duty to exercise care, skill, and diligence has an apparent overlap with the

[641] See also section 76 (4)-(6) of the Companies Act 71 of 2008.

[642] See *Robinson* supra note 633.

[643] Ibid.

[644] Ibid.

[645] A director's duty to avoid conflict of interest are some other common law duties which were however codified in the Companies Act of 2008. (Common law duties of a have been codified in section 76(2) of the Companies Act 71 of 2008).

[646] The Companies Act 71 of 2008, adds diligence to the directors' common law duty of care and skill in the exercise of their powers and functions (section 76(3)) of the Act. Thus, the Companies Act refers to the duty of care, skill and diligence, in section 76(3).

directors' fiduciary duties.[647] As a result of such overlap, there is no clearly defined line between the company directors' fiduciary duty and the duty to exercise care, skill and diligence.[648] In terms of the duty of care, skill, and diligence, company directors are duty-bound to always act in good faith and reasonably in the exercise of their powers as directors. In other words, the common law imposes a duty to exercise care and skill on directors, reasonably expected of persons in the position of the directors in question.[649]

The next discussion examines the company directors' duty to exercise care and skills in terms of the relevant legislation governing accounting authorities , is discussed below.

### 4.3.2 Duties Under the Legislation

The Companies Act 71 of 2008, the common law, a company's constitution, and other statutes such as the PFMA provide for the functions and duties of company directors. These pieces of legislation provide the main sources of the duties of directors. The Companies Act of 2008 has partially codified the duties of company directors.[650] Thus, the common law duties of directors still apply and are in force wherever the Act is deemed silent on a particular issue, and as such, the common law and the legislation are not inconsistent. The *fiduciary* duties of directors of State-Owned Enterprises and the duty of care, skill and diligence are discussed in the parts that follow, in relation to the Companies Act and the PFMA.

#### *4.3.2.1 The Companies Act*[651]

The statutory duties of the directors, mainly include first, the *fiduciary* duty to act in good faith and for a proper purpose; second, to act in the best interest of the company and to observe the duty of

[647] Mongalo op cit note 615 at 170.

[648] Ibid.

[649] LAWSA, op cit note 618 at 176 para 129.

[650] Cf. *Kensal Rise Investment Pty Limited v Merchant* 2014 JDR 2275 (KZD) (30 October 2014), paras 11-12.

[651] Act 71 of 2008.

reasonable care.[652] Section 76 of the Companies Act, 2008 provides for the duties of directors and indicates the standard that the directors' conduct must adhere to. Additionally, section 76 of the Companies Act, 2008 prohibits the directors from using their position or any knowledge they may acquire during their term in office to gain an advantage for themselves or for any person whatsoever other than the company itself or its wholly owned subsidiary. This section further prohibits the directors from using their position as directors or gaining an advantage from information acquired during their term in office, or in any way to intentionally cause harm to the company or its subsidiary. There is an apparent corelation between the way these duties are couched in the Act and the common law *fiduciary* duties discussed in part 4.3.1. Accordingly, these *fiduciary* duties under the Companies Act, 2008, are not new, but are a mere codification of the already existing common law.[653]

Also, section 76(3)(c)(i) of the Companies Act, 2008, imposes a duty of care, skill and diligence that is reasonably expected from a director, as another statutory duty for company directors. In terms of this duty, a director is expected to demonstrate the same care, skill and diligence as a reasonable person, that is director, who is in a similar position and who possesses the degree of care and skill that may be reasonably expected from a person with his knowledge and experience.[654] Again, section 76(3)(c)(i) of the Companies Act is also a codification of another common law duty of directors – the duty discussed in part 4.3.2 in this section. Accordingly, the Companies Act 71 of 2008 has preserved the common law duties to exercise care and skill that directors owe the company in the exercise of their powers and functions.[655]

Most importantly, section 77 of the Companies Act, 2008, imposes liability for breach of *fiduciary*

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[652] Section 76 of the Companies Act 71 of 2008.

[653] *Cyberscene Ltd v I-Kiosk Internet* and *Information* (*Pty*) *Ltd 2000* (3) SA 806 (C) at 8201. M.M. Botha 'The Role and Duties of Directors in the Promotion of Corporate Governance: A South African Perspective' (2009) 30(3) *Obiter*, 702, available at *https://journals.co.za/doi/pdf/10.10520/EJC85327,* accessed 20 July 2021.

[654] Section 76(3)(c)(i) of the Companies Act 71 of 2008.

[655] Section 77(2)(b).

duties against directors, amongst other things.[656] This section is indicative of the availability of personal liability for a breach of director's fiduciary duties which result in the financial loss to the company – be it private companies or public companies, such as SOEs, that are partly governed in terms of the Companies Act, 2008.

Nex, comes the PFMA. The PFMA introduces a further important piece of legislation that gives effect to the ideals of an efficient public administration as envisioned by section 195 of the Constitution.[657] In light of the above, the next section explores relevant provisions of the Public Finance Management Act.[658]

*4.3.2.2 The Public Finance Management Act*[659]

Chapter 6 of the PFMA specifically deals with the general responsibilities of accounting authorities of state-owned entities.[660] Section 49 of this Act[661] obligates all public entities, including SOEs, to each have an authority that is legally accountable in line with the PFMA. For section 49 of the Act, the company's board or controlling body (whichever applies in respect of a public entity) is designated the accounting authority of the entity. However, where the entity does not have a board or controlling body, the entity's Chief Executive Officer or anyone in charge of the public entity is its accounting authority, in terms of the PFMA, except where the entity's founding statute directs otherwise. Section 51 of this Act sets out the functions and duties of accounting authorities of public entities.[662] Among other things, accounting authorities are tasked with the management of the public entities.[663] Important

[656] The Liability of directors and section 77 of the Companies Act 71 of 2008 are discussed in some detail in chapter 5 of this thesis.

[657] The Constitution, 1996.

[658] The Public Finance Management Act 1 of 1999.

[659] The PFMA.

[660] Chapter 6, sections 46–57 of the PFMA.

[661] The PFMA.

[662] The PFMA.

[663] Section 51 (c) of the PFMA.

for this study is section 50 of the PFMA regarding accounting authorities. Section 50 of the Act sets out the *fiduciary* duties of the accounting authorities of public entities in four legs. First, as part of their *fiduciary* duty, accounting authorities must observe the utmost care, in exercising their powers of director, to ensure that the assets and records of state entities are reasonably protected.[664] From the way this imperative is couched in the Act, what is required of board members of state-owned entities is more than a bare minimum. The reference to 'utmost care' harks back to the common law standard of '*uberrimae fides'* regarding the type of good faith exerted on company directors in general.[665] Also, in the manner they manage the financial matters of the entity, accounting authorities are obliged to 'act with fidelity, honesty, integrity and in the best interests of the public'.[666]

As another *fiduciary* duty, an accounting authority is obliged to disclose information at its control, as a form of accountability to the relevant authority, upon request.[667] It is also required of accounting authorities to endeavour to protect the interests of the state, within their sphere of influence, from suffering prejudice.[668] Meanwhile, subsections 50(2) and (3) apply directly to individual members of public entity boards and to individual accounting authorities (in the absence of a board or body).[669] In terms of section 50(3) of the Act, a member of the accounting authority is required to disclose any direct or indirect personal or private business interest, (conflict of interests) to the accounting authority, on any matter before the authority.[670] In addition, the member is required to withdraw from such matter that creates a conflict of interests.[671] On the other hand, section 50(2) of the Act is couched in prohibitive language. In terms of this section, members of accounting authorities are not permitted

[664] Section 50 (a) of the PFMA.

[665] As mentioned earlier at the outset. Mongalo op cit note 609, at 160.

[666] Section 50 (b) of the PFMA.

[667] Section 50 (c) of the PFMA.

[668] Section 50 (d) of the PFMA.

[669] Section 50 (d) of the PFMA.

[670] Section 50 (3)(a) of the PFMA.

[671] Section 50 (3)(b) of the PFMA.

to act in a manner inconsistent with their responsibilities in the PFMA.[672] Members of accounting authorities may also not use their position, privileges, and confidential information to improperly benefit themselves or any other person outside of the entity itself.[673] Thus, as provided for in the common law and the Companies Act, 2008, boards and their members may never abuse their position of trust. In other words, boards and their members must always seek what is in the best interests of the entity.

In addition to the *fiduciary* duties under the PFMA discussed in this part, boards of public entities are legally tasked to manage the entities' available working capital, effectively and appropriately.[674] Meanwhile, the PFMA also enjoins accounting authorities to safeguard the entities, while also managing the entity's revenue, expenditure, and liabilities.[675] It is also the duty of an accounting authority to take effective steps to collect all revenue accruing to the entity.[676] To this end, accounting authorities also of State-Owned Enterprises have a responsibility to prevent expenditure that does not comply with the public entity's operational policies.[677] Moreover, members of boards have to take steps to prevent irregular, fruitless and wasteful expenditure and losses occasioned by criminal conduct.[678] As such, the prevention of irregular, fruitless and wasteful expenditure is their duty.[679] This duty amounts to a duty of care, skill and diligence because directors of SOE must employ appropriate and effective steps to prevent irregular, fruitless and wasteful expenditure.[680] Failure to

[672] Section 50 (2)(a) of the PFMA.

[673] Section 50 (2)(b) of the PFMA.

[674] Section 51(b)(iii) of the PFMA.

[675] Section 51(c) of the PFMA.

[676] Section 51(5)(b)(i) of the PFMA.

[677] Section 51(b)(ii) of the PFMA.

[678] Section 51(b)(ii) of the PFMA.

[679] D. L. Sauls *Directors Personal Liability for Irregular, Wasteful and Fruitless Expenditure in South African (SA) State Owned Companies (SOC)* (unpublished LM thesis, University of Western Cape, 2019) 70, available at *https://etd.uwc.ac.za/xmlui/handle/11394/7705*, accessed 20 July 2021.

[680] Ibid.

comply amounts to breach of the duty of care, skill and diligence that directors owe to an SOE.[681] Accordingly, this duty created in terms of the PFMA is a form of the duty to exercise care, skill and diligence.

It is significant that the PFMA uses descriptive words and phrases, such as 'effective', 'appropriate', 'economically' and 'safeguard' to underscore the legal responsibilities of accounting authorities. The PFMA's choice of such terms and phrases is an indication of the onerous nature of the responsibilities entrusted to the boards of public entities and their board members, as well as all employees in positions of responsibility. Ultimately, directors of public entities must ensure that the entity complies with all provisions of the Public Finance Management Act, as well as any other law, in general.[682] In terms of the Act, should the accounting authority be in any way unable to comply with its statutory responsibilities under the Act, it is required to report such non-compliance to the relevant departmental Minister (usually the NDPE) and the national treasury, in the case of national public entities.[683]

The PFMA further obliges accounting authorities to devise appropriate and effective measures against employees of public entities who contravene the provisions of the Act.[684] Such consequence management steps also must be employed against any employee who is responsible in whatsoever way for irregular or fruitless and wasteful expenditure.[685]

The discussion of the duties of directors of SOEs will be incomplete without a discussion of the relevant provisions of the Constitution, as SOEs and their managers are bound by the constitutional imperatives. Hence, the relevant values of the Constitution are discussed in the next part of the chapter.

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[681] Ibid at 74-5.

[682] Section 51 (h) (and the rest of section 51 (a)–(h)) of the PFMA.

[683] Section 51 (2) of the PFMA.

[684] Section 51(e) of the PFMA.

[685] Section 51(e) of the PFMA.

4.3.3 The Constitution

Section 195 of the Constitution, 1996, sets out the values and principles that govern public administration in South Africa.[686] SOEs form part of the organs of the state and section 195 of the Constitution applies to SOEs to the same degree as any other state organ forming part of the public administration, in South Africa. The section obliges the public administration to promote 'a high standard of professional ethics[687] and to adopt an efficient, economic and effective use of state resources.[688] The same section further states that the public administration 'must be development-oriented[689] and respond to people's needs' [690] and that the public administration 'must also be accountable,[691] and transparent.'[692] What can be deduced from the precepts introduced in section 195 of the Constitution, just mentioned above, is that the Constitution of the Republic of South Africa mandates those entrusted with the management of SOEs, whether public officials or directors in boards, to subscribe to a high standard of ethics and professionalism in the manner in which they discharge their duties. The Constitution also demands accountability and transparency for public officials. Equally, the same standard is required of any persons entrusted with any constitutional mandate. The obligations placed on these persons ought also to be understood in the light of section 2 of the Constitution, which declares that any law or conduct contrary to the Constitution is invalid.[693]

Moreover, as discussed in the second chapter, SOEs play a crucial role in the development of South

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[686] Section 195(2)(c) of the Constitution, 1996.

[687] Section 195(1)(a) of the Constitution, 1996.

[688] Section 195(1)(b) of the Constitution, 1996.

[689] Section 195(1)(c) of the Constitution, 1996.

[690] Section 195(1)(e) of the Constitution, 1996.

[691] Section 195(1)(f) of the Constitution, 1996.

[692] Section 195(1)(g) of the Constitution, 1996.

[693] Section 2 of the Constitution, 1996, provides:

*'Supremacy of the Constitution*

*2. This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'*

Africa's economy, especially regarding uplifting the social conditions of the people of South Africa. On the other hand, public functionaries (public officials) in SOEs are central to the functioning and management of the state enterprises as well as the achievement of the constitutional mandate of SOEs. Henceforth, the persons entrusted with the management of SOEs, including their boards of directors (as accounting authorities), ought to uphold set constitutional values and principles. Failure on their part to uphold the highest standard of ethics and professionalism, amounts to a violation of the Constitution, especially as regards the constitutional principle of accountability. Accordingly, the law expects nothing less of the public functionaries (officials) who are assigned a constitutional mandate, in the discharge of their duties when managing public entities.

According to section 195 of the Constitution, there are at least three key ideals (objectives) for a public administration that conform to the constitutional norms; namely that the public administration (1) must promote an efficient, economic and effective use of resources;[694] (2) must be development-oriented;[695] and (3) must be responsive to the people's needs'.[696] The phrase 'efficient, economic and effective use of resources',[697] among others, envisages public functionaries or officers (as well as public servants) who are prudent in the use of public resources, especially financial resources when they discharge their constitutional mandate in the management of SOEs. As such, there is no room for any (financial) mismanagement, irregular, or wasteful and fruitless expenditure. Not only will any such conduct amount to a breach of the functionaries' *fiduciary* duty to the SOE, but also, most important, the dereliction of duty will amount to a breach of their constitutional obligation. Fulfilling the obligation is the ultimate and highest duty of public functionaries. In other words, a public functionary

[694] Section 195(1)(b) of the Constitution, 1996.

[695] Section 195(1)(c) of the Constitution, 1996.

[696] Section 195(1)(e) of the Constitution, 1996.

[697] Section 195(1)(b) of the Constitution, 1996.

falls in breach of the Constitution[698] and the constitutional rights of the citizens who expect that those in public office always ensure that state resources are used efficiently, economically, and effectively.[699] In this wise, the accountability of public officers is meant to discourage deviations from this norm.

A further ideal set out under section 195 of the Constitution, 1996, is the establishment of a public administration that '[is] development-oriented'[700] This ideal means that public functionaries are tasked with public administration. The latter includes the management of SOEs. In the exercise of their duties and functions, public functionaries should always be conscious that the primary aim (or constitutional role) for public entities is to develop the economy of the country against the overarching goal of improving the social conditions of the people of South Africa.

Furthermore, as another ideal for public administration, section 195 of the Constitution envisions a public administration that 'responds to [the needs of the people]'[701] of South Africa. It is trite knowledge that the majority of South Africans are still trapped in the shackles of abject poverty. Hence, section 195 of the Constitution envisages a public administration that plays a pivotal role in improving the lives of the people; an administration that plays a key role in service delivery. This objective ought to be seen in the light of the second objective. All the three objectives are intertwined and should not be divorced from one another. It is, therefore, worth noting that public functionaries carry the highest (constitutional) duty. In harmony with this mandate, public officials must be held accountable for any breach of their constitutional duty.[702]

[698] Section 2 of the Constitution, 1996.

[699] Section 195(1)(b) of the Constitution, 1996.

[700] Section 195(1)(c) of the Constitution, 1996.

[701] Section 195(1)(e) of the Constitution, 1996.

[702] *EFF1 op cite note 31*

## 4.4 DUTIES OF SOE DIRECTORS IN OTHER JURISDICTIONS

This part of the chapter examines the governance of State-Owned Enterprises, their oversight in the five jurisdictions selected for this study. The primary objective of the chapter is to explore the good practices and lessons that South Africa could learn from the governance of SOEs in those jurisdictions. The selected jurisdictions are discussed in alphabetical order, starting with Australia.

### *4.4.1 Australia*

This part of the discussion focuses on the governance and oversight of government corporations in Australia. Part 3 of the State-Owned Enterprises Act deals with the affairs of state business corporations and is of particular importance for this study.[703] Part 3 of the Act regulates the affairs of state business corporations from inception to the powers and functions of the boards, and various other aspects of the workings of state-owned corporations in Australia. The Financial Management Act 1996 is a further legislation that has a bearing on the affairs of management of the affairs of state corporations in Australia. Section 78 of this Act empowers the Minister responsible for Territory Authority to appoint board members.[704] The criteria that the law provides as a qualification for appointment are set out in this section.[705] Among the factors for qualification that the appointing Minister must consider, are the contributions that a candidate can make to the goals and objectives of the relevant governing body,[706] and any other criteria provided in terms of other statutes, if any.[707] However, the Act may prescribe other criteria for appointment to the governing board.[708] The

[703] Part 3 of the State-Owned Enterprises Act covers sections 17–55 of the State-Owned Enterprises Act 90 of 1992.

[704] 'A Territory Authority' is defined in the Financial Management Act 1996 as '(a) … a body corporate established by an Act and (b) … an entity to which part 8 [of the Financial Management Act 1996] applies; … but (d) does not include a body declared under section 3B [of the Financial Management Act 1996] not to be a territory authority.' Therefore, the Financial Management Act 1996 also applies to state-owned corporations established in terms of any statute (Act) as this definition indicates, unless expressly excluded.

[705] Section 78(3) of the Financial Management Act of 1996.

[706] Ibid, section 78(3)(a).

[707] Ibid, section 78(3)(b).

[708] Ibid, section 78(4).

responsible Minister is also empowered to appoint the chair and deputy chair of the governing board, unless the establishing legislation, in respect of the deputy chair, provides otherwise.[709] The terms for an appointment may be agreed upon between a board member and the Minister at the time of appointment.[710] As regards the remuneration of the board members, it is subject to the provisions of the Remuneration Tribunal Act 1995.[711] The appointment of the governing board lasts for up to three years unless provided otherwise through the establishing Act.[712]

Moreover, the Act provides for the vacancies in the office of a director, the resignations and the removal of directors from office.[713] Part 3 of the Act also outlines the duties of directors, the disclosure of interests by directors, as well as other matters of state-owned corporations, which include the provision of state guarantees and the corporations' accountability to the Treasurer.[714] At the same time, the SOE Act also outlines the role of a responsible Minister.[715] Of particular importance is section 37. Section 36 empowers the relevant Minister to bring proceedings for breach of a director's duties, to recover in the name of the state business corporation.[716] The two grounds for the Minister to bring a court action, in terms of section 37, are where the offending party or a third offending party has derived a profit, or the corporation has suffered loss or damage.[717]

Furthermore, sections 23 and 24 of the SOE Act deal with the appointments of boards of directors and their composition. As for the directors, sections 23 and 24 of the SOE Act provide for all state business

[709] Section 79 of the Financial Management Act of 1996. However, in terms of this section, a CEO is disqualified from being chair and/or deputy chair of the governing board of territory authority (section 79(2) of the Financial Management Act of 1996).

[710] Section 78(8) of the Financial Management Act of 1996.

[711] Ibid, section 79(8).

[712] Ibid, section 78 (7).

[713] Section 29 of the State-Owned Enterprises Act 90 of 1992.

[714] Sections 35, 36 & 51 – 53 of the State-Owned Enterprises Act 90 of 1992.

[715] Sections 37 & 54 of the State-Owned Enterprises Act 90 of 1992.

[716] Section 37(a) – (b) of the State-Owned Enterprises Act 90 of 1992.

[717] Ibid.

corporations to consist of 4 and 9 directors, including the chairperson and deputy chairperson. Concerning the directors of all state business corporations, sections 23 and 24 of the SOE Act prescribe a minimum of four (4) and a maximum of nine (9) directors, which include the board chairperson (and its deputy, where the law provides for one).[718] Directors are appointed by the Governor in Council.[719] Section 24 of the SOE Act requires the Governor in Council to have regard to the expertise of a nominee concerning the objectives of the Corporation when making appointments.[720] Meanwhile, sections 25 and 26 deal with the appointment and terms of office of the directors of State-Owned Enterprises.[721] The directors may only be appointed for a renewable term of three years.[722] The director's term of office is determined by the relevant Minister and Treasurer as specified in the instruments of their appointments.[723] Moreover, Part 3 also provides for the appointment of chairpersons and deputy chairpersons,[724] chief executive officers (CEOs) and their deputies.[725]

Further, section 80 of the Financial Management Act gives the governing board the power to appoint the Chief Executive Officer (CEO) in consultation with the responsible Minister.[726] However, there is provision for some instances where the CEO may be appointed by the Director-General [of the State] in consultation with the Minister, should the law so provide.[727] Upon being appointed, the CEO becomes a board member.[728] However, the CEO is by operation of law excused from the board when

[718] Sections 23 & 24 of the State-Owned Enterprises Act 90 of 1992.

[719] Ibid.

[720] Section 25 of the State-Owned Enterprises Act 90 of 1992.

[721] Of the State-Owned Enterprises Act 90 of 1992.

[722] Section 26(1) of the State-Owned Enterprises Act 90 of 1992.

[723] Ibid.

[724] Sections 24 – 26 of the State-Owned Enterprises Act 90 of 1992. See also sections 27 and 28 of this Act which provides for the appointment of acting chairpersons and acting deputy chairpersons, respectively.

[725] Section 40 of the State-Owned Enterprises Act 90 of 1992.

[726] Section 80 (4) of the Financial Management Act of 1996 of 1996

[727] Section 80 (3) of the Financial Management Act 1996 of 1996.

[728] Section 80 (4) of the Financial Management Act 1996 of 1996.

it deliberates on matters in which the CEO is conflicted.[729] The CEO's conditions of appointment are also agreed upon between the CEO and the governing board, subject to the provisions of the Remuneration Tribunal Act of 1995, which regulates the remuneration of office bearers.[730] The functions and powers of the CEO are set out in section 84 of the Financial Management Act of 1996. Once again, this position shows similarities with the practice in South Africa, save for the fact that Australia has one legislation applicable to all State-Owned Enterprises . On the other hand, as discussed in chapter three above, the South African legislation appears fragmented, as most state-owned corporations in South Africa are governed by an individual statute that determines their governance and the appointment of their office-bearers.[731]

In the meanwhile, section 81 of the Financial Management Act empowers the responsible Minister to remove members from the governing board on several grounds.[732] The grounds for terminating a member's appointment include, among others, misbehaviour;[733] breach of the duty to carry out one's functions with honesty, lack of care and diligence, imposed under section 85 of the Financial Management Act of 1996;[734] negligently failing to avoid placing oneself in conflicts of interest, as provided for in terms of section 86 of this Act of 1996;[735] and for failure to disclose interest as required under section 88 of the same Act.[736] Also, directors may be removed from office for a variety of reasons, including a conviction for an offence concerning their office or failure to disclose personal

[729] Section 80 (5) of the Financial Management Act 1996 of 1996.

[730] Section 80 (6) of the Financial Management Act of 1996.

[731] See chapter 3 of this thesis above.

[732] The Financial Management Act of 1996.

[733] Section 81 (2)(b) of the Financial Management Act of 1996.

[734] Section 81 (2)(f) of the Financial Management Act of 1996.

[735] Section 81 (2)(g) of the Financial Management Act of 1996.

[736] Section 81 (2)(h) of the Financial Management Act of 1996.

interests.[737] In addition, the Governor in Council may remove a director from office.[738] Directors may also resign or be removed automatically in case of failure to attend three consecutive meetings without approval, or upon turning 72 years, etc.[739]

The Australian position about the appointment and removal of members of the board of state-owned entities does not differ materially from the South African approach wherein the power to appoint is vested in the relevant Minster. However, the environments in which state-owned corporations operate in the two countries differ. South Africa is a new democracy, whereas Australia has enjoyed a tradition of democracy for some time. As indicated in chapter three above, the appointment process has been abused in South Africa for political expediency. As a result, in South Africa it has proven counterproductive to leave the power to appoint members of boards to the Ministers, as the wide powers of the Ministers has resulted in patronage through the appointment of persons who have contributed to the demise of South African strategic state-owned corporations such as South African Airways (SAA), Transnet, Eskom and the South African Broadcasting Corporations (SABC), among other companies.[740]

Part 4.4.1.1below, discusses the duties of board members in Australia in some detail.

*4.4.1.1 The management of state corporations in Australia*

Section 36 of the State-Owned Enterprises Act 90 of 1992, and sections 85 to 88 of the Financial Management Act 1996 discuss the general duties of board members (directors) of Australian business corporations. In that regard, section 36 of the State-Owned Enterprises Act sets out two general duties of directors of state corporations in Australia. Meanwhile, Part 9 of the Financial Management Act of

[737] Section 30 (5) of the State-Owned Enterprises Act 90 of 1992.

[738] Section 30 (3) of the State-Owned Enterprises Act 90 of 1992.

[739] Section 30 (1)(a)–(d) of the State-Owned Enterprises Act 90 of 1992.

[740] The challenges of state-owned companies have been laid bare in chapter three of this study and the Reports of the Commission of Inquiry State Capture (also highlighted in the same chapter of this thesis).

1996 deals with the duties and functions of governing board members of government corporations. The Act provides for three basic duties of directors of Australian government businesses.[741] First, a director must always act honestly when performing the functions and duties of office, in terms of section 36 of the State-Owned Enterprises Act.[742] The duty to act with honesty requires directors to act in good faith. It is a *fiduciary* duty that directors owe to a corporation. The degree of honesty, care and diligence required of a board member is expected from every director who manages a corporation's affairs.[743] Honesty, in this regard, denotes good faith on the part of a board member. Therefore, the incorporation of 'honesty' into the duty of care and diligence means that the conduct of each board member in discharging functions, should be characterised by good faith.[744]

In the second place, section 36(2) of the State-Owned Enterprises Act obliges directors to always exercise a reasonable degree of care and diligence in the performance of their functions within and outside the country.[745] Meanwhile, section 85 of the Financial Management Act of 1996 reiterates both duties by requiring that individual governing board members should always exercise a degree of honesty, care and diligence in the discharge of corporate duties. As a third duty, section 36(4) of the State-Owned Enterprises Act also precludes directors of state business corporations from making improper use of their position to acquire advantage for themselves or third parties, to the detriment of the state entity as their principal.

As a fourth duty of directors, section 36(3) of the State-Owned Enterprises Act, precludes directors of state business corporations from improperly using information directors happen to be privy to in order

[741] Sections 85, 86 and 88 (read with section 87) of the Financial Management Act of 1996.

[742] Act 90 of 1992.

[743] Section 85 of the Financial Management Act of 1996.

[744] It is of note that the US law incorporates good faith (honesty) into the director's duty of loyalty, which is distinct from the duty of care, skill and diligence.

[745] The State-Owned Enterprises Act 90 of 1992.

to procure an advantage for themselves or to cause harm to the corporation.[746] Also, section 86 of the Financial Management Act 1996 imposes a duty (fifth duty) on members of a governing board to avoid conflicts of interest, by taking all reasonable steps to avoid a situation of conflict between their interest and the official position they occupy.[747]

Lastly, in terms of section 35 of the State-Owned Enterprises Act, directors of state-owned corporations have a duty to disclose interest.[748] Section 88 of the Financial Management Act of 1996 reaffirms the duty of governing board members to disclose any direct or indirect material interest in all matters the governing board considers. The law requires the disclosure of interest to be reported timeously after a board member has become aware of the matter that gives rise to a conflict of interest.[749] In addition, the conflicted member has to recuse himself when the governing board deliberates on the matter in question.[750] Also, in terms of section 89 of the Financial Management Act of 1996, the board chair has by law to report the disclosure, its nature and board decision to the responsible Minister within three months. Essentially, as discussed in the previous chapters above, In Australia the duties of board members of state business corporations are virtually no different from those of directors under South African law.

Moreover, the Financial Management Act of 1996 outlines the functions of the board members in general.[751] Section 82 of this Act discusses the functions of the chairs of the governing board, whereas section 83 deals with the functions of the deputy chairs of governing boards.[752] Among others, the functions of the chairpersons of boards include ensuring a good working relationship between the

[746] Section 36 (3) of the State-Owned Enterprises Act 90 of 1992. This prohibition in terms of this section applies even in the case of former directors.

[747] Section 86 of the Financial Management Act 1996.

[748] Section 35 (1)–(4) of the State-Owned Enterprises Act 90 of 1992.

[749] Section 88 (1) of the Financial Management Act of 1996.

[750] Section 88 (2) of the Financial Management Act of 1996.

[751] Part 9, sections 82 – 84 of the Financial Management Act of 1996.

[752] The Financial Management Act of 1996.

board and the management of the state entity.[753] Such a function is of particular significance and interest for South Africa considering South Africa's experience where board chairpersons have sometimes been responsible for creating a hostile relationship between the board and the management of a state-owned enterprise.[754] Moreover, section 84 of the same Act provides for the functions of CEOs of governing boards.[755] In terms of these functions, a CEO lies at the helm of the entity,[756] while also serving as a bridge between the board and the corporation.[757]

Section 4.4.1.2 below discusses the duties of directors under the Australian law.

*4.4.1.2 The duties of directors in Australia*

Section 36 of the State-Owned Enterprises Act 90 of 1992, and sections 85 to 88 of the Financial Management Act 1996 discuss the general duties of board members (directors) of Australian business corporations. In that regard, section 36 of the State-Owned Enterprises Act sets out two general duties of directors of state corporations in Australia. Meanwhile, Part 9 of the Financial Management Act of 1996 deals with the duties and functions of governing board members of government corporations. The Act provides for three basic duties of directors of Australian government businesses.[758] First, a director must always act honestly when performing the functions and duties of office, in terms of section 36 of the State-Owned Enterprises Act.[759] The duty to act with honesty requires directors to act in good faith. It is a *fiduciary* duty that directors owe to a corporation. The degree of honesty, care and diligence required of a board member is expected from every director who manages a

[753] Section 82 (b) of the Financial Management Act of 1996.

[754] One classic example is that of South African Airways under Ms Myeni, discussed in chapter three of this thesis, who created a hostile relationship between the board and the management of the corporation (see chapter three of this thesis).

[755] The Financial Management Act of 1996.

[756] Section 84 (1)(a)–(b) of the Financial Management Act of 1996.

[757] Section 84 (1)(c)–(d) of the Financial Management Act of 1996.

[758] Sections 85, 86 and 88 (read with section 87) of the Financial Management Act of 1996.

[759] Act 90 of 1992.

corporation's affairs.[760] Honesty, in this regard, denotes good faith on the part of a board member. Therefore, the incorporation of 'honesty' into the duty of care and diligence means that the conduct of each board member in discharging functions, should be characterised by good faith.[761]

In the second place, section 36(2) of the State-Owned Enterprises Act obliges directors to always exercise a reasonable degree of care and diligence in the performance of their functions within and outside the country.[762] Meanwhile, section 85 of the Financial Management Act of 1996 reiterates both duties by requiring that individual governing board members should always exercise a degree of honesty, care and diligence in the discharge of corporate duties. As a third duty, section 36(4) of the State-Owned Enterprises Act also precludes directors of state business corporations from making improper use of their position to acquire advantage for themselves or third parties, to the detriment of the state entity as their principal.

As a fourth duty of directors, section 36(3) of the State-Owned Enterprises Act, precludes directors of state business corporations from improperly using information directors happen to be privy to in order to procure an advantage for themselves or to cause harm to the corporation.[763] Also, section 86 of the Financial Management Act 1996 imposes a duty (fifth duty) on members of a governing board to avoid conflicts of interest, by taking all reasonable steps to avoid a situation of conflict between their interest and the official position they occupy.[764]

Lastly, in terms of section 35 of the State-Owned Enterprises Act, directors of state-owned corporations have a duty to disclose interest.[765] Section 88 of the Financial Management Act of 1996

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[760] Section 85 of the Financial Management Act of 1996.

[761] It is of note that the US law incorporates good faith (honesty) into the director's duty of loyalty, which is distinct from the duty of care, skill and diligence.

[762] The State-Owned Enterprises Act 90 of 1992.

[763] Section 36 (3) of the State-Owned Enterprises Act 90 of 1992. This prohibition in terms of this section applies even in the case of former directors.

[764] Section 86 of the Financial Management Act 1996.

[765] Section 35 (1)–(4) of the State-Owned Enterprises Act 90 of 1992.

reaffirms the duty of governing board members to disclose any direct or indirect material interest in all matters the governing board considers. The law requires the disclosure of interest to be reported timeously after a board member has become aware of the matter that gives rise to a conflict of interest.[766] In addition, the conflicted member has to recuse himself when the governing board deliberates on the matter in question.[767] Also, in terms of section 89 of the Financial Management Act of 1996, the board chair has by law to report the disclosure, its nature and board decision to the responsible Minister within three months. Essentially, as discussed in the previous chapters above, In Australia the duties of board members of state business corporations are virtually no different from those of directors under South African law.

Moreover, the Financial Management Act of 1996 outlines the functions of the board members in general.[768] Section 82 of this Act discusses the functions of the chairs of the governing board, whereas section 83 deals with the functions of the deputy chairs of governing boards.[769] Among others, the functions of the chairpersons of boards include ensuring a good working relationship between the board and the management of the state entity.[770] Such a function is of particular significance and interest for South Africa considering South Africa's experience where board chairpersons have sometimes been responsible for creating a hostile relationship between the board and the management of a state-owned enterprise.[771] Moreover, section 84 of the same Act provides for the functions of CEOs of governing boards.[772] In terms of these functions, a CEO lies at the helm of the entity,[773] while

[766] Section 88 (1) of the Financial Management Act of 1996.

[767] Section 88 (2) of the Financial Management Act of 1996.

[768] Part 9, sections 82 – 84 of the Financial Management Act of 1996.

[769] The Financial Management Act of 1996.

[770] Section 82 (b) of the Financial Management Act of 1996.

[771] One classic example is that of South African Airways under Ms Myeni, discussed in chapter three of this thesis, who created a hostile relationship between the board and the management of the corporation (see chapter three of this thesis).

[772] The Financial Management Act of 1996.

[773] Section 84 (1)(a)–(b) of the Financial Management Act of 1996.

also serving as a bridge between the board and the corporation.[774]

In the next section the writer examines the legal position regarding the governance of State-Owned Enterprises in Canada.

*4.4.2 Canada*

Canadian State-Owned Enterprises are known as Crown Corporations or parent Crown corporations.[775] Whereas Canadian legislation specifically provides for the operations of the crown corporations, SOEs in Canada are generally treated in the same manner as their private counterparts. In other words, Crown Corporations are also subject to the same law that governs business corporations in Canada, including the general principles for the liability of directors. The main legislation that governs all corporations in Canada is the Canada Business Corporations Act (R.S.C., 1985, c. C-44). In addition to the Canada Business Corporations Act (R.S.C., 1985, c. C-44), Crown Corporations are governed by the Financial Administration Act R.S.C., 1985, c. F-11.[776] The management of Canadian Crown corporations is discussed in detail below.

*4.4.2.1 The management of state corporations in Canada*

In Canada section 109 of the Financial Administration Act (R.S.C., 1985, c. F-11) entrusts the management of the affairs of Crown corporations to the boards of directors. The section provides for the board of directors of a Crown corporation to manage the business activities and other general affairs of the corporation.[777] The Governor in Council is responsible for appointing directors of Crown Corporations, on the advice of the relevant Minister.[778] On the other hand, the Minister is responsible

[774] Section 84 (1)(c)–(d) of the Financial Management Act of 1996.

[775] Section 83(1) of the Financial Administration Act R.S.C., 1985, c. F-11.

[776] Part X of this Act is dedicated to the management of Crown Corporations.

[777] Section 109 of the Financial Administration Act (R.S.C., 1985, c. F-11).

[778] OECD 'Boards of Directors of State-Owned Enterprises: An Overview of National Practices, Corporate Governance' (2013) *OECD Publishing*, 90, available at *https://doi.org/10.1787/9789264200425-en*, accessed 12 December 2022).

for the Corporations Law companies and to make nominations for all appointments of directors.[779] In terms of section 103 of the Financial Administration Act, Crown corporation directors are appointed for no more than a period of four years.[780] However, directors are eligible for reappointment.[781] In addition, section 103 strongly recommends that all efforts should be made to prevent the expiry of the term of more than half of the directors in one year.[782] Section 103 of the Act[783] brings two main benefits for the Crown corporation. First, it ensures continuity in the management of the corporation. The provision also prevents the creation of a vacuum in the management of the corporation, while a search is undertaken for replacements, as has been the case, for example, at the South African Broadcasting Corporation which had had to operate without a board of directors since October 2022.[784]

As for the qualification of directors, Canada has not imposed formal qualifications for appointment as a director, nor have any formal guidelines been stipulated in the Financial Administration Act (R.S.C., 1985, c. F-11).[785] However, as an unwritten rule, in Canada Ministers are required to reflect the country's diversity, in terms of linguistic, regional and employment equity in their recommendations.[786] Moreover, the Act prohibits the appointment of officers, employees, or affiliates of Crown corporations into the board of directors thereof. Directors and other officers (namely, the chairperson and the Chief Executive Officer) may resign from serving on the board of directors.[787]

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[779] Ibid. Compare section 105 (1) of the Financial Administration Act (R.S.C., 1985, c. F-11), which provides for the appointment by the relevant Minister, whereas the Governor in Council confirms the appointments.

[780] R.S.C., 1985, c. F-11.

[781] Section 105 (3) of the Financial Administration Act (R.S.C., 1985, c.F-11).

[782] R.S.C., 1985, c. F-11.

[783] Ibid.

[784] Mercedes Besent 'SABC Officially has no Board', *@SABCNews*, 15 October 2022, available at *https://www.sabcnews.com/sabcnews/sabc-officially-has-no-board/,* accessed 27 February 2023.

[785] See OECD op cit note 1289, 90.

[786] Ibid.

[787] Section 107 (1) of the Financial Administration Act (R.S.C., 1985, c.F-11).

The resignation takes effect immediately upon the written notice reaching the corporation.[788]

Vis-à-vis oversight, Canada has no formal oversight mechanisms for vetting prospective directors.[789] Still, sometimes the founding legislation makes a provision for the creation of nomination committees to deal with the recruitment process.[790] Most importantly, the law requires the Boards to establish and maintain board profiles for guiding future government decisions on the suitability of candidates for consideration for future appointments.[791] In terms of the directors appointed to boards, Canadian Boards of directors for Crown corporations are largely independent.[792] In addition, Canada has a fixed remuneration guide for directors of its corporations, based on a ten-level structure. In this manner the Board has no role in determining the remuneration of directors.[793]

In terms of section 88 of the Financial Administration Act, Crown corporations are accountable to the responsible Minister, who is accountable to Parliament as the one with the final oversight over the affairs of the corporation.[794] However, although the performance of directors may sometimes be addressed through audits and *ad hoc* reviews, Canada does not have any formal reviews or the evaluation of the performance of boards of Crown corporations.[795] It is also not mandatory for directors in Canada to undertake self-evaluation, but it is encouraged.[796] As a result, the country has a set of guidelines that have been established by the Treasury Board Secretariat.[797] Where self-evaluations have been conducted, Board chairpersons are required to communicate the findings to the

[788] Ibid.

[789] OECD op cit note 778.

[790] Ibid.

[791] Ibid.

[792] OECD op cit note 789.

[793] Ibid.

[794] R.S.C., 1985, c. F-11.

[795] *OECD Publishing*, 90, available at *https://doi.org/10.1787/9789264200425-en*, accessed 12 December 2022).

[796] Ibid.

[797] Ibid.

respective Minister and to sometimes informally inform future nomination process.[798]

Moreover, Part X of the Financial Administration Act[799] provides for detailed management and control of the financial affairs of crown corporations.[800] Meanwhile, section 138 of this Act provides for a special examination of the Crown corporations on a ten-year basis[801] and the presentation of those reports to the responsible Minister and the President of the Treasury.[802] In terms of section 142 of the Act, the auditor of Crown corporations (including the Auditor General of Canada)[803] is tasked with the special examination of Crown corporations envisaged in section 138 of the Act.[804] This measure comes in addition to the annual auditing of Crown corporations by the auditor of crown corporations appointed annually by the Governor in Council in terms of section 134 of the Act[805] and/or the Auditor General of Canada.[806]

All the above mechanisms provided for by the Financial Administration Act are measures designed to effect the oversight of Crown corporations in Canada. Worth special mention are the strong auditing measures designed to ensure financial accountability of Crown corporations and their management boards. The Canadian legislative provisions for auditing state-owned corporations do not differ materially from the South African position. Furthermore, Canadian law provides for an extra layer of

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[798] Ibid.

[799] Division III, sections 120-152 of the Act (R.S.C., 1985, c. F-11).

[800] These matters range from the financial year and budgets of Crown corporations; to the borrowing; the bank accounts; the payment of dividends; their financial management; the auditing and auditors' reports; the appointment of auditors; special examinations, examiners' reports and the like.

[801] Section 138(1) of the Act (R.S.C., 1985, c. F-11).

[802] Sections 139 of the Financial Administration Act (R.S.C., 1985, c. F-11).

[803] Sections 142 (5) of the Financial Administration Act (R.S.C., 1985, c. F-11).

[804] The Financial Administration Act (R.S.C., 1985, c. F-11).

[805] Ibid.

[806] Sections 134 (2) of the Financial Administration Act (R.S.C., 1985, c. F-11).

financial oversight in the form of a special examiner (examination) of Crown corporations.[807]

The duties of directors are discussed below. Thereafter, the liability of directors in relation to the corporation are discussed.

*4.4.2.2 The duties of directors of Crown corporations in Canada*

Under the Financial Administration Act (R.S.C., 1985, c. F-11), four duties of directors and other officers of Crown corporations are recognised in Canadian law. Mainly these are the *fiduciary* duty and the duty of care, as well as the duty to disclose interest and the duty to comply with the provisions of the Financial Administration Act and other legal instruments.[808] Section 115 of the Financial Administration Act enjoins directors and officers of Crown corporations to always 'act honestly and in good faith' as well as to consider the corporation's best interests.[809] The latter is a *fiduciary* duty of directors and all officers of Crown corporations. The duty to act honestly and in good faith implies applying loyalty in the discharge of a director's functions towards the corporation.[810] Central to the duty to act honestly and in good faith is one of the 'subjective motivation' of the director (or officer) of the corporation.[811]

Meanwhile, section 115 (1)(b) of the Financial Management Act obliges directors and officers of a corporation to 'exercise the care, diligence and skill' in exercising their powers and discharging their duties as directors.[812] In terms of the Act, the standard of care (diligence and skill) that the law requires of a director of a corporation and officers is one of 'a reasonably prudent' director or officer 'in

[807] Sections 138 of the Act. This measure is also in addition to internal audit committees of Crown corporations in terms of section 148 of the Financial Administration Act (R.S.C., 1985, c. F-11). The internal committee is in addition to the independent audits provided for in sections 132 and 134 of the Financial Administration Act (R.S.C., 1985, c. F-11).

[808] Sections 115–18 of the Financial Administration Act (R.S.C., 1985, c. F-11).

[809] Section 115(1)(a) of the Financial Administration Act (R.S.C., 1985, c. F-11). The corporation's best interests include the shareholders' and long-term interests of the corporation (section 122(1.1) of this Act).

[810] See the discussion of the duties of directors in respect of the US law in part 6.5 below in this thesis.

[811] *Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68 (CanLII), [2004] 3 SCR 461, para 64. See also *Soper v. Canada,* [1998] 1 F.C. 124, at para. 41.

[812] Financial Administration Act (R.S.C., 1985, c. F-11).

comparable circumstances'.[813] The test for reasonableness is an objective standard which involves interrogating all the facts surrounding the conduct of the director or officer.[814] When a director was being sued for breach of their duties under sections 118 and 119, he may rely on the reasonable diligence defence.[815] This defence is in terms of section 123 (4), which provides that a director will not be liable if he has exercised the care, diligence and skill of a reasonably prudent director.[816] The good faith of a director relying on the statements of the corporation's officer and the reports of experts or professionals, will also serve to exonerate a director from personal liability.[817] Section 122 of the Canada Business Corporations Act (R.S.C., 1985, c. C-44) also applies to corporations in general. It reiterates the two basic duties of directors and other officers of all corporations in Canada.[818]

Furthermore, section 116 of the Financial Administration Act deals with the duty of disclosure. This section obliges directors (and officers) of crown corporations who are party to a (proposed) material contract to disclose their contractual interest.[819] Alternatively, directors or officers may request the board to record the nature and extent of their interest in the minutes of the board of directors.[820] In addition, section 115 enjoins directors and officers of a crown corporation who have a material interest in any person who is a party to a proposed contract to disclose the nature and extent of the interest in writing to the corporation.[821] The disclosure is effected in terms of subsections 116(2) and (4) of the

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[813] Section 122 (1)(b) of the Financial Administration Act (R.S.C., 1985, c. F-11). See *Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68 (CanLII), [2004] 3 SCR 461.

[814] *Peoples Department Stores Inc.* supra, para. 41.

[815] This defence is addition to the business judgment 'limitation' (defence) to the director's corporation liability in Canada.

[816] The Canada Business Corporations Act ((R.S.C., 1985, c. C-44).

[817] Section 123 (4)(a)–(b) of the Canada Business Corporations Act ((R.S.C., 1985, c. C-44)

[818] Section 122 (1)(a) of the Canada Business Corporations Act (R.S.C., 1985, c. F-11). The corporation's best interests include the shareholders' and long-term interests of the corporation (section 122(1.1) of this Act). The Canada Business Corporations Act (R.S.C., 1985, c. F-11) applies to all corporations in Canada, in general.

[819] Section 116 (1)(a) of the Financial Administration Act (R.S.C., 1985, c. F-11).

[820] Section 116 (1)(b) of the Financial Administration Act (R.S.C., 1985, c. F-11).

[821] Ibid.

Financial Administration Act.[822] The failure to disclose an interest entitles the corporation or the Crown to have the contract set aside by a court of law, upon application to that effect.[823]

Moreover, in terms of section 115 of the Financial Administration Act, Crown corporation directors have a duty to comply with all the provisions of Part X of the Financial Administration Act.[824] As part of this duty,[825] directors (and officers) of Crown corporations should comply with the regulations, the charter, the by-laws, and the directives of the Governor in Council issued under section 89 of the Financial Administration Act (R.S.C., 1985, c. F-11).[826] To comply with this duty, directors have to familiarise themselves with the laws and regulations that apply to Crown corporations. Thus, being a director or an officer of a Crown corporation in Canada carries a responsibility that may not be taken lightly. As a result, breach of that responsibility incurs civil and criminal liability.

Part 6.3, below, will discuss the management of state-owned corporations as well as the duties of directors in the People's Republic of China (China).

*4.4.3 The People's Republic of China*

The main legislation dedicated to State-Owned Enterprises in China is the Law of the People's Republic of China on State-Owned Assets in Enterprises.[827] This legislation which came into effect in May 2009, complements the PRC's Companies Law.[828] The focus of this Law is on the state

[822] R.S.C., 1985, c. F-11. See also 117 of this Act regarding the effect of disclosure on the contract.

[823] Section 118 of the Financial Administration Act (R.S.C., 1985, c. F-11).

[824] R.S.C., 1985, c. F-11, section 115(2).

[825] Section 115 of the Financial Administration Act.

[826] Section 115 (2) of the Act.

[827] Order no. 5 of 2008. In terms of this Law, 'State-Owned Assets in Enterprises', refers to the rights and interests in the country's enterprises (companies) arising out of various state investments in the state-owned enterprises (Article 2 of the Law).

[828] Company Law of the People's Republic of China (2018 Revision).

interests (ownership) in the assets of all the country's State-Owned Enterprises (companies).[829] The Law of the People's Republic of China on State-Owned Assets in Enterprises is a single legislation which applies in respect of all State-Owned Enterprises, regardless of its founding law. This legislation is a comprehensive law that deals with every aspect of the management or leadership of China's State-Owned Enterprises . The Law was enacted as a further stage in the series of restructuring of State-Owned Enterprises which began in 1978.[830] As its main objective, the Law of the People's Republic of China on State-Owned Assets in Enterprises was intended to achieve the corporatization of China's state entities, through the transfer of their leadership from the government to independent boards.[831] The legislation comprises nine chapters and deals with, among others, the selection and appraisal of managers of state-invested businesses,[832] their supervision and the legal liability of directors and other managers.[833] In the section below, the writer dissects the key provisions entailed in this piece of legislation having a bearing on the broad investigation of the legal liability of directors.

First, as its main purpose, the Law of the People's Republic of China on State-Owned Assets in Enterprises, seeks to safeguard the basic economic system and to strengthen the protection of state-owned assets in China.[834] The Law is also intended to give effect to China's state-owned economic sector in the whole economy of the Republic.[835] At the same time, the legislation is intended to consolidate and expand the state-owned economic sector.[836]

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[829] Karen Jingrong Lin, Xiaoyan Lu, Junsheng Zhang, & Ying Zheng 'State-owned enterprises in China: A review of 40 years of research and practice' (2020) 13(1) *China Journal of Accounting Research* 31, available at *https://doi.org/10.1016/j.cjar.2019.12.001,* accessed 12 December 2022.

[830] Chen, Firth, Gao & Rui 'Ownership Structure, Corporate Governance, and Fraud: Evidence from China' (2006) 12 *Journal of Corporate Finance* 424, available at *10.1016/j.jcorpfin.2005.09.002*, accessed 12 December 2022; Lin, Lu, Zhang & Zheng op cit.

[831] Lin, Lu, Zhang & Zheng op cit note 829.

[832] This is how the legislation refers to the country's state-owned companies.

[833] Chapter VIII of the Law of the People's Republic of China.

[834] Article 1 of the Law.

[835] Ibid.

[836] Ibid.

Chapter III of the Law is wholly dedicated to state-invested enterprises. Chapter III affords SOEs a measure of autonomy in their affairs by minimising government intervention in their management.[837] The state companies exercise the independent management of their affairs within the precincts of the law. Article 17 of the Law enjoins state companies to observe laws and administrative regulations, under the supervision of the government as well as to accept the supervision of the general public, in their business operations. The Law requires such government and public supervision to be legally exercised.[838] Article 17 also obliges State-Owned Enterprises to strive to achieve better economic results.[839] This provision thus stresses the need for state-owned corporations in China and the highest standard of ethics expected of the directors of SOEs therein. The management of SOEs in China is discussed in more details below, in some detail.

*4.4.3.1 The management of state corporations in China*

Chinese State-Owned Enterprises are overseen by the State-owned Assets Supervision and Administration of the State Council (SASAC). However, Chines SOEs have independent boards of directors responsible for the management of state-invested businesses.[840] The SASAC is responsible for issuing regulations and guidelines on the operation of boards of directors of Chinese central State-Owned Enterprises (SOE).[841] In line with this mandate, the SASAC has established guidelines on a variety of matters, such as aligning the governance of central SOEs with Company Law as well as Interim Regulations on the Supervisors and Administration of State-Owned Assets of Enterprises.[842] In some instances, the SASAC has piloted the improvement of the governance of SOEs. This

[837] Articles 16–17 of Order No. 5 of 2008.

[838] Ibid Article 17.

[839] Ibid.

[840] Chapter IV (articles 22–29) of the Chinese SOEs Assets Law is dedicated to selecting and evaluating state-invested enterprises' managers.

[841] OECD op cit note 778.

[842] Ibid.

manoeuvre has led to the enhancement of the responsibility of boards, as well as to the corporatisation of central state-owned corporations[843] The SASAC is also entrusted with the power to determine an appropriate level of the remuneration package for directors of the country's state-owned corporations.[844] In China the remuneration package of directors comprises basic annual remuneration, allowances for attendance at board meetings, and allowances for board committees.[845] However, China does not place any legal limitations on the package for directors' remunerations.[846]

In addition to independent boards of directors, State-Owned Enterprises in China have boards of supervisors. Article 19 obliges wholly State-Owned Enterprises , state-owned capital holding companies and state-owned-capital joint stock companies to set up boards of supervisors, as permitted under the country's Companies Law.[847] In respect of wholly State-Owned Enterprises , boards of supervisors are appointed by institutions tasked with performing the functions of the contributor, under the State Council regulations.[848] The main responsibility of boards of supervisors is the supervision of the boards of directors and senior managers in the performance of their duties.[849] Boards of supervisors are also tasked to supervise and inspect the financial status of each state-invested enterprise.[850]

As for appointment to SOE boards, directors and supervisors need to meet four requirements; namely, be persons of good conduct; possess expertise and work capabilities appropriate for their position; be physically fit to perform their normal duties; and must also meet any other requirements prescribed in

[843] Ibid.

[844] Ibid.

[845] Ibid.

[846] Ibid.

[847] Article 19 of the Law (Order No. 5 of 2008).

[848] Ibid.

[849] Ibid.

[850] Ibid.

terms of other laws and administrative regulations.[851] The prospective board members must command professional knowledge and competency.[852] Most importantly, candidates should be persons of good character to qualify for appointment as board members.[853] The legislation requires that persons to be appointed must be examined by the appointing authority before their appointment to serve on the boards of state-owned entities, in terms of the prescribed requirements and procedures.[854] Directors and supervisors also require permission from the relevant appointing authority for concurrent appointment in other positions in other entities.[855]

Directors and senior managers are appointed and removed from office in terms of the provisions of the laws, administrative regulations and the articles of association of the enterprises.[856] The appointing authority[857] may remove or suggest the appointment or removal of the personnel of state-invested enterprises listed in this article.[858] The authority may appoint and remove chairpersons and vice-chairpersons of boards of directors, the directors, chairpersons of the boards of supervisors and supervisors of wholly State-Owned Enterprises .[859]

In addition, China observes a system of external directors' pool, and a body called the Professional Qualification Review Committee for External Directors (PQRCED).[860] As its main function, this

[851] Article 23(1) – (4) of the Law (Order No. 5 of 2008).

[852] In terms of the Regulations on State-Owned Assets of Enterprises, Order No. 5 of 2008 (see OECD op cit, 'Privatisation and the Broadening of Ownership of State-Owned Enterprises' (2018) *OECD* 14, available at *https://www.oecd.org/daf/ca/Privatisation-and-the-Broadening-of-Ownership-of-SOEs-Stocktaking-of-National-Practices.pdf*, accessed 12 December 2022.

[853] Ibid.

[854] Article 24 of the Law (Order No. 5 of 2008).

[855] Ibid, Article 25.

[856] Ibid, Article 22 (1).

[857] Among these individuals are the presidents, vice presidents, financial officers and senior managers of wholly state-owned enterprises (Ibid, Article 22 (1).

[858] Ibid, Article 22 (1)–(3).

[859] Ibid, Article 22 (2).

[860] *OECD* Privatisation and the Broadening of Ownership of State-Owned Enterprises (2018) OECD 14, available at https://www.oecd.org/daf/ca/Privatisation-and-the-Broadening-of-Ownership-of-SOEs-Stocktaking-of-National-Practices.pdf accessed 12 December 2022.

Committee reviews prospective candidates for board directors before they are included in the pool of the country's prospective directors of State-Owned Enterprises.[861] The practice of maintaining a pool system for prospective directors is a laudable initiative with some benefits for state-owned corporations. The practice ensures that there is a good turnaround time for finding a replacement in the case of a vacancy on the board. In addition, the pool maintenance system has the advantage to also positively impact the quality of directors appointed to the board as candidates' qualifications and character are matters of open knowledge. This system ensures transparency in the appointment process from participating candidates. The practice can also help broaden the scope of eligible candidates and prevent the recycling of the same individuals around different State-Owned Enterprises, as unfortunately happens in South Africa.[862]

China observes two ways of securing an appointment to a board of directors of state corporations. One may be nominated directly by the SASAC, the unit endowed with ownership of China's central state corporations.[863] The SASAC unit has the responsibility to nominate persons to serve on boards of state companies.[864] External directors may also be recruited through an open selection process.[865] The relevant boards may also recommend persons for appointment to the board, whereas interested persons may also recommend themselves for appointment as board members.[866] The SASAC is the body that screens applications for aspirant directors.[867] However, the SASAC is required to consult with relevant departments, line ministers, the central SOEs and industrial associations as they play an advisory role

[861] Ibid.

[862] The problem of recycling the same individuals even with a poor track record is discussed above in chapter 3 of this thesis.

[863] *OECD* op cit note 854.

[864] Ibid.

[865] Ibid.

[866] Ibid.

[867] Ibid.

to the agency when appointing directors.[868]

The first requirement is significant in that it leaves no room to deploy persons who have been implicated in corruption and other wrongdoing, as has usually been the case in South Africa before. Equally significant is the second requirement that nominees must possess the appropriate necessary expertise and experience. This diligence is also in contrast with the practice in South Africa where cadre deployment has been responsible for parachuting unqualified individuals into the management of critical state entities. As indicated in the previous chapter of this report, the results have been disastrous for the country's strategic state-owned corporations, such as Eskom, SAA and Transnet.
In the following section, the duties of directors in China are discussed.

*4.4.3.2 The duties of directors in China*

Article 26 of the Law sets out the duties of directors, supervisors and senior managers of state-invested businesses in China.[869] In addition to the requirement for directors to observe laws, administrative regulations and the articles of association of enterprises, office bearers are expected to be loyal to the enterprise and to work diligently.[870] The law also expressly forbids incumbents from taking or accepting bribes and abusing their positions by procuring any contracts to make unlawful gains or illegitimate benefits for themselves.[871] Persons in positions of directors, supervisors and senior managers are prohibited from engaging in acts that will place the rights and interests of the state entities in jeopardy.[872] Directors, supervisors and senior managers may not make major decisions that are *ultra vires* their powers or not sanctioned by law or procedures.[873]

[868] Ibid.

[869] Order No. 5 of 2008, supra.

[870] Ibid, Article 26.

[871] Ibid.

[872] Ibid.

[873] Ibid, Article 27.

Article 26 of the Law sets out the duties of directors, supervisors and senior managers of state-invested businesses in China.[874] In addition to the requirement for directors to observe laws, administrative regulations and the articles of association of enterprises, office bearers are expected to be loyal to the enterprise and to work diligently.[875] Incumbents are also forbidden from taking or accepting bribes and abusing their positions by procuring any contracts to make unlawful gains or illegitimate benefits for themselves.[876] Persons in positions of directors, supervisors and senior managers are precluded from engaging in acts that will place the rights and interests of the state entities in jeopardy.[877] Directors, supervisors and senior managers may not make major decisions that are *ultra vires* their powers or not sanctioned by law or procedures.[878]

In addition, in terms of the law, principal personnel at the head of State-Owned Enterprises are subject to an annual lifestyle audit for financial accountability. The audits are carried out by authorised competent institutions representing the government.[879] Moreover, the Chinese Companies Law requires SOEs to establish sound financial and accounting systems to provide truthful financial and accounting information to the respective contributors.[880] In addition, the law obliges state-invested businesses to distribute profits to the contributing entities, according to the provisions of the law, and their articles of association.[881]

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[874] Order No. 5 of 2008, supra.

[875] Ibid, Article 26.

[876] Ibid.

[877] Ibid.

[878] Ibid, Article 27.

[879] Ibid. See also Chapter V section 3 Articles 43–6 that regulate the relationship and transactions between State-Owned Enterprises and affiliated parties (i.e., persons appointed in positions of authority and their spouses).

[880] Article 18 of Order No. 5 of 2008. The contributors refer to various government investors in state-owned enterprises, which will be various levels of government and departments.

[881] Ibid.

competent institutions representing the government.[882] Moreover, the Chinese Companies Law requires SOEs to establish sound financial and accounting systems to provide truthful financial and accounting information to the respective contributors.[883] In addition, the law obliges state-invested businesses to distribute profits to the contributing entities, according to the provisions of the law, and their articles of association.[884]

The next section of the study explores the law in the United Kingdom (UK), regarding the governance of State-Owned Enterprises.

*4.4.4 The United Kingdom*

The main legislation governing all corporations in the UK is the Companies Act of 2006 (C. 46). However, the United Kingdom has also promulgated the UK Corporate Governance Code. Furthermore, UK observes the common law rules and equitable principles in addition to the Companies Act of 2006 (C. 46). The code, common law rules and principles regulate corporations throughout the UK jurisdiction.[885] The management of corporations and duties of directors may be found in the Companies Act of 2006 (C. 46),[886] the UK Corporate Governance Code, the common law rules and equitable principles.[887] In this part of the study, the focus will be on the powers and duties of directors in the UK jurisdiction, and the personal liability of directors under UK law. The discussion starts with the powers and duties of directors as laid down in the laws of the United Kingdom.

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[882] Ibid. See also Chapter V section 3 Articles 43–6 that regulate the relationship and transactions between State-Owned Enterprises and affiliated parties (i.e., persons appointed in positions of authority and their spouses).

[883] Article 18 of Order No. 5 of 2008. The contributors refer to various government investors in state-owned enterprises, which will be various levels of government and departments.

[884] Ibid.

[885] Section 170(3) of the Companies Act of 2006 (C. 46).

[886] Sections 170-77 of the Companies Act of 2006 (C. 46).

[887] Section 170 (3) of the Companies Act of 2006 (C. 46).

*4.4.4.1 The management of government corporations in the United Kingdom*

The UK law does not distinguish between state-owned and private companies. As in other jurisdictions around the world, the affairs of State-Owned Enterprises in the UK are managed through the boards of directors. Section 154 of the Companies Act of 2006 (C. 46) requires companies to appoint directors to manage their affairs. Section 155 of the Act deals with provisions about the composition of the board and requires at least one director to be a natural person.[888] Generally, the majority of directors appointed to Boards of SOEs in the UK are independent, although Shareholder representatives do sit on Boards, particularly when there is a need for public presence therein.[889] The United Kingdom does not stipulate formal qualifications requirements for appointment to a board of SOE. However in practice, the relevant Secretary of State appoints the candidates based on their knowledge and experience of the sector in question, and whether the skills of the nominees are relevant to the economy.[890] The Board's involvement is about the development of specialisation for the position, shortlisting, and interviewing candidates.[891] The general office of the Commissioner of Public Appointments (OCPA) has a set of guidelines for the recruitment process.[892] In the case of directors of SOEs, vacancies are advertised and the Shareholder Executive and the SOE normally shortlist the applicants for an interview.[893] Thereafter, the preferred candidate will be recommended to the Minister for the appointment.[894] The SOE Chair and the Shareholder Executive agree on the skills and experience required and produce a strategic plan for public appointments.[895] Other stakeholders, such as non-government shareholders, only get involved in the selection process in terms of their voting

[888] Part 10 chapter 2 of the Companies Act of 2006 (C.46) comprise sections 170 to 181.

[889] OECD op cit note 778.

[890] Ibid.

[891] Ibid.

[892] Ibid.

[893] Ibid.

[894] Ibid.

[895] Ibid.

rights or shareholders agreement, should there be such agreements in place.[896] The Secretary of State of the Ministry that sponsors State-Owned Enterprises is vested with the power to appoint directors of boards of state-owned corporations.[897] In short, the UK has a formal recruitment process for boards in which the current board (through the SOE Chair) cooperates with the Shareholder Executive at various stages of the recruitment process.[898]

In the UK, the board is formally evaluated, and the Shareholder Executive (ShEx) would appraise individual Board members on an *ad hoc* basis, usually annually and every three years.[899] The company also undertakes regular reviews of the performance and composition of the boards.[900] The Chairs of the State-Owned Enterprises are also expected to perform an internal review of the boards' performance annually.[901] Such reviews could be self-evaluations or conducted through external facilitators, depending on the circumstances prevailing at the time.[902] In the case of South Africa, the recent proposals by the South African Minister of Public Enterprises, as discussed in chapter 4 above, is an attempt to harmonise the South African evaluation with similar international trends.

As for the remuneration of board members, the remuneration are overseen by the Department for Business as the policy requires approval by the Senior Remuneration Oversight Committee (SROC).[903] In the meanwhile, additional approval from the Chief Secretary to the Treasury is required for any remuneration package exceeding the Prime Minister's salary (currently at £161,401).[904] The board's involvement in determining the package is through the Remuneration Committee or Company

[896] Ibid.

[897] Ibid.

[898] Ibid.

[899] Ibid.

[900] Ibid.

[901] Ibid.

[902] Ibid.

[903] Ibid.

[904] Ibid

Secretary, where there is no Committee, which prepares proposals for the remuneration framework that informs individual appointments' discussions.[905]

The following section explores the duties of company directors in the UK, including directors of state-owned corporations.

*4.4.4.2 The duties of directors*

The general duties of corporate directors under UK law are contained in Part 10, chapter 2 of the Companies Act of 2006 (C. 46).[906] Sections 170–177 of the Companies Act 2006 codify the long-standing common law duties of company directors. The Act lists seven general duties of directors.[907] The duties of company directors are the duty to act within the powers permitted to a director;[908] the duty to promote the success of the company;[909] the duty to exercise independent judgment;[910] the duty to exercise reasonable care, skill and diligence;[911] the duty to avoid conflicts of interest;[912] the duty not to accept benefits from third parties;[913] and the duty to declare interest in any proposed transaction or arrangement.[914] Most of the duties in sections 171 to 177 of the Act of 2006 (C. 46) follow familiar common law lines, but there are some important innovations.

A director's duty to act within the given powers entails that the director must act as the company's constitution provides and exercise powers only for the purpose for which the powers are conferred.[915]

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[905] Ibid.

[906] Part 10 chapter 2 of Act of 2006 (C.46) comprises sections 170 to 181.

[907] Section 175 of the Companies Act of 2006 (C. 46) is a duty to avoid conflicts of interest.

[908] Section 171 of the Companies Act of 2006 (C. 46). Most of the provisions about the duties of directors came into effect in October 2007, except for section 175 which came into effect in April 2008.

[909] Section 172 of the Companies Act of 2006 (C. 46).

[910] Ibid, section 173.

[911] Ibid, section 174.

[912] Ibid, section 175.

[913] Ibid, section 176.

[914] Ibid, section 177.

[915] Ibid, section 171.

Section 171(a) enjoins company directors to comply with all the directions stipulated in the constitution of the company regarding the organisation and administration of the affairs of the company. In addition, directors must comply with any limitations laid down in the company's constitution, on whatever activities a company may validly engage in. In consequence, every director must familiarise him or herself with the contents of the constitution governing his or her own company. Moreover, this duty prohibits directors from abusing their power by using their powers for any purpose that falls outside the scope of the powers conferred by the company constitution.[916]

Meanwhile, the duty to promote the success of the company[917] is the most fundamental of the general duties of directors and is central to the performance of other duties of directors that the legislation provides. As required by this duty, a director is obliged to exercise his powers in good faith and consider the option that is best likely to advance the success of the company and the body of its members.[918] The section lists some of the factors that a director must take into regard, such as the long-term consequences of his decision; the interests of its employees; the impact of the decision on the operations of the company; and the desirability of maintaining the best reputation that will conduce to the utmost business standards, among others.[919] Alternatively, if it is not for the benefit of the members of the company and depending on the nature of the company, directors must exercise their powers in good faith, to achieve the purpose of the company.[920] This principle is especially apt in the case of State-Owned Enterprises which are created to help the government to fulfil its mandate of service delivery and social upliftment. In this regard, each director must consider how his decision will help advance those objectives or the long-term effect of their decision on the government's

[916] Section 171 (b) of Act of 2006 (C. 46).

[917] Section 172 of the Act.

[918] Section 172 (1) of the Act of 2006 (C. 46). Creditors do not form part of the members of the company, in the absence of any law that provides for their inclusion as those to whom directors owe this duty (see section 172(3) 0f the Companies Act of 2006 (C. 46)).

[919] Section 172 (1)(a)–(f) of the Act of 2006 (C. 46).

[920] Section 172 (2) of the Act.

delivery of services to the citizens. Essentially, this is the equivalent of the duty of loyalty in other jurisdictions like the United States of America and the duty to act in good faith in other common law jurisdictions, like South Africa.

Moreover, directors ought to exercise independent judgment.[921] This duty entails that a director must not be improperly influenced to act (or not act) in a particular way. A director must not act in concert with others, but his decision must be his own decision, subject only to the constitution of the company.[922] However, directors are allowed to act in terms of an agreement contracted not in contemplation of a particular decision to be taken by the board.[923] Further, directors owe the company a duty to exercise reasonable care, skill and diligence in terms of the Act.[924] The care, skill and diligence expected of a director are those which would be expected from any 'reasonably diligent person of general knowledge, skill and experience'.[925] This is the objective part of the test for compliance with this duty of care, skill and diligence. However, the law also considers the 'general knowledge, skill and experience' of the director in question.[926] This is the subjective part of the test for the diligence of a director, for it considers his personal experience. So, the test for compliance with this duty is both objective and subjective.

The reference to a 'reasonably diligent person' obligates an ignorant and inexperienced director to rise to the level of a reasonably diligent person in the circumstances and holds a director to the standard of a reasonably prudent director with that special skill and knowledge. Notwithstanding the subjective aspect of the test, in interpreting the meaning of 'skill', no allowance is made by the courts for any shortcoming such as lack of skill, knowledge or intelligence. Still, in applying this test, the courts will

[921] Section 173 of the Act of 2006.

[922] Section 173 (1) of the Act.

[923] Section 173 (2) of the Act.

[924] Section 174 (1) of the Act.

[925] Section 174 (2)(a) of the Act.

[926] Section 174 (2)(b) of the Act.

also consider such factors as the qualifications of a director, the information that was available to him at the time of making the decision, the alternatives that were available to the decision maker at the time, the significance of the action and similar factors.

As indicated earlier, the other duty of a director is the duty to avoid conflicts of interest, in terms of section 175 of the Companies Act of 2006 (C. 46). To discharge this duty, a director must not place himself in situations of direct or indirect conflict or possible conflict of interests between his interest, on the one hand, and the interests of the company he serves, on the other.[927] The conflict that directors must avoid includes a conflict of interest and duties.[928] This duty would arise, for example, in situations of exploitation of property, information and business opportunities.[929] However, the Act provides for exceptions where the conflict of interest does not arise or which does not amount to a breach of duty.[930] The duty to avoid conflicts of interest will subsist even after a person has ceased being a director which means that erstwhile directors still owe a duty to avoid conflicts of interest.[931] Also, directors have a duty not to accept benefits from third parties.[932] This duty applies in respect of benefits offered to a person by his position as a director or his doing something or refraining from doing anything as a director of a company.[933] As in the case of the duty to avoid conflicts of interest, the section provides for exceptions to the rule.[934] Lastly, as a further duty, directors must declare interest in any proposed transaction and/or arrangement.[935] In terms of this duty, a director must

[927] Section 175(1) of the Act.

[928] Section 175(7) of the Act.

[929] Section 175(2) of the Act.

[930] Section 175(3)–(4) of the Companies Act of 2006 (C. 46). The subsections exempt conduct falling within situations such as a relationship with the company concerning a transaction or arrangement with the company and where the situation cannot be reasonably regarded as likely to amount to a conflict of interest or directors have given their authorisation (section 175 (3)–(4) of the Act).

[931] Section 170 (2) of the Act.

[932] Section 176 of the of the Act.

[933] Section 176 (1)(a)–(b) of the Act.

[934] Section 176 (4)–(5) of the Act.

[935] Section 177 of the Act.

declare any direct or indirect interest in any such transaction or arrangement to other directors.[936] To satisfy this duty, a director is required to declare the nature and extent of his interest in the proposed transaction and/or arrangement.[937] The declaration of interest is done in terms of Part 10 chapter 3 of the Companies Act of 2006 (C. 46).[938]

The following section examines the legal position regarding the management of State-Owned Enterprises in the United States of America (US) and the directors' *fiduciary* duties.

### *4.4.5 The United States of America*

The United States (US) distinguishes between corporations owned by the states (sgcs) and corporations owned by the Federal Government (fgcs). The country observes two types of state-owned corporations. The first are wholly owned government corporations, and the second are partly-owned government corporations.[939] In this chapter, although an attempt is made to define a government corporation, in the end the chapter only provides a list of wholly owned and mixed government corporations.[940] In other words, the Code does not define government corporations in terms of their characteristics.[941] Whereas legislation purports to define a Government Corporation, it does not define corporations in terms of their characteristics. Instead, the Act merely enumerates corporations that are classified as wholly owned government corporations and partly owned government corporations.[942]

#### *4.4.5.1 Management of State-Owned Enterprises in the United States*

The American government corporations are autonomous companies and are operated independently

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[936] Section 177 (1) of the Act.

[937] Ibid.

[938] Part 10, chapter 3 covers sections 182–87 of the Act.

[939] See Government Corporations Control Act of 1745 (31 U.S.C. et seq.), §9101(1).

[940] §§9101(1) - (3) of the U.S.C. 31 of 1982.

[941] K.R Kosar 'Federal Government Corporations (Report): An Overview of' (2011) , available at *https://sgp.fas.org/crs/misc/rl30365.pdf · pdf file,* accessed 12 December 2022.

[942] See Government Corporations Control Act of 1745 (31 U.S.C. *et seq.),* §9101(1)–(3).

of government. Corporations are established and run in terms of various pieces of legislation.[943] Government agencies may establish or acquire a corporation to act as the agents in the fulfilment of their duties or mandate in terms of the USC.31.[944] If not assigned an independent status, corporations are located within various executive departments.[945] In the US the oversight of federal government corporations is exercised through a network of statutes and various statutory bodies. However, the US does not operate a central unit responsible for designing and supervising government corporations, as is the case with China.[946] In contrast, the US exercises minimal central agency oversight over federal government corporations.[947] Instead, federal government corporations are assigned to Committees of subject-matter jurisdiction.[948] They are also subject to the supervision of the Committee on Government Operations of the House of Representatives and the Committee on Governmental Affairs of the Senate.[949] Federal Government Corporations have to account to the committees of the US government. In terms of the US Code Title 31, US federal government corporations are also subject to the oversight of the Inspector General and/or the Comptroller General, as well as Congress and, ultimately, the United States President.[950]

Several statutes govern government corporations and are responsible for the overall oversight of the fgcs. For example, the 'Money and Finance' of 1982 (the US Code Title 31 (USC. 31)), regulates the financial affairs of government corporations in the US. This Code is the equivalent of the PFMA of South Africa. Chapter 91 of the Code deals with the establishment of wholly owned federal government corporations, their obligations (debts), the accounts, the management reports and their

[943] Kosar op cit note 941.

[944] See §9102 of the 'Money and Finance' of 1982 (the US Code Title 31 (U.S.C. 31),

[945] Kosar op cit note 941.

[946] Ibid.

[947] Ibid.

[948] Ibid.

[949] Ibid.

[950] The Money and Finance' of 1982 (the US Code Title 31 (U.S.C. 31), see §9101.

audits. Further statutes that apply to government corporations include the Government Corporations Control Act (GCCA; 59 Stat. 841; 31 USC. 9101-10); the Federal Managers Financial Integrity Act of 1982; the Ethics in Government Act of 1978; the Inspector General Act of 1978 (Inspector General Reform Act of 2008); the Chief Financial Officers Act of 1978; the Anti-Deficiency Act of 1884 (as amended); the Government Performance and Results Act of 1993; the Securities Act of 1933; the Securities Exchange Act of 1934; the Accounts Reform and Investor Protection (Sarbanes -Oxley (SOX)) Act of 2002; the Federal Tort Claims Act of 1946; and the Federal Property and Administrative Services Act of 1949. Some of the above statutes may be referred to in this part of the study.

According to an official study of federal government corporations conducted in the US 2011, the country's Government corporations are run as discrete entities and have unique political and administrative requirements.[951] The study also reported that US government corporations have their distinct routes and degrees of political accountability.[952] Their governance is also varied, with the management of some government corporations resting on a part-time board comprising cabinet-level officials of the agencies; a mixed board of governmental and private appointees; or a single administrator accountable to the departmental secretary, and the President of the country; a CEO selected by and reporting to the part-time board; or managed by a full-time board.[953]

The US Code Title 31 requires each wholly owned government corporation to prepare and present its business-type budget in a prescribed format to the President of the country.[954] The provision also sets out in detail what the budget report must contain. The President must then present the budget programs

[951] Kosar op cit note 941.

[952] Ibid.

[953] Ibid.

[954] The 'Money and Finance' Code supra note 950, §9103(a).

of government corporations to Congress, in terms of §1105 of the Code.[955] Upon receipt of the budget programs, Congress must scrutinise them, before making any authorisation of appropriations as required by the law.[956] Congress must then avail corporate resources to a government corporation for its operational and administrative expenditures.[957] Most importantly, Congress must also make provision for the government's repayment of capital and dividends.[958]

These Money and Finance Code entrusts the oversight of the financial management and performance of wholly owned government corporations to the President and Congress. It requires government corporations to submit their annual management reports to Congress within 180 days after the end of their financial year.[959] In terms of the same provisions, the management reports must comprise the corporation's statements of financial position; operations, cash flows; reconciliations to the government corporation's budget report and statements on internal and accounting administrative control systems by the corporation's management head.[960] The provisions of the Money and Finance Code is meant to ensure that government corporations are accountable for the way they manage public companies. The legal provisions also seek to ensure the financial profitability of government corporations, while also ensuring that there is value for the taxpayers' money poured into government corporations. Any monetary investments made in these government companies are not a free grant or bailout. Instead, it is regarded as a 'loan' to be repaid to the government. Government corporations are also required to pay dividends to the government, which is the shareholder.

Further, the Auditor General is tasked with the responsibility to audit the financial statements of government corporations, as another measure of accountability and oversight, in terms of the Inspector

[955] Ibid, §9103.

[956] Ibid, §9104(a).

[957] Ibid, §9104(a)(2)

[958] Ibid, §9104(a)(3).

[959] Ibid, §9106(a)(1).

[960] Ibid, §9106(a)(2)(A)-(E) & §9106 (b).

General Act (USC. App) of 1978.[961] In addition, the USC. Code empowers the Comptroller General of the US to review the same financial statements that are audited by the Inspector General or by external auditors.[962] Thereafter, the Comptroller General is required to report to Congress, the Director of the Office Management and Budget, and the head of the government corporation who would have prepared the financial statements.[963] In auditing the financial statements of government corporations, the Comptroller General may act on his own accord or may act upon a request of a committee of Congress.[964] However, the President of the country has the authority to exempt wholly owned government corporations from the application of the provisions of this Code, provided doing so is practical and in the public interest.[965]

On the other hand, the provisions regarding the auditing of financial accounts of government corporations by the Inspector General do not differ materially from the South African position regarding the auditing of accounts of state organs by the Auditor-General.[966] Still, there is a major difference regarding the provision for additional audits by the Comptroller General, as an extra measure to ensure the financial integrity of the financial affairs of government corporations.

Additionally, some of the legislations referred above contain legislative provisions for oversight of federal government corporations. One such instrument is the Federal Managers Financial Integrity Act of 1982. This piece of legislation is aimed at strengthening oversight mechanisms of government corporations and preventing wastage, abuse or misappropriation of government resources.[967] The legislation seeks to achieve this stated purpose by enjoining all federal managers to strengthen control

[961] Ibid, §9105(3).

[962] Ibid, §9105 (4)(A).

[963]Ibid, §9105( 4)(6).

[964] Ibid.

[965] Ibid, §9105 (4)(C).

[966] The South African position has been discussed in this chapter in part 4.6.4.2.

[967] Section 2 (2) of the Federal Managers Financial Integrity Act of 1982.

over the government's limited resources. Primarily, the purpose of the Federal Managers Financial Integrity Act of 1982 was to amend the Accounting and Auditing Act of 1950 to ensure ongoing evaluations and reports of the adequacy of the systems of internal accounting and administrative control of each executive agency.[968] The Act also amended the Budget and Accounting Act of 1921 (31 USC.11), designed to strengthen accounting measures by the President over appropriations requested for the office of the Inspector General.[969] The Act also amended the Accounting and Auditing Act[970] to conform to the accounting standards prescribed by the Comptroller General, per section 112 of the Act.[971]

Additional legislative interventions, such as the Securities Exchange Act of 1934,[972] provide various regulatory enforcement actions against corporations in general and government corporations in particular provide for issues of corporate governance,[973] and regulation of credit rating agencies.[974] The Act also creates new institutions of oversight, namely the Financial Stability Oversight Council[975] and the Office of Financial Research[976] to identify threats to the financial stability of the United States. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 gives the Federal Reserve new powers to systemically regulate important institutions.[977]

The section below provides a review of the *fiduciary* duties of directors in the US.

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[968] The Preamble to the Act of 1982, supra note 950.

[969] Section 3 of the Act, supra note 950.

[970] Accounting and Auditing Act of 1950 (31 U.S.C.66a(b)).

[971] Ibid. See section 4 of the Federal Managers Financial Integrity Act of 1982.

[972] The Dodd-Frank Wall Street Reform Act & the Consumer Protection Act of 2010 [Public Law 111-203] amended the Securities Exchange Act of 1934.

[973] Ibid, sections 971-2.

[974] Title IX, subtitle C of the Act of 2010.

[975] Section 152 111 of the Act.

[976] Ibid.

[977] Sections 111, 153 and &154 of the Dodd-Frank Wall Street Reform Act & the Preamble thereto. See Adam Hayes 'Dodd-Frank Act: What It Does, Major Components, Criticisms' *Investopedia* 08 September 2022, available at *https://www.investopedia.com/terms/d/dodd-frank-financial-regulatory-reform-bill.asp*, accessed 25 December 2022.

*4.4.5.2 Fiduciary duties of directors in the United States*

In the US Government corporations are subject to the same corporate laws as private corporations. This means that the directors and boards of government corporations are subject to the same standards and the code of conduct as their private counter parts. In consequence, directors of both public and private companies owe the corporation identical *fiduciary* duties. The state corporate laws in the form of statutes and case law are primary sources of *fiduciary* duties and the responsibilities of directors of corporations in the US.[978] The main duties of directors of corporations are the duties of care and loyalty to the shareholders and the corporation,[979] coupled with the duty to carry out their obligations in good faith.[980] The duties of company directors are regarded as an integral part of their 'oversight and stewardship responsibilities' towards the corporation.[981]

The directors' duty of loyalty entails that the directors must always prioritise the best interests of the corporation and its shareholders ahead of their own or the interests of third parties.[982] The duty of loyalty also means that directors may not use their position of trust and confidence to promote private interests or to procure an advantage for themselves.[983] This duty also enjoins directors of a corporation to exercise an oversight function over the daily business operations of the company.[984] As such, they

[978] See also D.L. Stein, J Linder, G. K. Vanzura & B.A. Cohen, The Practitioners Guide to the Global Investigations' in Mayer Brown (ed) *Directors' Duties: The US Perspective* 5 ed (2022) ch 43, available at *https://globalinvestigationsreview.com/guide/the-practitioners-guide- global-investigations/2022/article/directors-duties-the-us-perspective,* accessed 12 December 2022.

[979] Z. P. Tinhaga (2015, April 1). *The paradox at the crossroads of US and OHADA corporate laws: A comparative study of fiduciary duties in Africa and the US* (SSRN Scholarly Paper No. 2588652). Social Science Research Network. https://ssrn.com/abstract=2588652, accessed 12 December 2022; Restatement (Third) of the Law of Agency, available at https://studylib.net/doc/8168533/restatement-of-the-law----agency-restatement--third--of-a...., accessed 12 December 2022. Stein, Linder, Vanzura & Cohen op cit note 978. See also *In re Walt Disney Co. Derivative Litig*., 709 A.2d 693,745 (Del. Ch. 2005) aff'd 906 A.2d 2 (Del. 2006) referred in Stein, Linder, Vanzura & Cohen op cit note 978.

[980] See also Stein, Linder, Vanzura & Cohen op cit note 978.

[981] Ibid.

[982] Ibid.

[983] *Smith v. Gorkom* 488 A.2d 858 (Del. 1985) (*Gorkom"*). Stein, Linder, Vanzura & Cohen op cit note 978. See *In re eBay, Inc. Shareholders Litig.,* 2004 WL 253521 (Del. Ch. 2004); *Guth v. Loft, Inc.,* 5 A.2d 503,510 (1939).

[984] Stein, Linder, Vanzura & Cohen op cit note 978.

must establish internal surveillance and control mechanisms, monitor and oversee compliance with these control systems.[985]

Furthermore, the duty of loyalty has been developed to include the duty to act in good faith. Good faith, as in the case of duty of loyalty, obligates directors of a corporation to act in the firm belief that their actions are in the best interests of the corporation.[986] To fulfil good faith, a director may not intentionally act with any other purpose other than to advance the best interests of the corporation.[987] Directors of a corporation may also not intentionally violate positive law that applies to corporations.[988] In addition, directors may not demonstrate a conscious disregard for their duties, by intentionally failing to act when there is a known legal duty to act.[989] Failure to act in the face of a known legal duty to act is a breach of good faith and ultimately a dereliction of the director's duty of loyalty.

Directors also must exercise reasonable care and diligence. In discharging their responsibilities and making business decisions, directors should exercise the proper amount of care and diligence.[990] The law requires company directors to demonstrate care, competence and diligence expected 'of a reasonable person' faced with a similar set of circumstances.[991] In the final analysis, directors should be well-versed in the corporation's environment and its business, the industry in which it operates and its inherent risks.[992] The law also requires directors to review the financial statements of the corporation regularly, while also keeping themselves informed about the decisions made by the board

[985] Ibid.

[986] *Stone v. Ritter,* 911 A.2d 362, 369 (Del. 2006). See Stein, Linder, Vanzura & Cohen op cit note 978.

[987] Ibid.

[988] Ibid.

[989] Ibid.

[990] Stein, Linder, Vanzura & Cohen op cit note 978.

[991] Ibid.

[992] Ibid. see also Tinhaga, op cit note 979.

on which they serve.[993] Therefore, a director (or candidate for the position of a director) who feels inadequate for the tasks of directorship bears the responsibility to acquire knowledge through inquiry or otherwise decline the appointment.[994]

The next exposition below deals with the business judgment rule, the common law defence available to directors who are being suing for personal liability to an aggrieved corporation.

## 4.5 THE BUSINESS JUDGMENT RULE

The business judgment rule (BJR) is a principle of corporate law developed to shield directors from liability for decisions made in good faith, on an informed basis, and in the best interests of the company.[995] It is predicated on the recognition that directors are often required to make complex commercial decisions under conditions of uncertainty and risk, and that courts should not easily second-guess such decisions in hindsight.[996] While its origins are common law-based, the BJR has since been codified or judicially entrenched in many jurisdictions, including Australia, Canada, China, the UK, and the USs.[997] This section explores the contours of the rule in these comparative jurisdictions, evaluates its relevance to South Africa's corporate governance regime, and critically analyses its application to directors of State-Owned Enterprises (SOEs), who function within a dual mandate of public service and commercial viability.[998]

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[993] Stein, Linder, Vanzura & Cohen op cit note 978. Tinhaga, op cit note 979. See also *Gorkom* supra note 983; *Francis* v. *United Jersey Bank432* A.2d 814 (NJ. 1981); *Barnes* v. *Andrews,* 298 F. 614,615 (S.D.N.Y. 1924).

[994] Stein, Linder, Vanzura & Cohen op cit note 978. *Francis v. United Jersey Bank432* A.2d 814,822 (NJ. 1981).

[995] S.M. Bainbridge, *Corporate Law* (3rd ed, Foundation Press 2015) 231; see also *In re Walt Disney Co. Derivative Litigation* 906 A.2d 27 (Del. 2006) at 62–67.

[996] H.S. Malek (ed) *Annotated Companies Legislation* (Oxford University Press 2013) at 1351; James D Cox & Hazen Thomas Lee *Corporations* (LexisNexis 2011) 319, noting that "judicial deference" is fundamental to the functioning of the BJR.

[997] Australia: Corporations Act 2001 (Cth), section 180(2); see also *Australian Securities and Investments Commission (ASIC) v Rich* [2009] NSWSC 1229) at 7273; Canada: *Peoples Department Stores Inc (Trustee of) v Wise* [2004] 3 SCR 461 at paras 63–67; Although the UK does not explicitly codify the BJR, a similar principle is embedded in *Companies Act 2006*, section 172 and judicially recognised in *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 (PC); USA: *Aronson v Lewis* 473 A.2d 805 (Del. 1984); *Smith v Van Gorkom* 488 A.2d 858 (Del. 1985).

[998] Muswaka op cit note 447; also see Mongalo, op cit at 145–149, on the tensions between public accountability and commercial discretion.

### 4.5.1 The Business judgment Rule in General

The BJR functions as both a substantive standard and a procedural shield. It protects directors from personal liability where they have acted honestly, loyally, and with reasonable diligence, even if the decision ultimately results in harm to the company. Courts typically refrain from substituting their own business acumen for that of the directors, provided the above elements are met. As echoed by Bainbridge, "[t]he rule embodies the principle that courts are ill-suited to second-guess the business decisions of corporate boards."[999] Essentially, the BJR is not a licence for negligence or recklessness. Instead, it offers deference to well-meaning directors who make decisions in the spirit of their *fiduciary* duties, especially the duty of care and duty to act in the best interests of the company.

### 4.5.2 The Rule Across Jurisdictions

#### *4.5.2.1 South Africa*

In South Africa, the BJR is both in terms of the common law and the South African Companies Act of 2008. The business rule is said to originate from the United States of America and was mooted for South Africa in 1994.[1000] However, the South African legal system does not explicitly recognise the BJR in the same doctrinal form as in the US. According to authors Kanamugire and Chimuka,[1001] the business rule principle was introduced into South Africa to counteract the onerous provisions of the Companies Act 71 of 2008.[1002] This principle is provided for in terms of section 76 (4) of the Companies Act 71 of 2008. First, section 76 (3) restates the standard reasonably expected of a company director. The section enjoins each director of a company to exercise his powers and perform

[999] Bainbridge "*Corporate Law and Economics"* op cit note 995, 265.

[1000] Ibid at 75.

[1001] J. Kanamugire & T. Chimuka 'The Directors' Duty to Exercise Care and Skill in Contemporary South African Company Law and the Business Judgment Rule' (2014) 5 *Mediterranean Journal of Social Sciences (MJSS)* 70, at 70), available at *10.5901/mjss.2014.v5n20p70,* accessed 20 October 2022.

[1002] Ibid at 74.

his duties in good faith and for a proper purpose;[1003] in the best interests of the company;[1004] and with a degree of care, skill and diligence.[1005] Thereafter, section 76 (4)(a) of the Companies Act 71 of 2008 exempts company directors from personal liability where they 'have exercised their powers or performed their functions in the best interests of the company and have acted with reasonable care, skill and diligence'.[1006]

Also, section 76(4) of the Companies Act of 2008 sets out the requirements for 'the business judgment defence'.[1007] In terms of this part of Act, a director must prove that the decision was taken in good faith and with the best interest of the company. The director must also show that he had taken reasonable steps to be informed about the matter; that he had no financial interest in the matter, or that he had already disclosed such interest; or that he had a rational basis for believing that the decision was in the best interest of the company. Kanamugire and Chimuka state that to succeed with this defence of BJR principle, a director must have made their business decision (1) in good faith, (2) with care, and (3) on an informed basis.[1008] The test for the use of the statutory BJR defence is partly objective and partly subjective.[1009]

In terms of this section of the Act, the degree of care, skill, and diligence expected of a director is that which is reasonably expected of a person who carries out the same functions as the director in question. This part of the test is the objective.[1010] For the subjective part of the test the law compares the director to a manager who possesses the same general knowledge, skill, and expertise as the director under

[1003] Section 76(3)(a) of the Companies Act 71 of 2008.

[1004] Ibid, section 76(3)(b).

[1005] Ibid, section 76(3)(c) of the Companies Act 71 of 2008.

[1006] See F.H.I. Cassim & M.F. Cassim *Contemporary Company Law* (2011) 507, 509 & 56; .see also Farouk HI Cassim *Contemporary Company Law* 3 ed (2022) chs 10-12.

[1007] Section 76 of the Companies Act 71 of 2008.

[1008] Kanamugire & Chimuka op cit note 1001 at 74.

[1009] See Ibid 73–4. See also *Shuttleworth v Cox Brothers & Company (Maidenland)* Ltd (1927) 2 KB 9 (CA) 23 referred to by Kanamugire & Chimuka op cit 1001.

[1010] Ibid at 73–4.

scrutiny – compares the director to himself. It enquires into the personal skills that the director possesses. Still a director is still required to take reasonable steps to become informed about any matter before acting, thus lack of skills or information that a director ought to reasonably possess is not a defence.

A director is legally entitled to rely on a variety of sources for his decision, such as opinions, reports, statements, or any professional advice that the company makes available at a director's disposal.[1011] The underlying rationale of protecting directors who act honestly, reasonably, and in good faith is embedded in section 76(4) of the Companies Act 71 of 2008, which codifies directors' fiduciary duties. It provides that a director is deemed to have satisfied their duty of care and skill if they took reasonably diligent steps to become informed, had a rational basis for the decision, and did not have a personal financial interest in the matter. This provision mirrors the process-based logic of the BJR by shielding directors from liability where they act honestly and with due care, even if the outcome is commercially unfavourable.[1012] Its purpose was meant to 'try and soften the statutory duty of care, skill, and diligence'.[1013] In its South African context, the business judgment rule is a cautionary rule for the courts to exercise restraint when company directors are sued for the business decisions that result in unintended consequences; that is, decisions that result in the company suffering financial losses.[1014] In a sense, the business rule principle provides a defence that can be raised by directors who are facing a claim for damages for any decisions which are alleged to have been in breach of their duty of care, skill and diligence. The business judgment rule defence is premised on the maxim that 'the wisdom of business decisions [is] not within the scope of judicial review.'[1015] As its objective,

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[1011] Section 76 (4)(b) of the Companies Act 71 of 2008. See, also, Kanamugire & Chimuka, op cit note 1175 at 75.

[1012] Cassim "*Contemporary Company Law"* op cit not 497.

[1013] Ibid.

[1014] Ibid.

[1015] *Daniels (Formerly Practising as Deloitte Haskins & Sells) v Anderson* (1995) 37 NSWLR 438; 16 ACSR 607). Kanamugire & Chimuka, op cit note 1175 at 75–6.

the principle is intended to encourage entrepreneurship, attract skills in companies, and promote higher standards of corporate governance.[1016] Alternatively, a director needs to have complied with the requirements of section 75 of the Act concerning any interest, in terms of section 76 (4)(a)(ii) and (iii) of the Companies Act 71 of 2008.[1017]

In these circumstances, the director would escape liability because the business judgment rule allows the directors to take honest risks in the best interest of the company.[1018] Thus, in terms of section 76(4) of the Companies Act, 2008, the director will escape personal liability to the company relying on the business judgment rule. Still, the provisions of section 76 of the Act should not be construed to provide impunity for breach of the *fiduciary* duties of directors. Instead, the construction of the provisions of section 76(4) – (5) of the Companies Act, 2008, merely provides criteria to prove that a director had not breached his *fiduciary* duties. Accordingly, viewed properly, the business judgment rule is not a limitation to the personal liability of directors for breach of *fiduciary* duties owed to a company and their duty of care, skill, and diligence provided for in terms of the Companies Act of 2008. Instead, an objective assessment of the requirements for reliance on the business rule principle leads to a conclusion that it serves to provide a yardstick to assist the courts in determining whether a director has complied with his statutory duties in terms of the Companies Act. Also, rather than providing a limitation on the personal liability of directors, the statutory rule provides a 'defence' or factors about what a director ought to satisfy to escape liability for breach of his duties. In terms of the assessment of this study, section 76(3) and section 76(4) are two sides of the same legal point. Seen in that regard,

[1016] Kanamugire & Chimuka op cit note 1175 at 74–5.

[1017] Section 75 deals in detail with the financial interests of directors and disclosures.

[1018] In this regard see section 76(3)-(5) of the Companies Act, 2008. See LAWSA op cit note 618 at 237, para 151. Section 76(4) of the Companies Act of 2008 provides that where there's a particular matter arising during the exercise of his powers or during the performance of his duties as a director, that particular director will have acted in the best interest of a company when a director (1) 'has taken reasonably diligent steps to become informed about the matter'; and (2) has no material personal financial interest in the matter; and (3) has no knowledge of anyone who might have a personal financial interest in the matter; and, finally, (4) where a director has made a decision or has supported a decision of a board and the director 'had a rational basis for believing, and did believe, that the decision was in the best interest of a company'.

in an action for damages for breach of a director's duties in terms of section 76 (3), a director will not be in breach if he satisfies the requirements of section 76 (4) of the Companies Act of 2008.

Therefore, strictly speaking, the business judgment rule is not a limitation to the directors' personal liability for financial damages or losses caused because of a breach of *fiduciary* duties and directors' duty of care, skills, and diligence, in terms of section 76 of the Companies Act 71 of 2008. The view that the liability of directors is unlimited is supported by the DPSA Handbook,[1019] which asserts in respect of board members of State-Owned Enterprises, about the Public Finance Management Act 1 of 1999 and the Companies Act of 2008, that '[their] liability is unlimited and that they are jointly and severally liable'.[1020] While the Handbook refers to the board members, it is reasonable to conclude that the position is the same regarding directors of companies in general. In any event, for this study, there is certainly no limit to the liability of board members to the enterprises they serve, for financial losses caused to the SOE, because of a breach of their director duties. It is submitted that the present of a breach of fiduciary duties and the duty of care, skills and diligence cannot stand on all fours with the three requirements for the defence afforded by the BJR.

Unlike the US model, South African courts have demonstrated a growing willingness to hold SOE directors personally liable in the face of governance failures.[1021] Moreover, some South African scholars have argued for the development of a more focused and context-sensitive standard of judicial deference for SOE boards, one that recognises the practical governance tensions they face.[1022] Such a standard might functionally resemble the BJR, offering directors a degree of discretion in complex

[1019] DPSA Handbook op cit note 509.

[1020] Ibid, ch 2 Item 17.

[1021] *Hlumisa Investment Holdings RF Ltd v Kirkinis* 2019 (4) SA 569 (GP); *De Bruyn v Steinhoff International Holdings NV and others* 2022 (1) SA 442 (GJ).*Venator Africa (Pty) Ltd v Watts* 2024 (4) SA 539 (SCA) (24 April 2024); *Venator Africa (Pty) Limited v Bekker* [2022] 4 All SA 600 (KZP); Cf. *Mbambisa v Nelson Mandela Bay Metropolitan Municipality* 2025 (3) SA 112 (SCA).

[1022] B.M. Mupangavanhu (2019). Impact of the Constitution's Normative Framework on the Interpretation of Provisions of the Companies Act 71 of 2008. *Potchefstroom Electronic Law Journal*, *22*, 1-24. https://doi.org/10.17159/1727-3781/2019/v22i0a7417.

decision-making environments, provided they act in good faith, adhere to statutory mandates, and exercise reasonable diligence.

The section below is a discussion of the BJR in terms of the Australian law.

*4.5.2.2 Australia*

Australia has codified the business judgment rule in section 180(2) of the Corporations Act 2001, which provides that a director or officer will not contravene the duty of care and diligence if they: (i) make a business judgment in good faith and for a proper purpose, (ii) do not have a material personal interest in the decision, (iii) inform themselves about the subject matter, and (iv) rationally believe that the judgment is in the best interests of the company. In the judgment of *ASIC v Rich,*[1023] the Supreme Court reaffirmed that courts should not second-guess boardroom decisions, unless the company directors have breached the basic tenets of informed decision-making.[1024] The statutory formulation reinforces predictability for directors, especially in the context of Australia's state-linked corporations. However, the application of the rule in this way may be at odd with the highest standard of ethics legally expected of a director of a corporation.

Next, the focus shifts to Canada's position regarding the use of the BJR as a defence for directors of crown corporations.

*4.5.2.3 Canada*

In Canada, the BJR is a judge-made doctrine that emerged in cases like *Peoples Department Stores Inc. v Wise*,[1025] where the Supreme Court noted that directors are entitled to a presumption of correctness, if their decisions were honest and prudent at the time they were made. Unlike Australia,

[1023] See *ASIC v Rich* supra note 997.

[1024] Cf: M. Hooper. (2011) "The Business Judgment Rule: *ASIC v Rich* and the reasonable-rational divide". http://epublications.bond.edu.au/cgej/22 (accessed 12 April 2025).

[1025] *Peoples Department Stores Inc. (Trustee of) v Wise* [2004] 3 SCR 461.

Canada has not codified the BJR in statute. Instead, Canadian law relies on judicial pronouncement. Out of the observance the business judgment principle, the Canadian courts do not generally interfere with the business decisions of the boards. The Canadian courts have also extended the business judgment rule even to directors of Crown corporations, provided the duties of loyalty and diligence are satisfied.[1026]

Under the business judgment rule, the board is presumed to be acting in the best interests of the corporation and its shareholders.[1027] The rule is premised on the principle that directors are better positioned to determine what is in the best interest of the corporation rather than the courts. To be protected, the decisions of the board must be reasonable, and must consider all the circumstances of the board's conduct. The rule emphasises process over outcome, echoing the "reasonableness" test rather than perfection. The applicable standard employs the question of whether 'directors applied an appropriate degree of prudence in reaching the impugned decision in question.[1028] As a requirement, to successfully rely on the business judgment defence, directors must have made a conscious decision or consciously decided not to act. Consequently, the defence is not available where directors simply failed to act and did not apply a considered judgment in relation to their conduct. Their act should be deliberate. Accordingly, the business judgment rule is not a complete defence against directors' liability in Canada.

Next, the BJR, in relation to the liability of corporate directors in China, is explored.

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[1026] J MacIntosh 'The Business Judgment Rule, the Public Interest Powers, and the "Fair and Reasonable" Test: Fellow Travellers or Ships in the Night?' (2023) 60(1) *Osgoode Hall Law Journal* 73 at [pinpoint page] doi:10.60082/2817-5069.3876 available at https://digitalcommons.osgoode.yorku.ca/ohlj/vol60/iss1/2 (accessed 30 April 2025).

[1027] Fasken 'Directors' and Officers' Liability' A Guide to Doing Business in Canada, (2022) 58–61, ch10, available at *https://www.fasken.com/en/knowledge/doing-business-canada/2021/10/10-directors-officers-liability#iframe,* accessed 10 January 2023.

[1028] Ibid.

*4.5.2.4 China*

China has only recently begun to explore the contours of a business judgment rule, primarily through guiding opinions and soft law instruments. In 2020, the Supreme People's Court issued *Guiding Opinion No. 9*, which recognised the BJR as a doctrinal shield if directors make decisions in accordance with law and procedural integrity.[1029] In view of China's heavy reliance on SOEs for state economic planning, the application of BJR is still evolving. There is a strong tendency for state influence to override independent board discretion, meaning Chinese courts are often reluctant to give directors the same latitude as in common law jurisdictions.[1030]

The focus now shifts to discuss the legal position in the UK.

*4.5.2.5 United Kingdom*

The UK, on the other hand, does not explicitly recognise the BJR as a standalone doctrine, but the Companies Act 2006, particularly section 172, echoes its spirit. Directors are required to act in good faith to promote the success of the company, considering various stakeholder interests.[1031] While UK courts do not formally invoke the BJR, they have adopted a hands-off approach to directors' commercial decisions unless there is fraud, bad faith, or breach of duty.[1032] This restrained judicial attitude is illustrated by the leading judgment in *Howard Smith Ltd v Ampol Petroleum Ltd.*[1033] The courts have traditionally deferred to directors' business judgment unless tainted by an improper purpose.

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[1029] Supreme People's Court (China), *Guiding Opinion No. 9 on Civil Cases Involving Company Directors' Liability* (2020). *Hlumisa Investment Holdings* supra note 1021.

[1030] T. Lin, "China's Capitalist Dilemma: A Political Economy Perspective" (2013) 34 *Northwestern Journal of International Law & Business*, 275.

[1031] Section 172(1) and (2) of the Act.

[1032] P Davies & S Worthington, *Gower's Principles of Modern Company Law* (11th edn, Sweet & Maxwell 2016) 512.

[1033] *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 (PC).

*4.5.2.6 United States*

The US is the birthplace of the BJR.[1034] The business judgment rule remains a fundamental principle of corporate governance in the United States. The rule plays a pivotal role in shielding directors from personal liability for business decisions taken in good faith, on an informed basis, and with a genuine belief that such decision was in the best interests of the corporation. Traditionally, the rule was formulated to encourage entrepreneurial risk-taking by ensuring that courts do not substitute their judgment for that of directors who operate under complex and uncertain market conditions. As the Delaware courts, which have led much of the jurisprudence in this area, have repeatedly emphasised, the BJR affords directors a presumption of propriety in their decision-making, unless plaintiffs can show gross negligence, bad faith, or self-dealing.[1035] The business judgment rule has been entrenched in the jurisprudence of Delaware courts, where the rule protects directors who act in good faith, on an informed basis, and without conflicts of interest.[1036] In *Aronson v Lewis*,[1037] the court stated that the rule presumes that directors always act in the best interests of the corporation, and that the burden of rebutting the presumption lies on the plaintiff.[1038] The BJR remains central to US corporate governance and has even been extended to independent directors of public institutions and certain hybrid public-private enterprises.

Over time, the US courts have extended the BJR beyond the realm of private corporate boards and into the domain of public governance, particularly where hybrid or quasi-public entities are

[1034] F Hamadziripi & P.C. Osode "The Nature and Evolution of the Business Judgment Rule and its Transplantation to South Africa under the Companies Act of 2008" (2023) 55(1) *Comparative and International Law Journal of Southern Africa* 1 at 3–16.

[1035] See *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984); *In re Walt Disney Co. Derivative Litigation*, 906 A.2d 27 (Del. 2006).

[1036] See *Aronson v Lewis* 473 A.2d 805 (Del. 1984).

[1037] Ibid.

[1038] Ibid, para IV.

involved.[1039] In the context of independent directors serving on the boards of public institutions or state-sponsored enterprises, the courts and scholars have increasingly acknowledged the applicability of BJR principles, albeit with adaptations tailored to the unique mandates of these entities. For example, where public-private partnerships or government-sponsored enterprises (such as Fannie Mae or Freddie Mac) are involved, the BJR continues to function as a protective doctrine that promotes autonomy of decisional, while still permitting judicial scrutiny in cases involving breaches of fiduciary duty or manifest failure to adhere to statutory obligations.[1040]

Moreover, in the post-Enron[1041] era, the rule's relevance has grown in tandem with heightened expectations of board independence, transparency, and accountability. Courts have begun to focus not only on the structural independence of directors, but also on the integrity of the decision-making process they employ.[1042] For instance, the Delaware Supreme Court, in *Stone v. Ritter*,[1043] held that a failure by the board to implement an adequate information and reporting system could result in liability under the *Caremark*[1044] standard, notwithstanding the protections of the BJR. Authors Bainbridge[1045] and Strine[1046] have further developed the conceptual underpinnings of the BJR in the context of public interest corporations and SOE-like entities in the US, noting that while the rule offers insulation from liability, it should not be misconstrued as a license for inaction or poor governance. Bainbridge argues

[1039] N.T. Pham *Directors' liability: a legal and empirical study* (Doctoral Thesis, Erasmus University Rotterdam, 2017) available at http://hdl.handle.net/1765/97805 (accessed 14 April 2025).

[1040] M O'Connor (2011). The Enlightened Shareholder Value Principle and Corporate Governance. *Fordham Journal of Corporate & Financial Law*, 16(2), 421–465; D Schwartz (2008). The Business Judgment Rule and State-Owned Enterprises: A US Perspective. *Columbia Journal of Law & Business*, 44(3), 785–822.

[1041] *In Re Enron Corp. Sec., Derivative & ER/SA Lit.,* 258 F. Supp. 2d 576 (S.D. Tex. 2003).

[1042] *Stone v. Ritter*, 911 A.2d 362 (Del. 2006).

[1043] Ibid.

[1044] *In re Caremark International Inc Derivative Litigation* 698 A 2d 959 (Del Ch 1996)

[1045] S.M. Bainbridge (2004). The Business Judgment Rule as Abstention Doctrine. *Vanderbilt Law Review*, 57(1), 83–131. Available at: https://scholarship.law.vanderbilt.edu/vlr/vol57/iss1/3.

[1046] L.E. Strine (2008). Toward Common Sense and Common Ground? Reflections on the Shared Interests of Managers and Labor in a More Rational System of Corporate Governance. *Journal of Corporation Law*, 33, 1–23.

that the BJR is best understood as a judicially created standard of review rather than a substantive standard of conduct, underscoring the courts' preference for process-based evaluation over outcomes-based liability.

In addition, the extension of BJR protections to independent directors of public or hybrid institutions reflects a recognition of the growing complexity of modern corporate governance. Directors in such institutions often straddle the line between commercial performance and public accountability. Applying BJR principles in these settings somehow helps maintain a necessary balance, encouraging independence and initiative while still holding directors to high standards of care and loyalty.

Thus, while the BJR originated in private corporate law, its continued relevance in the governance of publicly influenced entities in the US illustrates its adaptability and enduring importance. Its expansion to public directors reflects a jurisprudential commitment to uphold the autonomy of decision-making, so long as directors act (1) in good faith, (2) within their lawful mandate, and (3) through a diligent & informed process.

The following part deals with other statutory institutions exercising oversight over the South African public administration and affairs of the State-Owned Enterprises in South Africa.

## 4.6 THE OVERSIGHT OF STATE-OWNED ENTERPRISES

The oversight of State-Owned Enterprises is exercised through a complex network that is founded on the Constitution, 1996. Still, constitutional oversight does not trump other legislation that underpin oversight and accountability, such as the PFMA and other legal instruments. Section 5.1. will focus on various institutions of oversight over State-Owned Enterprises. In this regard, the focus will be on parliamentary committees, the executive authority, the Public Service Commission, and select chapter nine institutions and other statutory institutions, such as the Special Investigating Unit (SIU) and the Special Tribunals. The section will also examine common law and statutory mechanisms available to hold members of accounting authorities (board members) of SOEs accountable for a breach of their

*fiduciary* and constitutional duties as directors. Additionally, the section will consider relevant legislative provisions that deal with the accountability of board members.

The part that now follows, discusses parliamentary oversight and relevant committees tasked with parliamentary oversight.

### 4.6.1 Parliamentary Oversight

Parliament exercises oversight of State-Owned Enterprises through various parliamentary committees, such as parliamentary portfolio committees, and the Standing Committee on Public Accounts (SCOPA). Parliamentary committees derive their existence from the rules of parliament (including the Constitution). The National Assembly comprises standing committees (4) and portfolio committees (26), whereas the National Council of Provinces has Select Committees (11) associated, either with the government ministries/departments or with the government services or duties of parliament. There are also joint committees for the two houses of parliament, such as the joint committees on ethics and members' interests.[1047] There are joint standing committees (3). In total, there are currently 48 parliamentary committees for the two Parliamentary houses of the South African government.[1048] From time to time, the two houses of Parliament may also form *ad hoc* committees to deal with any need that may arise at any time.[1049] Once the job of an *ad hoc* committee is done, the *ad hoc* committee ceases to exist.[1050]

The parliamentary houses use committees as their instrument to facilitate the accountability of the executive, in that they perform oversight and monitoring services. As a result, Committees are referred

[1047] *https://www.parliament.gov.za/committees*.

[1048] Ibid.

[1049] Ibid.

[1050] Ibid.

to as 'engine rooms of parliament.[1051] Primarily, the function of committees is to scrutinise legislation, oversee government action, and interact with the public.[1052] Most importantly, it is the function of parliamentary committees to consider the annual report of organs of the state and the Auditor-General.[1053] From time to time, organs of the state appear before Parliamentary committees, at the behest of committees, to brief committees on matters relating to operations in the department under them.[1054]

The focus in the following section is devoted to portfolio committees.

*4.6.1.1 Portfolio Committees*

Portfolio committees are called such because they mirror government portfolios, with each national department having its affiliated portfolio committee to shoulder its work.[1055] Hence, presently the National Assembly has twenty-six (26) portfolio committees, which corresponds to the number of government departments. [1056] State-owned corporations generally fall under the oversight responsibility of the Portfolio Committee on Public Enterprises. However, other State-Owned Enterprises may also be the responsibility of a portfolio committee for the parent (policy) departments. For example, Transnet, Prasa, and SAA would be under the responsibility of the Portfolio Committee on Public Transportation, while the SABC is the responsibility of the Portfolio Committee on Communications and Digital Technologies. Portfolio committees are entrusted with the function of scrutinising Bills and dealing with budget votes for their respective departments. Portfolio committees also perform an oversight role over the work of their departments and may conduct

[1051] Parliament 'The role of Parliamentary Committees', available at *https://www.parliament.gov.za/oversight,* accessed 10 July 2022.

[1052] Ibid.

[1053] Ibid.

[1054] Ibid.

[1055] Ibid.

[1056] Ibid.

investigations on any matter of public interest that falls within their area of responsibility. Portfolio committees may also summon anyone to appear before the portfolio committee to give an account on any matter or to answer questions in case of an inquiry by the committee. Two classic examples of portfolio inquiries include the ground-breaking inquiry into the fitness of the SABC Board in 2016[1057] and the 2017 inquiry into the affairs of Eskom conducted by the Portfolio Committee on Public Enterprises.[1058] The two inquiries provided a model of how effective parliamentary oversight of state-owned entities can be, if only there is political will. Unfortunately, as the third chapter and the Reports of the State Capture Commission have shown, when the inquiries were conducted, the losses to the state-owned entities had already occurred.

The following part discusses a second important parliamentary committee, the Standing Committee on Public Accounts (SCOPA).

*4.6.1.2 The Standing Committee on Public Accounts*

The author argues that for some reason, the Standing Committee on Public Accounts has not been effective in fostering accountability in State-Owned Enterprises . Understandably, like all other parliamentary oversight committees, SCOPA has not managed to make office bearers of state corporations accountable for their mismanagement of State-Owned Enterprises.[1059] Obviously, if the SCOPA (and other parliamentary committees) had been effective, strategic State-Owned Enterprises would not have lost billions of rand due to corruption. For example, the SAA would not have

[1057] Report, available at *https://pmg.org.za/tabled-committee-report/2898/*, accessed 10 July 2022.

[1058] *Report of the Portfolio Committee on Public Enterprises* on The Inquiry into Governance, Procurement and the Financial Sustainability [o]f Eskom, 2018, available at *https://www.parliament.gov.za/storage/app/media/Links/2018/November%202018/28-11-2018/Final%20Report%20-%20Eskom%20Inquiry%2028%20NOV.pdf*, accessed 20 July 2022.

[1059] K.M. Matebese-Notshulwana 'Acritical analysis of the oversight role and function of the Standing Committee on Public Accounts (SCOPA) in Promoting Accountability in South Africa's Public Sector' (unpublished LLM thesis, University of Pretoria, 2019), available at *https://repository.up.ac.za/handle/2263/76749,* accessed 20 July 2022; Robert Egwim Obiyo 'Democracy and the committee system of the South African Parliament with special reference to the Standing Committee on Public Accounts' (2007) 26(1) *Politeia* (Online), available at *https://hdl.handle.net/10520/EJC88174,* accessed 20 July 2022.

descended to a state of decay to the point of having to undergo a process of business rescue. On the contrary, state-owned entities would be managed efficiently, by properly qualified board members. Most importantly, through the court process, billions of rand siphoned out of state-owned entities could have at least been recovered.

It is submitted that, as with other committees of parliament, attention to the limitations of the SCOPA holds the key to unlocking the remedial powers of SCOPA. Generally, the SCOPA is only competent to make recommendations to parliament (the National Assembly), strengthen the system, and stop the loopholes.[1060] Thus, the SCOPA may not, for example, recommend the return of stolen monies from State-Owned Enterprises. The most that SCOPA can do is make recommendations to other institutions for an investigation of the wastage of public resources of state-owned corporations. Hence, it is reasonable to conclude that even if parliamentary committees were to function optimally, there would still be a gap due to the limitations regarding their powers. At best, the SCOPA would only make recommendations which would not, *per se*, lead to the recovery of losses caused to State-Owned Enterprises. Investigations through parliamentary committees could also be used as a delaying tactic by politicians seeking to protect their cronies.[1061] In the meantime, valuable opportunity to trace the proceeds of maleficence or meaningfully holding wrongdoers as well as accounting authorities, would be lost.

Furthermore, the next focus moves on to the role played by the executive authority in the exercise of oversight over members of boards of state-owned entities in South Africa.

### 4.6.2 The Executive Authority

As defined by the PFMA, executive authority concerning public entities, refers to 'the Cabinet

[1060] https://www.parliament.gov.za/role-of-parliamentary-committee.

[1061] See, for example, State Capture Commission Report Part VI vol 2, paras 820, 893-94, 897 & 957 about the performance of ANC parliamentarians and members of Portfolio Committees. The report is available at *https://www.statecapture.org.za/site/information/reports,* accessed 22 June 2022.

member who is accountable to Parliament for [any particular] public entity or in whose portfolio [the entity] falls.'[1062] Generally, the executive authority responsible for State-Owned Enterprises is the Minister of Public Enterprises. However, in a limited instance, the executive authority may be the minister responsible for the policy (parent) department, the finance minister (national treasury), the Presidency, or any other person designated in terms of any law to be such. The executive authority (or line Minister) is the shareholder representative accountable to the cabinet and the National Assembly for the management of state owned entities.[1063] Primarily, the role and responsibilities of the line Minister are to ensure the financial viability of State-Owned Enterprises and profitable returns for the investments poured into state entities.[1064] In a sense, the shareholder representative has to exercise oversight over the performance of accounting authorities (boards and board members). In turn, the latter are also accountable to the portfolio committees.

However, as chapter three (above) of the thesis and the State Capture Commission of Inquiry Reports have shown, the checks and balances for the oversight of state-owned entities have been breached because of political interference, cadre deployment, and patronage networks. The executive authority (authorities) has itself been derelict in its responsibilities towards accounting authorities and complicit in the malfeasance of State-Owned Enterprises. It has been at the centre of the problems afflicting State-Owned Enterprises in South Africa, through improper interference with the boards of state-owned entities.[1065] For this reason, the researcher's key argument is that accounting authorities accountable for the financial losses of SOEs, must be held liable as joint wrongdoers.

The following section discusses the Public Service Commission, as a further statutory institution that

[1062] Section 1 of the PFMA.

[1063] See the DPE Evaluation Framework supra note 510, at 21, for a discussion of the roles and responsibilities of the key actors in SOE governance.

[1064] Ibid.

[1065] See, for instance, State Capture Commission Report Part VI vol. 2 supra note 266, at paras 75-8, regarding the performance of Minister Gigaba in the case of Transnet.

exercises oversight over state entities.

### 4.6.3 The Public Service Commission

Section 195 of the Constitution outlines the foundational values of public administration. Section 196 provides for the establishment of the Public Service Commission. As already indicated in chapter 3 above, public administration is not limited to the government and its departments, but it includes all organs of state, such as state-owned corporations.[1066] Other institutions established in terms of the Constitution, like the Chapter Nine Institutions, such as the Public Protector and the Public Service Commission,[1067] are independent and impartial, and execute their functions without fear, favour or prejudice.[1068] The Public Service Commission reports or is accountable to the National Assembly (and to a provincial legislature, in respect of provincial activities).[1069] As to its composition, the Commission is made up of 14 commissioners appointed by the State President, five of whom are recommended by a Committee of the National Assembly. Nine are nominated by Provincial Premiers, with respective provincial legislatures.[1070] Commissioners are appointed for a period of five years.[1071] Section 196(9) of the Constitution provides for the appointment procedures to be regulated through an Act of Parliament. Accordingly, the Public Service Commission Act of 1997, deals with the composition of the Commission, the appointment of commissioners, the designation of the chairperson and deputy chairperson of the Commission, the appointment conditions of commissioners, as well as their removal from office.[1072]

The Public Service Commission is tasked with ensuring the maintenance of efficient

[1066] State Capture Commission Report Part VI vol. 2 supra 266 paras 406-7.

[1067] Sections 181(1)(a) and 182 of the Constitution.

[1068] Sections 196(2) of the Constitution.

[1069] Sections 196(5) – (6)(a) and (b) of the Constitution.

[1070] Sections 196(7) and (8) of the Constitution.

[1071] Ibid.

[1072] Part II sections 3-7 of the Public Service Commission Act 46 of 1997.

administration.[1073] Also, the purpose of the Public Service Commission is to ensure a public service that subscribes to a high standard of professional ethics.[1074] Section 196(4) of the Constitution sets out the powers and functions of the Public Service Commission.[1075] At the forefront, the Commission is responsible for promoting the constitutional values and principles that enjoin the public administration, in terms of section 195 of the Constitution.[1076] The Commission also has to devise mechanisms that make for the effective and efficient performance of public service.[1077] The Public Service Commission, *inter alia*, is empowered with Investigating, monitoring, and evaluating the functions of the country's public service.[1078] Moreover, the Commission is required to provide an evaluation of the compliance with the constitutional values and principles, set out in section 195 of the Constitution.[1079]

Additionally, the Public Service Commission must report on its activities and functions.[1080] The Commission is also empowered, on its own accord or upon receipt of a complaint, to investigate, evaluate and report to the legislature and relevant executive authority about public administration practices, among others.[1081] The Public Service Commission also advises both national and provincial organs of state about the practices of personnel in the public service.[1082] While the Commission mainly focuses on public service in a narrow sense, the provisions of section 196 of the Constitution have a

[1073] Sections 196(2) & (4)(a) of the Constitution.

[1074] Sections 196(2) of the Constitution.

[1075] Sections 196(4)(a) –(e) of the Constitution. Also, Part III (sections 8–10) of Act 46 of 1997.

[1076] Sections 196(4)(a) of the Constitution.

[1077] Sections 196(4)(c) of the Constitution.

[1078] Sections 196(4)(b) of the Constitution.

[1079] Sections 196(4)(e) and (f)(iii) of the Constitution.

[1080] Sections 196(4)(e) of the Constitution.

[1081] Sections 196(4)(f)(i) of the Constitution. The Commission may also investigate grievances of employees about official acts and omissions in the public service and make appropriate recommendations thereof (Sections 196(4)(f)(ii) of the Constitution).

[1082] Sections 196(4)(f)(iv) of the Constitution.

wide application, which extends to other organs of state and/or state entities.[1083] Therefore, section 196 has to be understood in conjunction with sections 197 and 195 which deal with public administration as a whole.[1084] Seen in this light, the oversight mechanisms that section 195 introduces, also apply in the case of state-owned corporations. As indicated in this exposition already, the Public Protector Act 23 of 1994[1085] and the Public Service Commission Act grant the Public Service Commission added powers and functions to regulate the affairs of the Commission.[1086]

Accordingly, the Public Service Commission is one of the institutions that play a critical role in the oversight of State-Owned Enterprises. In this wise, the Commission is the watch dog that ensures that the administration and organs of state ascribe to the highest values and principles enshrined in the Constitution. It may expose malfeasance in State-Owned Enterprises . However, the Public Service Commission falls short in that it does not reimburse State-Owned Enterprises for losses, especially as the Commission does not have powers, such as those of the Public Protector and Auditor-General, to take appropriate remedial action. It is the writer's view that the Public Service Commission must be supplemented with another instrument, such as the SIU and its Special Tribunal, to provide a complete remedy.

The following account discusses chapter nine institutions, namely the Public Protector and the Auditor-General.

### 4.6.4 Chapter Nine Institutions

Section 181 of the Constitution lists 7 institutions that are intended to support constitutional democracy in South Africa.[1087] These institutions are also known as Chapter 9 institutions. Of the

[1083] See, for example, State Capture Commission Report Part VI vol 2 supra note 266, para 11.

[1084] Ibid.

[1085] See section 182(2) of the Constitution.

[1086] Sections 196(4)(g) of the Constitution.

[1087] Section 181(1) of the Constitution of 1996.

seven Chapter 9 institutions, this study will only examine the Public Protector (PP) and the Auditor-General (AGSA). The Public Protector and the Auditor-General are two of the Chapter 9 institutions that play a crucial oversight role in the affairs of the administration including State-Owned Enterprises.[1088] The two institutions are key to holding boards (accounting authorities) and board members of state-owned corporations to account for their performance in the exercise of their statutory and constitutional duties as public office bearers. The two are discussed below starting with the Public Protector.

*4.6.4.1 The Public Protector*

The office of the Public Protected was established in terms of section 181(1) of the Constitution of 1996 and the Public Protector Act 23 of 1994. The Public Protector institution is a new creation that sought to improve its Advocate General and Ombudsman predecessors.[1089] The Ombudsman could only investigate and make findings and recommendations to other institutions such as law enforcement agents but did not have powers to take remedial action.[1090] The role and powers of the Public Protector are now settled under South African law. The office of the Public Protector is an independent and impartial institution that is tasked with the investigatory mandate over public bodies, functionaries, and even persons and entities.[1091] The Public Protector office is subject only to the Constitution and law.[1092] Its cutting edge is the mandate to exercise its powers and functions without fear, favour, or prejudice.[1093] The Public Protector has powers to investigate conduct, such as alleged impropriety or dishonest conduct about public money or even offences in terms of the Prevention and Combating of

[1088] One other institution that may play the same role in the oversight of state-owned companies is the Human Rights Commission. However, its role is relevant only where human rights issues are affected.

[1089] *EFF1* op cite note 31.

[1090] *South African Broadcasting Corporation Soc Ltd* supra note 284, para 31.

[1091] Sections 6 and 7 of the Public Protector Act 23 of 1994.

[1092] Section 181(2) of the Constitution, 1996; *EFF1* supra note 31, para 49; *South African Broadcasting Corporation Soc Ltd* supra note 284 at para 24.

[1093] Section 181(2) of the Constitution, 1996.

Corrupt Activities Act (PCCA) 12 of 2004, concerning public money.[1094] The Public Protector may also investigate allegations of improper or unlawful conduct by any person alleged to have accrued an improper advantage in the course of the conduct of public entities and functionaries.[1095] As section 182 of the constitution provides, the Public Protector has the power to investigate complaints or reports of maladministration, malfeasance, and impropriety in the public administration. and public life.[1096] As the Supreme Court of Appeal (SCA) held in the *Mail & Guardian* case, the Public Protector is one of the institutions that gives effect to the Constitution's foundational notion of a grave and solemn promise to the South African citizens, *inter alia*, of a representative and accountable government.[1097] As its many functions, the Public Protector investigates and reports on its findings.[1098]

Most importantly, the Public Protector takes appropriate remedial action with its findings and reports.[1099] Regarding the status of the Public Protector's recommendations, both the SCA and the Constitutional Court have held that public functionaries are required to act upon the recommendations of the Public Protector, unless the findings and the recommendations have been reviewed and set aside by a court of law.[1100] On the other hand, the SCA aptly described the role of the Public Protector in the *Mail & Guardian* judgment 'as the last defense against … corruption and malfeasance in public office that is capable of insidiously destroying the nation.'[1101] As the court remarked in the above case, the office of the Public Protector is 'an indispensable constitutional guarantee.'[1102]

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[1094] Section 6 (4)(a)(iii) of the Public Protector Act 23 of 1994.

[1095] Section 6(4)(a)(iv) And six (5)(c) of the Public Protector Act. See also the *Public Protector v Mail & Guardian Ltd* 2011 (4) SA 420 (SCA), paras 9-11.

[1096] Section 182(1)(a) of the Public Protector Act 23 of 1994.

[1097] *Mail & Guardian supra note 1077*, par 5.

[1098] Section 182 of the Constitution and the Public Protector Act 23 of 1994.

[1099] Section 182(1)(c) of the Constitution.

[1100] *EFF1 op cite note 31* paras 71-75; *South African Broadcasting Corporation Soc Ltd* supra note 284, para 53.

[1101] *Mail & Guardian,* supra note 1077, para 6.

[1102] Ibid at para 6.

Meanwhile, in *Economic Freedom Fighters (EFF1)*[1103] the Constitutional Court referred to sections 181 and 182 of the Constitution and held that the Public Protector is 'pivotal to the facilitation of good governance in [South Africa's] constitutional dispensation.' [1104] As the CC states in the *EFF1* judgment, the office of the Public Protector was established to protect the public from conduct that may result in impropriety and prejudice, perpetuated in state affairs and/or any sphere of government.[1105] The powers of the Public Protector extend to investigating unlawful enrichment in addition to fighting corruption.[1106] In *EFF1* the Constitutional Court described the Office of the Public Protector as 'one of the most invaluable constitutional gifts to the nation in its 'fight against corruption, unlawful enrichment, prejudice and impropriety in state of affairs…for the betterment of good governance.'[1107] The court also described the Public Protector as one of the crusaders and champions of anti-corruption and clean governance.' [1108] The court also highlighted the role of the Public Protector in the affairs of the state, including state-controlled institutions.[1109] The Constitutional Court also referred to the office of the Public Protector as a critical and indispensable factor in the facilitation of good governance. [1110] Consequently, the Public Protector has jurisdiction over the affairs of government and state-controlled institutions such as State-Owned Enterprises .[1111]

As this study shows here about the constitutional and statutory powers of the Public Protector, the PP is empowered to take any remedial action it deems fit. It is also able to litigate in a court of law to enforce its remedial action. Using the Public Protector may at times prove to be a cost-effective

[1103] *EFF1,* supra.

[1104] Ibid, para 50.

[1105] Ibid, para 51.

[1106] Section 6(4)(a)(iii) – (iv) all the Public Protector Act 23 of 1994.

[1107] *EFF1,* supra note 31, para 52.

[1108] Ibid.

[1109] Ibid, para 56.

[1110] Ibid.

[1111] Ibid, paras 51 & 56

remedy for State-Owned Enterprises to recover their losses. However, there are hidden disadvantages to its operation. Its efficacy may be compromised as it may also involve a long process when a respondent decides to review its findings. The review process usually takes years before reaching finality, as the review process must start at the high court, move to the Supreme Court of Appeal, before final resolution in the Constitutional Court.[1112] Consequently, given the nature of the powers of the Public Protector, the institution of the Public Protector is best placed to hold accounting authorities of SOEs to account, while at the same time it effects compensation for losses incurred by a public entity. The Public Protector's potential as the most effective institution to hold public office-bearers accountable for the way they manage state-owned entities or other organs of the state, is best illustrated by its track record during the occupancy of Advocate Thuli Madonsela, as the Public Protector of South Africa. Under Advocate Madonsela, the Office of the Public Protector made recommendations for the establishment of the State Capture Commission as its remedial action.[1113] In another incident. the office of the Public Protector, under the same incumbent, succeeded to force then State President, Jacob Zuma, to make repayments to the state for non-security expenditures incurred by the state during the upgrade of his private homestead.[1114] During the same period also, the Public Protector held the SABC to account for the appointment of an unqualified COO, Mr Hlaudi Motsoeneng, and to reverse a sham disciplinary committee process that had exonerated Mr Motsoeneng.[1115]

The findings of the Public Protector in investigations such as those mentioned above, were ground-

[1112] This is what has happened in the past, in cases such as the one in the *Democratic Alliance v South African Broadcasting Corporation Ltd* 2015 (1) SA 551 (WCC); the SABC Board of Directors then appealed the high court judgment to the Supreme Court of Appeal (*SABC v DA* supra note 284). The two judgments are only a few days short of being separated by a year apart.

[1113] 'State of Capture' Report supra note 74, paras 8.2–8.8. See also State Capture Commission Report Part VI vol. 2 supra note 266, paras 631–32.

[1114] Public Protector, South Africa (Report no 25 of 2013/14) '*Secure In Comfort'* (2014), available at *www.publicprotector.org,* accessed 24 September 2022.

[1115] 'When Governance and Ethics Fail' Report supra note 280.

breaking and set a precedent about the accountability of public office-bearers. Advocate Madonsela succeeded Advocate Lawrence Mushwana in the office of Public Protector. During the era of Advocate Lawrence Mushwana, executives had often been exonerated by the Public Protector, let alone holding members of boards of State-Owned Enterprises to account for the way they exercise their constitutional duties.[1116] The era of Advocate Madonsela marked a turning point, not only for the office of the Public Protector in South Africa but also for the constitutional principle of accountability in the country's democracy. These sentiments are echoed by the erstwhile Chief Justice of the Republic, Mogoeng in the *Economic Freedom Fighters (EFF1)* judgment.[1117] In this judgment, Mogoeng CJ made a definite declarator about the status of the remedial action taken by the Public Protector.[1118] Thus, seen in the perspective of what the court held in *EFF1,* the powers of the Public Protector to hold public office-bearers accountable, in terms of its remedial action, are almost unlimited in terms of the remedial action it can take.[1119] In that regard, the Public Protector may investigate the misuse of public funds in State-Owned Enterprises , and take appropriate remedial action for the responsible wrongdoers, including boards and former members, to pay compensation to the affected public entity, for its loss.[1120] Unless an order for remedial action was set aside, it would be binding on the public official concerned.[1121]

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[1116] ANFASA *'The Sting in the Tale Bulelani Ngcuka'* https://www.anfasa.org.za/the-sting-in-the-tale-bulelani-ngcuka/?utm_source=rss&utm_medium=rss&utm_campaign=the-sting-in-the-tale-bulelani-ngcuka (30-09-2022); Also see [National Assembly] committee to consider protector's report on Ngcuka' *Polity* 4 June 2004, available at https://www.polity.org.za/article/na-committee-to-consider-protectors-report-on-ngcuka-2004-06-04, accessed 30 September 2022; HSF 'An inauspicious end to Ngcuka saga' 29 Sept 2009. Available at https://hsf.org.za/publications/focus/issue-35-third-quarter-2004/an-inauspicious-end-to-ngcuka-saga (30-09-2022); Corruption Watch, SA's public protectors – the legacies, part two, 15 Apr 2016. Available at https://www.corruptionwatch.org.za/sas-public-protectors-the-legacies-part-two/ (30-09-2022).

[1117] *EFF1* op cite note 31.

[1118] Ibid, para 1.

[1119] Ibid.

[1120] The limitation will only be that the Public Protector must act within the bounds of legislation and that the recourse available to the affected public office-bearers is the review. Should they not exercise the option for review, or the review fails, then the public official is legally obliged to comply. (Cf. *EFF1*supra note 31).

[1121] *EFF1* op cite note 31.

However, the effectiveness of the office of the Public Protector has two fundamental limitations to it. First, the office of the Public Protector may be hamstrung by the lack of financial resources to investigate alleged wrongdoing, especially given its wide mandate.[1122] For example, the State Capture Commission was born as a result of the lack of financial capacity on the part of the Public Protector to carry out an investigation of a huge magnitude that the investigation into state capture would involve.[1123] Second, a hurdle inherent in the effectiveness of the office of the Public Protector lies with the fact that history has shown that its strength has often been dependent on the strength of the character of the incumbent Public Protector. As has been indicated briefly immediately above, before the era of Advocate Madonsela, the office of the Public Protector was a 'sleeping giant'. It was only during the tenure of Advocate Madonsela that this office was revived into a force to be reckoned with.

On the other hand, Advocate Madonsela's successor, Advocate Busisiwe Mkhwebane has proved to be an inconsistent incumbent. As a result, thereof, the office of the Public Protector has lost its stature as one of the efficient offices to hold public office-bearers accountable for the exercise of their constitutional duties.[1124] Thus, this office is no longer a reliable institution to hold public officials accountable, let alone to effect compensation for the losses of State-Owned Enterprises, occasioned by directors' breach of *fiduciary* and constitutional duties. Considering the observations made above, the writer opines that State-Owned Enterprises need to look elsewhere for an effective remedy against their directors (past and present) whose dereliction of duties results in financial losses to the public corporations.

The following part of this chapter discusses the Auditor-General. The Auditor-General is a further

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[1122] 'State of Capture' Report supra note 74, para 8.2.

[1123] Ibid, paras 8.2-8.5.

[1124] Following a long suspension, Advocate Mkhwebane has been impeached through a parliamentary impeachment process in terms of section 194 of the Constitution, about her fitness to hold office and replaced by her deputy Advocate Kholeka Gcaleka (see, in this regard, *the Speaker of the National Assembly v Public Protector* 2022 (3) SA 1 (CC); *Public Protector of South Africa v Speaker of the National Assembly* [2022] 4 All SA 417 (WCC); *Public Protector of SA v Speaker of the National Assembly* [2022] ZAWCHC 117 (WCC) unreported case no 8500 / 2022 (10 June 2022).

important constitutional institution exercising oversight over state-owned entities.

*4.6.4.2 The Auditor-General*

The Auditor-General is one of the Chapter 9 institutions which was established to support democracy. The institution of the Auditor-General derives its existence from section 181 (1)(e) of the Constitution. Section 181 of the Constitution [1125] proclaims, among others, that the Auditor-General is an independent institution that is only subject to the Constitution. [1126] The Auditor-General is only accountable to the National Assembly, mainly through annual reports to it.[1127] The Auditor-General is appointed for a non-renewable period of between five (5) and ten (10) years.[1128] Section 188 of the Constitution, 1996, spells out the functions of the Auditor-General. Among others, the Auditor-General has the power to audit and report on the financial management of any institution in the government.[1129] The Auditor-General is also authorized to audit any institution that is funded by the National Revenue Fund[1130] or institutions authorized to receive money from the public purse.[1131] Thereafter, the Auditor-General must produce reports, which it must submit to any legislature with a direct interest in the audit, including any authority as required by any legislation.[1132]

Moreover, in terms of section 188, additional powers and functions may be assigned to the Auditor-General through national legislation.[1133] To this purpose, in line with the provisions of section 188(4) of the Constitution, the Public Audit Act[1134] was enacted. The purpose of this Act is to give effect to

[1125] Section 181 (1)(e) of the Constitution, 1996.

[1126] Section 181 (2) of the Constitution, 1996.

[1127] Section 181(5) and section 188(1) and (3) of the Constitution, 1996.

[1128] Section 188(1) of the Constitution, 1996.

[1129] Section 188(1) of the Constitution, 1996.

[1130] Section 188(2)(a) of the Constitution, 1996.

[1131] Section 188(2)(b) of the Constitution, 1996.

[1132] Section 188(3) of the Constitution, 1996.

[1133] Section 188(4) of the Constitution, 1996.

[1134] The long title to the Public Audit Act 25 of 2004.

the provisions of the Constitution.[1135] It sets out in detail the establishment, appointment into office, additional powers, and functions of the Auditor-General. The Act also provides for the appointment of an Acting Auditor-General, [1136] the Deputy Auditor-General, [1137] and the Acting Auditor-General.[1138]

The objectives of the Public Audit Act include giving effect to the provisions of the Constitution regarding the establishment of the Auditor-General and its functions.[1139] The Act also seeks to provide for the auditing of the public sector institutions, as well as accountability mechanisms for the Auditor-General.[1140] Among other things, the Auditor-General is competent to audit the accounts of any public entity, including those entities that are listed in the Public Finance Management Act.[1141]

As is the case with the Public Protector, the office of the Auditor-General is placed in a better position to hold accounting authorities of State-Owned Enterprises accountable for the way they exercise their statutory and constitutional functions over the public entities. However, the main limitation of the office of the Auditor-General is that it has played a limited role in the auditing of the affairs of State-Owned Enterprises.[1142] Still, it bears noting that a recent development regarding the office of the Auditor-General marked a turning point in the role of the office, in relation to the affairs of State-Owned Enterprises. The office of the Auditor-General is now able to fully extend its oversight role beyond government departments and local governments, into the affairs of State-Owned Enterprises.

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[1135] Public Audit Act 25 of 2004, the Preamble to thereto.

[1136] Public Audit Act 25 of 2004, section 9.

[1137] Public Audit Act 25 of 2004, section 31.

[1138] Public Audit Act 25 of 2004, section 33.

[1139] Section 4(3)(a) of the Public Audit Act 25 of 2004.

[1140] Section 2 and the Long Title to the Public Audit Act 25 of 2004.

[1141] Section 4(3)(a) of the Public Audit Act. See also State Capture Commission Report Part I vol. 1 supra note 125, para 626.

[1142] The Auditor General up to now has played a supervisory role in the appointment of outside auditors for state-owned companies (see State Capture Commission Report Part I vol. 1 supra note 125, paras 626 and 848 – 849).

A further development contains the amendment of the Public Audit Act 25 of 2004 that specifically adds a new remedy to those available to the Auditor-General. The amendment to the Act has inserted sections 5A and 5B of the Act that deal with the remedial action of the Auditor-General.[1143] In terms of sections 5A and 5B of the Act, the Auditor-General is now empowered to order accounting authorities of State-Owned Enterprises to demand any wrongdoer to compensate a public corporation for financial loss occasioned by a serious irregularity.[1144] First, section 5A mandates the Auditor-General to follow up with accounting authorities or authorities, regarding whether they have implemented the Auditor-General's recommendations.[1145] In terms of this provision, the Auditor-General is required to give accounting authorities a reasonable time to implement its recommendations as contained in its audit report, indicating where the Auditor-General has detected a material irregularity during its audit.[1146]

Also, the Auditor-General has additional powers to take appropriate remedial action to address any failure by accountable office-bearer(s) to implement its recommendations.[1147] Most importantly for purposes of this thesis, in case of financial losses to the state resulting from material irregularity, the appropriate remedy at the hands of the Auditor-General includes a directive to determine the amount of the financial loss to the state, against recalcitrant accounting authorities.[1148]

Additionally, the Auditor-General must direct the accounting authorities to recover such loss from anyone who may be responsible for causing the loss in question to the state.[1149] The recovery contemplated in terms of section 5A (3) must be carried out in terms of any law that is applicable

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[1143] For more on the amendments see State Capture Commission Report Part I vol. 1 supra note 125, paras 628 – 629.

[1144] Section 5A and 5B of the Public Audit Act, 2004.

[1145] Section 5A (1) of the Public Audit Act 25 of 2004.

[1146] Section 5A (1) of the Public Audit Act 25 of 2004.

[1147] Section 5A of the Public Audit Act 25 of 2004.

[1148] Section 5A (3) of the Public Audit Act 25 of 2004.

[1149] Section 5A (3) of the Public Audit Act 25 of 2004.

therein. It is submitted that the legislation contemplated here is the Special Investigating Units and Special Tribunal Act 74 of 1996 ('the SIU Act'). Still, one needs to bear in mind that the recovery in terms of the SIU Act uses the common law principles of the *Actio Legis Aquilae*. Section 5B is even more relevant for the present purpose. The section kicks in where the accounting authorities failed to recover the loss after having been ordered to do so by employing the Auditor-General 's remedial action in terms of section 5A (3) of the Public Audit Act. As an ultimate remedial action, the Auditor-General must issue a certificate of debt to the accounting authorities requiring them to repay the specified amount to the state.[1150] Effectively, the certificate of debt acts as a letter of demand against the accounting officer(s). The Auditor-General must further submit a copy of the certificate of debt to the relevant responsible executive authority, to collect the amount from the accounting officer(s).[1151] Moreover, the Auditor-General is obligated to submit a copy of the certificate of debt to the relevant legislature for tabling therein.[1152]

In the case of the State-Owned Enterprises under consideration in this thesis, the relevant legislature is the National Assembly. Still, there are specific provisions that the Auditor-General ought to comply with when it issues a certificate of debt. Inter alia, the Auditor-General has to consider the written submissions/representations from the affected accounting authorities.[1153] Even then, should the Auditor-General still believe that the certificate of debt should be issued notwithstanding the accounting officer(s) written representations, in terms of section 5B (4) of the Act, she must still allow the affected accounting office bearer(s) to make oral representations.[1154]

In practice, the two sections of the Public Audit Act that deal with the remedial action of the Auditor-

[1150] Section 5B (1) of the Public Audit Act 25 of 2004.

[1151] Section 5B (2) of the Public Audit Act 25 of 2004.

[1152] Section 5B (6) of the Public Audit Act 25 of 2004.

[1153] Section 5B(4) of the Public Audit Act 25 of 2004.

[1154] Section 5B(5) of the Public Audit Act 25 of 2004.

General, oblige the accounting authorities of the organs of states, including accounting authorities of public corporations, to discharge their *fiduciary* and constitutional duties towards the state entity, to recover any loss to a state organ, that is occasioned by material irregularities. At the same time, the Auditor-General's remedial action creates personal liability for accounting authorities who are derelict in the discharge of their *fiduciary* and constitutional duties that they owe organs of state, including state-owned corporations. As in the case of the remedial action of the Public Protector, public officials in positions of trust, such as the board members of state-owned entities, would ignore the recommendations of the Auditor-General at their peril.[1155] Thus, the impact of the provisions of sections 5A and 5B of the Public Audit Act is to give the recommendations of the Auditor-General, especially where an organ of the state suffers financial loss, an elevated status.

Although the remedial action of the Auditor-General, in terms of section 5A and section 5B of the Public Audit Act, is plausible, it has its limitations in holding accounting authorities accountable for the way they manage public entities. First and foremost, the remedial action of the Auditor-General envisages a situation where primary wrongdoers are persons other than the accounting authorities themselves. Sections 5A and 5B of the Public Audit Act are geared toward state losses caused by serious misconduct (irregularity) of officers such as company employees, including executives, over whom the accounting authorities exercise oversight.

The provisions of sections 5A and 5B[1156] may also apply in respect of third parties who are not part of the public corporations, such as suppliers doing business with public entities. Third parties may

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[1155] *EFF1* supra note 31 at para 1. Also, according to the Auditor-General annual report for 2021/22, the office of the AGSA has used its section 5B powers and issued its first remedial action to Prasa, the departments of Defence and Human Settlements, and the Ngaka Modiri Molema District Municipality after identifying several irregularities to the tune of R14,7 billion. AGSA, Integrated Annual Report 2021/22 at 11, 27 & 76, available at *AGSA_Annual_Report_2021-22_Interactive.pdf*, accessed 20 July 2022. According to media reports, the Municipal Manager of Ngaka Modiri District Municipality may become the first accounting officer to have a debt certificate issued against him for personal liability for irregular expenditure incurred by the Municipality, because of failed water treatment works. Paddy Harper 'Municipal Manager can be held responsible for losses' *Mail & Guardian* 17 June 2022, available at *https://www.pressreader.com/south-africa/mail-guardian/20220617,* accessed 21 June 2022.

[1156] Sections 5A & 5B of the Public Audit Act 25 of 2004.

cause state entities financial loss through corruption or failure to deliver in terms of a supply contract, for example. It would be against these individuals that sections 5A and 5B would oblige accounting authorities to act to protect the state corporation against suffering financial loss. However, accounting authorities would only incur personal liability when they fail to act against the real wrongdoers. Still, the remedial action of the Auditor-General falls short in situations where the accounting authorities are the primary wrongdoers (or even joint wrongdoers) who are responsible for the material irregularity that caused the organ of state to suffer financial loss. That phenomenon is what has often been manifested in state-owned entities, such as what happened with South African Airways, in the case of Myeni and Kwinana.[1157] These have been at the forefront of defrauding the SAA, using outsiders to benefit themselves at the expense of the state-owned corporation.[1158] Henceforth, in such situations, the remedial action of the Auditor-General would be ineffective to recover the financial loss of the state-owned enterprise that is caused by the accounting authorities' material irregularity, in breach of their constitutional and *fiduciary* duties.

The following part deals with further statutory institutions exercising oversight over the South African public administration and affairs of the state-owned corporation.

## 4.7 ADDITIONAL OVERSIGHT INSTITUTIONS

In this part of the research, the focus is on the Special Investigating Unity, and the Special Tribunal (the Tribunal). Although the SIU and the Special Tribunal are regulated by one legislation and operate in conjunction with each other, for this study, they are discussed separately.

### 4.7.1 The Special Investigating Unit

The SIU was established in terms of section 2 of the SIU Act. Section 2 of the SIU Act specifically

[1157] See, for example, State Capture Commission Report Part I vol. 1 supra note 125, paras 850-51.

[1158] See, for example, State Capture Report Part I vol. 1, paras 219-20 & 236.

empowers the President of the country to establish a Special Investigating Unit to investigate matters of serious maladministration concerning the affairs of state institutions.[1159] As the SIU Act provides, the SIU is a juristic person, headed by a judge or acting judge of the high court, appointed into the position by the State President.[1160] Section 3 of the SIU Act deals with the composition of the SIU. The appointed judge is the one who establishes the SIU, upon appointment by the President.[1161] The Head of the SIU is authorised to appoint as many individuals, including officers in the public service, as may be necessary to discharge the SIU functions. The SIU is said to be independent of the executive. The appointees of the SIU are at liberty to resign at any time should they wish to do so.[1162]

Section 2(2) of the SIU Act spells out matters that may give rise to the need for establishing a Special Investigating Unit and the Special Tribunal. These matters include, *inter alia*, serious maladministration in state affairs;[1163] unlawful expenditure of public money;[1164] unlawful, irregular, or unapproved acquisitive transactions;[1165] culpable loss of public money;[1166] acts of corruption perpetuated in public affairs;[1167] as well as any improper conduct causing serious harm to the public interests.[1168] Generally, section 4 of the SIU Act spells out the functions of the SIU, which include investigating all allegations about any matter, collecting evidence regarding the matter in question, instituting proceedings in the Special Tribunal, and presenting evidence in such proceedings in the Special Tribunal,[1169] regarding matters provided for in section 2 of the SIU Act. However, the State

[1159] Section 2(1)(a)(i) of the Special Investigating Units and Special Tribunal Act 74 of 1996.

[1160] Sections 3 & 13 of the SIU Act.

[1161] Section 3(1) & (2) of the SIU Act.

[1162] Section 3(4)(a) of the SIU Act.

[1163] Section 2(2)(a) of the SIU Act.

[1164] Section 2(2)(c) of the SIU Act.

[1165] Section 2(2)(d) of the SIU Act

[1166] Section 2(2)(e) of the SIU Act.

[1167] See section 2(2)(e) of the SIU Act.

[1168] Section 2(2)(g) of the SIU Act.

[1169] Section 4(1)(a) – (c) of the SIU Act.

President may also refer matters of such maladministration to an existing Special Investigating Unit for investigation.[1170]

Primarily, the SIU may, among other powers, institute civil proceedings in the Special Tribunal, arising from its investigations.[1171] The SIU is also empowered to refer other matters to the Public Protector of the Republic whenever any matter may, according to the SIU, be best dealt with by the Public Protector,[1172] the relevant prosecuting authorities (such as the National Prosecuting Authority (NPA))[1173] or the State Attorney, to institute legal proceedings, should there be justification for such proceedings in the opinion of the SIU.[1174]

In the exercise of its duties, the Special Investigating Unit has wide statutory powers, which are vested in the Head of the SIU (the judge). To fulfill its functions, the SIU has the authority to enter and search any premises or to authorise police officers to do such searches or investigations on its behalf.[1175]

4.7.2 Special Tribunal(s)

Section 2 of the Special Unit and Tribunals Act further empowers the President to establish one or more special tribunals to adjudicate on civil disputes that emanate from SIU investigations, whenever the President deems it necessary.[1176] As in the case of the SIU, the President has the power to establish one or more Special Tribunals through a Presidential Proclamation in the Government Gazette.[1177] Section 7 of the SIU Act deals with the composition of the Special Tribunal(s). The SIU goes in tandem with the Special Tribunal. So, when the President establishes the Unit, he also establishes the

[1170] Section 2(1)(a)(ii) of the SIU Act.

[1171] Section 5(5) of the SIU Act.

[1172] Section 5(6) of the SIU Act.

[1173] Section 4 of the SIU Act.

[1174] Section 5(7) of the SIU Act.

[1175] Section 6 of the SIU Act.

[1176] Section 2(1)(b) of the SIU Act.

[1177] Examples are Proclamations, R29 of 2017, & R19 of 2018 authorising investigations into the affairs of the SABC.

Special Tribunal to adjudicate on matters being investigated by the Special Investigating Unit.[1178] Section 7 of the SIU Act deals with the composition of the Special Tribunal(s). As is the case with the SIU, the Special Tribunal is headed by a judge of the high court (the Tribunal President) and is composed of any other number of additional members as may be necessary.[1179] The Head (and President) of the Special Tribunal is appointed by the State President, in consultation with the Chief Justice of the Republic of South Africa.[1180] Additionally, the State President appoints additional members of the Special Tribunal among judges or acting judges, as well as from magistrates and advocates or even attorneys of the high court.[1181]

To be eligible for appointment to the Special Tribunal, Magistrates and legal practitioners need at least seven years of service in the administration of justice.[1182] Additionally, the Minister of Justice, in consultation with the head of the Special Tribunal, seconds one or more officials from the Department of Justice to assist the tribunal in the performance of its functions.[1183] One such official acts as the secretary for the Special Tribunal, after the secondment by the President of the Special Tribunal.[1184] The Special Tribunal is independent and impartial, subject only to the Constitution.[1185] Section 8 of the SIU Act provides for the powers and functions of the Special Tribunal. The Tribunal has jurisdiction over civil disputes, which the SIU and any other interested party may refer to it.[1186] The

[1178] Section 7 of the SIU Act.

[1179] Section 7(1) of the SIU Act.

[1180] Section 7(2) of the SIU Act.

[1181] Section 7(3) of the SIU Act.

[1182] Ibid.

[1183] Section 7(1) of the SIU Act.

[1184] Ibid.

[1185] Section 8(1) of the SIU Act.

[1186] Section 8(2) of the SIU Act.

proceedings of the Special Tribunal are open to the public unless there is a good cause for the proceedings or part thereof to be held behind closed doors.[1187]

The Special Tribunal has the power to subpoena persons, including witnesses, to attend its proceedings, and to produce documentation, to name a few.[1188] The Tribunal, also, has powers to issue arrest warrants, directing the detention of those who fail to comply with its orders.[1189] Moreover, failure to attend the proceedings of the Tribunal without just cause is an offence, and carries a fine or imprisonment for a period of up to 12 months.[1190]

Generally, the powers and functions of the SIU and the Special Tribunal are geared towards the attainment of the purpose of the SIU Act, namely, to recover the monies that may be lost to the public purse, through maladministration. However, it is apparent from the provisions of section 2 that the SIU and the Special Tribunals are not permanent institutions for holding the accounting authorities and public officials accountable for the management of public institutions. Instead, the SIU and Special Tribunals are discretionary and subject to the State President's exercise of his discretion. Therefore, the two institutions are established on a*d hoc* bases when the State President sees a need for their services. This means that the SIU investigations will only take effect once the state President has authorised the Unit to begin investigations into the alleged misconduct, through a Proclamation in the Government Gazette. Once the SIU investigations are concluded, the Investigating Unit would normally commence a civil action against the wrongdoers in the Special Tribunal, to recover any money lost to the state organ, department, or state-owned enterprise.

Hence, the way the SIU operates presents at least two main setbacks for its independence and effectiveness as a means of advancing the accountability of board members of State-Owned

[1187] Section 10(2) - (3) of the SIU Act.

[1188] Section 8(3) of the SIU Act.

[1189] Section 8(4) of the SIU Act.

[1190] Section 12(2) of the SIU Act.

Enterprises. First, it operates on an *ad hoc* basis and too much of its authority is placed at the hands and discretion of the State President. It is undesirable to subject the power to authorise investigations into public maladministration to the hands of the executive, especially in the light of widespread corruption and patronage that South Africa has experienced in the past two decades. In a sense, the SIU is subject to the political will of the politicians. In *Glenister,* Moseneke DCJ and Cameron J, held regarding the need for an independent Directorate for Priority Crimes Investigation ("DCPI" or 'HAWKS'): [1191]

> 'The competence vested in the Ministerial Committee to issue policy guidelines puts significant power in the hands of senior political executives. It cannot be disputed that those very political executives could themselves, were the circumstances to require, be the subject of anti-corruption investigations. They 'oversee' an anti-corruption entity when of necessity they are themselves part of the operational field within which it is supposed to function. Their power over it is unavoidably inhibitory.'[1192]

These words of the Constitutional Court in the above judgment apply with the same force regarding the SIU. The obvious negative aspect in subjecting the SIU powers to the hand of the President, remains the conflict of interests between the public interests and the interests of the President, where he is conflicted or has a vested interest in the matter that was under investigation.[1193] This means that SIU investigations may never be authorised in such circumstances. The State President may selectively use the SIU to investigate his political opponents while he spares his allies. Therefore, while the SIU Act asserts the independence of the SIU, it is not independent.

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[1191] *Glenister* supra note 468.

[1192] Ibid, para 232.

[1193] This was the case during the reign of former President Zuma, who had openly admitted that the Guptas, accused of fleecing SOCs monies, were his friends. Hence, it would be foolhardy to expect him to authorise SIU investigations into wrongdoings taking place in SOCs. (State Capture Commission Report Part V vol. 2 supra note 123, paras 1313, 1394 & 1504.

The second fundamental setback about the SIU operations is the fact that the money recovered is primarily recovered to the national Treasury and not back to the state-owned enterprise.[1194] As such, the monies recovered may not necessarily compensate the affected state-owned enterprise, unless provided for in the Proclamation. Instead, the SIU process would only foster accountability of accounting authorities of State-Owned Enterprises.

In the following part of the section, the study looks at the appointment and removal of directors of State-Owned Enterprises in South Africa.

## 4.8 APPOINTMENT AND REMOVAL OF DIRECTORS

At present, the Companies Act regulates the appointment and removal of company directors, in South Africa. In general, directors are appointed and removed by shareholders at a general meeting, in terms of the law. As mentioned already, section 66 of the Companies Act, provides for the appointment and removal of board directors and prescribed officers of companies.[1195] First, section 66(4) of the Companies Act, 2008, provides for the designation of a person who should be responsible for the appointment and removal of directors, in the Memorandum of Incorporation (MOI). The MOI may also make provision for the appointment of alternate directors by the same designated person. Meanwhile, section 67 deals with a company's first director(s). First, directors of a company may be appointed as per section 66(4), or may be elected in terms of section 68 or as provided by the company's MOI.[1196] Alternatively, directors may be elected at a shareholders' meeting within 40 business days after the incorporation of the company, in the case of additional directors, when it is necessary in terms of the Companies Act, 2008, or the company's MOI.[1197] On the other hand, section

[1194] However, in recent judgments of the current Special Tribunal, there are indications that a state-owned enterprise may be able to use the services of the SIU and the Special Tribunal to recoup its losses, provided it falls within the terms of the SIU proclaimed by the State President. In that case, therefore, the second hurdle falls off.

[1195] Section 66 (1)-(12) of the Companies Act 71 of 2008.

[1196] Section 67 (1) of the Companies Act 71 of 2008.

[1197] Section 67 (2) of the Companies Act 71 of 2008.

68 of the Companies Act of 2008 deals with the election of profit companies. Generally, directors other than the first director(s) contemplated in section 67 of the Companies Act, 2008, are elected by persons who have voting rights in an election of directors.[1198] Section 70 of the Companies Act, 2008 deals with situations that give rise to vacancies in boards when one ceases to be a director.[1199] The same section directs how the vacancies may be filled[1200] and indicates the requirement for a company to file a notice when a director ceases to act.[1201]

Meanwhile, directors (board members and accounting authorities) of State-Owned Enterprises are appointed in terms of the founding legislation of the respective state entities. Where the entity falls under the Companies Act, 2008, the appointment of directors is regulated under the MOI or in terms of the Companies Act.[1202] The Companies Act of 2008, requires each public company to have a minimum of two directors.[1203] In the case of private companies, directors are appointed and removed by the majority shareholders, in terms of the company's constitution and the MOI. As a rule, company shareholders elect their directors in a general meeting.[1204] However, State-Owned Enterprises are by their nature *sui generis* in that they do not have conventional shareholders. Instead, the DPE Minister or some designated minister becomes the shareholder (government) representative.

Hence, directors and board members of state-owned corporations are appointed by the shareholder representative (the minister of public enterprises) or by the holding minister or the state president. It all depends on the founding legislation or what the cabinet has decreed concerning an entity at any given time. For example, the appointing authority in the case of Transnet is the shareholder

[1198] Section 68 of the Companies Act, 2008.

[1199] Section 70 (1) - (6) of the Companies Act, 2008.

[1200] Section 70 (3)-(5) of the Companies Act, 2008.

[1201] Section 70 (6) of the Companies Act, 2008.

[1202] Act 71 of 2008.

[1203] Section 208 (1) of the Companies Act 71 of 2008.

[1204] Sections 209-210 of the Companies Act 71 of 2008. See also Tshepo Mongalo, *Corporate Law & Corporate Governance. A Global Picture of Business Undertakings in South Africa* (2003) 152.

representative minister (DPE), whereas the Minister of Transport appoints board members for PRASA. The President, meanwhile, appoints the board of SABC (in consultation with the minister of communications and technologies and the cabinet). Company directors may also be removed under the relevant legislation, the MOI or in terms of the Companies Act 71 of 2008. Section 71 of the Companies Act, 2008, specifically deals with the removal of company directors from office. Generally, in the case of state-owned corporations, members of boards (accounting authorities) are appointed by the shareholder minister (Minister of Public Enterprises), who is at times required to consult with the policy minister (Minister of Public Transport) when making an appointment.[1205]

Generally, founding legislations, the Public Finance Management Act, 1999, and the Companies Act, 2008 (including the Memorandum of Incorporation of the company) provide for the composition and removal of directors. For example, the Broadcasting Act 4 of 1999 governs the operations of the South African Broadcasting Corporation (SABC),[1206] in addition to the partial application of the Companies Act 71 of 2008. As the Broadcasting Act provides, the affairs of the SABC are managed through the board.[1207] The members of the SABC board are appointed at the behest of the President to the National Assembly.[1208] The board comprise fifteen board members, three of whom are executive directors, in terms of section 12 of the Broadcasting Act, 1999. The three executive directors consist of the Group Chief Executive Officer ('GCEO'), the Chief Operating Officer ('COO'), and the Chief Finance Officer ('CFO').[1209] Nine members, one of whom must be the board chairperson or deputy, make up a quorum for meetings.[1210] Meanwhile, sections 15 and 15A of the Broadcasting Act details the dismissal process of non-executive members of the SABC board and the dissolution of the board

[1205] For example, see section 14(1) of the National Ports Act 12 of 2005.

[1206] Section 8A of the Broadcasting Act 4 of 1999.

[1207] Section 14 of the Broadcasting Act 4 of 1999.

[1208] Section 13(1) of the Broadcasting Act of 4 of 1999.

[1209] Section 12(b) – (c) of the Broadcasting Act of 4 of 1999.

[1210] Section 13(3) of the Broadcasting Act of 4 of 1999.

(together with the appointment of an interim board). The President may remove a board member after due enquiry, upon the recommendation by the board, in terms of section 15A of the Broadcasting Act 4 of 1999. The inquiry is conducted by the National Assembly Committee upon the passing of a National Assembly Resolution.[1211] The grounds for removal include misconduct, inability to efficiently perform the duties of a director, and a continued absence from board meetings.

However, in addition to the Broadcasting Act, the operations of the corporations are governed by the PFMA, the Companies Act, the Companies MOI of 2013, as well as the King III Code, King IV, the South African National Treasury Regulations,[1212] and the SABC's Delegation of Authority Framework.[1213] The MOI affirms the provisions of section 13 of the Broadcasting Act, 1999 regarding the composition of the board of the Corporation. Clause 14 of the MOI, 2013 confirms the provisions about ineligibility or disqualification to serve on the board and termination of one's membership of the board.[1214] The MOI contradicts section 13 of the Broadcasting Act of 1999. Clause 14(3) of the SABC MOI, 2013, empowers the Minister of Communications and Technologies to authorise the removal of any director appointed by him in terms of section 66(4)(a)(i) of the Companies Act, 2008. This conflicts with the Broadcasting Act which gives the power to appoint and remove the President.[1215] Moreover, the Broadcasting Act is silent about the appointment and dismissal of the CEO, the CFO and the COO. Instead, the MOI of the Corporation pronounces the conditions for key appointments. Clause 13(5) of the MOI, 2013 provides for the board to make the CEO, the CFO and

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[1211] Section 15A of the Broadcasting Act 4 of 1999.

[1212] *National Treasury Regulations*, supra note 499.

[1213] T.V. Geldenhuys, 'Delegation of Authority Framework 2018/19', available at *https://pmg.org.za/files/200728Annexure_E_Extract_from_Delegation_of_Authority_Framework.pdf,* accessed 20 July 2022.

[1214] Clause 14(1) – (2) of the SABC MOI, 2013. See also section 13(4) of the Broadcasting Act 4 of 1999.

[1215] However, in terms of the Broadcasting Act, this Act prevails in the case of conflict. So, since the MOI emanates from the Companies Act, it is its document. Thus, the Broadcasting Act, 1999, provisions prevail (*Ad Hoc* Committee Report supra para 4.3.2, available at *http://www.governmentpublications.lib.uct.ac.za/news/final-report-ad-hoc-committee-sabc-board-inquiry-fitness-sabc-board*, accessed 20 July 2022.

the COO appointments, with the approval and confirmation of the Minister of Communications.

Concerning Eskom, the entity is governed by the Conversion Act 13 of 2001 (Eskom Act), the Public Finance Management Act, 1 of 1999, the Companies Act 71 of 2008 and Eskom's MOI of 2014.[1216] The Conversion Act of 2001, is silent on the appointment (and dismissal) of members of the board, as well as that of the entity's CEO and CFO, who are topmost executives. Therefore, the appointment of members of the Eskom board is regulated by the Public Finance Management Act of 1999. The PFMA empowers the Minister of Public Enterprises to appoint members of the Eskom board.[1217] In addition, clause 14 of Eskom's MOI deals with directors of the utility in detail and endorses the provisions of the PFMA on the appointment of the entity's members of the board.

Regarding the composition of the Eskom board, clause 14(1)(2) of the MOI, 2016, provides for a minimum of 3 and a maximum of 15 directors, the majority of whom are independent non-executive directors. Among the 15 directors, at least two of them are required to be the Group Chief Executive and the Group Chief Financial Officer.[1218] Clause 14(1)(1) and 14(3)(1) of Eskom MOI, 2016, confer exclusive authority on the Minister of Public Enterprises regarding the appointment and dismissal of board members and the CEO of the power utility.[1219] However, in the case of the CEO, the Minister may request the board to identify, nominate, evaluate and submit a shortlist of potential candidates to the Minister for the appointment.[1220] On the other hand, the board has the power to appoint the CFO of the entity, with the Minister's written approval.[1221] The Eskom Memorandum of Incorporation

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[1216] Dullar Omar Institute for Constitutional Law, Governance and Human Rights (Dullar Omar Institute), 'Legal Framework of SOE Boards: Appointment and Dismissal of Board Members and Executives of Eskom, Prasa and SABC', available at *https://dullahomarinstitute.org.za/women-and-democracy/board-members-of-state-owned-enterprises-towards-transparent-appointments/reports/wandrag_legal_framework_paper_2_revision_4_04_07_2019.pdf,* accessed 22 August 2022.

[1217] Section 63 of the Public Finance Management Act, 1 of 1999.

[1218] Clause 14(1)(2) of the Memorandum of Incorporation (MOI), 2016.

[1219] See also Clause 14 (3)(3) of Eskom MOI of 2016.

[1220] Clause 14(3)(2) of Eskom MOI of 2016.

[1221] Clause 14(4) of Eskom MOI of 2016

(MOI) also sets out the factors such as knowledge and experience which the Minister must consider when appointing directors.[1222] Ultimately, the MOI requires that the board must be balanced, collectively, in terms of skills and experience considered appropriate to the achievement of the objectives of the company.[1223] The board may not include persons who are disqualified by law from serving as directors.[1224]

As for the South African Airways, the enabling legislation[1225] is silent regarding the appointment of directors for the entity and other matters pertaining to the management and operations of the national carrier. However, as the SAA is governed by the Companies Act, its affairs are governed by its MOI. The latest SAA MOI was signed by the responsible Minister (Minister of Finance) on May 22, 2015. The MOI vests the management and control of the SAA in the board, which has all the powers over the affairs of the entity, including the delegation of such powers.[1226] Directors for the SAA are appointed by the Minister (responsible for the SAA, currently the Minister of Finance), in consultation with the Cabinet.[1227] Clause 13 of the MOI, 2015 provides for a board of between five (5) and fifteen (15) directors.[1228] Of the number of directors, the majority are required to be non-executive, whereas the MOI requires a minimum of two executive directors, who at least include the CEO and the CFO of the national carrier.[1229] The MOI provides for the appointment to be based on the knowledge and skills of the candidates, while the government ensures that the board is balanced in terms of age, race

[1222] Clause 14(3)(1) of Eskom MOI of 2016.

[1223] Clause 14(1)(5)(4) of Eskom MOI of 2016.

[1224] Clause 14(1)(5)(5) of Eskom MOI of 2016.

[1225] The South African Airways Act 5 of 2007.

[1226] Clause 13.10.1 – 13.10.3 of the MOI, 2015.

[1227] Clause 13.1.1 of the MOI, 2015. The SAA MOI also governs the appointment of directors of boards of wholly owned subsidiaries of SAA, and the number of their directors (see in this regard Clause 13.9 of the MOI, 2015). One such wholly owned subsidiary of SAA is the South African Airways Technical Limited (SAA-T). The MOI of SAA-T is virtually the same as the SAA MOI, with minor adaptations. For this reason, therefore, it is unnecessary to focus on the SAA-T MOI, which was also last updated in 2015.

[1228] Clause 13.1.1 of the MOI, 2015.

[1229] Clause 13.1.2.1 of the MOI, 2015.

and gender.[1230] The MOI entitles the shareholder (government) to remove any director, using an ordinary resolution adopted at a shareholders' meeting.[1231] In addition, the board may also, through a resolution, remove directors on certain conditions, such as in the case of a neglectful or derelict director.[1232] The Minister is also empowered by the MOI to appoint both the chairperson and deputy chairperson of the board.[1233]

It is submitted that the provisions on the appointing authority in respect of the members of the board, the chairperson and the deputy chairperson, may tend to compromise the independence of the board. As it emerged from the 2022 findings of the State Capture Commission of Inquiry, this likelihood is especially strong within the South African environment, characterised as it is by corruption and patronage. Moreover, the SAA MOI empowers the board, with the approval of the responsible Minister, to appoint the company CEO and the CFO.[1234] The board conducts the recruitment and selection process.[1235] Generally, this provision of the MOI goes as far as giving the powers to the boards to conduct an independent appointment process. However, the above arrangement may be problematic in the South African environment, with a history of abuse of power, as was seen during Myeni's era as the chairperson of the SAA board.

On the other hand, the Legal Succession to the Transport Services Act[1236] governs the management of the affairs of the Passenger Rail Agency of South Africa (PRASA). Section 24 of the Legal Succession to the Transport Services Act 9 of 1989 deals with the governance of boards of directors. In terms of this section, the boards may include up to a maximum of 10 members, who are appointed by the

[1230] Clause 13.1.2.2 of the MOI, 2015.

[1231] Clause 13.6 of the MOI, 2015.

[1232] Clauses 13.7.7 – 13.7.8 of the MOI, 2015.

[1233] Clause 13.2.1 of the MOI, 2015.

[1234] Clause 13.3.1 of the MOI, 2015. The functions of the CEO and conditions of employment are also spelt out in the MOI (Clauses 13.3.3 and 13.3.4 of the MOI, 2015).

[1235] Clause 13.3.2 of the MOI, 2015.

[1236] Act 9 of 1989 (As amended by the Legal Succession to the Transport Services Amendment Act 38 of 2008).

Minister of Transport.[1237] Section 24 provides for the qualifications for persons appointed as members of the PRASA board of control; namely, a minimum of three are required to possess expertise and experience in managing companies in the private sector.[1238] Section 24(2) of the Legal Succession to the Transport Services Act also gives the Minister of Transport powers to dismiss members of the board of the PRASA.[1239]

In the case of the South African National Roads Agency Limited (SANRAL), the applicable legislation is the South African National Roads Agency Limited and the National Roads Act 7 of 1998 (SANRAL Act). Section 12 of the SANRAL Act provides for an eight-member board of directors. In terms of this Act, of the eight members, seven (7) of the eight members are appointed by the Minister of Transport, one of whom is required to be the Chief executive Officer (CEO) of the corporation.[1240] The eighth member of the SANRAL board is a nominee of the national Department of Finance.[1241] As a qualification for eligibility for appointment to the board of SANRAL, the SANRAL Act requires five of the persons appointed to the board of SANRAL to possess 'special qualifications, skills and expertise in matters concerning national roads or the business or operations of the South African National Roads Agency Act 7 of 1998.[1242] In respect of the six and the chairperson of the board, the Act provides that the appointee should be a' fit and proper person' to serve as the chairperson of the board of this Agency.[1243] However, the Act is silent about the qualifications of the seventh member that is nominated or appointed by the Minister of Transport, as is the case regarding the one representing the Department of Finance. As the Act provides, the term of office of a board member

[1237] Section 24 of the Legal Succession to the Transport Services Act 9 of 1989.

[1238] Section 24(2) of the Legal Succession to the Transport Services Act of 2008.

[1239] Ibid.

[1240] Section 12 of the SANRAL Act, 7 of 1998. The CEO for SANRAL is appointed in terms of section 19 of the SANRAL Act, 1998.

[1241] Section 12 of the SANRAL Act 7 of 1998.

[1242] Section 12(3)(b) of the SANRAL Act 7 of 1998.

[1243] Ibid.

of SANRAL is 3 years. [1244] The conditions of service of the members of the board are determined by the Minister of Transport.[1245]

Further, the National Ports Authority Act is detailed about the management of the National Ports Authority.[1246] Chapter 4 of the National Ports Authority Act is dedicated to the boards, staff and assets of the Authority. Section 14 deals with the composition of the Authority's board.[1247] In terms of this section, the National Ports Authority Board must consist of no less than 7 and no more than 13 members in total.[1248] The Minister of Public Enterprise (the Shareholding Minister) is the authority entrusted to appoint and remove board members of this authority, in consultation with the Minister of Transport.[1249] Section 18(3) sets out the grounds upon which the Shareholding Minister may dismiss members of the Ports Authority board from office. The reasons for dismissal include but are not limited to misconduct.[1250] In terms of section 18, all board members serve for a term not exceeding three years. The chairperson of the board may be reappointed for a further term of three years. In contrast, other members of the board may be reappointed for no more than six consecutive years.[1251] In terms of this Act, the shareholding minister is also empowered to appoint the chairperson,[1252] whereas the board members elect the deputy.[1253]

The Act also provides for qualifications for eligibility to serve on the National Ports Authority

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[1244] Section 13 (read with section14) of the SANRAL Act of 7 of 1998.

[1245] Section 13(b) of the SANRAL Act of 7 of 1998.

[1246] The National Ports Authority Act 12 of 2005. Chapter 4 comprises sections 14 to 28.

[1247] Section 14 of the National Ports Authority Act 12 of 2005.

[1248] Section 14(1) of the National Ports Authority Act 12 of 2005.

[1249] Sections 14(1) and 18(3) of the National Ports Authority Act 12 of 2005. The appointment process begins with the [s]hareholding [m]inister calling for nomination on the national media and selecting among the nominated persons (section 15(1) of the National Ports Authority Act 12 of 2005).

[1250] Section 18 (3)(a) – (d) of the National Ports Authority Act 12 of 2005.

[1251] Section 18 (2) of the National Ports Authority Act 12 of 2005. See also section 18(6) regarding reappointment for transition purposes.

[1252] Section 14 (3) of the National Ports Authority Act 12 of 2005.

[1253] Section 14 (4) of the National Ports Authority Act 12 of 2005.

board.[1254] Section 14 of the Act requires that the appointed members must command special knowledge or skills in fields that include the management of ports, international trade, corporate management, commerce, finance, and legal and economic matters, to name a few, to enable them to add value to the Authority.[1255] The Act also sets out the functions of the board of the National Ports Authority, which are mainly oversight in nature (oversight of the Authority's executive, the strategies and affairs of this public entity.[1256]

Generally, board members of State-Owned Enterprises may be removed in line with the provisions of the respective companies' founding legislation, the Memorandum of Incorporation or the Companies Act 71 of 2008. Section 71 of the Companies Act specifically provides for the removal of directors from office.[1257] In terms of the same section, members who get removed may challenge their removal, through a court review, within 20 business days.[1258] As was shown in chapter 3 above, there is generally a problem with the appointment and dismissal powers in respect of members of boards of state-owned entities. The seat of this power and its exercise have been at the centre of the instability of public entities, including failure of good corporate governance. The Dullah Omar Institute, Constitutional Law, Governance and Human Rights Centre, attributes the problem of instability in the boards of state-owned entities to the fact that the government is the shareholder, policymaker and regulator, as well as the agency vested with the power to appoint and remove directors and CEOs.[1259] The Institute argues that this phenomenon undermines the oversight role which is the mandate of the boards.[1260]

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[1254] Section 14(2) of the National Ports Authority Act 12 of 2005.

[1255] Section 14(2)(a)–(f) of the National Ports Authority Act 12 of 2005.

[1256] Section 16 of the National Ports Authority Act 12 of 2005.

[1257] Section 71(3) of the Companies Act 71 of 2008.

[1258] Section 71(5) of the Companies Act 71 of 2008.

[1259] Dullar Omar Institute op cit note 1198.

[1260] Ibid.

Partly, this study agrees with the Dullah Omar Institute's position. However, the problem is not so much because the government is the shareholder, policymaker, and regulator. Rather, the problem lies largely with vesting the power to appoint and remove directors, as well as company executives in the hands of a cabinet minister. Such vesting of power, especially in the Minister of Public Enterprises, is problematic, considering the political climate as0 South Africa's with one dominant political party and with the record of successive ministers in the Department of Public Enterprises. In many instances, ministers have proven to constitute a major part of the problems of SOEs as the findings of the State Capture Commission, discussed in chapter three above, indicated.

Also, the problem is exacerbated by the deployment policy of the governing party.[1261] Instead, there ought to be a realisation that State-Owned Enterprises , unlike private companies, are *sui generis* in that being a shareholder does not necessarily mean that the political head must be vested with the power to appoint and dismiss directors and executives. Such power may vest elsewhere, such as at the National Treasury, while shareholder-ship lies with the DPE, as this study argues.[1262]

To foster stability, the National Development Plan (NDP) Commission recommends joint appointments of boards, between the relevant ministries.[1263] However, for another reason, it bears pointing out that, the implementation of this recommendation may not achieve the desired stability in the governance of State-Owned Enterprises. The power to appoint and dismiss boards would still be with 'unstable' executives, that is, ministers who have no security of tenure in office.

The section below will focus on the issue of the remuneration of board members as an added reason supporting the argument for the imposition or enforcement of delictual remedies against directors of

[1261] See chapter 3 of this thesis about the discussion of the problem of deployment of cadres in the affairs of state-owned companies.

[1262] See chapter 7 of this thesis for more on this issue of abolishing the DPE and consolidating all strategic state-owned companies under the National Treasury.

[1263] The NDP supra note 9 at 439 & 441.

South African state corporations in the event of dereliction of the *fiduciary* duty to the SOE.

## 4.9 REMUNERATION OF DIRECTORS OF STATE-OWNED ENTERPRISES

The remuneration of board members of State-Owned Enterprises does not fall directly within the purview of this thesis. However, it is still necessary to examine the subject of director remunerations to establish the *quantum* of the incentives payable to board members for their services to public entities. It is also pertinent to understand further policies on the remuneration of office-bearers (particularly, non-executive directors serving as board members) of public entities. The confirmation of incentives awarded to board members and their value should provide further reason to hold them accountable for deviations in the discharge their responsibilities to public companies.[1264] In other words, because accounting authorities get remunerated for their services, this should add further weight to the argument for consequent management and accountability against them, in the form of delictual liability, when they are derelict in their legal duties.

Board members of state-owned entities in South Africa are entitled to receive 'remuneration' for their services, in line with their counterparts serving on boards of directors of private companies. Board members of state-owned corporations usually get paid a basic allowance for being a board member plus an extra fee for the attendance of meetings.[1265] In some instances, the founding legislation expressly provides for the remuneration of board members for their services. For example, the South African National Roads Agency Act[1266] states that appointed members 'will be remunerated' for serving on the board. Section 13 even provides for the relevant Minister to determine the daily rate of their remuneration for each day a member spends occupied with the business of the Agency, as well

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[1264] See MHR Bussin & M Ncube, 'Chief Executive Officer and Chief Financial Officer Compensation Relationship To Company Performance in State-Owned Entities' (2017) 20 (1) *South African Journal of Economics & Management Science* (*SAJEMS*), available at *https://doi. org/10.4102/sajems. v20i1.1644,* accessed 24 October 2019.

[1265] National Treasury 'Adjustment of the Remuneration Levels: Service Benefit Packages for Office-Bearers of Certain Statutory and Other Institutions,' 2019, available at *http://www.treasury.gov.za/legislation/pfma/renumerative/2019%20Cir%20-%20Rem%20Stat%20and%20Other%20Inst.pdf*, accessed 14 September 2022.

[1266] The SANRAL Act.

as when payment can be due to the member.[1267] Concerning those directors who are part of the entity's executive, the SANRAL Act makes an allowance for them to be paid an honorarium for their service on the board of the Agency.[1268] Yet, other statutes are silent regarding the remuneration of board members. In that case, the remuneration of members of boards and the rate applicable to them, is regulated in terms of the determinations of the National Treasury which get published from time to time. The latest determination in this regard was the 2019 proclamation.[1269] The National Treasury circular classifies office bearers and board members into 6 categories, ranging from categories S and A to E.[1270] In terms of this document, fees for directors of public entities are categorised into annual board fees, daily fees and hourly fees. For the chairperson, board membership fees range between R 32 722, for the lowest ranking, and R 111 817 for the highest-ranked chairperson per annum. The hourly rate ranges between R329.00 and R 694.00 for the lowest-ranked and the high-ranking chairpersons, respectively.[1271] Meanwhile, the daily rate ranges from R1 623 and R5 549, in the case of chairpersons of boards of public entities.[1272] On the other hand, a vice chairperson earns between R29 579 and R94,942 in terms of the stipulated annual rates.[1273] The hourly rate in respect of a vice-chairperson ranges from R183.00 to R589.00.[1274]

For ordinary board members, the national treasury document provides for an annual fee scale of between R26 251 and R87 030 depending on the category of directors.[1275] The members' daily fee ranges between R1 302 and R4 317, for the lowest and highest levels, in terms of the ranking or

[1267] Section 13(a)–(b) of the Act.

[1268] Ibid.

[1269] Ibid.

[1270] *Adjustment of the Remuneration Levels*, supra note 820. Each of the categories has two levels/notches (that is, sub-categories 1 and 2), except for category S.

[1271] Ibid.

[1272] Ibid.

[1273] Ibid.

[1274] Ibid.

[1275] Ibid.

categories.[1276] Members' hourly rate ranges between R163 and R540 for the lower and upper categories respectively.[1277] An analysis of these statistics shows that board members receive a base remuneration in the form of an annual fee but an attendance fee when they attend a board meeting.

The DPE has also produced a remuneration guide booklet, to deal with the issue of incentives for members of the boards of State-Owned Enterprises. The *Remuneration Guide for [State-Owned Enterprises ]*[1278] was developed by the Minister of Public Enterprise for the purpose of providing principles for assisting boards of SOEs to negotiate and determine remuneration scales for their executive directors, prescribed officers and board members.[1279] The booklet has a legal status in that boards and their remuneration committees are required to apply the departmental guide when they formulate policies for remuneration and incentives for the respective entities.[1280] The Remuneration Booklet requires that it be incorporated in the SOEs' MOIs and the Shareholder's Compact, defined in the Remuneration Booklet as a 'compact or equivalent governance tool that sets out the annual performance targets of the [SOE]'.[1281] The principles in the guide booklet give the Minister of Public Enterprise the power to determine the maximum annual remuneration and issue directives to the boards.[1282]

Moreover, the guide requires State-Owned Enterprises to each provide certain remuneration policies to the relevant executive authorities for approval before their implementation.[1283] These policies are

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[1276] Ibid.

[1277] Ibid.

[1278] 'The DPE Guide for State Owned Companies: Remuneration and Incentives for Executive Directors, Prescribed Officers and Non-Executive Directors' 2018', available at *https://dpe.gov.za/the-guide-for-state-owned-companies-remuneration-and-incentives-for-executive-directors-prescribed-officers-and-non-executive-directors/*, accessed 20 July 2022).

[1279] Ibid, para 2.1.

[1280] Ibid.

[1281] The DPE Remuneration Booklet defines shareholder compact (at para 4.1.5 & footnote 2).

[1282] The DPE Remuneration Booklet supra note 833.

[1283] Ibid at paras 4.1.1 & 4.1.6.

1) the remuneration strategy and philosophy; 2) a guaranteed remuneration policy; 3) the short – term incentive policy and rules; 4) the long – term incentive policy and rules (if applicable); 5) corporate scorecards which translate the Shareholder's Compact into measurable targets; 6) individual executive scorecards which are derived from the corporate scorecard, and 7) an executive grading system.[1284] In addition, the guide booklet obliges the Minister of Public Enterprises to establish an inter-ministerial oversight committee (IMC) responsible for consultation on the remuneration of the executive.[1285] In terms of the document, the IMC is a sub-committee of the IMC on State-Owned Enterprises and comprises of the Minister of Public Enterprises and the Minister of Finance, with the ministers for Parent Departments being invited, when necessary, to give input on the remuneration of the office-bearers serving as executive directors, prescribed officers and non-executive directors (boards members) of state-owned corporations.[1286] The IMC is supported by a Task Team, made up of the NPE, the National Treasury and the Department of Public Service and Administration,[1287] with functions set out in the document.[1288]

South Africa is also one of the five co-partners of the Organisation for Economic Co-operation and Development (OECD), which is an international association of 38 member countries, together along with Brazil, China, India and Indonesia.[1289] The OECD sets standards and norms for its associates on economic matters, including the remuneration of boards and executives of State-Owned Enterprises.[1290] The OECD Non-members or co-partners, like South Africa, subscribe to the norms

[1284] Ibid, paras 4.1.6.1– 4.1.6.7.

[1285] Ibid para 4.4.

[1286] Ibid paras 4.4.1 & 4.4.2.

[1287] Ibid paras 4.4.1& 4.4.4.

[1288] Ibid paras 4.4.5.1 & 4.4.5.3.

[1289] OECD 'South Africa and the OECD', available at *https://www.oecd.org/southafrica/south-africa-and-oecd.htm*, accessed 18 August 2022). South Africa was accepted to the OECD through the 2007 resolution and is a party to six of the OECD Bodies and projects, and a participant in 15. ( *https://www.oecd.org/brazil/oecdcouncilresolutiononenlargementandenhancedengagement.htm*; OECD 'South Africa and the OECD', 2007, available at *https://www.oecd.org/southafrica/south-africa-and-oecd.htm,* accessed 18 September 2022).

[1290] OECD 'Guidelines on Corporate Governance of State-Owned Enterprises' 2015, available at

and standards that the OECD set for its associate countries. According to the OECD research, remuneration models differ from country to country, depending on the ownership models of their SOEs. [1291] In most member states, remuneration policies are made by the SOEs Committee or by the Central Ownership Unit. The discussion emanating from the South African National Treasury circular and DPE Remuneration Booklet used the central ownership unit model and shifted towards the SOEs committee that the DPE minister is championing.

In any event, what this study has discussed in this section on the remuneration of accounting members, confirms the existence of government policy in terms of which board members of state entities are incentivised for serving on the boards of State-Owned Enterprises. Although their remuneration may not be comparable to that of their counterparts serving on boards of private companies, the remuneration is not a pittance. They receive a basic annual fee for being appointed to the boards. As an extra incentive, they get an additional hourly or daily rate for participating in board meetings. It bears noting that non-executive directors serve on boards on a part-time basis only and are in consequence not restricted to one company. In addition, no one is obliged to be a director of a state entity as board members join boards of state-owned entities voluntarily. It is borne in mind that non-executive directors of state entities derive their remuneration from the taxpayers' moneys. Hence, exacting a high standard of responsibility on the boards and their members is justified. In other words, board members need to be held accountable for the slightest breach of their *fiduciary* duty to the public entity. It remains the considered view of the writer that for a start, the state needs to consider the possibility of personal liability for damages caused to a state-owned enterprise.[1292]

The remuneration policy provides certainty regarding non-executive directors within the service in the sphere

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*https://doi.org/10.1787/9789264244160-en* accessed 18 August 2022. See 'Remuneration of Boards of Directors and Executive Management in State-Owned Enterprises – Foreword' 2022, available at *https://doi.org/10.1787/e891c5a4-en*, accessed 18 August 2022.

[1291] OECD '*Remuneration of Boards of Directors and Executive Management in State-Owned Enterprises'*, 2022, at para 2.3.1, foreword, available at *https://doi.org/10.1787/e891c5a4-en,* accessed 18 August 2022.

[1292] This issue is canvassed in some detail in chapters 5 and 7 of the thesis.

of state-owned corporations. However, there are several reservations about the document. Still, there are some serious reservations regarding some aspects of the policy, as expressed in the 2018 DPE booklet. The policy guide gives the Minister of Public Enterprises extensive powers. In terms of the policy, even the Department (and Minister) of Finance are led by the Minister of Public Enterprises. Furthermore, closely related to the caveat about extensive powers, the policy document delegates too much authority regarding the remuneration of directors. Although it is conceded that the document restates the board member's *fiduciary* duty is to always act in the best interests of the company, the devolution of power in such a manner poses a serious cause for concern. Both executive and non-executive board members, have shown themselves to be susceptible to corruption. As a result, the corruptibility of Ministers (especially, if it includes the Minister of Public Enterprises) manifesting in breach of *fiduciary* duties on the part of board members of state entities, is well documented in the State Capture Commission Report. Chapter 3 of this thesis has laid bare the findings of the State Capture Commission regarding the objectionable conduct of Ministers and several successive board members, as well as senior employees of State-Owned Enterprises (including executives). It is also the view of the writer that the Department of Public Enterprises is redundant as its oversight function can easily be discharged by the National Treasury. In other words, the matters of the remuneration of board members and their incentives policy, now under the management of the DPE and its Minister, can arguably be best left to the Minister of Finance and the National Treasury.[1293]

## 4.10 CONCLUSION

This chapter has discussed in detail the legal instruments regulating the governance of State-Owned Enterprises in South Africa and five other jurisdictions. The chapter discussed the appointment, removal and remuneration of board members and top executives, like the CEO and CFO, as well as their fiduciary duties and the duty to exercise care and skill. It has established that the affairs of State-Owned Enterprises in South Africa are governed in terms of various legal instruments, ranging from

[1293] The issue regarding the desirability and redundancy of the DPE is further explored in chapter 5 of this study.

the common law, the Companies Act, 2008, the PFMA, the Constitution, 1996, and various pieces of legislation responsible for the establishment of respective State-Owned Enterprises . The affairs of SOEs in South Africa are also governed by the enterprises' Memoranda of Incorporation, in the case of state entities incorporated under the Companies Act, 2008. Still, in some instances, the founding legislation of an entity may contain detailed provisions regarding the board and the appointment process. As was pointed out, in other instances, the legislation may be silent, in which case the PFMA, would be the regulatory law. Yet still, in some cases, the governance of state enterprises then falls to be regulated in terms of the PFMA, and the Companies Act of 2008 (as well as the entities' MOI). The MOI may be detailed or may even be a restatement of the provisions of the PFMA, as in the case of the SABC 2014 MOI.[1294]

Within the context of State-Owned Enterprises in South Africa, board members are expected to observe the highest standard of responsibility to soften the vulnerability of state entities and their susceptibility to corruption.[1295] Such a high standard becomes imperative because of the nature of state enterprises. State-Owned Enterprises have no shareholders in the conventional sense of shareholders in the private sector. By contrast, in the case of public entities, the taxpayers (and the majority of poor South Africans), are the real shareholders of State-Owned Enterprises. Therefore, those appointed to boards of public entities must be persons of high moral integrity and persons who have the highest regard for their constitutional and *fiduciary* duties toward State-Owned Enterprises. However, as discussed in chapter 2 above, conflict of interests was seen as the main driver of corruption in procurement. As illustrated in the example of entities such as SAA, Eskom and Transnet, some board members, executives and senior employees could easily get involved in self-enrichment deals, in conflict with their oath of office. At times, board members and senior executives used personal private

[1294] The SABC MOI, 2014 is even contradictory to the Broadcasting Act 4 of 1999 in that the MOI confers the power to appoint and remove members of the board to the Minister of Communication, whereas the Broadcasting Act vests such power to the State President.

[1295] Section 195 of the Constitution, 1996.

entities or businesses owned by friends or family members to fleece State-Owned Enterprises , through sham tender processes, and shabbily implemented 30% B-BBEE, as was done in the case of SAA. High-ranking individuals on the various boards, have procured personal benefits from their offices as directors. In so doing they flouted the rules of good corporate governance and repeatedly breached their constitutional and *fiduciary* duties.

A common thread in what was discussed in this chapter is that the Minister of Public Enterprises has been given almost unlimited powers of appointment and removal of board members. It became clear that this enormous power in the hands of the Minister has often been the cause of instability in the tenure of office of the boards of state entities. As the Dullah Omar Institute has correctly argued, the minister's enormous power tend to undermine the oversight role of the boards.[1296] As the writer argued, in most such instances where the Minister has the power even to appoint the CEOs of public corporations, the CEO's loyalty might tend to lie more with the appointing Minister rather than to the interests of the state entity. Moreover, board members of State-Owned Enterprises may also be removed following the provisions of the respective companies' founding legislation, the Memorandum of Incorporation or the Companies Act, 2008. Concerning the Companies Act, section 71 of the Act specifically provides for the removal of directors from office.

As noted, the King Code of good corporate governance is supposed to guide directors in the management of the affairs of all companies, including members of boards of state corporations. The Code provides guiding principles that promote good corporate governance and ethical leadership. The King Code is widely accepted and highly recommended for companies as they strive to enhance good corporate governance. As was observed, South Africa is a co-partner of the OECD and, among other things, subscribes to the guidelines for the management of State-Owned Enterprises, that the OECD sets for its association member countries. As can be expected, most of the provisions of the King Code

[1296] The Dullah Omar Institute supra note 1198.

mirror the OECD guide principles.

The chapter also explored the concept of the business judgment rule across all jurisdictions forming the sample of this study as well as in South Africa. This principle has been considered because of its potential to frustrate an SOE's action for personal liability against its derelict directors. In the chapter it was observed that the US is the birthplace of the BJR and the courts' willingness to extend its application to directors of hybrid and public institution. On the other hand, South African law achieves similar protective effects through section 76(4) of the Companies Act, though tempered by the stricter, public interest-driven demands of the PFMA. Given the intensifying scrutiny on SOE governance in South Africa, especially in the aftermath of state capture, there may be merit in developing a South African jurisprudence that balances director accountability with protections for bona fide business decisions in the public sector. The application of these principles to SOEs, however, raises additional complexities. SOE directors in South Africa are not only subject to the Companies Act, but also to the PFMA, which imposes stricter accountability standards. Under section 50 of the PFMA, the accounting authority (usually the board) must exercise the fiduciary duties of care, skill, and diligence, and act with fidelity, honesty, and in the best interests of the public entity. Section 83(1)(c) of the PFMA goes further, providing for personal liability where an accounting authority wilfully or negligently fails to comply with provisions of the Act, including where financial losses occur as a result. However, judging by the stringent requisites for the defence of BJR under the South African law, the rule does not appear to hinder personal liability of accounting authorities of SOEs, even using the principles of the law of delict. There is a fair balance. Alternatively, its application must be balanced with the values in the constitution, as demonstrated by section 195 of the Constitution.

Moreover, chapter 4 has discussed legislative mechanisms for oversight over State-Owned Enterprises in South Africa. In this regard, the study examined parliamentary institutions of oversight, namely, the Parliamentary Portfolio Committees, the Standing Committee on Public Accounts (SCOPA) as

well as the role of the Executive Authority, as means of oversight over State-Owned Enterprises . Two Chapter nine (9) Institutions were explained, namely, the role of the Public Protector and the Auditor-General, in the oversight and accountability of boards of State-Owned Enterprises. This chapter has shown that available oversight mechanisms are either not effective or have not been used to the fullest. For instance, this research has found that, due to political reasons, Parliament and its Portfolio committees have not been effective in discharging its oversight role. There has been lack of political will, while also, the majority in the governing party has often manipulated the oversight process in the party's favour.[1297]

In addition, parliamentary committees have generally been inactive, or they simply pretended that no wrongdoing was taking place in state-owned entities. The comrade attitude was particularly common during the period between 2009 – 2017, the era when Zuma was President.[1298] For the most part, the Executive Authority, was complicit in the malfeasance of state-owned corporations. As chapter 3 of this thesis has shown, successive ministers, both in the Department of Public Enterprise, as well as parent (policy) departments, such as the Department of Communications & Digital Technologies and the Department of Public Transportation, actively contributed to destabilising state-owned entities. Instead of providing oversight, Ministers abused their powers by interfering with boards, through the impulsive or irrational removal of board members and replacing them with flexible individuals.[1299] In this regard, the interference by the Executive Authority was part of the problem facing state-owned entities. As a result, it can largely be held to blame for the financial losses that State-Owned Enterprises have incurred.

Regarding the Public Protector, one of two chapter nine institutions that were discussed here, the

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[1297] State Capture Commission Report Part VI vol. 2 supra note 266, paras 820, 893 – 894, 897 and 957.

[1298] Ibid.

[1299] State Capture Commission Report Part I vol. 1 supra note 125, paras 149–50; 241–42; 436; *Molefe* supra note 433 paras 1–18; 2017 JDR 1191 (LC); Also see State Capture Commission Report Part VI vol. 2 supra note 266, paras 75 – 78.

writer pointed out that it is one of the institutions that can be effective in holding public office-bearers to account for the exercise of their statutory duties towards organs of state. However, the writer noted two shortcomings. The first observation was that the office of the Public Protector is often crippled by a shortage of financial resources to fulfill its mandate. This shortcoming proved a serious impediment, given the Public Protector's wide mandate applying to all aspects of the life of the citizens. Secondly, the office of the Public Protector is often as good as its incumbent. For instance, the office of the Public Protector only reached its highest point with the appointment of Advocate Thuli Madonsela as the incumbent. It was only during her tenure that the Public Protector began to hold executive[1300] and accounting authorities[1301] liable for the way they exercised their powers and executed their mandate. Advocate Madonsela's predecessor, Advocate Lawrence Mushwana, hardly held the executive or other office-bearers accountable. Also, after Advocate Madonsela's departure, the office of the Public Protector started becoming inconsistent and weak under the incumbent, Advocate Busisiwe Mkhwebane. These facts serve to illustrate the point that the office of the Public Protector can be great in holding board members accountable, especially as it can take any appropriate remedial actions, including ordering compensation. However, because of the problem just identified, the office of the Public Protector may not always be trusted to always uphold accountability. Additionally, the office of the Public Protector can only investigate matters that have arisen not older than two years.[1302] This limited timeframe can also throw the malfeasance beyond the purview of the Public Protector, if the wrongdoing is older than two years.

The Auditor-General is the second chapter nine institution that plays a role in the affairs of State-

[1300] 'When Governance and Ethics Fail' Report supra note 282.

[1301] Among others see *Public Protector Report (2013/14)* ibid *&* Public Protector, South Africa '*Derailed:* Report No. 3 of 2015/16 on an investigation into allegations of maladministration relating to financial mismanagement, tender irregularities and appointment irregularities against the Passenger Rail Agency of South Africa ('Prasa Report')(2015), available at *https://www.pprotect.org/?q=content/public-protector-irregularities-reports,* accessed 20 September 2022.

[1302] Section 6 (9) of the *Public Protector Act* 23 of 1994; *Gordhan v Public Protector* 2019 JDR 1328 (17 December 2020), par 30.

Owned Enterprises this chapter has explored. The chapter has found that the office of the Auditor-General is also best positioned to monitor the affairs of State-Owned Enterprises, especially through its annual auditing routine. It was also noted that the Auditor-General office is also equipped with new powers in terms of sections 5A and 5B of the Public Audit Act.[1303] This section allows the office to order responsible accounting authorities (or accounting authorities) to follow on any reported malfeasance. Should an investigation not follow, the Auditor-General may issue a debt certificate against a reluctant authority who becomes liable to compensate the affected organ of the state. However, this chapter argued that the process availed by the remedial action of the Auditor-General falls short as board members (accounting authorities) only become personally liable when they fail to act against the real wrongdoers. The remedial action of the Auditor-General does not envision a situation where the public office-bearers are the primary wrongdoers (or even joint wrongdoers) in cases of material irregularities that cause financial losses to public entities. For this reason, the remedies afforded by the Auditor-General may need a further adjustment to be at par with the Public Protector's remedial action.

The next chapter will discuss the accountability mechanisms (remedies) available against board members of State-Owned Enterprises who fall derelict of their duty of utmost trust. Among them, the damages claim will be given special attention as it is also at the centre of this study. The chapter will particularly examine the effectiveness of available instruments as tools to hold directors of public corporations accountable for causing financial loss to a corporation in breach of their duties.

[1303] The Public Audit Act 25 of 2004.

# CHAPTER FIVE

# FRAMEWORK GOVERNING ACCOUNTABILITY OF BOARD MEMBERS OF SOEs

## 5.1 INTRODUCTION

Accountability, more than any other factor, differentiates private entities from SOEs and leads to improved productivity.[1304] Thus, this chapter explores available legal instruments and remedies that can be used to hold office bearers personally liable for breach of their constitutional duty, resulting in loss to SOEs. South African legislative structure relevant to this study has been discussed in th previous chapter involves the common law and several statutes. The legislative framework for SOEs and board members include the Constitution of the Republic of South Africa, 1996 (the Constitution, 1996). Other pertinent statutory provisions include the Public Finance Management Act 1 of 1999 (PFMA), the Companies Act 71 of 2008, the Public Protector Act 23 of 1994; the Public Audits Act 25 of 2004, the Prevention Of Organised Crime Act (POCA), the Prevention and Combating Of Corrupt Activities Act 12 of 2004 (PCCA), the Public Service Act 103 of 1994, the Public Service Commission Act 46 of 1997, lastly, but also important, Policy Documents such as the King II, III and IV Codes as well as the Report on Corporate Governance.

Also, chapter five engages the issue that was central to the mail research question for this study – imposing/enforcement of delictual damages against derelict accounting authorities of SOEs as the

[1304] See note 47 above. With regards to productivity, the more accountable an entity is, the more effective and efficient it is, and '[g]overnment's [or any other entity's] performance is only as good as its ability to manage its tools and to hold its tool users accountable' Kettl (2002, 491) cited in J Forrer, JE Kee, KE Newcomer & E Boyer 'Public–Private Partnerships and the Public Accountability Question' (2010) 70(3) *Public Administration Review*, 475–484, available at https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1540-6210.2010.02161.x, accessed 08 August 2022.

most effective means of accountability. In addition to common law damages, there is also the issue of damages for breach of fiduciary duties. Regarding the former, the chapter will discuss the general requisites for liability and how they relate to the case of derelict board members of South African SOEs. Additionally, the chapter considers the legal feasibility of enforcement of damages claim against derelict board members of SOEs in South Africa. Inherently, this enquiry involves engages the question of locus standi to enforce the claim on behalf of the affected SOE, while also evaluating the efficacy of the organs empowered with the responsibility over SOEs in South Africa. They are the shareholder representative (i.e. the Minister of Public Enterprises[1305]), the SIU, as well as those empowered in terms of section 38 of the Constitution, 1996. Namely, the Non-Profit Companies (NPCs) and private citizens. The appropriate forum for bringing an action for litigating on the affected SOE's behalf is also discussed in this part of chapter. Further, the chapter considers prescription as a possible hurdle for a successful claim against derelict members of board – both current and erstwhile – brought on behalf of an SOE. Thereafter, a conclusion of the chapter will be advanced.

The following section of the discussion deals with the sources of accountability of accounting authorities of state-owned entities.

## 5.2 ACCOUNTABILITY UNDER SOUTH AFRICAN LAW

As discussed in chapter 4 of this thesis, company directors owe common law and statutory *fiduciary* duties toward the company and its shareholders.[1306] The Companies Act 71 of 2008 has made *fiduciary* duties of company directors mandatory. Thus, directors may not contract out of their *fiduciary* duties. *Fiduciary* duties entail acting in good faith, honesty, and loyalty.[1307] Directors also are duty-bound to

[1305] It must be noted that with the seventh administration, President Ramaphosa has since abolished the DPE and relocated the "DPE" to the Presidency. This contrasts with the recommendations made in this study. This change is beyond the scope of this study as it happened after the submission of the thesis for examination.

[1306] *Cohen v Segal* 1970 (3) SA 702 (W) 706C-D; Cassim holds that the fiduciary duties of directors are protective of the company, its shareholders and even of the public interest (Cassim op cit 497)

[1307] Cassim op cit note 497.

exercise reasonable care and skill in the exercise of their powers and performance of their functions toward a company. The company directors should not just act in good faith (*bona fides*), but they are required to exercise the utmost good faith or *uberrimae fides* in the manner that they manage the affairs of a company.[1308] Collectively and individually directors must always exercise their powers and functions in good faith (*bona fide*) and in the best interests of the company which they serve.[1309] *Fiduciary* duties of directors require them to observe the highest standard of care and ethics, in the exercise of their powers and functions. The highest standard of good faith leaves no room for directors to engage in conflict of interests or double agency on their part. Being a director entails a duty to exhibit loyalty of a superlative degree towards the company,[1310] whether it is private or public. One of the *fiduciary* duties of directors is the *Turquand rule,* which enjoins directors to not exceed the limit of their powers in the exercise of their duties.[1311] Exceeding the scope of the directors' powers could cause the company to be liable to third parties, and in turn, expose a director to liability for damages to the company.[1312] In sum, directors' *fiduciary* duties enjoin them to act in the best interests of the company.

Moreover, a director's duty to exercise care and skill (diligence) in the management of the affairs of the company is inherent in the *fiduciary* duty that directors owe to a company.[1313] A company director will thus be acting negligently when he fails to discharge the *fiduciary* duty by failing to exercise the care and skill expected of an official in the capacity of a director of the company. In the case of state

[1308] Mongalo op cit note 615, 164; *Fulham FC Ltd v Cabra Estate plc* [1994] 1 BCLC 363.

[1309] Mongalo op cit note 615, 161.

[1310] Ibid.

[1311] The *Turquand rule* entails that directors should know the scope and extent of the powers of the company as well as their powers. *Royal British Bank v Turquand* (1856) 6 E&B 327; 119 ER 886.

[1312] Mongalo op cit note 615, 168; *Cullerne v London and Suburban General Permanent Building Society* (1890) 25 QBD 485 at 409.

[1313] In this regard see Mongalo op cit note 615, 170

owned entities, as has been seen in the State Capture Commission,[1314] the writer is of a strong view that the onerous duty of being a company director demands a higher standard of honesty, good faith and integrity.[1315] The true shareholders (taxpayers, especially the poor citizens of South Africa) are removed from the management of their public assets but are at the mercy of elected public representatives who have shown themselves to be prone to abuse their powers by acting corruptly.[1316] Hence for this reason, persons appointed to boards of State-Owned Enterprises should be held to the highest standard of honesty and integrity in the exercise of their powers and functions in public entities.

Company directors are accountable for the way they exercise their powers and functions. When there has been a breach of *fiduciary* duties by the directors/officers of a company, at common law a company is afforded a few remedies against the directors. As primary remedies, a company can either claim any profit, or even business opportunity that the director or officer would have acquired or retained, that emanated from the directors' breach of *fiduciary* duty.[1317] Further, an aggrieved company could also sue for damages, where it has suffered damages as a result of directors' breach of the *fiduciary* duty owed to it.[1318] The purpose of the claim for damages is for the director or directors to compensate the company that has suffered a loss as payment of damages put the company in the same position it would have been in, had the breach of *fiduciary* duty not occurred.[1319] South African courts have held

[1314] State Capture Commission Report Part I vol. 1 supra note 125, para 434; State Capture Commission Report, Part V vol. 2, 1575 and Part IV vol. 3, par 1258.8–1259; State Capture Commission Report Vol. 4 Part IV supra note 226, paras 2493–4.

[1315] State Capture Commission Report Part I vol. 1 supra note 125, para 434; State Capture Commission Report, Part V vol. 2, 1575 & Part IV vol. 3, par 1258.8–1259; State Capture Commission Report Vol. 4 Part IV supra note 226, paras 2493–94.

[1316] Part V vol. 2 supra note 262, para 1408, 1410, 1433 & 1575; State Capture Commission Report Part V vol. 2 supra note 123, para 1409; *Electronic Media Network* supra note 320, para 20 & 25; State Capture Commission Report Part V vol. 2 supra note 123, para 1401.

[1317] LAWSA op cit note 618, para 131.

[1318] Ibid.

[1319] Ibid.

that a company's right to claim damages against its director or directors for breach of *fiduciary* duties is not necessarily based on fault.[1320] Instead, it is *a sui generis* claim based on a breach of *fiduciary* duties.[1321] However, the courts are in agreement that, additionally, an aggrieved company claim is based on delict (*Actio legis Aquiliae*).[1322] For this latter claim, the affected company must prove that there is a causal connection (*lexis nexus)* between the loss caused or damages and a director's breach of *fiduciary* duty.[1323]

The relevant modes/remedies of accountability of boards of SOEs and enforcement thereof, discussed in this chapter are the derivative action, declaration as a delinquent, disciplinary proceedings and criminal sanctions, in terms of both the statutes and common law. Understandably, there is an overlap between the common law and relevant legislation regarding the enforcement mechanisms for accountability in this respect since the duties and powers of directors of state corporations derive from both sources of law. Thus, in this part of the study, no categorisation is made on the bases of the sources of the accounting mechanism. Instead, the focus is simply on the method of enforcement, whereas the source of the accounting system is only used to substantiate the approach. Regarding the legal remedies for accountability of board members of SOEs in South Africa, the first part below discusses the common law remedies.

### 5.2.1 Common Law

In this part, the exposition deals with disciplinary proceedings, criminal proceedings, and the common law as well as relevant statutory provisions available to an entity to hold board members accountable

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[1320] *Du Plessis v Phelps* 1995(4) SA 165 (C), 171; Symington v Pretoria-Oos Privaat Hospital Bedryfs (Pty) Ltd 2005 (5) SA 550 (SCA) (27 May 2005); *Derbigum Manufacturing (Pty) Ltd v Callegaro* 2014 JDR 0495 (GSJ)(17 May 2013). See LAWSA op cit note 618 para 131.

[1321] *Derbigum* supra, para 24.

[1322] Ibid, para 25.

[1323] *Target Holdings Ltd v Redfems (a Firm)* 1994 2 All ER 337 (CA). See LAWSA op cit note 618, at 180 para 131. Also, Jean Kanamugire & Terence Chimuka 'The Directors' Duty to Exercise Care and Skill in Contemporary South African Company Law and the Business Judgment Rule' (2014) 5 *Mediterranean Journal of Social Sciences (MJSS)* 70, at 70), available at *10.5901/mjss.2014.v5n20p70,* accessed 20 October 2022.

for a breach of their duties towards state-owned entities. The exposition begins with disciplinary proceedings.

*(i) Disciplinary Proceedings*

Generally, misconduct by employees of a company, including State-Owned Enterprises , which include company executives (who are also members of the board of directors as executive directors) is dealt with through internal disciplinary processes. In South Africa, criminal sanctions have rarely been preferred by the shareholder authorities. In most cases, culprits often rather resign before the disciplinary proceedings are finalised. In other instances, alleged officials have been let off with payouts (the so-called golden handshakes). What has made the payouts unlawful and amounting to wasteful expenditure, is the fact that payouts have been paid shortly before some officials' terms of office were to expire.[1324] The non-executive directors, on the other hand, have simply resigned from the state-owned enterprise one by one, amid the crises.[1325] Once board members have resigned, there is generally no action taken against them to recover any loss that the state-owned enterprise has incurred as a result of their dereliction of duty. In that way, disciplinary proceedings have not proved an effective way to uphold the principle of accountability. Also, unlike in the case of ordinary employees who can be disciplined through the disciplinary process or criminal investigations for fraud, board members hardly get subjected to a disciplinary process for their wrongdoing in breach of their directors' duties.[1326] Even where the pension (in the case of senior employees) becomes forfeited to compensate for the loss suffered by the entity, proceeds from the forfeiture may prove to be too

[1324] See, for example, Nompumelelo Khuluse, *An Analysis of Executive Remunerations in South Africa's State-Owned Enterprises*,(unpublished Honours thesis, UCT 2015) 2, 3 & 20 (Cf. references on p. 41 of the thesis), available at *https://www.academia.edu/33982439/an_analysis_of_executive_remunerations_in_south_africa_s_state_ownes_enterprises,* accessed 20 October 2022.

[1325] For example, this is what occurred in the SABC board under the chairmanship of Dr Maguvhe, in 2018, until he was eventually the only remaining member of the board.

[1326] I could not find any case example of a disciplinary process against non-executive directors of a public entity (or company in general) in South Africa. However, it is not improbable and inappropriate for disciplinary proceedings against non-executive board members of state corporations.

little in comparison to the loss inflicted to the entity.[1327] In other words, the process may not compensate the state entity for the loss suffered.

The following section deals with criminal sanctions as a further mode of accountability for directors' involvement in the malfeasance of State-Owned Enterprises.

*(ii) Criminal Sanctions*

Mainly criminal sanctions derive from the common law. As a result, statutes are always the alternative to disciplinary action against errant public officials, especially those in the employ of companies, such as state-owned corporations. It is not difficult to envisage a situation where office-bearers who are directly party to the unlawful activities that cause financial loss to the public corporations could be prosecuted and criminally sanctioned for their role, thereof. However, in respect of those indirectly party to causing State-Owned Enterprises ' financial loss, such as those who are members of boards and accounting authorities, they could be exempt from criminal liability, unless they were directly involved in fleecing State-Owned Enterprises. To the contrary, however, persons in positions of accounting authorities, owe *fiduciary* and constitutional duties to State-Owned Enterprises . Consequently, they may be held criminally accountable for their inaction.

Statutory modes of accountability of board members of SOEs in South Africa are explored below.

### 5.2.2 Statutory Modes

This section begins by considering the significance of the constitution in accountability of accounting authorities and the argument to impose/enforce their personal liability is discussed in the next section.

#### *5.2.2.1 The Import of the Constitution*

The Constitution provides for basic constitutional values that govern public administration, and the

[1327] Section 37D Pension Funds Act 24 of 1956.

constitutional obligations placed on those entrusted with the management of organs of state.[1328] Accordingly, section 195 of the Constitution, 1996, sets out the nine (9) basic values and principles that govern public administration, of which SOEs are part.[1329] The Constitution is the supreme law of South Africa, and it binds every law as well as conduct.[1330] Though the Constitution (with its Bill of Rights) does not trump other laws, it serves as a prism through which all laws must be seen.[1331] In respect of public administration, the Constitution is more than the yardstick for what is acceptable conduct for officer-bearers charged with the management of state entities. Hence, in a defining moment for South African constitutionalism the Constitutional Court, per Mogoeng CJ in *EFF1* judgment, made it unequivocally clear that public office-bearers can no longer evade accountability.[1332] The Court the Constitutional referred to these constitutional values of constitutionalism, accountability and the rule of law as constituting "a sharp and mighty sword', that public office-bearers can ignore at their own peril.[1333] As the then Chief Justice emphatically held, accountability, the rule of law, and constitutional supremacy are not aspirational ideals, but binding duties, signalling South Africa's break from the past – an era of systemic abuse of state resources.[1334] Viewed as such, the values and principles that govern public administration are overarching in respect of the duties of board members of public entities. The values in the Constitution impose an even more onerous obligation on accounting authorities and members of boards entrusted with the management of State-Owned Enterprises**.** In other words, *fiduciary* duties (and other duties) of directors, in general, place a heavy responsibility on them. As the Court affirmed, impunity has no place in a constitutional

[1328] Section 195 of the Constitution, 1996.

[1329] Section 195(1) of the Constitution, 1996. See also the State Capture Commission Report Part VI vol. 2 supra note 266 paras 630-1.

[1330] Section 2 of the Constitution.

[1331] *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae)* 2003 (1) SA 398 (SCA), para 12.

[1332] *EFF1* note 33 at para 1.

[1333] Ibid at para 1.

[1334] Ibid.

democracy, and all those entrusted with public power carry a moral and legal duty to protect the public purse and advance the values of democratic governance. Drawing on the *Nyathi* judgment with approval, the Court emphasised that the foundational values of our Constitution are not merely aspirational ideals but binding principles that must be upheld with integrity and care.[1335] Reflecting on the accountability of public office bearers Justice Mogoeng echoed the warning by Madala J in *Nyathi*[1336] that when these core values are neglected or treated lightly, we risk opening the door to a serious constitutional crisis.[1337] A high standard of responsibility is placed on public servants, including accounting authorities. SOEs are especially important as they are key to the development of the South African economy through revenue generation (and largely, for services they render).[1338] Holding accounting authorities of SOEs personally liable for the companies' loss, is critical for 'strengthening and sustaining South Africa's democracy'.[1339] Also, when SOEs become self-sustaining, they are weaned from annual bailouts that constantly eat into public resources that should be going into improving the lives of poor South Africans.

Henceforth, it is no longer a question of whether public office-bearers (more so accounting authorities) should be held liable to reimburse the public purse for the wastage of public funds.[1340] Personal liability of public office-bearers in a democratic South Africa extends to cases where the public purse has suffered due to the officers' failure to uphold the constitutional duty that they owe to the public under their office. Assignment of liability thus follows regardless of whether failure was a result of

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[1335] *Nyathi v Member of the Executive Council for the Department of Health Gauteng* 2008 (5) SA 94 (CC) at para 80.

[1336] Ibid.

[1337] *EFF1* op cit note 31, para 1.

[1338] Mpete & Maier op cit note 19.

[1339] When concluding the above-mentioned passage, Mogoeng also alludes to this fact. Therein, the CJ stated that at the heart of the application to hold the president personally liable to reimburse the treasury as per the Public Protector's recommendations said, 'the role of these foundational values in helping to strengthen and sustain our constitutional democracy sits at the heart of this application.'

[1340] *Mbambisa v Nelson Mandela Bay Metropolitan Municipality* 2025 (3) SA 112 (SCA).

negligence or intention on the part of the performer of state duties.

Next, part 5.2.2.2 focuses on accountability of board members under the South African Companies Act of 2008.

*5.2.2.2 Accountability under the Companies Act*

Moreover, sections 22(1), 76, and 77(3)(b) impose additional duties to prevent reckless trading, act with care, skill, and diligence, and accept personal liability for losses caused by breach of fiduciary duties or by authorising prohibited conduct, under the Companies Act 71 of 2008. Thus, South African courts have affirmed that dereliction of these duties may justify personal consequences for SOE directors. In *Mthimunye-Bakoro,*[1341] for example, the court emphasised that both statutory and common law duties require directors to act with due care, skill, and diligence to protect public resources.[1342] Similarly, in *Watts*[1343] the high court held that directors could be personally liable under sections 22(1), 218(2) and 77(3)(b) of the Companies Act, for acquiescing in reckless or grossly negligent conduct and declared the director delinquent.[1344]

Three other mechanisms afforded by the Companies Act of 2008 are discussed in this part of the thesis, namely derivative actions[1345] and declaration as a delinquent[1346] and/or placing the wrongdoer on probation.[1347] The three remedies are discussed below, starting with derivative actions.

[1341] *Mthimunye-Bakoro v Petroleum Oil and Gas Corporation of South Africa (SOC) Limited* 2015 (6) SA 338 (WCC) (4 August 2015).

[1342] Ibid paras 46–50.

[1343] *Venator Africa (Pty) Ltd v Watts* 2024 (4) SA 539 (SCA) (24 April 2024)

[1344] Ibid paras 33.

[1345] Section 165 of the Companies Act, 2008.

[1346] Section 162 of the Companies Act, 2008.

[1347] Section 169 of the Companies Act, 2008.

*(i) Derivative Actions*

A derivative action remedy is available on behalf of a company to recover its losses against any wrongdoer.[1348] The action requires a person with interest in the matter to litigate on behalf of the company (substituting thereof), with the court granting him *locus standi* (legal standing).[1349] A derivative action remedy is exclusively regulated by section 165 of the Companies Act 71 of 2008.[1350] Section 165 sets out the process to bring a derivative action and stipulates the class of persons who have the legal standing to act on the company's behalf.[1351] The Companies Act gives title to company shareholders or any other persons who have a right to be registered as a shareholder of the company in question;[1352] individual company directors or prescribed officers;[1353] registered trade unions representing the employees of the company or the like;[1354] as well as persons granted title by a court to bring an action to protect their right(s).[1355]

Concerning the derivative action process, persons granted the title by a court to bring an action must serve a demand upon the company in question for it 'to commence or continue legal proceedings or

[1348] For an analysis of derivative action, see Mbali B Ngcobo *An Analysis of the Statutory Derivative Actions In South Africa and Selected Jurisdictions* (unpublished LLM thesis, University of Pretoria, 2019), available at *https://repository.up.ac.za/bitstream/handle/2263/77425/Ngcobo_Analysis_2019.pdf?sequence=1&isAllowed=y,* accessed 20 October 2022). Also, Christiaan Swart (Academic Research) 'The statutory personal and the statutory derivative action: Is a sharp distinction still justified?' (2021), available at *https://www.litnet.co.za/the-statutory-personal-and-the-statutory-derivative-action-is-a-sharp-distinction-still-justified/,* accessed 20 October 2022.

[1349] As a cardinal rule, when a company suffers damages, it is the company that must litigate to recover its loss and it acts through its directors who have a *locus standi* to litigate on behalf of the company (in terms of the settled precedent in *Foss v Harbottle* ((1843) 2 Hare 461, 67 ER 189. The principle has come to be known as the *proper plaintiff (claimant) rule*. (See Batool Hayath, 'Delving deeper into the territory of derivative actions', available at *https://www.golegal.co.za/derivative-action-companies/*, accessed 20 October 2022).

[1350] Section 165 of the Companies Act, 2008, has repealed the common law derivative action.

[1351] Section 165 of the Companies Act, 2008.

[1352] Ibid, section 165(2)(a).

[1353] Ibid, section 165(2)(b).

[1354] Ibid, section 165(2)(c).

[1355] Ibid, section 165(2)(d).

take related steps to protect the legal interests of the company.'[1356] Upon being served with a demand in terms of section 165(2), the company may make a court application to set aside the demand. The grounds for the application to be set aside are that the application is frivolous, vexatious, or that it has no merits.[1357] The company must institute an independent investigation into the cause of the complaint.[1358] Depending on the findings, that company may then pursue legal action or refuse to comply with the demand.[1359] From the date the notice of demand is served upon it, the company has 60 business days within which to act.[1360] Alternatively, the company may make a court application to set aside the demand, within 15 business days.[1361] The only three grounds for the court to set aside the demand are if the application is frivolous, vexatious, or without merits.[1362] Should the company choose to do nothing about the demand, or where the court does not set aside the demand, the company has to Investigate if the complaint has any merits.[1363]

Therefore, derivative action is intended to protect the rights of the company in question. However, a person who wants to pursue the matter needs to have an interest in the protection of the legal interests of the company. Still, in terms of the process, the company is first afforded the opportunity to act. It is only when the company fails to act, that any of the persons with a legal title to act on behalf of the company may then litigate on its behalf.[1364] In this regard, then the person who has served the company with the demand can escalate the matter further, by applying to the court, for leave to act on the

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[1356] Section 165(2) of the Companies Act 71 of 2008. See also Darren Subramanien ''Legal standing' and 'the demand' in Section 165 of the Companies Act 71 of 2008: A comparative discussion' (2022) 43(2) *Obiter* 46 at 48–49, available at *http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1682- 58532022000200003&lng=en&tlng=en.* accessed 25 January 2023.

[1357] Section 165(3)–(4) of the Companies Act 71 of 2008.

[1358] Ibid, section 165 (4)(a).

[1359] Ibid, section 165 (4)(b).

[1360] Ibid, section 165 (4)(a).

[1361] Ibid, section 165(3).

[1362] Ibid, section 165(3).

[1363] Section 165(4).

[1364] Section 165(5)(a) of the Companies Act 71 of 2008.

company's behalf.[1365] Upon being granted leave by the court, the person will substitute for the company and be permitted to bring an action 'in the name and on behalf of the company.'[1366]

On the other hand, the court has the discretion to grant leave to act in the name and on a company's behalf, provided certain requirements are satisfied. Primarily, the company must have failed to act or acted in a manner, not in compliance with the requirements of section 165(4) of the Companies Act, 2008. Alternatively, the investigation report issued by the company must have been inadequately prepared, and irrational, or the investigation contained 'unreasonable conclusions or recommendations' for a court to grant leave to substitute for a company.[1367] The court may also grant leave to litigate where a company has acted contrary to the report, where the report was reasonable.[1368] Furthermore, the court order authorizing a substitution for a company may be issued where the company has served a notice to the person seeking to bring an action, declining to comply with the demand.[1369]

Moreover, as a second prerequisite for a successful application for leave to substitute for the company, the applicant must satisfy the court of three factors, namely, that the person seeking leave to litigate on the company's behalf, 1) is acting in good faith; 2) that the matter to be litigated upon 'involves the trial of a serious question of material consequence to the company;' and 3) that granting leave is in the best interests of the company.[1370]

*(ii) Declaration as a delinquent and/or placing on probation*

A further statutory remedy available against derelict directors is to have the errant directors declared

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[1365] Ibid.

[1366] Ibid.

[1367] Ibid, section 165 (5)(a)(iii).

[1368] Ibid, section 165 (5)(a)(iv).

[1369] Ibid, section 165 (5)(a)(v).

[1370] Ibid, section 165 (5)(b).

delinquent through a court application, in terms of section 162 of the Companies Act.[1371] Alternatively, an interested party may have an errant director placed on probation, as provided for by section 169 of the Companies Act 71 of 2008. The declaration of delinquency and placing on probation are remedies for contraventions of sections 76 and 77 of the Companies Act 71 of 2008, which deal with the standards and duties of company directors.[1372] Section 162(2) of the Act[1373] gives a variety of persons a *locus standi* to bring an application for a declaration of a director's delinquency. Among these are the company, a shareholder, a director (erstwhile director, provided the application is made within 24 months from the date he ceased being a director), a company secretary, a prescribed officer, a registered trade union representing employees of the company or even an employees' representative.[1374] Additionally, the Act gives a state organ responsible for the administration of any legislation competent to bring an application to declare a director a delinquent.[1375]

Section 162 sets out the grounds under which an order for the delinquency of a director may be granted.[1376] Among other grounds are, where a director has grossly abused his position as a director, or where the director had taken personal advantage of confidential information or inflicted harm upon the company, intentionally or through gross negligence.[1377] Also, where a person conducted himself in a manner that amounted to gross negligence, wilful misconduct, or acted in breach of trust in the performance of his duties and functions, during the period he was a director of a company.[1378] The granting of an order of delinquency is not optional, but mandatory for the court to grant it, as long as

[1371] Ibid, section 162(2).

[1372] Rehana Cassim 'Declaring directors of state-owned entities delinquent: *Organisation Undoing Tax Abuse v Myeni'* (2021) 138(1) *South African Law Journal* 1, available at *https://doi.org/10.47348/SALJ/V138/I1A1*, accessed 20 October 2022.

[1373] The Companies Act 71 of 2008.

[1374] Ibid.

[1375] Ibid, section 162 (4).

[1376] Ibid, section 162 (5).

[1377] Ibid, section 162 (5)(c)(iii).

[1378] Ibid, section 162 (5)(c)(iv).

the requirements for delinquency are satisfied. Once declared a delinquent, the errant official one is disqualified from the directorship of any company.[1379] The declaration is unconditional and generally is for a lifetime,[1380] unless granted for contraventions of section 162(5)(c) – (f).[1381] The leading case in this area of law is the case of *Kukama.*[1382]

Subsequently, there have been other cases, including the famous *OUTA* judgment involving Myeni.[1383] The significance of the *OUTA* judgment lies in the fact that the order for delinquency was granted against a former board member of SAA, a state-owned enterprise, Ms. Myeni. Not only has Myeni been a board member for SAA when the malfeasances grounded the national airline, but also, she was its board chairperson. Under her leadership, the SAA was subsequently 'liquidated' or placed on business rescue in terms of section 129 of the Companies Act 71 of 2008.[1384] As was discussed in chapter 3 (3) of this thesis, the national airline was subsequently 'sold' to an unknown consortium for a mere R3 billion that was only payable over time.

On the other hand, the requirements for the granting of a probation order are spelled out in section 162(7) of the Companies Act 71 of 2008. They include failing to vote against a resolution despite the company's inability to satisfy the solvency and liquidity test in contravention of the Companies Act.[1385] To be accountable, a director in question must have been present at a meeting when the resolution was voted.[1386] Also, where a person, while he was a director of the company, acted in a

[1379] Ibid, section 162 (6)(a).

[1380] Ibid, section 162 (6)(a).

[1381] Ibid, section 162 (6)(b).

[1382] *Kukama v Lobelo* (GSJ) unreported case no [2012] ZAGPJHC 60 (12 April 2012); *Lobelo v Kukama* 2013 JDR 1434 (GSJ)(31 May 2013).

[1383] *Organisation Undoing Tax Abuse* (*"OUTA"*) *v Myeni* [2020] 3 All SA 578 (GP).

[1384] For a full discussion of the *OUTA* judgment and the action for declaration of delinquency, see Cassim op cit 1139.

[1385] Ibid, section 162(7)(a)(i).

[1386] Ibid, section 162(7)(a)(i).

manner that is materially inconsistent with the duties of a director,[1387] or that, while a director, he was party to a decision of the company to act in a manner that was oppressive or unfairly prejudicial in terms of section 163(1) of the Companies Act 71 of 2008. A probation order may be issued subject to any condition that the court deems appropriate, such as in respect of the time for probation.[1388] However, with delinquency or probation orders, a court is also empowered to order a director to pay compensation to any person adversely affected by the delinquent conduct of a director.[1389]

Generally, the remedies under section 162 of the Companies Act 71 of 2008 have some limitations. An application for a delinquency order may not be made beyond two years after one ceased to be a director of a company.[1390] His period may have to be reviewed. Secondly, the order of delinquency will only serve a future purpose in that a delinquent director will be barred from serving as a director, but it will not compensate for the harm already inflicted on a company. However, the order of delinquency may be less useful to a company, especially one in liquidation. For instance, the order granted against Ms. Myeni did not pay back the financial losses for which Ms. Myeni was directly and indirectly responsible at SAA. Granted, the court may use its discretion to award compensation in terms of section 162 (10)(c) of the Companies Act 71 of 2008. However, the court may only apply the provisions of section 162 (10)(c) of the Act where the victim does not have other legal bases to claim compensation. As in the case of delinquency, placing a deviant director on probation does not

[1387] Ibid, section 162(7)(a)(ii).

[1388] Ibid, section 162(9).

[1389] Section 162(10(c) of the Companies Act 71 of 2008. The provisions of this section empower the court to order payment of compensation 'to the extent that such a victim does not otherwise have a legal basis to claim compensation'. However, author Rehana Cassim questions this provision of the Act and argues that the provision is too generous in that it does not enquire into whether the essential elements for contractual or delictual liability are satisfied or not (Rehana Cassim 'Delinquent Directors Under the Companies Act 71 of 2008: *Gihwala v Grancy Property Limited* 2016 ZASCA 35' 19 (2016) *Potchefstroom Electronic Law Journal,* available at *SSRN: https://ssrn.com/abstract=3642535,* accessed 20 October 2022). I disagree with Cassim in this regard, as the construction of section 162(10) of the Companies Act 71 of 2008, allows the court to exercise unfettered discretion depending on what is in the interests of justice. So, the court will always be guided by what is in the interests of justice in any circumstances.

[1390] Section 162(2)(a) of the Companies Act 71 of 2008. See also State Capture Commission Report Part I vol. 1 supra note 125, paras 196 – 197.

redress the financial losses of a victim company, unless the court applies provisions of section 162(10)(c) of the Companies Act 71 of 2008.

Thus, in the final analysis, as far as the provisions of section 162 are concerned, the provisions play a vital role in fostering accountability of directors of a company, inclusive of State-Owned Enterprises (where the Companies Act applies). Section 162 of the Act also hangs as a sharp axe over the heads of directors should they act in breach of the *fiduciary* duties owed to a company. However, as discussed above, declaration as a delinquent director or placing a director on probation does not suffice to make amends for the financial harm caused to a company.

The following part of the chapter will discuss the common law damages for breach of directors' *fiduciary* duties.

In addition to the common law, three pieces of legislation have a bearing on board members' (accounting authorities) wrong-doing and provide for criminal consequences for such wrongdoing in the exercise of powers and the performance of duties. The statutes are the PFMA, the Prevention and Combating of Corrupt Activities Act 12 of 2004 ('PCCAA') and the Prevention of Organised Crime Act 121 of 1998 ('POCA'). All the three pieces of legislation contain provisions that create criminal offences for contraventions by public office-bearers. These statutes are discussed below, starting with the PFMA.

*5.2.2.3 The Public Finance Management Act*

The general responsibilities of directors (and accounting authorities of State-Owned Enterprises) have been discussed already in chapter four of this study. Still, section 51 of the PFMA reiterate these duties in relation to the accounting authorities serving in the SOEs. Section 51(1) of the PFMA expressly obliges accounting authorities to ensure that their entity has and maintains effective, efficient, and transparent systems of financial and risk management; to prevent irregular, fruitless, and wasteful expenditure; to safeguard the assets of the entity; and to collect all revenue due. Clearly, in view of

the nature and scope of statutory duties imposed on accounting authorities, their role is not a passive one. Instead, accounting authorities are proactive guardians over the financial and operational integrity of state-owned enterprises (SOEs). Thus, a hight standard of ethics is legally expected of the accounting authorities under the constitutional dispensation. Hence, to discharge these obligations board members of SOEs are required by law to act with fidelity, honesty, integrity, and in the best interests of the public entity.[1391]

As part of their responsibilities, boards of State-Owned Enterprises are by law required to ensure that other employees of the corporation comply with the provisions of the law concerning maintaining sound financial management.[1392] In that regard, it is the duty of the boards (accounting authorities), acting through board members, to take effective and disciplinary measures against any employees who contravene the Act.[1393] Accounting authorities and public office-bearers who become a party to acts of unauthorised and irregular expenditure, as well as fruitless and wasteful expenditure, commit an act of financial misconduct.[1394]

Primarily, internal disciplinary proceedings, is available as a recourse to an affected public entity (or an SOE) in the case of financial misconduct whether it is a public official or an individual board member.[1395] Thus, disciplinary proceedings are the primary remedy for committing acts of financial misconduct in contravention of the Act, in terms of which will make accounting authorities or public officials liable to suspension, dismissal or any other sanction.[1396]

In addition, acts of financial misconduct, through contraventions of the provisions of sections 50–55

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[1391] Section 50(1) of the PFMA.

[1392] Section 51(e) of the PFMA.

[1393] Section 51(1)(e) of the PFMA.

[1394] Sections 83(1)(b) of the PFMA. The provisions of section 83, regarding the offence of financial misconduct, also apply in the case of those officials exercising delegated powers, by accounting officers/authorities (Sections 83(3) of the Act).

[1395] Section 84 of the PFMA. Section 85 of this Act empowers the Minister of Finance to make regulations regarding, among others, the disciplinary proceedings envisaged in section 84 of the Act.

[1396] Sections 83(4) of the PFMA.

of the PFMA and/or acts of irregular expenditure, or fruitless and wasteful expenditure, make one liable for criminal charges.[1397] Generally, a director is only liable for intention or gross negligence.[1398] This is an onerous standard for liability and mere negligence does not suffice for an offence of financial misconduct. For any board member convicted for a financial misconduct under these provisions of the Act, the PFMA prescribes a fine and/or an imprisonment of up to a maximum of 5 years.[1399] The liability for financial misconduct of accounting authorities is a joint and several liability for each member of the board of the State-Owned Enterprise.[1400]

Consequently, and in view of the fore going, the PFMA provides an invaluable tool to deal with the dereliction of directors' *fiduciary*, statutory and constitutional duties, in the case of board members of State-Owned Enterprises in South Africa. Most importantly, the provisions of this Act regarding the sanctions for financial misconduct supersede any other legislation.[1401] This one is criminal in nature and indeed drastic in nature. Still, this remedy for accountability in SOEs falls short of affording the enterprise full recourse against its delinquent accounting authorities. It is unlike the one provided under the Companies Act, 2008, namely, personal liability.[1402]

Overall, accounting authorities are legally obliged to ensure efficient and economic management of the company's available working capital.[1403] Accordingly, the PFMA provides that accounting authorities (collectively and individually) owe the enterprise a *fiduciary* duty.[1404] As former Chief

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[1397] Section 86 (2) of the PFMA. Section 55 of the Act provides for the duty in respect of board members (as accounting authorities) to make annual reports and financial statements of their respective companies.

[1398] Section 83(1) & (3) of the PFMA. In this respect, in terms of section 83(1)(a) of this Act, any accounting authority or other official of public entities who fails to comply with the provisions of sections 50–55 of the PFMA commits an act of financial misconduct.

[1399] Section 86(2) of the PFMA.

[1400] Sections 83(2) of the PFMA.

[1401] Sections 83(4) of the PFMA.

[1402] See discussion of the Companies Act in part 5.2.2.2 above.

[1403] Section 51(b)(iii) of the PFMA.

[1404] Section 50 of the PFMA.

Justice Mogoeng CJ correctly held, to serve on the board of a state-owned enterprise is indeed an onerous and weighty responsibility.[1405] This is a duty of utmost good faith, which enjoins accounting authorities to 'act with fidelity, honesty, integrity, and in the best interests of the corporation' when exercising their responsibilities.[1406] Essentially, the same high standard of responsibility expected of accounting authorities is equally expected of directors, in terms of the Companies Act.[1407]

However, no one has been subjected to criminal prosecution for violation of the PFMA in terms of these provisions. It is only now that actions have been taken towards prosecuting former members of boards and former officials of State-Owned Enterprises.[1408] Thus, the failure to use the provisions of the PFMA to bring derelict board members of SOEs to account in this manner may have attributed to political reasons and a lack of a political will as discussed in chapter two of this study.

The following section deals with the Prevention and Combating of Corrupt Activities Act[1409] and what this Act provides in the case of breach of statutory (common law inclusive) duties of public office-bearers.

*5.2.2.4 Prevention and Combating of Corrupt Activities Act*

The PCCAA was enacted in 2003 and came into effect on 27 April 2004[1410] and 3 July 2004.[1411] This

[1405] *EFF1,* supra note 31 para 1.

[1406] Section 50(b) of the PFMA.

[1407] Sections 7(b)(iii) and 76 of the Companies Act, 2008.

[1408] See NPA 'Transnet Ex Group Ceo Brian Molefe [a]nd Former CFO Anoj Singh [a]nd Others Arrested On Transnet Related R398.4 Million Fraud And Corruption Charges' (2022), available at *https://www.npa.gov.za/Transnet-Ex-Group-Ceo-Brian-Molefe-And-Former-Cfo-Anoj-Singh-And-Others-Arrested-On-Transnet-Related-R398.4-Million-Fraud-And-Corruption-Charges*- accessed 20 October 2022; Antony Sguazzin 'McKinsey, Ex-Partner Added to South African Graft Case' *Bloomberg* 30 September 2022, available at *https://www.bloomberg.com/news/articles/2022-09-30/mckinsey-added-to-transnet-corruption-case-by-south-africa?leadSource=uverify%20wall,* accessed 20 October 2022; Lisa Steyn 'Gupta associates, ex-govt official arrested for allegedly looting R107m from Optimum, Koornfontein funds' *News24* 25 May 2022, available at *https://www.news24.com/fin24/companies/gupta-associates-ex-govt-official-arrested-for-allegedly-looting-optimum-koornfontein-funds-20220525*, accessed 20 October 2022.

[1409] Act 12 of 2004.

[1410] Ibid, section 37(1).

[1411] Ibid, section 37(2).

Act came barely ten years after the enactment of the POCA, which also is geared towards fighting organised crime, including dealing in drugs.[1412] The objectives of the PCCAA are outlined clearly in the Long Title and the Preamble to the Act. As seen from the Long Title and the Preamble to the Act,[1413] the PCCAA was enacted as a further tool for fighting corruption and corrupt activities in the country at large. The objective of the Act is to prevent and combat corruption as well as corrupt activities.[1414] Among other aims, this Act focuses on the investigation of corruption and creates a legal duty for persons in positions of authority to report (suspected) acts of corruption.[1415] The PCCAA sought to create a comprehensive, integrated and multidisciplinary measure in the fight against acts of corruption.[1416] This Act envisages cooperation with other states in the fight against acts of corruption, while also the Act is seen as a means to fulfill South Africa's international obligations under international and regional instruments.[1417]

Chapter 2 of the PCCAA creates various statutory offences against different persons in positions of authority. In this regard, it is an offence of corruption to directly and indirectly offer or accept gratification from someone, for one's benefit or the benefit of another person.[1418] Section 3 also names different activities which amount to corruption, such as influencing another person to act in an illegal, dishonest, or biased manner.[1419] It also amounts to an offence of corruption to influence another person

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[1412] Although the two Acts are different, there is an overlap between them. The Preambles to both Acts are like carbon copies of each other (see the Preambles to the two pieces of legislation, for similarities).

[1413] The Long Title and the Preamble to PCCAA.

[1414] Ibid.

[1415] The Long Title of the PCCAA.

[1416] The Preamble to the Prevention and Combating of Corrupt Activities Act 12 of 2004.

[1417] The Preamble to the PCCAA refers to the United Nations' various resolutions, such as [t]he UN Convention Against Corruption of 31 October 2003 (available at *https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf*) & the South African Development Community's (SADC) Protocol Against Corruption, 14 August 2001 (available at *https://www.sadc.int/document/protocol-against-corruption-2001*).

[1418] Section 3 of the PCCAA. 'Gratification' in the PCCAA is defined as including a wide range of things, including 'valuable consideration or benefit of any kind (see, in this regard, section 1(ix)(a) – (j) of the PCCAA)

[1419] Section 3(b)(i)(aa) of the PCCAA.

to misuse information that the person has acquired by virtue of position in the course of duty.[1420] The same section makes it an offence of corruption to induce another person to abuse their position of authority[1421] or act in breach of trust[1422] or even induce someone else to act in violation of a legal duty.[1423]

Meanwhile, section 4 of the PCCAA is directed against persons such as public officers. Section 4 deals with an offence of corruption, against public officers, and the like. The section, in terms of its content, mirrors the provisions of section 3 of the PCCAA. In that regard, section 4 specifically precludes public officers from directly and indirectly accepting or even offering gratification for the benefit of another.[1424] In terms of section 4, 'to act' includes acts of favouritism (favouring any person to do a business transaction with the public body.[1425] In terms of the PCCAA, public bodes include functionaries who exercise constitutional functions [1426] or exercise public power in terms of legislation.[1427] Thus, from this definition, it becomes apparent that the scope of the PCCAA is wide and covers all persons entrusted with positions of authority in the public service.

Further, the PCCAA creates an offence in respect of agents,[1428] which it defines as including directors or officers acting on behalf of a principal.[1429] Like section 3 of the PCCAA, the provisions of section

[1420] Ibid, section 3(b)(i)(bb).

[1421] Ibid, section 4(1)(a) – (b).

[1422] Ibid, section 3(b)(ii)(bb).

[1423] Ibid, section 3(b)(ii)(cc).

[1424] Ibid, section 3(b)(ii)(aa).

[1425] Ibid, section 4(2)(b).

[1426] Ibid, section 1(xxii).

[1427] Ibid.

[1428] Ibid, section 6.

[1429] Ibid, section 1(i).

6 [1430] create an offence against agents and make it an offence of gratification[1431] to receive a benefit. The offences are created specifically against agents.[1432] Similarly, sections 12 and 13 of the PCCAA create an offence of gratification for benefit in respect of contracts and procurement, and/or withdrawal of a tender.[1433]

In addition, section 34(3) of the PCCAA creates a duty for persons in positions of authority to report corrupt transactions to the police. Such a duty to report corrupt activities or transactions arises (1) when one holds a position of authority; and (2) the person knows or ought to reasonably have known or even have suspected the commission of acts of corruption.[1434] As of 31 July 2004, failure to report in terms of section 34 amounts to an offence.[1435] In terms of section 34 of the PCCAA, persons in authority among them, include Directors-General in government departments, [1436] municipality managers, [1437] public officers in the senior management service of a public body, [1438] company managers, securities and directors in terms of the Companies Act [2008], [1439] executive managers of financial institutions, [1440] Chief Executive Officers and the like of any institution or organisation.[1441]

Most importantly, the PCCAA prescribes penalties for offences related to corruption and corrupt

[1430] Ibid, section 6.

[1431] The Act defines 'gratification' in wide terms, which include, among others, '…money in cash or otherwise, donation or gifts, fee, reward, valuable security, property or interest in property of any description, whether movable or immovable or any other similar advantage, any other service or favour or advantage of any description, Service, favour, an advantage of any description, including protection from any penalty or any action or proceedings of a disciplinary, civil or criminal nature, …' already instituted or not, etc., (section 1 (ix)(a)–(j) and section 2 (3)(b) of the Prevention and Combating of Corrupt Activities Act 12 of 2004.

[1432] Section 6 of the Prevention and Combating of Corrupt Activities Act 12 of 2004.

[1433] Ibid, section 1(xxii).

[1434] Ibid, section 34(1).

[1435] Ibid, section 34(2).

[1436] Ibid, section 34(4)(a).

[1437] Ibid, section 34(4)(b).

[1438] Ibid, section 34(4)(c).

[1439] Ibid, section 34(4)(e).

[1440] Ibid, section 34(4)(f).

[1441] Ibid, section 34(4)(h).

activities.[1442] Contraventions of the Act incur penalties ranging from a fine, to 3 years, up to 18 years, or even to life imprisonment, depending on whether the sentencing court is the magistrates' court, regional court, or the high court. [1443] Additionally, the convicting court may order that the offender's name be listed in the endorsement register,[1444] established in terms of chapter 6, sections 29 to 33, of the Act.[1445] The jurisdiction and provisions of the PCCAA even extend to acts committed outside the borders of South Africa.[1446]

In this country, evidence has shown that public office-bearers and board members of State-Owned Enterprises have indulged in all these acts, which are prohibited by the PCCAA.[1447] It is in such instances that the provisions of the PCCAA should have been used to hold violators accountable. Still, the provisions of this legislation were never used against errant public office-bearers and derelict board members of state-owned corporations despite the prevalence of corruption therein.[1448] From what has been discussed in this part about the Prevention and Combating of Corrupt Activities Act 12 of 2004, this piece of legislation is one of the most important mechanisms to enforce accountability against board members of state-owned corporations or any other office-bearers placed in positions of authority. When used properly, this Act may be one of the most valuable tools to fight corruption and to hold senior office-bearers, including accounting authorities of State-Owned Enterprises, who exercise oversight over the executive directors of state entities, accountable for the way they exercise their constitutional duty towards public corporations.

Even so, the PCCAA does not provide for compensation for financial losses, which could be caused,

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[1442] Ibid, section 26.

[1443] Ibid, section 26(1)(b).

[1444] Ibid, section 28(1)(a).

[1445] Act 12 of 2004.

[1446] Ibid, section 35.

[1447] See, for example, State Capture Commission Report Part I vol. 1 supra note 125, paras 745-52 & 1109.

[1448] See State Capture Commission Report Part I vol. 1 supra, para 609.

such as in the case of dereliction of constitutional and *fiduciary* duties that members of boards owe towards state corporations. Hence, in this regard, the PCCAA, while useful to hold accounting authorities accountable for the exercise of their directors' duties, falls short. In other words, this piece of legislation is perfectly suited for criminal accountability, but not for facilitating compensation for financial losses sustained at State-Owned Enterprises.

The next section focuses on the POCA – another vital instrument for fighting crime, including the prevalent fleecing of state-owned corporations.

*5.2.2.5* The Prevention of Organised Crime Act[1449]

The POCA is one of the most valuable legislative tools at the disposal of state institutions to arrest the culture of wrongdoing, especially against accounting authorities of State-Owned Enterprises. The Long Title and Preamble to the POCA set out the objectives of the Act. Among others, the Act seeks to combat money laundering and to effect the recovery of unlawful profits through the civil forfeiture of assets, identified as proceeds of crime.[1450] The POCA was created, *inter alia*, out of the realisation of the inadequacy of the common law and other statutes to combat unlawful activities, such as money laundering.[1451] Chapter 3 of this Act creates offences relating to unlawful activities.[1452] Meanwhile, chapter 5 of the Act deals with the proceeds of unlawful activities.[1453]

Most importantly, the POCA emanated from the affirmation that no wrongdoer is entitled to benefit from the fruits of his own criminal activities.[1454] As its vital tool, POCA has the Asset Forfeiture Unit (AFU) in terms of chapters 5 and 6 of the Act. The Asset Forfeiture Unit is one of the seven units of

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[1449] Ibid.

[1450] The Long Title and Preamble to the POCA. See also *National Director of Public Prosecutions v Mohamed NO* 2003 (4) SA 1 (CC) paras 14-17; *National Director of Public Prosecutions v Mohamed NO* 2002 (4) SA 843 (CC) para 15.

[1451] The Preamble to the POCA.

[1452] Sections 4-8 of the POCA.

[1453] Ibid, sections 12-17.

[1454] The Preamble to the POCA.

NPA.[1455] The AFU was created in line with the objectives of the POCA, namely civil forfeiture of property used in connection with criminal activities.[1456] The AFU does not prosecute, but its mandate and functions involve effecting the seizure of property, which includes money linked to criminal activities, investigate white-collar crime, as well as enforce anti-money laundering legislation. The Asset Forfeiture Unit works closely with the NPA and the police services.[1457] It is responsible for conducting criminal and financial investigations in anticipation of planned forfeitures.[1458] The nature of the forfeiture proceedings is civil rather than criminal.[1459] In that regard, there is no need for a criminal conviction for a forfeiture order to be granted.[1460] Also, the standard of proof regarding the connection between the seized property and the criminal activities is one of a balance of probabilities, rather than certainty beyond a reasonable doubt.[1461]

Essentially, the forfeiture proceedings in terms of POCA are proceedings against the property (proceedings *in rem*) rather than proceedings against the wrongdoer.[1462] The property must be linked to criminal activities in that it was instrumental in the commission of criminal activities or it is from the proceeds of crime.[1463] To a large extent, an efficient and properly functional AFU can make a huge dent in the fight against criminal financial activities, including those committed against State-Owned

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[1455] Other Units of the NPA are the Office of the National Director of Public Prosecution; the National Prosecuting Services; the Investigating Directorate; the Legal Affairs Division(s); the Office of the Witness Protection; and the Strategy, Operations and Compliance.

[1456] *Mohamed NO* supra note 1450, paras 14-17.

[1457] See National Prosecuting Authority 'Purpose of the Asset Forfeiture Unit', available at *https://www.npa.gov.za/asset-forfeiture-unitailable*; Also, see *https://www.npa.gov.za/asset-forfeiture-unit* accessed 20 September 2022.

[1458] *Mohamed NO* supra note 1414, para 16.

[1459] Sections 13 and 37 of the POCA. See *Mohamed NO* supra note 1450, par 17.

[1460] M Montesh 'Analysis of the Role of the South African Asset Forfeiture Unit and the Special Investigating Unit (2009) 22(2) *Acta Criminologica* 33, available at *https://uir.unisa.ac.za/handle/10500/1272, accessed* 22-07-2022; *Brooks v National Director of Public Prosecutions* 2017 (1) SACR 701 (SCA), para 16.

[1461] Ibid paras 17, 18 & 21.

[1462] Ibid at para 16.

[1463] Ibid at paras 16-21; *National Director of Public Prosecutions v Van Staden* 2007 (1) SACR 338 (SCA). See also *www.npa.gov.za/asset-forfeiture-unit, accessed* 22 July 2022.

Enterprises . In this regard, using the POCA and its asset forfeiture unit, could also dispossess criminal doers, such as derelict board members of state-owned corporations, of proceeds and property gained from criminal activities. In this way, forfeitures can send a strong message that 'crime does not pay.'[1464]

Properly used, the POCA may be a powerful tool to prevent abuse of public funds from State-Owned Enterprises and to hold executives, as well as boards of directors to account to the public for failure in their constitutional and *fiduciary* duties owed to State-Owned Enterprises . Unfortunately, over the past years, especially between 2009 and 2017, the prevailing culture in several South African strategic State-Owned Enterprises was to let individuals benefit from the fruits of their unlawful activities.[1465] During the indicated period, South African State-Owned Enterprises experienced a wave of corruption and looting of financial resources on an unprecedented scale. Surprisingly, not once was the wide range of mechanisms of accountability ever used against the directors of State-Owned Enterprises and their accomplices for draining the finances of South African state-owned entities, such as the SABC, Transnet, Eskom, and Denel, to name a few. Many of these entities such as the SAA, Eskom, and Denel, lost money until they became totally dysfunctional.[1466] Instead, the provisions of POCA could have been effective, at least as a deterrent, against an unprecedented plundering of the financial resources of State-Owned Enterprises.[1467] Had the provisions of POCA been applied to stop evil-doing at State-Owned Enterprises , the errant board members and other senior office-bearers would have been dispossessed of their ill-gotten benefits, because the Act provides for the forfeiture

[1464] See the Long Title & Preamble to the POCA and section 48(1) of this Act; *Brooks* supra note 1098, par 16; *Mohamed NO Mohamed NO* supra note 1450, para16.

[1465] As in the case of former COO of SABC, Hlaudi Motsoeneng & Eskom's Brian Molefe ('When Governance and Ethics Fail' Report supra note 282; *DA v Minister of Public Enterprise* supra, note 483).

[1466] SAA went for a business rescue process in terms of section 128 of the Companies Act 71 of 2008. To date, the national carrier is a shadow of itself. Denel is to date battling to pay salaries. Eskom is dependent on government bailouts/guarantees to keep the lights on. However, no one among the past and present board members (accounting officers) who derived personal benefit was held to account.

[1467] The plunder involved all kinds of irregularities such as wasteful expenditure, irregular and wasteful expenditure.

of stolen assets. Perhaps, the lack of political will to apply the provisions of POCA against deviating accounting authorities (or board members) and senior employees of State-Owned Enterprises was largely exacerbated by the policy of cadre deployment followed by the governing party.[1468] It is reasonable to conclude that the governing party would also not have been keen to correct some of their own members, as evidence has shown that the governing party also benefitted from the proceeds of the criminal activities of its own deployees.[1469] Also, the lack of political will on the part of the government to use the provisions of POCA against derelict board members and their accomplices, was supplemented by the capture of the NPA. In other words, after the capture of the NPA as the implementing unit of the POCA, it was no longer able to carry out its prosecuting function optimally.[1470] Seen against this background, it becomes clear that the provisions of the POCA are capable of manipulation by those in positions of authority.

A further limitation of the POCA as an effective remedy to compensate affected State-Owned Enterprises , needs mention. It is the fact that proceeds of crime are forfeited to the state for further use in the fight against criminal activities. In this manner, proceeds of criminal activities are not used for the benefit of affected companies. In a sense, wrongdoers are indirectly punished and pay through their dispossession of the proceeds of their criminal activities. In the process, affected corporations are not compensated for their financial losses. Most importantly, the use of the forfeiture provisions may stand against compensating the affected entity for its losses by the wrongdoer. In other words, by the time compensation proceedings are finalized against derelict public office-bearers, such as erstwhile board members, the culprits may no longer be able to compensate the entity for its financial losses. Therefore, the current position amounts to an apparent conflict of interest between the objectives of the POCA and the interests of public entities affected by the criminal activities of their

[1468] State Capture Commission Report Part VI vol. 2 supra note 266, paras 405–6, & 442.

[1469] Ibid, para 432.

[1470] See *https://www. npa.gov.za/asset-for future-unit*; Montesh, op cit note 1424.

directors. This current position creates an anomaly that must be attended to by the legislature. One way to sort out this problem is to specifically exempt the property of State-Owned Enterprises from forfeiture into the state. Instead, the relevant Act, the POCA may provide for affected state-owned corporations to quantify their financial losses and submit their claim against the proceeds during the forfeiture proceedings.

Moreover, to bridge the fragmentation between the asset forfeiture mechanisms provided by POCA on the one hand, and the SIU process, the AFU and the SIU may have to be merged into one unit. In this way, the proceedings under the POCA may be prosecuted in the Special Tribunal, formed in terms of the SIU Act,[1471] (which must be made permanent). In turn, this move will lead to the economic use of scarce financial resources while also lightening the burden on the conventional judicial system.[1472]

In the final analysis, the POCA is a good piece of legislation that is available to hold accounting authorities liable for the exercise of their statutory duties toward State-Owned Enterprises . These two Acts can keep board members in check and restrain them from getting involved in criminal activities for self-enrichment or enriching others, in the exercise of their powers and functions as public office bearers. However, like the provisions of SIU, the POCA provisions generally do not provide for compensation to a state-owned enterprise for the financial loss it may suffer because of the failure of directors in the duties owed to the affected state entity. Whatever monies the AFU recovers from erstwhile directors of State-Owned Enterprises and their accomplices, are forfeited to the national treasury and are not returned to the state-owned public entity.[1473] It is therefore submitted that a suitable measure that may equitably compensate State-Owned Enterprises  for losses caused by

[1471] Special Investigating Units & the Special Tribunals Act 74 of 1996.

[1472] The legislature, for example, may decide to give ordinary courts concurrent jurisdiction with the special tribunal in matters of combating corrupt activities and money laundering.

[1473] The POCA, sections, 50 & 56–57. See also *Mohunram v National Director of Public Prosecutions (Law Review Project as Amicus Curiae)* 2007 (4) SA 222 (CC) para 74, per Van Heerden AJ, & para 121, per Moseneke DCJ; *Brooks* supra note 1098, paras 57 & 60.

directors, while at the same time holding them to account to the public for their inefficiencies, is the delictual remedy. The delictual remedy is discussed in full in chapter seven below.

The following section of the chapter will discuss the common law claim for damages claim for breach of directors' duties and delictual damages under the Lex Aquilia, as a means for effecting accountability of accounting authorities of SOEs.

## 5.3 DAMAGES

The first part explores the nature of action for breach of fiduciary duties, whereas part 5.3.2 deals with delictual damages and the essential requisites thereof.

### 5.3.1 Breach of *Fiduciary* Duties

In the South African common law tradition, the breach of *fiduciary* duties by directors or officers of a company gives rise to specific remedies available to the company. These remedies are not only rooted in notions of accountability but serve as essential deterrents to misconduct within corporate governance. Principally, a company is entitled to claim any profit or even a business opportunity that a director may have secured or retained through such a breach. Moreover, the law allows for an action for damages, aimed at redressing the harm suffered by the company due to a director's failure to uphold *fiduciary* obligations. The availability of a damages claim serves an important compensatory function: to restore the company to the position it would have occupied had the breach not occurred. Notably, however, South African jurisprudence has adopted a narrow position on the nature of such claims. In *Phelps v Hillingdon London Borough Council*,[1474] for example, Friedman JP held that a company's right to claim damages for breach of *fiduciary* duty is not based on fault,[1475] but is *sui*

[1474] *Phelps v Hillingdon London Borough Council* [2000] 2 AC 619 (HL).

[1475] Ibid at 170C–D.

*generis* in nature, insisting it was not grounded in delictual fault.[1476] Interestingly, while the court sought to distinguish such claims from delict, it failed to identify a firm doctrinal basis outside of delict for such *sui generis* liability. Friedman's reasoning is problematic. By alienating this remedy from the fault-based regime of the *Lex Aquilia*, the court effectively strips the claim of its most compelling feature, namely, accountability premised on culpability and the conventional principles underpinning delictual liability, where fault, either in the form of *dolus* (intent) or *culpa* (negligence), is a prerequisite. Even so, Friedman JP did concede that the plaintiff must establish causation between the breach and the resulting harm, and that the standard for assessing causation mirrors that found in delictual actions.[1477] This concession undermines his earlier assertion that the claim is wholly removed from delictual liability. This ambiguity invites critical reflection: if an action for breach of *fiduciary* duty features all five essential elements of a delictual claim, namely conduct, wrongfulness, fault, harm, and causation, then why resist its classification as a delictual remedy? Thus, the court's reluctance to recognise the delictual nature of such claims is more semantic than substantive.

Moreover, it is submitted that while *Phelps* acknowledges the uniqueness of *fiduciary*-based claims, court's conclusion may have failed to appreciate the structural overlap with delict. Indeed, despite the absence of precedent directly anchoring *fiduciary* breaches within delict, their alignment with delictual principles, albeit dormant, cannot be dismissed. A more compelling and critically coherent view would be to recognise that these claims do, in practice, operate within the framework of delict, albeit with specific features adapted to the *fiduciary* context. The insistence on *sui generis* status obscures the reality that the harm is real, the conduct is wrongful, and the duties breached have legal consequences. A functional analysis leads to the inescapable conclusion that the claim is not merely restitutionary but also compensatory, and therefore delictual in nature.

[1476] Ibid at 170G–171E.

[1477] Ibid at 276E–F.

Considering the foregoing, the liability of directors, particularly within South Africa's SOEs, cannot be fully understood without interrogating the deeper normative framework that underpins *fiduciary* duties and the remedial response of damages. Both the common law and statutory instruments impose *fiduciary* obligations on company directors. These are not hollow formalities. They require that directors act in good faith, with honesty, loyalty, and an objective alignment with the best interests of the company and public interest, in the case of SOEs. At common law, this is reinforced by a duty of care and skill. Yet, the Companies Act enhances this framework by introducing the requirement of diligence, which effectively raises the standard and expectations placed on directors. However, the adequacy of this legal framework must be critically examined considering South Africa's unique context, especially regarding SOEs. Within the South African context, these duties assume a constitutional dimension. Directors in SOEs are not just stewards of private assets, but they are custodians of public resources. Section 195 of the Constitution imposes further obligations, ethical governance, transparency, and the efficient use of public resources, which must shape the interpretation and enforcement of *fiduciary* responsibilities. Whereas the principle that a failure to discharge *fiduciary* duties renders a director liable to the company, and potentially to third parties, is legally uncontroversial, the practical enforcement of this principle is fraught with ambiguity and hesitation. This is particularly evident in the invocation of the business judgment rule, which is inherently a barrier to holding directors accountable in SOEs using delictual liability. Critically viewed, when applied in board members of SOEs, this rule is at odd with the constitutional values as reflected in section 195 of the South African Constitution.

Next, the focus is on the common law principles of delict, as possible effective remedy for effecting the accountability of board members while also compensating an affected SOE. It is appropriate to examine the delictual foundation of damages liability for breaches of *fiduciary* duties.

### 5.3.2 Delictual Damages

At the centre of this study was to explore the feasibility of imposing personal accountability of derelict accounting authorities of SOEs through the use of delictual remedy. South African delictual law is built on three primary causes of action: the *actio legis Aquiliae (*the *Lex Aquilia*), the *actio iniuriarum*, and actions for pain and suffering.[1478] All the three actions combined allow a person (including juristic persons, in the case of the first two causes of action) to sue for compensation for damages (loss) that have been caused him or her in a wrongful and culpable manner.[1479] In this thesis the writer is concerned only with the *actio legis Aquiliae* (*Lex Aquilia*). There are five foundational elements of Aquilian action: namely, conduct (or an act), wrongfulness, fault, harm, and causation. Moreover, the in *Phelps*, the court also held that a director who fails to exercise 'reasonable care in the management' of the affairs of the company may also incur liability to the company based on the principles of the *Lex Aquiliae*.[1480] This liability comes in addition to an action for damages based on a breach of *fiduciary* duties. Thus, a company may have a claim for damages, based on delict. To succeed with its claim under the *Lex Aquilia*, the entity (such as a state-owned enterprise) needs to comply with the five essential elements.[1481] These five elements of delict are conduct, loss or damages, culpability (that is, fault), wrongfulness, and causation. The following section of the exposition reviews these five elements in detail, starting with conduct.

#### *5.3.2.1 The Conduct*

In law, for one to be delictually liable (in terms of the *Lex Aquilia or actio legis aquiliae*) conduct may assume one of two forms; namely, the form of a commission (a positive act), or a form of

[1478] Neethling & Potgieter op cit 480 at 3–6.

[1479] Ibid.

[1480] *Phelps* supra note 1453 at 170B–C.

[1481] Neethling & Potgieter, op cit note 480, 4.

omission (failure to act).[1482] Both the action (positive act) and inaction (non-commission) amount to conduct and attract liability in delict.[1483] In addition, there are two legal requisites for an act to constitute conduct in law. First, the conduct must be a human act.[1484] Second, the conduct should be voluntary.[1485] The 'human act' requires that the wrongful act originate from a human being, acting in person or through an object, such as an animal or a juristic entity.[1486] In this context, directors' conduct, whether acting in person or through another legal vehicle, squarely falls within this definition. Consequently, directors of State-Owned Enterprises may contribute to the loss of a state-owned enterprise through their positive conduct, such as when they actively participate in defrauding an entity, by making payments to third parties, without a just cause.[1487] The conduct is an omission where directors of a state-owned enterprise do nothing, for example, to stop the wastage of financial resources of a state-owned enterprise. Consequently, directors of a company will be liable for their act of commission and/or omission (failure to act positively to prevent the loss to a company). Conduct will also be present where members of the board use another entity to cause loss to a state-owned enterprise under their management.[1488]

In the case of SOEs, the conduct of directors that causes loss to a state-owned entity may assume any of the two forms of conduct. In other words, the losses incurred by a state-owned entity may have

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[1482] Neethling & Potgieter supra note 480 at 32–33.

[1483] Ibid.

[1484] Ibid at 27–28.

[1485] *Molefe v Mahaeng 1999* (1) SA 562 (SCA) at 568H–J; *Wessels v Hall & Pickles (Coastal)(Pty) Ltd* 1985 (4) SA 153 (C), 567I & 568G–H.

[1486] *Jooste v Minister of Police* 1975 (1) SA 349 (E); *Chetty* v *Minister of Police* 1976 (2) SA 450 (N).

[1487] A classic example of conduct that comprises both positive and negative acts is the case of Transnet, where board members and senior employees authorised payments for 'work 'that was not performed for Transnet (Statement and Annexure of Popo Simon Molefe, Exhibit BB, para 11.8.3; *Transnet Soc Limited v Regiments Capital (Pty) Limited: In re: Transnet Soc Limited v Regiments Capital (Pty) Ltd: In re: Transnet Soc Limited v Trillian Asset Management (Pty) Ltd: In re: Transnet Soc Limited v Trillian Capital Partners (Pty) Ltd: In re: Transnet Soc Limited v Regiments Capital (Pty) Ltd* (*Regiments Capital*) [2022] ZAGPJHC 702 (GJ) unreported case nos 2018/41666; 2018/44041; 2018/44043 & 2018/44359 (19 September 2022), para 15.

[1488] It is submitted in this study that an act of a juristic person qualifies as a human act, because juristic persons, such as companies, act through their directors and other employees.

been caused through an act of commission or by way of an act of omission. It may also be possible that loss to a state-owned enterprise could be a result of both commission and omission,[1489] where for example, some directors may have inflicted harm/loss to an entity, while their counterparts do nothing to expose it, or stop it, or are even unaware of the malfeasance when, by their office, they ought to have been aware.[1490] The authority of O'Regan J in the judgment of *K* would apply *mutatis mutandis* in respect of a breach of *fiduciary* and constitutional duties on the part of directors (and senior employees) of State-Owned Enterprises.[1491] Whether they acted to cause loss to a public entity or failed to prevent the causing of harm, especially by their counterparts, would satisfy the element of conduct, to be liable in delict. In the context of State-Owned Enterprises (SOEs), this dual form of liability is especially salient. Directors may actively participate in wrongful acts such as fraudulent payments to third parties, or they may passively allow wastage and financial mismanagement by failing to intervene or oversee. In either case, the conduct element is satisfied. What complicates matters in the public sector is the layered nature of responsibility. It is entirely possible for an SOE to suffer loss due to both action and inaction: some members of board may actively orchestrate harm, while others remain silent or wilfully ignorant. In such circumstances, the entire board may be culpable, even if their roles vary.

Here, the principle articulated by O'Regan J in *Van Duivenboden* is apposite: the law imposes positive

[1489] Something similar occurred in the case of *K v Minister of Safety and Security* (2005 (6) SA 419 (CC). In this case, three police officers took turns raping a stranded woman whom they offered a lift to her home from a petrol station. In her judgment, O'Regan J of the Constitutional Court remarked that the police conduct was simultaneously commission and omission. According to her, the brutal rape of the girl was a commission, while the failure by the other two police officers who were on duty, to intervene while their colleague was raping the woman, constituted omission. As O'Regan found, both acts of raping and standing by constituted actionable conduct in law (para 52).

[1490] SAA and Transnet are classical examples in this regard. At SAA, the other members of the board, for example, sat and watched (failed to act to prevent the loss to SAA) while Ms Myeni and Ms Kwinana were fleecing the airline of its monies. The other board members and senior employees cooperated with the two chairpersons. (State Capture Commission Report Part I vol. 1 supra note 313, paras 15 and 845.) The same can be said about Transnet under Mr Gama and Mr B Molefe, particularly when the irregular/oversized locomotives were purchased (see *Swifambo* supra note 161, paras 1–16; State Capture Commission Report Part V vol. 2 supra note 123, paras 1784 &1786; State Capture Commission Report Part II vol. 1 supra note 314, para 17).

[1491] *K* supra note 1489, para 52.

duties on individuals in positions of authority, and their failure to act may be deemed wrongful, particularly where constitutional obligations are implicated.[1492] This approach would apply *mutatis mutandis* to board members of SOEs, who must be held accountable not only for what they do, but for what they fail to prevent.

As we turn next to examine the element of harm, it remains essential to appreciate that conduct is not merely an act, it is a gateway through which responsibility for corporate malfeasance is channelled. Directors, especially within the public sector, must act with vigilance and fidelity, lest their omissions become indistinguishable from active wrongdoing.

In the following section of the exposition, the writer considers the element of harm, which the plaintiff must also prove to succeed with the claim in delict.

*5.3.2.2 Harm*

In the law of delict, harm is not merely one of the five requisites for liability, it is the gravitational centre around which the entire delictual enquiry orbits.[1493] Particularly under the *Lex Aquilia*, harm is the bridge between wrongful conduct and accountability. As South African courts have consistently held, no matter how egregious the conduct of the defendant, if harm to the plaintiff cannot be established, the delictual claim collapses.[1494] In this respect, harm must be either actual patrimonial loss or *pure economic loss,* which does not arise from damage to person or property. In the context of State-Owned Enterprises (SOEs), loss often takes the latter form. Examples include missed financial opportunities, dissipation of state funds, or exposure to unnecessary financial risk, all of which are

[1492] *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 20.

[1493] Neethling & Potgieter op cit supra note 480, 4 & 255.

[1494] *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 838H-839A; *De Klerk v Absa Bank Ltd* 2003 (4) SA 315 (SCA) para 16; *Home Talk Developments (Pty) Ltd v Ekurhuleni Metropolitan Municipality* 2018 (1) SA 391 (SCA), para 93.

well-captured in the Commission of Inquiry into State Capture.[1495] The findings of the Zondo Commission illustrate in granular detail the quantum of harm, losses running into billions of rand, that SOEs such as Eskom, Transnet, and SAA suffered due to the reckless or complicit conduct of directors and senior officials. This harm is not hypothetical; it is substantiated by forensic audit trails, procurement irregularities, and detailed testimony.

Importantly, the harm discussed here focuses not only on lost revenue and profits but also on *unauthorised, irregular, fruitless and wasteful expenditure*, as defined in the PFMA.[1496] These forms of financial loss have practical and constitutional significance. They represent not merely financial mismanagement but the erosion of the state's capacity to serve the public good, an outcome fundamentally at odds with the constitutional vision of accountable and efficient public administration.[1497]

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[1495] *Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State* ("State Capture Commission"), Final Report (2022), Parts I–VI.

[1496] PFMA, section 1 (definitions) and section 38(1)(c).

[1497] Section 195 of the Constitution.

[1498] State Capture Commission op cit.

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*5.3.2.3 Wrongfulness*

Wrongfulness is another key element to complete delictual liability that a plaintiff needs to prove to be successful with his or her claim in delict. Thus, in *Van Eeden*, the SCA held that the common law wrongfulness was another element employed for determining liability for delictual damages, in addition to the elements of fault, causation, harm as well as conduct.[1501] As with the element of harm, without proving wrongfulness, the plaintiff will not be successful in his action for damages, even if he can prove that he sustained loss (harm). The wrongdoer (defendant) may raise a legal justification or defence for his conduct, such as the defence of consent.[1502] In the case of State-Owned Enterprises, directors (and senior employees) may have been authorised to act in a manner that results in loss to a public entity, for example through a lawful resolution or by a provision in a statute.[1503] In that circumstance, there would be no wrongfulness, nor would the defendant be liable in delict. This enquiry is normative and rests on a value judgment, specifically, whether the conduct breaches a legal duty and is unreasonable under the circumstances.[1504] In *Moses,* it was held that wrongfulness is

[1499] PFMA, section 1 (definitions) and section 38(1)(c).

[1500] Section 195 of the Constitution

[1501] *Van Eeden* supra note 1331, para 9.

[1502] *Mahele v Minister of Safety & Security* 1999 (1) SA 528 (SCA) 534.

[1503] For example, directors may raise the business judgment rule as their justification for their decision. Still, this would succeed if they acted within the legal bounds of the rule.

[1504] *Van Eeden* op cit note 1331, para 9; see also *Olitzki Property Holdings v State Tender Board* 2001 (3) SA 1247 (SCA), paras 11 and 31.

assessed according to the general criterion of reasonableness.[1505] According to the general criterion of reasonableness, conduct is regarded as wrongful if it is unreasonable to expect the defendant, considering the circumstances of the case, to conduct himself in a manner that would not have harmed persons in the position of the plaintiff.[1506]

The law uses two tests to determine wrongfulness; namely, the *boni mores* test[1507] and the infringement of subjective rights test.[1508] First, the *boni mores* test is also known as the legal convictions of the community test.[1509] In *Van Eeden's* case, the SCA held that the concept of the legal convictions of the community *(boni mores* as a test) is not concerned with what is regarded as 'socially, morally, ethically, or religiously right or wrong' by the community.[1510] Instead, this concept is concerned with the question of 'whether or not the community regards a particular act or form of conduct as delictually wrongful.'[1511] Thus, the *boni mores* test is an objective assessment of the reasonableness and/or unreasonableness of the wrongdoer's conduct.[1512] As the court stated further in *Van Eeden*, the legal convictions of the community ought to be seen through the prism of the values underlying the Constitution.[1513]

In the case of an omission, wrongfulness is ascertained in terms of a breach of a legal duty. Omission generally does not attract liability in law, unless it was considered wrongful.[1514] An omission is only wrongful where the defendant is under a legal duty to act positively to prevent the harm suffered by

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[1505] *Moses v Minister of Safety and Security* 2000 (3) SA 106 (C).

[1506] Ibid. See also *Carmichele v Minister of Safety & Security* 2001 (4) SA 938 (CC).

[1507] Neethling & Potgieter op cit note 480.

[1508] *Moses* & *Carmichele* judgments supra, notes 1505 & 1506, respectively. See also Neethling & Potgieter op cit note 480, 51–5.

[1509] Neethling & Potgieter, op cit note 480, 9–12.

[1510] *Van Eeden* supra note 1331, para 10.

[1511] Ibid.

[1512] Ibid.

[1513] Ibid at para 11.

[1514] Neethling & Potgieter op cit note 480, 64-65; *Van Eeden* supra note 1331 paras 9 & 11.

the plaintiff.[1515] The test is one of reasonableness. A defendant is under a legal duty to act positively to prevent harm to the plaintiff if it is reasonable to expect the defendant to have taken positive measures to prevent the harm. The court determines whether it is reasonable to have expected the defendant to have done so by making a value judgment, based *inter alia* upon its perception of the legal convictions of the community and on considerations of policy. The question of whether a legal duty exists in a particular case is thus a conclusion of law depending on a consideration of all the circumstances of the case and on the interplay of the many factors which must be considered.'[1516] In *Carmichele* the Constitutional Court held that in assessing a legal duty for actionable omissions, 'the question must always be whether the defendant ought reasonably and practically to have prevented harm to the plaintiff: in other words, is it reasonable to expect of the defendant to have taken positive measures to prevent the harm [occurring to the plaintiff]?'[1517] This exercise enjoins the court to weigh an interplay of factors, including the 'spirit, purport and objects of the Bill of Rights' and the foundational values of the South African constitutional state; namely, dignity, equality and freedom, that impose positive duties to promote and uphold these constitutional values.[1518] Within the context of the liability of board members, such constitutional values include the principles enshrined in section 195 of the Constitution, such as, *inter alia*, a high standard of professional ethics; the promotion of efficient, economic, and efficient use of public resources; and accountable public administration.[1519]

Ultimately, what the law regards as wrongful is essentially a policy consideration, based on the prevailing *boni mores* of the society at any time. Whether conduct is wrongful or not, would depend on the law and the prevailing norms and when it is legally unreasonable for the purpose of delictual

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[1515] Ibid.

[1516] *Van Eeden* supra note 1331 para 9. Neethling & Potgieter op cit note 469, 58–9. See also MC Buthelezi 'The action of dependants revisited in the light of *Brooks v the Minister of Safety and Security*' (2011) 642, at 649–50.

[1517] *Carmichele* op cit note 1506.

[1518] Ibid at paras 43 & 49.

[1519] Section 195(1)(a), (b) & (f) of the Constitution, 1996.

liability.[1520] On the other hand, a stringent approach to wrongfulness is taken where the loss is in the form of pure economic loss. The question of wrongfulness and pure economic loss is explored further in the section that immediately follows below.

South African courts rely on two tests for wrongfulness: (1) the *boni mores* or legal convictions of the community test, and (2) the infringement of a legally protected subjective right test. The *boni mores* test does not ask whether conduct is ethically or socially acceptable in a subjective sense, but rather whether it is legally unacceptable when assessed through the prism of constitutional values.[1521] In the post-1996 constitutional dispensation, courts are enjoined to interpret wrongfulness in light of the values of dignity, equality and freedom, and the spirit, purport and objects of the Bill of Rights.[1522]

Wrongfulness in omissions, as relevant to SOE directors who failed to act when they ought to have, requires a showing that a legal duty existed to act positively.[1523] In *Carmichele*, the Constitutional Court held that this determination is fundamentally influenced by constitutional values and policy considerations.[1524] Directors of SOEs, by virtue of their statutory and *fiduciary* offices, are undeniably under a legal duty to prevent harm to the public purse. Their inaction in the face of misconduct, or wilful ignorance of irregularities, thus engages the wrongfulness enquiry.

(i) Pure Economic Loss

Pure economic loss refers to a loss that does not have a direct connection with damage to one's person or property.[1525] Examples include loss of profit, incurring of extra expenses and the diminution in the

[1520] Neethling & Potgieter cit note 469, 47–9. See also MC Buthelezi op cit note 1529 at 650.

[1521] *Van Eeden* supra note 1331, para 11.

[1522] Constitution of the Republic of South Africa, 1996, section 39(2).

[1523] *Van Duivenboden* supra note 1492 para 20.

[1524] *Carmichele* supra note 1506 para 56.

[1525] *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA), para 1.

value of the plaintiff's property that has not arisen from physical damage to that property.[1526] Viewed in the context, the financial losses of SOEs due to the breach of *fiduciary* and statutory duties by members of boards, coupled with dereliction of their constitutional obligations towards these corporations fall within the category of pure economic loss. Consequently, the question of wrongfulness on the part of accounting authorities of SOEs falls within the ambit of pure economic loss, as their loss does not result from physical damage to property or to any person.[1527] The wrongfulness element is less straightforward in the case of negligence causing of pure economic loss.[1528] In the case of the negligent causing of pure economic loss, the conduct is not by itself *prima facie* wrongful.[1529] Instead, for policy considerations, the law must recognize the act or omission as unlawful. That is to say, policy considerations must regard the financial loss in such a manner that it will be reasonable to impose liability on the wrongdoer.[1530] The conduct giving rise to pure economic loss will be regarded as unlawful and thus delictually wrongful, if policy considerations require it to be actionable, that is, the resulting damages must be visited with legal liability.[1531] The law must impose a legal duty on the defendant to compensate the plaintiff for its financial losses.[1532] In other words, there will be a legal duty where the circumstances of the case are such that policy considerations 'demand' that the plaintiff should be compensated' for having suffered loss through the negligent conduct of the defendant.[1533] Effectively, the determination of wrongfulness in the case

[1526] Ibid.

[1527] Ibid para 12.

[1528] *Trustees for the Time Being of Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA)(*Two Oceans Aquarium Trust*), para 11. Also, *Loureiro v iMvula Quality Protection (Pty) Ltd* 2014 (3) SA 394 (CC), para 53.

[1529] *Telematrix* supra note 1525, para 1.

[1530] *Two Oceans Aquarium trust* supra note 1528, para 11; *Van Duivenboden* supra note 1492, para 12.

[1531] Ibid.

[1532] *Two Oceans Aquarium trust* supra note 150, para 11.

[1533] *Telematrix* supra note 1525, para 13.

of pure economic loss is somehow similar to wrongfulness for purposes of omission.[1534] Wrongfulness for purposes of omission is also considered in light of the principles discussed above already, that is, whether the policy considerations in each circumstance would demand that a legal duty be imposed (on board members to compensate an SOE for its) financial losses.

The SCA reflected at great length, in *Fourway Haulage,* on the factors that are relevant to policy considerations when determining the reasonableness or unreasonableness of imposing delictual liability for the causation of pure economic loss to the plaintiff.[1535] Among a matrix of factors, the SCA considered the need to protect what it called 'vulnerable to risk plaintiff[s]' who also lack other means to protect themselves.[1536] In the South African context, the key State-Owned Enterprises, such as the ones discussed already, fit squarely into the category of the plaintiffs that are vulnerable to risk but are unable to protect themselves by other means.[1537] As seen already in the previous chapters, billions of rand have been lost to State-Owned Enterprises, under the watch of the directors of the public entities, due to irregular, wasteful and fruitful expenditure.[1538] For the 2021/2022 financial year, for example, irregular expenditure by the country's public entities, which include 16 State-Owned Enterprises stood at R55, 22 billion.[1539] For decades, South African state-owned corporations have, experienced brazen pillaging of their financial resources, and yet, no consequence management

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[1534] *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA), para 12; *Van Eeden* supra note 1331, para 9.

[1535] Ibid paras 23–7.

[1536] *Fourway Haulage* supra note 1534, para 25.

[1537] Ibid para 12.

[1538] Auditor-General Report 2021/22, available at *https://www.agsa.co.za/ Portals/0/Reports/ PFMA/202122/ 2022%20PFMA%20Media%20Release%2023112022%20final%20-%20interactive.pdf?ver=2022-11-23-135533-110,* accessed 30 November 2022; Also 'Auditor-General Kimi Makwetu announces national and provincial audit results, 21 November 2018, available at *https://www.gov.za/speeches/auditor-general-reports-overall-deterioration-audit-results-national-and-provincial,* accessed 30 November 2022; Craig Jermaine, 'Irregular vs fruitless and wasteful expenditure', available at *https://businessmediamags.co.za/government-politics/irregular-vs-fruitless-and-wasteful-expenditure/*, accessed 30 November 2022. (Faizel Patel 'AG Report: Government too slow' in turning around ailing SOEs' *The Citizen*, 13 October 2022, available at *https://www.citizen.co.za/news/ag-report-ailing-soes-october-2022/*, accessed 30 November 2022.

[1539] Ibid.

followed. No board members (accounting authorities) were able to account for the losses incurred by State-Owned Enterprises under their stewardship. The culture of impunity has been prevalent in South Africa's state-owned corporations.

In the same judgment of *Fourway Haulage,* the SCA emphasised the importance of protecting vulnerable plaintiffs who have no alternative means of redress.[1540] Evidently, SOEs, as demonstrated by numerous financial audits and public reports, fall squarely within this category of vulnerable plaintiffs. Their governance structures are often prey to political manipulation, procurement exploitation, and the erosion of internal controls. Moreover, other remedies available have not offered compensation to affected entities. As a result, effectively State-Owned Enterprises have not had any other remedy to help themselves, so to say.[1541] The annual irregular expenditure of over R55 billion reported for the 2021/2022 financial year highlights the systemic nature of the vulnerability of SOEs in South Africa.[1542] This staggering figure is not merely a statistic, but it represents the collapse of institutional defences against wrongdoing, facilitated in part by the failures and omissions of directors.

Also, as part of the matrix of factors, the court would be wary to add a further unwarranted burden on the defendant(s), which may constitute an unjustified limitation on the defendant's rights.[1543] Thus, some may argue that imposing liability on the board members to compensate SOEs for causing them loss would have a discouraging effect on recruiting reputable individuals to manage State-Owned Enterprises. Yet other observers may also argue that such a move would also be counter-productive, by interfering with their freedom as directors. Hence, as seen in *Fourway Haulage*, to avoid indeterminate liability and the need to balance competing policy considerations, courts apply

[1540] *Fourway Haulage* supra note 1534, para 25.

[1541] Ibid.

[1542] AGSA*, "Consolidated General Report on National and Provincial Audit Outcomes,"* 2021–2022 FY, 18.

[1543] Ibid, para 26.

heightened scrutiny when delictual claims concern pure economic loss.[1544] However, it should be borne in mind that board members owe a *fiduciary*, as well as constitutional duties towards SOEs.[1545] Also, individually and collectively, board members owe State-Owned Enterprises that they serve a duty to act with care, skill, and diligence.

Consequently, the imposition of delictual liability upon the derelict directors is not only justifiable but necessary to reinforce accountability in the governance of SOEs in South Africa. Policy considerations thus favour recognising wrongfulness in these cases. Also, imposing liability does not impose new duties on directors. Instead, it gives effect to existing *fiduciary* and constitutional duties already owed under the common law, the Companies Act, PFMA, and the Constitution. The conduct of board members and executives would be wrongful and in violation of their *fiduciary* duties and the constitutional obligations towards state-owned entities. It is thus reasonable to have expected the board or past board members of state-owned corporations to act to prevent losses to these state entities, given their *fiduciary* and constitutional duties. Their failure to act or speak out against the wrongs of other board members, including rectifying the wrongs of the previous boards, amount to a breach of *fiduciary* duty. Accordingly, the matrix of factors enumerated in *Fourway Haulage* weigh heavily in favour of imposing delictual liability upon directors for losses that State-Owned Enterprises are caused by their dereliction of duty towards the entities.[1546]

In the next section, the element of fault (i.e., culpability) is examined in respect of both intention and negligence.

#### *5.3.2.4 The Fault*

The element of *fault*, or *culpability*, interrogates the mental state of the wrongdoer. Fault enquires into

[1544] *Fourway Haulage* supra note 1534, paras 24–36.

[1545] *EFF1 op cite note 31* para 1.

[1546] *Fourway Haulage* supra note 1534, paras 23–7.

the blameworthiness of the wrongdoer's state of mind. For delict, fault or culpability may take any of the two forms: namely, intention (*dolus*) or negligence (*culpa*).[1547] Thus, in this part of the study, the two forms of fault are examined, beginning with intention or *dolus*.

(i) Intention

Intention (or *dolus*) entails that one directs one's will at achieving a certain result or consequence.[1548] In addition, the directing of the will of the wrongdoer must be coupled with the knowledge or consciousness that his action is wrongful. Intention exists where a person directs their will to cause a result, with knowledge that their conduct is wrongful.[1549] South African law recognises three forms of intention: *dolus directus*, *dolus indirectus*, and *dolus eventualis*.

In the context of SOEs, it is less likely that board members and other executives would intentionally (acting with *dolus directus*), seek to cause harm to a public entity. Instead, causing monetary losses to a state-owned corporation they serve, will be an inevitable consequence of their primary intention (objective). Instead, *dolus indirectus* and *dolus eventualis* are particularly relevant. In *dolus indirectus*, the director may not seek to harm the SOE, but such harm is an inevitable by-product of their primary objective, such as enriching a political benefactor or fulfilling a corrupt instruction. Similarly, under *dolus eventualis*, directors foresee the possibility of harm to the SOE but proceed regardless, indicating indifference to the company's well-being. For example, in carrying out a political mandate or enriching himself (his primary objective or intent), a director should have been conscious of the wrongfulness of his conduct. Intention in law can take any of three forms of intention; namely, *dolus directus*, *dolus indirectus*, and *dolus eventualis*.[1550] In terms of *dolus directus,* the harm that the

[1547] Neethling & Potgieter op cit note 469, 155.

[1548] *Minister of Justice and Constitutional Development v Moleko* 2009 (2) SACR 585 (SCA) para 63; Neethling & Potgieter op cit note 469, 159–162.

[1549] *Dantex Investment Holdings (Pty) Ltd v Brenner NO* 1989 (1) SA 390 (A) at 396; *Moleko* supra note1548, para 63; Neethling & Potgieter op cit note 469, 159-163.

[1550] Neethling & Potgieter, op cit note 461, 160-162.

plaintiff sustains is the direct consequence that the defendant sought to achieve.[1551]

An intention may also assume a form of *dolus indirectus,* in which any loss that the plaintiff (a state-owned entity) is an inevitable secondary consequence of the wrongdoer's (errant directors) direction of his will at achieving his primary result (consequence).[1552] In other words, for a wrongdoer to achieve his primary objective (for example, to enrich himself by defrauding a state-owned enterprise), he must cause harm to the plaintiff when the wrongdoer's primary objective cannot be attained without causing loss to the entity. The loss to the plaintiff (state-owned corporation) is an inevitable certainty. The third form of intention (*dolus)* is *dolus eventualis*.[1553] This form of intention entails a factual finding that the wrongdoer had foreseen the possibility of causing harm to the plaintiff, i.e., the state-owned enterprise, on one hand. On the other hand, the defendant (a board member) must have reconciled himself with the possibility of causing harm to the plaintiff or state-owned corporation. As such, the wrongdoer must have proceeded with his harm-causing conduct (act), in complete indifference to the interest of the plaintiff, or for whatever reason, and thus causing harm to the plaintiff (a state-owned enterprise), in the process.

Such factual matrices are not hypothetical in the context of SOEs. For example, as in the case of the MultiChoice/SABC deal, board members and/or executives of a State-Owned Enterprise may act with the sole intention to enrich another person, or themselves or to carry out a 'political' instruction.[1554] As seen in this example of MultiChoice/SABC deal, board members often acted in ways that benefitted third parties at the expense of the public broadcaster.[1555] In such cases, the form of fault (intention) that results in financial losses to the State-Owned Enterprise would be the intention in the

[1551] Ibid. Compare *S v Dube* 2023 (1) SACR 513 (MM), para 7.

[1552] Neethling & Potgieter, op cit note 461, 133–5.

[1553] Ibid, at 133. *Dube* supra note 1551, para 11.

[1554] State Capture Commission Report Part V vol. 2 supra note 123, paras 1406 & 1426.7; State Capture Commission Report Part V vol. 2 supra note 123, paras 1396, 1436, 1439 & 1440.

[1555] State Capture Commission Report, Part IV vol. 2.

form of *dolus indirectus*. Viewed in that light, the causing of harm to the state-owned entity would have been present (inherent) in the board member's primary objective as the secondary or indirect objective. On the other hand, where the loss to the SOE was likely to occur, but not certain, the intention would be *dolus eventualis*, provided the official had 'actually foreseen' the possibility of causing loss to such a state-owned entity, yet still went ahead with his conduct.[1556]

The case *Roux* illustrates the reality that may occur in case where a State-Owned Enterprise may be spoilt for choice regarding the element of fault in suing its board members (accounting authorities) for causing financial loss to the entity.[1557] However, proving intention against a wrongdoer may turn out to be an onerous standard for the plaintiff to achieve. As argued earlier, no company director will agree with the plaintiff (company) that she had acted with the intent to cause harm to her company. Instead, board members could always argue that they had acted diligently and, in the company's best interests and that they had not intended to cause harm to the company (invoking the *business judgment* rule as their defence). Therefore, in such circumstances a State-Owned Enterprise would rely on negligence or *culpa*, as the form of fault to prove its case against accounting authorities or board members, to hold them liable in delict.

The next section of the chapter discusses negligence (*culpa*) in some detail.

(ii) Negligence (*Culpa*)

Negligence is the failure to exercise the degree of care that a *diligens paterfamilias (*reasonable person) would have exercised under the same circumstances. The test is twofold: (1) whether a reasonable person in the defendant's position would have foreseen the possibility of harm; and (2) whether they would have taken steps to prevent it.[1558] If the answer is yes, and the defendant failed to do so, they

[1556] Neethling & Potgieter op cit note 480, 133; *Dube* supra note 1551, para 11. Compare *Roux v Hattingh* 2012 (6) SA 428 (SCA) at paras 2 & 5–6.

[1557] *Roux* supra.

[1558] *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E–G.

are negligent.

This standard is adjusted for professionals.[1559] In the case of company directors, especially of SOEs, the applicable standard is not just that of an ordinary person, but of a reasonable director, informed by requisite *fiduciary* duties, statutory obligations, and corporate governance norms.[1560] The principle of *imperitia culpae adnumeratur* (lack of skill counts as negligence) applies stringently: if a director undertakes duties requiring expertise they lack, they act negligently by default.[1561]

Boards of SOEs must therefore not only possess the skills necessary to govern but must also actively exercise them. Courts will ask: Did the board know what expertise was required? Did they act diligently to acquire it or defer to those who had it? Failure to act accordingly constitutes actionable negligence. As South Africa's constitutional project envisions a culture of justification and accountability in public administration, negligence on the part of board members cannot be trivialised. Given the billions lost under their stewardship, courts may well impose personal liability where the evidence points to their dereliction of duty.

In the next section, the discussion will turn to causation, the final and decisive link in the chain of delictual liability.

*5.3.2.5 Causation*

Causation is the fifth and last element for liability in delict (*actio legis aquiliae*). In the judgment of *Phelps*,[1562] the English court (persuasively cited in South African jurisprudence) emphasised that causation is indispensable in claims for damages arising from both breach of *fiduciary* duties and negligence (failing to exercise reasonable care and skill [including diligence, in terms of the

[1559] *Durr v Absa Bank Ltd* 1997 (3) SA 448 (SCA), paras 31-47.

[1560] *Fisheries Development Corporation of SA Ltd v Jorgensen* 1980 (4) SA 156 (W) at 165D–E.

[1561] *Durr* supra note 1559, paras 31-32.

[1562] *Phelps* supra note 1453, at 171E & 172E.

Companies Act, 2008]) when managing the affairs of a company).[1563] Causation ensures that not every harmful event results in legal liability, but only those that meet the factual and legal criteria for attributing harm to a specific actor.[1564]

First, factual causation (the but for test or *conditio sine qua non*) inquires whether or not there is a material causal link (*lexus nexus*) between the conduct of the wrongdoer and the plaintiff's loss.[1565] In other words, the conduct of the defendant is the factual cause of the loss suffered by the plaintiff, if the loss falls off with the hypothetical mental elimination of the wrongdoer's conduct (in case of commission or positive act) or insertion of conduct (in case of omission).[1566] If the loss (financial or otherwise) suffered by the plaintiff hypothetically falls off, then the wrongdoer is the factual cause of the damages.[1567] Conversely, should the loss not fall away, then the wrongdoer is not the cause of the plaintiff's loss, and the enquiry ends at that point.[1568] However, factual causation tends to throw its net too wide.[1569] Hence, the enquiry must be made into legal causation.

Legal causation, meanwhile, enquires into the question of policy considerations and seeks to establish if, legally, it is fair, just and reasonable to impute delictual liability to the alleged wrongdoer, based on the strength of the link between the conduct of the wrongdoer and the plaintiff's loss.[1570] Legal causation is accessed in the light of all the prevailing circumstances of each case.[1571] The objective of the legal causation enquiry is to determine if the link between the wrongdoer's conduct and its

[1563] Ibid, at 650.

[1564] *Minister of Police v Skosana* 1977 (1) SA 31 (A), 34E–F.

[1565] *Van Duivenboden* supra note 1492, para 24.

[1566] *Skosana* supra note 1564 34E – F; *Van Duivenboden* supra note 1492, para 25.

[1567] *Skosana* supra note 1564 at 34E–F.

[1568] Ibid.

[1569] *Skosana* supra note 1564.

[1570] Ibid.

[1571] Ibid. Also *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A)).

consequences is sufficiently close or direct for legal liability to ensue.[1572] Should the loss be too remote, then it would not be fair, just or reasonable to hold the wrongdoer liable as the legal cause of the loss that the plaintiff suffered.[1573] The inquiry uses a flexible approach to the question of legal causation, in terms of which the plaintiff must prove that the causing of loss to him was reasonably foreseeable; the existence of a relationship of proximity between the parties; and that it is fair, just and reasonable to impose liability on the wrongdoer.[1574] The courts have held that there can be no single approach for determining legal causation, but that it all depends on the circumstances of each case. Considering the foregoing, the courts have thus adopted a flexible test as was crafted in the *Mokgethi* case.[1575] As discussed in connection with wrongfulness, the concept of policy considerations of necessity incorporates values, norms and standards prevailing in the South African Constitution.[1576] In the final analysis, legal causation boils down to a question of law and facts that seek to limit the net of liability for one's conduct.

As in the case of any delictual claim, legal causation (the same as wrongfulness) will play a significant role in the case of the liability of board members as accounting authorities for the losses of state corporations. Inherently significant in both elements for delictual liability are policy considerations which encompass constitutional principles, values, norms, and standards. Key among these constitutional principles is those guaranteed under section 195 of the Constitution. The constitutional provisions under section 195 include but are not limited to accountable public administration; promotion and maintenance of a high standard of professional ethics; transparency; the promotion of efficient, economic and effective use of resources; and development-oriented public

[1572] *Skosana* supra note 1564.

[1573] Ibid.

[1574] *S v Mokgethi En Andere* 1990 (1) SA 32 (A); See *Fourway Haulage* supra note 1546, paras 12 and 34.

[1575] *Fourway Haulage* supra note 1546, para 34; also, *Mokgethi* supra.

[1576] *Fourway Haulage* supra note 1546, para 33. *Van Eeden* supra note 1331, paras 9–13.

administration.[1577] Not surprisingly, the Constitution, 1996, enjoins all public office-bearers, such as board members of state-owned corporations, to fulfil their constitutional obligations.[1578] Holding board members, both present and past, to account for the way they discharge their duties in the exercise of their statutory powers becomes even more imperative considering the enormity of the damage that has been inflicted on state corporations in South Africa.[1579] Consequently, the inevitable conclusion considering all factors, policy considerations and constitutional norms, standards and principles, is that the question of legal causation in the case of past and future wrongdoing against State-Owned Enterprises, is not complicated.

## 5.4 SUMMARY

As the preceding chapters and this one have indicated, there has been a breakdown of corporate governance in most South African key SOEs. The Report of the State Capture Commission best exposes the fact that the corruption in many key State-Owned Enterprises in South Africa illustrates the conflict between the various forms of personal interests of directors and the best interests of state entities.[1580] As a result, it comes as no surprise that some board members, including non-executive directors, and senior employees failed in their *fiduciary* duties towards the entities they served. Influential and politically connected individual board members as well as some senior employees regularly reached decisions that were mediated by conflict of interest.[1581] In some instances, derelict accounting authorities used their positions of trust to ensure personal benefits for themselves.[1582] Other members of boards frequently contravened procurement and supply chain management (SCM) rules

[1577] Section 195(1)(f), (a), g), (b) & (c) of the Constitution of 1996.

[1578] *EFF1 op cite note 31*, para 1.

[1579] This was discussed above in chapters 3 & 4 of this thesis and reference was made to the evidence and findings of the State Capture Commission of Inquiry (Report Parts I to VI, available at *https://www.statecapture.org.za/site/information/reports*).

[1580] The reports of the State Capture Commission have been discussed in some detail in chapter three of this thesis.

[1581] See, for example, State Capture Commission Report Part V vol. 2 supra note 123, paras 1396, 1436, 1439 and 1440.

[1582] State Capture Commission Report Part I vol. 1 supra note 313, paras 159–75, 186 & 624–8.

to derive benefit for themselves or for their companions in crime.[1583] In some instances, accounting authorities acted to benefit themselves through personal private companies managed by friends, or even close family members.[1584] Some board members also never hesitated to abuse their powers as directors to get rid of other members of the board and/or senior managers they regarded as stumbling blocks, if they refused to join in the wrongdoing.[1585] There was also widespread infringement of rules regarding confidentiality, such as when board members would disclose sensitive and confidential information to financially benefit themselves and their acquaintances.[1586]

Each of these contraventions by board members amounted to a violation of the *fiduciary* and constitutional duties of directors. To this end, over the years State-Owned Enterprises in South Africa have lost billions of rand through mismanagement worsened by the inefficiency of their boards.[1587] For over a decade, state-owned corporations, such as the SAA, SABC, and Eskom, were rendered dysfunctional. They either reached a state of near-collapse or were grounded altogether. The SAA was even grounded in 2018 after its directors were found to have been derelict in carrying out their *fiduciary* duties but sought to promote their personal interests at the expense of the company. In addition, SOEs have also lost money through pretended or false tender processes, which deprived SOEs of the competitive edge in rates from suppliers. At SAA and SAAT, for example, enforcement of a 30% B-BBEE policy proved to be one of the downfalls of the South African national airline.[1588] The chairpersons of the SAA and SAAT were hell-bent to enforce the policy despite a clear instruction

[1583] State Capture Commission Report Part II vol. 1 supra note 314, paras 17, 18, 21 & 30.

[1584] For example, see State Capture Part I vol. 1 supra note 313, paras 211, 236 & 748.

[1585] For example, SAA persecuted Dr Dahwa who was the head of the SAA Supply Chain Management as Chief Procurement Officer (CPO), at the behest of Ms Myeni, because she refused to execute unlawful orders of Ms Myeni and Ms Kwinana (see State Capture Commission Report Part I vol. 1 supra note 313, paras 220 & 235–6).

[1586] State Capture Commission Report Part I vol. 1 supra note 313, paras 591–615 & 648–744.

[1587] State Capture Commission Report Part II vol. 1 supra note 314, paras 18 & 21.

[1588] State Capture Commission Report Part I vol. 1 paras 393–6; paras 15 & 845.

not to do so, from National Treasury.[1589] Such brave and shameless conduct was motivated by greed and the strong urge to enrich themselves improperly.[1590]

Significantly, state-owned corporations incurred losses without taking any action against them. No directors of State-Owned Enterprises' boards (or even third parties) were ever held to account for the losses of SOEs, even though South African law provides for various methods of ensuring accountability. The available forms of accountability for board members, such as disciplinary processes and criminal sanctions or provisions of POCA (including forfeiture of assets) and the PCCA Act, have either been ineffective in protecting the public purse against directors of SOEs or were not employed. It is submitted that even if the available legal means for accountability were employed, delict would still be the only remedy available in law that would effectively ensure appropriate compensation for state-owned entities. While enforcing the accountability of board members, the other legal remedies for directors' breach of *fiduciary* and constitutional duties towards SOEs are unable to compensate an entity for financial losses occasioned by breach of directors' duties and irregular, wasteful and fruitless expenditure.

The law of delict in South Africa, as crystallised through centuries of common law and refined under the transformative lens of the 1996 Constitution, provides a robust framework for holding individuals accountable for harm caused through their actions or omissions. When applied to the context of State-Owned Enterprises, this framework serves both a compensatory and a normative accountability function. Surprisingly, though, to date no delictual damages actions have ever been employed against derelict board members, whether current or former directors and executives of state-owned corporations for causing financial losses to state entities in South Africa over the years. The writer has found that before 2018, only one attempt was made to use delictual damages to recover losses against

[1589] State Capture Commission Report Part I vol. 1 supra note 313, paras 396 & 591–615.

[1590] Ibid at paras 648–744.

public office-bearers on behalf of a state corporation. Delictual damages were used in the court case against the former executive of South African Airways, Mr Khaya Ngqula. After that case, it was only in 2018 that several court actions for damages against erstwhile derelict public officials of state-owned corporations and their accomplices were instituted on behalf of state-owned entities, such as Eskom, Transnet and the South African Broadcasting Corporation (SABC).

In the case of *Ngqula*,[1591] Mr Ngqula had been employed by the SAA as a director and chief executive officer.[1592] In 2010 the SAA instituted a claim for damages against Mr Ngqula after the airline had sustained losses arising from wasteful expenditure under Mr Ngqula's leadership.[1593] The board of SAA, led by Carol Carolus as the chairperson, sought payment of R26 581 794 as a result of Mr Ngqula's breach of *fiduciary* duties as a director.[1594] The amount of R26 581 794 had been paid for the retention of bonuses to the senior management in 2007, under the leadership of Mr Ngqula. The SAA also sued Mr Ngqula for the payment of US$3,400,000 in damages that the airline incurred because of a sponsorship agreement with Cabrera, an Argentine golfer whom Mr Ngqula contracted to act as the face of SAA.[1595] According to the SAA, Mr Ngqula had not been authorised to spend the amount.[1596] Lastly, the SAA sued Mr Ngqula for the recovery of a further amount of R229 170 in unauthorised disbursements, for which the SAA alleged Mr Ngqula to be liable.[1597] In total, the SAA sought to recover an amount of about R252 million from Mr Ngqula.[1598] Mr Ngqula tried unsuccessfully to challenge the jurisdiction of the high court in the proceedings against him.[1599] In the

[1591] *Ngqula v South African Airways (Pty) Ltd* 2013 (1) SA 155 (SCA).

[1592] Ibid at para 4.

[1593] Ibid.

[1594] Ibid.

[1595] Ibid.

[1596] Ibid.

[1597] Ibid.

[1598] A Grobler 'Khaya Ngqula loses SAA appeal', 19 September 2012, available at *https://www.sowetanlive.co.za /business/ 2012-09-19-khaya-ngqula-loses-saa-appeal/*, accessed 23 February 2022.

[1599] *Ngqula* supra note 1591, para 5.

end, the SCA struck his application to dispute the jurisdiction of the high court off the court roll, giving the SAA a green light to proceed with its action against Mr Ngqula.[1600] However, to date nothing became of the action instituted against Mr Ngqula. Subsequent boards, particularly, one led by Ms Dudu Myeni did not pursue that claim for damages further. The inaction was evidently an indication of a lack of political will, as Mr Ngqula had been a deployee of the governing party, to the national airline.

Meanwhile, when a new board of Transnet assumed office in 2018, it instituted a claim for damages against several former board members and executives, former senior employees and other individuals who had been responsible for the wide-scale plunder of the financial resources of Transnet.[1601] These members were both natural and juristic persons. The multiple claims by the state entity ranged from payments made without just cause, to claims that the defendants had made without any value at all.[1602] Transnet's civil action had no parallel. The state-owned entity sued Regiments Capital (Pty) Ltd for a total R 268 470 000 in two separate claims.[1603] At the same time, Transnet sued Trillian Asset Management for a total amount of R145 920 000, in four separate claims comprising payments made without just cause and one paid for work that was never done.[1604] Transnet also sued Mr Siyabonga Gama, its former Group Chief Executive Officer (GCEO), for a sum of R323 760 000, being three amounts paid without just cause to Trillian Asset Management and Regiments Capital (Pty) Ltd.[1605] Additionally, Transnet instituted an action for damages against another CEO, Mr Brian Molefe, for the recovery of an amount of R79 230 000, an alleged unjustified overpayment to Regiments Capital

[1600] Ibid.

[1601] *Swifambo* supra note 161 paras 1–16; See also State Capture Commission Report Part I vol. 1 supra note 313, para 397; State Capture Commission Report Part V vol. 2 supra note 123, paras 1735–80 (also Statement and Annexure of Popo Simon Molefe, Exhibit BB, para 11.7–11.14).

[1602] Statement and Annexure of Popo Simon Molefe, Exhibit BB, para 11.7.

[1603] Ibid at para 11.8.1.

[1604] Ibid at para 11.8.3.

[1605] Ibid at para 11.4.

(Pty) Ltd.[1606] Yet again, the Transnet group sued its former Chief Finance Officer (CFO), Mr Anoj Singh, for an amount of R303 510 000, comprising two amounts paid to Regiments Capital (Pty) Ltd and one payment Transnet made to Trillian Asset Management, for no cause.[1607] Another former CFO (acting), Garry Pita was sued for R335 160 000, arising from four payments that Transnet made to two companies without just cause.[1608] Meanwhile, Transnet also instituted a damages claim against its former treasurer, Mr Phetolo Ramosebudi, for an amount of R282 720 000, comprising two separate payments to Trillian Asset Management and Regiments Capital (Pty) Ltd.[1609] Lastly, the state corporation sued its former *Group Chief Supply Chain Officer,* Mr Edward Thomas, for the amount of R11 400 000, being payments made to Trillian Asset Management for work that Trillian Asset Management never effected for Transnet.[1610] It has been reported that Regiments Capital (Pty) Ltd tendered a settlement offer to Transnet, which was still being considered by the public entity.[1611]

In separate court proceedings, the board of Transnet took a resolution to institute court proceedings to have contracts for the procurement of 1064 locomotives declared unlawful as the contract was tainted by fraud and corruption. The locomotives were acquired at an inflated cost of R4,4 billion, escalating from the initial R3,8 billion (with Transnet overpaying between R3 470 000 and R6 200 000 per locomotive).[1612] It remains to be seen whether the actions that were instituted by the board of Transnet will be ever pursued to finality.

However, as seen in cases of theft from State-Owned Enterprises involving erstwhile senior employees, the defendants sought to rely on the defence of prescription in the high court and special

[1606] Ibid at para 11.8.5–11.8.6.

[1607] Ibid at para 11.8.7.

[1608] Ibid at para 11.8.8.

[1609] Ibid at para 11.8.9.

[1610] Statement and Annexure of Popo Simon Molefe, Exhibit BB, para 11.8.10–11.8.11.

[1611] Ibid at para 11.8.2.

[1612] Ibid, para 10.12.4.3.

tribunal to avoid accountability.[1613] They also raised the special plea of unreasonable delay to institute action, particularly in the case of review applications by state-owned corporations. Considering the foregoing defences, the following section answers the question whether prescription and unreasonable delay could be possible stumbling blocks against SOEs seeking to hold members of boards of SOEs to compensate SOEs for causing financial losses to the entities.

## 5.5 THE ENFORCEMENT OF PERSONAL LIABILITY

At this juncture, the enforcement of personal liability against board members of state-owned entities for financial losses occasioned by directors' breach of their *fiduciary* and constitutional duties, is discussed. The focus is on *locus standi,* with special emphasis on the shareholder representative, the SIU and the Non-Profit Organisations (NPC). In addition, the status of the locus standi of private citizens acting as individuals rather than public interest groups (civil society) and the appropriate forum before which to bring an action, are also examined. The discussion begins by examining appropriate *fora* with jurisdiction to adjudicate *locus standi* issues on civil recoveries on behalf of state corporations. Thereafter other aspects of enforcement are examined.

### 5.5.1 The *locus standi*

The *locus standi in judicio* (legal standing) is an important part of the enforcement of rights in law. As it will be seen in the discussion below, *locus standi* even plays a more significant role in the case of state-owned corporations. *Locus standi* (legal standing) may be defined as the right to sue and deals with the question of whether a person approaching the court is the proper party to bring the matter at issue for adjudication before the court.[1614] Any party has a right to sue and be sued in a legal matter

[1613] *South African Broadcasting Corporation Soc Limited v Former Chief Operating Officer: Motsoeneng ("Motsoeneng")* [2022] ZAST 23 (Spec Trib) unreported case no GP01/2021 (18 October 2022); *Regiments Capital* supra note 1500.

[1614] C. Loots 'Standing, Ripeness and Mootness' in *Constitutional Law of South Africa* (2005) ch 7, available at *https://constitutionallawofsouthafrica.co.za/wp-content/uploads/2018/10/Chap07.pdf,* accessed 29 November 2022.

when she or he has the capacity to litigate and has a substantial interest in the matter brought before the court as well as its outcome.[1615] *Locus standi in judicio* is about 'the sufficiency [or adequacy] and directness' of a party's interest in the legal proceedings that warrant his title to prosecute the claim in court.[1616] *Locus standi* is a court-controlled access mechanism. A person's legal standing depends on whether the court regards one 'as having a sufficiently close interest in the litigation' rather than dependent on his authority to act.[1617] In other words, the interest that a person has in a matter at hand must not be a too remote one.

Generally, companies act through their boards of directors as the latter are legally entitled agents to litigate on behalf of their companies. In exceptional circumstances company shareholders (including minority directors) may institute a derivative action on behalf of the SOE, if its board fails to act in the interests of the enterprise or are suspected to be privy to the wrongdoing. In the case of State-Owned Enterprises, the responsible entity legally authorised to represent the corporation in an action is its boards and board members.

#### *5.5.1.1 The Minister of Public Enterprises*

Unlike their private counterparts, public corporations are unique (*sui generis)* in that they do not have identifiable shareholders. In the case of private corporations, shareholders may pierce the corporate veil and institute a derivative action on behalf of the corporation, should the board of directors be unwilling to act to protect the company from facing financial loss.[1618] On the other hand, the law only

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[1615] *Nel v Van Schalkwyk NO* [2020] ZANCHC 33 (NC) unreported case no 207/19 (26 June 2020), para 8; *Lupacchini NO v Minister of Safety and Security* 2010 (6) SA 457 (SCA). Also, see Oritonda Rambuda 'What Is Locus Standi?', available at *https://rambuda.co.za/2021/07/16/what-is-locus-standi-by-oritonda-rambuda/,* accessed 29 November 2022.

[1616] Cliffe-Dekker-Hofmeyr 'Back to basics – *[locus standi]* in litigation' 2019, available at *https://www.cliffedekkerhofmeyr.com/ en/news/publications/2019/Dispute/dispute-resolution-27-february-back-to-basics-locus-standi-in-litigation.html,* accessed 29 November 2022. See also *Four-Wheel Drive Accessory Distributors CC v Leshni Rattan NO* 2018 JDR 2203 (SCA), para 7–8; *Nel* supra note 1639, para 8.

[1617] *Lupacchini* supra note 1615, para 12.

[1618] M. Bailey, *The Doctrine of Piercing the Corporate Veil in South Africa'* (LLM thesis, UCT, 2020), available at *https://open.uct.ac.za/bitstream/handle/11427/32583/thesis_law_2020_bailey%20michael.pdf?sequence=1,* accessed 29 November 2022.

provides for a shareholder representative, in the case of state-owned corporations, usually the Department of Public Enterprises and the incumbent Minister of Public Enterprises.[1619] The authority of the shareholder representative (the Department of Public Enterprises) is exercised by the Minister of Public Enterprises. The primary function of the shareholder Ministry (the Department of Public Enterprises) is to issue policy frameworks for the corporations and, in most cases, to appoint members of boards. Moreover, the shareholder representative Minister is *ex officio* the authority that has *locus standi* to litigate on the SOE's behalf. However, as discussed in chapter 3 above, government ministers have in the past been collusive in causing financial losses of State-Owned Enterprises, especially the shareholder representatives.[1620] In most cases, government representatives (ministers) have been found to be at the centre of the malfeasance causing the enormous losses.[1621] There have also been power contestations between the appointed boards (accounting authorities) of state-owned entities and the government ministers.[1622] Conflict of interests between individual members of the boards and the executive on the one hand, and the company on the other, provides yet another reason why even the executive and accounting authorities themselves require policing. This conflict of interests has been clearly proven in evidence submitted to the State Capture Commission and its subsequent findings that detail how State-Owned Enterprises lost billions when board members had acted in breach of their *fiduciary* and constitutional duties.[1623]

In all these power struggles involving malfeasance, the ultimate losers have been the corporations and the taxpayers (the citizens) who are the true shareholders of State-Owned Enterprises. Cabinet Ministers have simply shifted around or redeployed errant Board members to other State-Owned

[1619] See, for example, section 1 of the National Ports Authority Act 12 of 2005.

[1620] *Molefe,* supra note 432.

[1621] State Capture Commission Report Part II vol. 1 supra note 159, paras 18, 20–21 & 30.

[1622] *Molefe,* supra note 432, para 149.

[1623] State Capture Commission Report Part IV vol. 3 supra note 148, paras 1281.4–1281.4.2; State Capture Commission Report Vol. 4 Part IV supra note 226, paras 2493–94.

entities. They have also unlawfully dissolved boards of SOEs whenever the members refused to 'toe the line', regarding carrying out unlawful mandates. In other words, often political heads have been conflicted and unable to effectively act on behalf of the SOE. It becomes thus almost impossible, considering the South African environment, to expect the shareholder representative to litigate against the boards of State-Owned Enterprises, on behalf of state corporations. Thus, the shareholder representatives and the boards of State-Owned Enterprises cannot be left to themselves to safeguard the financial interests of state entities. As a result, state corporations require another layer of intervention to litigate on their behalf against directors (or even erstwhile and current members of the executive). Against such a background, it becomes clear why *locus standi* assumes a critical role in the case of State-Owned Enterprises.

The Special Investigating Unit is a further functionary that may act on behalf of state entities against derelict board members. The competence of the Special Investigating Unit is discussed in the next section.

*5.5.1.2 The Special Investigating Unit*

In the cases referred to later in this chapter, in the discussion of prescription, it will be noted that once authorisation is issued using a Presidential Proclamation, the SIU has *locus standi* to recover on behalf of the affected state-owned entity.[1624] As seen from the provisions of the SIU Act, the SIU (upon being authorised to investigate) has *locus standi* to litigate on behalf of state-owned entities.[1625] Section 5(5)(read with section 8(2)) of the SIU Act, empowers the Special Investigating Unit to pursue civil proceedings 'if, arising from its investigation, [the SIU] has obtained evidence substantiating any allegation contemplated in section 2(2).' In the judgment of *Kim Diamonds,* the Special Tribunal held

[1624] *Special Investigating Unit v Kim Diamonds (Pty) Limited* 2004 (2) SA 173 (Spec Trib), para 3.6. *Special Investigating Unit v The National Minister in the Department of Public Works* ("*Public Works"*) [2022] ZAST 19 (GP) unreported case no (GP11/2021 (26 August 2022), paras 1, 29, 57 & 59–63 & 74; *Motsoeneng* supra note 1613, paras 54 & 59–60.

[1625] The Special Investigating Units and Special Tribunals Act 74 of 1996.

that the SIU litigates 'in its own name' to recover on behalf of state organs.[1626] That judgment means that the SIU does not act as an agent of the state organ affected by maladministration, which becomes the principal of the SIU. Moreover, *Kim Diamonds* also is authority for the fact that there may be occasions where the Special Investigating Unit may litigate to recover monies on behalf of a state organ as an agent substituting for the organ of the state concerned.[1627] However, as discussed above, there are two serious disadvantages of using the SIU. The first disadvantage is that it operates on an *ad hoc* basis in that it only comes into existence through a Presidential Proclamation. Thus, the independence of the SIU becomes compromised because the Unit is subject to the Presidential Proclamation. As a result, under current circumstances, the Special Investigating Unit, cannot be an effective weapon to use in the interests of state-owned corporations. The second disadvantage is more serious in that the SIU is dependent on the passage of time. By the time the SIU becomes legally operative, it is usually too late to hold wrong doers liable, and to recover compensation lost, after they have already left the service of the company. Consequently, one must look elsewhere for a means to litigate on the public corporations' behalf.

The following section considers *locus standi* in terms of section 38 of the Constitution, 1996. It examines the role that public interest groups, such as civil societies and individuals can play in litigating against board members, on behalf of state-owned corporations.

5.4.1.3 *Locus Standi* in terms of the Constitution

Section 38 of the Constitution of 1996, among others, allows anyone acting on behalf of another person who is unable to act on their name to approach a competent court to enforce the rights of another.[1628] Section 38 of the Constitution signalled a break from the narrow common law approach

[1626] *Kim Diamonds* supra note 1624, para 3.6.

[1627] Ibid.

[1628] Section 38(b) of the Constitution of 199 6.

to *locus standi* that has been adopted by the courts in litigation. The section also permits anyone to approach the court in the public interest.[1629] These are in addition to the constitutional right of anyone to bring an action in their own interest.[1630] Although section 38 of the Constitution, 1996, states that the litigant must allege infringement of or threat to their right in the Bill of Rights, the section has a wider application. It can be used to confer legal standing to litigate against recalcitrant board members of state corporations, on behalf of the injured state entity.[1631]

The two sections that follow below expand on the right to *locus standi* conferred by section 38 of the 1996 Constitution. It starts with Non-Profit Organisations (NPCs) and then explains the role of individual citizens.

*5.4.1.3.1 Non-Profit Companies (NPCs)*

Under the new constitutional dispensation, particularly in the last decade, organisations have evolved that act on behalf of others or even government institutions. Though this trend has occurred in the sphere of human rights, yet the trend is gaining momentum and spreading to issues challenging public officials in defence of public funds. Section 38 of the Constitution is amplified below in relation to private citizens.

*5.4.1.3.2 Private Citizens*

Concerning *locus standi* in the case of private individuals under the new constitutional dispensation, the judgment of *Glenister*[1632] affords the leading authority. *In casu* the applicant approached the Constitutional Court with leave of the high court as he sought to challenge proposed national legislation that purported to disband (reconfigure) the country's crime-fighting unit, the Directorate

[1629] Section 38(d) of the Constitution of 1996.

[1630] Section 38(a) of the Constitution of 1996.

[1631] *Glenister* supra note 468, para 5; *OUTA* supra note 1383.

[1632] Ibid.

of Special Operations (DSO).[1633] Mr Glenister was acting in his own private interest as a South African businessman,[1634] in the interest of other business men as well as in the public interest.[1635] Thus, the case confirms the constitutional right of private citizens to pursue litigation in the public interest, among others. The provisions of *Biowatch*, exempting litigants who act in the public interest are also available to private citizens.[1636] In terms of the principles in *Biowatch*, individuals and organisations that take up matters in the public interest are exempt from cost orders against them even when they have been unsuccessful in court.[1637] Conversely, they can recoup their costs where they are successful.[1638] Hence, in the context of this study, concerned citizens may take up litigation on behalf of a state entity to recover damages where there is inaction on the part of the shareholder and the board members, or where the latter are conflicted. However, one important point to note is that Glenister was a businessperson and had the financial means to pursue the litigation. On the other hand, because of lack of financial capacity, the majority of South Africans would not be too eager to pursue litigation, even with the costs order exemptions and the prospect of recouping costs, if successful. Therefore, for most citizens, the current court system is inherently exclusionary, notwithstanding the availability of the right of *locus standi* in terms of section 38 of the Constitution, 1996.

The following section discusses the possibility of using action for damages to recover loss incurred by State-Owned Enterprises because of a breach of *fiduciary* and constitutional duties of directors. In particular, the part examines the practical and legal feasibility of a damages claim in delict, as well as the reasons why a delictual remedy is an ideal mechanism to use against board members (accounting authorities) for the dereliction of their duty towards a state-owned entity. First, the right forum for

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[1633] Ibid para 5.

[1634] Ibid paras 1–5.

[1635] Ibid, para 5.

[1636] *Biowatch Trust v Registrar Genetic Resources* 2009 (6) SA 232 (CC), paras 16–7.

[1637] Ibid, para 20.

[1638] Ibid, paras 22 & 24.

bringing an action is discussed, and then damages claim, as a remedy and a means of effecting accountability of board members for breach of their *fiduciary* duties will be explored. Thereafter, the damages remedy will be examined.

### 5.5.2 The Appropriate Forum

Generally, two forums are available to litigants to recover damages on behalf of State-Owned Enterprises in South Africa. Section 34 of the Constitution, 1996, guarantees a resolution of disputes before a court (including any other independent and impartial tribunal or forum, in certain appropriate instances). Thus, a court of law is the first point of entry for any litigant who may want to sue derelict office-bearers of state-owned corporations for damages on behalf of affected entities. Courts with jurisdiction in the matter would range from the Magistrates' court to the High Court, the Supreme Court of Appeal (SCA), and the Constitutional Court.[1639] As discussed in chapter 5 above, and under section 34 of the Constitution of 1996, section 2 of the SIU Act empowers the State President to establish one or more Special Tribunal(s) to adjudicate civil disputes that may arise from the investigations of the SIU.[1640] Thus, upon the conclusion of its investigation, the SIU may bring matters before the Special Tribunal, From the foregoing, it becomes clear that the jurisdiction of the Special Tribunal is limited. The Special Tribunal is only competent to adjudicate civil matters of maladministration emanating from the investigations by the Special Investigating Unit. Additionally, inherent in the provisions of the SIU Act,[1641] only the SIU may bring an action before the Special Tribunal – at least, the SIU is always the chief plaintiff in these matters.[1642] Consequently, this means that NPCs and private citizens seeking to litigate on behalf of State-Owned Enterprises may only use

[1639] See sections 167–70 of the Constitution of 1996.

[1640] Section 2 (1)(b) of the SIU Act.

[1641] The SIU Act.

[1642] As shown by the cases that involve the SIU, discussed in this chapter, the SIU has taken the lead in litigating before the Special Tribunal, although in many instances it has been accompanied by affected state entities like SABC and Transnet.

conventional courts. Therefore, the legislation concerning access to the Special Tribunal will need to be revisited to make it accessible for general recoveries on behalf of defrauded state corporations. Such a move will also bring the Special Tribunal, its work and its objectives in line with the provisions of sections 34 and 38 of the Constitution. As it appears from section 38 of the Constitution, 1996, citizens and public interest groups have *locus standi* to litigate on behalf of State-Owned Enterprises.[1643] Yet, their right of access to a court or another independent forum, such as the Special Tribunal, is drastically curtailed in respect of litigating in the Special Tribunal on the public entities' behalf.

## 5.6 PRESCRIPTION

In South Africa prescription is governed by the Prescription Act 68 of 1969. However, the Act does not define 'prescription'. In addition, a prescription of debt means the debt is extinguished by operation of law after the lapse of a specified time, provided certain requirements indicated in the Act are satisfied.[1644] For purposes of this study, the relevant section of the Prescription Act is chapters III and IV. Chapter III deals with the prescription of debts,[1645] whereas chapter IV deals with the procedure for raising the defence of prescription.[1646] This exposition deals only with chapter III of the Prescription Act 68 of 1969, with a specific focus on sections 11 and 12. Section 11 pertains to the prescription period for debts. Generally, section 11 provides for various prescription periods in respect of different debts.[1647] The prescription period for all debts in South Africa is generally three (3) years unless section 11 of the Act or any other statute provides otherwise.[1648] While the Act does not define

[1643] *OUTA* supra note 1383*; Glenister* supra note 468, para 5. *Locus standi* is discussed in detail in the section that follows this part dealing with the forums for enforcement of remedies against wayward board members.

[1644] See section 10 (1) of the Prescription Act 68 of 1969.

[1645] Sections 10–16 of the Prescription Act 68 of 1969.

[1646] However, this study will only examine the relevant sections of the Act from chapter III.

[1647] Section 11(a)–(d) of the Prescription Act 68 of 1969.

[1648] Section 11(a)–(d) of the Prescription Act 68 of 1969.

'a debt', the courts have held that 'a debt' means a claim or a cause of action.[1649] A cause of action, on the other hand, refers to a matrix of facts necessary for the creditor to prove in order to succeed in a court action.[1650] Accordingly, a breach of their *fiduciary* duties and a duty to exercise care, skill and diligence by board members give rise to 'a debt in delict', which falls under section 11(d) of the Prescription Act 68 of 1969.[1651] Hence, the prescription period for claims of State-Owned Enterprises against erring board members is three years.

On the other hand, section 12 of the Act covers the details regarding when the prescription period begins to run. As an important aspect of prescription, the three years (or any other defined period) commences as 'soon as the debt is due.'[1652] A debt is due when it is lawfully owing and payable or where a creditor has acquired a complete right to recover the debt or cause of action.[1653] Furthermore, in terms of section 12(3), a debt is not deemed to be due 'until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arose…' unless a debt arose from a contract.[1654] However, the creditor must not have been negligent concerning his ignorance of the debt and the debtor.[1655] Knowledge, in terms of section 12, does not require the creditor to acquire knowledge of the legal consequences, but only the material facts upon which a debt is based.[1656] In other words, the foregoing represent the facts that the creditor will need to prove to sustain the liability of the debtor.[1657] The courts have held that knowledge means something more than mere opinion, supposition or a mere belief without a warrant or even an assertion and unjustified suspicion by the

[1649] *Links v Department of Health, Northern Province* 2016 (4) SA 414 (CC), para 30.

[1650] Ibid, para 32.

[1651] However, in *Phelps*, the high court held that a common law claim for damages for breach of fiduciary duty does not necessarily involve fault (*Phelps* supra note 1453 at 170C–D).

[1652] Section 12(3) of the Prescription Act 68 of 1969.

[1653] *Links* supra note 1649, paras 31 & 34.

[1654] Section 12(3) of the Prescription Act 68 of 1969.

[1655] Section 12(3) of the Act.

[1656] *Links* supra note 1649, paras 30–5.

[1657] *Truter v Deysel* 2006 (4) SA 168 (SCA) paras 16 &18; *Links* supra note 1649, paras 30–5

creditor of the debt and the debtor.[1658] Instead, knowledge means a true and justified belief (objectively assessed rather than a strongly held subjective assertion) on the part of the creditor that he has been wronged by the debtor.[1659]

As indicated already in this chapter, recent judgments of the courts and the Special Tribunal have shown that the issue of prescription is becoming complex in the case of litigation to recover on behalf of State-Owned Enterprises.[1660] Therefore, in this part of the exposition, the question of prescription is explored and reference is made to some of the leading court and Special Tribunal judgments, which involve State-Owned Enterprises and the Special Investigating Unit. In these cases, for the recovery of money lost to state entities through mismanagement, corruption and breach of directors' *fiduciary* duties owed to State-Owned Enterprises , as well as for the review in terms of section 172 of the Constitution, the defendants have raised the pleas of prescription and delays (in the case of review).[1661] The case of *Regiments Capital* is the latest prominent case in which the defendants raised the defence of a special plea of prescription against a claim by a state-owned enterprise.[1662] The case of *Regiments Capital (Pty) Limited* involved four actions against service providers and some executive directors of Transnet. The claim was for the recovery of losses incurred because of collusion on the part of company executives and service providers. The writer envisages that the case will provide a test case for the liability of executive members of the boards of State-Owned Enterprises for breach of their *fiduciary* duties towards the entity, among other things. The other causes of action were based on remedies of unjust enrichment and fraudulent collusion and misrepresentation of the amounts due to the service providers.[1663] The impugned transactions occurred between 2014 and 2016, while the

[1658] *Links* supra note 1649, para 35.

[1659] Ibid.

[1660] *Motsoeneng* supra note 1613; *Regiments Capital* supra note 1500.

[1661] *Public Works* supra note 1637, paras 29 & 57.

[1662] *Regiments Capital* supra note 1500, see para 5.

[1663] Ibid at para 6.

summons was issued by the new Board of Transnet in 2018, following investigations which the board conducted between February 2018 and September 2018.[1664] However, this judgment was based on an application for separation of the special pleas of prescription from the issue of the merits, bought by Transnet.[1665] The main action brought by Transnet is yet to be finalised by the high court.[1666] The court dismissed the application for separation of the issues.[1667] Based on the evidence the court dealing with the application for the separation of issues had, it was submitted that the majority of the special pleas of prescription raised against the Transnet claims did not have merit. For most, the defendants based their contentions on the dates when the alleged overpayments and fraudulent collusions by executives of Transnet took place, instead of when Transnet (through the new board that was appointed in May 2018)[1668] became aware of the overpayments (including collusions by former employees of Transnet) and the identity of the defendants (debtors) in terms of sections 11 and 12 of the Prescription Act 68 of 1969. Seen in this light, their special pleas had no chance of success. Moreover, one of the four actions was based on the payment made to Trillian Capital Partners on 26 April 2016, while the summons was issued on 23 November 2018. So, even if the date of payment was the starting point for calculating the prescription period,[1669] the special plea could not succeed as the summons was issued within three years in terms of the Prescription Act.[1670]

Meanwhile, in *Swifambo Rail Agency* (high court case),[1671] Trillian Capital Partners Trillian[1672] and

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[1664] Ibid.

[1665] Ibid at para 1.

[1666] Ibid at paras 5–6.

[1667] Ibid at par 44–5.

[1668] See *https://www.transnet.net/aboutus/pages/boarddirectors.aspx*.

[1669] In this study, it has been argued that the payment date is not necessarily when the debt becomes due (especially in the Trillian Capital Partners case).

[1670] Sections 11 & 12 of the Prescription Act 68 of 1969.

[1671] *Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd* 2017 (6) SA 223 (GJ), paras 74–79.

[1672] *Eskom Holdings SOC Limited v Trillian Capital Partners (Pty) Ltd* 2019 JDR 1256 (GP)( *'Trillian Capital'*).

*Siyangena Technologies (Pty) Ltd,*[1673] the defendants (respondents) sought to rely on the delays on the part of the State-Owned Enterprises to bring applications to review and set aside the impugned decisions of erstwhile executives that amounted to maladministration. The review applications were based on the common law[1674] or section 172 of the Constitution.[1675] In these cases, the public entities filed an application for condonation of the late challenge to the impugned activities (actions). In the same action, the applicants argued that the delays were not unreasonable.

As seen already in the actions brought by the SIU, the same special pleas that were raised in court against public entities were often raised repeatedly against the SIU application in the Special Tribunal. Significantly, the issue of prescription has become seemingly the single most insurmountable obstacle for the SIU in its attempts to recover damages on behalf of State-Owned Enterprises in the Special Tribunal. In the *Public Works* judgment, the learned judge had the issue of prescription in mind when he remarked by way of a *dictum* about a single hurdle that will always pose a challenge for the SIU in its efforts to recover monies lost through maladministration and corruption.[1676] Prescription poses a controversial issue when the question of exactly when the prescription period should begin to count in respect of debts owed to a state-owned entity. Along with the issue of prescription has also been the question of the legal standing of the Special Investigating Unit – that is, whether the SIU acts as an agent of the affected state organ or it acts in its own name. The Special Tribunal seems to be undecided whether the SIU acts in its own name or whether it acts as an agent of the state entity in question.[1677] As such, according to the Special Tribunal, the defence of a special plea of prescription

[1673] *Siyangena Technologies (Pty) Ltd v Prasa* 2023 (2) SA 51 (SCA).

[1674] *Trillian Capital* supra note 1843, para 8; *Swifambo Rail Agency* supra note 161 paras 74–9.

[1675] See, for example, *Siyangena Technologies* supra note 1673, para 2.

[1676] *Public Works* supra note 1637, paras 1 and 74. According to the learned judge, this challenge would only be overcome by changing the law to extend the prescription period for the category of cases falling within the scope of the SIU Act (paras 1 & 74).

[1677] *Kim Diamonds* supra note 1624, para 3.6.

applicable against an entity will also apply against the SIU to the same degree.[1678] For instance, in the case brought on behalf of SABC,[1679] the SIU instituted an application in the Special Tribunal to review and set aside the decision that had been taken by former executives of SABC to award R 50,000 to 50 musicians for their alleged role in the struggle against the apartheid Music Legends Project ("MLP"). The award was neither approved by the SABC Board nor was it budgeted for by the Corporation nor did the SABC have a policy on which the awards were based.[1680] It was common cause among the parties that the SABC claim against its former executives was a debt in terms of the Prescription Act 68 of 1969.[1681] It was also common cause that the implicated members of the board had started resigning between October 2016 and December 2016.[1682] A new interim board was appointed in March 2017.[1683] The Interim Board of the SABC immediately ordered a forensic investigation into the impugned decision of the executive regarding the MLP.[1684] The forensic investigation report was furnished to the board in August 2017. The findings were that the decision to make payment to the music legends was irregular and unlawful as it was in breach of the Public Finance Management Act 1 of 1999.[1685] The forensic report called for action against the Operations Committee ("OPCOM") for the unlawful award of money to the music legends.[1686] The SABC Group EXCO held its own meeting on 14 September 2017 where it discussed the forensic investigation report and resolved to make no further payments to music legends who were still to be paid.[1687] The other attendant facts were that the State President had authorised the SIU to conduct investigations into the same matter through a

[1678] Ibid, paras 64–5.

[1679] *Motsoeneng* supra note 1613.

[1680] Ibid at para 25.

[1681] Ibid at para 64.

[1682] Ibid at para 66.

[1683] Ibid at para 67.

[1684] Ibid.

[1685] Ibid.

[1686] Ibid.

[1687] Ibid at para 68.

presidential proclamation, following the SABC EXCO meeting of 14 September 2017.[1688] The SIU finalized its investigations in July 2020 and on 1 January 2021, the SIU brought an application for review in the Special Tribunal, based on its forensic report.[1689]

Among the challenges that the respondents raised against the SIU action, was the issue of prescription and the question of *locus standi* in the case of the Special Investigation Unit.[1690] The Special Tribunal examined the question of prescription concerning sections 11 and 12 of the Prescription Act 68 of 1969. The main issue before the Special Tribunal was the question of when the SABC had become aware of the debt and the identity of the debtor.[1691] The Tribunal held that, for prescription in terms of sections 11 and 12 of the Prescription Act 68 of 1969 to kick in, the SABC must have become aware of the debt and its debtor(s) from 3 August 2017 or at least by 14 September 2017.[1692] In terms of the Special Tribunal, the prescription period commenced running on 14 September 2017, if not from 3 August 2017.[1693] Subsequently, the Special Tribunal held that the SABC debt became prescribed on 13 September 2020.[1694] The Special Tribunal was of the view that the argument by the SIU that the Unit was acting based on the findings of its report of 6 July 2020 was 'unsustainable' in law.[1695] Instead, the Tribunal held that the SIU was acting as a substitute for the SABC and that a defence available to the debtor (Respondents) against the SABC was a defence against the SIU.[1696] The Special Tribunal, *per* Modiba J, relied on section 4(1)(c)(read with 5(5) of the SIU Act[1697] and

[1688] Ibid at para 20.

[1689] Ibid.

[1690] Ibid, paras 35–7 & 64–71. The question of locus standi is explored later.

[1691] Ibid at para 67.

[1692] Ibid para 68. The Group EXCO received the forensic report on 3 August 2017 & met to discuss it on 14 September 2017.

[1693] *Motsoeneng* supra note 1613, para 68.

[1694] Ibid at para 68.

[1695] Ibid, para 69.

[1696] Ibid.

[1697] The Special Investigating Unit and Special Tribunals Act 74 of 1996.

the judgment of *Kim Diamonds*[1698] for its proposition.[1699] As *the National Minister in the Department of Public Works,*[1700] a judgment of the Special Tribunal that had been decided a couple of weeks earlier, the same judge expressed similar sentiments as in the *SABC* judgment.[1701] Relying on the *Kim Diamonds*[1702] and *Miracle Mile Investments*[1703] judgments, Modiba J held again that the SIU was substituting for the Department of Public Works and that the same defences available to the other parties against the Department were also available against the SIU.[1704] Accordingly, Modiba J held that when the Department of Public Works became aware of the malfeasance in October 2016, prescriptions commenced running against it 'and invariably against the SIU on that date.'[1705]

It is submitted, though, that the reasoning of the judge in both *SABC*[1706] and *the National Minister in the Department of Public Works*[1707] is premised on a Special Tribunal's misunderstanding and misapplication of the judgment of Kuny AJ in *Kim Diamonds*.[1708] Properly understood, Kuny AJ did not assert that the SIU would always substitute (act as an agent) for an affected entity (this being the principal) when litigating.[1709] Instead, what Kuny AJ was iterating was that there may be instances where the SIU would litigate on behalf of an organ of the state. In such an instance, then the SIU would substitute for such a state organ. It is in those instances according to the special tribunal per Kuny AJ back to the defences available to how the parties against the state organ will be available

[1698] *Kim Diamonds supra note 1624.*

[1699] *Motsoeneng* supra note 1613, para 70.

[1700] *Public Works* supra note 1637.

[1701] Ibid.

[1702] Ibid.

[1703] *Miracle Mile Investments 67 (Proprietary) Limited v Standard Bank of South Africa Limited* 2016 (2) SA 153 (GJ).

[1704] *Public Works* supra note1637, paras 64–5.

[1705] Ibid at para 70.

[1706] *Motsoeneng* supra note 1613.

[1707] *Public Works* supra note 1637.

[1708] Ibid.

[1709] Ibid.

also against the SIU. Alternatively, if Kuny AJ's words in *Kim Diamonds* meant what Modiba J held the judge to mean, the *ratio* of *Kim Diamonds* is incorrect and inconsistent with the objectives of the SIU Act.[1710]

With respect, for two main reasons, the reasoning of Modiba J in both judgments cannot be accepted without dissenting comment. Primarily, the rights and powers of the SIU derive from two main sources; namely, section 4 (read with section 5) of the SIU Act, including the terms of its establishment set out in the Presidential Proclamation, in terms of section 2 of the SIU Act. Of note are the provisions of section 5(5) (read with section 8(2)) of the SIU Act. The section empowers the SIU to pursue civil proceedings 'if, arising from its investigation, it has obtained evidence substantiating any allegation[s] of impropriety contemplated in section 2(2).' This provision gives rise to the cause of action for the SIU case in the tribunal; namely, the findings of malfeasance which caused financial losses to state organs or public entities, by the SIU investigation(s). Accordingly, the prescription period would only commence running after the conclusion of the investigations by the Unit.

A further significant factor showing that the Special Tribunal's interpretation of the Prescription Act and the judgment of *Kim Diamonds* was flawed, is the fact that the SIU litigates 'in its own name', rather than that it acts as a representative (an agent) of state organs and entities.[1711] Thus, a contrary conclusion that regards the SIU as an agent for state-owned entities (which are principal) has the effect of nullifying the objects of the Presidential Proclamation and the core functions of the SIU as a recovery unit for misappropriated state monies. Consequently, Modiba J's rejection of the SIU's contention that it was acting based on its investigation findings, as unsustainable, is irrational.[1712] In light of the foregoing observation, it can be submitted that the absurdity that the court refers to, as arising from depriving the respondents of defences available against the state organ, is of the

[1710] Ibid.

[1711] Ibid para 3.6.

[1712] Ibid para 69.

Tribunal's own making by treating the SIU as always acting as a representative of an affected state entity.[1713] In other words, the crucial question for prescription in cases involving the SIU is not when the public entity got the knowledge of the identity of the debtor and the fact that gives rise to the debt, in terms of sections 11 and 12(3) of the Prescription Act 68 of 1969. Instead, the issue of when 'the debt became due' is about when the SIU acquired knowledge of the debtors and the relevant *facta probanda* (material facts) that give rise to the cause of action in respect of their claim for recovery.[1714]

As indicated earlier, Modiba J noted in a *dictum* that in order to overcome the hurdle of the three-year limitation, section 11 of the Prescription Act needed to be amended, to extend the prescription period in relation to debts of state corporations and other state entities.[1715] However, as argued earlier in this part of the thesis, Judge Modiba's argument was based on a misinterpretation of the *dictum* in Kim *Diamonds.*[1716] Nevertheless, there is a case to argue for the amendment of the Prescription Act in the case of 'debts' of State-Owned Enterprises and other state organs. Chief among the reasons for being amenable to the extension of the prescription period in respect of all state organs is the fact that the prescription period for some debts ranges from 30 years[1717] to 15 years[1718] and six years, in other cases.[1719] Thus the amendment of section 11 of the Prescription Act would help to bring clarity on the prescription period in respect of the SIU cases for the recovery of monies lost to state corporations through maladministration (including fraud and corruption) in the public administration. Additionally, the amendment may unify the law about the prescription of debts owed to state entities.

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[1713] Ibid, para 70.

[1714] Compare also, *Regiments Capital* supra note 1500 paras 21, 23 & 34–38.

[1715] *Motsoeneng* supra note 1613, paras 1 & 74.

[1716] *Motsoeneng* supra note 1613.

[1717] Such as in the case of a judgment debt, debt in respect of taxation debt regardless of the underlying law, or debt owed to the state for a share of the profit and royalties for mining rights, in terms of section 11 (a) of the Prescription Act 68 of 1969.

[1718] Any debt for other debts that are owed to the State and arising advance, loan, lease or sale of land (section 11 (b) of the Prescription Act)

[1719] Such as in the case of debts in connection with negotiable instruments (section 11 (c) of the Prescription Act 68).

Closely related to the defence against prescription, comes the special plea of unreasonable delay(s). Hence, below the writer discusses the special plea of unreasonable delay as a defence against prescription in response to a claim for the recovery of debts owed to state owed entities.

### 5.6.1 Unreasonable delay

The special plea of unreasonable delay is different from the defence of prescription. Nonetheless, the special plea of unreasonable delay bears some resemblance to the defence of prescription. It is for this reason that this study refers to the special plea of unreasonable delay to bring the action. Both the defence of prescription and the special plea of unreasonable delay require computation of time to determine the three years for prescription (with its requirement to acquire knowledge of the debt and the identity of the debtor) and unreasonableness, in respect of the review application. Although the special plea of unreasonable delay is not about calculating a period of three years, it still requires a determination of when the applicant became aware of the impugned decision, together with the factors of the delay in bringing the application. Consequently, there is often an overlap in respect of the two processes. In other words, the argument is that the findings on facts in respect of the latter are also critical for knowledge regarding prescription, as in the case of the former procedure.[1720]

Part 5.6 is a discussion of the accountability of directors of directors of SOEs in the five jurisdictions that form the basis of this study.

## 5.7 CONCLUSION

In conclusion, this chapter has demonstrated that the accountability of SOE board members in South Africa is firmly anchored in a multi-layered legal framework that blends constitutional imperatives, statutory provisions, common law principles, and soft law governance codes. The Constitution, 1996, with its foundational commitment to the rule of law, transparency, and responsiveness, provides the

[1720] See for example *Motsoeneng* supra note 1613, paras 29, 54, 57 & 59–63.

overarching normative framework. The statutory regime, spanning the PFMA, Companies Act, PCCA, POCA, Public Protector Act, and others, operates in concert to regulate conduct, establish fiduciary standards, and prescribe consequences for breach. Complementing these are governance instruments such as the King Codes, which, while not legally binding, have become deeply persuasive benchmarks for ethical and accountable corporate stewardship.

The chapter's focal point, the imposition and enforcement of delictual damages against derelict accounting authorities, emerges as a potent but underutilised mechanism of accountability. The analysis has shown that South African law recognises not only common law damages but also damages for breach of *fiduciary* duties, both of which can be applied to SOE boards in instances of neglect or misconduct. However, their practical enforcement hinges on overcoming procedural and structural hurdles, particularly in relation to *locus standi*, the willingness and capacity of enforcement bodies, and the choice of an appropriate forum. The role of the Minister of Public Enterprises, the SIU, non-profit entities, and private citizens was examined as part of a broader inquiry into who may act in defence of the public interest where an SOE has suffered harm.

The fifth chapter has also discussed the accountability of board members of state-owned corporations in South Africa and evaluated available remedies to enforce their accountability. Several legal instruments for the accountability of boards (accounting authorities) and directors (board members) in the case of breach of their statutory (including common law) duties, were discussed in this chapter. This legal framework for accountability ranged from the common law to the Public Finance Management Act 1 of 1999, the Prevention and Combating of Corrupt Activities Act 12 of 2004, the Prevention of Organised Crime Act 121 of 1998, and the Companies Act 71 of 2008. In conjunction with these legal instruments, the research also examined further legal remedies that are located within the legal instruments that the study identified. The remedies discussed in this chapter included disciplinary proceedings (DC), criminal sanctions, derivative action, and the declaration as a

delinquent director. The chapter has evaluated the efficiency of these legal remedies against board members of State-Owned Enterprises , as well as weighed their potential to afford an affected company redress for financial losses. It has been concluded that these instruments and the remedies that they offer have often not been used, primarily for political reasons. The writer has also argued in this chapter that most of these instruments prove inadequate to provide full compensation for the financial losses of State-Owned Enterprises . In most instances, available legal instruments are not geared toward providing compensation. Instead, these legal instruments are tailored towards the punishment of the wrongdoer, rather than providing compensation to the aggrieved state-owned enterprise.

Furthermore, this chapter identified several instruments considered suitable for providing compensation to State-Owned Enterprises , for financial losses, such as the Special Investigating Unit (SIU) and its Special Tribunal, and the section 165 derivative action.[1721] Nevertheless, these two remedies also have some limitations. For example, derivative action, can provide the desired relief to recover losses on behalf of a company. However, derivative action is subject to restrictions as its process requires authorization by a court.[1722] The courts have not been too keen to grant an order to substitute for a company.[1723] Presumably, a derivative action remedy is only available to companies incorporated in terms of the Companies Act 71 of 2008.[1724] However, most of the State-Owned Enterprises are regulated in terms of the Public Finance Management Act 1 of 1999. The derivative action also appears to be tailored for private rather than State-Owned Enterprises . Still, nothing excludes section 165 of the Companies Act 71 of 2008 from application to State-Owned Enterprises .

[1721] Section 165 of the Companies Act 71 of 2008.

[1722] Section 165 of the Companies Act 71 of 2008.

[1723] See Andrew Smith & Leontia McArdle, '*How do you obtain permission to bring a derivative action?'* (2020) *DLA PIPER,* available at *https://www.dlapiper.com/en/uk/insights/publications/2020/02/saatchi-v-gajjar-and-another-2019-3472-ewhc-ch-and-derivative-actions/,* accessed 20 October 2022.

[1724] Ngcobo op cit note 1115.

However, a negative factor against the use of the derivative action remedy is that it is a cumbersome relief to obtain.

On the other hand, the SIU and the Special Tribunal are best placed to provide 'full compensation' to state-owned entities for their financial losses, against derelict board members. However, the main disadvantage of the SIU is that it operates on an *ad hoc* basis and is subject to the authority of the President, the executive. As a result, the SIU is susceptible to abuse and being used selectively by the executive since the Special Investigating Unit is not completely independent from the executive. The fact that the SIU comes into existence by Presidential Proclamation is the single most inhibiting factor that compromises its independence. For this reason, it was argued that the SIU and the Special Tribunal were relatively ineffective during the twilight years of state capture.[1725] Thus, the SIU and the Tribunal, as they presently operate, cannot be effectively used to hold board members accountable, while also compensating affected State-Owned Enterprises for their financial losses.

This chapter has also discussed the legal and practical feasibility of using delictual damages action to uphold the constitutional accountability of board members. This issue was at the centre of this study regarding accountability of board members of SOEs through imposition of their personal liability. In this regard, legally the new board of a state-owned corporation has *locus standi* to act on behalf of the corporation. However, in many instances, there has been inaction on the part of new boards. As pointed out above, board members get deployed into State-Owned Enterprises by the governing party, often to achieve purposes totally unrelated to the interests of the state corporation. Also, in this chapter it was established that the shareholder representative Minister is disqualified to act as the

[1725] *https://www.siu.org.za/wp-content/uploads/2017/12/SIU-Interim-Report-2017.pdf*. It was only after 2018 that the SIU became active in matters of state-owned companies. Among other cases, the SIU has pursued the following case concerning maladministration in SOCs (*Motsoeneng* supra note 1613; *Special Investigating Unit & Transnet v Lebelo* [2022] ZAST 18 (Spec Trib) unreported case no GP06 /2022 (8 August 2022); *The Special Investigating Unit & Transnet Soc Ltd v CRRC E-LOCO Supply Pty Ltd* GP172020 31 Aug 2021; *Special Investigating Unit & Transnet Soc Ltd v Msagala* (GP) unreported case no GP052020 (30 April 2021); *Special Investigating Unit and Transnet v Msagala NO (GP)* unreported case no GP032020 (17 November 2020) – all available at *https://www.siu.org.za/judgement/*).

representative of the state-owned corporations against erstwhile and current board members. As evidence has shown, in many instances the executive has also been privy to the wrongdoing perpetrated against state-owned entities.[1726] The situation about the shareholder representative Minister becomes compounded by the fact that both ministers and board members are often deployees of the governing party to the state entity.[1727]

On the other hand, this chapter has shown that the SIU is one legal entity that is granted *locus standi* to bring a civil action (including a damages claim) to recover losses sustained on behalf of state-owned corporations (and other state organs) affected by maladministration, in terms of the SIU Act.[1728] However, as was discussed in chapter 5 of this thesis, the SIU only acts on an *ad hoc* basis. Moreover, this chapter has established that NPCs and the citizens of South Africa, in general, have legal standing to represent state-owned corporations, in terms of section 38 of the Constitution.[1729] As such, both NPCs and individuals may bring action against past and current wasteful accounting authorities and senior employees, in a representative capacity. Whereas section 38 of the Constitution refers to *locus standi* to enforce rights in the Bill of Rights, the courts have adopted a wider interpretation of the section.

In this chapter, indications were made of relevant forums for bringing damages action against board members on behalf of state-owned corporations. In addition to the conventional courts, civil action for damages can be brought in the Special Tribunal on behalf of an affected state-owned enterprise, in terms of section 4 of the SIU. However, only the SIU is competent to initiate litigation in the Special Tribunal. Hence, it may be ideal to allow access to anyone to litigate, on behalf of a state-owned

[1726] See chapter three where examples of the transgressions of successive Ministers of Public Enterprises and the Report of the State Capture Commission have been discussed.

[1727] Chapter 3 of this thesis and the State Capture Report has discussed the negative impact of cadre deployment on the accountability of office-bearers of state-owned companies.

[1728] Sections 2 & 4 of the Act.

[1729] Section 38(a)–(e) of the Constitution.

corporation, in the Special Tribunal. Such an action would give effect to the provisions of section 38 of the Constitution of 1996. As discussed in the chapter, a claim for damages may be brought for breach of *fiduciary* duties and the duty of skill and care, as well as in delict (*Lex Aquilia*). In respect of the former, the court held that it was not founded in delict and that it is not a requirement that the plaintiff should prove the element of fault.[1730] The court held that only causation, in the same way as in delict, is a requirement for damages for breach of *fiduciary* duties.[1731] On the other hand, the court held that all elements for delictual liability must be satisfied in order to claim successfully for damages against directors. However, considering all characteristics, the writer has argued that a damages action for a breach of *fiduciary* duties is also based on delict. The remarks of Friedman JP in Phelps also support the conclusion that a claim in damages for breach of *fiduciary* duties is based on delict, with all its elements. The chapter also discussed in detail, the five legal requisites for a successful claim in delict and then measured the five requisites against the documented malfeasances of State-Owned Enterprises . It was concluded that state-owned corporations, such as Eskom, the SABC, the SAA and Transnet have a strong case against erstwhile board members and senior executives in the quest to recover damages for their losses.

Furthermore, prescription and the special plea of unreasonable delay to bring an action on review were considered. It was argued in this chapter that prescription may prove to be an obstacle, especially for new board members, aiming to bring an action for damages against errant erstwhile accounting authorities. Experience has shown that wrongdoing in State-Owned Enterprises often comes to light long after the prescribed period of three years has lapsed.[1732] Therefore, it may be ideal for the legislature to extend the period of prescription for debts of state-owned entities beyond the current

[1730] *Phelps* supra note 1453 at 170C–D.

[1731] Ibid at 171E.

[1732] See, for example, *Public Works* supra note 1637; *Motsoeneng* supra note 1613. Also, see *Regiments Capital* supra note 1500, see para 5.

three years as Modiba J proposed in the *National Minister in the Department of Public Works* judgment.[1733] Confusion has arisen about whether the prescription of SIU cases is concurrent with that in the cases brought by affected state-owned corporations (together with a new board).[1734] This study argued that Modiba J erred when he held on two occasions that the SIU always act as a representative of a SOE, with the effect that prescription against the state owned company is brought as a defence against the SIU.[1735] However, it was argued here that the jurisdiction of the SIU is not concurrent with that of an entity that the Unit may act on behalf. Instead, prescription only commences running against the SIU after the conclusion of its investigations. Modiba J also erred in suggesting that the SIU always litigates in a representative capacity.[1736] Often, the SIU litigates in its own name although it acts on behalf of the state-owned corporation, as empowered by the SIU Act 74 of 1996, its founding legislation.[1737] Still, prescription remains a significant challenge, threatening to undermine otherwise meritorious claims, in the case where delays in detection, investigation, or political will have allowed statutory time limits to lapse. This study concurs with Modiba J that the legislature may have to amend section 11 of the Prescription Act to extend the period of prescription of the debts of state-owned corporations to 15 or even 30 years. The massive losses suffered by State-Owned Enterprises justify the call for such an amendment. In addition, the extension of the prescription period would help foster the constitutional principle of accountability and remove the cause for confusion that Modiba J inadvertently made in SABC[1738] and the National Minister in the Department of Public[1739] Special Tribunal cases.

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[1733] *Public Works* supra note 1637, paras 1 & 74.

[1734] *Motsoeneng* supra note 1613 paras 69–70.

[1735] *Motsoeneng* supra note 1613; Also, *Public Works* supra note 1637, paras 1 & 74.

[1736] Ibid paras 64–74.

[1737] The Special Investigating Units and Special Tribunal Act 74 of 1996, sections 2 and 4.

[1738] *Motsoeneng supra* note 1613 paras 69–70.

[1739] Ibid at paras 64–74.

The discussion highlights the need for vigilance and proactive enforcement to ensure that wrongdoers are not insulated from liability by procedural technicalities. Ultimately, the chapter confirms that the legal architecture to hold SOE board members personally liable for dereliction of duty exists, but its efficacy depends on robust and consistent application. The enforcement of damages claims is not merely a technical exercise in litigation, but it is an affirmation of constitutional values, a deterrent against future misconduct, and a necessary step towards restoring public trust in South Africa's SOEs. For accountability to be meaningful, these mechanisms must be pursued without fear or favour, ensuring that public office bearers entrusted with the stewardship of state assets remain accountable for their wayward actions.

# CHAPTER SIX

# ACCOUNTABILITY FOR SOE DIRECTORS IN OTHER JURISDICTIONS

## 6.1 INGRODUCTION

The previous chapter 5 examined in detailed the legal framework within South Africa that enables the holding of public functionaries and boards of directors, serving as accounting authorities of SOEs, accountable for dereliction of duty. It considered both the statutory and common law mechanisms through which such accountability is enforced. In moving beyond the domestic context, this chapter shifts focus to a comparative lens, analysing how other jurisdictions impose liability on accounting authorities who negligently or intentionally fail in their fiduciary and statutory duties. This approach not only broadens the analytical base but also enables the identification of governance models and accountability mechanisms that may inform local reform. The chapter aims to provide a grounded and context-sensitive foundation upon which proposals for South African reform can be developed. The jurisdictions selected for this study are Australia, China, the UK, and the US. These countries represent a mix of common law and civil law traditions, offering a spectrum of governance approaches.[1740] Australia and Canada share deep legal and institutional parallels with South Africa through the Commonwealth tradition,[1741] while the UK provides both a historical reference point and a contemporary example of evolving corporate governance standards.[1742] China, although operating under a civil law system with significant state involvement in enterprise management, has

[1740] B Tricker (2019). Corporate Governance: Principles, Policies, and Practices. Oxford University Press.

[1741] A Keay (2017). Board Accountability in Corporate Governance. Routledge.

[1742] C. A. Mallin (2019). Corporate Governance. Oxford University Press.

implemented robust frameworks for State-Owned Enterprise (SOE) governance that warrant examination,[1743] particularly given its position as South Africa's largest trading partner.[1744] The US, as the world's largest economy and South Africa's second-largest trading partner after China, presents an example of mature corporate governance standards and a strong enforcement culture.[1745]

The choice of these jurisdictions is intentional. Each has demonstrated a capacity to formulate and implement laws that regulate the conduct of SOE directors effectively, balancing public accountability with operational efficiency. Australia's public sector corporate governance frameworks,[1746] Canada's emphasis on board independence and transparency,[1747] China's centralised oversight coupled with modernising, [1748] the UK's reliance on codified directors' duties, [1749] and the US's rigorous enforcement of fiduciary responsibilities [1750] all present valuable lessons. Australia and China particularly provide contrasting but successful models, one grounded in Westminster-derived traditions and the other in centralised state management, which together broaden the scope of potential insights. The central objective of this chapter is to identify good practices and lessons that could enhance the governance and accountability of South African SOEs. The chapter seeks to determine whether elements of these foreign systems, whether legislative provisions, institutional oversight structures, or enforcement mechanisms, might be adapted to strengthen South Africa's approach. While each jurisdiction operates within its own political, economic, and cultural context, the comparative method allows for selective borrowing of principles and tools that have demonstrated

[1743] OECD. (2015). OECD Guidelines on Corporate Governance of State-Owned Enterprises. Paris: OECD Publishing.

[1744] DTIC (Department of Trade, Industry and Competition). (2023). South Africa Trade Statistics. Pretoria: DTIC.

[1745] T Clarke, (2022). Comparative Corporate Governance: A Research Overview (1st ed.). Routledge. https://doi.org/10.4324/9780429294648.

[1746] ANAO (Australian National Audit Office). (2014). Public Sector Governance: Better Practice Guide. Canberra: ANAO.

[1747] Canadian Treasury Board. (2016). Corporate Governance in Crown Corporations. Ottawa: Government of Canada.

[1748] OECD. (2015). OECD Guidelines on Corporate Governance of State-Owned Enterprises. Paris: OECD Publishing.

[1749] Companies Act 2006 (UK).

[1750] SEC (U.S. Securities and Exchange Commission). (2022). Duties of Directors. Washington, DC: SEC.

efficacy elsewhere. Each jurisdiction will be examined in terms of its legal framework for SOE governance, the statutory and common law duties imposed on directors, and the mechanisms by which those duties are enforced.

The selected jurisdictions are discussed in alphabetical order, starting with Australia.

## 6.2 AUSTRALIA

In Australia, the main legislation that governs corporations in general, including government corporations, is the Corporations Act of 2001.[1751] The affairs of State-Owned Enterprises are primarily regulated by the State-Owned Enterprises Act 90 of 1992 (SOE Act),[1752] as amended, and the Financial Management Act 1996 (as amended). The State-Owned Enterprises Act is a comprehensive piece of legislation covering various aspects of managing the country's state-owned corporations.

### 6.2.1 Directors' personal liability

As for the liability of directors for breach of their duties under Australian law, sections 36 and 37 of the State-Owned Enterprises Act 90 of 1992 provide that directors who contravene the provisions of the law can be liable in criminal and also in civil law.[1753] Section 37 of the Act[1754] gives the respective Minister the power to institute an action to recover, on the corporation's behalf, any losses against directors who have contravened the provisions of section 36 of the Act.[1755] In terms of section 37 of the Act, the Minister may bring action against errant directors and/or third parties on two grounds. He

[1751] The Corporation's Act of 2001 is Australia's main legislation for corporations and the equivalent of the South African Companies Act 71 of 2008.

[1752] As in the case of South Africa, there are other aspects of the affairs of state-owned companies which also fall under the Corporations Act of 2001.

[1753] Section 36 (5) of the State-Owned Enterprises Act 90 of 1992.

[1754] The State-Owned Enterprises Act 90 of 1992.

[1755] Section 36 of the State-Owned Enterprises Act 90 of 1992.

can sue for an amount equal to the profit made by any person at the corporation's expense.[1756] In the alternative, the Minister may sue for an amount equivalent to the loss that a state-owned corporation suffered.[1757] The liability of directors for breach of their *fiduciary* duty is not limited. Accordingly, section 37 of the SOE Act precludes the exemption of directors from liability for breach of trust or wilful breach of duty.[1758]

However, despite the explicit legislative provisions for the personal liability of directors of SOEs in Australia, there is no case law about the enforcement of such legislation.[1759] Lamenting the lack of enforcement of personal liability for the public sector duty of care and diligence, author Saunders attributes the problem to a lack of policy rationale for this public sector duty.[1760] He asserts that the public sector duty of care and diligence is modelled around/along the private sector, with somehow similar wording.[1761] However, Saunders argues, unlike the private sector, that the Australian public sector legislation has not completely embraced care applicable to the directors of public sector entities.[1762] Saunders also attributes the problem of lack of enforcement to the issue of dissimilarities between the interests of private corporations and public entities in Australia.[1763] Accordingly, the author asserts that interpretation in respect of the public sector becomes a sticking point, which creates a hurdle for the enforcement of the duty.[1764] Lastly, the author argues that the public sector entities generally lack effective enforcement mechanisms.[1765] Hence, the unavailability of jurisprudence for

[1756] Section 37 (a) of the State-Owned Enterprises Act 90 of 1992.

[1757] Section 37 (b) of the State-Owned Enterprises Act 90 of 1992.

[1758] Section 37 of the State-Owned Enterprises Act 90 of 1992.

[1759] BB Saunders, 'The Public Sector Duty of Care & Diligence' (2019) *UNSWLawJl* 23; (2019) 42(2) UNSW Law Journal 652, available at *http://classic.austlii.edu.au/au/journals/UNSWLawJl/2019/23.html*, accessed 20 October 2022.

[1760] Ibid.

[1761] Ibid.

[1762] Ibid.

[1763] Ibid.

[1764] Ibid.

[1765] Ibid.

personal liability of directors of SOEs in Australia. Accordingly, while the Australian jurisdiction is a model for South Africa regarding putting the law in place, it does not provide much assistance with the enforcement of the personal liability of accounting authorities. However, one needs to be mindful that the duty to exercise, skill, care and diligence and the *fiduciary* duties are more than common law and statutory duties. They are also underscored by the values in the Constitution, which means that they are constitutional imperatives that must be fulfilled.[1766]

In the next section the writer examines the legal position regarding the liability/accountability of State-Owned Enterprises in Canada.

## 6.3 CANADA

Regarding the liability of directors of Crown corporations, Canada does not distinguish between private and state corporations. State-Owned Enterprises , in Canada, are generally treated in the same manner as their private counterparts. Canadian Crown Corporations are also subject to the same law that governs business corporations in Canada, including the general principles for the liability of directors. The accountability of directors of Canadian Crown corporations is discussed in detail below. Various remedies are available for a breach of directors' *fiduciary* duties. These remedies range from the derivative action, in terms of section 239 of the Canada Business Corporations Act (R.S.C., 1985, c. C-44). The derivative action has the same limitations as its South African counterpart discussed in part 5.2.1.2 earlier.

Meanwhile, in Canada, a civil action using the principles of tort for breach of the duty of care, diligence and skill is available. The action is subject to the same business judgment rule. In South Africa and other jurisdictions discussed in this chapter, such as the UK and the US, the same position obtains. However, the business judgment rule only protects directors where their decisions were

[1766] Sections 2 & 195 of the Constitution of the Republic of South Africa, supra; *EFF1* supra note 31, par 1.

reasonable in the light of all the relevant circumstances. Corporations may also indemnify directors from liability or take up indemnity insurance against the liabilities of directors.[1767] Similar indemnity provisions are not available in South Africa. Yet, the provisions give a clear indication of the seriousness of a director's duties and that the directors expose themselves to liability whenever they fail to discharge their duties.

6.3.1 Personal liability of Directors of Crown corporations in Canada

Under the Canada Business Corporations Act (R.S.C., 1985, c. C-44, several remedies are available to the shareholders and other interested parties as their right of recourse against the corporation or its directors. The remedies are available only to the beneficiaries of the *fiduciary* duty.[1768] The four remedies, discussed in detail below, are the derivative action, an action for breach of duty of care, the common law action for oppression (repression) and other remedial provisions under the Canada Business Corporations Act (R.S.C., 1985, c. C-44).

Moving forward, in the following subsection, the writer discusses the remedy available for breach of the duty of care – action for breach of the duty of care.

*6.3.1.1 Action for breach of the duty of care*

As discussed already, in terms of section 122(1)(b) of the Canada Business Corporations Act (R.S.C., 1985, c. C-44), one of the duties of directors is the duty to exercise care, diligence and skill in the performance of their functions.[1769] Where this duty has been breached, the law has developed a civil action for breach of the duty of care, diligence and skill. The civil action is one of the remedies developed to protect the interests of shareholders and stakeholders, including the interests of the

[1767] See part 6.2.3.2 above of this chapter.

[1768] *BCE v. 1976 Debentureholders* 2008 SCC 69; [2008] 3 S.C.R., para 41.

[1769] As discussed in this part above, the equivalent of this section in respect of Crown corporations is section 115 of the Financial Administration Act (R.S.C., 1985, c. F-11).

corporation.[1770] Whereas the *fiduciary* duty is owed solely to the corporation, the duty of care may be owed to other stakeholders, in addition to the corporation.[1771] The civil action is pursued in terms of the principles of tort law laid down in *[t]he Queen in the right of Canada.*[1772] However, in terms of the business judgment principle, the courts do not [generally] interfere with the business decisions of the boards. Under the business judgment rule, the board is presumed to be acting in the best interests of the corporation and its shareholders.[1773] The business judgment rule is premised on the principle that directors are better positioned to determine what is in the best interest of the corporation rather than the courts. To be protected, the decisions of the board must be reasonable, and must consider all the circumstances of the board's conduct. The applicable standard employs the question of whether 'directors applied an appropriate degree of prudence in reaching the impugned decision in question.[1774]

To rely successfully on the business judgment defence, directors must have made a conscious decision or consciously decided not to act. Consequently, the defence is not available where directors simply failed to act and did not apply a considered judgment in relation to their conduct. Their act should be deliberate. Still, the business judgment rule is not a complete defence against directors' liability.

In addition to the business judgment 'limitation' to the director's corporation liability, when a director was being sued for breach of their duties under sections 118 and 119, he may rely on the reasonable diligence defence. This defence is in terms of section 123 (4), which provides that a director will not be liable if he has exercised the care, diligence and skill of a reasonably prudent director.[1775] The good faith of a director relying on the statements of the corporation's officer and the reports of experts or

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[1770] *BCE* supra note 1768 para 45.

[1771] Ibid para 44.

[1772] *The Queen (Can.) v. Saskatchewan Wheat Pool,* [1983] 1 S.C.R. 205.

[1773] Fasken, op cit note 1009.

[1774] Ibid.

[1775] The Canada Business Corporations Act ((R.S.C., 1985, c. C-44).

professionals, will also serve to exonerate a director from personal liability.[1776]

Where directors are sued for breach of the directors' duty of care, diligence and skill under sections 118 and 119 or their duty to comply with the Act[1777] and other regulations under section 122 (2) of the Canada Business Corporations Act ((R.S.C., 1985, c. C-44), they may rely on the defence of reasonable diligence.[1778] Moreover, the Canada Business Corporations Act (R.S.C., 1985, c. C-44), like the US provision, allows business corporations to indemnify directors and officers against liabilities that are incurred while exercising their functions and powers.[1779] As an alternative, corporations may purchase insurance to cover losses caused by directors and other officers, in their capacity as directors.[1780] Directors may also limit their liability for breach of duty of care by registering their dissent (against a decision) in the minutes of the board or through their resignation. However, resignation on its own does not absolve a director for decisions taken while he was still a director.[1781]

The next section of the exposition deals with the remedy under the derivative action.

*(i) Derivative Action*

The derivative action is brought in the name and on behalf of the corporation where the board of directors has breached the *fiduciary* duty to the corporation or engaged in self-interest transactions. The derivative action allows for the enforcement of directors' duty to the corporation where the directors are unwilling to pursue an action on half of the corporation.[1782] In Canada the derivative action is founded on section 239 of the Canada Business Corporations Act (R.S.C., 1985, c. C-44).

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[1776] Section 123 (4)(a)–(b) of the Canada Business Corporations Act ((R.S.C., 1985, c. C-44)

[1777] Ibid.

[1778] Section 123 (4)(a) of the Canada Business Corporations Act ((R.S.C., 1985, c. C-44).

[1779] Fasken, op cit note 1009.

[1780] Ibid.

[1781] Ibid.

[1782] *BCE* supra note 1768, para 43.

The purpose of the derivative action is to enforce the right of a corporation, including its subsidiaries.[1783] As a limitation to this action, the derivative action may be pursued only with the leave of a court.[1784] As a result, under Canadian law the derivative action is the same as in other common law jurisdictions, such as South Africa, as already discussed above in this chapter.[1785] As in the case of South Africa, the court will not easily grant permission to third parties to litigate in the name and on the corporation's behalf. Instead, the court must be satisfied that the action is brought in good faith and is not frivolous or vexatious.[1786]

Furthermore, the defence is available to directors for breach of a duty to act in good faith under section 123(5) of the Canada Business Corporations Act (R.S.C., 1985, c. C-44). The relevant subsection exempts directors from liability under section 122. This section kicks in where, in good faith, the directors truly relied on the information presented to them by an officer of the corporation or solely acted on professional advice in good faith.[1787] The inquiry is a subjective one. In other words, the determination of the enquiry is not premised on whether it is reasonable to have relied on the information or expert advice at the director's disposal at the time he acted as he did.

Moving forward, in the following subsection, the writer discusses the remedy available for breach of the duty of care.

*(ii) Action for oppression*

An action for oppression is a statutory remedy that is available to stakeholders, and has been endorsed

[1783] Ibid The rights that are enforceable on behalf of the corporation include rights related to the directors' duties of a company (*BCE* supra note 1768, para 43).

[1784] Ibid, para 43.

[1785] See the discussion of derivative action under the South African Companies Act 71 of 2008 in part 5.2.1.2 (i) above of this chapter.

[1786] *BCE* supra note 1768, paras 40–4.

[1787] Section 123 (5)(a) – (b) of the Canada Business Corporations Act ((R.S.C., 1985, c. C-44).

in the statutes of Canada.[1788] The stakeholders who may use the remedy include creditors, security holders, corporation officers or even other directors.[1789] The purpose of the action for oppression is to remedy the harm caused to the legal and equitable interests of stakeholders affected by the oppressive acts of directors or the corporation itself.[1790] The action for oppression remedy is available, by way of a court application, to the complainant in a position where he reasonably expected his interests to be safeguarded, but were instead, violated through repressive conduct, unfair prejudice, or just disregarded.[1791] An action for oppression is endorsed by section 241 of the Canada Business Corporations Act (R.S.C., 1985, c. C-44). The Act requires the court to satisfy itself that the conduct of the corporation resulted in oppressive, unfairly prejudicial outcomes or unfairly disregarded the interests of the claimants.[1792] Alternatively, the court has to satisfy itself that the business of the corporation was conducted in a manner that was oppressive, unfairly prejudicial or unfairly disregarded the interests of the claimants.[1793] Still, the court should satisfy itself that the directors of the corporation exercised their powers in an oppressive, unfairly prejudicial manner or disregarded the interests of the claimant.[1794] The court is empowered to make any order it deems fit under section 241(3) of the Act,[1795] including an order compensating the corporation or any other party to the transaction or contract;[1796] or giving an order compensating an aggrieved person.[1797] So, in terms of section 247 of the Canada Business Corporations Act (R.S.C., 1985, c. C-44), the order may be a

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[1788] Section 241 of the Canada Business Corporations Act (R.S.C., 1985, c. C-44). In terms of Canadian law, directors do not owe any fiduciary duty to shareholders of the company. Thus, the repression remedy is not based on the breach of any fiduciary duty towards shareholders.

[1789] Section 241(2) of the Canada Business Corporations Act (R.S.C., 1985, c. C-44); *BCE* supra note 1768, para 45.

[1790] *BCE* supra note 1768, para 45.

[1791] Ibid.

[1792] Section 241 (2)(a) of the Canada Business Corporations Act (R.S.C., 1985, c. C-44).

[1793] Section 241 (2)(b) of the Act (R.S.C., 1985, c. C-44).

[1794] Ibid.

[1795] The Canada Business Corporations Act (R.S.C., 1985, c. C-44).

[1796] Section 241(3)(h) of the Act.

[1797] Ibid.

useful remedy against directors to compensate state-owned corporations for their financial losses. In many respects, this remedy resembles the South African common law interdict.

Other additional statutory remedies in terms of Part XX, section 247 of the Canada Business Corporations Act (R.S.C., 1985, c. C-44) are discussed in the next subsection.

*6.3.1.2 Other remedial provisions*

Part XX of the Canada Business Corporations Act (R.S.C., 1985, c. C-44) deals with remedies, offences and punishment. Furthermore, it provides for an additional remedy for the violation of the duties of a director. In this regard, section 247 of the Canada Business Corporations Act (R.S.C., 1985, c. C-44) allows any person or complainant with a recognisable interest[1798] to bring an application for a restraining or compliance order against any person who fails to comply with the provisions of the Act (R.S.C., 1985, c. C-44) or any other applicable legal instruments. The director must have been recalcitrant to be ordered to comply or restrained from acting in breach.[1799] Section 247 empowers the court, upon application, to make any order the court deems fit.[1800] The application that may be made in terms of section 248 of the Canada Business Corporations Act (R.S.C., 1985, c. C-44) is an interdict.[1801]

Therefore, this additional remedy may be used by a state corporation to restrain its directors from continuing with the breach of duties owed to the corporation. The remedy may also assist the Crown corporation to get redress, including compensation, for any financial losses it may have incurred

[1798] Section 238 of the Canada Business Corporation Act (R.S.C., 1985, c. C-44) defines a 'complainant' as including 'any person, who in the discretion of the court, is a proper person to make an application under Part XX of the Act (R.S.C., 1985, c. C-44). The complainants may include directors or former directors of a corporation.

[1799] Section 247 of the Canada Business Corporations Act (R.S.C., 1985, c. C-44).

[1800] Ibid.

[1801] Section 248 of the Act (R.S.C., 1985, c. C-44) provides that application under the Act may be made in a summary manner by petition on notice of motion.

because of the director's breach of their duties.[1802]

Next, the Part, below, will discuss the personal liability of directors for breach of their *fiduciary* duties the management of state-owned corporations in China.

## 6.4 THE PEOPLE'S REPUBLIC OF CHINA

The Law of the People's Republic of China on State-Owned Assets in Enterprises is a single legislation which applies in respect of all State-Owned Enterprises , regardless of its founding law. As discussed in this study, among others, the legislation deals with the legal liability of directors and other managers for a breach of their director's duties.[1803] The issue of liability is discussed below.

### 6.4.1 Directors' personal liability in China

Chapter VIII of Law which deals with the legal responsibility (liability) of persons in the position of authority (including institutions performing the functions of a contributor) provides another important aspect of this piece of legislation is).[1804] Article 71 is specifically directed at directors, supervisors and senior managers of state-invested enterprises. This article creates both criminal liability and liability to compensate the state-owned enterprise where it has suffered losses.[1805] Article 71 makes one liable for criminal sanctions and to compensate the state according to the law, where he or she has taken or accepted a bribe or used the position to obtain any other advantage for her/himself.[1806] This provision also extends to other acts such as engaging in transactions with the company in contravention of the

[1802] Section 247 of the Act empowers the court in an application for a restraining and/or compliance order to 'make any further order it thinks fit' in addition to the restraining order. Logically, the further order includes an order for compensation for damages against directors and former directors.

[1803] Chapter VIII of the Law of the People's Republic of China.

[1804] Within the South African context, this part would apply even in respect of cabinet ministers when appointing board members and senior managers of state-owned companies.

[1805] Article 71 of Order No. 5 of 2008, supra.

[1806] Ibid, Article 71(1). See also Article 75 of the same Law., Order No. 5 of 2008.

law;[1807] making decisions contrary to the legal provisions;[1808] and performing duties in contravention of the law.[1809] In respect of unlawful gains obtained by directors, supervisors and senior managers, such gains are subject to confiscation or to be passed onto the affected company, according to the provisions of the law.[1810]

Moreover, directors, supervisors and senior managers who act in a manner that causes losses to the state entity are liable for removal and are barred from serving as directors or supervisors or senior managers of any state-owned enterprise for a period of five years and up to a lifetime.[1811] The period of the ban depends on the conduct responsible for the loss or the severity of the loss caused to the state corporation and the nature of the conduct, with acts of graft for which a person has been sanctioned making one liable for a lifetime ban from serving as a director, supervisor or senior manager of a state-owned business.[1812] It is also a criminal offence, in terms of Article 68 of the Law, to make appointments to positions of authority in State-Owned Enterprises in a manner contrary to the provisions of the law.[1813] The criminal responsibility falls on the person in charge of the institution.[1814]

The next section of the study will examine the law in the United Kingdom (UK), regarding the liability of directors for a breach of their director's *fiduciary* duties.

## 6.5 THE UNITED KINGDOM

The question of liability or accountability of SOE directors in the UK is explored in some detailed in

[1807] Ibid, Article 71(4).

[1808] Article 71 (6).

[1809] Ibid, Article 71 (7).

[1810] Article 71 supra.

[1811] Articles 71 & 73 of the Law, Order No. 5 of 2008.

[1812] Article 73 supra.

[1813] Articles 68 (1) & 75, Order No. 5 of 2008.

[1814] Ibid, Article 68.

part 6.5.1 below.

### 6.5.1 Liability of directors in the United Kingdom

Generally, the statutory duties of directors in the UK are modelled along the common law, although there are some variations.[1815] Section 170(3) states that the new provision takes effect in place of 'certain' common law rules and equitable principles as they apply to directors. Effectively, the rules and principles which have defined directors' legal duties for many years are superseded by the corresponding provisions of the statutory statement of general duties. Still, section 170 (4) provides that the duties which are set out in the statement are to be 'interpreted and applied in the same way as common law rules or equitable principles. To this effect, due regard shall be had to the corresponding common law principles and equitable principles in interpreting and applying the general duties.

In the UK, in terms of sections 171–77 of the Act, the law imposes personal liability on directors for breach of their general duties. [1816] In this regard, section 178 specifically provides for civil consequences for breach of general duties.[1817] The section endorses the common law rules for breach of general duties by directors.[1818] In other words, the section endorses the enforcement remedies available under the common law rules and equitable principle for breach of *fiduciary* duties or trust, except for the duty to exercise reasonable care, skill and diligence, as provided for in section 174 of the Companies Act of 2006 (C. 46).[1819] As a result, directors are exposed to five actions for breach of their *fiduciary* duties; namely, injunctive relief (interdicts), restitution of profits, rescission of the contract, restoration of property, and damages.[1820] Injunctive relief allows the affected company to

[1815] Section 170(3) of the Act.

[1816] The Companies Act of 2006 (C. 46).

[1817] Section 178 of the Act.

[1818] Section 178(1) of the Act.

[1819] Section 178(2) of the Act.

[1820] Saunders op cit note 1729.

bring a court action to interdict directors from committing or continuing with a breach of their *fiduciary* duties.[1821]

Meanwhile, in respect of restitution of profits, a court may make an order for the restoration of any personal profits derived by a director because of his misconduct, to the company, especially where it has suffered a loss.[1822] Rescission of a contract permits the reversal of a contract that a director would have signed in contravention of the intentions of the company.[1823] On the other hand, the restoration of property relates to the company's recourse to ask a court to order the restoration of the company's property taken by a derelict director for himself.[1824]

In the final instance, a company that suffers financial losses because of breaches of the directors' *fiduciary* duties is entitled to sue for damages.[1825] Section 178 of the Companies Act of 2006 (C. 46) imposes liability on directors, for damages in delict, for breach of *fiduciary* duties, except for the duty to exercise reasonable care, skill and diligence.[1826]

In the meanwhile, under the Companies Act of 2006 (C. 46), the remedy for breach of the director's duty to exercise reasonable care, skill and diligence, differs from the remedies that apply in respect of the rest of the duties of directors.[1827] First, the *fiduciary* duty of directors, creates a behavioural standard of expectations for directors.[1828] In terms of this behavioural standard, the law expects directors to behave responsibly, in a considered, competent and diligent manner in the performance

[1821] Ibid.

[1822] Ibid.

[1823] Ibid.

[1824] Ibid.

[1825] Section 178 of the Companies Act of 2006 (C. 46). See Saunders op cit note 1492.

[1826] Section 178(2) of the Companies Act of 2006 (C. 46).

[1827] Ibid.

[1828] Blanaid Clarke 'Duty of Care, Skill And Diligence – From Warm Baths To Hot Water' (2016) 56 *The Irish Jurist* 139 at 148, available at *https://www.jstor.org/stable/26447999,* accessed 13 January 2023.

of their functions as company directors.[1829]

The enforcement of the section 174 duty to exercise care, skill and diligence is in terms of the standard set out in section 174(2) of the Act.[1830] It involves the two-leg test of the objective/subjective standard.[1831] In terms of section 174(2)(a), the first leg of the test requires the exercise of the care, skill and diligence that a reasonable person possessing the same general knowledge, skill, and experience, would exercise when placed in similar circumstances as the said director.[1832] The test refers to the skill and care that society would reasonably expect of a person who undertakes the kind of a role in a similar kind of company as the director under scrutiny.[1833] The application of the objective part of the test also takes into account the role for which the director had been appointed in the company, without distinguishing between the executive and non-executive directors.[1834] On the other hand, the subjective part of the standard for a director's adherence to the care, skill and diligence expected of him inquiries into the 'general knowledge, skill and experience' that the director possesses.[1835] The two provisions of section 174 of the Companies Act of 2006 (C. 46) are meant to be considered as a combination to avoid either lowering the bar or raising it unjustifiably too high.[1836] Clarke asserts that the objective part of the test sets the minimum standard that the law requires of all directors in the position of a director, whereas the second leg will only be invoked for directors who possess greater knowledge or experience.[1837] Such a situation could arise when a particular director is

[1829] Ibid.

[1830] Ibid.

[1831] Ibid.

[1832] Ibid.

[1833] Ibid.

[1834] Ibid.

[1835] Ibid.

[1836] Ibid.

[1837] Ibid.

a professional because of his possession of certain qualifications, such as being an accountant.[1838] Accordingly, as Clarke argues, the first part of the test should be understood to set the floor, while the second part performs the role of setting the ceiling and displacing the objective standard where a director under consideration is in possession of 'greater knowledge, skill, and experience than may reasonably be expected' in the particular circumstances.[1839] Clarke correctly concludes that how the dual test applies is that the first part of the test always applies when assessing a breach of this duty, whereas the second part will only apply to raise the standard when a high degree of accountability is required (for example, where the director is a professional).[1840]

A breach by a director of his duties under section 174 of the Companies Act of 2006 (C. 46) will attract liability to account to the company to indemnify it for loss or damage that resulted from the breach and/or to account for any gain a director would have made from the breach.[1841] By law the liability of directors for breach of their duties under the Companies Act of 2006 (C. 46) cannot be contracted away nor may directors be exempt in any way from liability for being derelict in the performance of their functions.[1842] In that regard, section 232 of the Companies Act voids any provision purporting to exempt directors from liability.[1843] Nevertheless, section 232(3) of the Act provides for exceptions to the prohibition for exemption of directors from liability.[1844] The three exemptions relate to the provision of insurance, qualifying third party indemnity and qualifying pension schemes.[1845]

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[1838] Clarke op cit note 1828.

[1839] Ibid.

[1840] Ibid. See also *Arkins v Murphy* [2015] IEHC 2.

[1841] Section 178 of the Companies Act of 2006 (C. 46).

[1842] Section 232 (1) & (3) of the Companies Act of 2006 (C. 46).

[1843] Act of 2006 (C. 46).

[1844] Section 232 (2) of the Companies Act of 2006 (C. 46).

[1845] Section 232 (2)(a)–(c) of the Companies Act of 2006 (C. 46). The third-party indemnity applies in the case of third parties to the exclusion of the company or its associated companies (section 234 (2) of the Companies Act of 2006 (C.

Regarding these exemptions, section 233 of the Act allows a company, in general, to purchase and maintain insurance to cover directors' liability for their negligence, default or breach of trust.[1846] Furthermore, section 232(3) of the Act provides for exceptions to the prohibition for exemption of directors from liability.[1847] The three exemptions relate to the provision of insurance, qualifying third part indemnity and qualifying pension scheme.[1848] To this end section 233 of the Companies Act permits a company, in general, to purchase and maintain insurance to cover directors' liability for their negligence, default or breach of trust.[1849] In addition, a company may, by resolution, ratify acts of directors that amounted to negligence, default, breach of duty or breach of trust, owed to it.[1850]

Furthermore, section 183 of the Companies Act of 2006 (C. 46) creates an offence for failure to declare an interest which is one of the general duties provided for in terms of sections 177 and 182 of the Companies Act of 2006 (C. 46).[1851] In terms of section 183 of the Companies Act of 2006 (C. 46), a director found guilty of contravention will be liable to a fine of up to a statutory maximum for a summary conviction, which is now unlimited.[1852]

Moreover, upon an application by the relevant body, such as Corporate Enforcement agency in the case of insolvency, a director may be subject to a bar from serving as director because of a previous breach of duties as a director.[1853] The availability of such a bar provides a further tool for accountability of directors. In the South African context, declaration as a delinquent, acts as

46)). Meanwhile, a qualifying pension scheme is applicable where a company is a trustee of an occupational pension scheme (section 235(2) of the Companies Act of 2006 (C. 46).

[1846] The Companies Act of 2006 (C. 46).

[1847] Ibid section 233.

[1848] Ibid sections 233–135 of the Act.

[1849] Ibid section 232 (2).

[1850] Section 239 (1) & (2) of the Act.

[1851] Section 183 (1) of the Act.

[1852] Section 183 (2) of the Act.

[1853] See *In Re Hunting Lodges Ltd (In Liquidation)* 1985 I.L.R.M. 75.

the British equivalent of disqualification as a director.[1854]

The following section examines the legal position regarding the liability of directors for breach of their *fiduciary* duties.

## 6.6 THE UNITED STATES OF AMERICA

The next exposition below deals with liability for breach of *fiduciary* duties and the remedies available to an aggrieved corporation, under US Law.

### 6.6.1 Personal liability for Breach of Fiduciary Duty

The director's liability for breach of *fiduciary* duty frequently arises from the alleged failure of the board to respond to 'red flags' of corporate misconduct. When faced with actual knowledge or red flags signalling wrongdoing, directors must take steps, in good faith, to conduct a reasonable inquiry to understand the cause and scope of the issue, and to implement appropriate remedial measures, as they deem necessary. Directors may be subject to oversight liability because of inaction, wilful ignorance or failure to investigate and address possible misconduct in good faith. A breach of a director's duties under US law is usually visited with civil remedies, yet criminal penalties may be employed should the breach be accompanied by acts of serious misconduct such as a fraud.[1855] Generally, the relief for breach of *fiduciary* duties may be any equitable and monetary relief that the court deems appropriate.[1856] Each director is individually liable rather than as a board.[1857] Civilly, a derivative lawsuit is available to the shareholders of the corporations acting on behalf of the

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[1854] Section 162 of the South African Companies Act 71 of 2008, discussed in chapter five of this study.

[1855] A. Izaz, 'Remedies for Breach of Fiduciary Duties' (2010), available at *https://lawdit.co.uk/readingroom/remedies-for-breach-of-a-fiduciary-duty*, accessed 12 December 2022.

[1856] Stein, Linder, Vanzura & Cohen op cit note 978. In re *Tri-Star* Pictures, *Inc., Litigation* 634 A.2d 319, (Del. 1993); *Cinerama, Inc. v. Technicolor, Inc. 663 A.2d 1156 (Del. 1995)*.

[1857] Stein, Linder, Vanzura & Cohen op cit note 978. *In re Walt Disney* Co. *Derivative Litig.,* 709 A.2d 693,748 (Del. Ch. 2005), aff'd 906 A.2d 2 (Del. 2006).

corporation to sue for breach of their *fiduciary* duties.[1858]

Four general consequences for a breach of *fiduciary* duties by directors of corporations are possible in the US.[1859] A court may either order injunctions (interdicts), award damages, order restitution or issue criminal sanctions against wayward directors.[1860] Injunctions may be ordered where a breach of *fiduciary* duties persists.[1861] In this regard, the court will issue an order, interdicting directors to desist from continuing with their unlawful course of action. In addition to injunctions, courts may award damages against delinquent directors for a breach of their *fiduciary* duties owed to a corporation.[1862] In terms of US corporate laws, to succeed with their claim for damages, plaintiffs must prove the existence of three factors. First, they must prove that the alleged wrongdoer (or defendant) is a director of the corporation; second, that the defendant committed a violation of his *fiduciary* duties toward the corporation; and third, that the plaintiff (including the corporation) suffered damages because the director breached *fiduciary* duties. In the case of the last factor about the damages, the court may award damages to the plaintiffs according to the actual damages that the shareholder (or the corporation) incurred.[1863] The action uses the principles of the law of tort. Accordingly, for an action to succeed, four elements of tort should be present.[1864]

Meanwhile, the remedy in restitution is available to the aggrieved corporation, against its directors, as an order to restore to the company, any benefits lost to the corporation because of a breach of *fiduciary*

[1858] Stein, Linder, Vanzura & Cohen op cit note 978.

[1859] Izaz, op cit note 1855.

[1860] Izaz op cit. See also, *Securities and Exchange Commission v. Bernard L. Madoff and Bernard L. Madoff Investment Securities LLC* (S.D.N.Y. Civ. 08 CV 10791 (LLS)).

[1861] Tinhaga, op cit note 979.

[1862] Ibid.

[1863] Ibid.

[1864] KM Lewis & A. Kuersten, 'Introduction to Tort Law' (2019) *In Focus (IF11291),* available at *https://crsreports.congress.gov/product/pdf/IF/IF11291,* accessed 20 September 2023.

duties.[1865] For example in *eBay,* directors had appropriated for themselves a lucrative opportunity instead of presenting it to the corporation that they were serving.[1866] To achieve this purpose, they were advised by Goldman Sachs, the company's financial advisor, about lucrative initial public offerings.[1867] In consequence, the shareholders of eBay instituted a derivative action against its directors and other insider officers of the corporation for breach of their duty of loyalty under the doctrine of corporate opportunity, in the Delaware Court of Chancery.[1868] The plaintiff shareholder also sued Goldman Sachs for aiding and abetting the corporate insiders' breach of their *fiduciary* duty of loyalty to eBay, for allegedly bribing certain insiders of eBay, using the means of highly profitable opportunities that lawfully belonged to eBay.[1869] The court found the directors had usurped the corporate opportunity that actually belonged to the corporation.[1870] The court also held that as an alternative, the directors and other officers had acted contrary to their common law principle that profits made must be accounted for to the corporation.[1871] In this manner, they violated the corporate opportunity and were therefore in breach of the *fiduciary* duties they owed to the corporation. Accordingly, the court found in favour of the plaintiffs and rejected the directors' motions to dismiss the complaint laid against them.[1872]

Regarding the duty of care, in the US the courts are hesitant to impose liability on corporate directors for breach thereof. Thus the courts have become protective of directors and apply the business

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[1865] Tinhaga ZP op cit, note 979. See *In Re eBay Shareholders Litigation, C.A.* 19988-NC, 2004 WL 253521, 29 Del. J. Corp. L. 924 (Del. Ch. 2004); *Smith v. Van Gorkom* 488 A.2d 858 (Del. 1985).

[1866] *In re eBay, Inc. Shareholders Litig.,* 2004 WL 253521 (Del. Ch. 2004).

[1867] Ibid.

[1868] Ibid.

[1869] Ibid, para 1.

[1870] Ibid, para 4.

[1871] *Re eBay Shareholders Litigation, C.A.* 19988-NC, 2004 WL 253521, 29 Del. J. Corp. L. 924 (Del. Ch. 2004), para 5.

[1872] Ibid, para 5 (111).

judgment rule to shield corporation directors from personal liability in the case of a breach.[1873] The application of the business judgment rule is premised on the principle that the court should refrain from second-guessing company directors and the presumption that directors always act in the corporation's best interests.[1874] The rule only applies to business decisions and business opportunities that end up badly for the corporation.[1875] From the above, it becomes clear that the business judgment rule has made it difficult to prevail against directors for breach of their duty of care.[1876] Still, the plaintiff may still succeed where it proves that directors failed to exercise due care in their conduct.[1877] To this effect, in *McCall,* the 6th Circuit court held that directors' conscious disregard for known risks amounted to a breach of their duty of care and manifested bad faith that made them liable to the corporation, for instance, under derivative action.[1878] The US Supreme Court of Appeals for the 6th Circuit has held that what is actionable in this regard is an intentional ignorance and wilful blindness to obvious 'red flags', rather than a mere inattention to known risks.[1879] Additionally, US corporations offer directors liability insurance to cover expenses that result from their management of the corporation to protect them from personal liability expenses for breach of the duty of care.[1880] For example, the Delaware General Corporation Law provides for 'exculpatory clauses and liability insurance as mechanisms' to provide indemnity for directors against liability for breach of their duty of care.[1881]

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[1873] *Churella v. Pioneer State Mutual Insurance Co.,* 671 N.W.2d 125 (Mich. Ct. App. 2003). See Henry Hansmann 'The ownership and governance of mutual insurance companies' (2022), available at *SSRN: https://ssrn.com/abstract=4186367,* accessed 12 December 2022.

[1874] Tinhaga, op cit note 979.

[1875] *Shlensky v. Wrigley,* 237 N.E. 2d 776 (Ill. Ct. App. 1968).

[1876] Tinhaga op cit note 979.

[1877] Ibid.

[1878] *McCall v. Scott,* 250 F. 3d 997 (6. Cir. 2001); see also Tinhaga, op cit note 979.

[1879] Ibid.

[1880] Ibid.

[1881] Ibid. See also § 102 (6)(7) of the Delaware General Corporation Law.

On the other hand, criminal sanctions are employed where a breach of *fiduciary* duties was accompanied by misconduct on the part of directors.[1882] The law may only impose criminal penalties on directors of a corporation where there was also a contravention of other substantive laws, in addition to the breach of *fiduciary* duties.[1883] The court may also issue a forfeiture order against any property that is implicated in the crime committed by directors of a corporation.[1884] For example, a breach of directors' *fiduciary* duties may be accompanied by fraud, corruption and money laundering.[1885] Therefore, in addition to the remedies available to the shareholders or the affected corporation (including government corporations), one act of breach of a director's *fiduciary* duties may give rise to several serious consequences for the director. This position is also not unique to the US, as these other jurisdictions discussed in this chapter, including South Africa, follow a similar approach to breach of director's duties, accompanied by contravention of the law.[1886]

The next section is a critical reflection on the business judgment rule in relation to the personal liability of SOE directors in South Africa.

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[1882] Tinhaga, op cit note 979 & *McCall* supra. Also see M.C. Nunziato 'Aiding and abetting, a Madoff family affair: why secondary actors should be held accountable for securities fraud through the restoration of the private right of action for aiding and abetting liability under the federal securities laws.' (2010) 73 (2) *Albany Law Review* 603, available at *Gale Academic OneFi/e, link.gale.com/apps/doc/A226046765/AONE?u=anon-c992ccbd&sid=googleScholar&xid=ea 22117c.,* accessed 25 December 2022.

[1883] Tinhaga op cit note 979.

[1884] See, for example, *United States v. Madoff,* 09 Cr. 213 (DC)(S.D.N.Y. Dec. 3, 2019).

[1885] See for *US v. Bernard Madoff, 2009,* WL 3347945 (S.D. NY 2009), Madoff was also convicted of eleven counts of fraud, money laundering, and defrauding the clients of his investment scheme, BLMIS. For all these offenses Madoff was sentenced to a period of imprisonment of between 20 and 5 years per charge and restitution. (See, FBI 'Bernad L. Madoff pleads guilty to 11-count criminal information and [is] remanded [i]nto custody', *FBI Archives* 12 March 2009, available at *https://archives.fbi.gov/archives/newyork/press-release/2009/nyfo031209.htm,* accessed 25 December 2022; See also *In Re Enron Corp. Sec., Derivative & ER/SA Lit.,* 258 F. Supp. 2d 576 (S.D. Tex. 2003). Madoff was imprisoned for 150 years (See US Department of Justice 'Bernard L. Madoff sentencing transcript dated 29 June 2009', available at *https://www.justice.gov/usao-sdny/file/762821/download,* 25 December 2022).

[1886] For the South African position, see chapter 5 of this thesis above.

## 6.7 CRITICAL REFLECTIONS ON THE BUSINESS JUDGMENT RULE

As discussed in the previous chapter, a defence of BJR is available to directors of companies when sued for personal liability. The BJR, while essential for protecting directors from undue interference, ought to be contextualised within the broader governance environment of SOEs. In South Africa, the Companies Act 71 of 2008 does not explicitly codify the BJR but implies it through section 76(4), which provides that directors would have satisfied their duty of care if they took reasonably diligent steps, made informed decisions, and had a rational basis for believing their actions were in the company's best interests. This resonates with the common law understanding of the BJR. However, South African courts have not yet developed a consistent jurisprudence around the BJR, particularly for SOEs. Given the frequent governance failures at entities like Eskom, PRASA, and SAA, courts have become increasingly willing to scrutinise directors' decisions through a public accountability lens. The Zondo Commission highlighted how the absence of meaningful board oversight and wilful ignorance of red flags contributed to massive financial losses.[1887] Thus, for SOE boards in South Africa, relying on the BJR is not a panacea. Directors must demonstrate that their decisions are not only commercially sound but also align with the public interest and constitutional principles, particularly section 195 of the Constitution which demands transparency, accountability, and responsiveness in public administration.

In jurisdictions like the US and Australia, the rule works effectively because of well-defined director duties, accountability frameworks, and independent oversight mechanisms. In contrast, jurisdictions where SOEs are plagued by mismanagement, lingering political interference and blurred mandates, such as South Africa, require a re-imagined application of the BJR that balances autonomy with accountability. The Courts and legislatures must also be wary of abusive invocations of the BJR by

[1887] Judicial Commission of Inquiry into State Capture, "Report: Part 1–6" (2022).

directors who fail to act responsibly. As Mureinik[1888] famously argued, legality in South African public law must be infused with justifiability and reasonableness.[1889] Hence, the BJR should not be used to shield the negligence of directors under the guise of commercial discretion, particularly where public funds and services are at stake. Whereas the business judgment rule remains a cornerstone of corporate governance, its application to SOEs must be limited, especially in developing democracies like South Africa. Comparative lessons show that robust accountability mechanisms, statutory clarity, and judicial restraint are all necessary for the rule to work effectively. However, the unique features of SOEs demand that director decisions be subject to a higher threshold of scrutiny, not only in the boardroom, but also in the courts, the media, and the eyes of the public. Thus, in respect of the SOE board members, especially in South Africa, the application of the BJR to State-Owned Enterprises is complicated by their public mandates, accountability to Parliament, and developmental objectives. While the business judgment rule remains a cornerstone of corporate governance, its application to SOEs must be limited, especially in developing democracies like South Africa. Unlike private corporations, SOEs often operate under dual or triple mandates. As such, they are expected to be profitable, fulfil service delivery mandates, and advance socio-economic transformation. In jurisdictions like Australia and Canada, for example, directors of SOEs are still entitled to the protections of the BJR, provided their decisions are made with due regard to the entity's statutory objects and public interest obligations.[1890]

The claim that *fiduciary* duty and negligence are incompatible deserves further scrutiny. While theoretically compelling, especially through the lens of the *ipsa sequitur* principle, which infers negligence from the breach of a *fiduciary* duty, the practical overlap of these concepts demands more

[1888] E. Mureinik, "A Bridge to Where? Introducing the Interim Bill of Rights" (1994) 10 *SAJHR* 31.

[1889] Ibid. See also Mupangavanhu op cit note 1022.

[1890] A.R. Keay 'Ascertaining the Corporate Objective: An Entity Maximisation and Sustainability Model' (2008) 71 *Modern Law Review* 663 at 663, available at https://ssrn.com/abstract=1889236 (accessed 18 April 2025).

attention. A director who faithfully discharges his *fiduciary* and constitutional duties would, by implication, meet the legal standard of care. Therefore, any proven breach of such duties is strong *prima facie* evidence of negligence. Yet courts, often, are reluctant to draw this inference decisively, leaving accountability in a precarious position.

Moreover, the principle that a diligent, honest director should not be penalised for outcomes beyond their control must be balanced against the equally important imperative of preventing impunity. In South Africa's SOEs, riddled with historical mismanagement and corruption, the law must not only permit damages claims but actively encourage them where *fiduciary* or constitutional standards have been breached.

The business judgment principle should not be treated as a licence for impunity. Rather, its protective ambit is narrow; it only shields directors from liability in respect of business decisions properly taken within the bounds of their authority and in good faith. The moment negligence or *mala fides* enters the picture the protective veil is lifted. It is thus misleading to treat the rule as incompatible with delictual accountability under the *Lex Aquilia*. On the contrary, the requirement of good faith makes negligence doctrinally incompatible with the rule. This mutual exclusivity means that once a breach is established, particularly one grounded in negligence, the business judgment defence falls away. From a critical standpoint, this has profound implications for SOEs. Thus, directors of public institutions cannot hide behind the business judgment rule if their conduct falls below the expected standard of a reasonable person. The test in delict is objective: what would a reasonable director in the same position have done? If the conduct of the director in question fails this test, liability for damages should follow. Yet, enforcement practice often underwhelms in this regard, and the failure to litigate such breaches robustly contributes to the ongoing governance crises in many SOEs in South Africa.

In conclusion, in this regard, while the business judgment rule and the principles of delictual liability

under the *Lex Aquilia* may appear in tension, a closer examination reveals a complementary relationship. The rule protects directors who act honestly and with diligence; delict holds accountable those who do not. In the public law context of SOEs, this balance is not merely desirable, it is essential for institutional integrity.

In the following section the writer briefly examines some lessons about accountability that may be learned by South Africa from the foreign jurisdictions discussed in this chapter to improve the position of her state entities. The comparative analysis will follow the same alphabetical order of the jurisdictions discussed in this chapter. A start is made with Australia.

## 6.8 LESSONS FOR SOUTH AFRICA

A critical comparison of the five jurisdictions above has shown that, despite similarities here and there, no jurisdiction is exactly like the other, regarding the management and oversight of state-owned corporations. As a result, South Africa can learn a few lessons from the jurisdictions discussed above, to improve the management of its government corporations and the accountability of their respective boards. For instance, there is an international drive to professionalise the boards of state-owned companies, at least in the OECD countries. Already, with the introduction of the DPE Evaluation framework, South Africa has taken a step towards the 'professionalisation' of boards of state entities,[1891] and acceptance of the King IV Code (guidelines).[1892] However, from the experience of South Africa, despite its multiple turn-around strategies, the lack of political will to implement available laws, gives little reason to be over-optimistic about improving the management of state-owned corporations in South Africa.

As discussed in part 4.4.1 already, Australian government corporations are partly governed by the

[1891] DPE-[SOE]-Board-Evaluation-Framework supra note 510.

[1892] These were discussed in Part 4.2.2.5 of this research.

Corporations Act of 2001, the State-Owned Enterprises Act 90 of 1992 as well as the Finance Management Act 1996, which applies to financial matters of state-owned corporations. The three pieces of legislation complement one another. The Finance Management Act 1996 regulates the criteria for the appointment to the boards and the role of the responsible Minister for State-Owned Enterprises in Australia. The State-Owned Enterprises Act 90 of 1992 also deals with the liability of directors of government corporations in Australia. Australia's Finance Management Act, 1996, is the equivalent of the South African PFMA. Practically, the Australian State-Owned Enterprises Act 90 of 1992, and the Finance Management Act 1996 are designed to achieve the same effects as the South African PFMA. Also, in terms of its Financial Management Act of 1996, Australia has codified the functions of governing boards and CEOs of state entities. This legal codification serves to provide certainty of the legal framework governing the management and operation of government businesses. As already highlighted in chapter 4 above, the Australian position contrasts with the fragmented South African legal framework that governs State-Owned Enterprises .[1893] The other benefit of the codification is the certainty of unifying the guidelines for board members regarding what is expected of them. In addition, the codification also makes it easy for members of the public to enforce accountability of office-bearers, since every citizen has knowledge of the duties stipulated for public office-bearers serving in state corporations. The difference between Australia and South Africa is that the State-Owned Enterprises Act 90 of 1992 of Australia is dedicated to all state-owned corporations, whereas in South Africa state corporations are regulated by various pieces of legislations, including the Public Finance Management Act 1 of 1999.

Moreover, in Australia, as one of his or her functions, the relevant Minister is tasked with the responsibility to initiate litigation to recover on behalf of state business corporations.[1894] However, it

[1893] See chapter 5 of this thesis discussed earlier.

[1894] Section 37 (a)–(b) of the State-Owned Enterprises Act 90 of 1992.

bears noting that the critical provision regarding the alternative *locus standi* in the Australian State-Owned Enterprises Act[1895] will not work under the current environment in South Africa. As discussed in chapters 2 and 4 above, the South African system is hamstrung by a collusive relationship between the executive and the members of boards, who are all, as already highlighted, deployees of the governing party. The deployment of Ministers and board members has often tended to strip affected state-owned entities of massive financial resources.[1896] Thus, in the South African context, the Act will need to designate an alternative agent, such as the National Treasury, to litigate in the name of the wronged State-Owned Enterprises, instead of the shareholder minister, as is the current position.

Generally, there is little difference between how crown corporations in Canada and their South African counterparts are managed and overseen. The main difference is that in Canada, crown corporations are independent, with the government exercising oversight through the relevant Minister and the Governor in Council. Government oversight is primarily through financial oversight of financial reporting. Once again, this process is not distinct from the South African position, save for the strong emphasis on the independence of crown corporations.

Canada, on the other hand, has evolved two main pieces of legislation that apply in respect of its crown (state) corporations is the Canada Business Corporations Act (CBCA) (R.S.C., 1985, c. C-44) and the Financial Administration Act (R.S.C., 1985, c. F-11). The Financial Administration Act (R.S.C., 1985, c. F-11) is the equivalent of the South African Public Finance Management Act 1 of 1999 and applies exclusively to all Crown corporations, without exception. Thus, unlike South Africa which is characterised by fragmentation in the management of the state corporations, Canada has formalised a unified code for all its State-Owned Enterprises . Still, similarities between South Africa and Canada do exist except for the glaring mismanagement of State-Owned Enterprises in South Africa. The

[1895] Act 90 of 1992.

[1896] See chapters 3 & 5 of this thesis discussed earlier.

duties of directors are common; namely, the duty of loyalty and good faith, which are owed primarily to the corporation and not the shareholders. Directors also owe the duty to exercise care, diligence and skill, as well as the duty to disclose. Whereas the relevant Minister plays a role in the appointment of the directors, which are appointed by the Governor in the Council, directors are largely independent of the executive, as discussed in already.[1897] The independent dispensation in Canada, contrasts with South Africa's position, where board members are often beholden to the governing party through a network of patronage.

China is another jurisdiction with functional and stable state-owned corporations. In terms of performance and regular profitability, Chinese State-Owned Enterprises have been the envy of the world.[1898] The efficiency of Chinese corporations is remarkable despite China being a socialist country. Notwithstanding, China has managed to transform the boards of its state corporations and granted them a measure of independence. In terms of management and governance, China has a central control unit (the SASAC) responsible for the oversight of strategic state corporations. The SASAC works in consultation with line ministers. However, China observes two layers of governance of its central state corporations. First, it has boards of directors, which are accountable to the boards of supervisors, which in turn report to the SASAC. Still, line ministers and SASAC play a minimal role in the appointment of the board of directors and supervisors. Chinese directors of strategic state companies are independent, despite their central control by the SASAC. Second, the board of supervisors supplies an extra layer that shields directors against executive interference and minimises the risk of manipulation of the boards by the executive. The absence of an inappropriate relationship between the board and the executive proves a crucial factor in the enforcement of accountability. China, unlike South Africa, does not have unwarranted proximity between the executive and board appointees

[1897] OECD op cit note 1289.

[1898] OECD (2022), OECD Economic Surveys: China 2022, *OECD*, 49–50, available at *https://doi.org/10.1787/6f22322c-en,* accessed 12 December 2022.

because of an extra level of management through the board of supervisors. As seen already in chapter 4 above, in South Africa, a close relationship between the executive and the boards has been responsible for the lack of a political will to hold board members to account for their mismanagement of State-Owned Enterprises . Hence, in China, one may reasonably expect to find a more robust political will to enforce the law against derelict directors. Although the environment in socialist China differs markedly from the South African one, yet for years state-owned corporations in China have proved profitable and contributed to that country's economy.[1899]

Moreover, in contrast to South Africa, China has crafted a single comprehensive legislation that is dedicated to all Chinese strategic State-Owned Enterprises .[1900] This piece of legislation regulates the appointments (including removal) into positions of authority, the qualifications and duties of those appointed. In addition, the liability and removal of accounting authorities for the mismanagement of state-invested companies is spelt out clearly. In contrast, there is no uniformity in South African legislation for the liability and removal of accounting authorities for wrongdoing in the management of State-Owned Enterprises . Instead, South Africa is characterised by fragmentation in legislation, by which the affairs of some state entities are sometimes regulated by founding legislation instead of the Companies Act and/or the PFMA. South Africa may benefit by adopting the Chinese approach and enacting only one piece of legislation to govern the affairs of all strategic state corporations, if not all state-owned corporations. In addition to the financial management of the affairs of state entities, the legislation must deal with the leadership and liability of board members. Such legislation would also need to go a long way to achieve uniformity in the governance of South African State-Owned Enterprises . Nevertheless, as discussed in chapter 3 of this thesis, South Africa is in the process of establishing an SOE Holding company that will be responsible for all national State-Owned Enterprises and abolish

[1899] Lin, Lu, Zhang & Zheng op cit note 829.

[1900] Article 71(1) of the Law of the People's Republic of China, supra note 827.

the Department of Public Enterprises. This idea of a holding company appears to be borrowed from the Chinese model, with its State-owned Assets Supervision and Administration Commission (SASAC) of the State Council and Australian the Government Businesses Advice Branch (GBAB) of the Department of Finance and Deregulation.

Even more significant, are the concise provisions about liability for breaches of directors' duties. China provides an outstanding example in its reputation for taking a hard line against graft. The Chinese law is clear about liability for contravention of the law and duties of directors in the management of the affairs of state-owned businesses. Not even the contributor (the equivalent of the shareholder minister in South Africa) is spared from liability in the case of contravention of the law, including failure to comply with the law in the appointment of directors.1901 This record contrasts with the prevailing norm in South Africa, where, for example, shareholder ministers repeatedly violate the law in making appointments to boards of state entities and senior positions.[1902] What also sets China apart from South Africa is the political will to follow its reform resolutions.[1903] On the other hand, South Africa has failed to implement numerous turn-around strategies regarding the resuscitation of the country's ailing strategic state-owned corporations.[1904] It bears mention that in China the law bites. Legal provisions that criminalise conduct against the interests of State-Owned Enterprises are enforced rigorously. This record contrasts with the prevailing culture in South Africa where there has been a lack of will to enforce laws aimed to discourage corruption in State-Owned Enterprises .[1905] As indicated in chapter 5 already, the provisions of the PCCA and POCA Acts should have been applied against certain directors and senior managers found to have been privy to the looting of resources of state-owned corporations in

[1901] Article 71 of the Law (Order No. 5 of 2008) supra.

[1902] This phenomenon has been discussed in this thesis, especially in chapters 3 and 4 of the thesis, which examined the rot uncovered by the State Capture Commission.

[1903] Lin, Lu, Zhang & Zheng op cit note 829

[1904] Refer to SAA and Eskom turnaround strategies which were never implemented.

[1905] See, for example, State Capture Commission Report Part I vol. 1 supra note 313, paras 1112-14 & 508–9.

South Africa. As pointed out several times already, the failure to apply the law as discussed in chapter 3 above, stemmed from the culture of political patronage borne of the governing party's cadre deployment policy.[1906]

In the UK, the general duties of directors, for both private and public corporations are contained in the Companies Act of 2006 (C. 46), as discussed in part 4.4.4.2 above. The main feature of UK law is that it does not distinguish between private and government corporations.[1907] The UK law emphasises the independence of directors, which is ensured through an independent recruitment process. In the case of State-Owned Enterprises , the process falls under the management of the Office of the Commissioner of Public Appointments. This office sets guidelines for all recruitments into the public service. As discussed in this chapter already, the appointment to the boards of government corporations is made by the Shareholder Executive and the state-owned enterprise, after an interview. UK law is strong on the duty of loyalty and avoidance of any conflicts of interest. These norms are safeguarded under further duties such as the duty to disclose. Government corporations are independent, as in the case of their UK counterparts. Nevertheless, the duties of directors do not differ materially from the South African position. However, the independence of the boards of directors in the UK makes it possible for the executive or government to ensure that the boards of directors are accountable at all costs. This strict approach is in sharp contrast to the complaisant South African position.

From what was discussed in chapters 4 and 5 above, it becomes apparent that South African law is modelled along UK law. As seen in this chapter, UK law subjects company directors to civil liability for breach of their *fiduciary* duties. It does not distinguish between private and government

[1906] Article 71(1) supra note 827.

[1907] All companies in the UK, both private and public, including SOEs, are governed by the Companies Act of 2006 (C. 46).

companies.[1908] Among the civil consequences possible, directors are liable to injunctive reliefs, restitution of profits, rescission of contract called non restoration of property, and damages.[1909] However, South Africa, is still a long way from the standard of strict enforcement of corrective measures against dereliction.

Meanwhile, the duties of directors of state corporations under US law do not differ much from those owed under the South African law discussed in chapter four above. Under the US corporate law, company directors stand in a position of trust to the corporations they are commissioned to manage in the best interests of shareholders.[1910] However, federal government corporations are autonomous and managed like their private counterparts. Company directors subscribe to the same legal code of ethics as their private counterparts, even though the state corporations account to Congress and ultimately the President. The US government only plays a minimal intervention in the operations and governance of state-owned corporations. The country exercises extensive government oversight and supervision network of statutory bodies and statutes. The legislature provides legislative mechanisms that bind both government and private corporations, as well as their boards alike. Parliamentary Committees and institutions like the Inspector General and the Comptroller General play a central role in the oversight of US federal government corporations. The Comptroller General provides an extra layer for the supervision of government corporations in a way that minimises the chances for undetected financial losses in state corporations. Still, government corporations and their boards are exposed to the same civil liability and criminal sanctions for breach of their *fiduciary* duties and contravention of the substantive law. They cannot expect to be shielded by the government from exposure to consequences of breaches of their duties or violations of the law.

Moreover, the detailed requirements for disclosure in the US provide an invaluable tool for the

[1908] Section 178 of the Companies Act of 2006 (C. 46).

[1909] These remedies were discussed in part 5.7.4.1 above.

[1910] See also Stein, Linder, Vanzura & Cohen op cit note 978.

accountability of governing board members and the prevention of corruption. However, this transparency and accountability mechanism presuppose an independent governing board that is not captured by the executive through patronage networks that stem from loyalty to the governing party. Thus, even with similar legal provisions in South Africa, the measure is unlikely to be effective because of the underlying collusion between board members and Ministers in South Africa.[1911] Thus the US is ahead of South Africa regarding the professional management of its federal government corporations. South Africa has systematically failed to enforce the accountability of those entrusted with the management of State-Owned Enterprises despite there being in place both civil and criminal codes to do so.

The final part following below, concludes the chapter.

## 6.9 CONCLUSION

This chapter has examined the comparative legal frameworks governing the accountability of State-Owned Enterprise (SOE) directors in various jurisdictions, including Australia, Canada, China, the United Kingdom, and the United States. Through the exploration of these diverse legal landscapes, this chapter has sought to identify best practices and potential reforms that could inform the enhancement of SOE governance in South Africa. Each jurisdiction offers unique insights into the enforcement of director accountability. Australia's framework, while comprehensive, highlights challenges related to enforcement, which could benefit from greater clarity in public sector duty interpretation and strengthened mechanisms. Canada's robust approach, including the derivative action and oppression remedy, provides a clear path for holding directors accountable, which may be particularly relevant to South Africa's own governance structures. China's evolving SOE governance

[1911] As discussed in chapter two of this study and the reports of the State Capture Commission, the South African environment for state-owned corporations is characterised by a network of patronage that is engineered in the governing party and filters down to the executives and to the board members. So, the mechanisms for disclosure will not achieve any purpose in South Africa.

model, though operating within a centralised state framework, underscores the importance of strong regulatory oversight, especially in state-dominated economies. The UK and the US, with their respective reliance on codified duties and the business judgment rule, offer valuable lessons in balancing director discretion with public accountability.

The key takeaway from this comparative analysis is that, despite differing political, economic, and legal contexts, common themes of transparency, effective enforcement, and judicial oversight emerge as central to maintaining director accountability. These lessons provide important benchmarks for South Africa, where reform is urgently needed to ensure that SOEs are not only legally sound but are also effectively governed in the public interest. On the other hand, the examination of the legal frameworks governing director liability in the People's Republic of China, the United Kingdom, and the United States reveals a nuanced balance between statutory duties, fiduciary obligations, and enforcement mechanisms designed to promote accountability within State-Owned Enterprises . China's legislation notably combines criminal sanctions with civil liability, imposing stringent personal consequences, including lifetime bans, on directors whose misconduct causes loss to the state. This reflects a governance model that emphasises both deterrence and state control, aligned with its centralised political economy.

In contrast, the United Kingdom offers a framework deeply rooted in common law traditions, codified through the Companies Act of 2006, which merges historic fiduciary duties with statutory provisions. The UK model is characterised by clearly articulated duties, such as the dual objective-subjective standard for care, skill, and diligence, alongside an array of civil remedies including injunctions, restitution, and damages. The availability of director disqualification further strengthens the accountability regime. Importantly, while directors may benefit from indemnities and insurance, the law firmly prohibits exemption from liability for dereliction of duty. Similarly, the United States approach prioritises the fiduciary duties of loyalty and care but is distinguished by the robust

application of the business judgment rule, which affords directors protection from liability for honest business decisions that yield poor outcomes. Nonetheless, courts maintain a vigilant stance against conscious disregard of known risks and wilful ignorance, imposing liability where such bad faith conduct is established. The US also embraces a wide spectrum of remedies, including injunctive relief, damages, and criminal sanctions for breaches accompanied by fraud or corruption, supported by derivative litigation as a potent enforcement tool.

Taken together, these jurisdictions reflect diverse governance philosophies and enforcement strategies that nevertheless share a commitment to holding SOE directors accountable for fiduciary breaches. China's model underscores the role of strong state oversight and criminal sanctions, the UK combines codified duties with equitable remedies and director disqualification, while the US blends judicial deference under the business judgment rule with rigorous enforcement against bad faith conduct. Building on the detailed comparative analysis provided, it is also clear that while the Business Judgment Rule offers a vital safeguard for directors acting in good faith, its application within South African SOEs must be carefully recalibrated to reflect the unique public interest and constitutional imperatives that govern these entities. The South African context, characterised by fragmented legislation, political interference, and weak enforcement, demands that the BJR not serve as a shield for negligence or malfeasance but rather be applied with heightened scrutiny. The experiences of jurisdictions such as Australia, Canada, China, the UK, and the US reveal the importance of clear statutory frameworks, board independence, and robust oversight mechanisms in balancing director autonomy with accountability.

However, these lessons also highlight a critical reality, namely, that legal provisions alone cannot guarantee accountability without genuine political will and cultural shifts to dismantle patronage networks that compromise governance. South Africa's chronic challenges in enforcing existing laws and holding directors to account reflect systemic issues that transcend legislation. Therefore, reform

efforts must marry legal reform with institutional strengthening and transparent governance practices. In conclusion, this chapter highlights that South Africa's SOE governance will benefit not only from adopting best practices observed abroad, but also from embracing a tailored approach that recognises its socio-political context. Accountability mechanisms must be firmly embedded in law yet vigorously enforced in practice, ensuring directors of SOEs act with due diligence, transparency, and loyalty to the public interest. Only then can the promise of effective and ethical management of public enterprises be realised, advancing both economic performance and democratic governance.

As the chapter closes, these varied approaches provide a rich comparative backdrop for South Africa to consider. The lessons gleaned from these jurisdictions, ranging from China's strict liability regime to the UK's clear statutory duties and the US's protective yet accountable business judgment framework, may inform the development of a more effective and contextually appropriate governance model for South African SOEs. The following section begins this comparative reflection, starting with insights from Australia, continuing the alphabetical order of jurisdictions discussed.

# CHAPTER SEVEN

# ANALYSIS AND DISCUSSION

## 7.1 INTRODUCTION

Chapter seven summarises the key findings of the research as well as provides answers to the research questions raised in chapter 1 above. Having mapped the legal architecture for holding SOE directors to account and compared international models, chapter seven takes the enquiry deeper – it now confronts the practical obstacles that frustrate accountability in South Africa. The empirical and doctrinal work in the preceding chapters revealed recurring themes, namely blurred lines of responsibility, weak institutional independence, procedural hurdles and a culture that too often tolerates impunity. Chapter 7 brings these threads together to examine how gaps in *locus standi*, lack of political will to enforce the law, constrained prescription periods, the burdens of derivative litigation, and politicised appointments collectively neutralise otherwise sound legal rules. The aim here is twofold. First, to clarify how these obstacles operate in practice and why legal remedies frequently fail to translate into meaningful consequences for derelict accounting authorities of South African SOEs. Second, this chapter aims to propose targeted, practicable interventions that address not just the letter of the law, but also the institutional and cultural conditions that enable SOEs' malfeasance. In short, law without implementation and enforcement is meaningless. This chapter therefore prioritises reforms that improve institutional independence, widen and clarify standing to litigate where internal mechanisms fail, extend practical timeframes for discovery and redress, streamline derivative procedures, and re-shape the appointment culture that currently compromises

board autonomy. Throughout the discussion the emphasis remains on fit-for-purpose solutions that are sensitive to South Africa's constitutional commitments and political realities, reforms that strengthen accountability while safeguarding the legitimate operational autonomy SOEs need to fulfil public mandates. The chapter begins with the reflections on the research.

## 7.2 A REFLECTION ON THE RESEARCH QUESTIONS

The researcher set out to investigate the legal feasibility of using the *Lex Aquilia* as the common law delictual remedy to promote accountability of board members of State-Owned Enterprises in South Africa. The study investigated six questions. As is clearly spelt out in the constitutional principles, the main question posed was: Does the existing South African law provide for a delictual remedy against board members (accounting authorities) to compensate a SOE that suffers a loss due to a breach of the director's *fiduciary* duty?[1912] In addition to the main question, the sub questions to the main question were five-fold. First, what other legal instruments are available to SOEs to call board members to account to the SOEs for losses caused to them by the failure to properly exercise the director's statutory duties? Second, are the common law and current statutory remedies adequate to hold public officials liable to compensate SOEs for wrongdoing in breach of their *fiduciary* duties and functions? Third, should the state organs be reluctant to hold public authorities accountable, the question that begs making is who can exercise *locus standi* to enforce the law against the accounting authorities of SOEs? Fourth, why have the board members, that is, accounting authorities, not been held accountable for financial losses incurred by SOEs as a result of a breach of directors' *fiduciary* duties? Five, how best can the current legal remedies be used to recover damages for losses incurred by SOEs due to a breach of *fiduciary* and other statutory duties by accounting authorities in the exercise of their functions?

[1912] Section 195 of the Constitution, 1996.

The question lying at the core of the thesis was: does the current South African law provide for a delictual remedy against board members as accounting authorities to compensate a SOE that has suffered a loss due to a breach of the director's *fiduciary* duty, as clearly spelt out in the constitutional principles? In answer to this main question, the researcher has found that the law makes provision for damages against directors of SOEs in three ways: namely in terms of the common law, legislation and further policy documents as underscored by the values underlying the Constitution. Thus, accounting authorities are liable to pay damages for breach of their directors' *fiduciary* duties. Furthermore, the directors may also be held liable in delict for a breach of their duty to exercise care, skill and diligence. The liability of directors is not only unlimited but also, the directors are jointly and severally liable to the companies they serve. Compensation can be enforced through a derivative action where a director or shareholder initiates an action to recover losses on behalf of the affected state-owned enterprise. Thus, in answer to the main research question, the common law of delict can be used to enforce the rights of a state-owned enterprise against derelict accounting board members of that State-Owned Enterprises.

In amplification of the answer to the main question, what further legal instruments are available to SOEs to hold board members liable to the company for losses caused by their failure in the exercise of their statutory duties, additional legal instruments applicable for the accountability of board members were examined in the investigation. As was found, these further legal instruments are in the form of legislation intended to foster accountability of board members for the management of the affairs of state-owned corporations in South Africa. As the earlier exposition indicated, these additional legal instruments were the Companies Act 71 of 2008 and the Public Finance Management Act 1 of 1999. As was seen in chapter 5, in both statutes the legislature saw fit to adopt the common law duties of directors. The Constitution and statutes also task the institutions to enforce accountability measures against the accounting authorities. The Handbook also recognized delictual liability for

damages against derelict public office-bearers.[1913] In addition, members of boards of State-Owned Enterprises are accountable criminally where a breach is accompanied by acts of criminality.[1914]

To answer the question of the adequacy of the existing common law and statutory remedies for holding public officials liable to compensate SOEs for wrongdoing, the writer considered various common law and statutory mechanisms to enforce the accountability of board members. Several institutions created to enforce compliance with norms and standards, were also examined. The remedies that are afforded by the Public Protector, the Auditor-General, the SIU and through the AFU of the NPA proved limited and therefore inadequate in that the remedies are geared more towards upholding the constitutional principle of accountability that offers compensation. However, as discussed in the thesis, only the common law remedy of delictual damages (also adopted into the legislation) can strike a balance between accountability as a public interest and compensation to mitigate the loss to an affected public corporation. But there is a downside in that there is a fragmentation and overlap in the mechanisms and legislative provisions. Considering this, it was found unnecessary to introduce further remedies through legislation and institutions of oversight and enforcement of the law against members of the boards of SOEs. Considering the above, there remains good reasons to consolidate available mechanisms with stringent conditions for enforcement.

The answer to the question who exercises *locus standi* to enforce the law against the accounting authorities of SOEs, becomes complex where the state organs are reluctant to hold their accounting officers liable. As indicated, directors of SOEs are the only persons legally recognised to act on behalf of the corporation. However, the relevant minister as the shareholder representative may act on behalf of the state-owned corporation, should the accounting authorities fail or be unable to act. However, the South African environment can be complex and unpredictable where some members of a board

[1913] DPSA Handbook supra note 524, ch 2 Item 17.

[1914] A host of other legislations create criminal liability as discussed. See Chapter 5, part 5.2.1.2, of this study for a discussion of criminal sanctions as a mode of accountability for board members in South Africa.

act in breach of their *fiduciary* and constitutional duty. Worse still, the complexity becomes radical if the shareholder minister him or herself has connived at the wrongdoing because of complicity in it. In that event, the default responsibility would fall on the new board to act, or the SIU should be authorised to act on behalf of the SOE. In this way, the question of *locus standi* to enforce the law against errant authorities presents a challenge that needs to be addressed by the law.

To further radicalise the complexity, the problem in the South African situation is that board members have never been held accountable for financial losses incurred by SOEs arising from a breach of directors' *fiduciary* duties. Although the position seems to have improved since 2018,[1915] the researcher found a general reluctance on the part of the authorities to use delictual remedies and other legal means to enforce accountability against derelict board members of State-Owned Enterprises in South Africa. As was indicated throughout the report, the general lack of a political will to act against errant board members of SOEs is largely attributable to the governing party's policy of cadre deployment.

Cadre deployment is a patronage system which ensures that loyal party members are deployed as office bearers in state departments and State-Owned Enterprises for reasons remotely concerned with the possession of relevant knowledge, skill and experience in the state company business.[1916] As indicated in chapter 3, in most cases the cadre deployment policy merely facilitated the placing of unqualified and at worst unsuitable persons into state departments and State-Owned Enterprises .[1917] As is now public knowledge, often the deployment of incompetent individuals facilitated the plunder

[1915] *Swifambo* supra note 161, paras 1–16; See also State Capture Commission Report Part I vol. 1 supra note 313, para 397; State Capture Commission Report Part V vol. 2 supra note 123, paras 432, 1313, 1394 & 1504, 1735–80 (also Statement and Annexure of Popo Simon Molefe, Exhibit BB, para 11.7–11.14); Part VI vol. 2 supra note 266, paras 820, 893–4, 897 & 957. For the discussion and criticism of the SIU process in part 5.1.5.2 in Chapter 5 of this study. See also Landman op cit note 1207.

[1916] State Capture Commission Report Part VI vol. 2 supra note 266, para 405.

[1917] 'When Governance and Ethics Fail' Report supra note 282, paras (xix) & (xxiv)(b)(1)–(4); President Ramaphosa's 2020 *Newsletter*, as quoted in the State Capture Commission Report Part VI vol. 2 supra note 266, paras 430.1, 430.2, 442. See also Thomas op cit note 58, 448; Thabane & Snyman Van Deventer (op cit note 13) in this regard (about the appointment of unqualified persons to lead SOEs); Barlow op cit note 61, at 62.

of the financial resources of the state entities for the benefit of the governing party.[1918] As a result of patronage, the lines between the boards of SOEs and the executive authority (the ministers) became blurred or compromised with dire consequences to the SOEs.[1919] As was seen, even the institutions which should have enforced accountability became neutralised to the point of total dysfunctionality to enforce the law against derelict members of the boards of State-Owned Enterprises . In turn, the prevalence of the culture of patronage gave rise to impunity, lack of accountability and the eventual total financial demise of several strategic SOEs in South Africa. Accordingly, it may be concluded that 'cadre deployment' remains paramount among the reasons for the lack of a political will to utilise delictual and other legal remedies to enforce the law against accounting authorities and senior executives of state-owned corporations.

It remains to deal with the question of how best to use the existing law remedies to recover damages for losses incurred by SOEs after a breach of the *fiduciary* and other statutory duties by accounting authorities.

The investigation revealed that there exists a fragmentation in the legislation and institutions of accountability. There is also an overlap in the various legislative responses and the institutions that enforce accountability of authorities of SOEs in South Africa. The factor of the duplication of resources may not be left out of this evaluation. Accordingly, the writer supports the case to address the fragmentation and overlap in the legislation and institutions exercising oversight over State-Owned Enterprises in South Africa. To achieve this, a review and vigorous consolidation of oversight structures and functions in State-Owned Enterprises are in order. Most importantly, the SIU with its Special Tribunal, as the critical agents for recovery in public administration, sadly lacks the

[1918] *Swifambo* supra note 161, paras 1–16; See also State Capture Commission Report Part I vol. 1 supra note 313, para 397; State Capture Commission Report Part V vol. 1 paras 1735–80 (also Statement and Annexure of Popo Simon Molefe, Exhibit BB, para 11.7–11.14).

[1919] State Capture Commission Report Part VI vol. 2 supra note 266, para 401. See also DPSA Handbook supra note 524, ch 2 Item 17.

independence required to achieve its constitutional objectives. The SIU and the Special Tribunal(s) need to be moved from the jurisdiction of the President. Preferably the two should be integrated into the Office of the Auditor-General. The integrated unit would also need to be made permanent and open to take complaints around issues of corruption in the public service on the lines of the present Office of the Public Protector. Obviously, the integrated SIU and Special Tribunal would address only complaints that relate to financial losses in the operation and administration of State-Owned Enterprises .

Furthermore, the civil enforcement of accountability against errant board members lacks an agent to champion the cause of SOEs against the boards and third parties found to be complicit in wrongdoing. In addition, law reformers for the civil enforcement of accountability against errant board members must keep in mind that in the past, political heads have personally participated in wrongdoing in State-Owned Enterprises . Hence, in the future, the shareholder Ministers of state-owned entities should be disqualified from acting on behalf of State-Owned Enterprises . Also important, comes the issue of prescription that should be addressed with the view to extending the prescription period in respect of the debts of SOEs, beyond the current three years. Such extension has become necessary to address the challenges that the SIU and SOEs have encountered in the past in efforts to recover monies lost to SOEs.

After a reflection on the key questions for investigation in this research, the next section proceeds to provide a summary of the findings and highlights some major findings of the research.

## 7.3 SUMMARY OF KEY FINDINGS

The study established that State-Owned Enterprises in general, have an important role to play in the economy with special regard to improving the quality of the lives of the general population in each of the countries selected for special reference in this study. Chapter 2 demonstrated several ways in which SOEs contribute to the improvement of the lives of ordinary citizens in a country. It is for this reason

that a developmental economy like South Africa saw fit to place State-Owned Enterprises at the centre of its developmental agenda and service delivery. Since 1994, the South African government has positioned the country's SOEs to enable the state to deliver on its constitutional mandate. Several SOEs in South Africa have illustrated the invaluable contribution and future potential of State-Owned Enterprises. Sadly, as the research showed in chapter 3 above, South African SOEs have been embroiled in one set-back to the next. Several strategic SOEs in South Africa have survived on the back of continuous government bailouts and guarantees.[1920] In most cases the government has had to pay the creditors when the guarantees become due.[1921] Still, to date, several SOEs are in financial distress. Consequently, the inevitable outcome was that the South African strategic SOEs abused access to drain money out of the public purse, instead of contributing to it. The drain to the public purse was in direct proportion to the degree of corrosion of the governance mechanism to loot State-Owned Enterprises[1922] The members of boards and the executive were equally complicit in the widespread financial draining of State-Owned Enterprises. The financial losses of State-Owned Enterprises continued in the face of regulations outlawing irregular, fruitless and wasteful expenditure. The explanation for continual deviations from defined financial management norms and standards was precisely as a result of official connivance of deviations that ensured immunity to state officials who trampled on accepted ethical norms.[1923] Also, the irrational decisions of some executives of the SOEs have caused these entities to lose billions of rand.[1924] As pointed out already, interference

[1920] See, for example, National Treasury Budget 2022 supra note 187, 88.

[1921] Eskom is still heavily indebted and is on 'life support' of government guarantee as its guarantees exposure currently stands at R327.9 billion (National Treasury Budget supra note 187).

[1922] See for example, the statement and Annexure of Popo Simon Molefe, Exhibit BB, para 10.12.4.3 (also, Chapter 7, part 7.3, of this study for a detailed discussion of some of the financial losses of Transnet/Prasa); Also, chapter 3, part 3.1.1, of this study for another example involving financial losses to Eskom (State Capture Commission Report Part IV vol. 3 supra note 148, paras 1281.4–281.4.2, 1613 & 1721).

[1923] See, for example, State Capture Commission Report Part IV vol. 3 supra note 148, para 1748; *Swifambo* supra note 161, paras 1–16; State Capture Commission Report Part V vol. 2 supra note 123, paras 1784 & 1786; State Capture Commission Report Part II vol. 1 supra note 159, para 17.

[1924] The 2017 investigation into the fitness of the SABC board was established by the National Assembly resolution of 3 November 2016, in terms of section 15 of the Broadcasting Act 4 of 1999, available at https://pmg.org.za/tabled-

by the executive and politicians contributed to instability in the governance of SOEs in the country.[1925] Generally, the political meddling in the State-Owned Enterprises was effected through the appointment of incumbents with ties to the executive or ruling party, as long as they could play the role of pliable proxies.[1926] Against this background, the recycling of dubious persons into the boards of State-Owned Enterprises fits the pattern of systematic theft.[1927] Under the same category might be added unqualified and incompetent appointees as long as they possessed the right political connections. [1928] Still, a further layer of the mismanagement in the SOEs was largely through the appointment of service providers.[1929]

In sum, the research demonstrated the devastating effects of cadre deployment on the South African State-Owned Enterprises . All the financial losses and related challenges facing strategic SOEs, discussed in Chapter 3 above, could be attributed to the policy.

Moving further, the writer also reviewed the duties of accounting authorities of SOEs and drew a

committee-report/2898/). AA Rust & K Swart 'A new labour era for South African Airways' (2006) *EJC* (online), available *https://hdl.handle.net/10520/EJC16984,* accessed 22 March 2023). Also, see Shoneez Bulbulia 'SAA strike to disrupt Johannesburg airport' *Mail &Guardian* 19 Jul 2005, available at *https://mg.co.za/article/2005-07-19-saa-strike-to-disrupt-johannesburg-airport/,* accessed 25 December 2022.

[1925] Final Report of the SABC Inquiry, supra note 555; The Portfolio Committee on Public Enterprises conducted an oversight inquiry into governance, procurement and the financial sustainability of Eskom, in terms of its resolution of 21 June 2017 (supra note 556).

[1926] For example, regarding the appointment of Mr Brian Molefe as GCEO for Transnet (2010), former President Zuma got Mr Molefe to be appointed at Transnet although he scored low points that were insufficient to be appointed in the position (State Capture Commission Report Part IV vol. 3 supra note 148, paras 1258.5 & 1258.6). Mr Molefe was subsequently controversially redeployed to Eskom in 2014 as its CEO.

[1927] This is according to the Portfolio Committee on Public Enterprises Inquiry Report into governance, procurement and the financial sustainability of Eskom, (Eskom Report, supra note 556). In this regard, see also, State Capture Commission Report Part IV vol. 3 supra note 148, paras 1277–78, 1281.4–1281.4.2 & 1610–1736 (see paras 1613, 1718, 1721, 1728 & 1736) & 1748. *South African Broadcasting Corporation Soc Ltd* judgment supra note 284 paras 6 & 9.

[1928] State Capture Commission Report Part I vol. 1 supra note 313, paras 148.5–149, 259 & 435 (See also paras 166-77 & 203–55); The State Capture Commission Report Part VI vol. 2 supra note 266, paras 430.1 & 430.2). See, also, Jeanne van der Merwe '*SABC board chair to face questions over CV lies*' *@City_Press* 20 July 2014, available at *https://www.news24.com/news24/sabc-board-chair-to-face-questions-over-cv-lies-20150429,* accessed 25 December 2022).

[1929] State Capture Commission Report Part IV vol. 3 supra note 148, paras 1281.4–1281.4.2, 1250.2, 1613 & 1721; See also the Portfolio Committee on Public Enterprises conducted an oversight inquiry into governance, procurement, and the financial sustainability of Eskom, in terms of per its Resolution of 21 June 2017 ('Eskom Report' available at *https://www.parliament.gov.za/storage/app/media/links/2018/november%202018/28-11-2018/final%20report%20-%20eskom%20inquiry%2028%20nov.pdf*, accessed 20 February 2019); Also, Nicolson supra note 150.

comparison with a few selected jurisdictions. In that regard, the *fiduciary* duties and the constitutional imperatives in respect of the directors of State-Owned Enterprises in those jurisdictions were examined in the investigation. Among other things, the nature of the duty to always act in good faith for the benefit of the company and the director's duty to exercise care, skill, and diligence proved to be a common motif in all jurisdictions considered in this study. As was seen, in South Africa as well, the Companies Act 71 of 2008 was promulgated to place the duty to exercise care, skill and diligence in line with the general principles of the law of delict. The researcher highlighted that members of boards of State-Owned Enterprises too, are in fact expected in common law, the legislation and the Constitution of the Republic of South Africa to adhere to the *fiduciary* duties that they owe to their companies. In consequence, any breach of the *fiduciary* duty of care, skill and diligence vests the victim SOE with a claim for damages in delict.

The writer respectfully differs with the court's assertion in *Phelps* that a claim for damages for a breach of a director's fiduciary duties is not necessarily based on delict but is *sui generis*.[1930] Thus the point was made that there is no distinction between damages for breach of *fiduciary* duties and damages founded purely in delict. Instead, a closer examination of the damages claim for breach of a director's *fiduciary* duties indicates that to succeed, the claim should satisfy all the requirements of liability under the *Lex Aquilia*, i.e. fault in the form of intent (*dolus*) or negligence (culpa) as sufficient demonstration of culpable failure to act with the required care, skills and diligence.[1931] In light of the above position, the conclusion is made in this investigation that directors in general are liable, in delict to compensate a company for financial losses caused as a result of the breach of the director's *fiduciary* duties.

Still, the question of the personal liability of company directors could potentially pose a complex

[1930] *Phelps* supra note 1453 at 170G–171E.

[1931] Ibid. See the discussion for negligence in chapter 5, part 5.3.2.4, above, of this study.

difficulty when considered in view of the limited liability of company directors against the background of the common law 'business judgment rule' principle. Regarding the business judgment rule principle, the question in this study was whether the principle is compatible with the *fiduciary* duties of directors or not. If it were found not to conflict with the good faith standard expected of company directors, a further question was whether the limited liability of directors was in harmony with the Constitution. However, the researcher has found that the common law business judgment rule is not necessarily a limitation to the liability of directors. Instead, the principle serves to enhance the directors' duty to exercise utmost diligence in the best interests of the companies they serve. Hence, it necessarily follows that the trust invested in the directors does not afford them license to be negligent in the exercise of their powers and functions. Thus, the researcher argued that the principle should not be viewed as independent of the directors' duties. Instead, the business judgment rule should generally be seen in the light of the basic common law duties of directors. Accordingly, in exercising his discretion a director is still bound by the duty to exercise care, skill and diligence as well as act in good faith in performing his duties. Thus, there remains no room for a director to act negligently in the exercise of his or her powers and performance of functions as a director. The conclusion is duly informed by the codification of the business judgment rule in the Companies Act 71 of 2008 as this Act does not provide for any limitation of the liability of directors.

Still the point of departure in this study was that even if one were to accept that the business judgment rule relaxes the liability of directors, the limitation would not be compatible with constitutional values in the case of directors of State-Owned Enterprises .[1932] On the contrary, the principle of accountability raises the bar and demands the highest standard of accountability of public office-bearers, such as accounting authorities or members of boards of State-Owned Enterprises .[1933] After all, it is not that

[1932] Section 195 of the Constitution; *EFF1 op cite note 31*, para 1.

[1933] Section 195(1)(f) of the South Africa Constitution, 1996; See also *EFF1 op cite note 31* par 1.

members of the boards of State-Owned Enterprises perform charity services in respect of public entities. As indicated in Chapter 4 above, board members of State-Owned Enterprises receive generous pay packages and enjoy attractive incentives in recognition of their rare skills, experience and disposition to exercise reflection and discernment in the carrying out of their duties for the benefit of the companies they serve.[1934]

Yet, as became clear in the study, most of the time, accounting authorities committed breaches of their *fiduciary* duties in respect of the SOEs. Regrettably even cabinet ministers too (and the state president included), were ready to connive at the breaches in several ways.[1935] Against this background, it becomes difficult to avoid the inference that the crisis in State-Owned Enterprises was intentional as it evolved amidst the culture of orchestrated impunity. All deviations from laid down norms and principles, ran against the constitutional principle of accountability in the public administration.[1936] The culture that flouted accountability prevailed despite numerous legal instruments and common law remedies available to ensure that public officials conform to the norms of accountability in the exercise of their functions and duties at SOEs.

In a similar vein, several legal instruments and institutions intended to promote accountability were reviewed in detail in Chapter 5 above.[1937] The institutions of oversight of State-Owned Enterprises covered, ranged from the parliamentary oversight mechanisms in the form of departmental Portfolio Committees and the Standing Committee on Public Accounts to the oversight of the shareholder minister(s).

The Chapter Nine Institutions reviewed ranged from the Offices of the Public Protector and the

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[1934] See also Bussin & Ncube op cit note 1240. Also, part 4.4 in chapter 4, above, of this study for a discussion of the remuneration of board members.

[1935] *DA v Minister of Public Enterprise* supra note 483, paras 1-3.

[1936] Section 195 of the Constitution, 1996.

[1937] See chapters 5 & 7 of this study.

Auditor-General to the Special Investigating Unit and its Special Tribunal(s). The researcher examined the effectiveness of all these institutions and their corresponding legislations for oversight and accountability mechanisms in respect of SOEs in South Africa.

The writer also discussed the role of a further Chapter Nine Institution, the Office of the Public Protector, with respect to promoting the accountability of the members of the boards of State-Owned Enterprises . Several examples of cases were highlighted where the Office of the Public Protector could play a significant role in ensuring that the constitutional principle of accountable public service was respected.[1938] However, as it was found, the office of the Public Protector was seen to be overwhelmed with a lot of work to do. The factor of the overstretched Office of the Public Protector was exacerbated by lack of adequate financial and human resources to carry out its constitutional mandate effectively[1939] The research also revealed an element of subjectivity in the Office of the Public Protector in that its wide powers as a powerful agent to enforce accountability and ensure compensation of a despoiled SOE, could be set back by the personal characteristics of a current incumbent, if he or she proved to be weak or self-willed.[1940]

The office of the Auditor-General of South Africa (AGSA), another layer of Chapter Nine institutions, was also reviewed. The Constitution tasks the office with the duty to conduct annual audits of organs of the state, as well as several State-Owned Enterprises . The research found that the AGSA office is best placed to effect the accountability of accounting authorities of state-owned corporations because it conducts annual audits. Moreover, the researcher examined the capacity of the Special Investigating Unit and the Special Tribunal(s) to hold board members to account for breaching their *fiduciary* duties

[1938] Section 6 (4)(a)(iv) & 6 (5)(c) of the Public Protector Act. See also the *Mail & Guardian* supra note 1077, paras 9–11; *EFF1 op cite note 31* para 51; *South African Broadcasting Corporation Soc Ltd* supra note 284, para 31.

[1939] The Commission was established in January 2018, following the recommendations of the Public Protector (Public Protector, South Africa, (Report no 6 of 2016/17) *State of Capture' Report supra note 74' Report supra note 74* (2016) para 8.2. available at *www.publicprotector.org, accessed* 24 September 2022.

[1940] See Part 5.1.4.1 above, in chapter 5 of this study.

towards SOEs. The investigation established that the SIU is tasked with the responsibility to effect recoveries on behalf of state organs, including SOEs. However, the drawback of the SIU is that it is *ad hoc* in nature and only comes into existence with the Presidential Proclamation. Consequently, despite the SIU being well-placed as a tool to achieve accountability and compensation at the same time, its effectiveness is compromised by its susceptibility to political manipulation. A further downside of the SIU is that its work overlaps with the scope of the Asset Forfeiture Unit, which falls under the ambit of the NPA. Thus, amendments to the scope of the SIU unit appear necessary. In view of the above observation, the author argued for a permanent SIU (including its Special Tribunals) but integrated into the AGSA as a unit under it. The new AGSA Unit would focus on delictual recoveries on behalf of SOEs and other organs of the state. To give effect to this recommendation would require amendments to the Chapter Nine of the Republic of South Africa Constitution, the SIU Act and the AGSA Act. However, amending Chapter Nine of the Constitution would not be an arduous task, considering the benefits that would result from the reconfiguration of the SIU, the Tribunal(s) and the Auditor General Institutions. First, as argued in this study already, the reconfiguration of the SIU and the Tribunals into the AGSA office would insulate the unit from unnecessary political interference. Second, the integration of the two offices would capacitate the new office of the Auditor-General to make it more effective to recover stolen public funds. As the Auditor-General conducts annual audits, stolen public funds could be traced before they disappear. In the past this factor has made recovery impossible.

In addition, Chapter 5 considered the disciplinary proceedings and criminal sanctions as vehicles for enforcing the accountability of board members in terms of the common law and statutes. Yet the researcher found that the main shortcoming was the widespread inability of the disciplinary committees to compensate affected companies for their financial losses. The further shortcomings of the disciplinary process found in the investigation was, first, the problem of resignations ahead of the proceedings and second, the problem posed by the difficulty to apply the process to non-executive

directors as they had no employment relationship with the state-owned enterprise.

Furthermore, Chapter 5 examined criminal sanctions, in terms of the common law and the PFMA, as a mechanism to enforce the accountability of board members. Still, in a similar manner to the weakness of the disciplinary process, criminal sanctions were found unable to fully compensate affected SOEs for losses, even when a wrongdoer could be punished for the wrongful behaviour. Moreover, the most notable factor highlighted in the research which tended to weaken both the disciplinary process and criminal sanctions, was found to be the lack of political will on the part of the governing party, to pursue disciplinary and criminal matters to finality.

In addition, the methods of enforcing accountability in terms of the Companies Act 71 of 2008 were examined in the chapter. In this regard, the investigation focused on derivative actions and the declaration of delinquency which places a deviant director on probation for a defined period.[1941] The writer observed that though the derivative action could compensate an affected company, it could only be granted by the court in limited instances.[1942] Yet still, though the declaration of delinquency could not compensate the affected company, it can afford future protection for companies by 'blacklisting' erstwhile deviant directors. The additional downside of the declaration of delinquency is that the court must declare it within 2 years after the director has ceased to be a director.[1943]

In Chapter 5 the writer also discussed the methods of accountability afforded by the Prevention and Combating of Corrupt Activities Act 12 of 2004 and the Prevention of Organised Crime Act 121 of 1998. The PCCAA is criminal in orientation. As a result, it is not geared to assist an affected state-owned enterprise to recover lost monies. In other words, although the PCCAA can hold board members accountable for their conduct in the State-Owned Enterprises , its potential to compensate a

[1941] Section 165 of the Companies Act 71 of 2008.

[1942] Section 165 (2)(a)–(d), Companies Act 71 of 2008. See Cassim op cit note 1139. See Subramanien op cit note 1123.

[1943] Section 162 (2) of the Companies Act 71 of 2008.

despoiled company is limited. On the other hand, as Chapter 5 demonstrated earlier, the POCA goes a step further since it is supported by the Asset Forfeiture Unit under the NPA.

However, the main limitation of POCA is that whatever assets or monies are recovered, become forfeited to the state. Consequently, POCA may not afford the affected state-owned enterprise the appropriate compensation for its financial losses. The study has indicated fragmentation in legislation in that the PCCAA and the POCA cater for similar matters. There is also further fragmentation in that the AFU, and the SIU mandates seem to overlap. The fragmentation between the AFU and the SIU mandates unnecessarily stretches the limited resources of the state. A further overlap was seen between the work of the SIU and the Auditor-General Office, although the latter does not necessarily litigate and is a permanent Chapter Nine Institution. However, limited state resources may be utilised more effectively with the integration of the SIU (including the Special Tribunal(s)) and the Auditor-General Office. The SIU may continue to exercise its functions under the control of the Auditor-General, while the office of the Auditor-General continues with its annual auditing function. The Auditor-General of South Africa may refer any irregularities, including the recovery of misappropriated monies of SOEs, to the SIU for further action. As the case with the public protector, a new AG Office should be open to any person to lay a complaint with this office. However, as for the Tribunal, it should continue to enjoy concurrent jurisdiction with the High Courts, as is currently the case.

Also, in Chapter 5 the writer made a comparative analysis of selected jurisdictions. The comparative analysis revealed that SOEs and their boards of directors in the selected jurisdictions functioned autonomously and operated independently of the government. In these jurisdictions the SOEs functioned in the same way as their private counterparts, where government only exercises minimal oversight through the legislative provisions. Only China was discovered to run a political system that somehow resembles the South African position regarding the nature of the operating environment.

Still, China affords directors of central state corporations a measure of independence.[1944] Indeed, the government in China, unlike that in South Africa, was committed to the independence and proficiency of directors of state companies. In addition, China demonstrated the requisite political will to transform its state companies as vehicles for profit while at the same time affording the boards the necessary independence to manage the state companies without unnecessary let and hinder. Moreover, China had a unique hierarchy of supervision of its strategic SOEs. As discussed in Chapter 6, strategic state companies operated under the SASAC, which is responsible for oversight over the state corporations. However, in China SOEs were managed by boards of directors who in turn report to the boards of supervisors. Both boards of directors and boards of supervisors were recruited by the SASAC, with the input of the minister as the relevant political head. As was observed, such an extra layer of accountability had the effect of shielding the boards of directors from uncalled for executive interference.

The fifth Chapter also examined the legal and practical possibility of using the common law delictual remedy, precisely under the *Lex Aquilia,* as a tool to secure accountability against members of boards in South Africa. Based on investigations made, it was concluded that a common law damage claim in delict for pure economic losses, was available against company directors. It was established that in South Africa, this remedy is underscored by its inclusion in legislation governing companies in general and the values enshrined in the Constitution.[1945] Nevertheless, the researcher found that remedies, such as criminal sanctions, were hardly ever used against board members in South Africa. As stated earlier, the primary reason for the failure to use delictual remedies in furtherance of accountability to recover compensation for SOEs in South Africa was largely due to the patronage network created by

[1944] Chapter IV (articles 22–9) of the Law of the People's Republic of China on State-Owned Assets in Enterprises (Order No. 5 of 2008) is dedicated to selecting and evaluating state-invested enterprises' managers Chen, Firth, Gao & Rui op cit note 830; Lin, Lu, Zhang & Zheng op cit note 829.

[1945] Section 195 of the Constitution, 1996.

the governing party through its cadre deployment practice.[1946]

Among other things, the research has confirmed that a remedy for damages in delict is available to State-Owned Enterprises to claim compensation against board members responsible for loss of financial resources of SOEs in breach of their *fiduciary* duties. Reflection on the findings of the research leads to the need to make use of the role that the SIU should be playing in initiating litigation to recover losses against company directors complicit in wrongdoing together with offending third parties.

The next section of the conclusion discusses the contribution that this study has made to the law and the general body of knowledge in South Africa, as well as impact on society.

## 7.4 THE CONTRIBUTION OF THE STUDY TO KNOWLEDGE

Given the above, the notable contributions of this study to the body of knowledge may be briefly summarised into three categories, namely theoretical, methodological and practical contributions. These are discussed below.

### 7.4.1 Theoretical Contributions

#### *7.4.1.1 Reaffirmation of delictual remedies*

Theoretically, the study has reaffirmed the common law damages remedies in the form of delict's *actio legis Aquiliae* as the best tool to hold board members to account for financial losses of SOEs caused by the breach of their *fiduciary* and constitutional duties. Redress balances the interest of the public, in the form of accountability, and the interests of the wronged SOEs by affording them compensation.

[1946] The State Capture Commission Report Part VI vol. 2 supra note 266, para 430.1–430.2.

*7.4.1.2 Integration of oversight institutions*

The most important contribution that this research makes is the proposal to merge the Special Investigation Unit and its Special Tribunal(s) with the Auditor-General. In line with the foregoing, the proposal is to make the SIU and the Special Tribunal(s) a permanent unit of the Auditor-General and part of the Chapter Nine Institutions. In line with the above view, the recommendation is to make the reconfigured Auditor-General open to receive complaints from members of the public to initiate litigation in the name of SOEs against board members and third parties who are party to wrongdoing. This is also a proposal to make the SIU independent and insulated from political manipulation whatever.

*7.4.1.3 Extension of the prescription period*

The writer's other recommendation is to amend the Prescription Act to extend the prescription period in respect of SOEs to align it with other debts owed to the state (government). The amendment is necessary to deal with the challenge of corruption in the public sector where there is lack of political will to recover on behalf of state organs and SOEs, as is currently the case.

7.4.2 Methodological Contributions

*7.4.2.1. Legal feasibility analysis*

This research employs a comprehensive legal analysis about the possibility of applying delictual remedies to board members of SOEs as their accounting authorities. This methodological approach sets a standard for similar future studies that intends to examine legal remedies in corporate governance systems.

*7.4.2.2. Comparative legal evaluation*

The study provides a comparative analysis of the accountability of directors by studying the practices

of Canada, the UK, the US, and China, which provides a fuller discussion of the methodological aspects of international best practices in the described area.

### 7.4.3 Practical Contributions

#### *7.4.3.1. Policy Recommendations for SOE Governance*

The study provides feasible recommendations, including relocating strategic SOEs to the National Treasury and revisiting the appointment and removal of SOE board members. These recommendations aim to bridge fragmentation, enhance accountability and improve the financial performance of the South African SOEs.

#### *7.4.3.2. Legislative Amendments*

The study recommends consolidation legislation dealing with SOEs to streamline their governance and oversight. In that way the move will promote uniformity in the management of SOEs by addressing the current legal fragmentation.

### 7.4.4 Contextual Contributions

#### *7.4.4.1 Confronting the challenge South African SOE*

This study contextualises its findings within the unique challenges faced by South African SOEs, particularly issues of corruption, mismanagement and political interference. In doing so, it offers solutions that are appropriate for the South African Political environment.

#### *7.4.4.2 Improving Public Sector Accountability*

This study enhances the wider discourse regarding public sector accountability in South Africa and offers invaluable insights for policymakers, legal experts, and academics specialising on governance reform initiatives in the public sector.

## 7.5 IMPLICATIONS OF THE RESEARCH

Every piece of research, particularly one that engages with the governance of SOEs, carries consequences that may reach beyond the academic exercise. The findings of this study do not exist in a vacuum: they speak directly to the lived realities of institutions that carry the public trust, manage vast national resources, and shape the socio-economic direction of South Africa. The implications therefore extend to policymakers, regulators, directors, and the broader public whose welfare is intertwined with the effective and ethical functioning of SOEs. This section reflects on what the research outcomes mean in practical, legal, and policy terms. It highlights both the challenges and opportunities that the findings bring to the fore, underscoring how they can inform reforms, strengthen accountability frameworks, and contribute towards building institutions that embody constitutional values of transparency, responsiveness, and integrity.

### 7.5.1 Theoretical implications

#### *7.5.1.1 Expansion of Accountability Mechanisms*

The findings of the study propose a need to broaden the theoretical understanding of accountability mechanisms within SOEs, incorporating both legal and institutional reforms to ensure effective oversight these public entities.

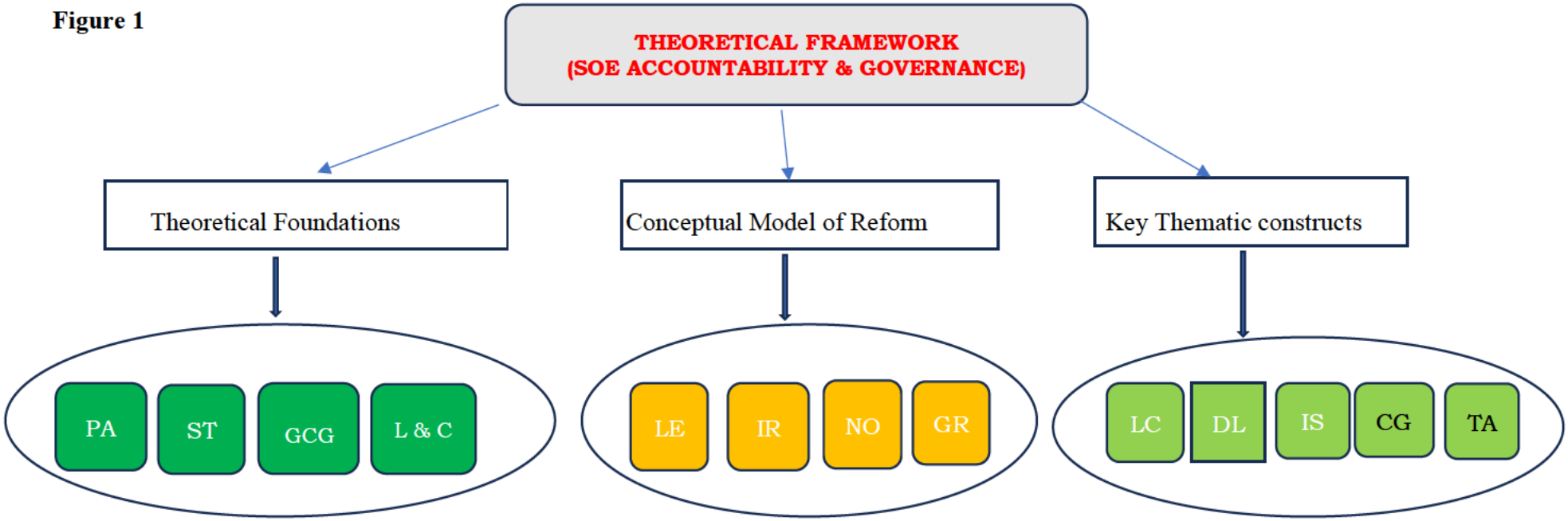
### 7.5.2 Practical and policy implications

#### *7.5.2.1 Implementation of Governance Reforms*

Policymakers may consider adopting the recommendations of this study to restructure SOE oversight, which could lead to reduced instances of corruption and financial mismanagement as well as more efficient management.

*7.5.2.2 Legislative Reforms*

**Figure 1**




**KEYS.**

**[P-A] : Principal-Agent Theory**
**[ST] : Stewardship Theory**
**[GCG] : Good Corporate Governance Theory**
**[GCG] : Good Corporate Governance Theory**
**[L&C] : Legal & Constitutional Framework**

**[LE] : Legal Enforcement of Delictual Liability**
**[IR] : Institutional Realignment for Oversight**
**[NO]: National Treasury Oversight**
**[GR]: Governance Reforms in Appointments**

**[LC] : Legislative Consolidation**
**[DL] : Delictual Liability for Accountability**
**[IS] : Institutional Strengthening**
**[CG]: Centralized Governance**
**[TA]: Transparent Appointments**

In terms of the above diagram, the research proposed legislative reforms that could harmonise the legal framework that governs SOEs and lead to simplified compliance and unified enforcement processes. This diagram organises the information into three primary sections, namely, Theoretical Foundations, Key Thematic Constructs, and Conceptual Model of SOE Governance Reform. Each section connects to its respective theories, governance challenges, and proposed solutions.

### 7.5.3 Implications for future research

#### *7.5.3.1 Evaluation of Reform Outcomes*

Future research could focus on assessing the impact of implementing the recommended reforms on SOE performance and accountability of board members.

#### *7.5.3.2 Comparative Studies*

Further studies might explore the effectiveness of similar governance structures in other jurisdictions, providing a broader understanding of best practices in SOE management.

## 7.6 LIMITATIONS OF THE STUDY

The limitations of this study may be classified into two categories: namely methodological and feasibility limitations. Each category is amplified herein below.

### 7.6.1 Methodological limitations

As was stated in the first chapter of this research, the study had three immediate limitations that may have influenced its findings; namely, it was qualitative research, rather than quantitative. Although this method may have assisted the study through in-depth insights, its reliance on desktop literature reviews may have lacked empirical rigour and the external applicability offered by qualitative approach. Granted, qualitative research may lead to subjective interpretations and challenges in replicability because of providing detailed and context-rich information, the absence of quantitative

data may be a limitation to the study's ability to generalize findings across all South African SOEs. As another limitation, the focus of the study was on a selected few strategic SOEs despite there being over 700 SOEs in South Africa. This narrow sample may not have captured the diverse challenges and dynamics common across all South African SOEs. The selective focus and Concentrating on a few key SOEs may potentially result in findings that are not representative of the entire South African spectrum of SOEs, mostly smaller and less prominent public companies that may face different governance challenges. Accordingly, this may have inherently limited the applicability of the findings of the study to the wider landscape of SOEs in South Africa.

Lastly, the comparative aspect of the study covered several countries, like Australia, China and the UK without firsthand engagement because of financial constraints. This could have negatively impacted the depth as well as accuracy of the comparative insights that the researcher has drawn from literature considered. Inherently, the study may have missed subtle differences in legal as well as governance frameworks in compared sample countries.

*7.6.1.1 Overcoming Limitations in Future Research*

To address the methodological limitations discussed above, the researcher proposes five measures for future research. These measures can provide more comprehensive and externally valid insights into the governance and accountability of SOEs in South Africa.

(i) The incorporation of mixed-methods research.

A hybrid approach that combines qualitative and quantitative methods may enrich the robustness of the study findings. The study may reach more comprehensive conclusions because of empirical evidence provided by quantitative data supporting qualitative insights of the study.

(ii) Expanding SOE sample size

Future research may also be enriched by broadening the sample size of SOEs to include a wide range

of SOEs, including smaller ones in the study. A larger sample size would enhance future research by capturing a wide range of issues of governance. In turn, this would make the research recommendations more applicable across various types of public enterprises.

(iii) Securing funding for Comprehensive Comparative Studies

For future research, the study proposes sourcing adequate financial resources for conducting in-depth firsthand analyses can enhance the accuracy of the study and the relevance of its findings. In that way, the researcher would be able to directly engage various stakeholders, while also observing governance practices in the selected jurisdictions, thus enriching data for study analysis.

### 7.6.2 Feasibility challenges

At th centre of the study is the feasibility, legally, of the employment of the common law delictual remedy of the *Lex Aquilia* to enhance the constitutional accountability of board members of SOEs in South Africa. Although this research provides valuable insights in this regard, there are several potential limitations that should be considered.

#### *7.6.2.1 Fragmented Legislative and Oversight Framework*

At present, South African legal and institutional framework for SOEs is fragmented and this fragmentation results in inefficiencies as well as overlapping mandates. This lack of cohesion can undermine the consistent enforcement of legal remedies, as multiple oversight bodies with overlapping jurisdictions may dilute accountability and weaken the effectiveness of corrective measures.

#### *7.6.2.2 Political Interference and Cadre Deployment*

The practice of cadre deployment by South Africa's governing party, where political proximities influence the appointment of board members, has undermined the independence and effectiveness of SOE boards. In turn, as legal responsibilities are often overshadowed by political considerations,

political interference has largely been responsible for weakening the enforcement of *fiduciary* duties and the application of delictual remedies against board members.

*7.6.2.3 Challenges in Locus Standi*

Where internal governance structures fail to act, determining the question of *legal standi* to initiate actions against derelict board members is often a complex one when internal structures of governance structures fail to act. In turn, breaches of directors' *fiduciary* duties may go unaddressed, because of accountability gaps due to this ambiguity.

*7.6.2.4 Reluctance in Enforcement*

The study has noted a lack of political will among authorities enforce accountability of board members of SOEs using existing legal remedies. As the study found, the reluctance to enforce legal remedies stems political considerations and it deprives the SOEs the benefit of legal measure designed for accountability.

*7.6.2.5 Inadequate Institutional Independence*

Also, the research observed that key oversight mechanisms, like the SIU & the Special Tribunal, are subject to executive influence and lack sufficient independence. This lack of independence impedes impartial investigations as well as the effective enforcement of accountability mechanisms.

*7.6.2.6 Constrains of Prescription period*

The three-year period for debts, including those owed state organs like SOEs may be insufficient to uncover and act upon complex financial misconduct. In turn, this limits the window period for effective legal recourse.

*7.6.2.7 Complexity of derivative actions*

Derivative actions afford shareholders or directors to sue on behalf of the company.[1947] However, these legal proceedings are often costly, complex, as well as time consuming and have the potential to deter stakeholders from litigating on the company's behalf.

*7.6.2.8 Cultural and systematic issues*

The study has uncovered the prevalent culture of impunity and lack of accountability within South ASOEs, undermining legal frameworks. Legal remedies on their own may be insufficient to drive meaningful change in the culture. Instead, a fundamental shift towards ethical governance and integrity is also necessary for effective legal fireworks. Consequently, comprehensive reforms about consolidation of oversight mechanisms, depoliticisation of appointments of SOEs' boards, addressing the issue of the locus standi for enforcement actions, the extension of prescription periods in claims for SOEs, simplifying the procedures for derivative actions, and nurturing a culture of accountability within SOEs are necessary to address these limitations.

Next, part 7.7 is the conclusion, providing a key take-away from this chapter.

## 7.7 CONCLUSION

The evidence gathered in this study makes a stark point: South Africa possesses a reasonably comprehensive body of legal instruments to hold SOE directors to account, yet accountability continually falls short because of systemic weakness rather than legal vacuum. Problems of *locus standi,* insufficiently independent oversight bodies, a permissive culture of patronage, procedural barriers to derivative claims, and the short window afforded by prescription together create an environment in which wrongdoing can flourish, and redress is the exception rather than the rule. A

[1947] Section 165 of the South African Companies Act 71 of 2008.

meaningful recalibration therefore requires more than legislative tinkering. It demands an integrated reform agenda that addresses structure, procedure and culture at once. Structurally, consolidation and clarification of governance rules, whether through a single framework for strategic SOEs or via a strengthened holding company model, would reduce fragmentation and give citizens clearer lines of accountability. Procedurally, widening avenues to litigate on behalf of harmed SOEs (with safeguards against frivolous suits), lengthening prescription periods for complex financial misconduct, and simplifying derivative actions would remove technical roadblocks to redress. Institutionally, insulating oversight bodies from executive capture and elevating the role of impartial actors such as the National Treasury, the SIU and an empowered Special Tribunal are necessary to ensure investigations and prosecutions are pursued without fear or favour.

Lastly, none of these measures will succeed without a deliberate project to shift norms: depoliticised appointments, professionalised boards, stronger whistleblower protection, and a leadership culture that prizes integrity over patronage. Legal reforms must therefore be accompanied by political commitment and civic vigilance. The ultimate test of any reform is whether it restores public confidence in SOEs as instruments of development rather than vehicles for private gain. If South Africa is to realise that promise, the balance between director autonomy and public accountability must be decisively redrawn so that the law protects both sound commercial judgement and the public interest it was created to serve.

# CHAPTER EIGHT

# THE CONCLUSION AND RECOMMENDATIONS

## 8.1 INTRODUCTION

This chapter brings the study to its close by consolidating the central arguments and insights developed throughout the thesis. The focus has been on the accountability of board members in South Africa's State-Owned Enterprises, particularly through the application of delictual remedies for financial losses caused by dereliction of their fiduciary duties as reinforced by constitutional imperatives. Much has been written about criminal sanctions and political reforms in the wake of state capture. However, this study has shown that civil liability, specifically the use of the *actio legis Aquiliae,* remains an underexplored but crucial tool for enforcing responsibility and restoring financial integrity of South African SOEs. The narrative that has emerged is not one of isolated misconduct, but of systemic governance failures within SOEs.[1948] These failures have been shaped by political interference, weak oversight, and the erosion of ethical leadership, all of which created conditions for large-scale corruption and inefficiency.[1949] The Zondo Commission provided a comprehensive diagnosis of the state capture phenomenon, yet its recommendations leaned heavily towards criminal prosecutions and institutional restructuring.[1950] This research complements that body of work by advancing a civil-law perspective: if directors and accounting authorities are held personally liable for financial losses, SOEs may recover much-needed funds and, at the same time, create a culture of deterrence against future

[1948] I Chipkin & M Swilling *et al* (2018). Shadow State: The Politics of State Capture. 10.18772/22018062125.

[1949] See chapter 2 of this study.

[1950] State Capture Report Part VI vol. 6.

misconduct. The significance of this perspective cannot be overstated. SOEs are not peripheral institutions; they sit at the heart of South Africa's developmental agenda. Eskom, PRASA, Transnet, SAA, and the SABC, among others, carry responsibilities that directly affect economic stability, infrastructure, and social wellbeing.[1951] Their decline has come at a heavy cost to the fiscus and to the trust of citizens.[1952] It follows that restoring their effectiveness requires more than symbolic accountability; it demands enforceable consequences and structural reforms that reposition SOEs as reliable custodians of public resources.

This study has made it clear that South Africa's legal framework already contains the tools for such accountability, even if they remain underutilised. The *actio legis Aquiliae* provides a pathway for holding directors liable where their negligent or intentional conduct causes financial harm.[1953] [7] Coupled with constitutional imperatives of accountability and transparency,[1954] [8] the action in delict is not a foreign or radical imposition but a natural extension of South Africa's legal heritage. In this way, delictual remedies can fill the gap left by criminal sanctions, which are often delayed or undermined by procedural and political obstacles.[1955]

The chapter proceeds with three interconnected objectives. First, it synthesises the findings of the thesis, drawing together the key arguments advanced in relation to accountability, governance, and remedies. Second, it outlines specific recommendations that are both legally feasible and practically necessary for improving SOE governance. Third, it reflects on the broader implications of these recommendations for constitutional democracy and the rule of law. The recommendations presented are structured around five focal points that flow directly from the study questions and findings.

[1951] National Planning Commission (2021), para 11.

[1952] AGSA, supra note 16 at 9.

[1953] *Olitzki Property Holdings* supra note 1504 at para 12.

[1954] Constitution, section 195.

[1955] Mureinik op cit note 1888 at 40.

Namely: **(1)** ***The enforcement of delictual remedies against directors and accounting authorities.*** This recommendation is central to ensuring that individuals are not shielded by the institutional form of SOEs but are held personally accountable for financial losses caused by their misconduct.[1956] **(2)** ***The reconfiguration of the Special Investigating Unit.*** By granting the SIU both investigative and enforcement powers, it can play a decisive role in recovering funds lost to corruption and negligence within SOEs and providing the affected SOE with redress – financial compensation.[1957] **(3)** ***The relocation of oversight functions away from the Department of Public Enterprises (DPE) to the National Treasury.*** This would ensure more coherent fiscal discipline, align governance with financial accountability, and reduce opportunities for political interference.[1958] **(4)** ***Strengthening governance frameworks.*** This includes enforcing merit-based appointments, enhancing transparency in board selection, and embedding ethical leadership principles into the institutional culture of SOEs.[1959] Lastly, **(5)** ***The consolidation and refinement of legislative frameworks governing SOEs.*** By harmonising the Public Finance Management Act, 1999 , the Companies Act, 2008, and the founding statutes of SOEs, South Africa can remove ambiguities and legislative fragmentation, thereby creating clear lines of responsibility, within SOEs.[1960]

These recommendations proffered in this chapter are neither abstract nor aspirational. Instead, they are grounded in South Africa's lived reality of governance failure and they are informed by comparative lessons from other jurisdictions that have managed to balance public accountability with operational efficiency.[1961] At their core, the recommendations affirm the central thesis of this research; namely, that accountability, particularly in its civil law dimension, is not only possible but

[1956] *Fisheries Development Corporation* supra note 1560 at 165.

[1957] SIU Act 74 of 1996, section 4.

[1958] Department of Public Enterprises Annual Report 2021/22 at 7.

[1959] King IV Report on Corporate Governance for South Africa (2016), Principle 7.

[1960] Public Finance Management Act 1 of 1999 section 51; Companies Act 71 of 2008 section 76.

[1961] Keay supra note 1890 at 670.

indispensable if SOEs are to be stabilised and restored as engines of service delivery and development.

In the sections that follow, the conclusions of the study are set out in greater detail before moving to a discussion of the recommendations themselves. The chapter ends by situating the contribution of this research within the broader scholarly and policy debates on governance reform in South Africa, underscoring its practical as well as theoretical significance.

## 8.2 THE RECOMMENDATIONS

The Commission of Inquiry into State Capture primarily recommended that investigations and criminal prosecutions must be opened against persons implicated in the stripping of the financial resources of SOEs and that ministers proved to have been complicit in the plunder of state resources be censored. The Commission hardly recommended compensation for state-owned corporations looted in contravention of the directors' *fiduciary* duties. As a result, the scope of the State Capture Commission is distinguishable from the scope of this study in that the terms of reference for the Commission were wider. Meanwhile, the scope of this thesis was limited to the feasibility of using the *Actio Legis Aquiliae* as a form of redress for the affected SOEs. Yet, the Commission investigations enriched this study immensely through its extensive research and verification of data that was initially seen in media reports. As a result, the recommendations emanating from the conclusions made in this study and those of the State Capture Commission complement one another.

To improve accountability, strategic management and efficiency of SOEs in South Africa and to effect compensation to state owned entities that have suffered loss through corruption and mismanagement, the researcher accordingly makes the following recommendations:

### *8.2.1 Vigorous enforcement of damages in delict*

The main issue for investigation in this thesis was the use of the delictual remedy to hold board members of state-owned corporations accountable for financial losses caused to the company owing

to a breach of *fiduciary* and constitutional duties. It was concluded that a claim for damages in delict remains the best remedy to effect compensation of all wilful and negligent financial losses arising from acts of mismanagement. In view of the foregoing observation, the study recommends a vigorous pursuit of delictual remedies on behalf of SOEs. Not only is the common law delictual remedy a means to effect retribution and deterrence, but it also ensures compensation to a state-owned corporation for financial losses occasioned by a breach of directors' *fiduciary* duties. What is meant by the above recommendation is that wilful and negligent breach of duty attracting liability, should be distinguished from a scenario where directors make a wrong decision in good faith. Enforcing compensation in the latter case would have a counterproductive effect by discouraging suitably qualified candidates from serving on the boards of SOEs. On the contrary, enforcing accountability through damages in delict would stabilise SOEs and improve their financial health, while also upholding the constitutional principle of accountability.[1962]

### *8.2.2 Reconfiguration of the SIU (and the Special Tribunal) and the Auditor-General.*

As the study makes clear, the SIU and its Special Tribunal(s) play a central role in civil recoveries in the public administration. Consequently, the SIU needs to be made a permanent unit capable of carrying out its mandate independent of the executive arm of the state. Therefore, the researcher recommends that the SIU Act 74 of 1996 should be amended to allow the SIU (and the Special Tribunal) to operate as a permanent Unit, with the same statutory mandate, and to integrate into the Office of the Auditor-General. This reconfiguration would in turn require amendments to the Auditor-General Act (the Public Audits Act 25 of 2004) and Chapter Nine of the Constitution to accommodate the relocation of the SIU (and the Tribunals) into the AG office. The reconfigured SIU and AG office would still be under the supervision of the Auditor-General and the Parliament oversight structure, the same as is the case with the Auditor-General. The new SIU should be specifically tasked with

[1962] Section 198 of the Constitution,1996.

concurrent jurisdiction as the accounting authorities, to litigate in the name and on behalf of the SOEs.

### *8.2.3 The relocation of strategic SOEs to the National Treasury.*

The writer highlighted a fragmentation in SOEs in that they fall under various departments and headed by different ministers, depending on the services they dispense. As a result, some SOEs even straddle between more than two national ministries, depending on their service mandates. Other SOEs, such as Eskom, fall under the supervision of even more than one Ministry. This fragmentation creates confusing duplication and contributes to the leadership and governance crisis which impedes the progress of SOEs in South Africa. The fragmentation results in multiple centres of power as orders and instructions to a single public entity emanate from different 'bosses'. Consolidating major SOEs under the Treasury (and Finance Ministry) as a shareholder representative would be sensible for one main reason. The Treasury is the custodian of the public purse, and SOEs have time and again come for bailouts and guarantees in times of financial crisis. The National Treasury has for several times had to bankroll ailing SOEs for a long time at a great loss to it. As the Finance Ministry is the only department with a relatively secure term of office for its Minister, the integration of strategic SOEs under it, would make good fiscal and governance sense. For years, the National Treasury has been relatively the most stable government department and is less affected by corruption.[1963] This work notes that government plans to replace the Department of Public Enterprises are at an advanced stage. However, the writer argued that the proposed SOE holding company does very little to address the pressing problems associated with SOEs in South Africa. Instead, it is relocating the problems of State-Owned Enterprises , while creating a new centre of political power struggles which are largely to blame for the collapse of most of the major SOEs in South Africa. Thus, this work recommends that as an alternative to the establishment of a new unit at the National Treasury, the proposed SOE

[1963] Since the advent of the new era under the democratically elected government, finance ministers have rarely been changed before 2018 when former President Zuma replaced the finance minister and then replaced the replacement in the space of three days.

Holding Company should be solely accountable to the National Treasury. Accordingly, the writer recommends that the Department of Public Enterprises should be dissolved (as already proposed by the government and a new SOE Unit that will be responsible for all the affairs of the proposed SOE holding company and its SOEs subsidiaries be established at the National Treasury. The National Treasury, through the SOE Unit, should be responsible for the oversight of all the affairs of the holding company and its subsidiaries (i.e., the country's strategic SOEs), including the appointment and removal of board members. The SOE Unit and the SOE Holding Company (including all its subsidiaries) will account to Parliament.

Relocating key SOEs to the Treasury would create much-needed stability as the relocated SOEs would fall under the oversight of one Parliamentary Portfolio Committee, i.e., the Finance Portfolio Committee.[1964] As a shareholder representative, the Minister of the National Treasury, through the SOEs Unit (and/or the SOE Holding Company), would be tasked with the responsibility to sue and recover damages for losses incurred by SOEs.

### *8.2.4 Fixing governance of State-Owned Enterprises .*

The appointment and removal of members of boards for SOEs has been a further underlying challenge facing SOEs in South Africa. Generally, the research showed that there is no uniformity regarding the hiring and dismissal of SOE boards. The hiring and firing process has been marred by political interference and the abuse of power by ministers in the name of exercising ministerial oversight in the appointment and removal of members of boards of state-owned corporations.[1965] The improper exercise of the ministerial power by the shareholder representative has created instability for the SOEs and often proved partly responsible for the failure in SOEs.[1966] The researcher has found that the issue

[1964] Of course, all public entities that deal with public money are also accountable to SCOPA. This will still apply with respect to SOEs.

[1965] See also State Capture Commission Report Part IV vol. 3 supra note 148, paras 1255–1346.

[1966] Ibid, paras 1255–1346.

of the appointment of board members into SOEs has tended to compromise the independence of the boards of SOEs. In turn, contestation in disciplinary application has led to the collapse of corporate governance and financial instability of SOEs. Compromised and patronised board members have largely been responsible for the financial ruin of SOEs.[1967]

Therefore, even if strategic SOEs would remain within their respective departments, or relocated to the National Treasury, the writer would recommend that the power to appoint and remove members of boards for SOEs needs to be reviewed.[1968] It is, therefore, suggested that it would be desirable that the members of boards should be appointed by the SOE Unit. In line with the preceding view, it is proposed that the appointments of board members should be conducted through a transparent public interview platform, following an open nomination process.[1969] The nomination process would have to be open to all suitable and qualified members of the public.[1970] To achieve the latter, appointment to SOEs should be transparent and not based on patronage or allegiance to any individual or party-political formation. Furthermore, a new method for appointing board members ought to be hammered out. Ideally, the new method should not be based on the majoritarian principle but on qualifications, competence and proven experience.[1971] Not only would the open recruitment process curb patronage and nepotism, but it would also enable the recruitment of the most suitable candidates in the public sector and scale down corruption in the country's State-Owned Enterprises .

Getting back to the basic constitutional principles and values in terms of section 195 of the Constitution, would result in the replacement of incompetent boards and executives of SOEs with

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[1967] Eskom Inquiry Report at 105 para 2.8.

[1968] See the remarks of the chairperson of the State Capture Commission, CJ Zondo, about the illegality of the cadre deployment policy (Capture Commission Report Part VI vol. 2, op cit note 266 para 575)

[1968] State Capture Commission Report Part VI vol. 2 par 576; also, *Mlokoti* supra note 273.

[1969] Section 195(1)(1) and (2) of the Constitution, 1996.

[1970] That is, should the review process so recommend.

[1971] Sections 195 (1)(i) & 197 (3) of the Constitution of 1996. See also *Mlokoti* supra note 273.

qualified persons to fit the job. Thus, independent boards would supervise the management of the affairs of SOEs without fear or favour. Independent non-executive board members would no longer be proxies for the executive or business interests of the politically connected.[1972] In turn, professional appointments would turn around the fortunes of State-Owned Enterprises in South Africa.

### *8.2.5 Consolidation of legislation and management of SOEs*

Lastly, *the study* concluded that there is a fragmentation in legislation about the management of SOEs. The SOEs are managed in terms of the Public Finance Management Act 1 of 199, the Companies Act 71 of 2008, and other statutes.[1973] The multiplicity of statutes applying to SOEs tends to fragment the management and supervision of these state corporations. The fragmentation also extends to the terms of office of board members. It is therefore, advised that the legislation that regulates the management of the affairs of all strategic State-Owned Enterprises should be reviewed and amended. To bring uniformity in their management, the recommendation is that all key SOEs should be regulated in terms of a single legislation, as is the case in China and Australia, for example. Ideally, the same Act would have to regulate the appointment and fix the terms of office of all boards of State-Owned Enterprises. Similarly, the appointment and removal of members of boards from office across all State-Owned Enterprises, would have to be uniform.[1974] It is submitted that the amendments would help stabilise the governance of SOEs by providing, *inter alia,* security of tenure for board members and guarantee the independence of all boards.

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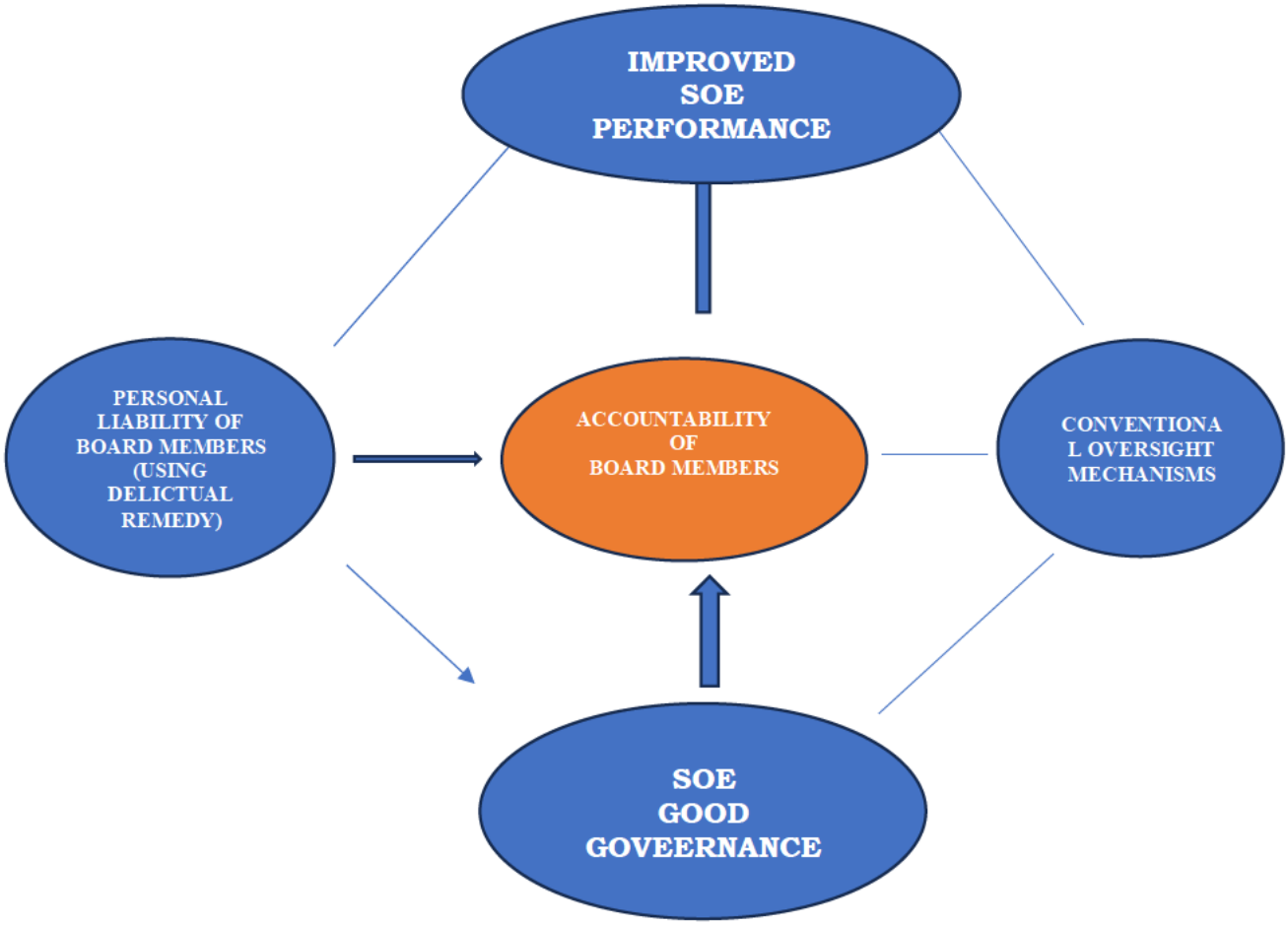
[1972] Eskom Report supra, note 556 at para 2.8.20.

[1973] This was discussed in chapter 5 of this research.

[1974] For example, when the Portfolio Committee on Communications conducted an inquiry into the SABC Board and the affairs of the SABC, there was no board in place, but only the Chairperson of the board remained after all other non-executive members resigned. The Portfolio Committee still recommended the dissolution of the board, when virtually the broadcaster had no board. This creates confusion regarding what constitutes the board, especially upon the resignations of board members.

**The graph bellow and the final part of the conclusion provide a synopsis of the closing observations.**

**Figure 2**




Ordinarily, conventional oversight mechanisms ought to lead to good governance of SOEs, accountability and improved SOE performance. However, as the diagram above shows, they lead to neither desired outcome – they are ineffective. On the other end, the study finds that personal liability of SOE board members for derelict in their fiduciary obligations will lead to quadruple effects on SOEs. Namely, it will directly feed into (1) improved SOE performance; (2) accountability; (3) SOE good governance; and (4) good SOE governance will result in accountability, which in turn leads into improved SOE performance.

## 8.3 CONCLUSION

The primary aim of the thesis was to investigate the legal feasibility to hold board members (accounting authorities or directors) of State-Owned Enterprises personally liable in delict to the State-Owned Enterprises for financial losses occasioned by breach of their *fiduciary* and constitutional duties. The culture of impunity that dominated the state-owned corporations, especially during the second decade in South Africa, did not happen by accident, but was planned and orchestrated to ensure non-enforcement of accountability measures. In this wise, the lack of accountability explains how and why perpetrators escaped both criminal and civil sanctions for immersing SOEs in a never-ending cycle of irregular, fruitless and wasteful practices. As this study has shown already, the law in South Africa and in other jurisdictions, like Canada, the UK, the US and China provides for civil liability for damages arising from a breach of a director's *fiduciary* duties. It is trite history that a lack of enforcement of accountability measures, both civil and criminal, has led to the near collapse of State-Owned Enterprises in South Africa. A culture of impunity within the sector of SOEs has also entrenched a patronage network which the law giver will have to pay attention to in the future.

The study argued for the activation of the enforcement institutions to uphold the constitutional principle of accountable public administration. However, maximum enforcement will only be possible once the boards of state-owned corporations discharge their duties outside the parameters of the official government influence. Once the independence of SOE boards is secured, the deployment policy currently in use to appoint board members of SOEs in South Africa will be dispensed with. The investigation also concluded that the common law remedy under the *Lex Aquilia* is the most appropriate tool for achieving the accountability of top officials in SOEs. Accordingly, shareholder ministers will need to be moved from the DPE (and other departments where they are housed) into Treasury, because various shareholder ministers have been found to be collusive in the losses sustained at State-Owned Enterprises In a nutshell, the writer recommends that the National Treasury

be the agent that acts on behalf of the strategic SOEs.

In this research the writer has also argued that the remedial action that the Auditor General may take, in terms of the Public Audit Act 25 of 2004, is inadequate, particularly as it does not hold accounting authorities personally liable to compensate State-Owned Enterprises for financial losses stemming from a breach of directors' *fiduciary* and constitutional duties. The inadequacy is also in contrast with the remedial action of the Public Protector, which is wide enough to make any appropriate order.[1975] However, regarding the advantages offered by such a powerful sword in the hands of the Public Protector in the form of its remedial action, the Public Protector process is hamstrung by a lack of adequate financial resources to carry out its investigations.[1976]

This research has made further proposals which will also improve the oversight mechanisms and ensure efficient recovery of losses (damages) of state-owned corporations. Namely, the incorporation of the Special Investigating Unit and its Special Tribunal(s) into the Auditor-General of South Africa as its Unit responsible for civil recoveries on behalf of state organs. Hence, this opens the prospect for future research into the legal implications and the feasibility of effecting this recommendation of this study.

As part of exploring the desirability and legal feasibility to hold accounting authorities personally liable using the common law delictual remedy, the researcher revisited various legal instruments available for oversight over State-Owned Enterprises. Generally, this research has found that there is fragmentation among South African institutions and instruments of oversight of the organs of the state, from parliamentary committees to Chapter nine institutions, such as the Public Protector and the Auditor General. There are other institutions, such as the SIU and its Special Tribunal, which operate parallel to these other institutions. The fragmentation is also seen among various legislations meant to

[1975] *EFF1* op cite note 31.

[1976] 'State of Capture' Report supra note 74, para 8.1-8.8.

fight acts of corruption and the like, such as PCCAA and the POCA, as well as the SIU and Special Tribunals Act.[1977]

Thus, this study has argued for the integration of the Auditor General and the SIU, including its Special Tribunals. The argument was to reconfigure the SIU (and the Special Tribunals) into a chapter nine institution as units of the Auditor General. The proposal was that the SIU and the Special Tribunals should operate in the same manner as the Competition Commission, as well as its Competition Tribunal and the Competition Appeal Court. It was argued that moving the SIU and the Special Tribunal into the office of the Auditor General would yield positive advantages, such as the saving on costs. Such a move is also likely to result in efficiency in oversight and recovery of losses, as the Auditor General does annual auditing. The Auditor General would also be able to use the provisions of the SIU and Special Tribunals Act[1978] to recover damages on behalf of State-Owned Enterprises . Also, integrating the SIU and Special Tribunals into the office of the Auditor General would ensure their independence, taking them away from the control of the State President and executive.

The investigator has also bemoaned the fact that the process of the SIU is not open to the public, but only open to the State President who has the constitutional prerogative to authorise the SIU recovery process. Hence, as in the case of the Public Protector, in which the process allows members of the public to participate by lodging complaints, the SIU process should operate in the same manner. The SIU should have a complaint system that is akin to that of the Public Protector, allowing individual members of the public to lodge complaints, especially against public office-bearers, including accounting officers. The system should also permit members of the public, to litigate on behalf of the state-owned corporations in the Special Tribunal, with or without the SIU, which suffers financial loss, against accounting authorities and third parties. As it was argued, all this process should take

[1977] Special Investigating Units and Special Tribunals Act 74 of 1996.

[1978] Ibid.

place in the SIU and Special Tribunals, reconfigured under the directorate of the Auditor General.

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