SCRUTINY OF THE INTRICACIES OF CORPORATE GOVERNANCE AND PUBLIC ACCOUNTABILITY MECHANISMS IN SOUTH AFRICAN STATE-OWNED COMPANIES

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DECLARATION

I do hereby declare that I have read and understood the regulations governing submission of Master of Laws dissertation, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

Signed by the Candidate **20 April 2024**

Signature: Mthokozisi Gift Shezi **Date**

DEDICATION

In loving remembrance of my beloved Aunt Delsie, whose unwavering motivation and love endures to this day. To all who have performed a crucial role in defining my journey, your confidence in me has been my strength. And to myself, for the dedication that steered me here. With deepest appreciation, I dedicate this paper to my beloved Aunt Delsie.

'His mercy is renewed every morning. Great is your faithfulness'.

Lamentations 3:22-23

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ABSTRACT

State-owned companies play a significant role in the South African economy. At the core of their operations, these state-owned companies provide a variety of services and public utilities, *inter alia*, transportation, telecommunication, infrastructure, and energy. State-owned companies additionally are formed in the pursuit of state policy objectives and in turn they make provision for public benefit i.e., employment and business opportunities to name a few. Insofar as these companies strive to pursue the aforementioned services and policy objectives, there are deficiencies that exist in respect of their functioning. These deficiencies are, *inter alia*, lack of good corporate governance practices, harmful interference with state-owned companies (as reported in the State Capture Report), lack of appropriate balance between board autonomy and political interference, financial mismanagement, and more importantly ineffective accountability mechanisms from relevant oversight institutions arguably plague these entities. To this end, there have been numerous notable cases adjudicated concerning state-owned companies' financial reporting irregularities, their policy objectives, and the exercise of powers thereto.

In light of the foregoing, this research embarks on a critical analysis of the intricacies between the corporate governance of state-owned companies and public accountability mechanisms in South Africa taking into consideration the Public Finance Management Act 1 of 1999, the Companies Act 71 of 2008, relevant case law, institutional reports, and applicable policy frameworks. The primary objective is to analyse and discuss the effectiveness of governance mechanisms by indicating their strengths and weaknesses. Through this discussion, the research aims to shed light on the challenges encountered by state-owned companies, by critically exploring the intricacies brought by their objectives, policy frameworks, operational challenges, and public accountability obligations. These discussions expose the significant challenges that are faced by state-owned companies and necessitate a need for legislative reform. In conjunction with the primary objective this research further investigates the dynamics and difficulties that are presented from the relations with the Auditor General, Standing Committee on Public Accounts, Department of Public Enterprise, and the portfolio committees as institutions in charge of overseeing state-owned companies from corporate governance and public accountability perspective.

This research further exposes concerns surrounding the relationship between the state, and state-owned companies, and the relevancy of portfolio committees in respect of the aforesaid. It submits the existing regime as complex, contradictory and ineffective insofar as

accountability is concerned. As a matter of fact, case law and the ground-breaking state capture reports expose the many multifaceted inconsistencies that exist between public accountability mechanisms and the corporate governance of state-owned companies. Insofar as the crucial role that these state-owned companies play in South Africa, it is imperative that these concerns are addressed expeditiously. In essence, this research proposes the review of the current state-owned companies' corporate governance framework and the role of public accountability mechanism to propose a singular, effective and practical legal framework that is inclusive of relevant oversight institutions and thus maintains an elevated level of accountability.

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List of Abbreviations

ACSAL	Armaments Corporation of South Africa Limited
AG	Auditor General
CC	Constitutional Court
GG	Government Gazette
GN	Government Notice
DPE	Department of Public Enterprise
PFMA	Public Finance Management Act
PWC	Price Waterhouse Coopers
SABC	South African Broadcasting Corporation
SCOPA	Standing Committee on Public Accounts
SOC	State-Owned Companies
TIPS	Trade and Industrial Policies Strategies

CHAPTER ONE: INTRODUCTION

1. Introduction

Chapter one provides a detailed introduction to this research by defining state-owned companies and their objectives, as well as detailing the significance of the research, the problem statement, and the research question. In particular, chapter one for the purposes of outlining the introduction and further discussions herein, considers relevant institutional reports and relevant commentary to outline the rationale for this research.

1.1. Defining State-Owned Companies

There is no typical definition for State-Owned Companies ('SOCs') and presently their essential attributes incorporate their status as established legal persons operating within a profitable environment, and the fact that the state[1] is their primary shareholder.[2] In this regard, legal commentary provides that a SOC is not a company in respect of which all of its shares or the majority control over or ownership of the shares are held by the state and describes that an SOC is a misnomer.[3] Literature categorises SOCs as entities owned by the state and registered under the Companies Act 71 of 2008 ('Companies Act').[4] The Companies Act incorporates the term 'state-owned company', which is well-defined as a company that is registered by legislation either listed as a public entity in terms of Schedule 2 or 3 of the Public Finance Management Act 1 of 1999 ('PFMA') and is owned by a municipality, as contemplated in the Local Government: Municipal Systems Act 32 of 2000.[5] Furthermore, according to legal

[1] Section 239 of the Constitution of the Republic of South Africa, 1996 provides as follows:
'"[o]rgan 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.'
Concerning the aforementioned definition of state, the thesis will use 'state' as a reference to the national executive and/or national department insofar as SOCs, shareholder departments and/or national executive are concerned. As most SOCs referred to herein, are designated to the national executive and/or respective shareholding national departments through various legislations and policies. Therefore, reference to the state within this research will be made in respect of the national executive/national department insofar as the definition of 'organ of state' is concerned. Reference to the term government will not be used within this thesis as the term 'legally' encompasses the executive, legislature, and judiciary from a separation of powers perspective. For the purposes of avoiding misinterpretation, the national executive/national department will be used interchangeably within the definition of the organ of state and/or state since SOCs are owned by the state and administered by the executive. The thesis in chapters one and four provides evidence of this through applicable legislative provisions and relevant commentary.

[2] David Fourie 'The role of Public Sector Enterprises in the South African Economy' (2014) 7 *AJPA* 33.

[3] Piet Delport *et al Henochsberg on the Companies Act 71 of 2008* (2023) p 54(11).

[4] Cassim *et al The Law of Business Structures* (2012) 87-88.

[5] Section 1 of the Companies Act 71 of 2008 and Henochsberg op cit note 3 at 54(10)-54(11).

commentary, a public entity that acquires its legal personality in another alternative manner than is stated in terms of the Companies Act or repealed legislation is not a SOC, as it is not a company in terms of the Companies Act.[6] In light of the foregoing, legal commentary argues that certain corporate entities for instance in terms of Schedule 2 of the PFMA are not incorporated in terms of the Companies Act and by definition, cannot be classified as a SOC.[7] Legal commentary further submits that the legal stance that was taken into account in respect of the legal recognition of state-owned companies was that a company in terms of the now repealed Companies Act of 1973, which did not provide for SOCs, that now falls under the definition of 'state-owned company', has been defined to have its memorandum of incorporation amended to change its name to include 'SOC Ltd' as it is required in terms of section 11(3)(c)(iv) of the Companies Act.[8]

Notwithstanding the unique foregoing submissions in respect of the legal status of SOCs, some argue that the term 'state-owned entity', which in this case is used interchangeably with a state-owned company, lacks a commonly recognised meaning but largely denotes companies formed by state and supervised by state officials.[9] With that being said, literature explains that SOCs operate as legal entities by participating in commercial activities on behalf of the state, regularly as entities owned either wholly or partially by the state for specific commercial purposes. Consequently, SOCs are categorised as distinctive entities established by states to participate in commercial activities and service delivery to the public, with a dual emphasis on commercial and non-commercial objectives. In essence, a SOC is an entity wholly or partially owned by the state and/or designated national department and it is established through public policies.[10] The state exercises such ownership authority through different shareholder departments and/or state actors known as Ministers.[11] In this respect, it is submitted that these SOCs play a critical role in sectors ,*inter alia*, finance, labour, utilities and natural resources.[12] In addition, the importance of these sectors and the resources of SOCs are utilised by the

[6] Henochsberg op cite note 3 at 54(10)-(11).
[7] Henochsberg op cit note 3 at 54(11).
[8] Ibid at 54(11).
[9] Sibulelo Ganda *Examining Privatisation as a Solution to Rescue South African State-Owned Entities* (published LLM thesis, University of Western Cape, 2013) 1.
[10] World Bank *Corporate Governance of State-Owned Enterprises: A toolkit* (2014) 9.
[11] In respect of state actors and shareholding Ministers section 1 of the Public Finance Management Act 1 of 1999 provides as follows:
'[e]xecutive authority—
(a) in relation to a national department, means the Cabinet member who is accountable to Parliament for that department;
(c) in relation to a national public entity, means the Cabinet member who is accountable to Parliament for that public entity or in whose portfolio it falls;'
[12] World Bank *A tool Kit* op cit note 10 at 12.

Ministers on behalf of the state to achieve the policy and legislative duties. To further consider this rationale the PFMA provides a clear-cut provision that defines and outlines the context of SOCs and their relationship with the state. The PFMA defines SOCs as juristic persons, owned and controlled by the national executive with provisions for financial and operational authority to offer goods and services according to ordinary business practices.[13] To this end, the PFMA definition further defines SOCs as state-owned companies that are fully or substantially financed by the National Revenue Fund and other avenues, such as tax, levies, or statutory money.[14] Inherently SOCs are crucial in the economy and also in the achievement of the state's objectives and this is evident in the foregoing discussions and definitions.

1.2. Mission and objectives of SOCs

South Africa has approximately twenty-four SOCs, with Transnet, Eskom, and South African Airways being the largest companies owned by the state.[15] These SOCs have commercial interests that span across the public and private sectors. Considering the variety of industries in which these companies operate, each presents its own set of challenges either financially, legally, or operationally.[16] It is submitted that to achieving public policy goals and economic policy states are prone to establishing SOCs through legislation to assist their departments in achieving or furthering policy goals in matters of, *inter alia*, employment and various economic objectives.[17] Hence, it can be deduced that the aforementioned SOCs serve as a supplement to the objectives of the state. On a comparative basis, it is provided that developed nations' SOCs also play a significant role in respect of participating in competitive industries, major scale manufacturing and making provisions for essential public utilities.[18] As far as the aforementioned is concerned, literature provides that the underlying purpose of the SOCs is for them to be utilised to achieve policy and social-economic goals.[19] In addition, SOCs are profitable companies although, to a certain degree, they serve as the state's tool and play a non-

[13] Sections 1 & 3(b) & Schedule 2 of the Public Finance Management Act 1 of 1999.
[14] Public Finance Management Act supra note 13.
[15] Research and Markets, 'South Africa State-Owned Enterprises Report 2021: Total SOC Debt Stands at a Staggering R692.9 bn' available *at https://www.prnewwire.com/news-releases/south-africa- State-owned-enterprises- report- 2021-total-SOC-debt-stands-at-a -staggering-r692-9 bn-301442984.html#:~:text=There%20are%20profiles%20of%2024,Africa%20and%20Independent%20Development%20Trust*, accessed on 20 April 2022.
[16] Parliamentary Monitoring Group, 'State-owned companies' corporate governance challenges: progress report; Department of Public Enterprises 1st Quarter 2015/16 performance' available at *https://pmg.org.za/committee-meeting/21492/*, accessed on 13 March 2022.
[17] Malcolm Gillis 'The Role of State-Owned Companies in Economic Development' (1980) *The John Hopkins Uni Press* 253-261.
[18] Malcolm Gillis op cit note 17 at 250.
[19] Malcolm Gillis op cit note 17 at 251.

commercial role in respect of promoting social objectives, providing essential services such as water, electricity and infrastructure to unprivileged persons,[20] as opposed to public companies, which are mainly created to supply goods or services with the main objective generating profits for the benefit of the shareholders.[21] Based on the foregoing, it can be deduced that, although the establishment of SOCs does not imply that they are burdened with the object of maximising profits insofar as the goal of a public company is concerned, however this indicates that their aim is to benefit the society socially and economically.[22]

In addition, considering the challenges faced by SOCs in fulfilling their objectives the World Bank study on Corporate Governance in South Africa submitted that there is a lack of clarity with respect to the identified owner or principal when it pertains to control over the SOCs.[23] The study submits that the existing challenge faced by SOCs emanates from the national department's ineffective coordination.[24] In this respect, some argue that various SOCs are without clear objectives, as they take part in many broad spectrums of service delivery, profit-making, and alignment to policy goals.[25] To this end, the aforementioned issues leave SOCs in a vulnerable position and with the expectation of adhering to different regulations or policies from their designated national departments, which in turn leaves them to be susceptible to political short-term goals that eventually hamper their growth.[26]

1.3. Background and rationale

The Trade and Industrial Policies Strategies ('TIPS'), a non-profit, independent, and economic research institution founded in 1996 to conduct research in respect of South African economic policy development, published a Policy Strategy Brief for 2020, in which they identified three major issues in light of the position faced by SOCs.[27] This policy brief highlighted issues concerning corruption, lack of strategic direction, and poor performance of SOCs. Having said

[20] World Bank *A tool Kit* op cit note 10.
[21] Malcolm Gillis op cit note 17 at 249.
[22] Adele Thomas 'Governance at South African state-owned enterprises: What do annual reports and print media tell us' (2012) 8 *Social Responsibility Journal* 451.
[23] World Bank, 'An Incomplete Transition: Overcoming the Legacy of Exclusion in South Africa: Corporate Governance in South African State-Owned Enterprises' available at *https://www.google.com/url?sa=t&sources=web&rct=j&url=https://documents1.worldbank.org/curated/en/798071529303940965/pdf/127288-WP-P161945-PUBLIC-Corporate-Governance-in-South-African-SOCs.pedf&ved=2ahUKEwjZjlyM67P3AhVFoVwKHciKCmgQFnoECAcQAQ&usg=AOvVaw2VstbOUtE_fbH4Uza-pMMK*, accessed on 12 March 2022.
[24] World Bank op cit note 23.
[25] Malcolm Gillis op cit note 17 at 260.
[26] World Bank *tool kit* op cit note 10 at 8.
[27] Trade and Industrial Policies Strategies 'The crisis at the State-Owned Enterprises' available at *https://www.tips.org.za/policy-briefs/item/3748-the-crisis-at-the-state-owned-enterprises*, accessed on 13 March 2022.

that, the policy brief submits that the SOC's financial situation has resulted in the state finding itself in the position of increasing loan rates and sustaining guarantees, which has contributed to the national debt.[28]

Furthermore, the policy brief submits an observation on the performance of SOCs, stating that, many SOCs are not effectively regulated nor given proper oversight and coordination.[29] The policy brief emphasises an underlying concern that SOCs lack a defined development mandate for their productivity and commercial activities.[30] In light of the foregoing, this research discusses the many broad issues confronted by the SOCs with the aim of proposing a singular, effective and practical legal framework that is inclusive of relevant oversight institutions and thus maintaining a high level of accountability.

1.4. Problem statement

Insofar as probing the challenges of SOCs is concerned, several deficiencies exist with respect to their functioning and this is evident through deficiencies that have been exposed as, *inter alia*, lack of good corporate governance practices, illegal or harmful interference with state-owned companies (namely the reported state capture), lack of appropriate balance between board autonomy and political interference, financial mismanagement, and more importantly ineffective accountability mechanisms from relevant oversight institutions.[31] In light of the foregoing, the underlying deficiencies that hamper the effective governance of SOCs emanate from them being assigned to different shareholding departments, each with its own set of policies, which often contradict their focus areas in terms of development, accountability, and sustainability.[32] In addition, the aforesaid deficiencies impacting the appropriate functionality of SOCs have been emphasised by the TIPS policy brief, South African Broadcasting Corporation corporate and governance scandal, relevant case law and the profound findings of the state capture report in which this research discusses and submits them as significant not only to the consideration of reform of SOC's governing regime but to expose the many underlying overarching challenges that face SOCs.

Having said that, the aforesaid considerations and deficiencies indicate inadequate compliance, implementation, and accountability with the relevant provisions such as the Companies Act, and the PFMA. Furthermore, these governing frameworks' ability to produce a clear governing

[28] Trade and Industrial Policies Strategies op cit note 27.
[29] Ibid.
[30] Ibid.
[31] Ibid.
[32] Ibid.

and accountability framework that encourages good corporate practices and encompasses the overarching correlation between the SOCs, state and public oversight institutions significantly contribute to the aforementioned challenges affecting SOCs. In addition, the World Bank's published Systematic Country Diagnosis Report on Corporate Governance in South African SOCs reported that ineffective corporate governance frameworks in South African SOCs as the root cause of such challenges.[33] It has also been submitted that in respect of the Auditor General's ('AG') annual audits, it has on several occasions been reported that SOCs, *inter alia,* Denel, South African Airways, South African Express Airways, South Africa Broadcasting Corporation and the Nuclear Energy Corporation have experienced continuous difficulties in generating long-term profits.[34]The emphasis is that these SOCs face challenges that pertain to full disclosure and uncertain future operations.[35] Notwithstanding the foregoing, the TIPS policy brief submits that the aforesaid issues, have existed for some time and the state has not only failed to address them, but it has also frequently emphasised that the only core issue in respect of the state quo of SOCs is low profitability. [36]

1.5. Significance of the problem

In South Africa, various national departments have SOCs that serve similar goals which assist them in achieving public policy objectives, and those departments are referred to as shareholder departments with Ministers serving as shareholder representatives on behalf of the national executive.[37] The role of the Ministers is to facilitate the appointments of the board insofar as it may be required and to provide the SOCs with finance in consultation with the Finance Minister.[38] In light of the foregoing, shareholding Ministers on an annual basis and on request of Parliament report to their respective parliamentary portfolio committees that oversee the national department's policy implementation and the performance of their designated SOCs.[39] The portfolio committees do so by proposing recommendations to the Minister and the department's Director General for purposes of oversight and accountability.[40]

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[33] World Bank op cit note 23.
[34] Business Tech 'South Africa's list of failure-the state-owned companies that are in a financial crisis' available at *https://businesstech.co.za/news/government/545244/south-africas-list-of-failure-the-state-owned-companies-that-are-in-financial-crisis/,* accessed on 13 March 2022.
[35] Business Tech op cit note 34.
[36] Trade and Industrial Policies Strategies op cit note 27.
[37] Ibid.
[38] Ibid.
[39] Chapter 4 of the Constitution of the Republic of South Africa, 1996.
[40] L Yengeni 'Role of Parliamentary Portfolio Committees and Members of Parliament on Oversight: Workshop' available at *https://pmg.org.za/committee-meeting/11720/,* accessed on 18 March 2022.

Insofar as the aforementioned committees are concerned it is argued that the portfolio committees lack authority in imposing strict accountability upon Ministers and/or relevant SOC officials and that their recommendations are not binding.[41] Unlike statutory audit and compliance committees in public companies, they have the authority to investigate irregularities, report and assist the company in managing risks that affect the company's credibility and this is completed to ensure that there are safeguarding and oversight mechanisms that adhere to the company's transparency and accountability policies.[42]

In light of the foregoing, it can be deduced that these committees place an underlying pressure within governance structures by assisting boards, committees, and shareholders to diligently focus on the issues raised by auditors in respect of governance, key performance indicators and more importantly the reduction of losses for the subsequent fiscal year. Based on this premise it can further be argued that there is additional responsibility imposed on public companies when it pertains to the maintenance of transparency and accountability.

Moreover, with respect to the foregoing issues this research draws attention to, *inter alia*, the importance of the current SOC governing frameworks' failure to provide the portfolio committees and the AG with effective powers in conducting oversight and enforcing accountability over the mismanagement of SOCs. Having regard to the aforementioned, the State Capture Commission's Reports of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State (Volumes 1, 2 and 3 published in 2022) has profoundly exposed these intricacies. It has provided significant findings with regards to financial mismanagement, lack of effective public accountability mechanism from oversight institutions and good corporate governance practices in major SOCs, i.e., Transnet, Eskom, Airways and Denel.[43]

In argument, the aforementioned issues reported from the commission's report provided a considerable necessity for portfolio committees and the AG to be assigned a crucial role in, ensuring effective oversight of their designated national departments and department's affiliated SOCs in respect of governance, risks, and compliance. In light of the foregoing, this research submits that given the importance of SOCs with respect to the state's objectives, portfolio committees as constitutional institutions have the responsibility to uphold accountability, safeguard the public interest and ensure that relevant shareholder departments

[41] RSM South Africa 'The duties and responsibilities of an Audit Committee' available at *https://www.rsm.global/southafrica/news/duties-and-responsibilities-audit-committee,* accessed on 20 March 2022.

[42] RSM op cit note 41.

[43] Research and Markets op cit note 15.

implement sustainable policies or remedial actions that cater to the needs of the public. However, the hurdle to that as this research submits is that they lack the powers and expertise to do so. Having said that, in support of the foregoing the World Bank's recommendations in respect of the SOCs have provided that significant reforms regarding the manner into which SOCs function may contribute to long-term advances and commercial productivity.[44] Therefore, should the state be unsuccessful in the pursuit of providing effective reforms for the governance and accountability of SOCs may continue to be plagued by corrupt practices, and in turn the state of the economy may continue to deteriorate.

1.6. Research Objective

This research embarks on a critical analysis of the intricacies between the corporate governance of SOCs and public accountability mechanisms in South Africa taking into consideration the PFMA, Companies Act, relevant case law, institutional reports, and policy frameworks. It critically considers the complex correlation between the SOC boards, the aforesaid governing frameworks, the oversight institutions, and the state. In answering the research question herein, the research paper's point of departure predominately argues for the necessity to adopt a SOCs' corporate governance and public accountability mechanism framework that incorporates public oversight institutions, enhances their accountability powers, and ultimately provides clear governance principles that cater for the intricacies faced by SOCs in their relations with the state.

[44] World Bank op cit note 23.

1.7. Research question

Does the current corporate governance and public accountability regime that governs the SOCs, namely, the Companies Act, PFMA, portfolio committees and various relevant accountability institutions possess effective accountability mechanisms that enable good governance in SOCs?

1.8. Methodology

This research has undertaken a desktop study methodology insofar as the content of the research and resources are concerned. The research has made use of primary resources namely, the Companies Act, the PFMA and the Constitution wherever necessary. It has also considered a variety of significant court rulings applicable to the topic and nature of the arguments and discussions raised herein. In respect of secondary resources, the research gathered data from desktop research and made use of institutional reports, articles, journal articles, books, and profound submissions by South Africa's major institutions. As such this research as evident in the discussions outlined herein utilises a broad range of primary and secondary sources to encapsulate the overall discussions, views, submissions, and critical analysis necessary to provide an argument for the reform and the adoption of a singular, effective and consistent framework for SOCs.

The table below identifies the methodology implemented in this research using the applicable chapters for ease of reference:

Chapter	**Methodology**
Chapter One	This chapter outlines the introduction to this research which sets out a background and/or rationale for the research, the problem statement, the research question, and the significance of the research using primarily secondary sources of law.
Chapter Two	This chapter provides an analysis and discussion of the background and concept of corporate governance in South Africa. In addition, this chapter examines the

	comparative view of the aforementioned concept and its impact on SOCs. The chapter consists of mainly primary and secondary sources of law.
Chapter Three	An examination of SOC's governing frameworks and analysis of relevant case law based on primary and secondary sources of law.
Chapter Four	An examination of the relationship between the SOC boards and the state using primary and secondary sources of law.
Chapter Five	An analysis of the function of oversight institutions in respect of SOCs using primarily secondary sources of law.
Chapter Six	An examination of the state capture and the findings of the state capture commission into the corruption, governance, and regulatory challenges on SOCs using mainly secondary sources of law.
Chapter Seven	Outlines the National State Enterprises Bill and submits a recommendation into the proposed legal framework based on the research's deliberations and submissions. In addition, provides a conclusion to the research by emphasising the necessity for reform in respect of the submitted deliberations.

CHAPTER TWO: PRINCIPLES AND FUNCTIONING OF CORPORATE GOVERNANCE IN SOCs

2. Introduction

Chapter two discusses the concept and the principles of corporate governance. In addition, chapter two draws attention to the emergence of the concept, insights and principles that underpin corporate governance in South Africa in comparison with the United Kingdom. Through literature chapter two discusses the application of corporate governance in SOCs, emphasising one of SOC's ground-breaking corporate scandal reports and further discusses the impact that corporate governance has on SOCs. Moreover, as a point of departure, chapter two briefly discusses challenges concerning board autonomy and corporate governance in SOCs.

2.1. Concept and principles of corporate governance

Corporate governance is defined as a concept that relates to the structures and systems used by a collective body to govern the organisation in matters of decision-making, controlling and managing the internal or external affairs of an organisation.[45] Insofar as this definition is concerned literature elaborates further by explaining that the purpose of corporate governance is to ensure that decision-making in corporate affairs guarantees the fulfilment of the company's purpose and creates value for the shareholders.[46] With that being said, literature provides that there is a view that corporate governance plays a role in specifying the distribution of rights and responsibilities among the organisation's shareholders, directors, and managers.[47] In addition, legal commentary provides that 'corporate governance', as defined by the Cadbury Report, is a system by which companies are controlled and directed.

The King IV Report on Corporate Governance for South Africa 2016 ('King IV Report') further enhances this concept, by describing it as an application of ethical and effective leadership by the board to achieve results connected to ethical culture, good performance, effective control, and legitimacy.[48] In light of the foregoing, legal commentary explains that the term 'corporate' is used to differentiate other forms of governance and further provides that corporate governance ordinarily works as a management system, assessing whether boards execute their duties and in doing so assist them in executing their duties.[49] With that being said,

[45] G J Rossouw *et al* 'Corporate Governance in South Africa' (2002) 37 *Journal of Business Ethics* 290.
[46] Kgwiti Prince Mathibela *Corporate Social Responsibility Legal Analysis and Social Transformation: The South African experience in a Comparative Perspective* (published LLM thesis, University of Cape Town, 2017) 13.
[47] G J Rossouw *et al* op cit note 45 at 292.
[48] Cassim *et al Contemporary Company Law* 3rd ed. (2021) 642.
[49] Cassim *et al* op cit note 48 at 642.

legal commentary highlights that the latest worldwide corporate scandals underline the necessity for enhanced governance principles and practices, emphasising the deficiency in effective accountability within companies.[50]

For the purposes of chapter two and the broad view of corporate governance, it is crucial to critically discuss the aforementioned concept and its background. The theory of agency plays a significant role in the underlying principles of the relationship between directors and shareholders insofar as corporate governance is concerned.[51] Literature submits that the said concept evolves from the theory of agency, based on that the relationship regarding the governance of a company was derived from the shareholders referred to as principals and the directors acting as their appointed agents.[52] The aforementioned relationship was based on the principle of the principals enlisting agents to manage their company's affairs and in turn make them profitable.[53]

As such, this relationship presented challenges concerning the agents' magnitude of control over the company's assets; since this control was effectively exercised by them on behalf of the principals.[54] In the long run, tensions emerged between the principals and their agents in matters of controlling the company. This was often based on the underlying concern and potential risk that an agent might abuse their agency powers to the detriment of their principals - this abuse, of course, emanated from the separate ownership and control of the company's assets from the principals.[55] For that reason, a risk of agency existed, and it created a basis on the principals' concern of mismanagement or misappropriation of their company's assets by their agents.[56]

In light of the foregoing, it is submitted that the risk of agency sparked a debate in 1970 and it led to the adoption of corporate governance, which advocated for companies to have a system within a company that ensures accountability and the inclusion of a fundamental governing aspect that obligates agents to control the company in the interest of their principals.[57] It is further submitted that in the 1970s the role of corporate governance was placed under scrutiny, wherein the manner in which[58] directors exercised their powers while minimizing harm to the

[50] Cassim *et al* op cit note 48 at 642.
[51] Ansie Ramalho 'Corporate Governance and the call for Stakeholder Inclusivity: Do shareholders lose out?' (2009) *The Corporate Report* at 18.
[52] Rossouw *et al* op cit note 47 at 289.
[53] Ansie Ramalho op cit note 51 at 18.
[54] Ibid.
[55] Ansie Ramalho op cit note 51 at 18-19
[56] Ansie Ramalho op cit note 51 at 20.
[57] Ibid.
[58] Ibid.

company.[59] With that being said, it is denoted that before 1970 states treated companies under the laissez-faire economic theory that objected to the state's intervention and called for the autonomy of companies operating in the free market and[60] insofar as legislated corporate governance regimes are concerned, literature provides that in this period governance frameworks had not yet been adopted, as most companies governed their own affairs within their own company's practises and policies.[61] In this respect, literature submits that the foregoing contributed to the failure of the boards in ensuring effectiveness and satisfactory risk management and also to restrain influential executives, who were concerned more about individual interests than the interests of the companies they served, was recognised as one of the foremost origins of these corporate failures.[62]

2.2. Department of Trade and Industry Policy guideline on company law reform

Although literature in the foregoing submits and argues that corporate governance emanated from the theory of agency or put simply was impacted by the theory of agency as previously discussed.[63] Insofar as corporate governance or governance of companies is concerned there are submissions that common law principles and various statutes have existed, even before the theory of agency came into debate.

Prior to the Companies Act of 1973 and Companies Act of 2008, South Africa's corporate governance and corporate law are said to have emanated from the United Kingdom and its framework and foundations were impacted by English law.[64] This means that even though corporate governance as a concept or a regime was not statutorily recognised or incorporated into legislations or regulations, common law duties and principles imposed on directors have long existed and they served as the principles regulating directors and the governance of companies they serve on. The foregoing view is supported by the Department of Trade and Industry's policy document published in May 2004, titled the 'South African Company Law for 21st Century Guidelines for Corporate Law Reform'. These guidelines were aimed at the legislative reform of South Africa's corporate and company law to align it with the international

[59] Ibid.
[60] Kimberly Amadeo 'What is Laissez-faire economic theory?' available at *https://www.thebalance.com/laissez-faire-definition-4159781,* accessed on 3 May 2022.
[61] Ansie Ramalho op cit note 60 at 19.
[62] Emily Makuta 'Good Corporate Governance in State Owned Industries' (2009) 3 *MLJ* 58.
[63] Ibid.
[64] Monray Marsellus Botha 'The Role and Duties of Directors in The Promotion of Corporate Governance: A South African Perspective' (2009) 30 *OBITER at 704.*

best practices and the new constitutional dispensation.[65] The policy document briefly outlined the history behind the South African company law, and it described that the aforementioned law owes its origins from 1861 when the Joint Stock Companies Limited Liabilities Act 23 of 1861 was declared in the Cape Colony.[66] This early law, together with other provincial company laws, in detail reflected the English laws of the 1800s. Furthermore, the policy document describes that the initial nationwide company law, the Union Companies Act of 1926, was formed pursuant to the latest English legal trends of that time.[67] In 1973, the Companies Act 61 of 1973 was introduced and it replaced the Union Companies Act of 1926 Act, which aimed to present innovations that were appropriate for South Africa while preserving a correlation to the English law principles.[68]

Notwithstanding attempts to break away, the Companies Act of 1973 preserved a majority of its predecessor's framework and persisted in being shaped by English law.[69] The policy document denoted that the current company law, the Companies Act of 1973 did not encompass plain rules in respect of corporate governance, the obligations and liabilities have been largely left to common law and Codes of Corporate Practice.[70] It also outlines that the debate in respect of corporate governance reforms took place all around the world in the late 1980's and 1990's and the issue was rooted in the question of stakeholder concerns and more importantly on 'whose interest should the company be managed'.[71] Therefore, there were no vast statutory frameworks consisting of corporate governance, duties and obligations of directors and their liability with regard to breaches.[72] With that being said, it is described that prior to the Companies Act of 2008 the legislations that regulated South Africa's corporate law were the Companies Act of 19731, the Close Corporations Act of 1984 and before them the common law principles taking into consideration the various statutes cited in the foregoing persisted not only as the primary source of law for businesses, partnerships and business trusts which are not regulated by the foregoing statutes, but to a certain degree solely govern significant parts of company law i.e., directors' fiduciary duties and duties of reasonable, care and skill.[73] These

[65] The *White Paper on South African Company Law for the 21st Century Guidelines for Corporate Law Reform* (GN 1183 in *GG* 26493 of June 2004) p 12.
[66] Supra note 65 at 12.
[67] Ibid.
[68] Ibid
[69] Ibid.
[70] Ibid.
[71] Ibid.
[72] Ibid.
[73] Michele Havenga 'Regulating Directors' Duties and South African Company Law Reform' (2005) 26 *OBITER* 609-610.

principles still play a vital role in the relevant aspects of the law of close corporations.[74] As a result, the Companies Act of 2008 was then incorporated with corporate governance principles, obligations, and numerous liability mechanisms.[75]

2.3. Comparative view on the emergence of the corporate governance concept

From a comparative perspective in respect of the foregoing, it is important to view other countries such as the United Kingdom to discuss how corporate governance as a regime and/or concept came about and more importantly to deliberate about fiduciary duties in the context of directors and corporate governance. In the early 1980s and the 1990s the United Kingdom saw several corporate catastrophes that resulted in the collapse of properly established companies such as *inter alia*, Polly Peck International,[76] the Bank of Credit and Commerce International and the Mirror Group News.[77] The United Kingdom then laid a foundation for corporate governance and the reform thereof, due to such significant collapses and corporate scandals that shaped the development of its corporate governance regime.[78] As a result, the aforesaid need for reform led to the initiation of the committee by the London Stock Exchange led by Sir Andrian Cadbury which published the Cadbury Report on Corporate Governance in December 1992.[79]

Furthermore, it is also submitted that court ruling such as the *Guinness Plc v Saunders* (1990) 2 AC 663 was enlisted as one of the cases that contributed to the necessity for the reform of corporate governance in the United Kingdom.[80] In brief, the case was concerned with a payment authorised by the committee of directors to another director in the sum of five million pounds in respect of the services provided for the take-over bid.[81] It was eventually discovered that the director had a financial gain in the bid. Based on this irregularity, the court was approached and one of the court's findings was that the payment to the director was in contravention of a fiduciary duty imposed on directors.[82] The court further held that the aforementioned occurrence ensued due to the proviso within the company's articles of

[74] Michele Havenga op cit note 73 at 610.
[75] Sections 76, 77 and 162 of the Companies Act.
[76] The Polly Peck International collapsed due to its misguided corporate governance practices, *inter alia*, the imbalance between executives and non-executive directors. See Ntene Ntswinyane Semi *The Interpretation and Application of Principles of Corporate Governance in the South African Airways* (published LLM, University of Limpopo, 2019)
[77] Emily Makuta op cit note 62 at 58.
[78] Chipo Mlambo *The influence of corporate failure and foreign law on South Africa Corporate Governance* (published LLM thesis, University of Pretoria, 2016) 7.
[79] Ntene Ntswinyane Semi op cit note 76 at 58.
[80] Ibid
[81] *Guinness Plc v Saunders* (1990) 2 AC 663 p 663 (United Kingdom).
[82] Ntene Ntswinyane Semi op cit note 76 at 58 and *Guinness Plc* supra note 81 at p 701.

association, requiring joint approval from the whole board to approve the payment, instead of the committee of directors approving it alone.[83] Consequently, this case displayed potential corporate governance liability emanating from the payment of significant remuneration to directors in the absence of suitable guidelines.[84]

Insofar as director fiduciary duties and the significance of acting in the best interest of the company are concerned, the United Kingdom also provides a similar principle to the South African common law fiduciary duty. It provides a strict principle relating to conflicts of interest between directors and their fiduciary duties which was outlined in the 1854 judgement of *Aberdeen Railway Co. v. Blaikie Bros (*1843-60) All E.R. 249.[85] Significantly in this case, the court held that a corporate entity can only act and operate through its agents and that it is binding upon such agents to act in a manner that fosters the best interests of the corporation whose dealings are monitored by them.[86] The court further held that these agents carry the fiduciary obligations towards their respective principals.[87] With that being said, the court emphasised that the aforementioned is an applied universal principle and that no person imposed with such duties must be permitted to enter into arrangements that implicate, or possibly involve personal interests differing with or perchance conflict with the interests of those they are obliged to serve.[88]

Reverently, it may be deduced that insofar as the obligations imposed on directors are concerned, the aforementioned cases showcase the jurisprudence of the risk associated with directors when they act on behalf of a company, without the use and adherence of appropriate guidelines. Therefore, the crux of case laws and the jurisprudence of risk of agency discussed in the theory of agency and the aforesaid comparative analysis in respect of the United Kingdom's corporate governance and the obligations imposed on evidently provides a view into how other jurisdictions have developed principles encompassing the issues of risk of agency in the lenses of corporate governance and fiduciary duties.

To this end, it may be argued that the advancement and evolution of modern corporate governance as derived from common law and the aforementioned theory of agency principles created powers for directors to supervise and steer the company's operations to the benefit of the shareholders.[89] It has also created powers for shareholders to hold directors accountable to

[83] *Guinness Plc* supra note 81a t p 667.
[84] Ntene Ntswinyane Semi op cit note 76 at 58.
[85] Ntene Ntswinyane Semi op cit note 76 at 32.
[86] *Aberdeen Railway Co. v. Blaikie Bros* (1843-60) All E.R. 249 p 249 and 256 (United Kingdom).
[87] Aberdeen Railway Co supra note 86 at para 256.
[88] Ibid
[89] Ibid.

common law fiduciary duties by ensuring that they act in good faith and in the company's interest. The Companies Act recognises this duty — by requiring directors to exercise their given authority in good faith and in the best interest of the company.[90] This stems from the notion that a company with a strong devotion to good corporate governance results in effective board practises, and effective internal systems and has disclosure that is transparent on holding efficient accountable measures that result to the success of the company.[91]

Thus, based on the foregoing it can be found that the risks agency and the common law fiduciary duties played a significant role in the concept of corporate governance and that this concept has been used as a tool to encourage company management by ensuring that boards conduct their affairs whilst they consider wider ethical considerations.[92] This may indicate how corporate governance created a clear set of responsibilities for directors and also created rights for shareholders to ensure that they can hold directors accountable for their actions.[93]

2.4. Impact of corporate governance in SOCs in South Africa

In this respect, literature argues that corporate governance in the South African public sector has been attempting to find a balance between external factors, i.e., socio-economic, regulation, technological trends and politics while inspiring the proficient usage of resources, obligations, exercise of authority, and accountability at the same time, benefiting the general public, and the economy through good corporate governance practices.[94] As such, SOCs and relevant public oversight institutions need to acknowledge the peripheral environmental aspects as prospects and pressures offered by such characteristics as economic, legal, political, technological, and infrastructural features as they partake in a constructive connection with corporate governance.[95]

Whereas good governance endorses adequate organisational performance, the literature argues that bad governance practices such as extreme acts of corruption, lack of transparency and accountability from organisational leaders, or overly intrusive protocols can hinder commercial activity, resulting in substantive losses.[96] With that being said, it can be claimed that the deprivation of good governance practices in SOCs results in substantial losses that lead to poor service delivery and a damaging impact on the economy. In light of the foregoing, commentary

[90] Section 76(3)*(a)* and *(b)* of the Companies Act.
[91] Cassim *et al* op cit note 48 at 706 and Emily Makuta op cit note 62 at 58-59.
[92] Kgwiti Prince Mathibela op cit note 55 at 13.
[93] Ibid.
[94] Miseria Tishaniso Nyathi *Corporate Governance and The Performance of South African National Government Departments: A Balanced Scorecard Perspective* (published LLD, University of South Africa, 2022) 130.
[95] Miseria Tishaniso Nyathi op cit note 94 at 130.
[96] Ibid.

notes that the significance of utilising sound corporate governance protocols is that it is in the company's best interest and South Africa's economic growth, to predominantly invite foreign investments, and advance efficiency in SOCs.[97] This indicates that companies with good reputations magnetise better employees and investments, whilst those that are deficient in sound governance encounter undesirable effects on their reputation, share prices, and sustainability.[98]

2.4.1. Impact of non-compliance with governance protocols in SOCs

The South African Broadcasting Corporation ('SABC') is a significant illustration of a state-owned entity that was plagued with the impact of political interference and non-compliance with the governing frameworks discussed herein. In 2010 SABC was at the centre of controversy in respect of its internal affairs and governing structures. These issues created further controversy in relation to accountability, media coverage and costly bailouts from the National Treasury.[99] The state of SABC grew to be a troubling concern and eventually, this led to an investigation by the Public Protector. In 2014, a final report was issued in terms of section 182(1) *(b)* of the Constitution of the Republic of South Africa, 1996 ('Constitution') and section 8(1) of the Public Protector Act 23 of 1994.[100] The report was titled 'When Governance and Ethics Fail' and it was aimed at an investigation to the allegations of maladministration, systematic corporate governance deficiencies, abuse of power and the irregular appointment of Mr Hlaudi Motsoeneng ('Mr. Motsoeneng') by the SABC.[101]

In summary, the report originated from an investigation triggered by a complaint in respect of SABC's various governance irregularities and lack of compliance with the relevant legislative framework. The aforesaid investigation included further complainants, consisting of, *inter alia*, former SABC employees, maladministration, and corruption within SABC's high-level ranking personnel.[102] Furthermore, the report was mainly based on Mr. Motsoeneng, the then SABC's Acting Chief Operations Officer, in particular, key issues including irregularities in his appointment, salary progression, accusations of falsification of qualifications, various irregular

[97] Cassim *et al* op cit note 48 at 643.
[98] Ibid.
[99] Public Protector 'A Report on an Investigation into Allegations of Maladministration, Systemic Corporate Governance Deficiencies, Abuse of Power and the Irregular Appointment of Mr. Hlaudi Motsoeneng by the South African Broadcasting Corporation' available at *SABC FINAL REPORT 17 FEBRUARY 2014.pdf (pprotect.org)*, accessed on 09 November 2023.
[100] Public Protector op cit note 99.
[101] Ibid.
[102] Ibid.

appointments of staff, unauthorised salary advances and undue intrusion by the Communications Department and its former Minister.[103]

In respect of the foregoing, the Public Protector reported various violations of the Constitution, Companies Act, PFMA, internal governance policies in relation to remunerations, and relevant guidelines, comprising international benchmarks such as the King III Report on corporate governance.[104] The report essentially found that the SABC directors failed to provide the necessary guidance required to aid the board in fulfilling its fiduciary duties and by that, Mr Motsoeneng also admitted that the foregoing influenced the board to make unlawful and irregular findings.[105] Insofar as the intricacies between the corporate governance of SOCs and public accountability mechanisms are concerned, the aforementioned controversial issues and investigations into the SABC affairs provide a significant example of a lack of effective oversight from the state, the boards, and the relevant portfolio committees responsible for overseeing the Minister in charge of monitoring the governance of SOCs.

2.5. Challenges on board autonomy and corporate governance in SOCs

With respect to the aforementioned principles of corporate governance and their application in SOCs, it is essential for the purposes of this research to briefly discuss the challenges faced by corporate governance in SOCs. The World Bank study uncovers that SOCs do not have a defined autonomy in their corporate governance frameworks that assists them in managing their affairs without interference.[106] In several reports such as the aforementioned SABC report by the Public Protector provide an instance where there has been undue political interference suffered by the SOC board in the governance of its affairs and implementation of the relevant laws.[107] It is held that this underlying aspect of the governance of SOCs means that boards still need to balance undue political interference or unfettered control from state institutions when adopting or implementing strategic policies.[108] On the foregoing, the World Bank study also provides further aspects on the challenges faced by SOCs and argues that ever changing public policy goals have an effect on the board's responsibility when it pertains to managing and steering their SOCs.[109] This places the corporate governance and oversight of SOCs in conflict as boards need to efficiently manage SOCs while battling with interference by the state. On the

[103] Ibid.
[104] Ibid.
[105] Ibid.
[106] World Bank *A tool kit* op cit note 10 at 13-14.
[107] Public Protector op cit note 99.
[108] World Bank *A tool kit* op cit note 10 at 13.
[109] World Bank *A tool kit* op cit note 10 at 33.

contrary, a World Bank study argues that as far as public companies are concerned this notion operates inversely since their corporate governance frameworks provide directors with defined autonomy and shareholders with limited measures of interference.[110]

In support of this notion, the World Bank study explains that owners or shareholders in private or public companies play a significant role in the functioning of corporate governance[111] and this establishes a notion that their role is clear as far as governing is concerned. This is due to the fact that to a certain extent, shareholders are actively involved in the appointment of what they believe to be the best candidates to serve as the company's directors,[112] and in turn, they rightfully anticipate the appointed directors to make commercially sound decisions and supervise the performance of the company.[113]

Therefore, this balance ensures that directors manage the company according to the shareholder's interests. Upon failure, shareholders then have the power to interfere with the governance of the company. For purposes of this research, chapter three provides an applicable case law in relation to this notion and evidently discusses the factual and legal implications of a shareholding minister acting within the prescribed powers to hold the appointed directors liable for breach of their duties.

2.6. Chapter two: concluding summary

In detail, chapter two has enlightened the role of corporate governance in SOCs and the impact it has on the governance thereof. With that being said, the position remains clear that South Africa's corporate governance regime and its foundations were influenced by various principles such as the theory of agency, international debates, case law, various developments in the sphere of company law and more importantly common law principles governing the company law and directors. In addition, chapter two has denoted a comparative view with the United Kingdom's corporate governance developments since English law holds similar principles and played a vital role in the influence of South African company law, particularly in the policy guideline that shaped the reform of the country's company law. Further to that, chapter two enlightened the challenges in corporate governance in South Africa, notably, chapter two raised the SABC corporate scandal as a substantial case study on one of the issues surrounding ineffective corporate and public accountability mechanisms in South Africa. Although chapter two provides a perspective into the foundations and jurisprudence of

[110] World Bank *A tool kit* op cit note 10 at 14.
[111] World Bank *A tool kit* op cit note 10 at 162.
[112] World Bank *A tool kit* op cit note 10 at 13.
[113] World Bank *A tool kit* op cit note 10 at 244.

corporate governance and emphasises the state's efforts to align South Africa's company law with best governance practices, SOCs have trailed behind in compliance and implementation of the aforesaid principles which has affected the SOCs significantly.

CHAPTER THREE: GOVERNING FRAMEWORKS

3. Introduction

Chapter three critically discusses the major legislative frameworks i.e., the Companies Act and the PFMA as the legislations that regulate the governing aspects of SOCs. In-depth chapter three outlines and discusses the impact and the accountability mechanism imposed by the aforementioned frameworks. Furthermore, chapter three briefly deliberates on the background of the common law duty imposed on directors and their legislative duties and the consequences for breach of the foregoing. In addition, to underscore the significant impact of the Companies Act and the PFMA, chapter three summarily discusses relevant case laws pertaining to the legislative duties imposed on SOC directors. Lastly, chapter three briefly provides an analysis with respect to the challenges faced by the Companies Act and the PFMA.

3.1. Companies Act

Insofar as the previously discussed principles of corporate governance are concerned, it is essential to discuss the applicable provisions of the Companies Act. Particularly, the relevant accountability measures it introduced and the impact it has on the SOCs.

3.1.1. Impact of the Companies Act on SOCs

The Companies Act is said to be a modernised piece of legislation that aligns South Africa's corporate governance framework with the applicable international trends.[114] In support of this notion, section 7 *(a)* to (l) of the Companies Act provides clear and extensive objectives in relation to the companies registered under it. It outlines the important subsections by providing that the legislation aims for the promotion and development of South Africa's economy by encouraging entrepreneurship, and business efficiency, creating flexibility, and simplicity in the forming and maintaining of companies and encouraging transparency and high standards of corporate governance.[115] Notwithstanding the aforementioned, this research has discussed many challenges in respect of the SOCS and the impact they have on the economy and it may be argued that the promotion of these objectives have been met with significant challenges. It is also denoted that the matter of flexibility and the maintenance of SOCs has often been a challenge, based on the issues of poor performance, corruption, and poor leadership.[116]

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[114] Angela Gail Stevens *Enforceable Accountability: A Corporate Governance Mirage for South African State-Owned Companies* (published LLD thesis, University of Cape Town, 2020) 32.
[115] Section 7(b)*(i)-(iii)* of the Companies Act.
[116] Adele Thomas op cit note 22 at 451.

Arguably, the Companies Act places an obligation upon SOC directors to encourage transparency and high standards of corporate governance in SOCs. However, as far as SOCs are concerned transparency and the applicable standards of corporate governance such as fiduciary duties and other legislative duties have faced systematic challenges pursuant to their objectives and the objectives of section 7*(a)* to (l) of the Companies Act. In addition, the World Bank study and the relevant case law and/or reports herein supports the foregoing by providing that some SOC's boards do not have acceptable levels of autonomy.[117] This perception has been argued earlier on the premise that insofar as board autonomy is involved when it comes to boards conducting their affairs or discharging their official, common law fiduciary duties and/or statutory duties without undue influence from political and public policy goals SOCs may not be facing so many substantial challenges.[118] In light of the foregoing, this research has discussed in brief that public companies possess effective accountability and transparency measures in place than SOCs based on their multiple shareholders performing an active role in such measures.[119] The TIPS policy brief stated that the obstacles that exist for major SOCs in implementing the aforementioned measures is that they have one shareholder and owner, being the South African national executive and/or shareholding department acting through its representatives or the designated public officials.[120]

In this regard, literature supports that where such a shareholder exist, they are free to utilise their voting rights on any matter, without the need to comply with any internal or external formalities unless the Memorandum of incorporation of the company provides otherwise.[121] Further to that, the Companies Act supports this notion and provides that the matters relating to shareholders' meetings, notices and resolutions do not apply as far as one shareholder is concerned.[122] Arguably, this notion is logical for the reason that there is only one shareholder and the board is not obliged to comply with these provisions. Although the Companies Act makes provisions for the SOCs, there still lies an ineffective accountability mechanism as evidenced by the findings of the SABC report by the Public Protector and that underlines, as this research argues, the inadequacy of the Companies Act to provide for effective accountability mechanisms that govern the internal controls within SOCs.[123] The entirety of the legislation arguably appears to be dedicated towards the regulation of public companies,

[117] Ibid.
[118] Adele Thomas op cit note 22 at 450.
[119] Ibid.
[120] Trade and Industrial Policies Strategies op cit note 27.
[121] Cassim *et al* op cit note 4 at 79.
[122] Section 57(2)(a) and (b) of the Companies Act.
[123] Ibid.

disregarding the SOCs vigorous, regulatory, operational requirements and complexities.[124] The incorporation of SOCs into the Companies Act lacks the many provisions that may properly assist in matters of the balancing of board autonomy and political interference, public accountability and oversight mechanisms offered by the shareholding department's portfolio committees, particularly the absence of appropriate provisions for accountability and transparency tailor-made to the precise challenges inherent in their relations with several state institutions mentioned herein.[125] This deficiency is evidenced by the SABC report and the state capture report discussed herein which provide a significant illustration of the foregoing discussion. Further chapters below provide detailed discussions through case law, literature, reports, and other relevant regulatory frameworks.

3.1.2. Defining directors

For the purposes of this research, it is important to briefly define what a director is and more importantly the common law and legislative duties of directors. The Companies Act defines a 'director' as a member of the board of a company, as contemplated in section 66 of the Companies Act, or an alternate director in addition it incorporates any individual occupying the post of director or alternate director.[126]

According to the critique by literature, it submits that this definition is restrictive as company law recognises a broad range of directors. In that, the definition of a director as contemplated in section 1 of the Companies Act is extensive enough to incorporate most sorts of directors, *inter alia*, executive, non-executive directors, *de facto* and *de jure* directors, alternate directors, nominee directors, *ex officio* directors and also shadow directors.[127] It is argued that the definition of a director is distinctly not restricted to individuals that are officially assigned as directors.[128] Therefore, the individuals for whatsoever reasons were not appropriately assigned as directors might also be considered as directors for the object of imposing fiduciary and legislative duties and liability upon them.[129] In addition, the Companies Act requires a SOC to have a board, that assumes the power to perform the functions of the SOC, insofar as the

[124] Parliamentary Monitoring Group 'Challenges facing SOEs; Update: SAA & Express; SOEs that have not tabled annual reports & impact of COVID' available at *https://pmg.org.za/page/Challenges%20facing%20SOEs;%20Update:%20SAA%20&%20Express;%20SOEs%20that%20have%20not%20tabled%20annual%20reports%20&%20impact%20of%20COVID*, accessed on 25 December 2023.
[125] Ibid.
[126] Section 1 of the Companies Act.
[127] Cassim *et al* op cit note 48 at 687.
[128] Ibid.
[129] Cassim *et al* op cit note 48 at 687.

Companies Act or the Memorandum of Incorporation permits.[130] In addition. it stipulates that the directors are accountable to the shareholder for their actions and the affairs of the SOC.[131] To this end, literature provides that the novel approach to directors' duties is that individuals who consent to the appointment of the office of directors of a company assume lawful obligation for certifying that they recognise and appreciate the nature of the responsibilities that they are mandated to comply with.[132]

3.1.3. Director duties

In the common-law jurisdictions, such as South Africa, it is submitted that principle of fiduciary duties in respect of directors have for instance in the eighteenth and nineteenth centuries been long judicially formed and developed, predominantly in English law, on judicial precent and/or cases.[133] Notwithstanding this, literature provides that currently the fiduciary duties of directors play a significant role in the governance of companies and for that reason that the Companies Act imposes legislative powers and obligations to the board.[134] Accordingly, the Companies Act provides outlines that the commercial and dealings of the company must be managed by or under the direction of the assigned board, which has the power to exercise all the assigned powers and execute any of the functions of the company, unless insofar the Companies Act or company's Memorandum of Incorporation stipulates otherwise.[135] The impact of this provision is that directors' powers now emanate from a legislation than the company's constitution and such control is subject to shareholder control.[136] Furthermore, the aforementioned principle imposes that a director is obliged to act in the best interest of the company emanates from common-law and currently it finds its legislative embodiment within section 76(3) *(b)* of the Companies Act.[137] As per the said provision, a director, in the course of executing their directorial responsibilities, is obligated to exercise their authority and carry out their duties in the best interests of the company.[138] Although the theory of agency as discussed in the foregoing provides the underlying historical premise of corporate governance, being the relationship between a principal and the agent.[139] According to the South African law, the predominant perspective is that the relationship between a director

[130] Section 66(1) of the Companies Act.
[131] Section 66(1) and (2) of the Companies Act.
[132] Cassim *et al* op cit note 48 at 678-688.
[133] Cassim *et al* op cit note 48 at 684.
[134] Ibid.
[135] Section 66 of the Companies Act.
[136] Cassim *et al* op cit note 48 at 684.
[137] Cassim *et al* op cit note 48 at 693.
[138] Section 76(3)(b) of the Companies Act.
[139] Ibid.

and a company is first and foremost classified as *sui generis*, signifying a distinctive and separate category of a fiduciary relationship.[140]

In the case of *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, insofar as the aforesaid relationship is concerned, the court described that the development of a fiduciary relationship dependent upon the facts wherein an individual has been designated to act in the interest of another, and such appointment entails discretionary authority that, if wielded injudiciously, could be detrimental to the interests of a third party.[141] Furthermore, in the case of *Parker v Mckenna* (1974) LR 10 Ch App, the court held that the director's primary duty of allegiance is unbendable, inflexible, and has to be firmly applied by the court.[142] With that being said, it is submitted that the fiduciary relationship necessitates the fiduciary to perform with utmost good faith and to the beneficiary's best interests.[143] These set of duties are tied to this fiduciary relationship, with their principal objective being the deterrence of any abuse or breach of the entrusted relationship established on trust and confidence.

In light of the foregoing, the Companies Act makes provision for a principle that incorporates the an all-encompassing duty for directors to exercise their duties in good faith and in the best interests of the company.[144] In addition, the Companies Act provides that directors must exercise their given powers with the 'degree of care, skill and diligence' that may be reasonably anticipated from a person performing parallel functions for the company and possessing the general knowledge, skill, and experience of the particular director.[145] *In re Dorchester Finance Co Ltd v Stebbings* 1989 BCLC 498 it was held that directors are obliged to be of reasonable level of skill and expertise in respect of their roles and they are also required to apply a standard of care equivalent to what a reasonable person would apply to their private matters.[146] Moreover, it was further held that directors have to employ their duties honestly, in good faith and to prioritise the best interest of the company.[147] Insofar as these director duties are concerned, legal commentary emphasises that the intention behind the foregoing obligation was preventative in nature, meaning that the obligation was incorporated to safeguard the interest of the company and the shareholders.[148]

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[140] Cassim et al op cit note 48 at 692.
[141] *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 96-97 (United States of America).
[142] *Parker v Mckenna* (1874) LR 10 Ch App 96 at 124-125 (United Kingdom).
[143] Cassim *et al* op cit note 48 at 691.
[144] Section 76(3)(a) and (b) of the Companies Act.
[145] Section 76(3)(c) of the Companies Act.
[146] *Dorchester Finance Co Ltd v Stebbings* 1989 BCLC 498 para 502 (United Kingdom).
[147] *Dorchester Finance* supra note 146 para 502.
[148] Cassim *et al* op cit note 48 at 706.

3.2. Challenges faced by director duties in SOCs

3.2.1. Managing duties and balancing political interference

Notwithstanding the aforementioned common law and statutory duties that directors have, there are underlying challenges concerning the compliance with these duties. For instance, literature provides that the selection of SOC board stands as the obligation of the Minister in control of the Ministry of Public Enterprises.[149] Occasionally, there is an underlying predicament in respect of preserving a balance on the selection of a board that fosters political interference or one that elects detested decisions to retain the sustainability of SOCs.[150] Further to this, literature explains that the fostering of political interference is found to be more common, therefore boards stand compromised and entrapped in the accountability of the assigning principals and remain unable to function without undue political interference when appointed.[151] Evidently, one may argue that in respect of the common law and legislative duties that directors are obligated to execute, the aforementioned contributes to the challenges faced by SOCs in respect of the intricacies between corporate governance and respect state actors.

3.2.2. Conflict between directors in respect of fiduciary duties

The case of *Mthimunye-Bakoro v Petroleum Oil and Gas Corporation of South Africa (SOC) Limited* [2015] JOL 33744 (WCC) provides clarity into the obligations imposed on directors and supports the aforesaid discussions in respect of fiduciary duties. In brief the facts of the case were outlined as follows, Mthimunye-Bakoro, an executive director at the Petroleum Oil and Gas Corporation of South Africa, was confronted with a suspension pursuant to a probe into the SOC's substantial estimated shortfall.[152] The SOC being a public entity accountable to the PFMA, suffered a significant projected shortfall in December 2014. In response to this, the board began an inquiry to determine the origins of the poor financial performance and they discovered that the director's conduct influenced the reported financial losses.[153] The board which comprised of largely non-executive directors acting on their obligations to serve the best interest of the SOC, conducted a meeting that excluded executive directors, to discuss the suspension of the director.[154] Discovering the action taken by the board, the aggrieved director

[149] Misheck Mutize and Ejigayhu Tefera, 'The Governance of State-Owned Enterprises in Africa: An Analyses of Selected Cases'12 *JEBS* 11.
[150] Misheck Mutize and Ejigayhu Tefera op cit note 149 at 11.
[151] Ibid.
[152] *Mthimunye-Bakoro v Petroleum Oil and Gas Corporation of South Africa (SOC) Limited* [2015] JOL 33744 (WCC) p 3-5.
[153] *Mthimunye-Bakoro supra* note 152 p 5.
[154] *Mthimunye-Bakoro supra* note 152 p 7- 11.

sought to challenge the validity of the board meeting and the resolution thereof, claiming that the exclusion of executive directors from the aforementioned meeting was contrary to the principles of corporate governance.[155]

In respect of the aforesaid facts, the legal question hereto was pursuant to the Companies Act, specifically section 75(5) *(d)* and *(e)*, which pertains to the presence and involvement of a director in board discussions where the director has a personal financial interest.[156] *In casu*, the court held that the case presented significant queries in respect of the common-law duties of directors, the function of those duties and the correlation between the common law and the Companies Act.[157] In this respect, the court's judgement affirms the importance of considering the facts and circumstances of each case to establish whether resolutions undertaken at the board meetings were binding. Accordingly, the court referred to section 71(3) of the Companies Act which pertains to the removal of directors and outlines the prerequisite aimed at a fair process, including a notice and an opportunity for the director to reply to the alleged allegations of conflict of interest and financial losses prior the determination for exclusion is considered.[158] However, the court rejected the interpretation and argument that a director with a personal interest in respect of discussions held by the board about their suspension is in contravention of section 75 of the Companies Act.[159]

Respectfully, the court declined the relief sought by the applicant and held that the meeting was indeed valid as the director was provided notice in respect of the meeting that was held by the board.[160] Holistically, the judgment provides the significance of director duties insofar as the conduct of their affairs, section 75 of the Companies Act and the corporate governance principles are concerned. With that being said, principle 6 of the King IV Report provides that the directors should serve as the centre and caretakers of corporate governance and [161] in respect of the foregoing literature provides that directors must possess the appropriate calibre and independent judgement pursuant to the strategy, performance, standards of conduct and performance evaluation.[162] Furthermore, insofar as the low performance of the company is concerned it is submitted that the director should to resign or be terminated rather than yield in a judgement that does not progress the best interests of the company.[163] It is also argued that

[155] *Mthimunye-Bakoro supra* note 152 p 11-13.
[156] *Mthimunye-Bakoro supra* note 152 p 20.
[157] *Mthimunye-Bakoro supra* note 152 p 17.
[158] *Mthimunye-Bakoro supra* note 152 p 28.
[159] *Mthimunye-Bakoro supra* note 152 p 30.
[160] *Mthimunye-Bakoro supra* note 152 p 36-40.
[161] Cassim *et al* op cit note 48 at 654.
[162] Emily Makuta op cit note 62 at 68.
[163] Ibid.

such corporate governance issues present irregularities and lack of awareness in that directors have to be made cognisant throughout their induction process and execution of duties that they cannot discharge liability by maintaining that they sanctioned a depraved decision because of the encouragement received from another board fellow.[164]

3.2.3. Companies Act remedies for breach of duties

Fiduciary duties play a critical role in the governance of SOCs and wherein a director has breached their duties, amongst others the Companies Act makes provisions for liability for directors and a mechanism that may be utilised by the Minister, or any concerned party. In respect of this the Companies Act provides a remedy for the disqualification of a director. All things considered; section 162 of the Companies Act makes provision for an application to declare a director delinquent.[165] It provides that pursuant to an administration of relevant legislation, any organ of state that is responsible for the administration of the particular statute can apply to a court for an order declaring the director a delinquent under specific conditions.[166] Those being in the case where the person in question is a director or within twenty-four months urgently before the aforesaid application was a director the company and taking into consideration any of the circumstances envisaged in subsection (5) *(d)* to *(f)*[167] as applicable to the legislation administered by the concerned organ of state. [168] In addition, the Companies Act makes further provisions in which directors may be held liable for breach of their duties.[169] It provides that a director may be held liable within two legal principles, first they may be held liable in terms of the principles of common law in respect of breach of fiduciary duties for loss of damages or costs suffered by the company as a result of the breach of duties stated in section

[164] Emily Makuta op cit note 62 at 68-69.
[165] Section 162(1) of the Companies Act.
[166] Ibid at section 162 (4).
[167] Ibid at section 162 (5)(d) to (f) provides as follows:
'(5) [A] court must make an order declaring a person to be a delinquent director if the person-
(d) has repeatedly been personally subject to a compliance notice or similar enforcement mechanism, for substantially similar conduct, in terms of any legislation;
(e) has at least twice been personally convicted of an offence, or subjected to an administrative fine or similar penalty, in terms of any legislation; or
(f) within a period of five years, was a director of one or more companies or a managing member of one or more close corporations, or controlled or participated in the control of a juristic person, irrespective of whether concurrently, sequentially or at unrelated times, that were convicted of an offence, or subjected to an administrative fine or similar penalty, in terms of any legislation, and
(i) the person was a director of each such company, or a managing member of each such close corporation or was responsible for the management of each such juristic person, at the time of the contravention that resulted in the conviction, administrative fine or other penalty; and
(ii) the court is satisfied that the declaration of delinquency is justified, having regard to the nature of the contraventions, and the person's conduct in relation to the management, business or property of any company, close corporation or juristic person at the time.'
[168] Ibid at section 162(4)(a) and (b).
[169] Ibid at section 77(2).

75, 76(2) or 76(3) *(a)* or *(b)* of the Companies Act.[170] Second, they may be held liable in terms of the principles of common law with relating to delict for whatever loss, cost or damage suffered by the company due to the breach of duties envisaged in section 76(3) *(c)*, any provision of the Companies Act not mentioned in the section or any provision provided for in the company's memorandum of incorporation.[171]

3.3. Public Finance Management Act

The governance of SOCs is largely circumscribed by the PFMA, it necessitates compliance with additional provisions beyond those outlined by the Companies Act. Accordingly, the individual directors and the collective SOC boards are obligated with the fiduciary responsibility under both the Companies Act and the PFMA.[172] In addition, the PFMA sets forth the oversight duties in respect of SOCs' shareholder compacts, corporate plans, and reporting requirements. Additionally, the PFMA creates the principles that pertain to governing the functions and obligations of boards within SOCs.[173] In the below, the research discusses the relevance and applicability of the aforementioned provisions insofar as SOCs are concerned.

3.3.1. Board statutory duties and accountability mechanisms

In respect of the foregoing, section 50 of the PFMA plays an essential role in the corporate governance and accountability mechanism of SOCs as it sets out the fiduciary duties of the accounting authority, in reference to a SOC board.[174] This provision states that the public entity, in reference to a SOC, has to exercise the duty of utmost care in safeguarding the assets and records of the public entity.[175] Furthermore, it states that the accounting authority is obliged to manage its affairs with fidelity, honesty, integrity and more importantly it has to do so in the best interests of the public entity when managing its financial affairs.[176]

Additionally, the PFMA provides that upon request the accounting authority must disclose all material facts, inclusive of those are that reasonably discoverable subject to their potential

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[170] Ibid at section 77(2) (a).
[171] Ibid at section 77(2)(b) (i)-(iii) of the Companies Act.
[172] Sections 76 and 77 of the Companies Act and section 50 of the Public Finance Management Act.
[173] Sections 50, 51 and Schedule 2, 3B and 3D of the Public Finance Management Act.
[174] In respect of the accounting authority, section 49 of the Public Finance Management Act provides as follows:
'(1) [E]very public entity must have an authority which must be accountable for the purposes of this Act.
(2) If the public entity—
(a) has a board or other controlling body, that board or controlling body is the accounting authority for that entity.'
[175] Section 50(a) of the Public Finance Management Act.
[176] Ibid section 50(b).

influence in respect of the decisions or actions of the executive authority or the legislature to which the public entity is answerable.[177] Lastly, within its influence the accounting authority is assigned with the obligation to take steps in preventing any prejudice to the states financial.[178] In addition, section 51 of the PFMA provides an extended crucial responsibility to the SOCs boards as it stipulates that the accounting authority has the obligation ensure its respective SOC maintains, *inter alia*, an effective, efficient, and transparent systems for financial and risk management, as well as internal control; internal audit system, monitored by an audit committee in accordance with the relevant regulations specified in sections 76 and 77; and to provide for a procurement and provisioning system that is fair, equitable, transparent, competitive, and cost-effective.[179] Furthermore, the PFMA obligates the accounting authority to adopt effective and suitable disciplinary procedures against any employee an SOC that violates the provisos of this Act.[180]

In respect of the aforementioned PFMA provisions, it is clear that the SOC board have additional duties apart from the Companies Act and insofar as the state is concerned the provisions provide a significant position into the additional obligations that the SOC boards have towards the executive and the legislature. As the foregoing provides the PFMA recognises boards as the accounting authority and as this research has discussed, the said authority is accountable to its designated shareholder department. In addition to this, the PFMA provides another mechanism into which the board uses namely, the shareholder compacts that the accounting authority is required to comply with along with various PFMA statutory duties while acting in the interest of the SOC.[181]

To this end, the Companies Act requires that the board must act in the company's interest and places a fiduciary duty on directors to act in good faith.[182] In light of the aforementioned, one may establish that insofar as the intricacies of the state and SOC are involved, the PFMA provides the SOCs boards with robust statutory duties than those found in the Companies Act.

3.3.2. PFMA on financial accountability

Insofar as financial accountability in SOCs is concerned the PFMA also imposes general duties towards compliance with tax policies, management of revenue, safeguarding of assets,

[177] Ibid section 50(c).
[178] Ibid section 50(d).
[179] Ibid section 51.
[180] Ibid section 51(a) (i)-(iv).
[181] Ibid at section 52 and Schedule 2, 3B & 3D.
[182] Section 76(3)(a) of the Companies Act.

management of human resources, combating futile and wasteful expenditure.[183] The SOC boards in respect of the aforesaid financial and other related duties concerned with the governance of the company are obligated as prescribed by the PFMA to prepare annual budgets, corporate plans and financials which have to be submitted to the AG and National Treasury.[184]

For explanatory purposes in respect of the PFMA and SOC boards, the case summary herein provides a brief discussion of the practicality and the effectiveness of section 51 of the PFMA. The Eskom court ruling below highlights the significance of a competent board in respect of exercising its respectable autonomy and managing the affairs of an SOC according to the aforementioned provisions of the PFMA, Companies Act and corporate governance principles. In essence, the case outlines a narrative of the significance of a board in ensuring the financial accountability of a previously appointed board and more importantly the case denotes the importance of a board as an accounting authority to conduct reviews in respect of the financial decisions made by the previous board insofar as compliance with the applicable PFMA provisions is concerned.

3.3.3. Court ruling on Eskom's financial mismanagement

In re, Eskom Holdings SOC Limited v McKinsey and Company Africa (Pty) Ltd [2019] ZAGPPHC unreported case no. (22877/2018) of 18 June 2019 provides a remarkable judgement on the corporate governance and financial mismanagement of SOCs. In brief, the then 2018 newly appointed Eskom board took the initiative to investigate the previous board's decisions and payments.[185] In doing so, as the designated accounting authority the sitting board discovered that McKinsey and Trillian Management Consulting received a payment of R100 million and they had not performed the services they were contracted for.[186] Consequently, McKinsey and Trillian Management Consulting, the opposing parties, challenged Eskom's allegation and the legality of the investigation, wherein they claimed that the board lacked the authority to investigate the previous board's decisions and to challenge them in open court.[187] In respect of the foregoing, the court had to determine whether any procedural challenges hindered Eskom's sitting board from investigating the legality of the previous board's decisions

[183] Section 51(1) of the Public Finance Management Act.
[184] Ibid at section 54.
[185] *Eskom Holdings SOC Limited v McKinsey and Company Africa (Pty) Ltd* (22877/2018) [2019] ZAGPPHC 185 para 6.
[186] *Eskom* supra note 185 para 7.
[187] Ibid.

and the payments it authorised.[188] Notably, in adjudicating this case, the court referred to the *Department of Transport and others v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC), wherein the court stated that the Constitutional Court stressed that state organs may challenge the exercise of public power, including a state organ challenging its own exercise of public power.[189] Accordingly, the court held that there was no existing challenge that hindered Eskom's sitting board to review the decisions taken by a previous board.[190] Furthermore, the court held that the decisions made by the previous board and Eskom's Board Tender Committee were unlawful and ordered Trillian to repay all monies owed to Eskom.[191]

3.4. Challenges presented by the PFMA and the Companies Act

It is denoted that the accountability issues in respect of the PFMA stem from the SOC's board failures to accept responsibility, as well as the lack of provisions requiring the Public Enterprise Minister and relevant shareholder Minister to hold it accountable for financial misconduct.[192] The Companies Act also makes provision for directors to be declared delinquents by way of an application in case of breach of duties and misconducts.[193] In addition, the Companies Act provides shareholders with remedies that can be utilised as an accountability mechanism to hold their boards accountable for a breach of statutory duties such as financial misconduct.[194] With that being said, it is argued that the question of effective internal controls in respect of SOCs is based on the premise that the PFMA or SOC's founding legislations do not subject them to suitable implementation and this affects their accountability mechanisms.[195]

For instance, the *Organisation Undoing Tax Abuse NPC and Another v Myeni* (15996/2017) [2019] ZAGPPHC 957 court ruling encompasses a significant perspective with regards to the underlying issues found in the PFMA, wherein it was stated that the ability of the national executive to hold SOC directors accountable is critical for maintenance of effective accountability in SOCs.[196] In respect of the foregoing, it is provided that SOC boards and committee directors have to fulfil their common law obligations, including their statutory obligations under the PFMA, the Companies Act that they must also manage the affairs of the

[188] *Eskom* supra note 185 para 6.
[189] *Eskom* supra note 185 para 5 and *Department of Transport and others v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) p 657-658.
[190] Ibid para 6.
[191] *Eskom* supra note 185 para 7.
[192] Angela Gail Stevens op cit note 114 at 83.
[193] Sections 162 and 77 of the Companies Act.
[194] Ibid at sections 161, 163, 164 and 168.
[195] Misheck Mutize and Ejigayhu Tefera op cit note 149 at 11.
[196] *Organisation Undoing Tax Abuse NPC and Another v Myeni* (15996/2017) [2019] ZAGPPHC 957 para 267.

SOCs within the ambit of their relevant founding legislations.[197] Although this premise finds its application on the governance of SOCs, it is submitted that achieving this goal retains implementation challenges since SOCs legislative and policy frameworks remain fragmented and vague and although there internal controls that exist; the PFMA or the relevant SOC founding legislations do not subject them to suitable implementation.[198]

The foregoing submission is evidenced by the *Mjayeli Security (Pty) Ltd and Another v South African Broadcasting Corporation SOC Limited* (unreported case no 47916/2017 of 10 October 2023). This is a recent unreported court ruling concerning financial misconduct and non-compliance with tender processes and it significantly highlights the violation of fiduciary duties outlined in the PFMA and the corruption perpetuated by a SOC board.[199] In light of the foregoing, the Special Investigating Unit was requested to initiate an investigation into the unlawful and biased awarding of a tender to a second highest scoring bidder and accordingly found violations of tender processes.[200] In its judgment, the court was required to determine whether the SABC in conjunction with its interim board breached its own Supply Chain Management ('SCM') policy; whether the interim board took into consideration the irrelevant factors when awarding a tender to Mafoko ('Applicant'); and whether there was a reasonable suspicion of bias towards the Applicant.[201]

In its decision, the court held that the interim board members failed to comply with the SABC's SCM policy dictated by the PFMA and that the Application was certainly favoured.[202] The court additionally held that the foregoing conducts violated section 83 of the PFMA, which provides that an accounting authority commits a conduct either willingly or negligently if it fails to comply with sections 50, 51, 52 and 53 of the PFMA or if it decides to create a fruitless and wasteful expenditure its members will be individually and severally liable.[203] Having held that, the court acknowledged that due to the SABC and the interim board's failure to observe applicable legal and policy frameworks and their decision to benefit another entity, the court held them accountable under Section 86(2) of the PFMA.[204] Moreover, the court the held that the interim board's decision to award the Applicant, constituted gross financial misconduct.[205]

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[197] Angela Gail Stevens op cit note 114 at 69.
[198] Misheck Mutize and Ejigayhu Tefera op cit note 149 at 11-13.
[199] *Mjayeli Security (Pty) Ltd and Another v South African Broadcasting Corporation SOC Limited and Others* unreported case no. 47916/2017 of 10 October 2023 para 1-23.
[200] *Mjayeli supra* note199 para 24-28.
[201] *Mjayeli supra* note199 para 6.
[202] *Mjayeli supra* note 199 para 126.
[203] *Mjayeli supra* note 199 para 127.
[204] *Mjayeli supra* note 199 para 128.
[205] *Mjayeli supra* note199 para 136.

Ultimately, in its judgement the court held that the interim board's decision to award the Applicant with the tender was invalid and as it was *ultra vires* granted lawfully to it by the Constitution, PFMA, Preferential Procurement Policy Framework Act and the SABC's SCM policy.[206] Therefore, taking into consideration the aforementioned court rulings, the discussions of the provisions of the PFMA and the Companies Act, it is evident that there is inadequate facilitation and violation of fiduciary duties in SOCs.

3.5. Chapter three: concluding summary

Chapter three has critically discussed the Companies Act and PFMA's influence on *inter alia*, the SOC's accountability mechanisms, the existing provisions that play a crucial role in director duties and the consequences of breaching such duties. With that being said, the chapter emphasised the challenges met by the SOC's major governing frameworks, the impact they have on the governance of SOCs and more importantly exposing the extent of their influence through various case laws. Moreover, chapter three in summary revealed the crucial legal remedy from one of the governing frameworks used by the shareholder Ministers to hold SOC board members accountable when duties and objectives of being a director are compromised and chapter three highlights a significant aspect in respect of the accountability mechanisms of SOCs. Although, the aforesaid legislative frameworks provide extensive provision in respect of duties for directors and their objectives, however through the case laws and the pertinent non-compliance issues adjudicated by the courts they bear the evidence on the issues presented by the existing framework insofar as accountability is concerned.

[206] *Mjayeli supra* note199 para 137.

CHAPTER FOUR: SOC BOARDS RELATIONSHIP WITH THE STATE

4. Introduction

Chapter four discusses the governing relations and various controls in respect of the affairs of SOCs. It discusses the underlying relationship between the SOC boards and the state. In addition, chapter four briefly discusses significant case law in respect of the foregoing. Furthermore, chapter four discusses one of the state's latest frameworks and briefly provides an analysis concerning the impact of the framework taking into consideration relevant commentary and considerations.

4.1. SOC governance relations

For the purposes of this research, chapter four initially provides a discussion in respect of the role of the state actors such as the shareholder departments, shareholder Minister and the Department of Public Enterprise ('DPE') in the affairs of SOCs and the governance thereof.[207] It is submitted that this function is purely enabled by legislation, namely, the PFMA, the Companies Act and SOC founding legislation, wherein the DPE or the responsible relevant Minister act as representatives, or put simply, a proxy for the state insofar as the affairs and oversight of SOCs is concerned.[208] In light of the aforesaid, legal commentary distinctively submits that for Ministers or the DPE acting in accordance with the relevant legislations, their actions can be considered as administrative or executive insofar as their legal status is concerned.[209] Having regard to the foregoing, legal commentary further submits that the state is and remains the shareholder and the designated Minister functions as the representative of the state.[210]

4.1.1. Relationship between shareholder departments and the SOC boards

The relationship between shareholder departments and the board influences the governance of SOCs significantly, and it is submitted that the shareholder compacts regulate the aforementioned.[211] Accordingly, shareholder compacts are a legal requirement established under the PFMA, which serve as the performance agreement between the Minister of the

[207] Ibid.
[208] Ibid.
[209] Henochsberg op cit note 3 at 224(6).
[210] Henochsberg op cit note 3 at 224(5).
[211] Ibid.

shareholding department and the board.[212] The SOC board framework provides that this compact needs to be concluded before finalising the relevant SOCs corporate planning as shareholder compacts define the relationship between the shareholding department and the board by enlisting specific commitments required from both parties.[213] Furthermore, this shareholder compact has to be submitted to the DPE to ensure that SOCs and their shareholder departments comply with relevant laws such as the Public Audit Act, PFMA, Companies Act, labour laws, environmental management policies, procurement policies and it does this through its established compliance unit.[214]

Although the DPE is obligated to warrant SOCs' compliance with the aforementioned regulatory frameworks, there is a fundamental challenge that exists in the implementation of the SOCs board evaluation framework. The challenge stems from shareholder compacts being signed late or often not signed at all and the framework provides that this fractures the duty of the shareholding department to hold the board accountable for poor governance and performance.[215] Therefore, to that extent, it may be argued that non-compliance with relevant policy framework and lack of coordination thereto set forth challenges for the effective governance of SOCs.

4.1.2. Court ruling on shareholding Minister and SOC board governing intricacies

To reiterate, this research has provided an in-depth discussion with regard to the relationship between shareholder departments and SOC boards and in doing so it denoted the shareholding department's exercise of supervisory functions over their designated SOCs.[216] The *Minister of Defence and Military Veterans v Motau* 2014 (5) SA 69 (CC) is a landmark case on accountability insofar as the aforesaid relationship is concerned. The case is seemingly an example of the intricacies that exist between the corporate governance of SOC and the involvement of state actors such as the shareholding minister.

In *casu*, the Minister terminated the Armscor board members for failure to execute their oversight duties in respect of the procurement project for the South African Special Forces and the reasons for the termination were that, *inter alia*, the Armscor board failed several

[212] Section 52 of the Public Finance Management Act.
[213] Department of Public Enterprises 'DPE-SOC 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 8 July 2022.
[214] Department of Public Enterprises op cit note 205.
[215] Ibid.
[216] Ibid.

procurement projects and delayed deliverables for a period of thirty-six months.[217] In respect of the foregoing, the Minister argued that the termination of the chairperson and the deputy chairperson of the board was empowered by section 71 of the Companies Act, which provides a procedure for the dismissal of board members by the shareholders. Furthermore, the Minister argued, *inter alia*, that Armscor's founding legislation, the Armaments Corporation of South Africa Limited Act 51 of 2003 ('ACSAL Act') gave the Minister the power to terminate board members based on a good cause and that in terms of the aforesaid legislation the Minister has the power to represent and act on behalf of the state.[218]

In respect of the foregoing, the Constitutional Court ('CC'), in its judgement, held that this case pertained to accountability in respect of the standard of performance that a Minister can hold the SOC board accountable and the standard that must be applied by the courts when Ministers exercise their supervisory powers over SOCs.[219]

Notably, the CC held that these standards are significant for democracy, held that accountability and good governance plays a crucial role in the adjudication of the case.[220] In respect of the foregoing, the CC was enquired to consider, *inter alia*, whether the Minister's decision to dismiss the Armscor's chairpersons constituted administrative or executive action, if the Minister demonstrated good cause for the dismissals as stipulated under section 8 *(c)* of the ACSAL Act and if the Minister was duty-bound to any procedures that prevented the exercise of the power granted by section 8 of the ACSAL Act?[221]

In its judgment, the CC first held that the board was responsible for the management of Armscor's affairs as they controlled the decisions and conducts of the SOC.[222] The further CC held that the board was accountable for its actions and that there was no acceptable reason for the state of affairs that Armscor was in since the chairperson was a skilled professional obligated to display professionalism, due diligence and to act in the interest of Armscor by ensuring that its affairs were in order.[223] Accordingly, the CC agreed with the decision of the Minister to dismiss the chairpersons based on the failure to lead the board diligently and to take responsibility for the failure in discharging their duties.[224]

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[217] *Minister of Defence and Military Veterans v Motau* 2014 (5) SA 69 (CC) p 69-70.
[218] Section 2 and 8 (c) of the Armaments Corporation of South Africa Limited Act 51 of 2003.
[219] *Motau* supra note 217 p 73.
[220] *Motau* supra note 217 p 73-74.
[221] *Motau* supra note 217 p 80.
[222] *Motau* supra note 217 p 92-93.
[223] Ibid.
[224] *Motau* supra note 217 p 90-94.

The CC further held that the Minister demonstrated good cause in dismissing the chairpersons for their failure in leading the board and ensuring that Armscor was functioning effectively and delivered the policy directives of the Department of Defence.[225] Although there was a strong emphasis that the Minister had acted unlawfully by failing to follow the procedure provided under section 71 (1) and (2) of the Companies Act.[226] Based on the arguments outlined by the Minister, the CC found the conduct of the Minister lawful and held in favour of the Minister for the chairpersons remain dismissed.[227]

In light of the foregoing, the case provides robust evidence for the effectiveness of section 71 of the Companies Act as an accountability mechanism. However, it provides a persuasive argument for the revision of section 52 of the PFMA shareholder compacts signed between the Minister and the board members to be legally binding, to warrant the Minister's duty to hold the board liable for its failure to deliver the shareholding department's policy goals per given timelines.

4.2. Oversight by shareholder representative

4.2.1. Role of the DPE

The DPE is a national executive portfolio designated by the PFMA as the executive authority responsible for SOCs and accountable to Parliament.[228] Established in 1994 as the shareholder representative of the national executive and tasked with the responsibility of, *inter alia*, rendering legal services, corporate governance mechanisms, monitoring of key performance indicators, fiscal compliance and commercial viability with the sole purpose of aligning the SOCs with the state's strategic economic objectives.[229] In addition, the DPE acts as a connection between the state and the SOCs and more importantly it plays a significant role in formulating policies, legislation and regulating SOCs.[230]

Ever since 1994, the DPE has made considerable progress in strengthening the SOC's legislative and policy landscape and it has done so by incorporating accountable and transparent corporate governance measures.[231] As the public administrator and a shareholder representative, the DEP encompasses an oversight role in the affairs and the accountability measures of SOCs. Accordingly, this is evident from the PFMA which empowers it to, *inter*

[225] *Motau* supra note 217 p 89, 99-101.
[226] *Motau* supra note 217 p 97 and 99.
[227] *Motau* supra note 217 p 101-105.
[228] Section 1 and 49 of the Public Finance Management Act.
[229] Department of Public Enterprises op cit note 213.
[230] Ibid.
[231] Ibid.

alia, have supervisory powers, partake in corporate plans, create shareholder compacts, safeguard public interest, and conduct three-monthly and annual reporting in respect of the affairs of the SOCs.[232]

4.2.2. DPE's legislative and policy initiative SOC

The powers of the DPE as the shareholder's representative powers are influenced by, *inter alia*, the Companies Act, the PFMA together with the National Treasury Regulations, SOC founding statutes,[233] King IV Report, Medium-Term Strategic Framework 2019-2024 and the 2050 National Spatial Development Framework. Although these legislative and policy frameworks provide the DPE with relevant guidelines and extended use of its powers, it is noteworthy that the Minister of DPE insofar as its role is concerned has received criticism from Parliament, particularly the department's portfolio committee, over its supervisor decisions and the effectiveness in respect of the use of such frameworks.[234] In light of the foregoing, the criticism on the DPE has been based on its failure to implement effective policy and operational changes over SOCs given their growing challenges.

4.2.3. SOC's Board Evaluation framework

To strengthen internal governance controls within SOCs, the DPE adopted the State-Owned Company Board Evaluation Framework (version 2 of 25 March 2021). The purpose of the framework is to provide boards with guidelines aimed at reinforcing strong governance and evaluation processes within SOCs. [235] In addition, this board evaluation framework is aimed at advancing the effectiveness of SOCs and their duties to the state.[236] That being stated, the framework is not legally binding nor published in the government gazette, however, it does include several legislations, such as the PFMA, Companies Act and corporate governance instruments such as King IV Report and National Treasury regulations. In light of the foregoing prescripts of the framework, it appears that the DPE issued it as a form of a guideline and solely for purposes of assisting board members with their relationship with the state and the execution of their duties.[237] In any event, the framework remains a useful guide for purposes of identifying what SOCs boards must consider in governing their affairs. There are still underlying challenges that exist in the governance of SOCs emanating from inconsistent

[232] Ibid.
[233] Sections 57 and 58 of the Companies Act.
[234] Misheck Mutize and Ejigayhu Tefera op cit note 149 at 11.
[235] Department of Public Enterprises op cit note 213.
[236] Ibid.
[237] Ibid.

frameworks which in turn fractures the existing overall accountability mechanism of SOCs. The framework's failure in encompassing the Department's and/or the board member's obligations to share the evaluation reports with public oversight institutions has the possibility to leave them with either misinformation or unquestioned affairs only the Department and the board is aware of.[238] Thus, this creates ongoing concerns in respect of the effectiveness of non-binding frameworks as far as accountability of directors is concerned.

4.3. Challenges in SOC's legislative frameworks

This research has discussed in various chapters how SOCs are subject to empowering legislations, *inter alia*, the Companies Act, and the PFMA insofar as fiduciary duties and governing obligations are concerned. In that regard, a study by the International Monetary Fund on the "Role of SOCs in South Africa" has submitted that while the focus of the aforesaid places certain governance structures into SOCs, founding legislations play a crucial role that varies across SOCs, as they often encompass unique explanations in respect of the SOC's goals, reporting, governance prerequisites, and accountability. [239]

In addition, it is submitted that the founding legislations concerned with the governance of SOCs are distributed among numerous laws and often lacks consistency.[240] In that regard, it is argued that the existence of incompatible aspects being the SOC founding legislations, the Companies Act, and the PFMA encompasses vagueness when it pertains to SOC governance structures, compliance protocols and chain of command.[241] For instance, these inconsistencies that occur in the internal governing structures of SOCs are the appointment of chief executive officers, directors, resolutions regarding remuneration guidelines, oversight duties and reporting directives which causes complexities and heighten legislative compliance challenges for SOCs.[242] In light of the foregoing, literature submits that the continuous lack of effective and well-defined governing mechanisms for SOCs aggravates their existing challenges. [243]

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[238] William Gumede 'South Africa's lack of accountability crisis' available at *https://www.news24.com/news24/opinions/analysis/william-gumede-south-africas-crisis-of-lack-of-accountability-20210908,* accessed on 23 December 2023.

[239] International Monetary Fund 'The Role of SOCs in South Africa: Issues and Policy options' available at *https://www.bing.com/ck/a?!&&p=04c7fdd07932501fJmltdHM9MTcwMDQzODQwMCZpZ3VpZD0yNDUwYTI1NC0yN2Q0LTY0YjItMmYyZC1iMGMwMjNkNDZhMDkmaW5zaWQ9NTI2Mg&ptn=3&ver=2&hsh=3&fclid=2450a254-27d4-64b2-2f2d-b0c023d46a09&psq=PFMA+role+in+the+governnace+of+SOCs&u=a1aHR0cHM6Ly93d3cuZWxpYnJhcnkuaW1mLm9yZy9kb3dubG9hZHBkZi9qb3VybmFscy8wMDIvMjAyMi8wMzgvYXJ0aWNsZS1BMDAyLWVuLnhtbA&ntb=1,* accessed on 19 November 2023.

[240] International Monetary Fund op cit note 239.

[241] Ibid.

[242] Ibid.

[243] Ibid.

Furthermore, the predominant obstacle is that, although there is a theoretical and legislative framework that is properly established, leadership and corporate governance roles remain a challenge.[244]

In that regard, it is submitted that the DPE has failed to adopt effective corporate governance legal frameworks that are effective and address the key governance challenges faced by major SOCs.[245] This view is supported by the argument that the existing SOC's legislative and policy frameworks remain fragmented and contradictory due to SOC's designation to different sectors with diverse needs, paradoxes and perspectives.[246] In its 2012 SOCs Policy Dialogue the DPE illuminated that there are numerous inconsistencies found between the PFMA and the Companies Act and that these legislations from their adoption did not fully grasp the challenges faced by SOCs on a daily basis.[247] Although the state has taken different initiatives to adopt policy framework, i.e., the SOC board evaluation framework as an approach to addressing bad governance in SOCs, commentary argues that the existing SOC governance landscape remains susceptible to, *inter alia,* inconsistent, unaccountable frameworks and, given the application challenges they face, stakeholders have advocated for the adoption of a sound and effective SOCs governing and legislative framework.[248]

4.3.1. Analysis of the SOC board evaluation Framework

To supplement the effectiveness of policy frameworks such as the board evaluation framework, there may be a need to balance effective performance by the board and effective oversight from accountable designated stakeholders, since the state is the sole shareholder and to a certain degree has excessive involvement over affairs of SOC boards. In respect of the foregoing, some argue that the legislative frameworks governing SOCs devolve extreme controlling powers in shareholder representatives, as a result, this position weakens boards and unfavourably impacts the governance of SOCs.[249] It is noteworthy, that the DPE through the board evaluation framework and its other various oversight methods seeks to establish a guided approach to strengthen the internal governance of SOCs. However, the framework or any other governance

[244] Modimowabarwa Kanyane and Kombi Sausi, 'Reviewing state owned entities' governance landscape in South Africa' (2015) 9 *African Journal of Business Ethics* 32.

[245] Modimowabarwa Kanyane and Kombi Sausi op cit note 244 at 33. To note, this research in chapter seven provides a brief example of this in respect of the National State Enterprises Bill introduced for public comment by the DPE and through this Bill the DPE ignores the significant issues that confound the effective and efficient governance in SOCs.

[246] Modimowabarwa Kanyane and Kombi Sausi op cit note 244 at 32.

[247] Modimowabarwa Kanyane and Kombi Sausi op cit note 244 at 32-33.

[248] Modimowabarwa Kanyane and Kombi Sausi op cit note 244 at 38.

[249] Tebello Thabane *The ownership and Control Architecture of South Africa's State-Owned companies and its impact on corporate governance* (published LLD thesis, University of Cape Town, 2020) 223.

framework it establishes requires to be effective and in doing so necessitates the inclusion of a strong -external accountability oversight role.

Therefore, when it pertains to accountability, the board framework should have considered a structured role of the portfolio committees, National Treasury and AG concerning the consideration of board evaluation reports to bring a balance in the state's supervisory role to ensure that directors or public officials who contribute to lack of ineffectiveness are answerable.[250]

4.4. Chapter four: concluding summary

In essence, chapter four has discussed the relationship between the state and the SOCs, which through extensive analysis, exposed the various loopholes and challenges, which affect not only the accountability of the directors but also the proper governance and oversight of SOCs from the state. To this end, chapter four utilised the board evaluation framework and the role of the state as has so far revealed the need for a revision of corporate governance and governance of SOCs.

[250] Ibid.

CHAPTER FIVE: FUCNTION OF OVERSIGHT INSTITUTIONS AND THEIR ROLE ON THE ACCOUNTABILITY OF SOC's

5. Introduction

Chapter five discusses the role of portfolio committees and accountability institutions in the oversight of SOCs. It will do so by undertaking an analysis in respect of the lack of proper and effective powers required to oversight SOCs. It draws attention to the existing accountability measures and the use of powers by the oversight institutions insofar as SOCs and shareholder departments are concerned. In addition, chapter five argues that the pertinent flaws in the oversight and accountability mechanisms of SOCs and underlines the overarching concerns for SOC's lack of effective and efficient adequate powers that may aim to, *inter alia*, enforce higher governance standards, recommendation of effective sanctions and appropriate legislative reforms insofar as the governance of SOCs is concerned.

5.1. Parliament's oversight role

It is submitted that Parliamentary oversight is conducted in myriad methods that includes, *inter alia*, examining, evaluating, assessing the performance of departments and entities in which the portfolio committee is the designated oversight body.[251] This role underpins the evaluation of SOCs and shareholding department's expenditures, outcomes and the assessment of the successes or challenges faced by the shareholding departments.[252] In addition, the oversight role includes accountability institutions that play a vital role in overseeing shareholding departments' actions over SOCs.[253] For instance, in the National Assembly, there are portfolio committees that oversee a corresponding national department, ministries or executive organisations.[254] Whereas in the National Council of Provinces, there are select committees that are grouped according to their precise area of responsibility, i.e., select committee for Agriculture and fisheries will oversee the department that is the executive authority over the

[251] A minor dissertation on Public Policy and Administration by Doyle Monique of the University of Cape Town published in 2016, focused on the South African Parliamentary Committee System and Institutional capacity. This dissertation provided critical studies, *inter alia,* interviews on portfolio committees in Parliament, the manner in which proceedings are conducted, which powers are exercised by committee members, the capacity of resources, relations between the executive and the committees (legislative) and the effectiveness of the committees were discussed in depth. See Doyle Monique *The South African Parliamentary Committee system and institutional capacity* (published minor dissertation, University of Cape Town, 2016) 66.
[252] Doyle Monique op cit note 251 at 67.
[253] Ibid.
[254] Luvuyo Mbete *An evaluation of oversight and accountability by fourth Parliament of the Republic of South Africa* (published thesis, University of Stellenbosch, 2016) 58.

aforesaid areas.[255] It is further submitted that these institutions serve as the oversight agencies for Parliament and they oversee the running and policy implementation of unique departments.[256] Predominately, their oversight role includes issuing recommendations on numerous aspects of shareholding departments and SOCs annual performance insofar as the concern of expenditure is concerned.

Although it may seem that there is a clear mandate over the aforementioned institutions, a study on the South African Parliamentary Committee System and Institutional capacity submitted that the executive's resource advantage is significant than that of the legislature and this imbalance affects the effectiveness of the legislature as an oversight institution.[257] In essence, this study rightfully argues that notwithstanding the verity that the legislative portfolio committees possess well-crafted constitutional objectives they tend to face challenges in having the capacity to fulfil such objectives.[258]

5.1.1. Portfolio Committees: Functions and objectives

Portfolio committees serve as oversight structures and agents of Parliament and their role encompasses the oversight of the state's affairs, i.e., finances, policy implementation and use of resources.[259] The effectiveness of the legislature as an upright institution within the democratic governance system lies with portfolio committees and their role in overseeing state affairs on annual basis is the mechanism by which their oversight is conducted.[260] Moreover, the crucial role in respect of these committees is enabled by section Constitution and the provision empowers the legislature to conduct oversight functions through its portfolio committees.[261] With that being said, the aforesaid provision offers extensive constitutional responsibilities over the executive and its departmental officials as it obligates them to submit documentation and information to portfolio committees so to assist them with their oversight function.[262]

[255] Luvuyo Mbete op cit 254 at 58.
[256] Ibid.
[257] Doyle Monique op cit note 251 at 31.
[258] Doyle Monique op cit note 251 at 32.
[259] Doyle Monique op cit note 251 at 34-36.
[260] Doyle Monique op cit note 251 at 34-35.
[261] Chapter 4 of the Constitution of the Constitution of the Republic of South Africa, 1996.
[262] Parliament of the Republic of South Africa 'Role of Parliamentary Committees' available at *https://www.parliament.gov.za/role-of-parliamentary-committee,* accessed on 10 September 2022.

5.1.2. Existing influence of Portfolio Committees

Portfolio committees as discussed in the foregoing play a significant role not only in the oversight of the executive and the SOCs and the Ministers entrusted with the oversight thereof. Although this is met with challenges, research on legislative oversight submits that the influence of portfolio committees is most effective when state officials are summoned to appear in Parliament.[263] This method has been appraised and measured to be effective by senior public officials due to the impact oversight and accountability it offers the portfolio committees.[264] Literature submits that the reason behind the appraisal is that the method offers an in-house sit in meeting between departmental senior officials and portfolio committee members.[265] On that regard the departmental senior officials are required to answer the questions posed by the committee and these questions are often based on the submitted reports and other essential information to assist the committee to fulfil its oversight obligations.[266]

Furthermore, it is submitted that the aforementioned function from portfolio committees has certain oversight challenges. Studies by an auditing firm known as the Price Waterhouse Coopers ('PWC') submitted that the difficulty faced by portfolio committees is due to the slow improvement towards its capacity in ensuring that departments and SOCs are accountable for their performance through their strategic plans, budget distributions documents and yearly reports which forms part of the mechanism to compare such with the goals set by Parliament.[267]

5.2. Role in the oversight of SOCs

In respect of SOCs, the DPE manages many SOCs as the representative shareholder and executive authority.[268] By that virtue the Constitution provides the DPE with duties to the legislature and as it stipulates that the members of the cabinet must furnish the legislature with full and regular reports pertaining to the affairs that are within their control.[269] This provision functions as an accountability mechanism to ensure that the shareholding departments and their

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[263] Thabo Rapoo 'Rating the Effectiveness of Legislative Oversight Methods and Techniques: The Views of Senior Public Service Officials'
available at *http://www.cps.org.za/cps%20pdf/polbrief34.pdf*,accessed on 10 September 2022.
[264] Thabo Rapoo op cit note 263.
[265] Ibid.
[266] Doyle Monique op cit note 251 at 31.
[267] PWC 'State-Owned Enterprises: Governance responsibility and accountability Public Sector Working Group Position Paper 3' available at *https:*
www.google.com/url?sa=t&source=web&rct=j&url=https://cdn.ymaws.com/www.iodsa.co.za/resources/collection/879CAE6C-7B90-49F5-A983
28AECBCE196F/PSWG_Position_Paper_3_Governance_in_SOEs.pdf&ved=2ahUKEwjL7cHQyIH6AhWJXsAKHR7pAbIQFnoECA8QAQ&usg=AOvVaw0QitQbUXHN1i0CLOsyHFqA, accessed on 03 September 2022.
[268] Ibid.
[269] Section 92(3)*(b)* of the Constitution.

affiliated SOCs effectively and lawfully utilise public resources and report to the legislature accordingly. Insofar as the aforesaid is concerned, the Constitution empowers the portfolio committees with the privilege to determine whether shareholding departments have met their targets as provided in their yearly strategic and performance plans.[270] To assist the portfolio committees in respect of the aforesaid role, it is submitted that the National Treasury tabled a guideline that can be utilised to measure shareholding department's performance in annual reports by assessing them against goals the department's strategic plans and budget allocations.[271] It may deduced that this guideline is aimed to assist the portfolio committee to be able to comprehend the SOC's affairs. In addition, the PWC in its study on the governance responsibility and accountability in the public sector submitted that portfolio committees are also responsible for the analysis of non-financial material reports with regard to SOCs i.e., service delivery, performance, and policy implementation.[272]

5.3. Financial oversight

Standing Committee on Public Accounts ('SCOPA') is a specialised committee that only reviews audited financial material from state departments and its institutional obligation is to interrogate audited annual financial statements.[273] It is submitted that the aforesaid audited reports are prepared by the AG and reviewed by SCOPA.[274] Consequently, SCOPA plays a significant role in scrutinising the use of public funds, financial irregularities and it does so by reviewing the AG's annual financial statements. It also scrutinises compliance with the applicable PFMA and financial expenditure that is deemed to be unauthorised and futile.[275] It is further submitted that SCOPA plays a role in the interrogation of risks management systems and corporate governance issues and this role as discussed in the foregoing works in conjunction with the AG.

[270] Doyle Monique op cit note 251 at 67.
[271] Doyle Monique op cit note 251 at 36.
[272] PWC op cit note 267.
[273] Ibid.
[274] Ibid.
[275] National Government of SA 'Auditor General South Africa- Constitutional Bodies' *https://nationalgovernment.co.za/units/view/50/auditor-general-south-africa-agsa,* accessed on10 September 2021.

5.3.1. Challenges faced by SCOPA

Over the years SCOPA has issued public hearings and scrutinised the lack of accountability for the reckless expenditure and theft of public monies.[276] With that being said, it has also been reported that the findings and recommendations by the AG and SCOPA have been consistently repeated, but with no room for improvement from the executive.[277] In respect of the foregoing, it is further submitted that the recommendations pertaining to non-compliance with applicable legislation has over the years been overlooked.[278] As a result, this has led to financial irregularities being left unsupervised [279] thus rendering the oversight function of SCOPA ineffective.

5.4. Challenges and enhancement on Portfolio Committees

Public Policy Research on Parliament's institutional capacity has revealed that the lack of required insight or industry expertise from portfolio committee members has provided challenges towards the achievement of effective oversight.[280] The foregoing further submits that portfolio committee's fundamental challenge in exercising some of its functions stems from the failure to receive supportive information from the executive and the issue that there is lack of capacity from portfolio committee members in processing the necessary information when received.[281] Although the objectives of portfolio committees are clear, there is an emphasis on several restrictions regarding effective oversight.[282] The restrictions and complications that exist over the oversight function are *inter alia*, legislative members lacking the technical expertise to participate in economic strategic planning and evaluations thus rendering them ineffective in participating in in the state's fiscal planning processes.[283] With that being that, it is submitted that the predominant complexity that affects portfolio committees in their duties, is the fact that legislative members are heavily subjected to political party dominance and that inhibits them from exercising effective oversight functions on the executive and the SOCs.[284]

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[276] Koliswa Matebe-Notshulwana *A Critical Analysis of the Oversight Role and Function of the Standing Committee on Public Accounts (SCOPA) in Reporting Accountability in South Africa's Public Sector* (published thesis, University of Pretoria, 2019) 115.
[277] Matebe-Notshulwana op cit note 276 at 115.
[278] Ibid.
[279] Matebe-Notshulwana op cit note 276 at 116.
[280] Doyle Monique op cit note 251 at 78.
[281] Luvuyo Mbete op cit note 254 at 23.
[282] SM Madue 'Complexities of the oversight role of legislatures' (2012) 47 *Journal of Public Administration* 435.
[283] Madue op cit note 282 at 435-436.
[284] Madue op cit note 282 at 435.

In light of the foregoing, the study by the PWC submits that for effective oversight to be successful, several governance key players that have oversight function over SOCs require to be clarified.[285]

5.4.1. Effect of political interference on oversight function[286]

It is submitted that there are political challenges faced by portfolio committees when discharging their oversight functions and the World Bank has indicated that even boards themselves receive political interference in managing their official affairs.[287] This is caused by the fact that the executive and its state actors are more resourceful and politically shielded from accountability than oversight institutions.[288] Thus making it challenging for portfolio committees to enforce their recommendations. In addition, studies on the powers of Parliament, have submitted that there is also a lack of influence from portfolio committee chairpersons over the executive and this has provided a significant disadvantage on the oversight role with regards to accountability.[289] With that being said, this disadvantage has caused the relationship between the executive and portfolio committees to be categorised and fractured by political power.[290]
For instance, although the role of the shareholder minister is to monitor their designated SOCs, there is an existing challenge concerning the effectiveness of the Minister's function and this challenge is reflected by the legislative member's habits in deducing their functions by maintaining ineffective state programmes and shielding public officials such as the Ministers from accountability.[291]
With that being said, the foregoing results in the lack of effective oversight from legislative members due to their lack of powers or political favouritism which contributes to the Minister's poor policies over SOCs, and this conduct is mainly attributed to the fear of losing a political seat.[292]

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[285] PWC op cit note 267.
[286] Notably, it is submitted that over the years there has been relentless political interference within the governance of SOCs which results in poor governance and the disturbance of the independence of boards. These constant occurring events are likely to endanger the integrity and functioning of boards. For virtuous governance to exist board's independence is essential for the strategic and coordinated performance of SOCs. However, this is unlikely to occur given that boards and portfolio committees are burdened with political interference which affects the achievement of their objectives. See study by Limakatso Qhobosheane *The impact of political interference in State-owned companies: A case study on SABC* (published LLM thesis, University of Free State, 2018) 44-45.
[287] Ibid.
[288] Ibid.
[289] Luvuyo Mbete op cit note 254at 125.
[290] Luvuyo Mbete op cit note 254 at 126.
[291] Luvuyo Mbete op cit note 254 at 16.
[292] Ibid.

It is therefore submitted that the legislature may have oversight powers and functions, but it is without proper enforcement when it seeks accountability.[293] This lack of enforceable power over public officials and shareholding departments regarding their use of power or resources contributes to ineffective growth and performance challenges in SOCs.

5.5. Financial accountability institution

The Office of the AG was formed as the constitutional accountability institution entrusted with the duty to audit the state's financial expenditure and to furnish audited reports to Parliament on an annual basis. [294] In light of the foregoing, it is submitted that the auditing function includes auditing of reports in respect of SOCs performances taking into consideration the prearranged objectives, which are referred to as performance information for report purposes.[295] Respectively, the AG has a relationship with the Standing Committee on Public Accounts ('SCOPA') whereby the AG conducts the reporting on the state's financial expenditure and the assist SCOPA in the inspection of prepared audited reports.[296]

Based on the aforementioned overall role of the AG, it can be argued that the AG, in conjunction with SCOPA and shareholder departments to a certain degree play a role in monitoring the performance of SOCs. For instance, the National Treasury and the DPE monitor governance and financial policy execution through review of financial reports, utility of public resources and compliance with regulatory objectives.[297] However, these roles stem from unique pieces of legislation and regulatory frameworks which create contradictions as to the depths of monitoring imposed on the SOCs.

5.5.1. AG's challenges in auditing SOC

In respect of the function of the AG it is submitted that the office serves a role in the oversight and the accountable management of SOC finances and such functions are encompassed by the PFMA and the Public Audit Act 25 of 2004.[298] In that regard, these legislations empower the AG to conduct investigations and, more importantly, audit the financial reports of SOCs in terms of section 6 (a) of the Public Audit Act 25 of 2004 .[299] In executing its statutory duties, it is submitted that the AG has issued findings pertaining to the financial mismanagement of

[293] Luvuyo Mbete op cit note 254 at 17.
[294] Section 181(5) of the Constitution.
[295] PWC op cit note 267.
[296] Ibid.
[297] Ibid.
[298] Sbusiso Madonsela *Reviving accounting principle in state owned- A critical study of the governance framework governing state-owned companies in South Africa* (published LLM thesis, University of KwaZulu-Natal, 2018) 26.
[299] Sbusiso Madonsela op cit note 298 at 26.

SOCs and reported several SOCs as state holdings burdened with financial and operational difficulties and emphasised that this position has affected them in making sustainable profits.[300] The AG outlined further issues being *inter alia* full disclosure in respect of financial statements legally required by the AG's office to determine the SOC's financial performance and submitted that the continuous application for funds (known as bailout) from the state has side-tracked their intended public service delivery purpose.[301]

In addition, the aforementioned concerns in respect of the state of SOCs were pessimistically expressed by the AG in the 2018 Nelson Mandela University public lecture, wherein it was described that the impact of the financial failures in South African SOCs is tremendous. [302] In this regard, the AG presented that the SOCs systematic challenges pertaining to their governance are not simply emotional or academic, but they also carry severe and real consequences.[303]

Furthermore, the AG indicated that there are numerous challenges that cripple the effectiveness of the SOC's accountability measures and stated that amongst others most audited reports conducted and issued by external auditors in respect of the financial affairs have been repeated (with the same format, and explanations in terms of operations and strategies) and this has led to failure in holding auditors accountable for the previous years of irregular findings.[304] Lastly, the AG presented that even though there are recommendations that are issued to assist the auditors with turn around strategies, there still seems to be a lack of implementation of the foregoing and this has led to a conclusion that the AG's ability to ensure SOCs financial responsibility through enhancing accountability is ineffective.[305]

5.6. Chapter five: concluding summary

Chapter five outlined the significant role of the AG's office and the portfolio committees as the oversight institutions that oversee SOCs within their affiliated shareholding departments. In doing so, it exposed the challenges faced by the portfolio committees and the AG, particularly, the challenge of enforcing accountability upon the executive and the SOC board. Moreover, chapter five revealed technical loopholes that affect the effectiveness of the portfolio

[300] Ibid.
[301] Ibid.
[302] Nelson Mandela University 'Accountability and the management of public funds toward delivery of services' available at *https://news.mandela.ac.za/news/media/Store/documents/2019/Auditor-General%20lecture/Public-Lecture-by-the-Auditor-General-August-2019.pdf*, accessed on 07 September 2022.
[303] Nelson Mandela University op cit note 302.
[304] Asief Dhansay Investigating the powers of the Auditor General of South and its ability to strengthen the quality of democracy in South Africa (published research dissertation, University of Cape Town, 2019) 50.
[305] Asief Dhansay op cit note 304 at 50-51.

committees, and those loopholes are, *inter alia*, lack of expertise from portfolio committee members, political interference, and excessive power by the executive over committees which all affect the oversight of the affairs of SOCs. In essence, chapter five advocates for the aforementioned oversight institutions to be incorporated into the SOC's accountability mechanisms and to be granted enforceable powers to ensure effective accountability over the shareholding departments and their SOCs.

CHAPTER SIX: STATE CAPTURE COMMISSION REPORT IN RE: SOC'S CORRUPTION, GOVERNANCE & REGULATORY FRAMEWORKCHALLENGES

6. Introduction

Chapter six briefly discusses the background of the concept of state capture and the impact it has on the governance of SOCs. To support the foregoing discussions submitted by this research, chapter six briefly discusses the findings of the State Capture Commission and the submissions by the Dullah Omar Institute in respect of the SOC's governance irregularities, legislative complexities, and accountability challenges.

6.1. What is state capture?

State capture refers to a state where influential individuals, bodies, companies or groups within or outside a country practice corruption to construct the state's policies, statutory environment and economy for their own private benefits.[306] Hellman *et al*, who conducted the first Business Environment and Enterprise Performance Survey on behalf of the World Bank and European Bank for Reconstruction and Development in 1999, were the first to notice the phenomenon of state capture.[307] Hellman *et al* developed the term "state capture" to refer to a new aspect of corruption that had emerged in East Europe as these countries shifted from planned economies to market economies.[308] In light of the foregoing, it is submitted that state capture is accomplished through the creation of regional networks of patronage, red tape, and bribe bribery, a lack of local capacity, the abuse of local state resources, public procurement, infrastructure facilitation, and informal pay-outs, and an absence of effective controls and monitoring mechanisms.[309] Although the origin of state capture was European, the corruption attributed to it found itself in South Africa where it has deteriorated the state's capacity to

[306] Maíra Martini 'State capture: an overview' available at *https://www.transparency.org/files/content/corruptionqas/State_capture_an_overview_2014.pdf*, accessed on 11 December 2022.
[307] Richter and Der erkaufte Frieden 'Welche Ordnung schafft 'state capture' in Nachkriegsgesellschaften? The 'Untouchables': State capture in post-conflict countries' available at *http://www.afk-web.de/fileadmin/afk-web.de/data/zentral/dokumente/AFK-Kolloquium_2016/Paperroom_2016/Paper_AFK_Solveig_Richter.pdf*, accessed on 11 December 2022.
[308] Richter and Der erkaufte Frieden op cit note 307.
[309] LE Sitorus 'State Capture: Is it a crime? How the world perceived it' (2011) 2 *Indonesia Law Review* 56-57.

provide for its citizens, advance economic growth, tackle unemployment, lessen poverty and inequality.[310]

6.1.1. Purpose of South Africa's State Capture Commission and significance towards the status quo of SOCs

The State Capture Commission known as the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State by Chairperson and Justice RMM Zondo ('State Capture Report'), was established as a remedial action pursuant to the October 2016 State Capture Report by the then Public Protector Thuli Madonsela.[311] One of the objectives of the Commission[312] on state capture highlights the significance of the impact of ineffective accountability mechanism in SOCs and other various discussions submitted by this research. That submission by the State Capture Report being, *inter alia*, the nature and magnitude of corruption in the granting of contracts, tenders to corporations or organisations by SOCs as listed by Schedule 2 of the PFMA, [313] whether any state functionary or organs of state or persons acted illegally or improperly in relation to the appointment or removal of SOC directors.[314] Accordingly, probing these issues took the Commission four years to complete and, the Commission exposed profound legislative and key policy irregularities such as corporate governance failures, political interference and more importantly the violation of public procurement processes.[315]

6.2. State Capture Commission of Inquiry's findings

The State Capture Report made various submissions, wherein it provided that the PFMA does not explicitly provide for the appointment and dismissal of board members.[316] and it stated that

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[310] Mecayla Maseka 'State capture has worsened an already ailing economy' – Economics expert during UP-hosted thought leadership webinar' available at *https://www.up.ac.za/news/post_3078247-state-capture-has-worsened-an-already-ailing-economy-economics-expert-during-up-hosted-thought-leadership-webinar,* accessed on 11 December 2022.

[311] Government of South Africa 'Judicial Commission of Enquiry into State Capture report-part 1' available at *https://www.gov.za/documents/judicial-commission-equiry-state-capture-report-part-1-4-jan-2022-0000* accessed 18 September 2022.

[312] The goals of the Judicial Commission of Inquiry into allegations of state capture, corruption and fraud in the public sector including organs of state are very extensive and some of them are not relevant to the points made by this research. Hence, only the ones that are relevant to this research and the research question were selected for the purposes of ensuring that the reader gains an enlightened understanding in reaching the conclusion and recommendations of this research.

[313] Government of South Africa op cit 311.

[314] Ibid.

[315] Jehran Naidoo 'State Capture Report: Over R1,5 million spent on paper during Zondo Commission' available at *https://www.iol.co.za/news/politics/state-capture-report-over-r-15-million-spent-on-paper-during-zondo-commission-6b73cbd0-2dca-47df-aae4-abb52fe081de,* accessed on 11 December 2022.

[316] Government of South Africa op cit note 311.

soft law instruments such as principles of the King IV Report', the Protocol on Corporate Governance in the Public Sector and the Handbook on the Appointment of Persons to Boards of State and State-Controlled Institutions are not legally binding.[317] In respect of the foregoing, the State Capture Report stated that the law remains unclear insofar as the appointment of board members is concerned and it questioned whether such appointments were conducted prior or after the consultation with the cabinet.[318] The State Capture Report further submitted that the aforementioned procedure is conflicted as is does not represent a robust and transparent process as recommended under the King IV Report. In respect of the foregoing, the report emphasised that the appointment process suffers integrity since the appointed persons do not meet the criteria and the processes thereof do not encompass transparency to enable public scrutiny.[319] Insofar as the governance of SOCs is concerned, the State Capture Report submitted that the appointments of persons to the SOC boards have seen minor developments since the exposure of the state capture phenomenon in South Africa.[320] Although the shareholding ministers became vigilant with regards to the appointments of individuals to the SOC boards, the State Capture Report submitted that the appointment regime remains unregulated and unreformed.[321]In addition, the State Capture Report submitted that the aforesaid is required to be transformed and to encompass a transparent and objective criterion that is without political interference or political benefit and that the national interest demands SOCs to be operated within a properly regulated sphere.[322]

For effective governance of SOCs, it is then warranted that the promotion of the independent status of politicians, directors, and their governing structural set-up,[323] insofar as public accountability is concerned requires reform. Due to the current set-up is characterised by soundless hostilities amongst politicians and directors where politicians pursue the expansion of their authority, something that is contrary to good governance practices.[324] Therefore, independence that permits forward-looking top management that is not afraid to think outside of the box, rather than simply continuing with the ineffective governance practices the company has always taken[325]is crucial for SOCs.

[317] Ibid.
[318] Ibid.
[319] Ibid.
[320] Ibid.
[321] Ibid.
[322] Ibid.
[323] Miseria Tishaniso Nyathi op cit note 94 at 251.
[324] Ibid.
[325] Miseria Tishaniso Nyathi op cit note 94 at 251-252.

6.2.1. Dullah Omar Institute: Key summaries on corporate governance issues and lack accountability submissions to the Commission

The Dullah Omar Institute ('Institute') issued a significant submission to the Commission in respect of the issues surrounding the corporate governance of SOCs and the lack of accountability by oversight institutions. In summary, the Institute made submissions which not only support the findings by the Commission but emphasise the key points relevant to this research. The submissions are, *inter alia,* first, that in 2018 Parliament passed the Public Audit Amendment Act, which heightened the AG's powers to not only make findings on the audited SOC's financial statements but to refer negative audited results for investigation as a form of an accountability mechanism.[326] In light of the foregoing, the Institute submission indicated that the Office of the AG has expressed its frustration with regards to the state's failure to execute its recommendations, as a result, this has led to a negative public view that as far as corruption and poor audited results are concerned there are no significant consequences that can be taken for reparation.[327]

Additionally, the submission included the matter of parliamentary oversight function over the executive. It highlighted that even though there is information provided to the Parliament from reports compiled by the AG and other independent institutions, Parliament has continuously performed poorly in fulfilling its oversight functions.[328] Essentially, the submission underscores the financial and governance catastrophes in respect of SOCs has an aspect that emanates from complex legal frameworks consisting of overlapping and conflicted provisions.[329] Further to the foregoing, the submission stated that despite the SOCs in the national sphere being regulated by the PFMA, founding legislations, Companies Act and the King IV Report, to a certain extent, these legal frameworks regulate different features of SOCs and with governance remaining as the conflicted aspect of insofar as the functions of SOCs are concerned. [330]Lastly, the submission argued certain aspects with regard to the appointments and dismissal of boards and executives. It submitted that whereby the Companies Act and the PFMA are in conflict, the PFMA prevails.[331] However, the Institute argued that that the legal framework intended to appoint the SOC boards remains challenged with overlaps and

[326] Dullah Omar Institute 'Submission by the Dullah Omar Institute to the Zondo Commission' available at *https://dullahomarinstittute.org.za/women-and-democracy/board-members-of-state-owned-enterprises-towards-transparent-appointments/reports/doi-submissin-to-zondo-commission.pdf*, accessed 12 September 2022.
[327] Dullah Omar Institute op cit note 326.
[328] Ibid
[329]Ibid.
[330] Ibid.
[331] Ibid.

contractions.[332] In light of the aforesaid the Institute argued that this legal uncertainty has yielded a negative position to the SOCs and many court battles in respect of SOC's high ranking appointments bear evidence to this issue.[333] In essence, the Institute's submission argued that in its current form, the Companies Act is not designed to cater for the specific functions and complexities of SOCs[334] and this submission through various chapters of this research has been discussed and emphasised as one of the frameworks that require a dedicated legislative reform.

6.3. Chapter five: concluding summary

The effects of the state capture not only affected the public sector, but also affected SOCs. Through the State Capture Report by the Commission and the submission by the Institute chapter five accordingly revealed significant and notable irregularities surrounding the current corporate governance regime and public accountability mechanisms that regulate SOCs. In addition, chapter five revealed the aforementioned surrounding issues as, *inter alia,* the improper interference by Ministers pertaining to SOC board appointments, ineffective, and contradictory legislative frameworks namely, the PFMA, Companies Act and the King IV Report, challenges faced by the AG and portfolio committees in ensuring effective accountability on the corporate governance and public accountability structures of SOCs. To end, chapter five highlights the aforementioned issues as the crucial underlying concerns that affect the accountability and governance of SOCs and reveals the submissions by the Institute and the State Capture Report which ultimately advocated for the reform of the current SOC's governance and public accountability regime.

[332] Ibid.
[333]Ibid.
[334] Ibid.

CHAPTER SEVEN: RECOMMENDATIONS AND CONCLUSION

7. Introduction

Pursuant to the consideration of the National State Enterprises Bill of B-2023 ('Bill') this chapter proposes certain legislative reform and recommendations in respect of the SOC's existing corporate governance and public accountability regime. In addition, chapter seven outlines the overall conclusion of the research.

7.1. Proposed provisions of the Bill

The Bill published in the government gazette on 9 January 2024 for public comment provides as follows:

> "[T]o provide for the development of a strategy for national state enterprises; to establish the State Asset Management SOC Ltd; to provide for the State as the sole shareholder of a holding company; to consolidate the State's shareholdings in national state enterprises; to provide for the powers of the shareholder on behalf of the State; to provide for the phased succession of national state enterprises to the holding company; to provide for the holding company's powers as shareholder of subsidiaries; to provide for appropriate and effective monitoring and reporting mechanisms over subsidiaries; and to provide for matters connected therewith.
>
> PREAMBLE
>
> WHEREAS, the State recognises the value of its shareholding in national state enterprises and wishes to optimise that shareholding to achieve long-term strategic interventions for developmental purposes and secure these enterprises for future generations;
>
> AND WHEREAS, the State wishes to enhance its capacity as owner of national state enterprises through a strategy for those enterprises and for the operational implementation of that strategy by a holding company on the State's behalf;[335]
>
> **2.** [T]he objects of this Act are to—
>
> (a) enhance the operational efficiency of national commercial state-owned enterprises to achieve the State's developmental objectives through a National Strategy to be implemented by a holding company and national commercial state-owned enterprises;
>
> (b) establish the State Asset Management SOC Limited as a holding company incorporated in terms of the Companies Act;
>
> (c) transfer the shareholding of state enterprises to the holding company to ensure that the holding company exercises the ownership function over its subsidiaries in accordance with the Companies Act, this Act, and any applicable legislation;
>
> (d) ensure the proper governance of the holding company and its subsidiaries; and

[335] Preamble of the National State Enterprises Bill in GN 4242 *GG* 49978 of 9 January 2024.

(e) promote the commercial sustainability of the holding company and its subsidiaries.[336]

Establishment of holding company

6. (1) [N]otwithstanding the Companies Act, the President must ensure

that the necessary steps are taken for the formation and incorporation of the holding company as a company contemplated in subsection (2).

(2) The Companies and Intellectual Property Commission must—

(a) register the Memorandum of Incorporation and incorporate the holding company under the name "State Asset Management SOC Limited" with the State as the sole shareholder; and

(b) issue to the holding company the necessary documents to enable it to conduct business as a holding company.

(3) The State is the sole shareholder of the holding company and the President is the representative of the shareholder but may transfer the administration of this Act or any power or function referred to in this Act to a member of Cabinet in accordance with section 97 of the Constitution.[337]

Shareholder powers and duties

8. (1) [T]he shareholder must promote and support the functions of the

holding company and table a report annually in Parliament on the commercial sustainability, developmental impact and material risks of the investment in the holding company.

(2) Notwithstanding the Companies Act, the shareholder may only appoint a director to the Board in accordance with section 68 of the Companies Act on the recommendation of the Board after a prescribed transparent process contemplated in section 10.

(3) The shareholder may remove a director of the Board in accordance with sections 69 and 71 of the Companies Act and this Act.

(4) The shareholder must commission an independent assessment of the Board's performance in the form and manner as prescribed once every three years and publish the report on the holding company's website."[338]

[336] Ibid at Clause 2.
[337] Ibid at Clause 6.
[338] Ibid at Clause 8.

7.1.1. Research recommendation

The National State Enterprises Bill of 2023 ('Bill') has emanated from legislative efforts, directed at the DPE, to accelerate and address challenges faced by SOCs in South Africa through the establishment of a legal framework that introduces broad policy reforms. The Bill aims to consolidate SOCs under a holding entity and simplify the governance of SOCs. To achieve this objective, the Bill seeks to eliminate the existing fragmentation of financial and resources and the attendant challenges plaguing SOCs and establishes a single overarching state-owned holding entity and governance framework in an attempt to restructure the SOC landscape. This is a positive development. However, certain challenges highlighted by this research remain and are not addressed by the Bill in its current form. For example, the inconsistencies contained in existing statutes, such as the Companies Act and the PFMA which resulted in uncertainty and governance challenges for SOCs are not resolved by the structural changes proposed in the Bill. The focal point of the Bill, being the formation of a holding entity and allocation of powers and duties is necessary and welcomes progress, but it needs to go further to address the various additional governance issues identified and discussed in this dissertation.

The lack of effective accountability mechanisms available to portfolio committees and the AG to combat poor governance remains a major concern. Accordingly, it is suggested that the Bill should include robust enforcement and accountability mechanisms to safeguard effective oversight and accountability. Moreover, the Bill must attempt to consolidate and align existing legislative frameworks and address the inconsistencies in order to provide a clear and complete statutory foundation for SOCs. Bearing in mind the wider insufficiencies pertaining to SOCs such as *inter alia*, lack of effective corporate governance practices tailored to the SOCs, and unlawful interference from the state, the Bill must integrate provisions that bring transparency to the oversight institutions, effective accountability, and strategic coordination. This requires the consideration of significant lessons from recent litigation and judgements in respect of SOCs and financial management irregularities which are referred to in this research.

In light of the aforesaid, this research has highlighted the existing accountability mechanisms relevant to SOCs which are contained in other statutes such as section 76 of the Companies Act and section 50 of the PFMA which assist in regulating the SOC's corporate governance and accountability landscape. Judgements in cases such as the *Minister of Defence and Military Veterans v Motau*

and *Eskom Holdings SOC Limited v McKinsey* and Company Africa illustrate the extent of the potential effectiveness of such provisions.

However, other rulings such as those in *Mthimunye- Bakoro v Petroleum Oil and Gas Corporation of South Africa SOC Limited*, the *Mjayeli Security (Pty) Ltd and Another v South African Broadcasting Corporation SOC Limited* as well as the Public Protector's report on the SABC, the Dullar Omar Institute and ultimately the State Capture Report illustrate and emphasise the challenges presented by the Companies Act, the PFMA and the tensions inherent in the relationship between SOCs and the state.

7.2. Conclusion

This research examined whether the current corporate governance and public accountability regime that govern the SOCs in South Africa, namely, the Companies Act, PFMA, portfolio committees and various relevant accountability institutions cumulatively possess effective accountability mechanisms that enable good governance in SOCs. The conclusion is that to a certain degree, they do. This research has identified and discussed various accountability mechanisms in respect of the Companies Act and PFMA which encourage the application of good corporate governance among SOC boards by incorporating their duties as accounting authorities, their statutory objectives, and the consequences for breach of these. However, this research supported by, *inter alia*, case law, reports, legal commentary, and literature has identified the lack of cohesion between the existing governing frameworks as one of the significant contributing aspects to poor SOC governance.

This is due to a lack of effective coherence in addressing the nature and details of the relationship between the SOC boards, the state and the oversight institutions that have an impact on the overall governance of SOCs. Further, this research discussed and made proposals regarding the failure of the existing governing frameworks to address significant and existing challenges faced by SOCs, particularly political interference, board autonomy and oversight influence from oversight institutions. Case law provides evidence that the existing frameworks can be used to foster accountability and address adequate compliance from the boards in cases where they have failed to fulfil their contracted roles or obligations in areas of compliance and implementation of good governance pursuant to the aforementioned governing frameworks. However, it should not be necessary to resort to litigation to do so. The research has further submitted the findings of the state capture report, specifically on corruption, irregularities within the existing governance frameworks and political interference as aspects that affect the functionality and effective accountability of SOCs. Although the existing frameworks exist and

do, to a certain degree, provide useful remedies for the purposes of ratifying breaches by SOC boards, the Public Protector's report on the SABC corporate scandal provides remarkable evidence in respect of failures to ensure effective governance and accountability is enforced. In essence, this research has exposed the deficiencies inherent within existing governing frameworks of SOCs and the key players that have a role in maintaining the accountability thereof and it ultimately proposes the adoption of a singular framework to address the complex and multi-faceted challenges.

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