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# REVIVING ACCOUNTABILITY PRINCIPLES IN STATE OWNED COMPANIES - A CRITICAL STUDY OF THE GOVERNANCE FRAMEWORKS GOVERNING STATE OWNED COMPANIES IN SOUTH AFRICA

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As the candidate's supervisor, I agree to the submission of this dissertation in the form of integrative material for examination.

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Date: December 2018

## DECLARATION

I, **SBUSISO DANIEL SPHELELE MADONSELA,** Student number **204523637,** declare that,

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## ABSTRACT

State owned companies are an important ingredient to economic development, in particular to South Africa as a developing country. They are created to serve a public interest objective and each entity derives its specific mandate from the state's strategic objective. It is therefore important for these entities to be properly governed and operate within the realm of best governance and legislative frameworks. Notwithstanding this reality, State owned companies are generally embroiled in corruption and maladministration, which, in most cases, ultimately affect their ability to deliver on their mandate. If these trends continue unabated, they have a potential of creating instability within the country; erode confidence of the public in government and its entities; diminish public trust and negatively affect economic development

Answers must be found, and urgently put in place, to turn the tide and revive accountability principles in state owned companies. This dissertation moves from the premise that corporate governance principles and practices and strict compliance with the requirements of legislative frameworks hold the much needed answers in addressing the fundamental governance failures and challenges faced by state owned companies and provides an overview of key corporate governance principles provide some pointers as to how these principles must be applied within the governance frameworks of State owned companies

## ACCRONYMS / ABBREVIATIONS

| | |
|---|---|
| CEO | Chief Executive Officer |
| NDP | National Development Plan, RSA, 2011 – Vision 2030 |
| OECD | Organisation for Economic Co-operation and Development |
| PFMA | Public Finance Management Act, 1 of 1999, as amended |
| SCM | Supply Chain Management |
| SOC | State Owned Company |
| SOE | State Owned Entity |

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CHAPTER ONE

## 1. INTRODUCTION AND BACKGROUND

The state, or government, plays an important role in the development of a country's economy. The state has the ability to incorporate legal entities, known as state owned entities (SOEs) or state owned companies (SOCs), for the purpose of participating in commercial activities in order to positively stimulate the economy. These SOCs are established in several key sectors of the economy. For instance, the Water Services Act 108 of 1998 is the legislation that constitutes water boards[1] in the country under the oversight responsibility of a member of the executive authority responsible for water and sanitation and their primary mandate is to supply bulk water to municipal customers who in turn must supply to end users.

The Electricity Act 42 of 1922 created the Electricity Control Board (ECB) and the Electricity Supply Commission (what is today known as Eskom) with the specific statutory powers and mandate to supply electricity. The South African Broadcasting Corporation's (the SABC) existence dates back to the early 1900s, but the Broadcasting Act 73 of 1976 was the legislative instrument for its incorporation. The SABC became known as the mouthpiece of the apartheid government, which is one of the reasons why in 1999 the Broadcasting Act 4 of 1999 was enacted to establish a new broadcasting policy and to re-position the SABC from being the mouthpiece of the apartheid government to becoming the public broadcaster that is independent, impartial and free from political manipulation.

The Industrial Development Corporation (IDC), an SOC operating in the financial industry, with the primary aim of developing new businesses and growing existing ones was established in 1940 as a national development finance institution set up to promote economic growth and industrial development in terms of the Industrial Development Corporation Act 22 of 1940.

Other key SOCs providing key infrastructure for the economy are Transnet, South African Airways (SAA), the South African Post Office, Airports Company of South Africa and Telkom to mention but a few.[2] All these companies were incorporated by the state to serve a

[1] Water boards are classified as schedule 3B National Government Business Enterprises in terms of the Public Finance Management Act 1 of 1999, hereafter referred to as PFMA.
[2] Major public entities listed in schedule 2 of the PFMA.

particular public interest objective.[3]

The common rhetoric, particularly in the media and business / investment circles, regarding South African SOCs is one of inefficiency, non-delivery, maladministration, fraud and corruption. Such rhetoric ultimately points to weaknesses in these entities' governance. SOCs, unlike private companies, bridge the divide between corporations and the public. Due to their unique political and socio-economic dynamics and operations, SOCs warrant special attention in relation to more efficient corporate governance policies and implementation frameworks with the aim of improving SOCs' performance.

This dissertation seeks to analyse the state of affairs on how companies are currently governed in South Africa, with a particular focus and emphasis on SOCs. As alluded to earlier, there is a substantial number SOCs operating in a wide range of industries. This paper does not purport to analyse all of them, but will confine itself to key court decisions affecting SOCs that have placed SOCs under scrutiny for alleged poor corporate governance. The aim will be to identify governance shortcomings and challenges faced by some of the key SOCs, and weigh them against the legislative and regulatory framework. Further lessons will be sought from instructive jurisprudence laid down by the courts. The paper will then attempt to formulate proposals that may improve governance in state owned companies.

## 2. STATEMENT OF PURPOSE

The purpose of the study is to evaluate the legislative and regulatory frameworks governing SOCs with the view of pin-pointing governance challenges experienced by key SOCs and evaluate key court judgments with the view to contribute to the public discourse that aims at reviving the best governance and accountability principles in South Africa's state owned companies.

## 3. SIGNIFICANCE

As a developing country crippled by gross levels of inequality, poverty and unemployment, South Africa's SOCs are one of the key catalysts to the stimulation of economic activity in South Africa.[4] The success of the broader objective largely depends on the sustainability of

[3] 'National Development Plan 2011 - Vision 2030', available at *https://www.gov.za/sites/default/files/devplan_2.pdf.* accessed on 22August2018
[4] Ibid.

these SOCs, more importantly the resilience of their governance frameworks becomes key to the success of the country. As demonstrated in chapters to follow, some scholars point out that corporate governance is highly correlated with better corporate performance.[5] If this was true then South Africa desperately and urgently needs properly governed SOCs that are systematically and fundamentally resolute to act within the confines of the legislative and regulatory frameworks.

It is often argued that the success of a government can be measured by the resilience of its governance structures and systems and adherence to those by all, irrespective of the positions they hold. It is equally important to analyse and assess the effectiveness of SOCs through the evaluation of their governance prescripts. Where there are areas of concern or improvement, such challenges must be identified to encourage the dialogue and enrich the jurisprudence, hoping that those who occupy positions of influence would ultimately motivate for the adoption of such invaluable contribution to the broader discourse.

## 4. RESEARCH QUESTIONS

This dissertation seeks to answer the following questions:

- What is the objective of state involvement in business activity (formation of state owned companies)?
- What is the significance of good corporate governance principles, particularly in relation to state owned companies (SOCs)?
- What could be attributed to the dismal failures of state owned companies?

These questions will culminate into the main question of this dissertation, namely: Why is corporate governance a challenge for SOCs?

## 5. METHODOLOGY

The dissertation is based on a qualitative approach, analysing various documents on the subject matter, amongst others, the Constitution of the Republic, various pieces of legislation to which SOCs are obligated to comply with, judicial guidance through court judgments, codes

[5] Klapper & Love 'Corporate governance, investor protection, and performance in emerging markets' (2004) 10 *Journal for Corporate Finance* 703-705.

of best practices in corporate governance, to mention but a few. Information coming from the mentioned categories of documents provides clear guidelines and answers to the research question. The dissertation further looks at scholarly articles on the subject matter.

## 6. OVERVIEW OF THE DISSERTATION

*Chapter one: Introduction*

As evidenced above, this chapter provides an introductory overview to the study; it indicates the objectives and the significance of the study and further, as will be shown below, also provides the structure of the research showing the flow of the contents as will be found in chapters to follow. In addition to the introductory chapter, this dissertation is made up of five other chapters:

*Chapter two: Defining corporate governance*

This chapter seeks to highlight the significance of corporate governance within the SOCs whilst defining key concepts relevant to addressing corporate governance challenges faced by SOCs.

*Chapter three: An overview of the legislative framework*

This chapter will from a corporate governance perspective, and at a high level, display the legislative framework within which SOCs are mandated to exercise their functions and objectives within the realms of the law.

*Chapter four: Key role players*

This chapter will describe the roles and interplay of different role-players involved in the governance of SOCs as envisioned by applicable legislation and through court decisions.

*Chapter five: An overview of selected SOCs*

This chapter looks at some of the key SOCs who have had their governance challenges laid bare in the public domain, and through their exposure, jurisprudence has been developed. The reference to these selected SOCs is in the context of legislative provisions and regard will be given to court judgments involving these SOCs relating to their legislative mandate and regulatory frameworks.

*Chapter six: Conclusion and Recommendations*

This chapter concludes the research paper by summarizing the study findings and assessing whether the study objectives were met. It also makes some key recommendations on how to respond to the identified challenges.

## CHAPTER TWO: DEFINING CORPORATE GOVERNANCE

### 1. INTRODUCTION

The previous chapter highlights corporate governance as a critical variable in promoting economic development, particularly in South Africa, but the same holds true around the world. For example, the World Bank described Africa's stifled development as a 'crisis of governance'.[6] This chapter seeks to define corporate governance whilst providing an overview of key corporate governance concepts and their significance in relation to South Africa's SOCs. Such concepts include accountability, transparency and ethics.

### 2. DEFINING CORPORATE GOVERNANCE

Despite the popularity of the term 'corporate governance', its precise definition has proven elusive largely because the notion has been analysed and defined from different stakeholders' perspectives. Below are some definitions offered by academics and business practitioners.

There is academic support for the view that corporate governance refers to the set of internal and external controls that reduce the conflict of interest between the managers and shareholders deriving from the separation of ownership and control.[7] The significance of this is highlighted in chapter 4 below where the different role players in SOCs are discussed. Further to this relationship-based definition, other well renowned experts on the subject of corporate governance, define corporate governance as the 'relationship among various participants in determining the direction and performance of corporations'.[8] They list shareholders, management, and the board of directors as primary participants in corporate governance.[9]

A view from the shareholder's perspective is offered by Dr Sternberg, who defines corporate governance as 'the mechanism by which corporate actions are geared toward achieving corporate objectives established by shareholders'.[10] She opines that it is ultimately the shareholder's responsibility to ensure that management uses the corporation's assets effectively and efficiently to fulfill corporate objectives.[11] This view finds support in Sir Cadbury's view that corporate governance dictates that a director's sole consideration when conducting the

[6] World Bank 'Held by the visible hand: The challenge of SOE corporate governance for emerging markets' 2006 28 *Journal of General Management* 1.
[7] Fama & Jensen 'Separation of ownership and control' 1983 26 *Journal of Law and Economics* 301 326.
[8] Monks & Minow *Corporate Governance* (1995) 1.
[9] Ibid.
[10] E Sternberg *Corporate Governance Accountability in the Marketplace* (2004) 10.
[11] Ibid.

corporation's business is the best interests of the shareholder, to the exclusion of other stakeholders.[12]

A broader approach, which the thesis supports, is offered by Naidoo who envisions corporate governance as a system of checks and balances that ensure a balanced exercise of power, compliance with its legal and regulatory obligations, the management of risk, and accountability to the broader society in which the corporation operates.[13] Naidoo also places emphasis on leadership that is accountable, transparent, and answerable to the company's stakeholders, whilst balancing the shareholders', the corporations' and societal needs as a whole. This definition has special relevance to SOCs given the political and socio-economic environment in which they operate. They are, by law, expected to operate in a transparent manner and they must be put through scrutiny and are fundamentally accountable to the general public merely because they serve as stewards on behalf of the general public.

In line with the broader approach that is supported by this dissertation, the OECD defines corporate governance as:

> 'a set of relationships between a company's management, Board, shareholders and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined.'[14]

Khan defines corporate governance as the processes, customs, policies and laws that direct corporations in the way they carry out and control their operations, whilst enhancing the long term shareholder value by ensuring accountability and improving the corporation's performance.[15]

Taking the broad approach too far is Hyden[16] who opines that governance refers to the duty or task of running a government or entity.[17] With this definition, officials involved in corruption

[12] Mongalo 'Self regulation versus statutory codification: Should the new regime of corporate governance be accorded statutory backing?' (2004) *Journal of Contemporary Roman Dutch Law* 266.
[13] Naidoo *An Essential Guide for South African Companies* (2002) 1.
[14] Available at *http://www.fsb.org/2015/09/cos_040401/*, accessed on 27 October 2018
[15] Khan *A Literature Review of Corporate Governance* (2011) 1.
[16] Hyden *The Concept of Governance in Africa* (1992).
[17] Ibid.

can claim to have adhered to corporate governance as they did not necessarily derelict their duties whilst looting. This strict definition could lead to an untenable position. However, to his credit, Hyden adds that there must be a 'conscious management of regime structures with the view to enhance legitimacy of the public realm',[18] which by implication, entails that there must be rules and processes geared toward eradicating practicing that would tarnish the entities' legitimacy, for example corruption. The definition must necessarily be restricted by concepts that eradicate instances of corruption and maladministration that plague SOCs. Such concepts are discussed in the next section.

The definitions above, notwithstanding merit in them, are either too narrow or are presented in a convoluted manner adding elements that are redundant or rely on the purpose of corporate governance, rather than defining it. Stripped to its essence, the paper submits that the appropriate definition of corporate governance is:

> 'A legal and rule based regulatory framework that governs the running of an entity based on the principles of accountability, transparency, ethics, good faith and the reputational wellness of the corporation'.

## 3. KEY DOCTRINES OF CORPORATE GOVERNANCE

The next chapter analyses the legislative and regulatory framework of corporate governance. Before delving into that topic, it is important to discuss key concepts and principles associated with public finance raised in such framework. It would be a futile exercise attempting to draw an exact recipe of governance that would be effective for all corporations.[19] This is due to the fact that there are numerous variables involved, such as the environment and culture in which a corporation operates; the applicable legal framework; the history of the relevant society; and the roles of the active market forces.[20] However, having traversed the literature, as will be shown below, one can extrapolate a few key principles that appear universal to all corporations with good governance and form the basis for the South African legal and regulatory framework. These are discussed in turn below:

### *(a) Accountability*

In the context of South Africa's constitutional democracy, government, its officials and all public entities, must account for their actions to the citizenry. For instance, section 32 of the

[18] Ibid.
[19] Dodija *Emergence of Corporate Contract Set, Governance and Accountability* (2008) 4.
[20] Williamson 'Corporate governance' 1984 93 *Yale Law Journal* 1197.

Constitution[21] promotes access to information as a way of promoting accountability.

This requires that those entrusted with the public entities must display care and responsibility in carrying out their mandates, which in turn fosters a culture of openness, honesty and productivity.[22] SOCs are bound by the Constitution, which means that accountability forms the foundational basis of good governance. Directors are accountable to shareholders and management is accountable to directors.

In addition to accountability, the King Reports, in particular King II (2002) and King III (2009) and King IV (2016) mention related principles such as discipline, responsibility, fairness, and transparency.

*(b) Transparency*

Transparency entails an openness and willingness to report accurate information to all stakeholders. For instance, reporting requirements specified in sections 32 and 40(4) of the PFMA require that SOCs report expenditure and revenue information for all programs to the National Treasury on a monthly basis.[23] In addition, SOCs are legally required to provide reports to other departments and institutions, such as the National Treasury, the Auditor General, Provincial Treasuries, and the Offices of the Premiers.[24] As entities of state, SOCs are accountable to parliament to report on their activities on an annual basis.[25] Parliament represents the voice of the people- considering that parliamentarians are public representatives elected in terms of the electoral legislative process. For this reason, amongst many others, activities by parliamentarians in exercising their representative duties, take place in an open atmosphere that allows parliament to be open to the general public, including during parliamentary briefings on the performance of the SOCs. This is a fundamental aspect of good corporate governance for SOCs.

Transparency is a key component for driving growth and progress as all government institutions, business and the general public is privy to governments' business. Transparency indicates benevolence and builds trust and confidence with investors, the general populace and

[21] Section 32 of the Constitution of the Republic of South Africa, 1996.
[22] Gildenhuys *Public Financial Management* 1993.
[23] Fung 'The demand and need for transparency and disclosure in corporate governance' (2014) 73 *Universal Journal of Management* 80.
[24] Ibid.
[25] Section 65 of the PFMA.

is a foundation for economic stability.[26]

*(c) Ethics*

An ethical perspective of corporate governance is founded on core values of integrity, honesty and trust.[27] It is said that corporations with reputations of good ethical practices are more likely to attract talent, investment and have a positive influence in the market which creates customer loyalty.[28]

Some academics contend that negotiated and expressed ethical standards and values form the foundation of corporate governance.[29] Rossouw submits a concept of 'the governance of ethics' which supposes a corporation's ethical governance through, amongst other things, the development of codes of ethics and rules of conduct, and requires that the boards of directors and staff be trained on such codes, and an ongoing assessments or audits on the adherence to the codes.[30]

As mentioned above, SOCs are plagued by allegations of maladministration, corruption and deliberate disregard of the rules or regulatory expectations. This speaks to a general lack of ethical standards in the general administration of SOCs and, the thesis submits that government must take positive and urgent steps to re-inculcate ethical standards in particular in SOCs.

## 4. THE ROLE OF CORPORATE GOVERNANCE IN SOCS

As mentioned above, SOCs are government's arm mandated to further the agenda of state development, for a public purpose and in the interest of the general populace. An element of an emerging economy, such as South Africa, is a 'major preoccupation… to ensure sustained economic growth and development on the back of high rates of accumulation, industrialisation and structural change.'[31] Although there many variables and stimulus for economic growth, the performance of SOCs is of critical importance, much of which hinges on good governance practices. OECD research submits that globally, SOCs account for twenty percent of investment

[26] State Capacity Research Project 'Betrayal of the promise: How South Africa is being stolen' available at *https://pari.org.za/betrayal-promise-report/* accesses on 26 October 2018.
[27] Arjoon *Corporate Governance An Ethical Perspective* (2005) 20.
[28] Ibid.
[29] Young & Thyil *Anglo-based Governance- Rules versus Flexibility: The Continual Debate Contemporary Issues in International Corporate Governance* (2009) 11; see also Fleming & McNamee 'The ethics of corporate governance in public sector organizations' (2005) 7 *Public Management Review* 137, who argue that a moral philosophy drives a corporations governance.
[30] Rossouw 'The ethics of corporate governance: A (South) African perspective' (2009) *51 International Journal of Law and Management* 10.
[31] United Nations DESA 'State-owned enterprise reform national development strategies policy notes.' 2007 available at http://esa.un.org/techcoop/documents/PN_SOEReformNote.pdf . accesses on 27 October 2018

and five percent of employment. In Africa, they produce around fifteen percent of GDP, in Asia eight percent and in Latin America six percent, whereas in Central and Eastern Europe the sector remains significant, accounting for 20 to 40 percent of output.[32]

To bring it home, in South Africa, in the 2010/2011 financial year, two major SOCs, Eskom and Transnet made up more than two-thirds of the total procurement expenditure in SOCs (R114 billion) or seventeen percent of government's total procurement budget.[33] Furthermore, both these SOCs were listed in the top eight state guarantee exposure, meaning if Eskom's debt alone were to be repayable, this could immediately bankrupt South Africa. [34] This illustrates how important it is for SOCs to be properly governed and remain in a going concern trajectory.[35]

According to the World Bank, the overall performance of many SOCs globally has been below par, with meagre productivity compared to their private counterparts.[36] The World Bank argues that SOCs have been used by politicians to reward their supporters and gain in popularity, leading to distorted financial systems and monetary policy.[37] Choang and Lopez-de-Silanes,[38] and the World Bank[39] attributed SOCs' poor performance squarely on fundamentally flawed governance problems. In the late 1970s, many countries began attempting to turn this tide by introducing reforms aimed at enhancing SOC performance through improved governance. Although strong governance may not remedy all ills that plague SOCs, such as corruption, it has been argued that good governance assists with the early diagnosis and treatment of such ills.[40]

[32] OECD *OECD guidelines on corporate governance of state-owned enterprises* (2005).
[33] Ibid at 26.
[34] Ibid.
[35] 'The Auditor-General's report on the status of state owned enterprises 2016/2017' available at *http://www.agsa.co.za/Portals/0/Reports/PFMA/201617/GR/04percent20statuspercent20ofpercent20state-ownedpercent20enterprises.pdf accessed on 19 November 2018*
[36] World Bank 'Held by the visible hand: The challenge of SOE corporate governance for emerging markets' 2006 28 *Journal of General Management* 1.
[37] Ibid.
[38] Chong & López-de-Silanes *Corporate Governance in Latin America* (2007).
[39] World Bank op cit note 36.
[40] Khoza & Adam *The Power of Governance: Enhancing the Performance of State-Owned Enterprises* (2005).

## 5. CONCLUSION

Good corporate governance should be a key feature in how the affairs of every SOC are managed. Failure to appreciate the significance of corporate governance and relegating corporate governance to triviality, as illustrated above, risks undermining the constitutional principles of accountability, transparency or openness and is a good recipe for poor performance by SOCs.

## CHAPTER THREE: AN OVERVIEW OF THE LEGISLATIVE FRAMEWORK

### 1. INTRODUCTION

As mentioned in the introductory chapter, government implements its programmes through legally constituted national or provincial departments. Over and above the government departments, the state can, in some instances, fully participate in the mainstream economic or business ventures through its own companies who are treated differently to executive government departments.[41] The legislative environment allows the state (on behalf of the people of South Africa) to form companies. There is, therefore, a distinction between the government departments, whose tasks are primarily to implement policies, whilst business ventures by the state are primarily aimed at operating outside the public service, but within public administration whilst exploring business advantages without being frustrated by government bureaucracy, or red tape accustomed to state decision making complexities.[42] A typical SOC is usually a creature of statute whose mandate is for the general benefit of the public. As the Presidential Review Committee Report suggests there is a need to '… review whether South Africa's SOEs are functioning according to the common agenda.'[43]

The governance mandate, primary activity, oversight reporting obligations and operating perimeters of SOCs are usually entrenched in the statute that creates such an SOC, in some instances through executive decision promulgation, hence SOCs are obligated to act within the legislative mandate given to them by the enabling legislation. Some key pieces of legislation will be critically analysed throughout this study and the effect they have on the governance expectations of that particular SOC.

#### *(a) The Constitution of the Republic of South Africa*

The constitutional dispensation ushered in an era where the government is mandated to realise the values of the Constitution. This mandate is a recurring theme throughout the Constitution, starting from the preamble which foresees the creation of 'a society based on democratic values, social justice and fundamental human rights'. It reads:

> '…We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to —

[41] Ibid at 3.
[42] Ibid .
[43] 'Report: Presidential review committee on state owned entities (South Africa) vol 2 at 28', available at https://www.gov.za/sites/default/files/presreview.pdf , accessed on 17 August 2018

… Improve the quality of life of all citizens and free the potential of each person …'

To echo the values enshrined in the Constitution, the writer agrees with the National Planning Commission and the Presidential Review Committee on State-Owned Entities' reports when they make the assertion that SOCs are the delivery arm of the government for the realisation of ultimately 'a public interest mandate.'[44] If that were so, then governance instruments and management policies and procedures must reflect the same value systems as enshrined in the Constitution. In buttressing these values, section 32 of the Constitution deals with access to information. It stipulates that everyone has the right to information held by the state and its organisations, which is binding on SOCs. Adherence to this results in transparency in the running of SOCs.

As the dictum in *Alfred McAlpine & Son*[45] poignantly demonstrated, long before the advent of this democratic dispensation, that the general trend was that those in positions of authority in SOCs failed to demonstrate openness and accountability for mishaps that occur in those respective companies.

All role-players in the governance of SOCs have a duty of care and this duty should be the epitome of how SOCs operate. The duty to act with 'reasonable care' is central to ensuring the sustainability of state owned companies. All those who are given the responsibility to manage or provide oversight assurance over the affairs of SOCs are charged with a legal obligation to act to the best interest of the company and to act in good faith at all material times.[46] The themes of openness, transparency and accountability are further highlighted in the PFMA.

*(b) Promotion of Administrative Justice Act 3 of 2000*

It is trite that the legislative framework in South Africa has placed an important burden on the directors of SOCs, shareholders, management and prescribed officers to ensure that they all act in the best interest of the company and, ultimately, in the interest of the public.[47] The

[44] Ibid.

[45] *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* (1974) 3 SA 506 (A); also affirmed in *Nedcor Bank Ltd v SDR Investment Holdings Co Pty Ltd and others* (2008) 11 ZASCA at 12.

[46] *Fisheries Development Corporation of SA Ltd v Jorgensen* (1980) 4 SA 156 (W).

[47] Section 33 of the Constitution affords citizens the right to just administrative action and reads: 'Just administrative action.(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair. (2) Everyone whose rights have been adversely affected by administrative action has the right to be given

Promotion of Administrative Justice Act (PAJA) defines administrative action as any decision, including failures to take a decision, by an organ of state that has an adverse effect on a person's rights. By virtue of section 239 of the Constitution,[48] SOCs – notwithstanding their separate legal identity - constitute organs of state. As such, PAJA is applicable to the conduct of SOCs. It is trite that decisions taken by organs of state constitute administrative actions[49] which require that decisions by officials, using public money, on behalf of a public body, acting purportedly in the public interest must always ask themselves whether they are acting in a just manner, in a rational manner, and there is adequate transparency in such decision making. This is the fundamental aspect of promoting good governance by all organs of state, but and more importantly by SOCs. This has been emphasised by the Supreme Court of Appeal.[50] In *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others*[51] the court stated:

> '…it is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law ─ to the extent at least that it expresses this principle of legality ─ is generally understood to be a fundamental principle of constitutional law.'

In *Mvoko v SABC* [52] the court held:

> 'In this respect, regard should firstly be had to the basic values and principles governing public administration set out in s 195 of the Constitution which provides, amongst others, that services must be provided impartially, fairly, equitably and without bias, and that public administration must be accountable. In terms of s 195(2) these principles apply to administration in every sphere of government, organs of state and public enterprises'.[53]

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written reasons.(3) National legislation must be enacted to give effect to these rights, and must— *(a)* provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal; *(b)* impose a duty on the state to give effect to the rights in subsections (1) and (2); and *(c)* promote an efficient administration.'

[48] Section 239 reads: _In the Constitution, unless the context indicates otherwise—; organ of state means—
*'(a)* any department of state or administration in the national, provincial or local sphere of government; or
*(b)* any other functionary or institution (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer; see also section 1 of the Legal Proceedings Act 40 of 2002, and *Haigh v Transnet Ltd* (2115/2010) [2011] ZANCHC 41 (2 December 2011).

[49] *Umfolozi Transport (Edms) Bpk v Minister van Vervoer en Andere* (1997) 2 *All SA* 548 (SCA) 552 j – 553;see also *Transnet Ltd. v Goodman Brothers (Pty) Ltd (373/98)* (2001) 1 *SA* 853 (SCA).

[50] *Oudekraal Estates (Pty) Ltd v The City of Cape Town & others* (25/08) (2010) 1 SA 333 (SCA).

[51] *Greater Johannesburg Transitional Metropolitan Council & others* (1999) 1 SA 374 (CC), at para 56.

[52] *Mvoko v SABC* (1066/2016) (2017) ZASCA 139 at para 35.

[53] Ibid para 35.

*Mvoko v SABC*[54] further illustrates that the corporate governance of SOCs must be informed by principles of impartiality, fairness and equity, and accountability. Judicial review of administrative action and the procedures to be followed when instituting such proceedings are governed by sections 6 and 7 of PAJA. Such grounds of review were outlined in *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd*[55] as:

> 'a) failure to apply one's mind to the relevant issues;
> b) that the decision was arbitrary or capricious or mala fide;
> c) that the decision was as a result of an unwarranted adherence to a fixed principle;
> d) that the decision was arrived at in order to further an ulterior or improper purpose;
> e) that the decision was as a result of taking into account irrelevant considerations or ignoring relevant facts; and
> f) that the decision was grossly unreasonable.'

It is submitted that although the standard set by courts for rational, lawful and transparent actions by organs of state is generally the same, it is of critical importance to SOCs who are arguably at the forefront of enhancing economic activity in South Africa – the developmental agenda.[56]

*(c) Public Finance Management Act 1 of 1999 (PFMA)*

The PFMA was promulgated to give effect to chapter 10, read with chapter 13, of the Constitution, primarily to ensure the protection of the public purse by government departments, organs of state and the SOCs or any other legal entity that falls within public service or public administration.

The PFMA gives effect to section 216 (1) of the Constitution which speaks to the establishment of a National Treasury whose role is to prescribe and ensure both transparency and expenditure control in each sphere of government by introducing generally recognised accounting practices and uniform expenditure classifications, and uniform treasury norms and standards.

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[54] Ibid.
[55] *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* 1988 (3) SA 132(A) 152 A-E. Specific to section 6(2) of the Promotion of Administration of Justice Act 3 of 2000.
[56] Presidential Review Committee Report op cit note 43 at 36.

By means of the PFMA, the National Treasury is empowered to determine the financial management framework and set the norms and standards that are applicable to all spheres of government. The Constitution also accords the Treasury with the responsibility to oversee other organs of state in all spheres of government.[57] To illustrate the powers vested in Treasury, section 49(3) of the PFMA, indicates that Treasury may approve or instruct another functionary of a public entity to become an accounting authority. The active role played by Treasury in managing the affairs of the SOCs increases the accountability and reporting requirements of the SOCs.

The Auditor-General (A-G) constitutes another layer of governance structure overseeing the financial management affairs of SOCs. The A-G's powers and duties are enumerated in the Public Audit Act 25 of 2004 and the PFMA. In terms of section 6 *(a),* the A-G can investigate or audit the financial statements of any public entity. The A-G is thus an important role player in accountability related issues in relation to SOCs. Some SOCs are also governed by the Companies Act 71 of 2008. As has been observed in the A-G's latest report on the status of state-owned entities, there still exists numerous of areas of non-disclosure and sub-minimal performance from SOCs, all of that pointing to the reality that there still remain major governance challenges in SOCs.[58]

The critical question is: What happens when all role players are unable to detect the governance lapses or are party to the mishaps? What is clear from recent court judgments[59] is that in the governance framework of SOCs, there are a number of value contributing players starting from management to directors, then to assurance providers (like company secretary, auditors), then outside interested parties (like investors), then shareholder representatives, then the public, on whom the reliance on their bona fides is crucial.

[57] Section 216 of the Constitution, read with section 49 of the PFMA.
[58] Ibid at 35.
[59] See Constitutional Court judgments in *EFF v Speaker of Parliament & others* (CCT76/17) (2017) ZACC 47; 2018 (3) *BCLR* 259 CC (29 December 2017); *South African Broadcasting Corporation SOC Ltd & others v Democratic Alliance & others* (2015) 4 *All SA* 719 (SCA); *the Public Protector v Mail and Guardian Ltd & others* 2011 (4) *SA* 420 (SCA); and *SOS Support Public Broadcasting Coalition & others v SABC & others* (81056/14) (2017) ZAGP *JHC* 289 (17 October 2017).

*(d) The Companies Acts*

The main legislative prescript governing the affairs of Companies in South Africa has over a long time been through the Companies Act 61 of 1973 (the old Act), more recently through the Companies Act 71 of 2008 (the new Act). Over and above these two pieces of legislation, there are other pieces of legislation dealing with issues around the rules regulating how companies, through their directors and employees, ought to conduct their affairs; the recourse shareholders have against directors of the company in which they hold shares; the protection of the interests of employees and third parties.[60]

The new Act ushered in a new dispensation that sought to bring the legislative framework to par with modern challenges in the realm of company law. The preamble to the new Act suggests that policy makers felt that the old Act had become obsolete and needed to be overhauled in its entirety and by introducing provisions that would make it relevant to the new challenges faced by companies and the public in general on company law matters.

*(e) Prevention and Combatting of Corrupt Activities Act 12 of 2004 (PCCAA)*

Section 34 of the PCCAA creates a duty to report corrupt activities. Anyone who holds a position of authority and who can be expected to reasonably know that an offence has been committed is obligated to report any corrupt activities they may become aware of.

On this premise, it is evident that an analysis of the governance of SOCs must necessarily be conducted at a macro and micro level. Due to the external political influences on SOCs, the macro level relates to the interface between managers, board members, ministers and parliament. A microcosmic analysis elucidates the relationship between the board of directors, senior management, shareholders, prescribed officers and auditors.

## 3. CONCLUSION

When all of these players are unable to observe the legislative frameworks within which they should operate, or are unable to detect, or are intrinsically part of, the governance failures in SOCs, then the public protector or all chapter 9 institutions are the last line of defense. This means all these players are part of the defense and they should all play the key part in

[60] The most significant for this dissertation are the Close Corporations Act 69 of 1984; Insolvency Act 24 of 1936; and the Johannesburg Stock Exchange (JSE) rules applicable to companies listed in the JSE, Shareholders' Agreements; Memoranda of Incorporation.

defending the public interest in their spheres of responsibility. This study makes a few suggestions on how such defenses by all the role-players can be enhanced with the view of reviving the best governance principles in SOCs.

## CHAPTER FOUR: KEY ROLE PLAYERS

### 1. INTRODUCTION

Over and above some of the role players that are mentioned in the concluding remarks of the previous chapter, this chapter describes the roles and interplay of key, but not all, different role players involved in the governance of SOCs. It starts with a description of the relationship between government and SOCs' boards of directors, and ends off with an analysis of the relationship of between the Executive and the Parliament.

### 2. PARLIAMENT

#### *(a) Introduction*

The different spheres of government derive their powers from the Constitution. The National Assembly and Provincial Legislature exercise an oversight role over the executive arm of government. Sections 55(2)[61] and 42(3)[62] of the Constitution empower the National Assembly to put in place measures that ensure that the executive arm is accountable to it, and for the National Assembly to maintain an oversight on the executive's exercise of its authority and implementation of legislation. Section 92(3) *(b)*[63] of the Constitution mandates the executive to provide full and regular reports of their dealings to Parliament.

The executive exercises an oversight role over SOCs. As such, the Constitution vests power on the National Assembly and the provincial legislatures to oversee executive and SOE performance. This role is facilitated mostly through annual reports, which are regulated by statutes such as the PFMA and the Public Service Act 103 of 1994, as amended. Section 65[64] of the PFMA requires the Executive to table the annual reports for SOCs. There are 35 national departments overseeing over 250 SOCs. Parliamentary committees have been put in place to

[61] Powers of National Assembly are provided below:
'(1) …(2) The National Assembly must provide for mechanisms— *(a)* to ensure that all executive organs of state in the national sphere of government are accountable to it; and *(b)* to maintain oversight of— (i) the exercise of national executive authority, including the implementation of legislation; and (ii) any organ of state.'

[62] Section 42(3) reads 'The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action.'

[63] Section 92(3) 'Members of the Cabinet must— *(a)*… act in accordance with the Constitution; and *(b)* provide Parliament with full and regular reports concerning matters under their control.'

[64] Section 65:'Tabling in legislatures.—(1) The executive authority responsible for a department or public entity must table in the National Assembly or a provincial legislature, as may be appropriate— *(a)* the annual report and financial statements referred to in section 40 (1) (*d)* or 55 (1) *(d)* and the audit report on those statements, within one month after the accounting officer for the department or the accounting authority for the public entity received the audit report;'

handle the sheer volume of reports the executive tables before Parliament. The introduction of the committees has the added benefit of creating specialised expertise in certain fields.

*(b) Parliamentary committees*

*(i) Public accounts committee*

The audit reports of the Auditor General are reviewed by the Standing Committee on Public Accounts (SCOPA). This committee plays the important role of protecting public money. It fulfils this role by scrutinising issues raised in the Auditor-General's audit reports, financial probity issues, and compliance issues with relevant legislation, expenditure considered unauthorised, fruitless and wasteful. SCOPA will also scrutinise risk management systems and corporate governance issues.

*(ii) Portfolio committees*

Portfolio committees concern themselves primarily with service delivery performance of SOCs. They do this by reviewing non-financial information contained in the annual reports of SOCs. They however consider the SOC's financial performance in order to obtain a holistic appreciation of the SOC's performance. They use the performance indicators presented in annual reports as a yardstick to measure performance. These committees also evaluate the quality of the reports and they consider management's explanation of poor performance, if any, and steps taken by management to rectify the circumstances. They then investigate the circumstances that led to the underperformance and the impact on service delivery

The collaboration between SCOPA and the Portfolio Committees cannot be gainsaid if one is to obtain an overall picture of SOC performance. The success of the process depends heavily on the quality of information received from other role players. Corporate governance is critical throughout the entire process.

## 3. THE GOVERNMENT'S/EXECUTIVE'S ROLE

*(a) Introduction*

The executive's relationship with SOCs is multi-faceted. As owner and shareholder, the executive seeks satisfactory returns on investments. As policy maker, the executive aims for efficient and effective implementation of policies and service delivery through SOCs. As the regulator, the executive concerns itself with the interests of the consumer by regulating industry practices and pricing structures.

*(b) Oversight role*

The executive's oversight role entails monitoring and reviewing the affairs and practices of the SOC. The guiding principles in that regard are informed by the principles of good governance. The boards of directors of SOCs and their management are thus accountable to the executive and must ensure that all the necessary and appropriate corporate governance structures and controls are put in place and properly implemented. This oversight role is done in accordance with Section 52 of the PFMA. In the event of non-compliance or unsatisfactory performance, the executive has the power to dismiss directors and re-constitute the board of SOCs.

*(c) Policy role*

The Constitution vests policy making authority in the executive arm of government. The executive thus shapes policy to meet the needs and mandate of South Africans. These policies, through the relevant ministers, are communicated down to the SOCs charged with implementing and delivery on the policy. The minister must ensure that the SOCs are capacitated to implement these policies. This entails putting necessary structures and practices, such as good governance, in place. Thereafter the executive's role becomes one of monitoring and reviewing SOCs performance.

*(d) Regulatory role*

The government has established regulators for specific industries. These regulators regulate a myriad of issues, ranging from pricing, consumer interests, to other industry interests. The relationship with the regulators and SCOs is more independent and objective, as compared to the shareholder relationship the executive has with the SCOs.

## 4. THE BOARD OF DIRECTORS

*(a) Introduction*

The governing body of SOCs is the board of directors. It is ideally comprised of a mix of executive and non-executive directors equipped with the necessary skills to guide SOCs at a strategic level. Its mission is to fulfill the mandate of the SOCs, commercially and in terms of government policies, whilst remaining within the confines of the law, regulations and corporate governance prescripts. The board must exercise full and effective control over SOCs as it has ultimate responsibility and accountability for the performance of SOCs. The

board is bound by fiduciary duties as per the Companies Act of 2008 and the PFMA.

*(b) Powers and duties of the board of directors*

The board of directors enjoys broad powers enabling it to execute its mandate. It is the board's duty to produce an annual budget to be submitted to government and to the National Treasury. This budget must, amongst other things, contain:

- 'Plans for the SOC to have effective, efficient and transparent systems of operational, risk management and financial internal controls;
- Plans for the monitoring of the executive management;
- Succession plans for senior executives;
- Ensure that the SOC operates ethically;
- The SOCs internal audit system in compliance with sections 76 and 77 of the PMFA;
- An appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective; and
- A prevention plan against irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure not complying with the operational policies of the SOC'.

The board is responsible for submission of the SOCs' reports to Parliament and the Treasury. In terms of section 55 of the PFMA, the board must:[65]

• 'keep full and proper records of the financial affairs of the SOE;
• prepare financial statements for each year in accordance with GAAP;
• must submit the draft financial statements within two months after year-end to the treasury and auditors for auditing; and
• must submit the audited statements within 5 months after the financial year-end to Government, National Treasury and the Auditor-General'.

The King Codes recommend that the board has a charter setting out its responsibilities, which should be documented in its annual report. The boards of SOCs are the conduit through which corporate governance principles are implemented in SOCs. The executive must closely monitor that the board fulfills this role.

[65] Section 55 of PFMA.

The Chief Executive Officer, who ordinarily must be appointed by the oard, must focus on the efficient and effective running of the operations of the SOCs. The Chief Executive Officer is accountable to the board. There is often a pre-occupation by the executive authorities (ministers, who exercise shareholder representative responsibility) to want to be involved in the appointment of Chief Executives. Corporate governance principles,[66] government's own policy documents[67] and case law[68] dictate that this should not be so.

## 5. CONCLUSION

It is therefore important that each of the role players understand their role and discharge their responsibility to the SOC in accordance with the principles of good governance and in compliance with the legislative prescripts. Failure to appreciate this fundamental point, has the potential of diverting energies of those in charge of the SOC and ultimately bring instability and cause inadequate performance to the detriment of the SOC and the public in general.

[66] King Reports on Corporate Governance (King I, II, III and IV).
[67] Examples of such documents are the NDP and Presidential Review Committee on State Owned Entities.
[68] *SOS Support Public Broadcasting Coalition & others v South African Broadcasting Corporation SOC Limited & others; SOS Support Public Broadcasting Coalition & others v South African Broadcasting Corporation SOC Limited & others* (81056/14) [2017] ZAGPJHC 289 (17 October 2017).

# CHAPTER FIVE: AN OVERVIEW OF SELECTED SOCs

## 1. INTRODUCTION

This chapter presents an overview of three SOCs, namely the SABC, Eskom and Transnet and related governance challenges each has been faced with highlighting the importance of governance principles to safeguard SOCs. The overview of these corporations will be the broad topics surrounding the applicable legislative and regulatory environment, the interplay between the respective boards with management and performance monitoring mechanisms, role of shareholders as against that of the boards and funding regime for these SOCs. The chapter will also assess the political and market influences on these SOCs and the impact on corporate governance issues.

## 2. SABC

### *(a) Historical overview*

The historical overview of the SABC is divided into two eras, the apartheid and the post-apartheid eras. During the apartheid era, the SABC was merely a pawn used for the state's propaganda and oppressive agenda. The change of regime in 1994 precipitated the transformation of the SABC into an important avenue of promoting democratic and constitutional values.

The South African government first established the SABC in 1936 with radio services offered first in English and Afrikaans. Only in the 1950s and 60s did the SABC introduce radio services broadcast in African languages. During this period, the SABC was the mouthpiece of the National Party's (NP) led government. The Broadcasting Act was the primary regulating statute, which gave the NP's government exclusive control over broadcasting policy formulation and regulations. During this period, governance and management of the SABC lacked transparency and accountability to the general public. The SABC catered for the white minority to the exclusion of other races.

At the dawn of the constitutional dispensation in the early 90s, the NP and the ANC engaged in negotiations where the NP did not want the ANC to have unfettered control over the airwaves, whilst the ANC did not want the NP to maintain strangle hold it had over the same airwaves. This tussle of power brought during the Conference of Democratic South Africa (CODESA) in 1992, brought about the Independent Broadcasting Act no 153 of 1993. The idea was to have

an independent broadcaster. Whilst that was elusive during the apartheid era, some academics argue that that remains the case even during the constitutional era because the board is still plagued by undue political influence.

*(b) The legislative and regulatory overview of the SABC*

The SABC is governed by the Constitution, the PFMA, the Companies Act, and the Broadcasting Act. Section 195 (1) of the Constitution provides that all public administration and management in all spheres of government should be efficient and effective in terms of resources, as well as be economically viable and accountable. The PFMA sets out the financial regulations. Section 9 of the Broadcasting Act 4 of 1999[69] spells out the contrasting mandate of the SABC, that is the public service and commercial service mandate. The dichotomy causes inherent operational problems because, as there will always be, a conflict to fulfil the commercial aspects whilst public service may not bring about any financial returns. This also creates tension between the board and management, the board and its shareholder.

*(c) Contestations*

The SABC, by its very nature, is a contested terrain. As a result the corporation has had to deal with many challenges, some appearing briefly in the cases mentioned above in chapter three. The thesis will focus on the one involving allegations of maladministration, systemic corporate governance deficiencies, abuse of power and the irregular appointment of Mr Motsoeneng by the SABC which culminated in a public protector investigation. The public protector's report was eventually released and presented to Parliament titled *When Governance and Ethics Fail*. The public protector's report identified the minister of communication's political interference in the administrative affairs of the SABC.

It found that the previous minister of communications , Ms Pule, unlawfully interfered with the recruitment and appointment of a Chief Financial Officer of the SABC in 2012. The contestations in the affairs of the SABC led to this matter finding its way to the courts in the *SOS Support Public Broadcasting Coalition & others v South African Broadcasting Corporation SOC Limited & others*.[70] The main feature of the court action concerned the constitutionality and lawfulness of the powers that the minister exercises in respect of the directors of the SABC board.

[69] Broadcasting Act 4 of 1999.
[70] *SOS Support* supra note 68.

*(d) Court Ruling*

The main findings in the ruling of the court are reflected below and are a positive outcome in restoring good corporate governance in SOCs:

i. 'The Non-Executive members of the Board of the SABC must be appointed by the President on the advice of the National Assembly, after a public nomination process which must be in compliance with section 13 of the Broadcasting Act. The President's power to appoint the non-executive board members of the SABC is a purely formal power as the National Assembly is the appointing authority who interviews and selects candidates before forwarding their names to the President for their formal appointment. The President has no discretion but to appoint the candidates recommended by the National Assembly as it is the only authority that is empowered to interview and select candidates. The same principle applies to the appointment of judges of the High Court.

ii. The President (or any other person or functionary who is given a similar role in other SOCs) has no unfettered power. The parliamentary process provides the necessary checks and balances.

iii. The exclusive power to control the affairs of the SABC rests with the Board. The Minister, or Executive Authority, is precluded from exercising any powers by which he or she may control the Directors in how they control the affairs of the SABC. The appointment and removal of Directors is the responsibility of the Board, not the political principals or anyone else.

iv. The Chief Executive and his or her executive team must run the day-to-day affairs of the SABC without fear or favour and must only be subject to the constitutional principles as per the dictates of the constitution and its subordinate applicable legislation.

v. Subordinate legislation, or policy documents and other instruments that enable the SABC to be properly governments, must be aligned and be in compliance with the prescripts of the constitution. If not, they stand to be rejected and set aside and substituted with provisions or instruments that speak to the core values of the constitution'.

3. ESKOM

*(a) Historical overview*

The historical overview of ESKOM is divided into various phases.[71] It was effectively established through a Government Gazette of 6 March 1923 which announced the establishment

[71] 'The history of ESKOM' available at *http://www.eskom.co.za/sites/heritage/Pages/2000.aspx, accessed on 18 October 2018*

of the Electricity Supply Commission (ESCOM – as it was referred to at the time), effective from 1 March 1923. Over the period, ESCOM was merely an entity that was structurally designed to ensure security of electricity supply for the minority part of the population and primarily for the industry. In late 1998, the government released a White Paper unveiling the government's vision for the entity going forward. Ultimately parliament passed legislation, making Eskom a limited liability company with share capital and falling under the Companies Act.

*(b) The legislative and regulatory overview of ESKOM*

The conversion of Eskom took effect in 2002 when the Eskom Conversion Act 13 of 2001 was signed into law, clarifying that Eskom Holdings Limited (its new name) was now a public enterprise, but a public company with share capital and listed as a major entity in terms of schedule 2 of the PFMA. The government became the sole shareholder of Eskom with the minister of public enterprises being the executive authority representing the shareholder A board of directors was appointed by the relevant minister to replace the two-tier governance structure of the Electricity Council and the Management Board. This new board of directors was now charged with the responsibility to presided over the affairs of Eskom.

Further to legislative compliance with the PFMA and the constituting legislation, Eskom is now incorporated and required to comply with the provisions of the Companies Act 71 of 2008, as amended. In terms of the Treasury Regulations issued in accordance with the PFMA, Eskom must, in consultation with its executive authority annually conclude a shareholder compact documenting the mandated key performance measures and indicators to be attained by Eskom as agreed between the board of directors and the executive authority.

*(c) Controversies*

As can be seen from various reports, Eskom is a significant contributor to the economic development in South Africa:[72]

- 'As at the 2016/2017 financial analysis of the A-G, government has issued sovereign guarantees to the tune of R440, 26 billion. Of that amount, Eskom was issued with guarantees of R350 billion.[73]
- If Eskom were to default in repayment of its debts and its creditors call from the immediate

[72] Auditor General's Report op cit note 35; see also State Capacity Research Project op cit note 26.
[73] Ibid.

payment of their loans, the South African fiscus would have to find this amount – and bankrupt the economy at once.[74]

- Eskom's procurement expenditure during the 2010/2011 financial year amounted to R74 billion amounting to 8.75percent of the total government procurement expenditure. That is significant enough for one entity'.

If Eskom was this significant, one would expect that it is in the interests of the country for Eskom to be managed in the best possible ways. It should be one of the government's priorities to ensure that Eskom is properly governed; that a functioning board is put in place and discharging its responsibilities in accordance with the principles discussed above; that a competent CEO is employed at all material times. However, as observed in the public protector's report[75] from 2014 governance processes in Eskom deteriorated. Changes to the board were effected and most of the new members of the new board had links with a controversial family that has been accused of gross governance transgressions. Procurement irregularities were escalating year in year out. During the 2016/2017 financial year Eskom's irregular expenditure was over a staggering R4 billion.

*(d) Observations*

In an environment where corporate governance principles were observed:

- Eskom would not be allowed to operate without a fully functional board;
- In appointing board members, greater care would be placed on the individual's expertise and contribution they will bring to the board;
- the best CEO would be appointed after a transparent process of trying to identify the best suitable candidate.
- Appointment into any position would never be on the basis of the close proximity to certain individuals who are advancing their own interests at the expense of the public interest.

4. TRANSNET

*(a) Historical overview*

[74] Ibid.

[75] Public Protector South Africa 'State of capture', available at *http://saflii.org/images/329756472-State-of-Capture.pdf accessed on 18 August 2018*

Transnet's history dates back to the 1800s but can be located in 1910 when the South African Railways and Harbors administration (SAR&H) was established as an arm of government. [76] Its constituting Act specified that it was to be run on business principles. The decade of the 1980s the entity changed its name to Transnet Ltd.

The organisational reconstruction began in 1987 and was streamlined to a holding company with five financially independent operating subsidiaries. In April 1990 Transnet Ltd, a company with limited liability, representing a vast transport was unveiled. With the advent of democracy since 1994, Transnet visibly invested heavily on infrastructure programmes and on integrating and coordinating infrastructure programmes encouraging the use of road, pipeline, rail and harbor networks and within South African to transfer imports and exports. Transnet's vision and mission is to be a focused freight transport company, delivering integrated, efficient, safe, reliable and cost-effective services to promote economic growth in South Africa.

Transnet, in its current governance structure, is made up of the following operating divisions:

- 'Transnet freight rail (formerly Spoornet – the freight rail division)
- Transnet rail engineering (formerly Transwerk - the rolling stock maintenance business)
- Transnet national ports authority (formerly the NPA - fulfils the landlord function for South Africa's port system)
- Transnet port terminals (formerly SAPO - managing port and cargo terminal operations in the nation's leading ports), and
- Transnet pipelines (formerly Petronet - the fuel and gas pipeline business, pumps and manages the storage of petroleum and gas products through its network of high-pressure, long distance pipelines).'[77]

*(b) The legislative and regulatory overview of Transnet*

Transnet is listed as a major entity in terms of schedule 2 of the PFMA. The government of South Africa became the sole shareholder with the minister of public enterprises being the executive authority representing the shareholder. The relevant minister acts in the interests not only of the cabinet, but as a public representative, he or she is enjoined to act in the interests of the public at large.

[76] Jay P. Pederson *International Directory of Company Histories* 1992 6; see also *https://www.transnet.net/AboutUs/Pages/History.aspx accessed on 15 November 2018*

[77] Transnet Annual Reports accessible online on www.transnet.net accessed on 15 November 2018.

*(c) Controversies*

Transnet's procurement expenditure during the 2010/2011 financial year amounted to R70 billion, second only to Eskom with an 8.3percent of the total government procurement expenditure. That is also significant enough for one entity. Besides its procurement expenditure, Transnet can be classified at the heartbeat of South Africa due to its complex network of business involvement, primarily the logistics business that drives South Africa's economy. With this narrative, the governance of Transnet should be of paramount interest to government. However, Transnet, so as Eskom, is at the centre of the alleged manipulation of government processes and weakening of state institutions in order to loot from their coffers.[78]

## 5. CONCLUSION

From the narrative of the reports referred to above and from the court judgments, it is trite that SOCs have now become a contested terrain. There seems to be a preoccupation for the control of SOCs. The salient expressions as contained in the SABC judgment and the constitutionally framed provisions of the applicable legislation provides a positive narrative that seeks to channel and guide SOCs to observe the strictest corporate governance standards and be free from outside pressures, but concentrate in discharging their responsibilities to the general citizenry towards the achievement of national development goals and for a public benefit objective. There is also a clear message given to political principals not to interfere with the day-to-day affairs of the SOCs. However the politicians are expected to provide proper oversight over these entities without orchestrating the weakening of their governance frameworks.

[78] The history of Eskom on cit note 72.

# CHAPTER SIX: CONCLUSION AND RECOMMENDATIONS

## 1. GENERAL CONCLUSION

The chapters above have demonstrated the significance of SOCs and how if governed appropriately they can enhance economic development to the ultimate benefit of the general public. By the same breath, the public interest agenda of SOCs may be hijacked and diverted to a trajectory not envisaged by public policy and constitutionalism. By their very nature, and regard being had to the significance that SOCs bring in the developmental sphere, they are susceptible to contestations.

In this dissertation it has been highlighted that SOCs are a contested terrain. As evidenced, the contestations can either be positive and or negative. Positive contestations are informed by the rule of law, constitutionalism and the desire to serve the interest of the general public. Negative contestations are evident in various forms that include mala fide, political interference, attempts to weaken governance structures, patronage, lack of transparency, and manipulation of governance systems in order to benefit those who are in close proximity to political power, to mention but a few.

This dissertation has demonstrated that adherence to corporate governance principles and practices and strict compliance with the requirements of legislative frameworks hold the much needed answers in addressing the fundamental governance failures and challenges faced by SOCs. On that score the following recommendations may add another voice towards reviving the accountability principles in how SOCs are governed:

- The executive authorities, that is, politicians, should always act in the best interests of the public.
- The process of appointment of non-executive directors of SOCs should be based on the constitutional principles that include transparency, ethics, good faith, accountability and adherence to the rule of law.
- Once board members (non-executive directors) of SOCs have been appointed, through a transparent process based on constitutional principles, the board should be given space do its work without any fear or favour.
- The board, not the minister, must have the authority and be accountable for the appointment of a Chief Executive Officer of an SOC.

- Candidates for appointment as board members and Chief Executive Officers should pass a suitability test which must developed and be applied consistently for all SOCs.
- Removal of board members and Chief Executive Officers of SOCs should not be an action that can be taken lightly. When taken there should be gravitas in the decision thereof. This will ensure and or maintain stability in the governance structures of SOCs.
- Board members of SOCs must account fully for the activities of the SOC through appropriate compulsory disclosures. A compulsory disclosure or reporting framework for company secretaries, auditors and other assurance providers must be developed to ensure that what the SOC through its board, reports on in Parliament and to the relevant treasury, is a true reflection of all material occurrences during that specific financial year.
- A central governance framework for SOCs must be developed for various categories of SOCs so as to maintain consistency in the application of decisions pertaining to SOCs.

## 2. LIMITATIONS

The study focused primarily on the key contributory factors that seem to cut across all SOCs and which have been dealt with by courts, including the public protector in various reports. The study could not look at all aspects and all cases and could not even look at all the challenges that are faced by all SOCs, but was an attempt to identify key contributory factors, which if addressed, could enable SOCs to perform better and remove any forms of disregard of the rule of law and constitutionalism in the affairs of SOCs.

## BIBLIOGRAPHY


### Acts

Broadcasting Act, No.4 of 1999

Close Corporations Act, No. 69 of 1984

Companies Act, No. 71 of 2008

Constitution of the Republic of South Africa

Electricity Act, No. 42 of 1922

Insolvency Act, No 24 of 1936

Public Finance Management Act, No. 1 of 1999

Legal Proceedings Act 40 of 2002

Eskom Conversion Act, 13 of 2001

### Case law

*Haigh v Transnet Ltd* (2115/2010) [2011] ZANCHC 41 (2 December 2011).

*Umfolozi Transport (Edms) Bpk v Minister van Vervoer en Andere* (1997) 2 *All SA* 548 (SCA) 552 j – 553;

*Transnet Ltd. v Goodman Brothers (Pty) Ltd (373/98)* (2001) 1 *SA* 853 (SCA).

*Oudekraal Estates (Pty) Ltd v The City of Cape Town and Others* (25/08) (2010) 1 SA 333 (SCA).

*Alfred McAlpine & Son case (Pty) Ltd v Transvaal Provincial Administration* (1974) 3 SA 506 (A).

*Nedcor Bank Ltd v SDR Investment Holdings Co Pty Ltd and others* (2008) 11 ZASCA at 12.

*Fisheries Development Corporation of SA Ltd v Jorgensen* (1980) 4 SA 156 (W).

*EFF v Speaker of Parliament and others* (CCT76/17) (2017) ZACC 47; 2018 (3) *BCLR* 259 CC (29 December 2017)

*South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* (2015) 4 *All SA* 719 (SCA)

*The Public Protector v Mail and Guardian Ltd and Others* 2011 (4) *SA* 420 (SCA); *SOS Support Public Broadcasting Coalition and Others v SABC and others* (81056/14) (2017) ZAGP *JHC* 289 (17 October 2017).

*Fedsure Life Assurance Ltd and others v Greater Johannesburg Transitional Metropolitan Council and others* 1999) 1 SA 374 (CC)

*Mvoko v SABC* (1066/2016) (2017) ZASCA

*Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* 1988 (3) SA 132(A) 152

**Books and Articles**

Arjoon *Corporate Governance An Ethical Perspective* (2005) 20

Arun T G & Turner J Corporate governance and development reform, financial systems and legal frameworks (2009) Cheltenham: Edward Elgar Publishing Limited

Berle, A. and Means G, The Modern Corporation and Private Property (1932) London: Macmillan Publishers Ltd

Chong and López-de-Silanes *Corporate governance in Latin America. Inter-American Development Bank* (2007).

Dodija *Emergence of Corporate Contract Set, Governance and Accountability* (2008) 4.

Freeman R E Strategic Management , a Stakeholder Approach (1984) Cambridge: Cambridge University Press

Gildenhuys *Public financial management* 1993.

Hyden *The concept of governance in Africa* (1992).

*International Directory of Company Histories*, Vol. 6. St. James Press, 1992.

Khan *A literature review of corporate governance* (2011) 1.

Khoza and Adam *The power of governance: Enhancing the performance of state-owned enterprises* (2005).

Mongalo H T Modern Company Law for a Competitive South African Economy (2010) 1st ed Cape town : Acta Juridica

Monks and Minow *Corporate governance* (1995) 1.

Naidoo .R Corporate Governance: An essential guide for South African companies (2002) 2nd edition, Cape Town: Double Storey Book

Renfrew C Electricity, Industry and Class in South Africa, (1984) New York: State University of New York Press

Ross G, Golley J and Song L The Next 20 Years of Reform and Development (2010) Canberra: ANU E Press

Simpson J and Taylor J Corporate Governance Ethics and CSR (2014) Great Britain: Kogan Page Limited

Sternberg E *Corporate Governance Accountability in the Marketplace* (2004) 10.

United Nations DESA. 'State-owned enterprise reform national development strategies policy notes.' 2007

Whincop, M.J Corporate Governance in Government Corporations. Key Centre for Ethics, Law, Justice and Governance. (2005) Australia: Ashgate Publishing Limited

Wiese T Corporate Governance in South Africa with International Comparisons (2014) Claremont: Juta and Company (Pty) Ltd

Young and Thyil *Anglo-based Governance- Rules versus Flexibility: the Continual Debate*

*Contemporary Issues in International Corporate Governance* (2009) 11.

Fleming and McNamee 'The ethics of corporate governance in public sector organizations' (2005) 7 *Public Management Review* 137

Young, S. and Thyil, V. Anglo-based Governance- Rules versus Flexibility: the Continual Debate Contemporary Issues in International Corporate Governance (2009) Melbourne: Tilde University Press

**Journal articles**

Klapper and Love 'Corporate Governance, Investor Protection, and Performance in Emerging Markets' (2004) 10 *Journal for Corporate Finance* 703 705.

Williamson 'Corporate Governance' 1984 93 *Yale Law Journal* 1197.

Fung 'The Demand and Need for Transparency and Disclosure in Corporate Governance' (2014) 73 *Universal Journal of Management* 73 80.

Eberhard A & Mtepa M 'Rational for restructuring and regulation of a low priced public utility: a case study of Eskom South Africa' (2005) *International Journal Of Regulation And Governance* 77-102.

Fung B. 'The Demand and Need for Transparency and Disclosure in Corporate Governance' (2014) *Universal Journal Of Management* 72 – 80.

Mongalo T 'Self-regulation versus statutory codification: Should the new regime of corporate governance be accorded statutory backing?' (2004) 67 *THRHR* 264-279.

Mongalo T 'The Emergence of Corporate Governance as a Fundamental Research Topic in South Africa' (2003) 120 *SALJ* 173-191.

Owusu-Ansah, S. 'Factors Influencing Corporate Compliance with Financial Reporting Requirements in New Zealand' (2005) 15(2) *International Journal Of Commerce And*

*Management* 141-156.

Thomas A 'Governance at South African state-owned enterprises: what do annual reports and the print media tell us?' *Social Responsibility Journal* (2012) Vol. 8 Iss: 4, 448 – 470

Vaughn M and Ryan L 'Corporate Governance in South Africa: A Bellwether for the Continent. Corporate Governance' (2006) 5 Vol 14 *European journal of accounting auditing and finance research* 10-29.

World Bank 'Held by the visible hand: The challenge of SOE corporate governance for emerging markets' 2006 28 *Journal of General Management* 1 28.

World Bank 'Held by the visible hand: The challenge of SOE corporate governance for emerging markets' 2006 28 *Journal of General Management* 1 28.

Rossouw 'The ethics of corporate governance: A (South) African perspective' (2009) *51 International Journal of Law and Management* 10.

**Reports**

Bisschop B S Integrity and transparency as fundamental notions of Good Governance but are they enforceable (2014) Maastricht University: Netherlands

Cadbury A. The financial aspects of corporate governance, report of the committee on the financial aspects of corporate governance.(1992) Oxford University Press: London

Dobbin F. and Zorn D. Corporate Malfeasance and the Myth of Shareholder Value (2005) 17 Massachusetts Institute of Technology: Cambridge

Dodija D Emergence of Corporate Contract Set Governance and Accountability (2008) Kozminski Business School: Warsaw Poland

King Report I launched by the King Committee on Corporate Governance for South Africa (29 November 1994).

King Report II launched by the King Committee on Corporate Governance for South Africa (26 March 2002) at an Institute of Directors: Sandton Convention Centre, 26 March 2002.

King Report III and Code launched by the King Committee on Corporate Governance for South Africa (1 September 2009).

King Report IV and Code launched by the King Committee on Corporate Governance for South Africa (1 November 2016).

OECD Bank Group Policy on Good Corporate Governance (1999) Organization for Economic: Washington DC

OECD Experience from the regional corporate governance roundtable (2004) Organization for Economic: Washington DC

OECD Guidelines on Corporate Governance of State-Owned Enterprises (2005) Organization for Economic: Washington DC

Zhiwu C Capital Markets and Legal Development: The China Case. (2003) 14 Yale School of Management: New Haven

National Development Plan 2011 – Vision 2030 Vision 2030

State Capacity Research Project: *Betrayal of the Promise: How South Africa is being stolen (May 2017)*

The Auditor-General's report on the Status of State Owned enterprises 2016/2017

Report: Presidential Review Committee on State Owned Entities (South Africa)

Public Protector South Africa. 2016. State of Capture Report.

**Websites**

*http://saflii.org/images/329756472-State-of-Capture.pdf*

*https://www.gov.za/sites/default/files/devplan_2.pdf.*

*https://pari.org.za/betrayal-promise-report/*

*https://www.gov.za/sites/default/files/presreview.pdf*

*http://esa.un.org/techcoop/documents/PN_SOEReformNote.pdf* .

*http://www.agsa.co.za/Portals/0/Reports/PFMA/201617/GR/04percent20statuspercent20ofpercent20state-ownedpercent20enterprises.pdf*

*http://www.eskom.co.za/sites/heritage/Pages/2000.aspx*

*https://www.transnet.net/AboutUs/Pages/History.aspx*

*http://www.fsb.org/2015/09/cos_040401/*