

THE USE OF LEGAL PROVISIONS BY CIVIL SOCIETY ORGANISATIONS TO
ADVANCE CORPORATE GOVERNANCE IN STATE-OWNED
ENTERPRISES IN SOUTH AFRICA

by

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DECLARATION

I declare that this thesis submitted for the degree of Doctor of Philosophy at the University of Cape Town has not been previously submitted by me for a degree at this or any other university, that it is my work and that all referenced material in it has been duly acknowledged.

Julieth Gudo

ABSTRACT

Civil society organisations (CSOs) in South Africa, as citizen representatives, have been involved in challenging the ongoing poor corporate governance of state-owned enterprises that has caused tensions between citizens and the government. In doing so, civil society organisations demand accountability, transparency and citizen participation in state-owned enterprises governance. The problem is that their role in challenging state-owned enterprises is undefined in both law and literature and this uncertainty has resulted in an unsatisfying legal environment for them and in a strained relationship between themselves and government. The purpose of this research is to examine the legal provisions used by civil society organisations to advance good corporate governance in state-owned enterprises in South Africa by means of literature review, case studies and interviews. Existing provisions used by civil society organisations are explained in the study, loopholes in such provisions identified and measures that CSOs use to hold those responsible for poor governance in state-owned enterprises accountable for their actions discussed, consequently closing the existing gap on the undefined role of CSOs in the corporate governance of SOEs. The research demonstrates that there is need for an enabling legal environment through the speedy and effective amendment of existing laws and the introduction of legal provisions that give express authority to CSOs to challenge poor governance on the part of SOEs. Also critical is an enforcement of laws so that those responsible for poor corporate governance in SOEs are held accountable.

DEDICATION

This thesis is dedicated to my late parents, Phillip Gudo and Constance Siwela. You will always be in my heart.

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National Key Points Act 102 of 1980

Nonprofit Organisations Act 71 of 1997

Prevention and Combating of Corrupt Activities Act 12 of 2007

Promotion of Access to Information Act 2 of 2000

Promotion of Administrative Justice Act 3 of 2000

Protected Disclosures Act 26 of 2017

Public Audit Amendment Bill of 2018

Public Finance Management Act 1 of 1999

Public Protector Act 23 of 1994

LIST OF ABBREVIATIONS

ACSA	Airports Company of South Africa
AG	Auditor-General
ANC	African National Congress
Armcor	Armaments Corporation of South Africa
BRICS	Brazil, Russia, India, China, South Africa
CALS	Centre for Applied Legal Studies
CBO	Community based organisation
CEO	Chief Executive Officer
CFO	Chief Financial Officer
COO	Chief Operating Officer
CPS	Cash Paymaster Services
CSO	Civil society organisations
DA	Democratic Alliance
DBSA	Development Bank of South Africa
EFF	Economic Freedom Fighters
FICA	Financial Intelligence Centre Act
IDC	Industrial Development Corporation
JSE	Johannesburg Stock Exchange
KPMG	Klynveld Peat Marwick Goerdeler
LSSA	Law Society of South Africa
NEDLAC	National Economic Development
NGO	Non-governmental Organisation
NPO	Non-profit organisations
OECD	Organisation for Economic Co-operation and Development
OUTA	Organisation Undoing Tax Abuse
PAIA	Protection of Access to Information Act 2 of 2000
PAJA	Promotion of Administrative Justice Act
PDA	Protected Disclosure Act
PFMA	Public Finance Management Act 1 of 1999
PRASA	Passenger Rail Agency of South Africa
RDP	Reconstruction and Development Programme
RSF	Reporters without Borders

SAA	South African Airways
SABC	South African Broadcasting Corporation
SASSA	South African Social Security Agency
SANCO	South African National Civics Organisation
SANGOCO	South African NGO Coalition
SANRAL	South African National Road Agency
SARS	South African Revenue Agency
SCOAG	Standing Committee on Auditor General
SEC	Security Exchange Commission
SETA	Sector Education and Training Authority
SOEs	State-owned Enterprises
TAC	Treatment action Campaign
TCTA	Trans-Caledon Tunnel Authority

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CHAPTER 1: INTRODUCTION

1.1 Background to the research

There has been a rising concern in South Africa over the governance of state-owned enterprises (SOEs). The prevalence of corruption and the persistently unsatisfactory distribution by government of state resources among the citizens are clear indicators of a festering problem. The years 2014 to 2017 were characterised by protests all over the country and legal actions instituted by civil society organisations (CSOs) against the government, triggered by the poor delivery of basic services, corruption in government and the increase of higher education fees beyond what most students can afford. Protests were also fuelled by a growing concern about the capture of state resources to benefit those that are already privileged.

Civil society organisations represent the interests of the citizens¹ who are, of course, stakeholders of SOEs.² In this role CSOs are often engaged through legal action, protests and non-stop vigorous enquiries pressing the government to meet its obligations to the public. Civil society organisations perform many roles, one of which is filling the gaps in government provision to citizens.³ In this respect CSOs have been described as the delivery arm of the state.⁴ This oversight function is typically performed by the segment of the non-profit sector described as civil society organisations (CSOs).⁵

The apartheid government was characterised by a public service that lacked legitimacy, inclusivity, representation and a fair delivery of public goods to all citizens.⁶ The

¹ Constitution of the Republic of South Africa, 1996 (hereafter Constitution 1996) s 38, provides that 'anyone acting in the public interest has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights'

² P Prinsloo & L Pieterse 'King III in the public sector' (2009) (Summer) *Auditing SA*, at 54: 'The South African public, whether as taxpayers, consumers, service providers or recipients of government benefits, and foreign entities interacting with South Africa, are all stakeholders in the South African government as they all have a vested interest in the success of the government enterprise.' See also Shelagh Gastrow 'The role of civil society is misunderstood; but why should donors subsidise the state so NGOs provide services the government can't or won't do?' asks Shelagh Gastrow' *Daily News* 4 March 2010.

³ Adam Habib 'State-Civil Society Relations in Post-Apartheid South Africa' (2005) 72 *Social Research* at 683-86.

⁴ Adam Habib & Hermien Kotzé 'Civil society, governance and development, in an era of globalisation: The South African case' in Guy C Z Mhone & Omano Edigheji (eds) *Governance in the New South Africa: The Challenges of Globalisation* (2003) at 249.

⁵ Lisa Vetten & Zohra Khan *We Are Doing Their Work for Them: An Investigation into Government Support to Non-profit Organisations Providing Services to Women Experiencing Violence* (2002) at 1-10.

⁶ A Habib and R Taylor 'South Africa: Anti-apartheid NGOs in transition' (1999) 10 *Voluntas: International Journal of Voluntary and Nonprofit Organizations* at 73-82. See also Liezel Lues 'Citizen participation as a

majority of the population suffered major service delivery deficits.⁷ They lived in poor living conditions with no clean water, electricity and health facilities.⁸ CSOs used protests and mass rallies to challenge the lack of service delivery.⁹ These CSOs were known as struggle CSOs and their relationship with the apartheid regime was oppositional.¹⁰ South African CSOs played a huge role during the liberation struggle against apartheid. There is no disputing the critical contribution of CSOs to the success of the democratic elections which led to the coming into power of the African National Congress in April 1994.¹¹

The aim of the new democratic government was to change the culture of the public service to accommodate and benefit everyone, as entrenched in the Constitution.¹² The government's ethic, as envisaged, included the values of good governance, sustainability, and integrity, accessibility, transparency and accountability in the public sector.¹³ This new government elected democratically during the 1994 elections was, however, mainly dominated by returnees from exile who did not have much experience in matters of state governance, did not know much about the management of public finance and accountability systems and therefore were not sufficiently equipped to address the shortcomings of the previous government. It was because of this and other reasons discussed in chapter 3, section 3.4.2 that a crisis arose in the public sector on several of the key delivery matters.¹⁴

contributor to sustainable democracy in South Africa' 2014 (80) *International Review of Administrative Sciences* at 789–807.

⁷ Volkhart Finn Heinrich 'The role of NGOs in strengthening the foundations of South African democracy' 2001 (12) *Voluntas: International Journal of Voluntary and Nonprofit Organizations* at 12.

⁸ Daryl Glaser, 'South Africa and the limits of civil society' (1997) 23 *Journal of Southern African Studies* at 5.

⁹ Heinrich op cit note 7 at 12.

¹⁰ Coalition on Civil Society Resource Mobilization *Critical Perspectives on Sustainability of the South African Civil Society Sector: Including an Assessment of the National Lotteries Board (NLB) and the National Development Agency (NDA)* (2012).

¹¹ Glaser op cit note 8 at 5. See also Camay Phiroshaw & Anne J Gordon *Civil Society as Advocate of Social Change in Pre- and Post-transition Societies: Building Sound Governance in South Africa* at 2, available at <https://www.issuelab.org/resource/civil-society-as-advocate-of-social-change-in-pre-and-post-transition-societies-building-sound-governance-in-south-africa.html>, accessed on 22 February 2017.

¹² Victor G Hillard & Norman D Kemp 'Citizen participation indispensable to sustainable democratic governance and administration in South Africa' (1989) 65 (3) *International Review of Administrative Sciences*, at 356. See also Lues op cit note 6 at 789–807.

¹³ Karen Miller *Public Sector Reform, Governance in South Africa* (2005) at 13.

¹⁴ Hennie Bekker *Public Sector Governance: Accountability in the State* (2009) at 2, available at <https://www.chartsec.co.za/documents/speakerPres/HennieBekker/BekkerPublicSectorGovernance7.pdf>,

accessed on 13 June 2017. For a summarised list of other reasons, see Adele Thomas 'Governance at South African state-owned enterprises: What do annual reports and the print media tell us?' (2012) 8 (4) *Social Responsibility Journal* at 451. See also, Lynn McGregor *Can South African State Owned Enterprises Succeed* (2015), available at

<https://portal.regenesys.net/course/discussions/editors/kcfinder/upload/files/McGregor%20%20L.%202015.%200Can%20State%20Owned%20Companies%20succeed.%20USB..pdf>

Today, inequality in service delivery by the government, ineffectiveness of government departments and the failure to meet the legitimate needs of the citizens is a well-known feature of present day South African society.¹⁵ Although the apartheid legacy of structural inequality contributes to those difficulties,¹⁶ a growing culture of lack of accountability by the government and lack of public participation provides its current driving force.¹⁷ The key cornerstone for good governance of public entities requires the inclusion of citizens and civil society organisations in governance and decision-making.¹⁸ The right to freedom of expression and freedom of association must be upheld.¹⁹ Furthermore, the failure of SOEs to meet their obligations as well as breach of good corporate governance practices are the main reasons for legal action and intervention by CSOs in the corporate governance of SOEs. As citizens' organisations, CSOs are mandated to keep government alive to its responsibilities.²⁰

A recent landmark case challenging poor corporate governance and corruption by government officials is the *Black Sash Trust v Minister of Social Development & others*.²¹ This action was brought to the Constitutional Court by the human rights organisation Black Sash, after the South African Social Security Agency (SASSA) failed to make arrangements for the payment of social grants on the 1 April 2017. This position could have led to 17 million people in South Africa not receiving their monthly social grants. In 2014, the Constitutional Court declared the SASSA contract with Cash Paymaster Services (CPS) for the provision of social grants to 17 million South Africans invalid due to certain irregularities in the tender process. After the court ruling, SASSA was expected to be ready by April 2017 to take over the payment of social grants directly. However, it failed to make such arrangements and also failed to make arrangements for a new agency to replace CPS.²²

¹⁵ Oludele A Akinboade, Mandisa Putuma Mokwena & Emilie C Kinck 'Understanding citizens' participation in service delivery protests in South Africa's Sedibeng district municipality' 2013 (40) *International Journal of Social Economics* at 458-478. See also Lues op cit note 6 at 709–804.

¹⁶ Leila Patel Getting it right and wrong: An overview of a decade of post-apartheid social welfare (2008) 20 (2) *Practice* at 71–81, available at <http://dx.doi.org/10.1080/09503150802058822>, accessed on 06 July 2018.

¹⁷ Akinboade, Mokwena & Kinck op cit note 15 at 467.

¹⁸ TI,Nzimakwe 'The value of civil society participation in governance' 2008 (43) *Journal of Public Administration* at 44.

¹⁹ Constitution 1996 s 16 and 17.

²⁰ Heinrich op cit note 7 at 2. See also Claire Mercer 'NGOs, civil society and democratization: a critical review of the literature' 2002 (2) *Progress in Development Studies*; Albert Arko-Cobbah 'Civil society and good governance: Challenges for public libraries in South Africa' (2006) 55 *Library Review* at 350-353; Jan Aart Scholte 'Civil society and democratically accountable global governance' (2004) 39 (2) *Government and Opposition* at 219–220.

²¹ 2017 (3) SA 335 (CC).

²² Supra note 21 para 8.

The Black Sash organisation brought its application to the court in the public interest and in light of a concern for all grant beneficiaries to seek restoration of the oversight role of the Constitutional Court for the payment of social grants. This is clear evidence of poor corporate governance in SASSA, a state-owned enterprise, that could have seriously affected 17 million people.²³ The Constitutional Court ordered South African Social Security Agency and Cash Paymaster Services to continue with their mandate to pay social grants for the next 12 months until another entity that could do so was appointed.²⁴

As shown above, it is very clear that civil society organisations play a huge part in the society, particularly in relation to confronting poor management and corrupt practices in the public sector. However, laws that regulate the intervention of CSOs in the corporate governance of SOEs and their workings have not been critically studied. Although CSOs, like ordinary citizens, are entitled to know how public funds are used, their intervention in the corporate governance of SOEs often generates much tension as their role and *locus standi* is heavily challenged by the government. There is a lack of express authority for CSOs to seek accountability from SOEs and although CSOs have found avenues under constitutional provisions and other laws for making interventions, this gap in the law is problematic. This research therefore examines the legal provisions that CSOs use to challenge the government to promote good governance and address corruption in government institutions.

1.2 Research question

The overarching research question addressed is: how are civil society organisations using legal provisions to advance good corporate governance in state-owned enterprises in South Africa? In other words, what are the legal tools employed by civil society organisations in their efforts to secure public accountability from SOEs in South Africa? In addressing this question, the legal position of CSOs which enables them to perform this watchdog role will also be examined. Subsidiary research questions are:

- (i) Do the legal frameworks promote CSOs activism or constrain it?
- (ii) What challenges do CSOs face in their efforts to make SOEs accountable in service delivery or in being socially responsible?

²³ Supra note 21 para 43.

²⁴ Supra note 21 para 76.

- (iii) What are the desirable reforms that may further aid CSOs in ensuring that SOEs adhere to good corporate governance culture or are held accountable for bad governance?

SOEs provide important services, products, employment and capacity building for the public and so they are critical to the economy and must be properly managed.²⁵ As an independent sector representing the interests of the public, CSOs are well positioned to denounce and expose corruption cases and press the government for change.²⁶

1.3 Research justification

The proposed research may be justified on several grounds. First, some research has been done on the role of CSOs and on successes and challenges facing CSOs generally in South Africa.²⁷ Not much research is, however, available on the undefined role of CSOs in the governance of specifically SOEs. There has not been much research into what an enabling environment for an effective role for CSOs could be in their engagement with state-owned enterprises over issues of poor corporate governance and corruption.

Secondly, this research is relevant in that it intends to examine the role of law and the contested role of CSOs in keeping the government accountable to citizens. Furthermore, it will explore the gaps in existing laws that hinder the role of CSOs in acting as watchdogs. In so doing, the research attempts to answer key questions surrounding the relationship between CSOs and SOEs. These questions include how the stake of citizens in state-owned enterprises is protected and advanced through the agency of the CSOs and how CSOs can more effectively utilise legal provisions to promote SOE accountability to citizens?

Thirdly, having enabling laws and CSOs on a strong legal footing advances the public interest as cases of mediocrity and avarice in the administration of public enterprises will be

²⁵ Ramani Naidoo *Corporate Governance: An Essential Guide for South African Companies*, 3 ed (2015) at 353. See also Akaniboade, Mokwena & Kinfaok op cit note 15 at 460.

²⁶ Organisation for Economic Co-operation and Development *Civil Society Empowerment* (2013) at 3, available at <https://www.oecd.org/cleangovbiz/CivilSocietyEmpowermentDraft.pdf>, accessed on 27 February 2017.

²⁷ See for example Mark Swilling & Bev Russell *The Size and Scope of the Non-Profit Sector in South Africa* (2002) . See also, IDASA & CORE *Two Commas and a Full Stop, Civicus Index on Civil Society, South African Country Report* (2001) available at <https://africanphilanthropy.issuelab.org/resources/20330/20330.pdf> accessed on 04 May 2021; Vincent Saldanha 'NGOs and the promotion of human rights in South-Africa' in Paul Tiyambe Zeleza & Philip J. McConaughay (eds) *Human Rights, the Rule of Law, and Development in Africa* (2004); Bongani Magongo *Enhancing Civil Society Participation in the South African Development Agenda: The Role of Civil Society Organisations'* (2015) ; Habib op cit note 3; Heinrich op cit note 7.

checked. In the context of the plethora of suspected cases of maladministration of SOEs, this research draws attention to knowledge that can be used to advocate the amendment of current laws and the introduction of new laws that strengthen civil society and enable CSOs to seek legal recourse where there is suspected abuse of power in corporate governance and public administration of SOEs.

The cases of *Economic Freedom Fighters v Speaker of National Assembly* and *Democratic Alliance v Speaker of National Assembly*²⁸ (popularly known as the *Nkandla* case) and *Democratic Alliance v South African Broadcasting Corporation & others*²⁹ (popularly known as the *SABC COO* case) are two very important recent cases that illustrate the dimensions of corruption and misuse of public funds by state officials and poor corporate governance in state-owned enterprises. The Constitution requires public enterprises to be managed well through transparency, accountability and high professional ethics.³⁰ These obligations are further reflected in various other sources such as King Report and King Code IV on Corporate Governance (*King IV*), the Companies Act, 71 of 2008 the Promotion of Administrative Justice Act 2000 and the common law.

Fourthly, the non-profit sector, though largely a product of private initiative, has taken on greater significance in public life, by increasingly participating in tasks and services that are traditionally performed by government³¹ as well as pressing the government to meet its obligations.³² CSOs play a major role in keeping SOEs accountable to citizens and this is evident through legal actions and protests initiated by these CSOs. Furthermore, CSOs also participate in parliamentary hearings and give opinions on corporate governance by SOEs. This hard work and commitment from CSOs is a way of promoting accountability and transparency as well as inclusivity for the benefit of the public.³³ Research in this area is useful for advancing strategies for more effective interventions by CSOs.

²⁸ 2016 (3) SA 580 (CC). See s 2.6 below for the full discussion of this case.

²⁹ 2016 (3) SA 468 (WCC). See s 3.10.4 for the background to this case and s 4.2.4 for the discussion of the case.

³⁰ Constitution 1996 s 196.

³¹ See also 'NPOs, democracy and service delivery' *NGO Pulse* 29 April 2014, available at <http://www.ngopulse.org/blogs/npos-democracy-and-service-delivery>, accessed on 28 June 2017.

³² Sultan Khan & Jayanathan Govender 'Direct politics: The struggle for participative spaces in local government decision-making' in Lindy Heineken & Heidi Prozesky (eds) *Society in Focus, Change, Challenge and Resistance: Reflections from South Africa and Beyond*. (2010) at 167. See also Heinrich op cit note 7 at 2; Scholte op cit note 20 at 219–220.

³³ Ibid. See also World Bank *Accountability in Public Services in Africa* (2011), available at http://siteresources.worldbank.org/INTSOUTHAFRICA/Resources/Accountability_in_Public_Services_in_Africa.pdf, accessed on 29 June 2017.

A fifth justification has to do with the fact that in African countries CSOs are significantly funded by foreign donors who are usually foreign governments.³⁴ This makes it even more imperative that an internal legal framework that enables continued and improved delivery by non-profit organisations is developed, while local funding is mobilised.

Lastly, SOEs are critical to the economy and they play a huge role in the well-being of the citizens.³⁵ Service provision by SOEs should, therefore, be transparent and SOEs should be accountable for their decisions.³⁶ There should also be an element of legal confidentiality on certain internal matters of SOEs to avoid interference that may have a negative impact on the management of sensitive internal affairs and put SOEs at a disadvantage as an arm of the state.³⁷ Any research that examines the operation of SOEs and explores the limits of interference by stakeholders will no doubt contribute much to the well-being of SOEs.

1.4 Research methodology

The research is principally doctrinal with a limited component of empirical research. Doctrinal research was conducted through a review of literature as well as an examination of relevant sources of law, both statutory and judicial. Successful participation of the CSOs in the fight against poor governance and corruption is based on three important factors:

- (i) the existence of a legal framework that enables CSOs' participation without political and legal restrictions;
- (ii) the willingness of the state to engage constructively with the CSOs; and
- (iii) the effective engagement of CSOs in the fight against corruption.³⁸

Therefore, the empirical component of the research was conducted by way of interviews directed at examining how CSOs use legal provisions to challenge SOEs and identifying potential impediments to the effective and positive contribution of CSOs to the promotion of good corporate governance and accountability in SOEs. Due to financial constraints, the face-to-face empirical research component was restricted to organisations based in Cape

³⁴ Julie Hearn 'Aiding democracy? Donors and civil society in South Africa' (2000) 21 *Third World Quarterly* at 817. See also Habib op cit note 3 at 678-79; Abigail Barr & Marcel Fafchamps= & Trudy Owens *Is International Funding Crowding out Charitable Contributions in African NGOs?* (2006) at 1–3, available at file:///C:/Users/user/Downloads/gprg-wps-055.pdf ,accessed on 28 June 2017.

³⁵ Naidoo op cit note 25 at 353–373.

³⁶ Ibid.

³⁷ Charles J. Glasser, Jr *International Libel and Privacy Handbook: A Global Reference for Journalists, Publishers, Webmasters, and Lawyers* 3 ed (2013) at 158-160, available at <http://onlinelibrary.wiley.com/book/10.1002/9781118653784>, accessed on 01 June 2020.

³⁸ Organisation for Economic Co-operation and Development op cite note 26 at 3.

Town while those based outside Cape Town were interviewed telephonically and on Skype. The interview questions were addressed to civil society organisations that specialise in anti-corruption issues and other key NGOs (such as those who work with academic institutions and professional associations, etc.).

1.5 Literature review

Corporate governance is the management and control of companies that involves a set of relationships between a company's management, its board, its shareholders and other stakeholders.³⁹ According to Gillis, state-owned enterprises (SOEs) are a critical element of the African economies as they play a key role in the development of many African countries and as a result, should be managed and controlled well through practicing corporate governance.⁴⁰ Corporate governance that is applied in both SOEs, and private companies is the same since both have similar characteristics and behaviour and operate in a competitive market resulting in both suffering similar corporate governance failures.⁴¹

Unlike a private company, an SOE is not simply a tool for profit maximisation as it is also responsible for service delivery.⁴² SOEs are established to deal with socio economic issues and operate in key sectors such as telecommunications, transport, water, and electricity.⁴³ Roper and Orgad assert that by operating these major commercial sectors, the government enters the economic sectors and issues of corporate governance arise.⁴⁴ According to Subramanian, while SOEs are owned by the state, leading to an expectation that the state's leadership as a shareholder should be exemplary in terms of practicing ethical standards such as corporate governance when managing and controlling SOEs, the opposite is true.⁴⁵ SOE have a reputation for practicing poor corporate governance.⁴⁶ Edwards argues that there is a moral and ethical challenge in South African public sector particularly in state-

³⁹ Cadbury Committee *Report on the Financial Aspects of Corporate Governance* (1992), available at <http://www.ecgi.org/codes/documents/cadbury.pdf>, accessed on 28 August 2018. See also OECD *Principles of Corporate Governance* (2004) at 11, available at <http://www.oecd.org/corporate/ca/corporategovernanceprinciples/31557724.pdf>, accessed on 11 October 2018.

⁴⁰ Malcom Gillis 'The role of state enterprises in economic development' (1980) 47 *Social Research* at 249-59.

⁴¹ Juliet Roper & Michéle Schienberger Orgad 'State owned enterprises: Issues of accountability and legitimacy' (2011) 25 (4) *Management Communication Quarterly* at 694.

⁴² S Subramanian 'Corporate Governance, Institutional Ownership and Firm Performance in Indian State-Owned Enterprises' (2015) 11 (2) *Journal of Management Research and Innovation* at 117-9.

⁴³ Roper and Orgad op cit note 41 at 694.

⁴⁴ Ibid at 694.

⁴⁵ Subramanian op cit note 42 at 119.

⁴⁶ Tebello Thabane & Elizabeth Snyman Van Deventer 'Pathological corporate governance deficiencies in south Africa's state-owned companies: A critical reflection' (2018) 21(1) *Potchefstroom Electronic Law Journal* at 14-22.

owned enterprises.⁴⁷ According to McGregor, South African SOEs have been bedevilled by governance failures mostly fuelled by a disregard for existing corporate governance principles, not enough repercussions for those responsible for breaching corporate governance principles and excessive political interference, corruption⁴⁸ and unethical leadership.⁴⁹ For example, in 2008/2009 South African Broadcasting Corporation (SABC) lost around R910 million to poor corporate governance.⁵⁰ This has led to citizens distrusting the state and demanding for accountability in SOEs.

SOEs are financed from public fiscus hence the scrutiny of their performance by the citizens and civil society organisations (CSOs) who are the citizens' representatives demanding for accountability in SOEs.⁵¹ Lues asserts that strengthening democracy includes denouncing poor service delivery and unethical conduct by public service leaders hence SOEs as state institutions must ensure sound leadership to maintain a pattern of good governance and leadership.⁵² Lues's point is affirmed by Welch who states that in a democratic society, state and civil society organisations are complementary in improving the society⁵³ while Nassali points that CSOs ensure democracy through actions that advances the needs of the marginalised influencing policies, mobilising citizens to hold power accountable and upholding political and human rights.⁵⁴ The role of CSOs in holding power accountable in SOEs in South Africa has not been critically studied and the focus of this thesis is to examine the legal provisions that CSOs use in upholding corporate governance principles in state-owned enterprises (SOEs) in South Africa.

⁴⁷ T Edwards 'Ethical fitness for accountable public officials: An imperative for good governance' (2007) 42 (5) *Journal of Public Administration* at 29.

⁴⁸ Lynn McGregor *Can South African State Owned Enterprises Succeed* (2015), available at <https://portal.regenesys.net/course/discussions/editors/kcfinder/upload/files/McGregor%2C%20L.%202015.%200Can%20State%20Owned%20Companies%20succeed.%20USB..pdf>, accessed on 20 September 2018. See also Lynn McGregor *Improving Corporate Governance of South African State Owned Companies (SOCs) A "Think-piece"* (2014), available at <https://pdfslide.net/documents/improving-corporate-governance-of-south-african-state-documents-sa-socimproving.htm>, accessed on 20 September 2018.

⁴⁹ Lufuno Nevondwe Kola O Odeku & Konanani Raligilia 'Ethics in the state-owned enterprises in the public sector: a thin line between corporate governance and ethical leadership' (2014) 5 (15) *Journal of Social Sciences* at 661.

⁵⁰ Staff Reporter 'SABC loses R910-million in 2008/09 financial year' *Mail & Guardian* December 2009, available at <https://mg.co.za/article/2009-12-18-sabc-loses-r910million-in-200809-financial-year/> accessed on 22 June 2021.

⁵¹ Lues op cit note 6 at 790-92.

⁵² Ibid.

⁵³ Claude E. Welch, Jr 'Protecting Human Rights in Africa: Roles and strategies of Non-Governmental Organisations' (1995) 44 at 260.

⁵⁴ Maria Nassali 'Politics, Power and Accountability: Addressing the elephant in the room in quest for civil society organisation's right to freedom of association' (2014) 16 (2) *International Journal of Not-for-Profit Law* at 44.

1.6 Scope of study

This study is concerned with the role which civil society organisations play in the corporate governance of state-owned enterprises. Not all CSOs directly address the management of the public sector, consequently this research is limited to those CSOs that play a role in holding government accountable for service delivery and management of the public sector by the government. Sometimes this role is direct and culminates in a CSO bringing an action against an SOE. At other times, a CSO may work in the background or in conjunction with other institutions to highlight issues that need to be addressed.

Ultimately, it seeks to answer the fundamental question posed by this study, which is: how are civil society organisations using legal provisions to advance good corporate governance in SOEs in South Africa? Consequently, the research focuses on institutions that engage the government in this way.

1.7 Outline of the thesis

The study is divided into six chapters. In chapter 1, the framework of the entire study is set out. It serves as the introduction stating the research question, background and the justification for the research. It also describes the methodology as well as the scope of the work.

The theories, characteristics and roles of CSOs are dealt with in chapter 2. The focus of the chapter is on CSOs that are active in addressing corruption and poor governance by pressing the government to meet its statutory obligations. In addition, the relationship between the state, CSOs and citizens is examined in the chapter.

Chapter 3 applies the principle of corporate governance to the activities of state-owned enterprises. It starts by defining corporate governance and proceeds to discuss theories of corporate governance, highlighting the benefits of good corporate governance by SOEs. It then demonstrates the strategic importance of different SOEs, with specific reference to South-African SOEs engaged in direct service delivery to the society. The chapter discusses the regulation of corporate governance in SOEs in South Africa. In addition, the chapter describes the corporate governance failures at major global public companies. Although CSOs may not have been the main legal challengers in relation to those scandals, they nonetheless serve as useful illustrations of the severe consequences of poor corporate

governance in major companies, demonstrating the imperative on other SOEs to draw lessons from them. The chapter further discusses poor corporate governance at South African SOEs to indicate why accountability checks are important. Lastly, this chapter attempts to answer questions such as: what role do SOEs play in the society? What are the objectives of SOEs? What makes SOEs similar to and yet different from their private sector counterparts, and how do these distinctions interpret how they are led, governed and controlled? Do SOEs owe CSOs a duty to account?

Chapter 4 discusses the provisions of the law that regulate the activities of the CSOs. The chapter further discusses recent cases of poor corporate governance to identify the ways in which SOEs have been held to account not only by CSOs but by other entities that represent various constituencies such as political parties.

Chapter 5 presents findings from empirical research to uncover the thinking behind the legal strategies used by CSOs in scrutinising the activities of SOEs. The chapter further discusses the challenges and other dynamics that confront CSOs in their role to end poor governance in SOEs.

In chapter 6 conclusions are made about the research, including a determination about whether CSOs have a sound legal platform to challenge the government. Links are established between the findings and the theorisation on CSOs in the context of corporate governance of SOEs. Recommendations are also made in this chapter on ways to make CSOs more effective in their role of pressing the government to deliver, holding government officials and departments to account for their stewardship and increasing SOE productivity and delivery.

1.8 Definition of terminology

There are certain terms that will appear more frequently in this study. There is no agreed meaning to these words among researchers. Therefore, it is necessary to define them in the context in which they are used in this study.

Amicus curiae

An *amicus curia* is a friend of the court, a person with strong interest in an action but who is, however, not a party to the action. An *amicus curiae* educates the courts on points of law that are in doubt, gathers or organises information or raises some awareness about some aspect of

the case that the court might otherwise miss. Non-profit Organisations particularly CSOs are in most cases *amicus curiae* in cases that involve human rights.⁵⁵

Civil society organisations

A civil society organisation is an institution that seeks to serve the public's socio-political interests.⁵⁶ They are independent of the government.⁵⁷ CSOs are organisations that represent the public interest in general or particular sections of it. CSOs come in many forms, some informal and some as formal entities such as non-governmental organisations (NGOs), Community Based Organisations (CBOs) and faith-based organisations (FBOs), among others.⁵⁸ These organisations seek to influence policy, offer alternatives, and resist undemocratic policies and laws — policies that are hostile to a human rights culture and a democratic society.⁵⁹ CSOs prioritise disadvantaged and marginalised groups of people in order to promote citizen participation.⁶⁰

Corporate governance

Corporate governance is the practice by which companies are managed.⁶¹ It is the rules, practices and processes by which a company is coordinated and controlled. Corporate governance involves balancing the interests of a company's stakeholders, such as shareholders, management, customers, suppliers, financiers, government and the community.⁶²

Non-profit organisations

A non-profit organisation (NPO) is an organisation that operates for purposes other than making a profit and where profit is made, it is not distributed to members, but ploughed back into the work of the organisation. A non-profit organisation is often dedicated to promoting a

⁵⁵ Merriam-Webster Inc *Merriam-Webster's dictionary of Law* 1996, available at <https://www.merriam-webster.com/dictionary/amicus%20curiae#legalDictionary> accessed on 01 November 2020. See also *The Free Dictionary*, available at <https://www.thefreedictionary.com/amicuscuriae>, accessed on 11 January 2018.

⁵⁶ Ada Obianuju Okoye *The Role of Law in the Development of the Non Profit Sector in Nigeria and South Africa* (unpublished PhD thesis, University of Cape Town, 2006) at 14.

⁵⁷ Ranjita Mohanty 'Civil Society and NGOs' (2002) 63 *The Indian Journal of Political Science* at 1–10.

⁵⁸ Koketso Moeti 'Understanding the differences between civil society and civil society organisations'. *NGOPulse* 31 August 2012.

⁵⁹ Abdul Aziz 'Democratic decentralisation and civil society' (2002) *Social Change* .

⁶⁰ Mercer op cit note 20 at 7–9.

⁶¹ Naidoo op cit note 25 at 3.

⁶² Cadbury Committee *Report on the Financial Aspects of Corporate Governance* (1992), available at <http://www.ecgi.org/codes/documents/cadbury.pdf>, accessed on 28 August 2018. See also James L Brickley & Jerold L Zimmerman Corporate governance myths: Comments on Armstrong , Guay and Weber (2010) 50 (2–3) *Journal of Accounting and Economics* at 236.

particular social goal or point of view.⁶³ Non-governmental organisations (NGOs), community-based organisations (CBOs) and civil society organisations (CSOs) are collectively known as non-profit organisations (NPOs) because of their legal status as non-profit-making or non-profit-distributing entities.⁶⁴

Non-governmental organisations

A non-governmental organisation (NGO) is a non-profit organisation that is independent from the government. NGOs receive their funds by way of donations, but some avoid formal funding completely and are run essentially by volunteers. NGOs are highly diverse groups of organizations involved in a wide scope of activities and take different forms. Some have charitable status, while others are registered for tax exemption based on recognition of social purposes. Others may be fronts for political, religious, or other interests.⁶⁵

State-owned enterprises

A state-owned enterprise (SOE) is a legal entity that is formed by the government to perform commercial activities on behalf of the government. It can be either partially or wholly owned by a government and is typically reserved to partake in commercial activities⁶⁶ and in some certain areas, to advance more effective and efficient service delivery.⁶⁷

1.8 Conclusion

In this chapter the research was described. The background shows the root cause of CSO's unrest in tackling poor governance and corruption through legal action and many other interventions. In so doing, CSOs have been heavily resisted by the government due to the lack of clarity in legal provisions that authorise CSOs to challenge the government. This has led to CSOs being undermined. The need to bring clarity on legal provisions that authorise CSOs to challenge the government is the major justification for the research. Lastly, the way

⁶³ Mohanty op cit note 57 at 2–10.

⁶⁴ NPO Act: Chapter 1, non-profit organisation means a trust, company or other association of persons— 25 (a) established for a public purpose; and (b) the income and property of which 'is not distributable to its members or office-bearers except as reasonable compensation for services rendered;

⁶⁵ Mohanty op cit note 57 at 1-10.

⁶⁶ Naidoo, op cit note 25 at 353–74. See also Investopedia [website], available at <https://www.investopedia.com/terms/c/corporategovernance.asp>, accessed on 23 November 2017.

⁶⁷ Wendy Ovens & Associates *The Role and Significance of State Owned Enterprises, Public Entities and other Public Bodies in the Promotion of Urban Growth and Development in South Africa*, available at http://www.cogta.gov.za/cgta_2016/wp-content/uploads/2016/05/IUDF-STATE-OWNED-ENTEPRISES.pdf, accessed on 23 November 2017.

this research is conducted as well as the definition of words shows the boundaries and limitations of the study, while the outline of the chapter displays the contents and contribution of the work. In subsequent chapters, CSOs' origins, existence, and role are discussed, SOEs' roles are explained and lastly the legal provisions that CSOs use to challenge the government are analysed.

CHAPTER 2: CIVIL SOCIETY ORGANISATIONS - ORIGINS AND ROLE IN PUBLIC GOVERNANCE IN SOUTH AFRICA.

2.1 Introduction

The background to the study was given in chapter 1. A brief framework of administration of the public sector by the government during apartheid and in the contemporary South Africa was explained. The background of civil society organisations (CSOs) as well as their work during apartheid and in contemporary South Africa was further described. The research was justified on several grounds but most importantly the examination of laws and the contested role of CSOs in keeping the government accountable as well as the need to clarify the legal provisions authorising CSOs to promote good governance. The methodology was outlined as a combination of doctrinal research, literature review and empirical research. Empirical research was conducted specifically on South African civil society organisations and non-profit organisations (NPOs).

In this chapter, theories of the existence of NPOs are explained, with the focus on the characteristics and role which CSOs play, their contribution to governance and their source of financial support as well as their challenges in holding the government accountable to citizens. Secondly, the chapter looks at the relationship between the state, CSOs and citizens. Lastly, the chapter highlights the work of CSOs that participate in governance and confronting corruption.

State-owned enterprises (SOEs) are a machinery for service delivery by the government and the good management of SOEs guarantees good service delivery.⁶⁸ Since SOEs are government institutions they are located in the public sector, and the term ‘service delivery’ is used in this chapter to describe their functions. The research is not limited to CSOs but briefly discusses other organisations that contribute to democracy by ensuring good governance in SOEs as well as fighting corruption. Such organisations include political parties as well as other government institutions, for example, the Public Protector’s office and the Human Rights Commission.

⁶⁸ Habib & Kotzé op cit note 4 at 246–270.

In terms of their legal structure, civil society organisations (CSO) are located in the non-profit sector and constitute a sub-category of non-profit organisations (NPO).⁶⁹ The term civil society organisation is used interchangeably with a host of other terms in the literature, depending on the context, but the common denominator is that they are constituted for public benefit. The terminology includes ‘non-profit organisations (NPOs)’, ‘non-governmental organisations (NGOs)’, voluntary organisations, third-sector organisations, charity-based organisations, independent sector agencies and other such descriptors.⁷⁰ These organisations consist of a variety of formations which include faith-based organisations, community-based associations, social movements and mutual benefit organisations. Globally, CSOs have increased for the past decade due to an increase in their demand.⁷¹ The demand is mainly due to internal and external factors. Internally, the reduction of service delivery by government and the limitations in the provision of public goods has left a gap which non-profit organisations (NPOs) generally work to fill by providing public services and infrastructure.⁷² Externally, the demand by the donor community to use NPOs to channel aid has contributed to the increase in NPOs.⁷³

In South Africa, the role of civil society organisations in promoting good service delivery by the government is shaped by the country’s history and this chapter therefore looks at the characteristics and role of CSOs during the apartheid era. From this point, it also traces how the legal framework has contributed to the operating environment for CSOs in contemporary South Africa. It is necessary to understand CSO origins and existence in order to understand the role of CSOs in good governance. This information is subsumed in theories of the existence of NPOs which are discussed next.

⁶⁹ See Department of Social Development South Africa *Building a Caring Society Together* (2011), [website], available at <http://www.dsd.gov.za/npo>, accessed on 24 October 2017.

⁷⁰ A Habib and R Taylor ‘South Africa: Anti-apartheid NGOs in transition’ (1999) 10 *Voluntas: International Journal of Voluntary and Nonprofit Organizations* at 73-82. See also Freda Donoghue ‘Public governance roles of third sector organisations in Ireland: A comparison with South Africa’ in B Enjolras & K Sivesind Henrik (eds) *Civil Society in Comparative Perspective* (2009) 26 *Comparative Social Research*. In terms of the Nonprofit Organisations Act No. 71 of 1997, a non-profit organisation means a trust, company or other association of persons established for a public purpose and the income and property of which may not be distributed to its members or office-bearers except as reasonable compensation for services rendered.

⁷¹ Taye Aseefa & Zewde Bahru *Civil Society at the Crossroads: Changes and Prospects in Ethiopia* (2008) at 23.

⁷² Monsiapile Kajimbwa ‘NGO’s and their role in the Global South’ (2006) 9 (5) *Int’l J. Not-for-Profit L.* at 58–62, available at http://heinonline.org/HOL/Page?handle=hein.journals/ijnpl9&g_sent=1&casa_token=&collection=journals&id=61, accessed on 10 December 2017. See also Rolph van der Hoeven & Fred van der Kraalj (eds) *Structural Adjustment and Beyond in Sub-Saharan Africa*: (1994) at 24.

⁷³ David Hulme ‘Reinventing the Third World states: Service delivery and the civic realm’ in Willy McCourt, & Martin Minogue (eds), *The Internationalisation of Public Management: Reinventing the Third World State* (2001) at 129–152. See also Diana Mitlin Sam Hickey & Anthony Bebbington, ‘Reclaiming development? NGOs and the challenge of alternatives’ (2007) 35 (10) *World Development*.

2.2 Theories on the existence of non-profit organisations

As mentioned above, NPOs have increased due to the demand for their services, as a result of the reduction in government service provision, market failure to provide public goods and the preference of donors to channel donations through NPOs.⁷⁴ A range of scholars have written about why NPOs exist and their theories of NPO existence are based on the discipline in which the writer is situated.⁷⁵ There are three main theories on why NPOs exist, these being economic theory, political theory and sociological theory.

2.2.1 Economic theories of NPOs

Service provision can be given through three platforms, government service provision, business/commercial and the NPO sector. The advantage of government service is lower costs while the other two sectors have the benefit of individual control.⁷⁶

According to Salamon, NPOs exist to fill the gaps that the government cannot fill: this is called the government failure theory.⁷⁷ Weisbrod argues that as gap-fillers, NPOs supplement a government's role in socio-economic upliftment and provide an alternative to private sector provision.⁷⁸ The services that government provides for the benefit of everyone are called public goods and they are goods that if one person, in a group, consumes, cannot be withheld or restricted from others in that same group.⁷⁹ The gaps in the provision of public goods and services by government are a reflection of various limitations faced by the state, including economic and political limitations.⁸⁰ For example, government's service provision is based on equity considerations, is subject to revenue from tax, is constrained to offer goods and services in a uniform way⁸¹ and is only triggered by a majority vote. These limits leave

⁷⁴ Van den Hoeven & Van der Kraaij (eds) op cit note 72 at 24. See also Hulme op cit note 73 at 129–152.

⁷⁵ Lester M Salamon *America's Non Profit Sector: A Primer* (1999); Burton A Weisbrod 'Towards a theory of the voluntary nonprofit sector in a three sector economy' in S Rose- Ackerman (ed) (1986). See also J Steven Ott & Lisa A Dicke *The Nature of the Non-Profit Sector* 3 ed. (2015); John Douglas 'Political theories of non profit organisation' in Walter W Powell (ed) *The Non Profit Sector: A Research Handbook* (1987); Estelle James 'Economic theories of the nonprofit sector: A comparative perspective' in Helmut K Anheier & Wolfgang Seibel (eds) *The Third Sector: Comparative Studies of Nonprofit Organisations* (1990); Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (1976, Harvard University Press).

⁷⁶ Okoye op cit note 56 at 28.

⁷⁷ Lester M Salamon *America's Non Profit Sector: A Primer* (1999) at 12.

⁷⁸ Burton A Weisbrod 'Towards a theory of the voluntary nonprofit sector in a three sector economy' in S Rose- Ackerman (ed) (1986) at 16.

⁷⁹ Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (1976) Harvard University Press at 14.

⁸⁰ J Steven Ott & Lisa A Dicke *The Nature of the Non-Profit Sector* 3 ed. (2015) at 149. See also John Douglas 'Political theories of non profit organisation' in Walter W Powell (ed) *The Non Profit Sector: A Research Handbook* (1987) at 46.

⁸¹ Ott & Dicke op cit note 80 at 149.

minority groups of people not attended to, so they form their own non-profit organisation or turn to existing organisations which meets their needs.⁸² Citizens who belong to a minority religion or ethnic group have needs that other groups do not. A good example would be a Muslim school that provides an Islamic environment with an Islamic cultural identity at the school for the Muslim learners as an alternative to a public school provided by the government and other private schools in a secular state, which may not have an Islamic environment for its learners. Government failure theory predicts that NPOs are most active where the population is heterogeneous since many different needs must be attended to under these circumstances.⁸³

Secondly, according to the market failure theory, the market sector is good at providing private goods that people utilise individually such as food and clothes.⁸⁴ However, the market system has a problem providing collective goods, things that can be used collectively such as clean air, national defence or safe neighbourhoods.⁸⁵ The challenge with public goods is the free rider problem, meaning that the people who did not pay for these goods benefit as well, as they cannot be excluded and, therefore, no one has the motivation to pay for these services. The government can solve this problem by collecting taxes from people.⁸⁶ There are, however, limitations to the government as it is required to distribute goods and services uniformly.⁸⁷ These limitations, as mentioned above may lead to some people not receiving such service or being unsatisfied with it. As a result, NPOs come in to complement the government in providing public goods.⁸⁸ In summary the market failure theory places NPOs as need-fillers where particular goods or services required by the majority are not sufficiently supplied or that required by a minority is not readily available.

Market failure theory places NPOs as a response to demand caused by diversity in a society,⁸⁹ as described by Weisbrod in the following quote:

⁸² Lester M Salamon *Partners in Public Service: Government-Nonprofit Relations in the Modern Welfare State* (1995) at 44.

⁸³ Estelle James 'Economic theories of the nonprofit sector: A comparative perspective' in Helmut K Anheier & Wolfgang Seibel (eds) *The Third Sector: Comparative Studies of Nonprofit Organisations* (1990) at 23.

⁸⁴ Salamon (1999) op cit note 77 at 16.

⁸⁵ Ott & Dicke op cit note 80 at 229.

⁸⁶ Olson op cit note 79 at 14.

⁸⁷ Douglas op cit note 80 at 46.

⁸⁸ A Najam *The Three C's of NGO-Government Relations: Confrontation, Complementarity, Collaboration* (unpublished manuscript, Boston University, 1997.) at 383-390. See also Dennis R Young 'Complementary, supplementary or adversarial: A theoretical and historical examination of government-nonprofit relations in the U.S.' in Elizabeth T Boris & Eugene Steuerle(ed) *Governments and Nonprofit Organizations: The Challenges of Civil Society* (1999) (The Urban Institute, Washington, D.C ..

⁸⁹ James op cit note 83 at 23.

The greater the homogeneity within a political unit - that is the greater the similarity in income, wealth, religion, ethnic background, education level, and other characteristics influencing demand for any collective-consumption good, the smaller the expected variation in individual demands and hence, the smaller the likely degree of dissatisfaction with the politically determined level and quality of output.⁹⁰

Thirdly, there is the contract failure theory for the existence of nonprofit organisations.⁹¹ Hansmann argues that people place their trust where profit is not a priority and for that reason many people prefer NPO service providers as they do not prioritise profit but service provision.⁹² According to the distribution theory, contract failure happens where consumers are unable to determine the precise costs or the quality of the service.⁹³ This can be due to various reasons - first the service might be too complex to determine, such as medical operations or the customer may not be capable of assessing the service, such as a mentally ill person in a clinic. Sometimes the person who pays for the service is not the one who consumes it therefore the customer does not have the necessary information to evaluate its quality. In these cases, such customers tend to trust NPOs more because their primary aim is not profit but serving the public and they cannot seek profits for personal gains⁹⁴ as profits are ploughed back into the organisation, for the running of the organisation.⁹⁵

Lastly is the non-profit failure theory. This theory by Salomon describes NPOs as a partner of the government. It states that NPOs in partnership with the government, are directly funded by the government to provide goods and services to the citizens.⁹⁶ These are goods and services demanded by people through the government. NPOs are preferred providers of these services in this theory and government becomes necessary only when NPOs fail to meet the needs.⁹⁷ This theory is of the view that non-profit sector does not merely exist as a response to government failures and market failures but that the sector can be seen as the favoured tool for 'providing' collective goods, with government as the residual institution required to compensate for certain shortcomings of the non-profit sector.⁹⁸ Where

⁹⁰ Burton A. Weisbrod 'Towards a theory of the voluntary non-profit sector in a three-sector economy' in Edmund S. Phelps (ed) *Altruism, Morality, and Economic Theory* (1975) at 177.

⁹¹ Salomon 1999 op cit note 77 at 13.

⁹² Henry Hansmann 'Economic theories of nonprofit organisations' in WW Powell (ed) *The Nonprofit Sector: A Research Handbook* (1987) at 17.

⁹³ Ott & Dicke op cit note 80 at 132.

⁹⁴ James op cit note 83 at 22.

⁹⁵ Hansmann op cit note 92 at 17.

⁹⁶ Salomon (1999) op cit note at 13.

⁹⁷ Ibid.

⁹⁸ Julian Wolpert 'Voluntary failure theory and non-profit-government partnership' in Helmut K Anheier Avener Ben-Ner. (eds) *The Study of the Non-profit Enterprise: Themes and Approaches* (2003) at 171.

government has failed to deliver goods and service due to political reasons, NPOs intervene as a supplement to the government as discussed in the next segment.

2.2.2 Political theories of NPOs

Political theories of the non-profit sector mainly comprise three strands as follows: the individualist theory, pluralist theory and the corporatist theory.

First, the individualistic state theory by Self states that politics is seen as a market for the demand and supply of public goods.⁹⁹ Examples are education and public utilities such as the maintenance of clean air, pure water and the prevention of crime etc. The challenge is that each consumer demands as much of it as she/he can personally utilise but as a taxpayer, she/he will be reluctant to vote for an adequate supply for this purpose.¹⁰⁰ Government can provide such services to the public, but because there are limitations to its service, NPOs may be required to intervene and supplement the government in providing services to the public.¹⁰¹ The government indirectly provides such services by subsidising NPOs so that they can provide such services and that is the political theory of NPOs.¹⁰²

Second is the pluralist theory. According to this theory, a rich variety of self-governing associations represents works of democracy and meaningful social life.¹⁰³ Pluralists emphasise that groups are coalitions of individuals who identify their interests with a variety of groups.¹⁰⁴ Pluralists see competing groups as the vehicle for reconciling the diverse interests of individuals as taxpayers, motorists, homeowners, etc. through NPOs.¹⁰⁵ The normative basis of the pluralist theory justifies the dominance of group influences in modern democracies.¹⁰⁶ It maintains that the freedom of groups to organise and try to influence government is a basic democratic right and sees the existence of such groups as proof of a healthy system.¹⁰⁷ The overlapping of such groups helps to modify political conflicts and to promote reasonable compromise between conflicting interests.¹⁰⁸ Furthermore, political scientists view NPOs as a medium that provides civic participation and

⁹⁹ Peter Self *Political Theories of Modern Government Its Role and Reform* (1985) at 50.

¹⁰⁰ Ibid.

¹⁰¹ Salamon (1999) op cit note 77 at 12. See also Douglas op cit note 80 at 46.

¹⁰² Okoye op cit note 56 at 23.

¹⁰³ Self, op cit note 99 at 80.

¹⁰⁴ Paul Q Hirst ed *The pluralist theory of the state: selected writings of GDH Cole, JN Figgis and HJ Laski*. (2005) Routledge at 2-3.

¹⁰⁵ Self op cit note 99 at 81.

¹⁰⁶ Tim Schouis *Shifting boundaries: Aboriginal identity, pluralist theory, and the politics self-government*. UBC Press, 2011 at VIII-IX

¹⁰⁷ Self op cit note 99 at 82.

¹⁰⁸ Cecile Laborde and St Antony's College *Pluralist thought and the State in Britain and France, 1900-25*. (2000) Basingstoke: Macmillan at 1.

the representation of political interests in a political system of a heterogeneous society. Different ideas, interests and values are gathered through associations and represented to the political system by NPOs.¹⁰⁹ NPOs create space for collective action, for the mobilisation of the disadvantaged, or for the expression of diversity.

Thirdly, the corporatist state theory views the corporation as an evolution from pluralism that requires government and the interest groups to co-operate closely in policy-making and enforcement.¹¹⁰ The relationship is characterised by extensive state expenditure on social development but in partnership with segments of the non-profit sector. NPOs act as conduits for delivering services, in place of or in partnership with state agencies.¹¹¹ Whaites argues that there can be considered development only when NPOs partner with the state to deliver services rather than doing so independently because it gives NPOs an opportunity to bring the state into service delivery and build state capacity.¹¹²

Another factor supporting the corporation theory is the number of people who are accommodated when there is an NPO-state partnership that is higher than when the state acts alone.¹¹³ This is due to the fact that the state utilises funds from taxation to provide services.¹¹⁴ These funds are, in turn, regulated and monitored to ensure public accountability, something that does not strictly apply to NPOs.¹¹⁵

Fourthly, the pressures of political feasibility and political justice are another explanation for political theorisation of NPOs.¹¹⁶ Political justice is when the government is expected to justify — in terms of the equality clause in the Constitution — why it can only provide for a certain group of people and not another. This however, does not apply to NPOs who may provide services to some groups of people without explaining why. In the process of funding NPOs for service provision, the government ensures that some social service is being rendered in order to avoid the burden of public accountability for insufficient

¹⁰⁹ Ott & Dicke, op cit note 80 at 149.

¹¹⁰ Self op cit note 99 at 108.

¹¹¹ Mark Swilling & B Russell *The Size and Scope of the Non-Profit Sector in South Africa* (2002) at 66.

¹¹² Alan Whaites 'Viewpoint NGOs, civil society and the state: Avoiding theoretical extremes in real world issues' (1998) 3 (8) *Development in Practice* at 346–47.

¹¹³ Burton A Weisbrod 'The future of the non profit sector: its entwining with private enterprise and government' 1997 (16) *Journal of Policy Analysis and Management* at 543. See also Douglas op cit. note 80 at 46; Salamon (1999) op cit note 77 at 12.

¹¹⁴ Weisbrod op cit note 114 at 543.

¹¹⁵ Douglas op cit note 80 at 46.

¹¹⁶ Ibid. See also Peter Dobkin Hall *Philanthropy, the welfare state, and the transformation of American public and private institutions* (2000) at 11-16 Cambridge..

provision. This addresses the requirement of political feasibility without the demand for political justice.¹¹⁷

Political theorisation of NPOs' existence also identifies the flexibility of NPOs as a key driver for its relevance in complementing government provision. Democratic government dislikes the risks that come with public service delivery as they require accountability.¹¹⁸ As a result, government service-provision operations tend to be similar everywhere to avoid risks. NPOs, on the other hand, are sufficiently flexible to try new experiments.¹¹⁹ According to Olson, NPOs serve as the critical mass that often overcomes collective action problems, which often induce passivity by members of a large group due to rational apathy. It is the belief of individual members that the gain obtainable from activism is not excludable, and that is thus beneficial to free ride. In the end, nothing gets done, and the managers whose actions need to be monitored remain unchallenged. Since rational apathy signals no action, the CSOs or NPOs thus come in to fill the void and help to liberate millions of citizens who are usually passive.¹²⁰

2.2.3 Sociological theories of the NPOs

Origins of contemporary NPOs activity are traced back to the organised forms of community support that occurred in primitive societies as they became complex.¹²¹ According to sociologists, the character of NPOs is influenced by many factors such as population growth, social change, social values and government policies as well their modes of formation.

First, according to Self, social change is the reason for NPOs' existence. Social change has influenced the welfare needs with which a government tries to cope.¹²² Social change over the past four centuries has influenced how government functions as well as politics. These changes represent a faster trend which has been clear for a long time and is closely associated with changes in the economic system.¹²³ Many people's social life has changed resulting in structural changes in attitudes and values. These include the freedoms

¹¹⁷ Douglas op cit note 80 at 46.

¹¹⁸ Sara JS Nikolic & Tomas M. Koontz 'Nonprofit organizations in environmental management: A comparative analysis of government impacts'(2008) 18 (3) *Journal of Public Administration Research and Theory* at 441. See also Salamon Lester 'The new governance and the tools of public action: An introduction. *In the tools of government: A guide to the new governance*, ed. Lester Salamon at 1-47 Oxford: Oxford University Press.

¹¹⁹ John Stuart Mill *On Liberty*, cited in Salamon LM (ed) *America's Non Profit Sector: A Primer 2nd* (1999) at 14.

¹²⁰ Olson op cit note 79 at 16.

¹²¹ Stephen R Block 'A history of the discipline' in DL Gies, J Stephen Ott & Jay M Shafritz (eds), *The Non Profit Organisation: Essential Readings* (1990) at 47.

¹²² Self op cit note 99 at 37.

¹²³ Lewis A Coser 'Social conflict and the theory of social change' (1957) 8 (3) *The British Journal of Sociology* at 197-205.

and rights of individuals as opposed to those of family. The movement for sexual freedom, women's liberation, the rights of youth and racial equality all build upon this theme. The effects of social change upon demands for public expenditure have been considerable. Working mothers, for example, have wanted day-nurseries and nursery schools. The demand for the care of old people and health service has increased. So has the care of people who suffer physical or mental incapacity. These have led to the expansion of NPOs.¹²⁴

A second sociological justification for NPOs' existence is the way in which they are formed. They are started not by businesspersons but by religious or other ideologically motivated organisations who strive to offer services such as housing, education, health and others, with a view to meeting needs rather than making a profit.¹²⁵ Thirdly, government policies have an impact on NPO existence. Housing policies are an example of social impact, as the demand for housing has escalated, largely because of the dramatic reduction in the size of households.¹²⁶ In South Africa, the failure of the government's Reconstruction and Development Programme (RDP) to provide houses for everyone due to lack of funds, led to interventions by NPOs, who provided houses for certain groups of people.¹²⁷

Fourthly, changes in social values have other important impacts upon government. Strong assertions of freedoms or the rights of individuals and minorities have brought about extensive anti-discrimination legislation, resulting in the emergence of more NPOs taking steps to activate these legal provisions. The growth of anti-authoritarian attitudes has softened discipline within bureaucracies and led to the provision of new mechanisms for public participation and protest.¹²⁸ According to Tocqueville's theory of freedom, people are free to the extent that they enjoy the greatest possible room to pursue their own interest. For Tocqueville, freedom is the capacity to employ morality in making choices.¹²⁹ Lastly, according to the sociological approach, the population of a country influences the NPO sector, as well as the size of the government. A diverse population tends to have a large government structure for meeting the wants of citizens for various collective services.¹³⁰ On

¹²⁴ Self op cit note 99 at 39.

¹²⁵ James op cit note 83 at 23.

¹²⁶ Self op cit note 99 at 37-40.

¹²⁷ 'NGO alleviates housing shortages' *SABC News* 3 November 2017 available at <https://www.sabcnews.com/sabcnews/ngo-alleviates-housing-shortage/#:~:text=Habitat%20For%20Humanity%20Volunteers%20say,able%20to%20call%20themselves%20homeowners> accessed on 30 October 2020.

¹²⁸ Self op cit note 99 at 40.

¹²⁹ Alexis de Tocqueville *His Social and Political Theory* (1986) at 58.

¹³⁰ Weisbrod 1997, op cit note 114 at 542.

the other hand, the growing importance of the NPO sector in a society reflects a diverse population and growing demands with increasing migration.¹³¹

Now that the theories for the existence of NPOs have been discussed, it is necessary to identify the features of NPOs as a diverse sector before the discussion on the role of CSOs commences. The characteristics of NPOs are explained in the next segment.

2.3 Characteristics of NPOs

As mentioned above, NPOs are different from private companies or state companies in that their motive is not profit making but service delivery: when a profit is made, it is channelled back into the organisation.¹³² NPOs are concerned with public rather than private ends and they relate to the community rather than being centred on the individual.¹³³ NPOs have been characterised in terms of their type, objectives, their activities as well as the motive for their existence.¹³⁴ Salamon identifies six characteristics of non-profit organisations as follows:

- i. Institutional presence and structure;
- ii. Private, as opposed to public (government) — they are institutionally separate from the state;
- iii. Non-profit distributing — they do not return their profits to their managers or to founders;
- iv. Self-governing — they are in control of their own affairs;
- v. Voluntary— their formation is not mandatory but derives from the free will of the founders; and
- vi. Of public benefit—they benefit the community or groups of people instead of individuals.¹³⁵

In addition, Douglas identifies three motives for the existence of NPOs. These are self-seeking interest, altruism, and keeping the government alive to its responsibilities. First, the self-seeking motive is the search to further one's own welfare and interests such as through professional bodies.¹³⁶ An example of a self-seeking organisation would be the Law Society of South Africa (LSSA), a professional body for all attorneys who practice law in South

¹³¹ Ibid.

¹³² Salamon (1999) op cit note 77 at 13. See also ET Boris 'Non profit Organizations in a democracy: Varied roles and responsibilities' in Elizabeth T Boris & C Eugene Steuerle (eds) *Non-Profits and Government Collaboration and Conflict* 1998) at 3.

¹³³ André Mbata Mangu, 'African civil society and the promotion of the African Charter on Democracy, Elections and Governance' (2012) 12 *African Human Rights Law Journal* at 366–7.

¹³⁴ Ada Okoye Ordor 'The Non-Profit Sector in the Context of Law in Development in Africa' (2014) 58 *Journal of African Law* 1 at 46.

¹³⁵ Salamon 1995 op cit note 82 at 11.

¹³⁶ Douglas op cit note 80 at 43.

Africa. Secondly, the altruistic motive comes into play when a group of people come together to form an organisation that, for example, builds houses for poor people, known as public benefit organisation. An example of this would be Habitat for Humanity, a South African NGO based in Cape Town that builds houses for the less privileged all over the country.¹³⁷ The last of these is an organisation formed to keep the government accountable. This organisation may not provide services but coerce the government to provide necessary services, through direct provision or change of policies.¹³⁸ An example of this is seen in the case of *Section 27 v Minister of Education*,¹³⁹ where Section 27, a South African non-profit organisation, successfully brought an action to compel the Ministry of Education to provide books to a school in Limpopo that had not received books for learners. The case was brought in terms of section 29 of the Constitution which provides everyone with a right to education.

Another case is *Government of the Republic of South Africa v Grootboom*.¹⁴⁰ In this case in which the Community Law Centre appeared as *amicus curiae*, the government was ordered to provide shelter for children and their parents who had been evicted from their informal homes. The argument in this case was based on section 28 of the Constitution which provides for the right to shelter for every child and section 26 which provides for a right to adequate housing for everyone.¹⁴¹ Lastly, in *Treatment Action Campaign v Minister of Health*,¹⁴² the organisation Treatment Action Campaign (TAC) pushed the reluctant government which was violating sections 27(1) and 28 of the Constitution which provides for the right to healthcare, to begin making antiretroviral drugs available to South Africans. In *Minister of Health v Treatment Action Campaign*¹⁴³ the Legal Centre appeared as third respondent, while the Institute for Democracy in South Africa and Community Law Centre and Cotland Baby Sanctuary appeared as *amici curiae*. The court ordered that the Health Department should make Nevirapine available to mothers and their newborn babies in public health facilities. These cases demonstrate a successful representation of the citizens by NPOs in keeping the government accountable.

¹³⁷ Habitat for Humanity [website], available at <http://habitat.org.za/> visited on 15 December 2017.

¹³⁸ Heinrich op cite note 7 at 1–15.

¹³⁹ 2013 (2) SA 40 (GNP).

¹⁴⁰ 2001 (1) SA 46 (CC).

¹⁴¹ Constitution 1996.

¹⁴² 2005 (6) SA 363 (T).

¹⁴³ 2002 (5) SA 703 (CC).

Having discussed the characteristics of NPOs, the next segment of this chapter examines the role NPOs have played and continue to play in South Africa, with a particular focus on NPOs constituted as civil society organisations (CSOs).

2.4 The role of civil society organisations

As discussed in the political and sociological theories on NPOs, the achievement of democracy in a society is the most important reason for NPO existence. NPOs who work towards the advancement of democracy are typically civil society organisations (CSOs). These CSOs deepen democracy through such actions as championing the cause of the marginalised, influencing policies, educating and mobilising citizens to hold the state accountable as well as contributing to political and human rights consciousness.¹⁴⁴ Civil society activism has an influence on the whole society, not just on the government¹⁴⁵ and this is evident in the huge role played by CSOs in fighting against the apartheid regime to promote democracy. In this part of the chapter, the role of CSOs during apartheid and in the contemporary South Africa is discussed, as is CSOs' contribution to governance, their funding and their challenges.

2.4.1 Civil society organisations during the apartheid era

This part of the research discusses the emergence of CSOs, service delivery and the legal environment, as well as the judicial system during the apartheid era. This discussion serves both as a precursor to the consideration of contemporary CSO-State engagement and a demonstration of the countervailing role of CSOs to the excesses of political power.

First, in South Africa, civil society activism was driven by thought leaders who were against apartheid. The idea was to achieve a South African society that was democratic and favourable for all. They campaigned for better living conditions for all, particularly for blacks in the townships, and opposed the apartheid government.¹⁴⁶ African people were not included in the administration and governance of the country.¹⁴⁷ The experience was one of neglectful service delivery while the white population received good service delivery from the

¹⁴⁴ Maria Nassali 'Politics, power and accountability: Addressing the elephant in the room in the quest for civil-society organisations' right to freedom of association' (2014) 16 (2) *International Journal of Not for Profit Law* at 44.

¹⁴⁵ Yvette Geyer & Ivor Jenkins *Civil Society and the Zuma Governemnt: Opportunities for Engagement* (2009) at 36–38.

¹⁴⁶ Daryl Glaser 'South Africa and the limits of civil society' 1997 (23) *Journal of Southern African Studies* at 5.

¹⁴⁷ *Ibid.*

government.¹⁴⁸ Different CSOs, whose objective was to overthrow the authoritarian regime, were formed and these organisations played a very crucial role in the anti-apartheid struggle.¹⁴⁹

Secondly, state-owned companies as a machinery for service delivery¹⁵⁰ were not as clearly defined during the apartheid era as they are today, and corruption was not easily identified and reported as it is today. Although the manifestation of corruption and economic crime has been more pronounced in the post-apartheid era, corruption in the administration of state resources and other areas existed during the apartheid era but was rarely reported. When the struggle for South Africa's freedom was at its fiercest, economic crime not only increased but became state policy.¹⁵¹ Corruption, money laundering, sanctions busting and organised crime, all elements of such economic crimes, had become a necessity for the survival of the state.¹⁵²

Thirdly, the legal environment was not favourable to CSOs involved in the anti-apartheid struggle (struggle CSOs), even though it allowed them to operate.¹⁵³ Despite the state's obligation to protect — which also includes the duty to ensure that the legislative framework related to freedom and civil society is enabling — the legal system supported those NGOs whose objective was to further the interests of the white population or the state. The publications of struggle CSOs' were banned and their operations were restricted. The relationship between the state and struggle CSOs was that of opposing each other.¹⁵⁴ The environment is considered enabling if there are no barriers to civil society's free enjoyment of democratic rights. There are six basic freedoms that civil society needs to operate. These include:

- i. The right to entry (freedom of association);
- ii. The right to operate independently from state interference;
- iii. The right to free expression;
- iv. The right to communication and cooperation (with other CSOs, business community, international organisations, governments);

¹⁴⁸ S Sithole & N Mathonsi 'Local governance service delivery issues during apartheid and post-apartheid South-Africa at 14-16, available at <https://apsdpr.org/index.php/apsdpr/article/viewFile/87/86>, accessed on 5 August 2017.

¹⁴⁹ Ibid.

¹⁵⁰ Habib & Kotzé op cit note 4 at 246–270.

¹⁵¹ Hennie van Vuuren *Apartheid, Guns and Money: A Tale of Profit* (2017) at 8.

¹⁵² Ibid.

¹⁵³ Adam Habib & Taylor & op cit note 6 at 74. See also Habib op cit note 3 at 675.

¹⁵⁴ Ibid.

- v. The right to freedom of peaceful assembly (as individuals, organisations or networks of organisations); and
- vi. The right to seek and secure resources (from individuals, business, government and intergovernmental organisations).¹⁵⁵

The administrative law in place during apartheid did nothing to limit abuse of power. Parliament passed laws it felt appropriate. Administrative decisions were based on laws which often contradicted human rights. The same laws were used to oppress NGOs that were against the apartheid regime.¹⁵⁶ The court could not declare the laws invalid, as the judicial system operated within a state policy of segregation.

Lastly, in response to these injustices, CSOs organised resistance activities such as boycotts. They used many forms of resistance other than the legal provisions, as the legal framework was biased against them and the majority of the population. Civil society organisations demanded fair service delivery. One of the famous protests for service delivery in the context of education during the apartheid regime is the well-known 1976 Soweto uprising by young people against the introduction of Afrikaans as the language of instruction in local schools. Subsequently, many struggle CSOs were banned and its members forced into exile for working together to overthrow the administration of the apartheid regime.¹⁵⁷ Their leaders were tortured, arrested, harassed, detained and some killed.¹⁵⁸ In addition to protesting poor service delivery, struggle CSOs provided some services to black people.¹⁵⁹ Some of these services were the provision of land in informal settlements, policing, and settling disputes through people's courts. NGOs further attempted to provide areas with services such as literacy, health care, human rights and welfare.¹⁶⁰ The apartheid government

¹⁵⁵ 'Models to promote cooperation between society and public authorities.' The present paper was developed based on the following researches: Katerina Hadzi-Miceva-Evans 'European practices on implementation of policy documents and liaison offices that support civil society development' (2009) at 2, available at <http://www.icnl.org/research/resources/ngogovcoop/Models%20to%20Promote%20Cooperation%20Working%20Paper.pdf>, accessed on 27 July 2019.

¹⁵⁶ WHB Dean 'Our administrative law: A dismal science?' 1986 (2) *South African Journal on Human Rights* at 164, accessed on 5 August 2017.

¹⁵⁷ Vincent Saldanha 'NGOs and the promotion of human rights in South-Africa' in Paul Tiyambe Zeleza & Philip J. McConaughay (eds) *Human Rights, the Rule of Law, and Development in Africa* (2004) at 209-215.

¹⁵⁸ Habib & Taylor, op cit note 6 at 73-5.

¹⁵⁹ N Ndangwa *Civil Society and Poverty Reduction in South Africa* at 2, available at <http://ccs.ukzn.ac.za/files/Civil%20society%20and%20poverty%20reduction%20in%20South%20Africa.pdf>, accessed on 5 August 2017.

¹⁶⁰ Greenstein S Kola & D Lopes, *Civil Society in South Africa: Opportunities and Challenges in the Transition Process* (2004) at 4.

continued to face unabated civil unrest.¹⁶¹ The uprisings continued until the transition to a post-apartheid regime.¹⁶² When democracy was ushered in, it came with a more enabling environment for NPOs to operate freely in the contemporary South Africa.

2.4.2 *Civil society organizations in contemporary South Africa.*

South African governance and administration was transformed with the adoption of the interim Constitution of 1993. The democratic government committed itself to the principles of accountability and transparency to promote inclusivity of the public as entrenched in the Constitution of 1996.¹⁶³ The discussion in this segment briefly recounts the transitioning period of South Africa from its former authoritarian regime. It also categorises NPOs and discusses their various roles in securing participatory democracy as well as the current legal environment for NPOs.

South Africa transformed from an undemocratic regime to a democratic one that provides for equal rights for everyone. The transition into a democratic South Africa made CSOs change most of their objectives to match the needs of the current South African society. CSOs had to redefine their role and their relationship to the state and align their goals to those of the state. As a result, most CSOs turned to service delivery because the state's objective was to bring service delivery, focusing on the population that was previously discriminated against.¹⁶⁴ In addition, CSOs had to rethink their legitimacy and from where

¹⁶¹ Pfungwa Michelle Nyamukachi *Options for Urban Service Delivery in South Africa Special Reference to the Tswane Metropolitan Municipality* (unpublished MAdmin (Public Administration) dissertation, University of Pretoria, 2006) at 18-21.

¹⁶² *The White Paper on Local Government (WPLG)* (1998), available at http://www.cogta.gov.za/cgta_2016/wp-content/uploads/2016/06/whitepaper_on_Local-Gov_1998.pdf, at 12-13, accessed on 13 July 2017.

¹⁶³ Constitution 1996 s 195 provides that 'public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles: a. high standard of professional ethics must be promoted and maintained, b. efficient, economic and effective use of resources must be promoted, c. Public administration must be development-oriented, d. Services must be provided impartially, fairly, equitably and without bias, e. People's needs must be responded to, and the public must be encouraged to participate in policy-making, f. Public administration must be accountable, g. Transparency must be fostered by providing the public with timely, accessible and accurate information, h. Good human-resource management and career-development practices, to maximise human potential, must be cultivated, i. Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation'.

¹⁶⁴ Lauren Graham, Rebecca Himlin & Hermine Engel et al *Review of the State of the Civil Society Organisations in South Africa* (2008) at 17, available at <https://www.nda.org.za/assets/resources/CF824421-4FA0-41EE-AB69-4DB10CD0384A/Review-of-the-State-of-CSOs-in-SA-NDA-Audit-of-CSOs1.pdf>, accessed on 19 October 2018.

they get their mandate. They also had to consider whom they serve and how to operate. However, their main objective did not change — improving the citizens' lives.¹⁶⁵

Secondly, when the democratic government came into power, more CSOs were established. In February 2017, the NPO directorate reported a total number of 170 199 registered non-profit organisations.¹⁶⁶ These NPOs are diverse and have different objectives. Khan and Govender identify four categories of civil society. The first are self-help organisations concerned with building social capital.¹⁶⁷ The second category of CSOs consists of philanthropic organisations where a third person is the beneficiary, while the third category is comprised of organisations that promote participation and are involved in the governance process either through representation in government or representation on other consultative bodies. The fourth and last category is the advocacy and campaigning category, or organisations involved in lobbying government for purposes of changing policy and legislation and service delivery. This category mostly consists of organisations that are concerned with issues of human rights.¹⁶⁸ This research is mainly concerned with organisations found in the third and fourth categories, although other categories of NPOs may also occasionally be found engaging the state.

Thirdly, in terms of their role, CSOs operate in two main capacities. The first is to act as watchdogs of the citizens and protect the interests of the less privileged people in society. The second role is that of service provision that aims at addressing poverty among the disadvantaged through the creation of jobs, skills training, etc..¹⁶⁹ This is echoed by Habib who states that NPOs are currently divided into those that play a watchdog role and those that deliver services.¹⁷⁰ Desai agrees that there are two main roles for NPOs, these being policy advocacy and gap filling. Desai further argues that these two should co-exist.¹⁷¹ Lister and Nyamugasira maintain that the dual role as watchdogs and service provision providers is necessary for NPOs as advocacy needs to emerge from service delivery.¹⁷² The Treatment Action Campaign is one of the civil society organisations that successfully played the two roles.

¹⁶⁵ Ibid.

¹⁶⁶ See Department of Social Development Republic of South Africa, Non-Profit Organisations Directorate [website] 2017, available at <http://www.dsd.gov.za/npo/>, accessed on 24 October 2017.

¹⁶⁷ Khan & Govender op cit note 32 at 162.

¹⁶⁸ Ibid.

¹⁶⁹ Swilling & Russel op cit note 112 at 4.

¹⁷⁰ Habib op cit note 3 at 679–81.

¹⁷¹ Vandana Desai 'Role of non-governmental organisations and the state' in Vandana Desai & Robert B Potter (eds) *The Companion to Development Studies* (2002) at 496.

¹⁷² Sarah Lister & Warren Nyamugasira *Development Policy Review* at 93–106.

It was in playing the watchdog role that the Treatment Action Campaign (TAC) in *Treatment Action Plan v Minister of Health*,¹⁷³ pressured the South African government to provide cheap, generic anti-AIDS drugs as legislated in section 27 of the Constitution, which recognises healthcare as a basic right. In *Minister of Health v Treatment Action Campaign*,¹⁷⁴ the court ordered the government to implement a national programme to prevent mother-to-child transmission of HIV and AIDS, and as a service provider, the TAC¹⁷⁵ established treatment centres around the country in partnership with Médecines Sans Frontières, a Belgium-based NGO, for the provision of treatment and counselling to community members.¹⁷⁶

A fourth point is in relation to participatory government: the role of CSOs in South Africa is being shaped not only by the formal democratic transition but by new forms of participatory democracy and an enabling legal environment. The role of civil society in democratic governance was first positively recognised by the ANC in the Reconstruction and Development Programme (RDP). This was the first policy that was chosen to address socio-economic challenges. The aim of this policy was to establish an equal society through reconstruction and development as well as ensuring democracy for all South Africans.¹⁷⁷ The RDP made it mandatory to include civil society in decision-making and developmental initiatives.¹⁷⁸ It envisaged the democratic process as promoting a wide range of institutions of participatory democracy in partnership with civil society.¹⁷⁹ An example of these is the Sector Education and Training Authority (SETAs) established in the National Employment Skills Act. The SETAs are in the field of employment, are concerned with education, training and the implementation of the National Skills Development Strategy, and aim to increase the skills of people in their sector.¹⁸⁰ Another is the National Economic Development and Labour Council (NEDLAC) which is funded by the Department of Labour. NEDLAC brings government together organised business, organised labour and organised community groupings to discuss and reach an agreement on socio-economic policy. As a result,

¹⁷³ 2005 (6) SA 363 (T).

¹⁷⁴ 2002 (5) SA 703 (CC).

¹⁷⁵ *Treatment Action Campaign* supra.

¹⁷⁶ Jacques P de Wet 'On the horns of dilemma: Non-profit organisations relations with the state in post apartheid South Africa' 2010 (40) *Africanus* at 10.

¹⁷⁷ The Reconstruction and Development Programme (RDP): *A Policy Framework* (1994) at 4 available at <https://www.gov.za/sites/default/files/governmentgazetteid16085.pdf>, accessed on 12 June 2018.

¹⁷⁸ RDP 1994 at 4.

¹⁷⁹ RDP 1994 at 39-41.

¹⁸⁰ Sector Education and Training (SETA) [website], available at www.labour.gov.za, accessed on 14 March 2018.

economic decision-making is more inclusive.¹⁸¹ Some of the community groupings that represent the people at NEDLAC include the South African National Civic Organisations (SANCO), the Women's National Coalition, the South African Youth Council, Disabled People of South Africa, and others.¹⁸²

Lastly, the legal environment that was hostile to CSOs during apartheid changed progressively in post-apartheid South Africa, such that CSOs are in contemporary times, now able to use legal measures effectively to challenge the government. CSOs are no longer subjected to torture, harassment, banning and hostility.¹⁸³ In the immediate post-apartheid period, civil society leaders pushed for the enactment of the Nonprofit Organisations Act 71 of 1997 (NPO Act) as a way of consolidating the gains made and creating an enabling environment for the non-profit sector in line with the Constitution. By providing a clear and relatively accessible legal framework, the Act therefore operationalises for civil society in South Africa the rights to freedom of association, expression and assembly as provided in the Constitution by enabling citizen participation.¹⁸⁴ These rights are not only applicable to natural persons but also to juristic persons and that is how they affect CSOs.¹⁸⁵ The Constitution, the NPO Act and other related laws, in combination, have no doubt influenced contemporary democratic South Africa in positive ways. Even though protests occur intermittently, civil society has the opportunity and effective environment to utilise the law by instituting legal proceedings and other legal measures to challenge poor governance.¹⁸⁶

2.4.3 CSO contributions to governance.

Civil society organisations have often required that the government answer to decisions about its policy approach and the measures and procedures taken concerning this. This section discusses how CSOs have achieved this through improving the public participation of citizens, monitoring the activities of the authorities, reviewing the impact of government policies and by calling upon authorities to own up to their shortcomings.

First, CSOs have made sure that transparency and accountability remain an objective for governance in South Africa.¹⁸⁷ Transparency is a very important principle when

¹⁸¹ National Economic Development and Labour Council (NEDLAC) [website], available at <http://new.nedlac.org.za/>, accessed on 14 March 2018.

¹⁸² Ibid.

¹⁸³ Habib op cit note 3 at 676-77.

¹⁸⁴ Constitution 1996 ss 16, 17 & 18.

¹⁸⁵ Ibid at s 8.

¹⁸⁶ Heinrich op cit note 7 at 1-15.

¹⁸⁷ Scholte op cit note 20 at 217-20.

administering the public sector.¹⁸⁸ Public accountability demands that SOEs disclose how funds are spent and by whom, so that the citizens can have a clear idea of how their resources are managed and utilised.¹⁸⁹ Globally, transparency has been a very complicated topic among government authorities. Despite this, CSOs in South Africa have managed to make it a key indicator of good governance.¹⁹⁰ Secondly, civil society organisations have provided platforms or channels through which citizens can pursue justice when their rights are contravened by those in authority. CSOs have, through this, influenced the changing of rules, replacement of officials and the reconstruction and construction of institutions.¹⁹¹ This active role of CSOs is based on demands for the realisation of the rights of the citizen, development and openness, inclusivity, transparency and accountability.¹⁹² These rights are exercised through participation in policy making and service delivery and in the monitoring of the performance of the government.¹⁹³

Thirdly, CSOs have contributed to good governance through service delivery. CSOs have provided service delivery as a supplement to government by filling in gaps left by it in service delivery as well as complementing it by receiving funds from it and providing service delivery.¹⁹⁴ Lastly, CSOs play a watchdog role by assisting legislature — and ultimately the government — by being the eyes and the ears of the people (as it did during the time of apartheid) and also plays a huge role in debates on the kind of South Africa built on the Constitution that the people want to live in.¹⁹⁵ This has, however, not been an easy journey for CSOs as they face many challenges, particularly a lack of funding that has become an impediment to some of them, as discussed next.

2.4.4 *The funding of civil society organisations in South Africa*

Funding for CSOs is insufficient and external funding is drying up due to factors such as donor funds being channelled through government, which then fails to fully transmit these funds to the CSO beneficiaries. Other factors include the fact that South Africa is viewed as

¹⁸⁸ Constitution 1996 s 195.

¹⁸⁹ Constitution 1996 s 1(d).

¹⁹⁰ Scholte op cit note 20 at 217–20.

¹⁹¹ Ibid. See also discussion in 2.4.2 in relation to the Treatment Action Campaign, NEDLAC and the NPO Act.

¹⁹² Khan & Govender, op cit note 32 at 158.

¹⁹³ Ran Greenstein, Heinrich Volkhart & Kumi Naidoo *The State of Civil Society in South Africa: Past Legacies, Present Realities and Future Prospects* (1998) at iv.

¹⁹⁴ Young op cit note 88 at 33–35.

¹⁹⁵ Geyer & Jenkins, op cit note 148 at 8–16.

a middle-income economy and also, a perception of CSOs' failure to sustain the level of work which they did in the past.¹⁹⁶

South Africa has had a long history of foreign donor funding, particularly funding for CSOs from Western donors.¹⁹⁷ The expansion of NGOs from the 1980s was generally as a result of international funding that was made available by foreign governments and philanthropists.¹⁹⁸ Foreign donors played their role in the process of democracy through the funding of those opposed to the apartheid regime.¹⁹⁹ However, external funding of South African CSOs has had many consequences in that foreign donors are perceived as having made an inroad into South African democracy, thereby influencing the system.²⁰⁰ External funding is viewed as one of the major reasons for the poor relationship between government and CSOs. Government believes that external donors decide the agendas of CSOs, and in consequence, make CSOs biased and prejudiced against the state.²⁰¹ The government has been distrustful of some of its very own institutions who receive foreign funds from donors. The Public Protector's Office is one of many government institutions that receives foreign funding and has, in consequence, been described as prejudiced and biased.²⁰² Secondly, because the government does not fund CSOs sufficiently, this makes them more dependent on external donors who may tend to influence their agendas.²⁰³ The dependence of CSOs on foreign funding compromises their contribution to policy making as the developmental policies may be tailored to the funders' interests.²⁰⁴

2.4.5 Challenges faced by civil society organizations in a democratic South Africa

A democratic government does not always provide a favourable environment for CSOs in which to effectively conduct their mandate. Civil society organisations in contemporary South Africa have faced challenges in their role to hold the government accountable to its citizens. Government does not like to be checked and balanced and often deems attempts to

¹⁹⁶ *NGOPulse* 'An emerging funding crisis for South African civil society' 12 January 2011.

¹⁹⁷ Hearn op cit note 34 at 817.

¹⁹⁸ Habib & Taylor op cit note 6 at 73.

¹⁹⁹ Hearn Julie 'The 'uses and abuses' of civil society in Africa' 2001 (28) *Review of African Political Economy* at 4.

²⁰⁰ Dambisa Moyo *Dead Aid: Why Aid Is Not Working and How There Is a Better Way for Africa* (2009) at 40–44.

²⁰¹ *Ibid* at 66.

²⁰² K Mafaro & O M Kinyunyu, 'How ordinary South Africans felt the effect of an active Public Protector' 1 January 2017, available at <https://mg.co.za/article/2017-01-01-how-ordinary-south-africans-felt-the-effect-of-an-active-public-protector-2>, accessed on 27 June 2017.

²⁰³ Mangu op cit note 136 at 369.

²⁰⁴ Greenstein, Kola & Lopes op cit note 163 at 103–104.

apply checks and balances as a threat or challenge to its power.²⁰⁵ This presents a number of challenges for the work of CSOs.

First, the tendency of the government is to use its legislative powers against CSOs. Such undermining of the CSO's role is a known tactic that presents a major challenge.²⁰⁶ The legislative framework is directed more towards controlling CSOs' actions to restrain them from participating in politics than towards facilitating their democratic and independent space.²⁰⁷ In particular, the NPO Act in spite of its enabling status, is applied with more concern for the regulation and compliance of the NPO sector with national regulations than for operational success and sustainability.²⁰⁸ Civil society organisations often assert that they speak on behalf of the communities and the voiceless. For the sector in South Africa to survive and reclaim its position in the public discourse, it needs self-regulatory mechanisms.²⁰⁹

Secondly, CSOs face less support from government and governing party structures when government or governing party structures feel that CSOs want to usurp its roles but at the same time continue to lobby and be independent to advocate. On the other hand, CSOs often feel that government has all the power, that their work is undervalued by it and that it does not take them seriously.²¹⁰ Yet in a democratic society, the state and an active civil society are 'two sides of the same coin' and are complementary in enhancing society.²¹¹ The state and civil society are interdependent, with the state expected to provide the legal and regulatory framework for civil society to function independently in order to ensure government's accountability to its citizens.²¹²

Thirdly, some CSOs have failed to maintain the dual role of watchdog and service delivery provider due to government's reaction to criticism from CSOs. Government in some cases discourages advocacy that clashes with its policies.²¹³ For example, the Free State ANC Youth League in 2015 called for the Treatment Action Campaign (TAC) to be deregistered

²⁰⁵ John. M Ackerman *Social Accountability in the Public Sector: A Conceptual Discussion*. Draft Paper prepared for the World Bank (2004) at 7, available at <http://documents.worldbank.org/curated/en/514581468134386783/pdf/357330Ackerman.pdf> ,accessed on 07 June 2020.

²⁰⁶ Moyo op cit note 203 at 62–89.

²⁰⁷ Nassali op cit note 147 at 45.

²⁰⁸ Ibid at 45.

²⁰⁹ Bongani Magongo *Enhancing Civil Society Participation in the South African Development Agenda: The Role of Civil Society Organisations'* (2015) at 7.

²¹⁰ Greenstein, Kola & Heinrich op cit note 163 at 91–95.

²¹¹ Claude E. Welch, Jr 'Protecting Human Rights in Africa: Roles and strategies of Non-Governmental Organisations' 44 (1995) at 260.

²¹² Michael Edwards *Civil Society* (2004) at 24.

²¹³ Greenstein, Heinrich & Naidoo op cit note 196 at 67-70.

after the TAC 'Fire Bunny' campaign which called for the dismissal of the then member of the executive council (MEC) (for health) who was facing allegations of failing to fix the dire state of public health in the Free State.²¹⁴ Government resistance like this has resulted in most CSOs being encouraged to become service providers rather than advocating the better provision of services. This is, however, at the expense of their role as watchdogs.²¹⁵

A fourth challenge which CSOs face is that of insufficient funding, as discussed in section 2.4.4. CSOs often do not receive enough funding for their activities. Funding from the government is insufficient and difficult to access. Reduced funding by the government to CSOs compromises their ability to deal with social issues affecting communities.²¹⁶ CSOs, therefore, tend to focus on external funding for support, therefore causing problems between CSOs and the government. International funding does not solve the funding problem as it is also drying up and being withdrawn.²¹⁷ A fifth challenge CSOs face is the shortage of skilled staff and infrastructure and the lack of management and human resources systems.²¹⁸ There is a lack of qualified or skilled personnel in CSOs to drive the campaign for government accountability.²¹⁹ In addition, there is currently little or no coordination among CSOs.²²⁰ There needs to be an active coalition of CSOs at all times as this improves the services by CSOs as well as governance of CSOs and streamlined financing of CSOs.²²¹ For the first 15 years following the end of apartheid, there were strong coalitions around anti-poverty strategies such as the South African NGO Coalition (SANGOCO), an NGO organisation that seeks to act as an umbrella body for CSOs.²²² SANGOCO constituted a rallying point for NGOs post-apartheid but, like other organisations, it was affected by its failure to define itself clearly either as a service provider partner with the state, or as advocacy and lobbying

²¹⁴ Nathan Geffen 'Free State ANCYL calls for deregistration of TAC' *Daily Maverick* 20 February 2015. See also eNCA 'ANC wants TAC deregistered' 21 February 2015.

²¹⁵ De Wet op cit note 179 at 7.

²¹⁶ Ibid.

²¹⁷ National Development Agency *Funding Constraints and Challenges Faced by Civil Society in South Africa* (2013:.) at 49, available at https://www.nda.org.za/assets/resources/CF824421-4FA0-41EE-AB69-4DB10CD0384A/1.FUNDING_CONSTRAINTS.pdf, accessed on 26 April 2017.

²¹⁸ Geyer & Jenkins op cit note 148 at 8.

²¹⁹ National Development Agency op cit note 220 at 49.

²²⁰ Ibid at 50.

²²¹ Kumi Naidoo 'Challenges and opportunities for civil society coalition building in an era of globalisation' in Taye Aseefa & Bahru Zewde (eds) *Civil Society at the Crossroads: Changes and Prospects in Ethiopia* (2008).

²²² Kirty Ranchod, 'State-civil society relations in South Africa: Some reasons from engagement policy' (2007) 20 (7) *Policy: Issues and Actors*.

agents engaging critically with the state. This has affected the entire NGO sector and led to SANGOCO losing much of its credibility.²²³

Lastly, since 1994 and the beginning of the democratic era, CSOs have been facing an inability to clearly identify their new roles in relation to the new state: as participants in policy making processes, partners in service delivery and monitors of government performance.²²⁴ A good example would be the South African National Civic Organisation (SANCO) an NGO formed in 1992 as a national structure for NGOs. During ‘Operation Khanyisa’ in 2003 SANCO worked with the government to persuade residents in Soweto to pay their electricity bills even though it admitted that people were being inaccurately billed and corrupt contractors had cut off electricity to force residents to pay high reconnection fees. SANCO later changed its attitude and said its policies were wrong, so it opposed the government actions. This is an indication that SANCO, although at the same time trying to speak for the deprived citizens, also fears to upset the government and as a result fails to adequately clarify its role.

The origins and guiding motives for the existence of NPOs as well as their characteristics have been discussed above, so as to clarify the role of NPOs in South Africa and the challenges which CSOs in particular face. The next section examines the relationship between the state, the CSOs and the citizens.

2.5 Relationship between the state, CSOs and citizens

2.5.1 The state and CSOs

State-society relations are interactions between state institutions and societal groups concerning the exercise of public authority and citizen participation.²²⁵ South Africa presents a good example of how the relationship between state and CSOs can change because of a move from an oppressive regime to a democratic government. According to Young, CSOs’ relationship with the state can be supplementary, complementary or adversarial.²²⁶

²²³ Fazila Farouk ‘South African NGO coalition’ *NGOPulse* 7 June 2006, available at <http://www.ngopulse.org/article/south-african-ngo-coalition>, accessed on 16 December 2017.

²²⁴ Bert Klandermans, Marlene Roefs & Johan Olivier (eds) ‘Involvement in civil society’ in Bert Klandermans, Marlene Roefs, Johan Olivier (eds) *The State of the People: Citizens, Civil Society and Governance in South Africa, 1994–2000* (2001) at 111–134.

²²⁵ Huma Haider *State-society Relations and Citizenship in Situations of Conflict and Fragility* [and] *State building and Peacebuilding in Situations of Conflict and Fragility* (2014), available at <http://www.gsdr.org/docs/open/con87.pdf>, accessed on 13 June 2020.

²²⁶ Young op cit note 88 at 33–35.

When, as explained in the discussion about the theories of NPOs' existence in section 2.2, their role is supplementary, NPOs are gap-fillers, providing services that the government is unable to. Government decides on the goods and services to be made available to the citizens based on citizen preferences, but such provision is limited by considerations of equity and budgetary constraints. The government distributes services in a uniform way,²²⁷ without taking these preferences into consideration. If some citizens' preferences are not met or are unsatisfied, these citizens may form an NPO to provide such goods and services to their satisfaction.²²⁸ Secondly, as discussed in section 2.2, Salamon advocates the theory that positions NPOs as partners of government.²²⁹ This is according to the non-profit failure theory.²³⁰ In this complementary view, NPOs are seen as working in partnership with the government, providing services that are largely financed by the government²³¹ In this case NPOs and the -government have a direct relationship with one another.²³² Lastly, NPOs' relationship with the government can be adversarial, as NPOs prod the government into attending to their concerns through changes in their policies as well as maintaining accountability to the public. Government also influences the behaviour of NPOs by regulating their activities. Minorities whose concerns need to be addressed by the government mobilise themselves through NPOs and approach the government to have their concerns addressed.²³³

However, despite democracy, the relations between the state and CSOs has not been smooth sailing as discussed above for a number of reasons, among them a lack of an official policy towards civil society organisations. Furthermore, lack of trust of CSOs by government are some of the reasons for the ambivalent behaviour of the government towards the CSOs.²³⁴ Instead, relations between the state and civil society organisations have been oppositional, as CSOs have been engaged in extensive litigation against the policies and actions of the government as discussed in chapter 4, section 4.4 and briefly in chapter 5, section 5.5.2 g. For the most part, both parties share the same goals, however their approaches are very different leading to mistrust and suspicion.

²²⁷ Weisbrod 1995 op cit note 78 at 28.

²²⁸ Young op cit note 88 at 33.

²²⁹ Salamon 1999 op cit note 77 at 12. See also Douglas, op cit note 80 at 45-47.

²³⁰ Salamon 1999 op cit note 77 at 12.

²³¹ Benjamin Gidron, Ralph M. Kramer & Lester M. Salamon. *Government and the third sector: Emerging relationships in welfare states*. Jossey-Bass (1992). See also Young op cit note 88 at 35.

²³² Beth Gazley & Jeffrey L. Brudney. 'The purpose (and perils) of government-nonprofit partnership' (2007) 36 (3) *Nonprofit and Voluntary Sector Quarterly* at 390-398.

²³³ Young op cit note 88 at 39.

²³⁴ Aseefa & Bahru op cit note 71 at vii.

2.5.2 *The state and its citizens*

There is much dissatisfaction in South Africa among the citizens over service delivery and the governance of the public sector, particularly in relation to state-owned enterprises (SOEs). This segment discusses the state of service delivery in South Africa, citizen participation in decision-making and democracy.

First, public services are a bridge between the state and its citizens. Their well-being signifies the health of the economy of a country. Public services are a tool for the reduction of poverty, as they provide an enabling environment for micro enterprises to thrive. They symbolise a government that is well run, a society that is well governed. There are many reasons triggering civil unrest, demonstrated through legal actions and protests in South Africa, but primarily these are caused by much dissatisfaction with the poor state of service delivery and worsening corruption by government officials in the public sector.²³⁵ Service delivery is the face and hands of the state, yet South Africa's public service stands at the crossroads. It suffers from institutional challenges such as lack of skills, ethical problems and ever-growing corruption. The often violent confrontations in service delivery protests highlight the distance between the populace and the public representatives and at the same time pose challenges to the state to improve service delivery.²³⁶

Although there has been significant improvement in terms of equality in service delivery since the end of apartheid, many citizens still do not have access to basic needs such as clean water, electricity, health facilities and education.²³⁷ As a result, municipalities have been faced with protests in recent years. Unsatisfactory service delivery is further caused by poor governance at all levels, political squabbles within the government and no effective communication.²³⁸ In response, citizens have resorted to protests as a way of communicating their grievances. Citizens believe that government representatives do not pay attention to their grievances as taxpayers.²³⁹ This has attracted the keen involvement of CSOs in an attempt to improve the situation.²⁴⁰ Service delivery as a public service is sustained through

²³⁵ Akinboade, Mokwena & Kinck op cit note 15 at 459-467.

²³⁶ Neeta Misra-Dexter, & Judith February *Democracy: Which Way is South Africa Going?* (2010). See also Alexander De Juan & Eva Wegner 'Social inequality, state centred grievances and protest: Evidence from South Africa' (2019) 63 (1) *Journal of Conflict Resolution*.

²³⁷ Akinboade, Mokwena & Kinck op cite note 15 at 459. See also Geyer & Jenkins, op cit note 130 at 7. and Lues op cit note 6 at 789-807.

²³⁸ Akinboade, Mokwena & Kinck op cite note 15 at 458.

²³⁹ Ibid.

²⁴⁰ Ibid.

funds from taxation.²⁴¹ Citizens pay tax and therefore expect to receive services from the government.²⁴² However, corruption and wastage of many resources by government officials have become a huge problem in South Africa. Yet government is supposed to be the protector of the funds. Government departments and agencies do little to improve service delivery and even less is done to expose corruption which fuels poor service delivery.

Secondly, the Constitution provides that the government should consult the public on issues of service delivery and policy making.²⁴³ Various policy documents such as the 2013 *White Paper on Local Government*²⁴⁴ and the Municipal Systems Act of 1998²⁴⁵ legislate that municipalities should develop measures that ensure public participation in issues that affect them, such as policy making and service delivery. Furthermore, other legislation such as the Municipal Finance Management Act of 2003²⁴⁶ and the Municipal Property Act of 2004 provides that there should be consultation with the community. The idea is to ensure inclusivity. Citizen participation is further strengthened in the Draft National Policy framework for Public Participation which provides that:

Public participation is an open, accountable process through which individuals and groups within selected communities can exchange views and influence decision making, it is a democratic process of engaging people, deciding, planning and playing an active part in the development and operation of services that affect their lives.²⁴⁷

Involving citizens in governance promotes good decisions and better governance.²⁴⁸ Good governance is dependent on challenge and external scrutiny. There is, however material information that need to be protected. For there to be effectiveness on the part of the

²⁴¹ Gastrow op cit note 2.

²⁴² Ibid.

²⁴³ Constitution 1996 s 195.

²⁴⁴ *The White Paper on Local Government* (draft) September (2013), available at <http://www.tparliament.org/documents/2207.pdf>, accessed on 1 January 2017.

²⁴⁵ Municipal Systems Act 1998 s 19 provides: '(1) A municipal council must strive within its capacity to achieve the objectives set out in section 152 of the Constitution. (2) A municipal council must annually review- (a) the needs of the community; (b) its priorities to meet those needs; (c) its process for involving the community; (d) its organizational and delivery mechanisms for meeting the needs of the community; and (e) its overall performance in achieving the objectives referred to in subsection (1). (3) A municipal council must develop mechanisms to consult the community and community organizations in performing its functions and exercising its powers'.

²⁴⁶ The Municipal Finance Management Act 2003 s 33 requires the municipal council to consider the views of the local community by embarking on a process to invite comments from the local community, which needs to be considered.

²⁴⁷ Khan & Govender op cit note 32 at 157.

²⁴⁸ Andre A Cornwall & Vera Schatten Coelho *Spaces for Change?: The Politics of Citizen Participation in New Democratic Arenas* (2007) at 4.

government there must be some policy deliberations that have to be done in private and the rest of the information should be made public in compliance with principles of good governance and collective responsibility.²⁴⁹

Lastly, citizen participation is crucial to promoting and sustaining democracy.²⁵⁰ To be effective, democracy rely on government and citizens to sustain it and this can be achieved when government and citizens cooperate to ensure accountability, transparency and better service delivery to the citizens.²⁵¹ Well over two decades after the first democratic elections in 1994, South African citizens are unsatisfied, the objectives and goals that were expected are not being met. This is evident from the legal actions, protests and media reports that maladministration, corruption and imbalance in the distribution of power are vexing problems. The current state leads to questions about contribution of the government and the citizens respectively in sustaining democracy.²⁵² Strengthening democracy includes condemning ineffective service delivery and confronting unethical behaviour by public officials. Public service institutions such as state-owned companies need to provide continuous commitment, enforcement and the modelling of leadership in professionalism by means of, among others, policy structures. This will preserve a pattern of good governance even in the future.²⁵³ When apartheid ended in 1994, citizens had high expectations of the economic benefits of the political transition²⁵⁴ — and that should be the objective of the democratic government.

The discussion so far in this chapter shows the commitment that CSOs have displayed to promote democracy through efforts to ensure good governance in the public sector. CSOs that are involved in the pursuit of governance of SOEs are discussed in detail in chapters 4 and 5. However, having highlighted the commitment displayed by CSOs in this chapter, it is now necessary to briefly look at some legal measures taken by CSOs that are active in fighting poor governance and corruption.

2.6 Civil society organisations addressing poor governance and corruption

CSOs played a huge role in the struggle against apartheid in South Africa. That struggle was not achieved only through liberation movements such as African National Congress (ANC)

²⁴⁹ Glasser op cit note 37 at 158-160.

²⁵⁰ Hillard & Kemp op cit note 12 at 355–356.

²⁵¹ Lues op cit note 6 at 789.

²⁵² Ibid at 790.

²⁵³ Ibid. at 792.

²⁵⁴ De Juan & Wegner op cit note 239 at 6–9.

and the Pan Africanist Congress (PAC) but also significantly involved organised CSOs such as Black Sash, Legal Resources Centre, South African National Civics Organisation (SANCO) and many other human rights organisations and trade unions. These organisations used different legal and non-legal strategies to fight the authoritarian regime, consequently placing themselves in direct collision with the state.²⁵⁵ Today the same CSOs with an addition of other non-governmental organisations and CSOs that were formed post-apartheid such as Corruption Watch (founded in 2012 with the goal to fight corruption in South Africa) are working actively to hold the government to account as well as fight corruption.²⁵⁶

A recent case challenging poor corporate governance and corruption by government officials earlier discussed in chapter 1, section 1.1 is the *Black Sash Trust v Minister of Social Development & others*.²⁵⁷ This action was brought to the Constitutional Court by human rights organisation Black Sash after the South African Social Security Agency (SASSA) failed to make arrangements for the continued payment of social grants from the 1 April 2017 onwards. This position could have led to 17 million people in South Africa not receiving their monthly social grants had the Constitutional Court not intervened. Another case challenging poor governance is *Allpay Consolidated Investment v The South African Social Security Agency (SASSA)*.²⁵⁸ In 2013, the organisation Corruption Watch appeared as a friend of the court in a case closely related to the *Black Sash* case. This case involved irregularities in the tender of R10 million awarded by South African Social Grants (SASSA) to Cash Paymaster. Allpay Consolidated Investment brought the case to court against SASSA for tender irregularities. The Constitutional Court found that the decision to award the tender to CPS was constitutionally invalid. In 2016, Corruption Watch again appeared as *amicus curiae* in *Economic Freedom Fighters, Democratic Alliance v Speaker of National Assembly*,²⁵⁹ well known as the *Nkandla* case. In that case, the office of the Public Protector investigated and made findings that the President had used his power to unfairly benefit from state funds to upgrade his homestead.²⁶⁰ The two political parties, Economic Freedom Fighters and Democratic Alliance instituted legal action to hold the president to account. Later, in 2014, Corruption Watch appeared as an *amicus curiae* in the case of *Democratic Alliance v South*

²⁵⁵ Bhokinkosi Moyo 'Regulation or strangulation? NGO laws in Africa part 1: South Africa' *Mail & Guardian* 5 October 2008, available at <http://www.thoughtleader.co.za/bhekinkosimoyo/2008/10/05/regulation-or-strangulation-ngo-laws-in-africa-part-1-south-africa/> accessed on 25 October 2017.

²⁵⁶ See Corruption Watch [website], available at <http://www.corruptionwatch.org.za/about-us/who-we-are/about-corruption-watch/>, accessed on 25/10/2017.

²⁵⁷ 2017 (3) SA 335 (CC).

²⁵⁸ 2014 (4) SA 179 (CC).

²⁵⁹ 2016 (3) SA 580 (CC).

²⁶⁰ *Supra*.

African Broadcasting Corporation & others,²⁶¹ a case in which the Democratic Alliance took the SABC to court over the matter of the corporate governance of an SOE (SABC). After the removal of the chief operating officer of the SABC, Hlaudi Motsoeneng, by the court for incompetence and misconduct, the SABC board re-appointed him as the SABC group executive of corporate affairs. The court held that the decision to re-appoint the same person as SABC group executive of corporate affairs was unlawful and irrational and ordered that he be removed.²⁶²

Secondly, during the apartheid era, the African National Congress (ANC), the Pan Africanist Congress and other liberation movements opposed the apartheid regime. Today's political parties such as the Economic Freedom Fighters (EFF) and the Democratic Alliance (DA), although not civil society organisations, have also contributed together with CSOs towards ensuring that the current government is held accountable to the citizens in the fight against corruption by government officials. The cases of *Economic Freedom Fighters v Speaker of National Assembly*, *Democratic Alliance v Speaker of National Assembly*²⁶³ (popularly known as the *Nkandla* case) and *Democratic Alliance v South African Broadcasting Corporation & others*²⁶⁴ (popularly known as the *SABC COO* case), briefly discussed above, are two very important cases that illustrate the dimensions of corruption and misuse of public funds by state officials and poor corporate governance in state-owned enterprises, as well as the contributions made by the opposition parties.

Thirdly, the government also established institutions, the aim of which is to strengthen constitutional democracy in the country. Such institutions are found in section 181 of the Constitution of 1996, and of key importance is the Public Protector's Office and the Human Rights Commission.²⁶⁵ The Public Protector's Office is an institution that protects the rights of the citizens from the maladministration by the state as stated in Chapter 9 of the

²⁶¹ 2016 (3) SA 468 (WCC).

²⁶² *Supra*.

²⁶³ *Nkandla case*.

²⁶⁴ *Ibid*.

²⁶⁵ The Constitution of the Republic of South Africa s 181 provides: '(1) The following state institutions strengthen constitutional democracy in the Republic: (a) The Public Protector. (b) The South African Human Rights Commission. (c) The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities. (d) The Commission for Gender Equality. (e) The Auditor-General. (f) The Electoral Commission. (2) These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice. (3) Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions. (4) No person or organ of state may interfere with the functioning of these institutions. (5) These institutions are accountable to the National Assembly and must report on their activities and the performance of their functions to the Assembly at least once a year.'

Constitution.²⁶⁶ The office investigates matters reported about the abuse of public administrative power. The Public Protector has the right to investigate and report on state affairs or public administration in any government sphere.²⁶⁷

Lastly, based on respect for human rights, the South African Human Rights Commission was established to entrench a culture of human rights as well as to advance the protection, development and attainment of human rights as stated in Chapter 9 of the Constitution.²⁶⁸ It also has a right to investigate and report on the observance of human rights abuses and take steps to secure redress where human rights are violated.²⁶⁹

2.7 Conclusion

The legal provisions that CSOs use today to challenge the government were a tool of oppression in the apartheid era.²⁷⁰ The legal environment that was hostile to CSOs during apartheid changed tremendously in the contemporary South Africa where CSOs can effectively use legal measures to call the government to account. However, CSOs continue to face challenges even though the legal environment is now more enabling. This is partially because the provisions giving them authority are not clearly defined. Perhaps there needs to be a clear codification of laws authorising CSOs to conduct certain activities, thus bringing clarity and reducing the undermining of CSOs by government authorities. More is said on this in chapter 6, section 6.6.1.

Lastly, the literature clearly indicates that CSOs are not sufficiently funded. Insufficient resources make civil society organisations more dependent on foreign donors that tend to decide their agendas, for as the idiom goes ‘he who pays the piper calls the tune’.²⁷¹ This compromises CSOs’ contribution to policy making as the developmental policies will be done according to the will of the funders.²⁷² The following chapter discusses corporate governance and corporate governance failures in SOEs.

²⁶⁶ Constitution 1996 chap 9.

²⁶⁷ Ibid.

²⁶⁸ Ibid.

²⁶⁹ Ibid.

²⁷⁰ Dean op cit note 159 at 164.

²⁷¹ Mangu op cit note 136 at 369.

²⁷² Greenstein, Kola & Lopes op cit note 163 at 102.

CHAPTER 3: CORPORATE GOVERNANCE FRAMEWORKS AND FAILURES IN STATE OWNED ENTERPRISES

3.1 Introduction

In the previous chapter theories of non-profit organisations were explained, characteristics of civil society organisations (CSO) were stated, the relationship between the state, CSOs and the citizens was discussed as was the challenges CSOs are facing and, lastly' the recent contributions that CSOs have made in the corporate governance of state-owned enterprises (SOEs) were briefly stated. To understand the contributions by CSOs in advancing the corporate governance of SOEs, it is necessary to look at the meaning of corporate governance and how it is applied in SOEs. First, this chapter explains what corporate governance is with a focus on SOEs. Secondly, the chapter also discusses theories of corporate governance. The chapter further reinforces the importance of sound corporate governance practices by SOEs and the practice of corporate governance in SOEs. The chapter also explains the difference between SOEs and private companies to shed light on SOE objectives that are distinct from private companies. Throughout the discussion, the chapter engages with the issue of whether SOEs owe a duty to account to CSOs who are the citizens' representative and therefore stakeholders in SOEs. Lastly, the chapter discusses global and South African examples of corporate governance breaches and failures.

3.2 The meaning of corporate governance

There is no agreed definition for corporate governance. Experts of corporate governance have interpreted it widely and broadly. First, in a wider way Sir Adrian Cadbury, the architect of corporate governance who chaired the Cadbury Committee, defines corporate governance as a system by which companies are directed and controlled.²⁷³ Sir Adrian's definition of corporate governance, although criticised for being simplistic and lacking nuances,²⁷⁴ has been adapted by other contemporary corporate governance experts such as Greg Shailer.²⁷⁵ Shleifer and Vishny view corporate governance as dealing with the ways in which

²⁷³ Cadbury Committee *Report on the Financial Aspects of Corporate Governance* (1992), available at <http://www.ecgi.org/codes/documents/cadbury.pdf>, accessed on 28 August 2018.

²⁷⁴ Cally Jordan *Cadbury Twenty Years on* (2012) at 6.

²⁷⁵ Gregory R P Shailer *Introduction to Corporate Governance in Australia* (2004) at 14. In it Shailer defines corporate governance as the mechanisms and relations by which corporations are controlled and directed.

shareholders guarantee themselves of getting a profit on their investment,²⁷⁶ while Brickley and Zimmerman define corporate governance as a system of laws, regulations, institutions, markets, contracts and corporate policies and procedures that direct and influence the actions of the governing body in organisations.²⁷⁷ Brickley and Zimmerman's definition is more closely related to the definition by the Principles of Corporate Governance of the Organisation for Economic Co-operation and Development (OECD) which defines corporate governance as the relationship between a corporation's governing body, shareholders and other stakeholders.²⁷⁸ Corporate governance definitions emphasise the important role that different organs play in corporate decision-making.²⁷⁹

When it comes to state-owned enterprises (SOE), corporate governance would be the process of governing SOEs like private companies, even though SOEs may have social and public objectives that are not available in private companies.²⁸⁰ Both SOEs and privately-owned companies in South Africa are subject to the Companies Act 71 of 2008. The Act, however, does not provide the definition of corporate governance; the definition is provided by the *King IV Report on Corporate Governance for South Africa, 2016*²⁸¹ which defines corporate governance as the exercise of ethical and effective leadership by the governing body of the organisation.²⁸² Also, companies do not operate in an empty space; they influence the environment and society in which they operate. It is for this reason that it has been widely accepted that companies should be managed taking into consideration interests of all stakeholders and not only its shareholders.²⁸³ The definition of corporate governance can, as a result, be expanded as:

The system of regulating and overseeing corporate conduct and of balancing the interests of all internal stakeholders and other parties (external stakeholders, governments and local communities...) who can be affected by the corporation's

²⁷⁶ Schleifer Andrei & Vishny Robert W. 'A survey of corporate governance' (1997) (52) *Journal of Finance* at 737.

²⁷⁷ James L Brickley & Jerold L Zimmerman Corporate governance myths: Comments on Armstrong, Guay and Weber (2010) 50 (2–3) *Journal of Accounting and Economics* at 236.

²⁷⁸ OECD *Principles of Corporate Governance* (2004) at 11, available at <http://www.oecd.org/corporate/ca/corporategovernanceprinciples/31557724.pdf>, accessed on 11 October 2018.

²⁷⁹ Tshepo Mongalo 'The emergence of corporate governance as a fundamental research topic in South Africa' (2003) 120 *S. African LJ* at 173.

²⁸⁰ Tebello Thabane & Elizabeth Snyman Van Deventer 'Pathological corporate governance deficiencies in south Africa's state-owned companies: A critical reflection' (2018) 21(1) *Potchefstroom Electronic Law Journal* at 3.

²⁸¹ Institute of Directors Southern Africa *The King IV Report on Corporate Governance for South Africa* (2016) (thereafter *King IV Report*), available at <https://www.adamsadams.com/wp-content/uploads/2016/11/King-IV-Report.pdf>, accessed on 28 August 2018.

²⁸² *King IV Report* op cit note 283 at 20.

²⁸³ T Wiese, *Corporate Governance in South Africa with International Comparisons* 2 ed (2017) at 6.

contact, to ensure responsible behaviour by corporations and to achieve the maximum level of efficiency and profitability for a corporation.²⁸⁴

In addition to the broader definition above, corporate governance brings together authority, leadership, direction and control practiced when managing corporate entities.²⁸⁵ The goal in all corporate governance is the facilitation of the control of management and achievement of company value,²⁸⁶ that is associated with protection of shareholders' interests through the establishment of good governance systems.²⁸⁷

Secondly, corporate governance is founded on a system of ethics.²⁸⁸ Good corporate governance has its foundations in effective and ethical leadership.²⁸⁹ Effective leadership is about success in objectives and goals and ethical leadership is shown by responsibility, accountability, fairness and transparency. Ethical leadership is broad and includes not only the relations between the organisation and its internal stakeholders but extends to the organisation's ethical relationship with the society.²⁹⁰ The cost of failure to ensure an ethical environment in the organisation is high and organisations should aim for a good ethical culture. Ethical values of transparency, accountability, responsibility and probity²⁹¹ should be enforced in all aspects of governance and be shown in every decision of the board. The different parts of governance such as board formation, and functioning, transparency, and risk management are instrumental in realising these fundamental principles of good governance.²⁹² In support of the above, the OECD's Principles also identified these four core standards of good governance, these being fairness, transparency, accountability and responsibility.²⁹³ Lastly, the foundation of successful corporate governance is an enforceable code of ethics that advances ethical and professional conduct and that sets up the moral

²⁸⁴ Naidoo op cit note 25 at 3.

²⁸⁵ Benjamin Mwanzia Mulili & Peter Wong 'Corporate governance practices in developing countries: The case for Kenya' (2011) 2 (1) *International Journal of Business Administration* at 14.

²⁸⁶ Poh-Ling Ho & Grantley Taylor 'Corporate governance and different types of voluntary disclosure: Evidence from Malaysian listed firms' (2013) 25 *Pacific Accounting Review* at 4.

²⁸⁷ Olof Brunninge, Mattias Nordqvist & Johan Wiklund 'Corporate governance and strategic change in SMEs: The effects of ownership, board composition and top management teams.' 2007 (29) *Small Business Economics* at 295.

²⁸⁸ Suzanne Young, & Vijaya Thyil 'A holistic model of corporate governance: a new research framework' 2008 (8) *Corporate Governance: The International Journal of Business in Society* at 99.

²⁸⁹ King IV Report op cit note 284 at 20.

²⁹⁰ Ibid at 24. See also Rehana Cassim 'Corporate Governance' In Farouk Cassim, Maleka Femida Cassim, Richard Jooste *et al*, *Contemporary Company Law* (2012) Juta, Cape Town at 476-7.

²⁹¹ Ibid at 43.

²⁹² Eric Nzibonera *Efficacy of corporate governance on Corporate Disclosure in Developing Economies: A Comparative Study of Companies Listed on Selected Stock Markets in Sub-Saharan Africa*. (unpublished PhD thesis, University of Cape Town., 2017) at 101. See also Cassim op cit note 293 at 477.

²⁹³ OECD op cit note 281 at 22-24.

structure for the whole organisation.²⁹⁴ According to Rossouw, effective regulatory and institutional systems to advance good principles of corporate governance is lacking in Africa as a whole.²⁹⁵

The meaning of corporate governance and the values it entails have been examined above. In the next segment theories of corporate governance will be discussed.

3.3 Theories of corporate governance

There are various theories that seek to analyse corporate governance. However, for the purposes of this research which in this segment seeks to clarify whether SOEs owe any duty to CSOs, focus will be on two main theories: the shareholder-centric theory and the pluralist stakeholder-inclusive approach. These two opposing approaches have led to a huge debate about who the legitimate stakeholders of a company are. The debate originates from the different viewpoints of Professors Berle²⁹⁶ and Dodd²⁹⁷ of Harvard University in the early 1930s.

Before the theories of corporate governance that show whether SOEs owe a duty to account to CSOs are discussed, it is necessary to explain who the stakeholders and shareholders of SOEs are, since SOE entities are different from private companies. The public and government are key stakeholders of SOEs, the public as the funder (taxpayer) of these entities and government in the sometimes-conflicting roles of shareholders, policy maker and as regulator.²⁹⁸ In other words, citizens as taxpayers are the ultimate shareholders of SOEs.²⁹⁹

3.3.1 The shareholder-centric theory of corporate governance

The shareholder theory suggests that the corporation should serve the interests of shareholders only. It contends that corporate managers should answer only to shareholders

²⁹⁴ RK Mishra & D Geeta Rani 'Convergence of corporate governance and business ethics-some reflections' (2009) 2 (1) *Indian Journal of Corporate Governance* at 82.

²⁹⁵ GJ Rossouw 'Business ethics and corporate governance in Africa' (2005) 44 (1) *Business & Society* at 94–106.

²⁹⁶ AA Berle Jr 'Corporate powers as powers as in trust' (1931) 44 *Harvard Law Review* at 1049.

²⁹⁷ EM Dodd 'For whom are corporate managers trustees?' (1932) 45 *Harvard Law Review* at 1145.

²⁹⁸ Chien-Chung Lin 'The Chinese Independent Director mechanism underchanging macro political-economic setting: Review of its first decade and two possible models for the future' (2012) 1 (2) *Business Law Review* at 295.

²⁹⁹ Daniel D Sokol 'Competition policies and comparative corporate governance of state-owned enterprises' (2009) 2009 *Brigham Young University Law Review* at 1728. See also George Amoako & Mawusi Kofi Goh 'Corporate governance practices of state-owned enterprises in Ghana: An analysis' (2015) 14 *IUP Journal of Corporate Governance* at 50.

and act only with interests of shareholders in mind.³⁰⁰ According to the shareholder theory the directors of the company are entitled to consider the interests of other stakeholders only if it would be in the interest of the shareholders to do so. This approach is illustrated by the case of *Hutton v West Cork Railway Co.*³⁰¹ In this case the directors of a company that was being closed down proposed to give bonuses to employees because they were about to lose their jobs. The court stated:³⁰²

Charity has no business to sit at boards of directors qua charity. There is, however, a kind of charitable dealing which is for the interest of those who practice it, and to that extent and in that garb (I admit not a very philanthropic garb) charity may sit at the board, but for no other purpose.....The law does not say that there are to be no cake and ale, but that there are to be no cake and ale except such as are required for the benefit of the company.

The court held that the money payment was invalid and that directors are not free to spend funds of the company for purposes that are not reasonably incidental to the business of the company.³⁰³ In summary, according to the shareholder centric approach, the company is run in the interest of the shareholders³⁰⁴ and decisions of a company will take into account the interest of other stakeholders only to the extent that such decisions benefit the shareholders.³⁰⁵ This mean that in the SOEs environment, as stated above, the ultimate shareholders of SOEs are the citizens who pay tax and as such the shareholder-centric theory is in favour of the civil society which is the actual shareholder, meaning SOEs corporate managers should answer to civil society organisations who are civil society representatives and act with interests of civil society in mind.

3.3.2 *The pluralist stakeholder-inclusive theory of corporate governance*

The inclusive model was first introduced to South Africa in 1994 in the first *King Report on Corporate Governance in South Africa*. One of the reasons for adopting an inclusive approach includes the long-term sustainability of companies, respect for the local community and the society at large in which a company operates.³⁰⁶ The emergence of stakeholder theory

³⁰⁰ Friedman M, *Capitalism and Freedom* (1962) at 133.

³⁰¹ 1883 23 ChD 654.

³⁰² Supra at 673.

³⁰³ Supra.

³⁰⁴ Franklin Allen 'Corporate governance in emerging economies' (2005) 2 *Oxford Review of Economic Policy* at 164.

³⁰⁵ Virginia Ho 'Enlightened shareholder value: Corporate governance beyond shareholder-stakeholder' (2010) 36 *Divide Journal of Corporation Law* at 61.

³⁰⁶ Stephen M. Byars & Kurt Stanberry *Business Ethics* (2018) chap 3, Openstax available at <https://openstax.org/books/business-ethics/pages/1-introduction> accessed on 10 November 2020.

in corporate governance was prompted by the growing recognition of the need to consider the wider interests of the society.³⁰⁷ Expanding the focus of corporate governance past shareholders to other stakeholders guarantees that their interests are legitimately represented in corporate decision-making. Ferrell refers to a stakeholder as being any person or group upon which the organisation is dependent for its longevity.³⁰⁸

The *King IV Report* chooses a stakeholder-inclusive approach as it requires the corporate managers of an organisation to consider the interests and expectations of all stakeholders in making decisions in the best interests of the organisation.³⁰⁹ *King IV Report* states:

Stakeholder-inclusive involves the balancing of interests over time by way of prioritising and in some instances trading off interests. The quality of stakeholder relationships indicates how effectively an organisation is able to strike this balance in making decisions³¹⁰

The stakeholder-inclusive theory extends the scope of corporate governance beyond the relationship between management and shareholders to include other interested parties in the corporation's activities.³¹¹ In other words, while in the shareholder-centric approach other stakeholders' needs, interests and expectations are considered only if it is in the interests of shareholders to do so, the board in the stakeholder-inclusive approach considers other stakeholders as a priority for decision-making by the board in the interests of the company. Secondly, the stakeholder approach is premised on the notion that a company is a legal and artificial person that carries out its activities in a community, therefore there is a need to disclose corporate information and satisfy various needs of different interested parties. The stakeholder approach recognises the fact that most corporations have a large and integrated set of stakeholders to which they have an obligation and responsibilities and, therefore, they should have governance systems tailored towards meeting their specific and diverse requirements.³¹²

³⁰⁷ Nzibonera op cit note 295 at 101.

³⁰⁸ OC Ferrell 'Business ethics and customer stakeholders' (2004) 18 (2) *Academy of Management Executive* at 126.

³⁰⁹ *King IV Report* op cit note 284 at 25.

³¹⁰ Ibid.

³¹¹ David Wanyonyi Wanyama & Tobias Olweny , 'Effects of corporate governance on financial performance of listed insurance firms in Kenya' (2013) 3 (4) *Public Policy and Administration Research* at 159.

³¹² Lorraine Sweeney & Joseph Coughlan 'Do different industries report corporate social responsibility differently? An investigation through the lens of stakeholder theory.' (2008) 14 *Journal of Marketing Communications* at 114.

Thirdly, the implication of the theory is that corporate disclosure should aim not only at resolving conflicts between corporate management and shareholders but also focus on serving the interests of all stakeholders.³¹³ The stakeholder approach stresses potential advantages for firms that follow a stakeholder-inclusive approach.³¹⁴ Meanwhile, it has been observed that a developing number of empirical studies uphold the idea that organisations whose governing body adopts a stakeholder-inclusive approach perform better than those who do not.³¹⁵ Stakeholders include not only the shareholders or citizens but civil society representatives such as CSOs, community-based organisations, trade unions, political parties and other organisations whose interests should be taken into consideration by the SOE boards. As a result, in an SOE setting the stakeholder-inclusive approach is clear, citizens as taxpayers and funders of public entities represented by CSOs are primary stakeholders of SOEs that should be prioritised in every decision-making taken by the SOE boards. SOEs owe CSOs, who are citizen representatives, a duty to account.

In the next segment of this chapter the practice of corporate governance in SOEs is discussed.

3.4 Corporate governance in state-owned enterprises

State-owned Enterprises (SOEs) are entities that are owned and controlled by the state rather than by private actors.³¹⁶ SOEs generate their revenues from selling goods and services.³¹⁷ Some objectives for SOEs include employment,³¹⁸ social services³¹⁹ and capital formation.³²⁰ SOEs are an important element of the economy, consequently there is an emphasis on them to practice corporate governance. Unlike privately owned companies in that SOEs objective is not necessarily profit maximisation or shareholder-value maximisation but service

³¹³ Nzibonera op cit note 295 at 78.

³¹⁴ R Edward Freeman, *Strategic Management: A Stakeholder Approach* (1984) at 5.

³¹⁵ Amy J Hillman & Gerald D Keim 'Shareholder value, stakeholder management and social issues: What is the bottom line?' (2001) 2 *Strategic Management* at 126.

³¹⁶ Sokol, op cit note 302 at 1712.

³¹⁷ World Bank. *Bureaucrats in Business: The Economics and Politics of Government Ownership* (1995) at 26, available at <http://documents.worldbank.org/curated/en/197611468336015835/Bureaucrats-in-business-the-economics-and-politics-of-government-ownership>, accessed on 6 September 2018.

³¹⁸ Maxim Boycko, Andrei Shleifer & Robert W Vishny 'A theory of privatisation' (1996) 106 *Economics Journal* at 306.

³¹⁹ Ronald Wintrobe 'The market for corporate control and the market for political control' (1987) 3 *J.L Econ & Org* at 435–436.

³²⁰ Armando Labra 'Public enterprise in an underdeveloped and dependent economy in public and private enterprises in a mixed economy' (1980) in William J Baumbol (ed) *Public and Private Enterprise in a Mixed Economy: Proceedings of a Conference held by the International Economic Association in Mexico City* (1980) at 36–40.

delivery, an example being the provision of employment or housing to the citizens.³²¹ As can be seen, some SOEs are based on non-financial goals such as socio-economic services.³²²

Secondly, although SOEs are entities that are wholly owned by the state, unlike private companies that are owned by private actors, corporate governance that is practised in both SOEs and private companies internationally is generally the same, because SOEs have the same appearance and behaviour of private companies and are created to function competitively in a free market.³²³ There are, however, some exceptions given to SOEs for as public-sector institutions they are allowed to function flexibly with benefits such as a relaxation of tax incentives and flexible corporate governance requirements.³²⁴ SOEs' legitimacy emanates from their ability to return profit to their owners — citizens who are the taxpayers³²⁵ — to whom they have primary responsibility.³²⁶ There is scarcity of literature on public sector corporate governance locally and globally.

3.4.1 *The Global Landscape*

Internationally, most literature focuses on corporate governance in the private sector than in the public sector and this has left a gap in literature. Subramanian, notes how most studies on corporate governance are mostly within the private sector than in state owned enterprises (SOEs).³²⁷ Tsameyi, Enninful-Adu and Onumah state that corporate governance in general has received less attention in developing countries.³²⁸ The greater part of the literature on corporate governance in SOEs is predominantly centred on China since China is the second-biggest economy globally and as of late was a socialist economy where SOEs were producing goods and services and the state held proprietorship and managerial rights.³²⁹ A number of factors make the study of corporate governance in the public sector imperative.

First, unlike a private sector corporation, a public-sector corporation is not just a tool for creating wealth for shareholders but a service-delivery machine. Williams suggests that:

³²¹ Sokol, op cit note 283 at 1713.

³²² Ibid.

³²³ Juliet Roper & Michéle Schienberger Orgad 'State owned enterprises: Issues of accountability and legitimacy' (2011) 25(4) *Management Communication Quarterly* at 697.

³²⁴ Sokol, op cit note 283 at 1713.

³²⁵ Ibid at 1728.

³²⁶ Yoichi Takahashi *Does Discipline by State Owned Enterprises Bonds Work? Japan's Experience with Zailo Reform* (2000) at 3.

³²⁷ S Subramanian 'Corporate governance, institutional ownership and firm performance in Indian state-owned enterprises.' (2015) 11 (2) *Journal of Management Research and Innovation* at 117.

³²⁸ Mathew Tsamenyi, Elsie Enninful-Adu, & Joseph Onumah 'Disclosure and corporate governance in developing countries: evidence from Ghana' (2007) 22 (3) *Managerial Auditing Journal* at 320.

³²⁹ Cioduy Schipani & Liu Junhai Cimdy 'Corporate governance in China: Then and now' (2002) 1 *Columbia Business Law Review* at 1.

Financial models that prevail in the SOE sector are based on profit motive that is at philosophical odds with the social functions that must be served through the provision of services at the lowest costs to benefit the country.³³⁰

SOEs contribute to developing countries by reducing inequalities in income, increasing employment and contributing to development of the region.³³¹ Secondly, less consideration has been given to the issue of governance in state-owned enterprises, regardless of proof that poor performance and fall of SOEs are associated with poor corporate governance. Nellis reports that the poor performance of SOEs, especially in African nations, is because of difficulties that are traceable to corporate governance, for example, lack of monitoring and reporting systems, managerial challenges and incompetent boards of directors.³³² Globally, the fall of major global corporate entities such as Enron, WorldCom and Parmalat has shown the need for adherence to corporate governance practices through identifiable indices such as promotion of transparency, accountability and financial disclosure quality.³³³ The decline of these corporations in the early years of the twenty-first century brought a clear message that business ethics matter in business.³³⁴ The public perception of corporate ethics changed.³³⁵ As a result, corporations have adopted a practice of corporate governance to enhance accountability, transparency in financial reporting and disclosure of corporate information.³³⁶

Thirdly, South Africa is a member of the BRICS, an association of five major emerging national economies which includes Brazil, Russia, India, China and South Africa.³³⁷ Being a BRICS member means South Africa can learn invaluable lessons from other members when it comes to public governance. In terms of corporate governance, in Brazil, the Brazilian Code of Best Practice of Corporate Governance³³⁸ provides that boards of companies should seek a balance between the interests of stakeholders so that each receives a proportionate benefit and is exposed to a proportionate risk in the activities of a company.³³⁹ The code for corporate governance for listed companies in China acknowledges

³³⁰ D Williams 'State owned enterprises:End of the road' (2010) 205 *Financial Mail* (7) at 34–8.

³³¹ Thomas op cit note 14 at 451.

³³² Ibid.

³³³ Wiese op cit note 286 at 4.

³³⁴ Mishra & Rani op cit note 297 at 79.

³³⁵ Ibid.

³³⁶ Ibid.

³³⁷ Brazil, Russia, India, China and South Africa (BRICS) [website], available at <http://www.brics2018.org.za/>, accessed on 30 September 2018.

³³⁸ Brazilian Code of Best Practice of Corporate Governance (2015), available at http://www.ibri.com.br/Upload/Arquivos/novidades/3877_GT_Interagentes_Brazilian_Corporate_Governance_Code_Listed_Companies.pdf, accessed on 30 September 2018.

³³⁹ Ibid at Principle 3.3.

the interests of all stakeholders.³⁴⁰ It provides that companies must respect the rights of stakeholders.³⁴¹ A fourth point is that other major economies have since adopted the practice of multi-stakeholder corporate governance. In the United Kingdom, section 172 of the UK Companies Act of 2006 provides that a director must act in good faith to promote the success of the company for the benefit of its members. In the United States of America, the courts have begun to acknowledge that companies have to take into account the interests of other stakeholders when making decisions. In *AP Smith Manufacturing Co v Barlow*³⁴² the court stated that corporations acknowledge and discharge social as well as private responsibilities as members of the community in which they operate.³⁴³

Lastly, developing states have also adopted several practices for corporate governance. In East Africa, the Kenyan Capital Market Authority issued draft corporate governance guidelines outlining changes in principles and practices that companies had to adhere to.³⁴⁴ In West Africa, Nigeria's Security and Exchange Commission (whose corporate governance role has now been taken over by the Financial Reporting Council of Nigeria as a result of the Financial Reporting Council Act of 2011), introduced and mandated a corporate governance committee to develop principles and practices for public companies.³⁴⁵ In 2018, the Financial Reporting Council of Nigeria published the Corporate Governance Code for Nigeria, while in South Africa the King Code defines best practices in corporate governance.

3.4.2 South Africa

South African SOEs are critical to the economy.³⁴⁶ For example, the South African Broadcasting Corporation (SABC) and the Telecommunications Company (Telkom) control communication. Transport infrastructure is significantly controlled by the Airports Company South Africa (ACSA), the Railway Company (Transnet), Postnet International Franchise Corporation (Postnet), the South African Roads Agency (SANRAL) and the Passenger Rail Agency of South Africa (Prasa). Energy and resources are under the control of Eskom, the Trans-Caledon Tunnel Authority (TCTA) and the energy industry company (Petronet), while

³⁴⁰ OECD Code of Corporate Governance for Listed Companies in China (2011), available at <https://www.oecd.org/corporate/ca/corporategovernanceprinciples/48444985.pdf>, accessed on 30 September 2018.

³⁴¹ Ibid at art 81.

³⁴² 98 A2d 581 (NJ 1953).

³⁴³ Supra at 586.

³⁴⁴ Dulacha G Barako, Phil Hancock & H Y Izan Barako 'Factors influencing voluntary corporate disclosure by Kenyan companies' (2006) 14 (2) *An International Review* at 109.

³⁴⁵ Adenike Adewale, 'An evaluation of the limitations of the corporate governance codes in preventing corporate collapses in Nigeria' (2013) 7(2) *IOSR Journal of Business and Management* at 112.

³⁴⁶ Naidoo op cit note 25 at 353.

defence is controlled by the aerospace and military technology conglomerate, Denel. Funding is provided by the Industrial Development Corporation of South Africa (IDC) and the Development Bank of Southern Africa (DBSA). In 2016, there were over 700 wholly owned or partially owned SOEs in South Africa including 167 national and provincial departments and 301 public entities. In 2015 the Department of Public Enterprises declared that it owned 130 companies, trusts and agencies with interests in unlisted investments from railways and water utilities to forest products, aerospace and defence. Their influence underpins every facet of the South African economy. If they do not work the country will fail.³⁴⁷

Given the key role that SOEs play in promoting the socio-economic goals and their contribution to the economic competitiveness of the country, it is important that they are well managed with transparency and accountability.³⁴⁸ However, South African SOEs have been bedevilled by scandals mostly fuelled by unethical leadership that disregards existing corporate governance principles,³⁴⁹ not enough repercussions for those responsible for breaching corporate governance principles and excessive political interference in SOEs, poor corporate governance decisions, and corruption. Other reasons for poor performance in SOEs include a lack of transparency in SOEs and a lack of a uniform legal framework without the overlapping and conflicting provisions that govern all SOEs.³⁵⁰ SOEs are currently governed by the same legislation that governs private companies and the provisions lean more towards the circumstances and structures of private companies than SOEs, in some cases causing uncertainty on SOEs.

All of these factors, lie at the heart of the poor performance of SOEs.³⁵¹ Furthermore, as to the problem of excessive political interference, not only are boards of SOEs not appropriately structured but also board and senior management appointments are made by the state, often on political grounds.³⁵² This does not allow for the independence required for good governance, for example while the board may recommend candidates for the position of chief executive officer (CEO), it is ultimately government as the sole shareholder that makes

³⁴⁷ Ibid.

³⁴⁸ Department of Public Enterprises *An Analysis of the Financial Performance of State-owned Enterprises* (2006) at 2, available at https://www.gov.za/sites/default/files/gcis_document/201409/analysisfinperformancesoe0.pdf, accessed on 6 August 2019.

³⁴⁹ Lufuno Nevondwe, Kola O Odeku & Konanani Raligilia 'Ethics in the state-owned enterprises in the public sector: a thin line between corporate governance and ethical leadership' (2014) 5 (15) *Journal of Social Sciences* at 661. See also T Edwards 'Ethical fitness for accountable public officials: An imperative for good governance' (2007) 42 (5) *Journal of Public Administration* at 29.

³⁵⁰ Public Affairs Research Institute *Long Road Ahead for New SOE Law* (PARI), 10 July 2019 available at <https://pari.org.za/long-road-ahead-for-new-soe-law/>, accessed on 20 November 2019.

³⁵¹ Amoako & Goh op cit note 302 at 79.

³⁵² Rossouw op cit note 295 at 96.

this decision. This institutional necessity unavoidably obscures the lines of accountability for performance between the board and the shareholder when the board has no genuine authority over a chief executive officer (CEO) who is ultimately answerable for the management of the organisation.³⁵³ In support of the above, Rossouw notes that political connections often influence governing body appointment, yet the appointment of a blend of individuals with critical skills supports the performance of the governing body and its accountability. When political motives drive appointments, ability and autonomy are undermined and individuals without the necessary competencies that are crucial to the needs of the organisation end up carrying the mandate of overseeing SOEs leading them to failure and lack of public trust.³⁵⁴ Although taxpayers are the ultimate owners of SOEs they rely on politicians and bureaucrats who administer the SOEs to be their agents and look after their interests.³⁵⁵

In addition, McGregor attribute the underperformance of SOEs to constant turnover of key players, dysfunctional working relationships and lack of moral norms³⁵⁶ and instability of leadership,³⁵⁷ inappropriate rewards including excessive pay and benefits to executive managers and board members despite SOE underperformance,³⁵⁸ mismanagement of resources and poor financial accountability, fruitless wasteful expenditure and conflict of interests.³⁵⁹ Furthermore, poor corporate governance in SOEs is as a result of weak auditing services in state owned enterprises where the big auditing companies hired by SOEs to audit SOE financial books and enhance accountability in SOEs are also implicated in the corporate governance failures happening at SOEs.³⁶⁰ Also, failure by South African investigation authorities to prosecute white collar crime is another challenge.³⁶¹

³⁵³ Adele Thomas 'Governance at South African state-owned enterprises: What do annual reports and the print media tell us?' (2012) 8 (4) *Social Responsibility Journal* at 450.

³⁵⁴ Miko Kamal 'Corporate governance and state-owned enterprises: A study of indonesia's code of corporate governance' (2010) 5 (4) *Journal of International Law and Technology* at 214.

³⁵⁵ Amoako & Goh, op cit note 302 at 50.

³⁵⁶ Lynn McGregor *Can South African State Owned Enterprises Succeed* (2015), available at <https://portal.regenesys.net/course/discussions/editors/kcfinder/upload/files/McGregor%2C%20L.%202015.%20Can%20State%20Owned%20Companies%20succeed.%20USB..pdf>,

accessed on 20 September 2018. See also Lynn McGregor *Improving Corporate Governance of South African State Owned Companies (SOCs) A "Think-piece"* (2014), available at <https://pdfslide.net/documents/improving-corporate-governance-of-south-african-state-documents-sa-socimproving.htm>, accessed on 20 September 2018.

³⁵⁷ M Klein 'The number of feet treading the boards of parastatals is cause for plenty of alarm' *Business Times* at 20, 5 December 2010.

³⁵⁸ Phillip Theunissen *Is executive remuneration out of control?* (2010), available at <http://www.computus.co.za/Publikasies/CEOVReportPDF.pdf>, accessed on 12 September 2018. accessed on 27 May 2018.

³⁵⁹ Tim Kenny *The Non-Developmental State* [2010]. available at <https://hsf.org.za/news/hsf-articles/the-non-developmental-state>, accessed on 10 September 2018.

³⁶⁰ Roxanne Henderson 'Efforts intensify to break dominance of SA's Big Four auditors after state capture scandals' *Biznews* March 2020, available at <https://www.biznews.com/briefs/2020/03/11/efforts-intensify->

Lastly, there is limited information about SOEs or the information disclosed is unreliable.³⁶² The government does not elaborate to the public its objectives for public sector firms nor does it explain how it plans to monitor and influence these enterprises.

The position of corporate governance in SOEs in South Africa as well other countries was discussed above. In the following segment the difference between SOEs and private companies is discussed.

3.5 State-owned enterprises v private companies

SOEs are different from privately owned firms in a number of ways. Although both SOEs and private companies are generally governed by similar corporate governance regulations, there are a number of factors that differentiate them. Such factors include: prioritising service delivery than profit maximisation by SOEs, ownership, political interference in SOEs and government benefits that are given only to SOEs.

First, SOEs are controlled by the state rather than by private actors. These public entities are government owned or government controlled economic entities that generate the bulk of their revenues from selling goods and services.³⁶³ SOEs are not necessarily profit maximisers, they do not necessarily seek to maximise shareholder value. Instead, SOEs provide service delivery, for example, the provision of employment or housing to the citizens.³⁶⁴ Some objectives for SOEs include the provision of employment,³⁶⁵ social services³⁶⁶ and capital formation.³⁶⁷ In addition, SOEs tend to be less efficient than similar private firms because of the incentives associated with government ownership.³⁶⁸ Some SOEs may not focus on profit maximisation because they are in regulated industries that regulate

break-dominance-sa-big-four-auditors visited on 08 June 2021. See also Kabous Le Roux ‘State Capture: KPMG, Deloitte, EY, PwC function as a state-sanctioned cartel’ *CapeTalk* September 2020, available at <http://www.capetalk.co.za/articles/396451/state-capture-kpmg-deloitte-ey-pwc-function-as-a-state-sanctioned-cartel> accessed on 09 June 2021.

³⁶¹ Rossouw Jannie & James Styan ‘Steinhoff collapse: a failure of corporate governance’ (2019) 33 *International Review of Applied Economics* 1 at 168.

³⁶² Amoako & Goh op cit note 302 at 56.

³⁶³ World Bank op cit note 320 at 26. Some South African SOEs such as South African Social Security Agency (SASSA), do not sell their services and therefore cannot make profit. SASSA is financed by taxpayer’s funds.

³⁶⁴ Sokol, op cit note 302 at 1713.

³⁶⁵ Boycko, Shleifer & Vishny op cit note 321 at 306.

³⁶⁶ Wintrobe op cit note 322 at 435.

³⁶⁷ World Bank Operations Evaluation Department *Economies in Transition: An OED Evaluation of World Bank Assistance*, available at <http://hdl.handle.net/10986/14885>, accessed on 30 September 2018.

³⁶⁸ William Leon Megginson *The Financial Economics of Privatisation* (2005) at 38.

any pressure to undertake certain policies, the outcomes of which benefit politicians rather than shareholders.³⁶⁹

Secondly, while private companies have shareholders, SOEs are owned by the government as the primary shareholder while the ultimate shareholder equivalent in an SOE is the country's citizens.³⁷⁰ The role of the state as the shareholder of SOEs differs significantly from that of shareholders of private companies. The rights of the government as the shareholder of an SOE are exercised by the relevant government department. The SABC, for example, falls under the jurisdiction of the Department of Communications and so the rights of the shareholder are exercised by the Minister of Communications on behalf of government.³⁷¹ In private companies, conversely, directors owe their positions to the shareholders and other stakeholders but directors in SOEs owe their positions to the minister who appoints them and they work to give effect to the ministers will.³⁷² The centralisation of power on the Minister who represents the government as the shareholder, regulator and policymaker in SOEs is problematic as it can result in the abuse of power as the president and the minister can push their favourite individuals into SOE board and executive positions.³⁷³

Furthermore, unlike shareholders of a private company, the nature of the shareholders' rights exercised by the minister are not proprietary as they are exercised on behalf of the people of the country who are ultimately the owners.³⁷⁴ In that sense, the rights exercised by a shareholding minister must be exercised as a fiduciary. This means that in exercising the right to intervene in the governance of state-owned entities, ministers are equally bound together with the directors by the fiduciary duties set out in the Public Finance Management Act (PFMA), the Companies Act and the common law. It follows that the personal liability provisions of the acts and the protocol — to the extent that they apply to the director — must also apply to a shareholding minister.³⁷⁵

A third distinction, one which reflects a weakness in SOEs, is that government may disregard boards and interfere directly in corporate governance matters. There is often a lack of clarity over the goals and objectives of SOEs. There are often no plainly set out requirements to be appointed on SOE boards, less transparency and lack of monitoring of

³⁶⁹ Michael C Jensen & Kevin J Murphy 'Performance pay and top-management incentive' (1990) 98 *J Pol Econ*.

³⁷⁰ Sokol op cit note 302 at 1715.

³⁷¹ Naidoo op cit note 25 at 355.

³⁷² Ibid.

³⁷³ Public Affairs Research Institute op cit note 353.

³⁷⁴ Ibid.

³⁷⁵ Naidoo op cit note 25 at 371.

performance of board members³⁷⁶ Furthermore, unlike in private companies, managers in SOEs are less likely to be dismissed by the board for making a bad decision and the state is more likely to rescue out a mismanaged SOE.³⁷⁷

Lastly, government has an interest in ensuring that SOEs succeed and as a result as regulator it may restrict competition by providing various benefits to SOEs which it does not offer to private firms, such as tax incentives or softer corporate governance requirements.³⁷⁸ SOEs may benefit from information asymmetries. Information asymmetries occur where the government SOEs have data that private competitors do not access where it collects data.³⁷⁹ Although there are several differences between SOEs and for-profit companies, SOEs are subject to the same corporate governance regulations as privately-owned companies in South Africa, as discussed below.

3.6 Regulation of corporate governance of state-owned enterprises in South Africa

State-owned enterprises (SOEs) are subject to the Constitution and general principles of corporate law, primarily the Companies Act 71 of 2008. Corporate law in South Africa recognises the distinctive nature of SOEs and gives certain exemptions under law, for instance, the government may specify that specific provisions of the Companies Act are not applicable to SOEs. When SOEs are established under special statutes they are administered by them. Listed SOEs on stock exchange market are also governed by the Johannesburg Stock Exchange (JSE) regulations.³⁸⁰

SOEs are governed collectively and to an extent by Treasury Regulations and corporate governance instruments, for example, the founding legislation for the South African Broadcasting Corporation (SABC) is the Broadcasting Act 4 of 1999, the Public Finance Management Act (PFMA) 1 of 1999, the Treasury Regulations,³⁸¹ the King Code of 2016 (King IV)³⁸² and the 2002 Protocol on Corporate Governance in the Public Sector

³⁷⁶ William Gumede *South African State-Owned Enterprises: Boards, Executives and Recruitment: Report to the South African Presidential Review Committee on State-Owned Enterprises* (2012,) at 23, available at <https://portal.regenesys.net/.../Presidential%20Review%20of%20SOCs%2C%202013.pdf>, accessed on 23 February 2018.

³⁷⁷ Sokol op cit note 302 at 1730.

³⁷⁸ Ibid.

³⁷⁹ Ibid.

³⁸⁰ Johannesburg Stock Exchange (JSE) [website], available at <https://www.jse.co.za/current-companies/companies-and-financial-instruments>, accessed on 1 October 2018.

³⁸¹ National Treasury Regulations (2005) 27388 *Government Gazette*, available at http://www.treasury.gov.za/legislation/pfma/regulations/gazette_27388.pdf, accessed on 21 August 2019.

³⁸² *King IV Report* op cit note 284.

which is based on King II Report on corporate governance and is now outdated.³⁸³ In addition, SOEs incorporated as companies have a memorandum of incorporation which provides additional rules. These instruments that make up the corporate governance regulatory framework are discussed next.

3.6.1 The Constitution

State-owned enterprises are public entities and therefore subject to the laws regulating the public sector. Section 195 of the Constitution sets out the over-arching guiding principles in terms of which all the administration of public entities should occur. These guiding principles include an emphasis on ethical conduct, efficiency, development, equity and accountability, transparency and inclusivity.³⁸⁴

3.6.2 Public Finance Management Act 1 of 1999

The Public Finance Management Act (PFMA) 1 of 1999 (as amended) became effective on 1 April 2000.³⁸⁵ The PFMA regulates the management of finances at national and provincial government levels and is aimed at upholding the principles of transparency, accountability and sound financial management in government and public institutions as set out in the constitution.³⁸⁶ The key objectives of the PFMA are to improve the system of financial management in the public sector, promote accountability and reduce waste and corruption in the public sector.³⁸⁷

The PFMA confers specific operational and fiduciary responsibilities on boards and CEOs. These include the duty to ensure that companies do not overspend their budget, ensure that procurement by the company is dealt with in accordance with a fair, equitable, transparent, competitive and cost-effective system, report in monthly basis and annual basis

³⁸³ Protocol on Corporate Governance 2002.

³⁸⁴ Constitution of the Republic of South Africa, 1996 s 195 provides: ‘Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles: a. high standard of professional ethics must be promoted and maintained, b. efficient, economic and effective use of resources must be promoted, c. Public administration must be development-oriented, d. Services must be provided impartially, fairly, equitably and without bias, e. People's needs must be responded to, and the public must be encouraged to participate in policy-making, f. Public administration must be accountable, g. Transparency must be fostered by providing the public with timely, accessible and accurate information, h. Good human-resource management and career-development practices, to maximise human potential, must be cultivated, I. Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.’

³⁸⁵ Public Finance Management Act 1 of 1999 (PFMA).

³⁸⁶ *Ibid* at s 3.

³⁸⁷ *Ibid* at s 2.

including performance reports in the prescribed format.³⁸⁸ The introduction of the PFMA ushered in strict measures to implement principles of corporate governance at SOEs, especially through financial management which is important for the economy.³⁸⁹

The Treasury Regulations are issued in terms of the Public Finance Management Act. Part 2 and 3 of the regulations stipulate the requirements that SOEs should adhere to in ensuring principles of public administration are adhered to such as appointing chief finance officer (CFO), an audit committee, as well as preparing a strategic plan and budgets³⁹⁰

3. 6.3 Companies Act 2008

Although the Companies Act of 2008 does not define what corporate governance is, it defines an SOE in section 1 as ‘an enterprise that is registered in terms of the Companies Act as a company and is either listed as a public entity in schedule 2 or 3 of the PFMA or is owned by a municipality as contemplated in the local government Municipal Systems Act 32 of 2000’.

SOEs are required to comply with applicable requirements under the Companies Act which aim to ensure corporate transparency in companies. The Act provides for a two-tier regulatory scheme, first provided for in sections 23 to 34 which require accountability and transparency and apply to all companies including SOEs.³⁹¹ Secondly, the Act recommends the application of corporate governance in a number of its provisions. For example, the Act requires every SOE and every listed company to appoint an auditor and a company secretary.³⁹² The Act further requires the appointment of social and ethics committee.³⁹³ The function of this committee is to monitor the social activities of the company and report to the board and shareholders.³⁹⁴ It is compulsory for SOEs to apply the second tier as it sets minimum standards to ensure transparency, accountability and integrity of all companies including SOEs.³⁹⁵

³⁸⁸ Ibid at Chap 6.

³⁸⁹ D van der Nest, Christopher Thornhill & J de Jager 'Audit committees and accountability in the South African public sector' (2008) 43 *Journal of Public Administration* at 545.

³⁹⁰ Treasury Regulations part 2 and 3 (2005) op cit note 384.

³⁹¹ Companies Act 71 of 2008 ss 23–24.

³⁹² Ibid at ss 88–94.

³⁹³ Ibid at s 72 (4).

³⁹⁴ Companies Act 71 of 2008 Reg 43 (1).

³⁹⁵ , Companies Act 71 of 2008 Chap C, part 2.

3.6.4 Common law

The Court in the case of *SABC v Mpofu*³⁹⁶ urged directors of SOEs to incorporate the value of *ubuntu* (which is based on serving humanity) into their decision making. The value of *ubuntu* in part 2 of *King IV Report 2016* is captured by the IsiZulu expression ‘*uMuntu ngumuntu ngabantu*: I am because we are; you are because we are’.³⁹⁷ The impact of the principles of the King Report being cited by courts is, of course, that they become part of the common law. Following this judgement, directors of state-owned entities are constrained by law to apply *ubuntu*.³⁹⁸ In addition, in *Black Sash v Minister of Social Development*,³⁹⁹ the court held that accountability is a central value of the Constitution that should be applied in the public sector. It is founded on the commitment to openness and responsiveness that is further required by the Constitution in section 41. Lastly, in *Minister of Water Affairs & Forestry v Stilfontein Gold Mining Company* the court stated:

Practising sound corporate governance is essential for the well-being of a company and is in the best interests of the growth of this country’s economy especially in attracting new investments.⁴⁰⁰

3.6.5 Other governance rules

Corporate governance is influenced by way of thinking and culture of management and cannot be restricted to legislation alone. It is regulated by other means, such as practice codes such as King IV, the guide of the Organisation for Economic Co-operation and Development (OECD) and other internal regulations.

i. The King IV Code and Report on Corporate Governance 2016

The principles of the King IV Code are about developing an ethical culture within companies, ensuring value creation and sustainable performance, maintaining appropriate levels, of corporate governance, ensuring proper governance of risk and compliance and adopting a stakeholder inclusive approach to governance of private companies apply equally to SOEs.⁴⁰¹ There is an inter-dependent relationship between the organisation and its stakeholders and the

³⁹⁶ *South African Broadcasting Corporation Ltd & another v Mpofu* (2009) JDR 0634 SCA para 63.

³⁹⁷ *King IV Report* part 2 op cit note 284 at 24.

³⁹⁸ *Ibid.*

³⁹⁹ 2017 (3) SA 335 (CC) para 14.

⁴⁰⁰ 2006 (5) SA 333 (W) para 16.7.

⁴⁰¹ *King IV Report* op cit 284 at 111.

organisation's ability to create value for itself depends on the ability to create value for others.⁴⁰² This was first reflected in King Report II 2002 which stated:

A well-managed company will be aware of, and respond to, social issues, placing a high priority on ethical standards. A good corporate citizen is increasingly seen as one that is non-discriminatory, non-exploitative, and responsible with regard to environmental and human rights issues. A company is likely to experience indirect economic benefits such as improved productivity and corporate reputation by taking those factors into consideration⁴⁰³

Secondly, King Code IV 2016 is based on the idea that leadership starts with the person entrusted with governance and duties but, in addition, the governing body must act ethically. The governing body for SOEs must be aware of the objectives of the organisation, its stakeholders and prioritise their interests and expectations.⁴⁰⁴ Above all, SOEs should always be accountable and transparent. In addition, SOEs are accountable to the public by virtue of their public interests mandate and also because as taxpayers, citizens contribute to the funding of SOEs.⁴⁰⁵ Principle 3.4 para 20 of the King IV provides that the process by which accountability is satisfied is through a disclosure of information by lodgement at the company's commission or maintenance at the company's premises.⁴⁰⁶ It is an offence for an SOE to fail to accommodate any person's reasonable request to access information about SOEs.⁴⁰⁷ Furthermore, in terms of transparency, the King IV mandates formal and transparent procedures for the board of directors' nominations.⁴⁰⁸ Other parts of the report focus on such corporate governance issues as reporting, accounting and auditing, compliance and enforcement.

Lastly, the King IV Code 2016 is a very effective mechanism that provides for effective corporate governance principles for all organisations. The King IV Code 2016 is however, not compulsory, it is applied voluntarily by organisations (unless prescribed by law or a stock exchange Listings Requirement). This is problematic because some companies simply ignore the King IV principles, yet the principles have proved to be very effective.

⁴⁰² The International Integrated Reporting Council (IIRC) *The International <IR> Framework* (2013), at 10, available at <https://integratedreporting.org/wp-content/uploads/2013/12/13-12-08-THE-INTERNATIONAL-IR-FRAMEWORK-2-1.pdf>, accessed on 02 December 2018.

⁴⁰³ *King II Report on Corporate Governance for South Africa* 2009 at 12 para 18.7.

⁴⁰⁴ *King IV Report* op cit note 284 at 115.

⁴⁰⁵ *Ibid* at 113. See also Constitution 1996 s 195.

⁴⁰⁶ *King IV Report* op cit note 284 Principle 5 at 2016.

⁴⁰⁷ Promotion of Access to Information Act 2000 part 7 s 90. See also Companies Act 2008 sec 26(9).

⁴⁰⁸ *King IV* op cit note 284 Principle 7.

ii. OECD Guidelines on Corporate Governance of State-owned Enterprises (OECD) 2015

In 2015 the Organisation for Economic Co-operation and Development (OECD) published revised guidelines on corporate governance for SOEs (the Guidelines). The guidelines are internationally agreed standards for how government should execute the state ownership function to avoid the pitfalls of passive ownership on the other hand and excessive state intervention on the other.⁴⁰⁹

The guidelines were first developed in 2005 to complement the OECD Principles of Corporate Governance and were updated in 2015 to address new issues that have arisen concerning SOEs in domestic and international domains. The guidelines aim to:

- i) professionalise the state as an owner;
- ii) make SOEs operate with a similar efficiency, transparency and accountability as good practice private enterprises; and
- iii) ensure that competition between SOEs and private enterprises, where such occurs, is conducted on a level playing field.⁴¹⁰

In the next segment the importance of corporate governance in SOEs is discussed. Its focus will be on the importance of the core values of corporate governance of SOEs which are transparency and accountability.

3.7 Elements of corporate governance in state-owned enterprises

Good governance is based on two important ethical values of transparency and accountability. These values should permeate all aspects of corporate governance and be displayed in all actions and decisions on the board as stated in the Companies Act 2008 in section 23 to 33 which require all companies to register, ensure disclosure and access by anyone interested of company financial and general records, and sections 88 to 94 which require an SOE to appoint a company secretary, financial auditor and a social and ethics committee. The various aspects of corporate governance such as board composition, board

⁴⁰⁹ OECD *Guidelines on Corporate Governance of State-owned Enterprises* (2015) at 12, available at <http://www.oecd.org/corporate/guidelines-corporate-governance-SOEs.htm>, accessed on 12 September 2018.

⁴¹⁰ Ibid.

functioning, organisational reporting, disclosure of material information and risk management are instrumental in realising the values of transparency and accountability.⁴¹¹

First, power that lacks accountability invites abuse.⁴¹² An accountability regime has six key attributes, namely:

Who is accountable to whom; what they are liable to be called to account for; through what process accountability is to be assured; by what standard the accountable behaviour is to be judged; and what the potential effects are of finding that those standards have been breached.⁴¹³

Secondly, closely linked to accountability is transparency. Transparency refers to the accessibility of necessary information about the performance, financial position, opportunities, governance and risk of a company. Transparency is an essential part of corporate governance as it allows the governing body to assess the overall position of the company and take critical management decisions.⁴¹⁴ Enhanced transparency and viable corporate governance keep managers from stealing.⁴¹⁵ Not all SOEs have solid transparency that allows effective monitoring or an independent audit. Indeed, a typical issue of SOEs is the absence of transparency in the appointment of board members as well as management of SOEs in general, yet transparency is a cornerstone of any government reform. Transparency provides basis for accountability and raises the protection against self-serving behaviour.⁴¹⁶

Although the values of corporate governance are very clear and the benefits of applying corporate governance principles speak for themselves, seldom do SOEs follow these principles and this leads to the corporate failure, collapse of big companies and loss of jobs. In the next section international and South African corporate governance failures will be examined.

⁴¹¹ Rossouw op cit note 295 at 101, see also Caroline B Ncube 'Transparency and accountability under the new company law' (2010) *Acta Juridica* at 44-5.

⁴¹² Louis Lowenstein 'Financial transparency and corporate governance: You manage what you measure' (1996) 96 (5) *Columbia Law Review* at 1335.

⁴¹³ Jerry Louis Mashaw, 'Accountability and institutional design: Some thoughts on the grammar of governance in Michael Dowdle (ed) *Public Accountability: Designs, Dilemmas and Experiences* (2006) at 118.

⁴¹⁴ Benjamin E Hermalin & Michael S Weisbach *Transparency and Corporate Governance* at 19.

⁴¹⁵ Richard A Lambert 'Contracting theory and accounting ' (2001) 32 (2-3) *Journal of Accounting and Economics* at 3.

⁴¹⁶ *Ibid.*

3.8 Corporate governance failures internationally and in South Africa

Corporate governance scandals often reflect governance failures and can be defined as widely publicised incidents involving claims of managerial wrongdoing or disgrace or moral outrage on the part of one or more members of a company.⁴¹⁷ Typical corporate governance failures include poor leadership, the misrepresentation of financial figures and investments, corruption, a delay in disclosing or failure to disclose information, bribery, insider trading and any other activities that hurt the well-being of the company.⁴¹⁸ Internationally, the collapse of big and global corporations like Enron, WorldCom and Parmalat due to fraudulent activities and mismanagement, have put corporate governance in the limelight more than ever before.⁴¹⁹ Corporate governance failure in South Africa has been around corruption, mismanagement of resources, poor leadership, instability in executive leadership and conflict of interest. Some specific cases of corporate governance scandals will be discussed in the next segment.

3.9 International corporate governance failures

Although state-owned enterprises (SOEs) are entities that are wholly owned by the state unlike private companies that are owned by private actors, corporate governance practised in both SOEs and private companies internationally is the same since SOEs have the same appearance and behaviour of private companies and are created to function competitively in a free market like private companies.⁴²⁰ As a result, both often suffer similar corporate governance challenges.⁴²¹ For this reason, the corporate governance failures in global public companies discussed next are relevant as they examine corporate failures similar to those SOEs face and from which SOEs should take lessons. These poor corporate governance failures at major global companies are useful to demonstrate the severe consequences of poor corporate governance at a global scale and further indicate why accountability checks are important in companies regardless of the type or size of a company.

⁴¹⁷ Stefano Bonini & Diana Boraschi, (2010) 95 (2) Corporate scandals and capital structure' *Journal of Business Ethics* at 241.

⁴¹⁸ Alexander Dyck, Adair Morse & Luigi Zingales 'Who blows the whistle on corporate fraud' (2010) 765(6) *Journal Of Finance* at 2213.

⁴¹⁹ Patricia M Myers, & Douglas E Ziegenfuss 'Audit Committee pre-Enron efforts to increase the effectiveness of corporate governance' (2006) 65 (6) *Corporate Governance* at 49.

⁴²⁰ Roper & Orgad op cit note 326 at 694.

⁴²¹ Sokol op cit note 302 at 1730.

3.9.1 *Enron–United States of America*

Enron was one of the largest energy companies in the USA that went bankrupt in 2001.⁴²² Enron's chief executive officer (CEO) and chief financial officer (CFO) created and implemented business ideas that resulted in the collapse of Enron.⁴²³ The CEO and CFO came up with a plan to make the company appear to be financially stable to handle the growing company liabilities.⁴²⁴ The CFO established a way of hiding the financial losses of the company and other operations of the business, using what was called mark-to-market accounting.⁴²⁵ Using this technique, Enron would build an asset and immediately claim the projected profit on its books, even though it had not made any profits out of it so instead of taking the loss, the loss would go unreported.⁴²⁶ This type of accounting enabled Enron to hide the losses and make the company appear to be more profitable than it really was.⁴²⁷ In addition, Enron's board disregarded conflict of interest rules to allow its CFO to create private partnerships to do business with the company and its auditors provided ancillary services which undermined their independence and reporting ability.⁴²⁸ The Enron scandal drew attention to accounting and corporate fraud as its shareholders lost much funds in the four years leading up to its bankruptcy and its employees lost funds in pension benefits.⁴²⁹

In summary, the Enron failure involved both illegal and unethical activities: the neglect of managerial integrity capacity was, at its core, Enron's legal and financial problems.⁴³⁰ Enron and WorldCom's corporate governance failures led to a global revolution in corporate governance practices, prompting the enactment of the Sarbanes Oxley Act of 2002 which addresses corporate governance requirements and has improved criminal

⁴²² Joseph A Petrick & Robert F Scherer 'The Enron scandal and the neglect of management integrity capacity' (2003) 18 (1) *American Journal of Business* at 37.

⁴²³ Peter C Fusaro & Ross M Miller *What Went Wrong at Enron: Everyone's Guide to the Largest Bankruptcy in US History* (2002) at 8.

⁴²⁴ Curtis C Verschoor 'Were Enron's ethical missteps a major cause of its downfall?' (2002) 83(8) *Strategic Finance* at 22–28.

⁴²⁵ Troy Segal 'Enron scandal: The fall of a wall street darling' in Investopedia 20 September 2018, available at <https://www.investopedia.com/updates/enron-scandal-summary/>, accessed on 02 October 2018.

⁴²⁶ *Ibid.*

⁴²⁷ Charles M Elson 'Enron and the necessity of the objective proximate monitor.' (2004) 89 (2) *Cornell Law Review* at 500.

⁴²⁸ Rezart Dibra 'Corporate governance failure: The case of Enron and Parmalat' (2016)12 (16) *European Scientific Journal* at 285.

⁴²⁹ Segal op cit note 428 at 1.

⁴³⁰ Petrick & Scherer op cit note 425 at 37–50.

penalties for financial fraud.⁴³¹ The Enron failure in conjunction with other similar corporate scandals discussed below has resulted in a significant re-examination of the American system of corporate governance that focuses on the board of directors who are at the top of a company governance structure.⁴³²

3.9.2 Parmalat—Europe

The Parmalat group, a world leader in the dairy food business, collapsed and entered bankruptcy protection in December 2003 after acknowledging huge gaps in its financial statements.⁴³³ Funds seemed to have disappeared from the company's accounts and the collapse led to the questioning of the soundness of the Italian corporate governance system during the time.⁴³⁴ The problem started when Parmalat defaulted on a bond payment, prompting auditors and banks to investigate the group's financial statements.⁴³⁵ During the investigations, Italian prosecutors found that management simply created assets to offset billions in liabilities and forged accounts over a 15-year time span, compelling the organization into insolvency.⁴³⁶ Parmalat's financial statements were manifesting high levels of cash and debt, with the management being opaque and difficult to approach by analysts, investors and other stakeholders, just as was the situation with Enron. Parmalat's management, as seen above, was not approachable, and analysts' reports showed that the arrogance of the group's management was generally evident.⁴³⁷

The scandal remains one of the world's biggest corporate scandals. The United States of America's Security Exchange Commission (SEC)⁴³⁸ described the scandal as one of

⁴³¹ Megan Connell *The Fall of Enron and the Creation of the Sarbanes-Oxley Act of 2002* (2017) at 15 available at http://digitalcommons.lasalle.edu/honors_projects/19 accessed on 05 May 2021, see also Rosemary Carlson 'The Enron Scandal That Prompted the Sarbanes-Oxley Act' (2009) available at <https://www.thebalancesmb.com/sarbanes-oxley-act-and-the-enron-scandal-393497> accessed on 05 May 2021.

⁴³² Elson op cit note 430 at 496.

⁴³³ Cecelia Carrara 'The "Parmalat" case ' (2006) 70 (3) *Rabels Zeitschrift für ausländisches und internationales Privatrecht / The Rabel Journal Comparative and International Private Law*.

⁴³⁴ Andrea Melis 'Corporate governance failure: To what extent is Parmalat a particularly Italian case?'(2005) 13 (4) *Corporate Governance An International Review* at 478.

⁴³⁵ 'How Parmalat went sour', *Bloomberg Businessweek* 12 January 2004 at 1, available at <https://www.bloomberg.com/news/articles/2004-01-11/how-parmalat-went-sour>, accessed on 3 October 2018

⁴³⁶ Ibid.

⁴³⁷ Guido Ferrarini & Paolo Guidici 'Financial Scandals and the role of private enforcement: The Parmalat's case.' (2005) *European Corporate Governance Institute* at 8-10, available at https://ecgi.global/sites/default/files/working_papers/documents/SSRN-id730403.pdf, accessed on 13 July 2018.

⁴³⁸ United States of America Security Exchange Commission (SEC) *Protecting Investors: Annual Report* (2003), available at <https://www.sec.gov/pdf/annrep03/ar03full.pdf>, accessed on 2 October 2018.

the largest corporate financial frauds to place in the modern day Italy, perpetuated by a weak corporate governance structure and process, a failure to exercise due professional care by auditors, as well as greed by its founder Calisto Tanzi and its top management team.⁴³⁹ The governance structure at Parmalat was weak, with a controlling shareholder who owned 51 per cent of Parmalat shares who simply took advantage of this weakness to further his own personal gain instead of furthering the interests of Parmalat.⁴⁴⁰ According to Italy's corporate governance principle, it is extremely important that some of the directors be independent of the controlling shareholders in instances when a group of shareholders control a company. Parmalat did not adhere to this critical corporate governance principle. The management simply ignored it.⁴⁴¹ Board members comprised mostly family members. Chair and CEO positions were not separated, both positions being held by one person.⁴⁴² Again, Parmalat's accountants, auditors and legal advisors failed to advise Parmalat appropriately.⁴⁴³

3.9.3 *WorldCom–United States of America*

WorldCom was a pre-eminent global telecommunications company (fourth ranked Fortune 500 company for telecom sector as per *Fortune* magazine, April 12, 2002 issue) operating in more than 65 countries.⁴⁴⁴ The corporate governance disaster at WorldCom did not occur overnight for WorldCom was unconsciously walking on the path of a disaster.⁴⁴⁵ When business started declining at WorldCom around 2000, the chief financial officer (CFO) decided to use accounting tactics called accrual releases to achieve targeted performance.⁴⁴⁶ The CFO instructed the controller and general accounting to handle any resistance from other managers in relation to these tasks.⁴⁴⁷ In addition, with the desire to build and protect his personal financial condition, the company's chief executive officer (CEO) since 1985 orchestrated fraud by showing continually growing net worth in order to avoid margin calls

⁴³⁹ Emmanuel Omondi Ogutu, 'Corporate failure and the role of governance: The Parmalat scandal' (2016) 11 *Journal of International Management and Information Technology* at 2247.

⁴⁴⁰ Ibid.

⁴⁴¹ Dibra op cit note 431 at 288.

⁴⁴² Melis op cit note 437 at 485.

⁴⁴³ Ibid at 482.

⁴⁴⁴ Anaf Sadat Ahmed *Summary of Accounting Scandal: WorldCom* (2002), available at http://www.academia.edu/18835601/Summary_of_WorldCom_Accounting_Scandal, accessed on 3 October 2018.

⁴⁴⁵ Satish C Pandey & Pramod Verma 'Worldcom Inc' (2004) 29 *Vikalpa: The Journal for Decision Makers* at 117.

⁴⁴⁶ Ibid at 118.

⁴⁴⁷ Susan Pulliam & Deborah Solomon 'How three unlikely sleuths exposed fraud at WorldCom' (2002) 1 *The Wall Street Journal* at 2.

on his own WorldCom stock that he had pledged to secure loans.⁴⁴⁸ The SEC launched a probe in March 2002 into how and why WorldCom had loaned its former CEO an amount of US\$400 million at a very low interest rate.⁴⁴⁹ The CEO used these loans to pay off his personal liabilities, most of which were secured by his WorldCom stocks.⁴⁵⁰ When his personal loan with the WorldCom had grown to US\$408 million he resigned and the new CEO took over WorldCom in 2002.⁴⁵¹ The new CEO was in a dire situation as the company had already shown significant imbalances since 1999: it was sinking under a US\$28 billion debt and he hoped to save WorldCom in accordance with ethical standards.⁴⁵² On May 9, 2002, rating agency Moody's downgraded WorldCom's ratings to junk status and in May 2002, another agency, Standard & Poor's, removed WorldCom from its 500 index.⁴⁵³ The share price of WorldCom which was \$62 in 1999 fell to 7c in 2002.⁴⁵⁴ WorldCom filed for bankruptcy in July 2002, its shareholders lost their investments, employees lost their jobs and creditors lost their funds.⁴⁵⁵

The setting in which this occurred was marked by a serious corporate governance failure. WorldCom's fast paced growth had developed an individualistic culture where loyalty to people was appreciated and rewarded more than the loyalty to the company and the company's human resources department never objected to such special rewards.⁴⁵⁶ The culture which was rooted from top to the bottom was that no one should question plans, decisions and actions of top bosses.⁴⁵⁷ Some company employees who questioned the irregularities, the company's policy and the behaviour of the CEO and the CFO were silenced.⁴⁵⁸ Corruption, intimidation and the firing of whistle-blowers or those who speak out, the rewarding of those loyal to top management, arrogance and unapproachable behaviour by those in top management as well as fraud and corruption are all corporate

⁴⁴⁸ Stefano Theodore F Stefano, 'WorldCom's failure: Why did it happen?' *Commerce Times*, 19 Aug 2005 available at <https://www.ecommercetimes.com/story/45542.html>, accessed on 8/10/October 2018.

⁴⁴⁹ Pandey & Verma op cit note 448 at 117.

⁴⁵⁰ Gil Sadka 'The economic consequences of accounting fraud in product markets: Theory and a case from the US telecommunications industry (WorldCom)' (2006) 8 (3) *American Law and Economics Review* at 465.

⁴⁵¹ Pandey & Verma op cit note 448 at 118.

⁴⁵² Beresford, Katzenbach, & Rogers *Report of Investigation by the Special Investigative Committee of the Board of Directors of WorldCom, Inc* (2003), available at <https://www.sec.gov/Archives/edgar/data/723527/000093176303001862/dex991.htm>, 15 October 2018.

⁴⁵³ Aigbe Akhigbe, Anna D. Martin & Ann Marie Whyte 'Contagion effects of the world's largest bankruptcy: the case of WorldCom' (2005) 45 (1) *The Quarterly Review of Economics and Finance* at 51.

⁴⁵⁴ Mishra & Rani op cit note 297 at 84.

⁴⁵⁵ Bob Lyke & Mark Jickling 'WorldCom: The accounting scandal' (2002) 29 *Congressional Research Service Report for Congress* at 4. See also Pulliam op cit note 456 at 1.

⁴⁵⁶ Pandey & Verma op cit note 448 at 117.

⁴⁵⁷ Pulliam op cit note 456 at 2.

⁴⁵⁸ Amanda Ripley 'Cynthia Cooper: The Night Detective' *TIME* December 2002, available at <http://content.time.com/time/subscriber/article/0,33009,1003990,00.html> accessed on 23 June 2021.

failures that contributed to the collapse of the corporate giants discussed in this section. Similar corporate failures have occurred in South African SOEs as discussed in the next segment of the chapter.

3.10 Corporate governance failures in South African SOEs

Major South African SOEs such as Eskom, South African Airways (SAA), Transnet and the South African Broadcasting Corporation (SABC) have been in the news regularly over the past few years for various corporate scandals, involving either allegations or proven instances of bribery and corruption at board and top management level, ineffectual or incompetent leadership, state interference, secret deals and the like. Boardroom intrigues, financial irregularities and serial breaches of even the most basic corporate governance codes and rules are now commonplace.⁴⁵⁹ As a result of the gross corporate governance failures that are at the expense of taxpayers, it has been suggested that certain SOEs that have been involved in poor governance and corruption and are struggling to operate should be fully or partially privatised.⁴⁶⁰ Privatisation of SOEs, however, leads to the neglect of social objectives such as equality, employment creation and affordability of basic needs. In this segment, four SOEs that have been affected by corporate governance misconduct are discussed. These entities are Eskom, SAA, Passenger Railway Agency of South Africa (PRASA) and SABC.

3.10.1 Eskom

Eskom Holdings Limited (Eskom) is the national power company in South Africa. It is a hundred per cent state-owned enterprise that exists as a statutory juristic body.⁴⁶¹ Eskom is a critical SOE which is responsible for ensuring that the entire electrical energy needs of South Africa are met, economically and efficiently.⁴⁶² This, however, the power utility has failed to do and there have been many governance failures hindering it from providing sufficient service delivery.

⁴⁵⁹ Vishnu Padayachee 'King IV is here: Corporate governance in South Africa revisited' (2017) 66 *New Agenda: South African Journal of Social and Economic Policy*.

⁴⁶⁰ James de Villiers 'These are three ways SAA could go bust' *Business Insider SA* 15 November 2019, available at <https://www.businessinsider.co.za/south-african-airways-saa-strike-numsa-retrenchments-3000-airline-pravin-gordhan-tito-mboweni-2019-11>, accessed on 20 November 2019.

⁴⁶¹ A juristic body is an entity that existed by an Act of Parliament, in this case, the Eskom Act No 40 of 1987.

⁴⁶² Public Protector of South Africa *State of Capture... . Report No 6 of 2016/17* (hereafter *Public Protector State of Capture*) at 49, available at <https://cdn.24.co.za/files/Cms/General/d/4666/3f63a8b78d2b495d88f10ed060997f76.pdf>, accessed on 11 October 2018.

First, Eskom's corporate governance problems have continued for more than a decade.⁴⁶³ Because of its inability to properly anticipate and plan for electricity demand in the early 2000s this led to load-shedding and tariff hikes significantly above inflation, making South Africa's electricity very expensive.⁴⁶⁴ Average electricity tariffs went up by 170 per cent in 2007 and 2015 respectively.⁴⁶⁵ Meanwhile, Eskom has been the largest beneficiary of government largesse, with R350m in government guarantees. Its board was singled out in the Public Protector's *State of Capture Report* as being irregularly constituted and having failed dismally in its fiduciary duties. It was recommended that the board be dissolved.⁴⁶⁶ Other issues include the scandalous cost of and time overruns on new power stations, Medupi and Kusile.⁴⁶⁷

Secondly, the blackout emergency in 2014 which cost South Africa about R300 billion was allegedly arranged to benefit certain companies.⁴⁶⁸ The Eskom manager entrusted with more than R10 billions of emergency coal during the 2008 power crisis, negotiated several irregular contracts including one with a friend and resigned shortly after an investigation was started.⁴⁶⁹ An investigation done by the AmaBhungane Centre for Investigative Journalism found that the Gupta family had received contracts worth R11.7 billion from Eskom to supply coal between 2014 and 2017.⁴⁷⁰

Thirdly, in 2017, the high court ruled that the nuclear deal with Russia signed by the government was unlawful.⁴⁷¹ This is after the government had insisted on unaffordable nuclear power generation options for South Africa, despite the falling price of alternate energy solutions. There are some who believe that a nuclear deal with Russia would have greatly benefited some members of the ruling party.⁴⁷² Fourthly, Eskom wanted R24 million in 2017 to buy 9 212 operator-visitor chairs. This was over and above an existing R72.7

⁴⁶³ Naidoo op cit note 25 at 363.

⁴⁶⁴ McGregor op cit note 359.

⁴⁶⁵ John Kane Berman 'Privatisation or bust @Liberty: *The Policy Bulletin of the Institute of Race Relations* (2016) 4(27).

⁴⁶⁶ Public Protector, *State of Capture* op cit note 465.

⁴⁶⁷ Chris Yelland 'Medupi, Kusile and the massive cost/time overrun' *Daily Maverick*, 7 July 2016, available at <https://www.dailymaverick.co.za/article/2016-07-07-medupi-kusile-and-the-massive-costtime-overrun/>, accessed on 11 October 2018.

⁴⁶⁸ Bobby Jordan 'Revealed: How Eskom load-shedding was a get rich scheme' *Rand Daily Mail, Business Live* 15 February 2017, available at <https://www.businesslive.co.za/rdm/business/2017-02-15-revealed-how-eskom-load-shedding-was-a-get-rich-scheme/> accessed on 12/10/2018.

⁴⁶⁹ Ibid.

⁴⁷⁰ 'Gupta leaks released to journalists worldwide' *Mail & Guardian* 10 November 2017 available at <https://mg.co.za/article/2017-11-10-guptaleaks-released-to-journalists-worldwide/>, accessed on 14 May 2018, accessed on 10 October 2018.

⁴⁷¹ *Earthlife Africa Johannesburg v Minister of Energy* 2017 (5) SA 227 (WCC).

⁴⁷² Kane-Berman op cit note 468.

million contract signed in 2013, to supply office and soft chairs. Suspicious of the latest request, the National Treasury conducted a physical inspection of Eskom's offices.⁴⁷³

A fifth point is that in the wake of a scandal surrounding the Gupta-linked company Trillian Holdings Pty Ltd in 2017, the Eskom chief financial officer (CFO) was suspended.⁴⁷⁴ Three executives followed, reportedly over their involvement in payments made to Trillian in a controversial contract with global consulting company McKinsey & Company.⁴⁷⁵ McKinsey, United Kingdom Public Relations Firm Bell Pottinger, International audit firm KPMG and German's SAP were drawn into the Gupta saga and allegations of state capture as information continued to emerge that show unethical behaviour in work done for businesses linked to Gupta continued.⁴⁷⁶ McKinsey was accused of having subcontracted 30 per cent of its business with Eskom to the Gupta-linked Trillian Firm, in what critics say essentially amounted to a bribe to secure the contract for McKinsey after the Gupta brothers had influenced the giving of the contract to McKinsey by Eskom.⁴⁷⁷ This contract resulted in McKinsey Consultancy earning R1.6 billion for advising Eskom. This was after Eskom deliberately ignored at least four times in two years advice by its own legal team, not to go ahead with the controversial McKinsey contract.⁴⁷⁸ One non-executive director at Trillian Firm who is a businessman and former Minister of Human Settlements, was the biggest earner at the firm, getting paid R500 000 per month and continued to collect his salary for eight months after the Eskom-Trillian Firm corporate failures were exposed and upon resignation, cited lack of knowledge of the corporate failures.⁴⁷⁹

Lastly, as the scandals at Eskom continued, Eskom suspended its acting chief executive officer (CEO) in August 2017, for he faced disciplinary action over allegations of

⁴⁷³ Prega Govender & Sabelo Skiti 'Eskom in new R100 million office chair scandal' *Sunday Times* 8 October 2017, available at <https://www.timeslive.co.za/sunday-times/news/2017-10-07-eskom-in-new-r100-million-office-chair-scandal/>, accessed on 10 October 2018.

⁴⁷⁴ Gia Nicolaidis 'Eskom suspends 3 more executives over Trillian Scandal-report' *Eye Witness News* (EWN) October 2017, available at ewn.co.za/2017/10/02/first-on-ewn-eskom-suspends-3-more-executives-over-trillian-scandal, accessed on 10 November 2018.

⁴⁷⁵ Ibid.

⁴⁷⁶ Paul Burkhardt & Renée Bonorchis 'Bell Pottinger, McKinsey, KPMG-big names tarnished by the Guptas' *Business Day*, 14 September 2017, available at <https://www.businesslive.co.za/bd/national/2017-09-14-bell-pottinger-mckinsey-kpmg--big-names-tarnished-by-the-guptas/>, accessed on 11 October 2018.

⁴⁷⁷ 'McKinsey denies involvement in Gupta-linked businesses' *Mail & Guardian* 20 September 2017, available at <https://mg.co.za/article/2017-09-20-mckinsey-denies-involvement-in-gupta-linked-businesses>, accessed on 10 October 2018.

⁴⁷⁸ Ibid.

⁴⁷⁹ Jessica Bezuidenhout 'Red flags and Tokyo Sexwale's Trillian oblivion' *Scorpio/Daily Maverick* 27 October 2020 available at <https://www.dailymaverick.co.za/article/2020-10-27-red-flags-and-tokyo-sexwales-trillian-oblivion/> accessed on 07 November 2020.

conflict of interest.⁴⁸⁰ He was accused of awarding a contract without following Eskom's supply chain management policy to Impulse International where his stepdaughter was a shareholder and director in 2018 after his name was cleared in the disciplinary hearings but was suspended again in January 2018 when new allegations against him emerged⁴⁸¹ The CEO resigned in February 2018.⁴⁸² Lastly, Eskom suspended its chief information officer in February 2018 over his role in the Eskom-McKinsey contract.⁴⁸³ The chief information officer who was acting CEO for Eskom at the time of the Eskom-McKinsey contract later resigned in March 2018.⁴⁸⁴ Other SOEs have not been spared from the corporate governance failure either, and these are discussed next.

3.10.2 South African Airways (SAA)

South African Airways (SAA) has been kept alive by continuous infusions of funds from the government. SAA has received billions of rand in taxpayer funded bailouts.⁴⁸⁵ Despite the corporate failures and strong public sentiment that no company should be too big to fail, the bailouts continued and the SAA bill in 2016 stood at more than R30 billion.⁴⁸⁶ First, SAA grounded all domestic, regional and international flights on 15 November 2019 following a strike by its employees. The employees demanded an eight per cent salary increase, no retrenchments and the insourcing of employees.⁴⁸⁷ The stoppage of flights cost R50 million per each day of the strike and R200 million in total.⁴⁸⁸ SAA needed R2 billion by the end of

⁴⁸⁰ Kyle Cowan & Stephen Hofstatter 'Eskom's Koko breached suspension conditions, phone records show' *TimesLive* 24 January 2018, available at <https://www.timeslive.co.za/politics/2018-01-24-eskoms-koko-breached-suspension-conditions-phone-records-show/>, accessed on 10 October 2018.

⁴⁸¹ Ibid.

⁴⁸² Katherine Child 'Koko resigns from Eskom' *TimesLive* 16 February 2018, available at <https://www.timeslive.co.za/news/south-africa/2018-02-16-koko-resigns-from-eskom/>, accessed on 06 June 2020.

⁴⁸³ Gia Nicolaidis 'Eskom explains suspension of executive Sean Maritz' *EWN* 1 February 2018, available at <https://ewn.co.za/2018/02/01/eskom-explains-suspension-of-executive-sean-maritz>, accessed on 09 October 2018.

⁴⁸⁴ Sabelo Skiti 'Disgraced Eskom executive Sean Maritz resigns', *Timeslive* 1 March 2018, available at <https://www.google.com/search?safe=active&source=hp&ei=GIDAW8bdIsz7kwWZyJqQAg&q='Disgraced+Eskom+executive+Sean+Maritz+resigns>, accessed on 10 October 2018.

⁴⁸⁵ Naidoo op cit note 25 at 363.

⁴⁸⁶ Naledi Mashishi 'South Africa's SAA workers start strike that could cripple the airline' *Reuters* 15 November 2019, available at <https://www.reuters.com/article/us-safrica-saa/south-africas-saa-workers-start-strike-that-could-cripple-airline-idUSKBN1XP0L0>, accessed on 07 June 2020.

⁴⁸⁷ Veronica Mokhoali 'SAA passengers urged to re-book or reroute flights as strike continues' *EWN*, 16 November 2019, available at <https://ewn.co.za/2019/11/16/saa-passengers-urged-to-rebook-flights-or-reroute-amid-strike>, accessed on 21 November 2019.

⁴⁸⁸ Tanisha Heiberg 'Pravin Gordhan to meet Unions to try end SAA strike' *Business Live*, 19 November 2019, available at <https://www.businesslive.co.za/bd/national/labour/2019-11-19-pravin-gordhan-to-meet-unions-to-try-to-end-saa-strike/>, accessed on 21 November 2019.

the month to stay afloat.⁴⁸⁹ Secondly, the tender scandal by an SAA employee in 2016 who, after successfully falsifying documents and forging the signature of SAA senior executives, managed to manipulate the awarding of a lucrative tender after which she allegedly went on a shopping spree, acquiring several properties, an expensive vehicle and a top-of-the-range motorcycle.⁴⁹⁰ The R13.6 million tender was awarded without due procurement process being followed.⁴⁹¹ The employee violated the airline's procurement process by not presenting the tender documents to the bid adjudication committee at SAA.⁴⁹² According to a report in the *Sunday Independent*, she was given a written warning only.⁴⁹³ While the corporate governance failures at Eskom and SAA solely involved finances, the failures at PRASA and SABC as discussed next went beyond finances to the falsifying of educational qualifications by the executive members.

3.10.3 Passenger Rail Agency of South Africa (PRASA)

The public protector's investigative report *Derailed* exposed the corruption at the passenger rail agency.⁴⁹⁴ The report recommended a forensic investigation into 200 questionable contracts awarded since 2012, each worth more than R10 million.⁴⁹⁵ Dodgy tenders and irregular expenditure of some R24 billion have been the subject of various investigations.⁴⁹⁶ The most notorious of these was the procurement of trains from a Spanish supplier through an intermediary (Swifambo Rail Leasing) for R3.5 billion.⁴⁹⁷ Swifambo Rail Leasing appeared to be just a front for the Spanish supplier with questionable broad-based black economic empowerment certification (BEE) and no previous involvement in the rail industry

⁴⁸⁹ Ibid.

⁴⁹⁰ Steve Motale 'SAA staffer in R13.6m tender scandal' *IOL* 21 May 2017 available at <https://www.iol.co.za/news/politics/exclusive-saa-staffer-in-r136m-tender-scandal-9253018>, accessed on 08 October 2018.

⁴⁹¹ Ibid.

⁴⁹² Ibid.

⁴⁹³ Tebogo Tswane 'SAA probing tender scandal linked to employee' *EWN*, 22 May 2017, available at <https://ewn.co.za/2017/05/22/saa-probes-scandal-linked-to-employee>, accessed on 12 October 2018.

⁴⁹⁴ Public Protector of South Africa *Derailed: Report on Investigation into Allegations of Maladministration Relating to Financial Mismanagement, Tender Irregularities and Appointment Irregularities against Passenger Rail Agency of South Africa (PRASA) Report: No 3 of 2015/16* (2015) (hereafter *Public Protector Derailed*), available at https://www.gov.za/sites/default/files/PUBLIC_PROTECTOR_INVESTIGATION_REPORT_NO_3_OF_2015_16_PRASA_24082015a.pdf, accessed on 13 October 2018.

⁴⁹⁵ Ibid at 66.

⁴⁹⁶ Naidoo op cit note 25 at 364.

⁴⁹⁷ Ibid.

before landing the deal.⁴⁹⁸ In what the report refers to as ‘an extremely disturbing feature’, the tender specifications appear to have been tailored to suit the products supplied by Swifambo.⁴⁹⁹ The trains were too high for the South African rail network and they communicated only in Spanish.⁵⁰⁰ The former chief executive officer (CEO) and engineer at Prasa (who later turned out to have faked his qualifications) at the time of the deal, resigned in the wake of the scandal, amidst ongoing protestations.⁵⁰¹ One wonders, were proper evaluation process not available for a major capital project and where was the board?⁵⁰²

3.10.4 South African Broadcasting Corporations (SABC)

The report of the former Public Protector into events of the South African Broadcasting Corporation, “*When Governance and Ethics Fail*” and subsequent media reports, describe an organisation brimming with political deployees⁵⁰³ and a former under-qualified chief operating officer (COO) who insisted on a 70 per cent positive rating for news stories.⁵⁰⁴

The former Public Protector found in her 2014 report that the SABC chief operating officer (COO) had lied about his matric certificate, that the COO was dishonest and had been allowed to operate above the law.⁵⁰⁵ It recommended that SABC board take corrective action against him for lying about his qualifications, raising his salary from R1.5 million per year to R2.4 million and for irregularly and rapidly increasing the salaries of other

⁴⁹⁸ Pauli van Wyk ‘Prasa: Swifambo was a front for R2.6 billion locomotive contract’ *Daily Maverick* 4 July 2017, available at <https://www.dailymaverick.co.za/article/2017-07-04-prasa-swifambo-was-a-front-for-r2-6-billion-locomotive-contract/>, accessed on 13/10/2018.

⁴⁹⁹ Naidoo op cit note 25 at 364.

⁵⁰⁰ Ibid.

⁵⁰¹ Barry Bateman ‘Prasa’s head of engineering lied about qualifications’ *EWN*, 18 July 2015, available at <https://ewn.co.za/2015/07/18/Prasas-head-of-engineering-lied-about-qualifications>, accessed on 10 October 2018.

⁵⁰² Liesl Peyper ‘What SAA paid departing CEOs and CFOs’ *Fin 24* 12 July 2016, available at <https://www.fin24.com/Companies/Industrial/what-saa-paid-departing-ceos-and-cfos-20160712>, accessed on 11 October 2018.

⁵⁰³ Government’s view on key appointments to SOEs is that these should be done through the ANC’s deployment committee.

⁵⁰⁴ Greg Nicolson ‘Decoding Hlaudi: the Public Protectors’ SABC Report’ *Daily Maverick* 17 February 2014, available at <https://www.dailymaverick.co.za/article/2014-02-17-decoding-hlaudi-the-public-protectors-sabc-report/>, accessed on 12 October, 2018 at 3.

⁵⁰⁵ Public Protector of South Africa *A Report of the Public Protector in Terms of Section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 and Section 8(1) of the Public Protector Act, 1994 “When Governance and Ethics Fail”*: A Report on an Investigation into Allegations of Deficiencies, Systemic Corporate Governance Maladministration, Abuse of Power, and The Irregular Appointment [sic] of Mr. Hlaudi Motsoeneng by the South African Broadcasting Corporation (SABC) Report No 13 of 2013/2014, (hereafter Public Protector “*When Governance and Ethics Fail*”) at 2–9, available at https://www.gov.za/sites/default/files/gcis_document/201409/when-governance-fails-report-exec-summary17feb2014.pdf, accessed on 13 October 2018.

staff members.⁵⁰⁶As a result, in 2014, Democratic Alliance (DA) launched a court application calling for the COO's suspension pending a disciplinary hearing and to try to force the SABC to implement the public protector's report that was legally binding.⁵⁰⁷ A disciplinary hearing ordered by the court into the then SABC COO's misconduct, cleared him of any wrongdoing for the SABC board said it could not charge the COO with dishonesty or misrepresentation of his qualification because of affidavits by the staff members in his appointment supporting the irrelevance of the matric qualification to the COO's employment.⁵⁰⁸ The board further said the COO was cleared of all charges during the hearing and reappointed him as the Group Executive of corporate affairs.⁵⁰⁹

Despite the disciplinary hearing, the corporate governance failures at SABC persisted, with allegations of censorship as journalists who dared to question the editorial policy not to show violent protests (the reality of what was happening in the country at that time) were summarily removed from their jobs.⁵¹⁰ The SABC board appeared to have no ability or willingness to hold the former COO and other executives to account.⁵¹¹ These continuous occurrences at the SABC triggered resistance from civil society organisations. In response to the continuing corporate failures at the SABC and the lack of effective measures taken against the COO, the Right-to Know Campaign held protests outside the SABC offices and a current affairs producer, presenter and the SABC economics editor disagreed with the decision not to cover the demonstrations. Three days later she and others were suspended for failing to agree with directive.⁵¹² The suspended employees were summoned to a disciplinary hearing and SABC laid further disciplinary charges against them.⁵¹³ These charges came the same day that the Independent Communications Authority of South Africa (ICASA) Complain and Compliance Committee ruled that the protests policy was unlawful.

⁵⁰⁶ Charl Blignaut & Lloyd Gedye 'Hlaudi's R600-million shocker' *News 24* in partnership with *City Press* November 2016, available at <https://www.news24.com/SouthAfrica/News/hlaudis-r600m-shocker-20161119>, accessed on 11 October 2018.

⁵⁰⁷ *Democratic Alliance v South African Broadcasting Corporation* 2016 (3) SA 468 (WCC).

⁵⁰⁸ *Ibid.*

⁵⁰⁹ Matuma Letsoalo 'SABC blatantly ignores Public Protector's Report' *Mail and Guardian* 18 March 2016, available at <https://mg.co.za/article/2016-03-17-sabc-blattantly-ignores-public-protectors-report>, accessed on 14 October 2018.

⁵¹⁰ Ed Herbst 'Media transformation and employee rights' *The Media Online*, 27 June 2016, available at <http://themedialonline.co.za/2016/06/media-transformation-and-employee-rights/>, accessed on 13 October 2018.

⁵¹¹ Greg Nicholson 'SABC: Labour court battle won, but the war is still on' *Daily Maverick* 27 July 2017, available at <https://www.dailymaverick.co.za/article/2016-07-27-sabc-labour-court-battle-won-but-the-war-is-still-on/>, accessed on 13 October 2018.

⁵¹² Aurelie Kalenga 'SABC journos suspended after disagreement on protest footage policy' *EWN* 24 June 2016, available at <https://ewn.co.za/2016/06/24/SABC-journalists-suspended-for-overriding-editorial-decision>, accessed on 12 October 2018.

⁵¹³ Nicholson op cit note 514.

Despite ICASA's ruling, a request from lawyers to cease the disciplinary action, a pending Constitutional Court challenge and an imminent Labour Court application, the SABC fired eight journalists who criticised the decisions taken at the SABC.⁵¹⁴ The SABC was already accused of showing recklessness in implementing its protest policy which was not backed up by consultation, and was facing broad claims of censoring the news ahead of the local government elections.⁵¹⁵

Civil society called for the Parliament as early as 2016 to dissolve the SABC board for failing in its fiduciary duties and causing corporate failure.⁵¹⁶ This followed the scandal that the then SABC chief operating officer had been paid a bonus of R11.4 million for selling the public broadcaster's archives to Multichoice for R500 million. The full bonus that was to be paid to the COO for the Multichoice deal was 33 million over a period of three years.⁵¹⁷ The bonus which was authorised by the subcommittee of the board was irregular and against the Public Finance Management Act.⁵¹⁸ The labour court case instituted by some of the aggrieved SABC employees revealed in 2016 how the then SABC COO — who later became group executive of corporate affairs — allegedly ignored governance protocols to seize control of the television broadcast service.⁵¹⁹

In addition, a *City Press* investigation found that the executive of corporate affairs allegedly traumatised many SABC employees, including former SABC group executive for television, and made staff report to him only instead of to their line managers.⁵²⁰ He then proceeded to set up a process to commission R600 million worth of local TV shows and, for these, he brought in chosen producers, many of them celebrity actors, to the SABC.⁵²¹ The flaunting of legislated procedures contributed to the massive loss at the SABC between 2015 and 2016. This was confirmed by the Auditor-General who revealed that the broadcasters' reports of unauthorised, irregular, fruitless and wasteful spending amounting to R421 million for 2015 to 2016 was massively understated and that in fact, the figure amounted to R798.2 million.⁵²² The last straw came in 2016 when the Western

⁵¹⁴ Ibid.

⁵¹⁵ Ibid.

⁵¹⁶ Siyabonga Mkhwanazi, 'SABC board under fire amid scandal' *IOL South Africa* 26 September 2016, available at <https://www.iol.co.za/dailynews/news/sabc-board-under-fire-amid-scandal-2072625>, accessed on 10 October 2018.

⁵¹⁷ Ibid.

⁵¹⁸ Bignaut & Gedye op cit 509.

⁵¹⁹ *Solidarity & others v South African Broadcasting Corporation* 2016 (6) SA 73 (LC).

⁵²⁰ Bignaut & Gedye op cit note 509.

⁵²¹ Charl Bignaut, 'Hlaudi fires TV boss' *City Press* 31 July 2016, available at <https://citypress.news24.com/News/hlaudi-fires-tv-boss-20160730-2>, accessed on 11 October 2018.

⁵²² Ibid.

Cape High court ruled that the new appointment of the former COO as the group executive of corporate affairs was unlawful and irrational and that the former SABC COO was not entitled to hold any position in the SABC.⁵²³

3.11 Conclusion

The emphasis throughout this chapter has been on the importance of corporate governance in SOEs. It became clear that failure by SOEs to adhere to corporate governance principles is mostly due to ignorance of the existence of these principles, as well as a failure to hold accountable those who have breached corporate governance principles. First, the ignorance of corporate governance principles is sometimes because the board and CEOs in SOEs are appointed based on political affiliation rather than qualifications, since the government is the sole shareholder in SOEs and, as result, individuals without appropriate qualifications and relevant experience are appointed to top positions that are critical to the performance of the SOE.

Although politicians are needed on the board because it is the government that makes policies, SOEs are very critical to the economy and therefore should comprise a mix of people with effective skills as it is this that underpins the performance of SOE boards and their accountability. This will eliminate the problem of instability in leadership that South African SOEs have been facing, including the vexing issue of excessive pay or rewards given to those in senior management, despite SOEs' underperformance and mismanagement of resources or wasteful expenditure, as well as conflicts of interest and poor financial accountability.

Lastly, the existence of corporate governance and public-sector regulations without adherence is pointless. SOEs need to comply with the existing measures that regulate them. Furthermore, King IV which is the main tool that addresses corporate governance in South Africa is not compulsory. It only becomes binding when applied through case law. This creates a vacuum in South African corporate governance. It is necessary that King IV be made a law as this will bring certainty. Although the argument behind not making King IV a law is that organisations are different and face different dynamics, making the King IV Code a law would be favourable to organisations since the South African courts are already using King IV Code as the required standard of care in their rulings against directors and some

⁵²³ *DA v SABC* 2016 (3) SA 468 (WCC).

practises of good governance have been legislated.⁵²⁴ To avoid these anticipated challenges that may come with legislating King IV, there can always be a provision that where King IV as a law is in conflict with other legislation, the other legislation prevails.

The next chapter discusses how specific civil society organisations and non-profit agencies have used various legal measures in their work. These include tools such as legal provisions and case law, legal strategies such as litigation, advocacy, protests, engagement and exposure, and other channels such as publication of materials and investigations. All these have been used to promote corporate governance as well as to ensure that those responsible for the contravention of corporate governance principles are held accountable.

⁵²⁴ Abishek Maharaj & Justine Combrink ‘King IV — the why, the what and the what now’ *Mazars*, available at <https://www.mazars.co.za/Home/News-Insights/Articles-Studies-and-White-Papers/Article-Archives/KING-IV-THE-WHY-THE-WHAT-AND-THE-WHAT-NOW>, accessed on 11 October 2018.

CHAPTER 4: LEGAL PROVISIONS AS AN ACCOUNTABILITY TOOL FOR CIVIL SOCIETY ORGANISATIONS AGAINST POOR GOVERNANCE IN STATE OWNED ENTERPRISES

4.1 Introduction

As indicated earlier in chapter one, this research considers how civil society organisations (CSOs) use legal provisions to advance corporate governance in SOEs. To explain and clarify the contribution that CSOs have made to the corporate governance of state-owned enterprises (SOEs), the concept of corporate governance and its theories were defined in the previous chapter. The focus then was on corporate governance in SOEs as they are different entities from private companies. The importance of corporate governance in SOEs was explained, as were the failures and consequences of poor corporate governance in international corporations and South African SOEs.

Those SOEs that have been implicated in poor corporate governance as well as the corporate failures in such SOEs were discussed in detail in the previous chapter. In this chapter, the discussion is on how CSOs have contested such poor governance using various legal provisions and other measures. In so doing, the chapter discusses statutory provisions and other legal measures that CSOs have utilised to confront poor corporate governance and corruption in South Africa's public sector. First, the legal framework for the regulation of CSOs is described. Secondly, provisions that enable CSOs to contest poor governance and corruption as well as hold public sector officials are explored. This segment is illustrated with case studies of CSO activism against corporate governance failure or corruption. Case studies also highlight CSO allies in these campaigns, such as opposition political parties. Secondly, recent CSO activism — the focus of this research — has been informed by the Public Protector's investigations and findings on SOEs which unveiled damaging instances of poor governance, corruption and maladministration. As a result, the recent works and findings of the Public Protector are discussed as the background to current CSO engagement with the public sector.

4.2 Legal provisions that regulate and authorise the activities of CSO

The current South African legal framework does not present many obstacles for CSOs operating in South Africa. South African laws are generally supportive of CSOs. These laws

include, among others, the Constitution of the Republic 1996, the Nonprofit Organisations Act 1997, the Promotion of Access to Information Act 2000 and the Promotion of Administrative Justice Act 2000, the Companies Act 2008, the Companies Amendment Act 2011 and the Trust Property Control Act 57 of 1988. Other sources include common law, non-binding regulations or soft law such as the *King IV Report on Corporate Governance for South Africa 2016* and the Gauteng Social Development Guidelines for the selection of board members for non-profit organisations as well as other laws. The relevant provisions of the key laws are discussed in this section.

4.2.1 Nonprofit Organisations Act of 1997

Civil society organisations are regulated by the Nonprofit Organisations Act 71 of 1997. This Act repealed the Fundraising Act of 1978, used by the apartheid regime to suppress the fundraising activities of struggle CSOs. Registration under the NPO Act is voluntary, and an organisation is not precluded from operating on grounds of non-registration under the Act. The main advantage of registration under the NPO Act is that it affords an organisation with credible legal identity which is important for qualifying for government grants and fundraising.⁵²⁵

The Nonprofit Organisations Act defines a 'nonprofit organisation' as 'a trust, company or other association of persons established for a public purpose; and the income of and property of which are not distributable to its members or office-bearers except as reasonable compensations for services rendered'.⁵²⁶ The term 'nonprofit organisations' to describe civil society associations gained recognition with policy makers and nonprofit sector practitioners because of the uncertain complexities of differentiating between various kinds of civil society organisations, most notably nongovernmental organisations (NGOs) and community-based organisations (CBOs).⁵²⁷

The Act was enacted as part of the legal framework to create an enabling environment for the non-profit sector. Together with the South African Constitution which is the cornerstone of South African democratic state, the Act specifically provides an operational framework for the non-profit sector in South Africa. The Act states that its aim is to encourage and support NPOs in their contribution towards a diverse community in the

⁵²⁵ A Ordor 'Exploring civil-society partnerships in enforcing work in South Africa' in Deidre McCann, Sangheon Lee & Patrick Belser et al (eds) *Creative Labour Regulations: Indeterminacy and Protection in an Uncertain World* (2014) at 235.

⁵²⁶ Nonprofit Organisations Act 71 of 1997 s 1(1).

⁵²⁷ Swilling & Russell op cit note 112.

country, create an environment where NPOs should successfully conduct their mandate as well as encourage NPOs to practice transparency and accountability.⁵²⁸ The Act further states that the state must determine the execution of its policies in a way that advances, supports and upgrades the capacity of NPOs perform their functions⁵²⁹

4.2.2 *The Constitution of 1996*

The South African government has a duty in terms of section 153 the Constitution to ensure a reasonable service delivery to the citizens as well as a government that is accountable and transparent.⁵³⁰ Should the state fail to provide these services, CSOs as a citizen's representative can intervene in many ways, for example, as a service provider or as a watchdog for the citizens. CSOs' representative capacity and intervention is enabled by different legal provisions, for example section 38 of the Constitution provides that the citizens' representative can approach the court to enforce the Bill of Rights where the rights of the citizens are violated. In *SATAWU v Garvas*, the South African Transport and Allied Workers Union (SATAWU) organised a gathering of its members in Cape Town to register their employment concerns. During the gathering, property was destroyed including private property. The owners of the property claimed damages against SATAWU and SATAWU challenged the validity of the law that regulates public gathering in section 11 of the Regulation of Gatherings Act of 1993. The court said this about civil society representation:

In democracies like ours, which give space to civil society and other groupings to express collective views common to their members, these rights are extremely important. It is through the exercise of each of these rights that civil society and other similar groups in our country are able to influence the political process, labour or business decisions and even matters of governance and service delivery. Freedom of assembly by its nature can only be exercised collectively and the strength to exert influence lies in the numbers of participants in the assembly. These rights lie at the heart of democracy.⁵³¹

To emphasise the importance of democracy, specific provision is made for a responsive, democratic form of government in section 1(d) of the Constitution.⁵³² It is important, therefore, that public service administration is not based on assumptions. Every essential

⁵²⁸ Nonprofit Organisations Act 71 of 1997 s 2.

⁵²⁹ Nonprofit Organisations Act 71 of 1997 s 3.

⁵³⁰ Akinboade, Mokwena & Kinfack op cit note 15 at 458.

⁵³¹ *SATAWU & another v Garvas & others* 2013 (1) SA 83 (CC) para 120.

⁵³² Constitution 1996 s 1(d).

public service decision made must be based on the actual needs of the citizens and with a respect for the citizen's personal rights.

Secondly, section 7 introduces the right to human dignity, equality and freedom.⁵³³ These rights form the basis of citizen relationship. The Constitution further provides for freedom of expression⁵³⁴ and freedom of association⁵³⁵ both of which ensure that individuals and organisations enjoy rights of participation. In *South African Association of Personal Injury Lawyers v Heath & others*, the validity of provisions governing the functioning of the Special Investigating Unit (SIU) was challenged. The SIU Unit headed by Justice Heath was established to investigate maladministration within state institutions. In this case the court emphasised the importance of human rights to democracy:

Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic state. There can be no quarrel with the purpose sought to be achieved by the Act, or the importance of that purpose. That purpose must, however, be pursued in accordance with the provisions of the Constitution.⁵³⁶

Also, in *South African National Defence Union v Minister of Defence* in which the issue was whether it is constitutional to prohibit members of the armed forces from participating in public protest action and from joining trade unions in terms of section 126B of the Defence Act of 1957, the Court explained the intersection between various rights afforded by the Constitution:

Freedom of expression is one of a 'web of mutually supporting rights' in the Constitution. It is closely related to freedom of religion, belief and opinion (section 15), the right to dignity (section 10), as well as the right to freedom of association (section 18), the right to vote and to stand for public office (section 19) and the right to assembly (section 17). These rights taken together protect the rights of individuals not only individually to form and express opinions, of whatever nature, but to establish associations and groups of like-minded people to foster and propagate such opinions. The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial.⁵³⁷

⁵³³ Constitution 1996 s7.

⁵³⁴ Constitution 1997 s 16 provides that everyone has the right to freedom of expression, which includes: freedom of the press and other media; freedom to receive or impart information or ideas; freedom of artistic creativity; and academic freedom and freedom of scientific research.

⁵³⁵ Constitution 1996 s 18 provides that everyone has the right to freedom of association.

⁵³⁶ 2001 (1) SA 883 (CC) para 4.

⁵³⁷ 1999 (4) SA 469 (CC) para 8.

These rights are applicable not only to natural persons but also to juristic persons such as CSOs.⁵³⁸

Thirdly, section 17 provides for the right to protest⁵³⁹ and therefore allows citizens to express their grievances and dissatisfaction through protests and other forms of resistance.⁵⁴⁰ In *Mlungwana & others v S*, members of the Social Justice Coalition (SJC) protested outside the offices of the city of Cape Town in 2017 against issues of poor sanitation for communities and others. Protesters, among other things, chained themselves to the railings at the city's civic centre and, as a result, twenty-one protesters were arrested and charged under section 12(1) of the Gatherings Act 205 of 1993 for unlawfully attending a gathering without the required permission from the relevant authority. The Western Cape High Court declared section 12(1) of the Gatherings Act unconstitutional. The court stated:

People who lack political and economic power have only protests as a tool to communicate their legitimate concerns. To take away that tool would undermine the promise in the Constitution's preamble that South Africa belongs to all who live in it, and not only a powerful elite.⁵⁴¹

A fourth provision that is similarly important is section 32 (1) which guarantees everyone the right of access to information held by the state and any another person which is required for the exercise of any rights.⁵⁴² In *Mandag Centre for Investigative Journalism & another v Minister of Public Works and another*, the applicants requested access to records of expenditure spent on upgrading the then President's private Nkandla homestead. The request to access the information was refused by the Department of Public Works on the grounds that the Nkandla infrastructure was protected under the National Key Points Act 102 of 1980. The court ordered that the department furnish such information as well as the missing documents within 30 days. The court stated:

Failure to keep record or a tendency to lose documents, or to hide them or to deal with government business under a cloud of secrecy where it is not justified or, like in this matter to confine disclosure to the project managers documents, in situations where a government department is taken to task or where the shoe might pinch certain officials in government, constitutes a dereliction of one of the most important obligations on a

⁵³⁸ Constitution 1996 s 38.

⁵³⁹ Constitution s 17 provides that everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.

⁵⁴⁰ Constitution 1996 s 32(1). See also Godfrey Kanyenze, Herbert Jauch, Alice D Kanengoni et al *Towards Democratic Development States in Southern Africa* (2017).

⁵⁴¹ 2019 (1) SACR 429 (CC) para 69.

⁵⁴² Constitution 1996 s 32(1).

government, which is to keep proper records. Such conduct on the part of government does not advance the values espoused in our Constitution, that of a democratic, transparent and accountable government. It is in the public interest to keep record in order to give credence to the business of government itself and to those who govern.⁵⁴³

Also, in *Brümmer v Minister for Social Development & others* Brümmer, a journalist, made a request to the Department of Social Development for access to information about a business tender at the department and the request was denied. Brümmer approached the Western Cape High Court which rejected the PAIA. Upon appeal to the Constitutional Court which ruled that the 30-days limit in the PAIA was unconstitutional, the Court explained the importance of the constitutional right of access to information held by the state as follows:

The importance of this right of access to information in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the State. Indeed, one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency 'must be fostered by providing the public with timely, accessible and accurate information.'⁵⁴⁴

Related to the above is the case of *Khumalo v Holomisa*. In this case a public politician sued a newspaper house Sunday World for defamation of character arising out of the publication of an article by Sunday World. Explaining the importance of access to information, the Constitutional Court emphasised the importance of media by stating that:

In a democratic society, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility.⁵⁴⁵

A fifth provision is section 33(1) of the Constitution which provides that all people have the right to administrative action that is fair. It further stipulates that where people's rights have been adversely affected by administrative action they have a right to be given reasons.⁵⁴⁶ Section 33(3) provides that national legislation must give effect to these rights and that

⁵⁴³ 2014 JDR 0870 (GNP) para 35.

⁵⁴⁴ 2009 (6) SA 323 (CC) para 62.

⁵⁴⁵ 2002 (5) SA 401 (CC) para 24.

⁵⁴⁶ Constitution 1996 s 33 (1).

provision must be made for review of administrative action by a court or tribunal.⁵⁴⁷ The importance of procedural fairness is well described by Hoexter:

Procedural fairness . . . is concerned with giving people an opportunity to participate in the decisions that will affect them, and – crucially – a chance of influencing the outcome of those decisions. Such participation is a safeguard that not only signals respect for the dignity and worth of the participants, but is also likely to improve the quality and rationality of administrative decision-making and to enhance its legitimacy.⁵⁴⁸

In support of procedural fairness is Chap 10 which is very relevant to the South African public service and the state's relationship with its citizens, particularly section 195(1)(g) which mentions principles that underpin public administration. These principles are practicing professional ethics, ensuring equality and inclusivity in policy making, accountability and transparent.⁵⁴⁹ In *Nyathi v MEC Council for Department of Health, Gauteng & another*, Nyathi sought to obtain effective relief against the state for damages from the pain caused by his stroke and the disability suffered by him as a result of the omissions and mistakes due to negligent care administered to him at state hospitals. The court stated:

Certain values in the Constitution have been designated as foundational to our democracy. This in turn means that as pillar-stones of this democracy, they must be observed scrupulously. If these values are not observed and their precepts not carried out conscientiously, we have a recipe for a constitutional crisis of great magnitude. In a State predicated on a desire to maintain the rule of law, it is imperative that one and all should be driven by a moral obligation to ensure the continued survival of our democracy.⁵⁵⁰

Lastly, the above-mentioned rights can only be limited in section 36 only to the extent that the limitation is reasonable and justifiable considering all factors.⁵⁵¹ The use of the word 'must' in section 7 of the Constitution places a mandatory obligation on the state to comply with the above provisions.⁵⁵²

4.2.3 Promotion of Administrative Justice Act 2000 (PAJA)

In addition to the Constitution, the Promotion of Administrative Justice Act (PAJA) is very important in regulating the administrative interaction between the citizens and the state. The

⁵⁴⁷ Constitution 1996 s 33(3),

⁵⁴⁸ Cora Hoexter *Administrative Law in South Africa* (2007) at 358–9.

⁵⁴⁹ Constitution 1996 s 195

⁵⁵⁰ 2008 (5) SA 94 (CC) para 80.

⁵⁵¹ Constitution 1996 s 36.

⁵⁵² Constitution 1996 s 7 (2) provides that: the state must respect, protect, promote and fulfil the rights in the Bill of Rights.

PAJA promotes inclusivity and consultation of the people before any decision that will affect them is taken.⁵⁵³ Section 3 of the Act gives effect to section 33 of the Constitution that provides that all people have the right to administrative action that is fair and reasonable. It further stipulates that where people's rights have been adversely affected by administrative action they have a right to be given reasons.⁵⁵⁴ Administrative law is important in terms of the public administration as it involves the relationship between citizens and the legislative, executive and the administrative branches of the spheres of government.⁵⁵⁵

In *Joseph & others v City of Johannesburg & others*, applicants whose electricity connection was cut by City Power because the owner of the building they were renting and to whom paying all the rent due, owed R400 000 to City Power. The applicants argued before the Constitutional Court that since the decision to terminate electricity supply to the building adversely affect their rights, the Promotion of Administrative Justice Act required City Power to afford them procedural fairness before taking the decision. The court ruled that the termination of electricity supply was inconsistent with the PAJA and the city was ordered to reconnect the electricity to the building. Emphasising the need for procedural fairness by the state, the court stated:

Taken together, the values and principles described above require government to act in a manner that is responsive, respectful and fair when fulfilling its constitutional and statutory obligations.⁵⁵⁶

Besides section 3, the key provision of the PAJA is contained in section 6 (1) which provides for any person to institute proceedings in a court or tribunal for the judicial review of an administrative action. Examples in which people have the rights to a judicial review include unauthorised administrative action, circumstances of bias, procedural unfairness, error of law, bad faith, and failure to take decisions, unreasonable actions, and unconstitutional actions.⁵⁵⁷ Lastly, the primary goal of the Constitution and administrative justice legislation is to promote a transparent government with effective decision- making where the public has direct involvement and input.⁵⁵⁸ This is evident in common law cases also that are being discussed throughout the chapter.

⁵⁵³ Promotion of Administrative Justice Act 3 of 2000 s 4,

⁵⁵⁴ Constitution 1996 s 33.

⁵⁵⁵ Khan & Govender op cit note 32 at 170.

⁵⁵⁶ 2010 (4) SA 55 (CC) para 46.

⁵⁵⁷ Promotion of Administrative Justice Act 2000 s 6.

⁵⁵⁸ Khan & Govender op cit note 32 at 170–172.

4.2.4 Promotion of Access to Information Act 2000 (PAIA)

The Promotion of Access to Information Act was enacted in order to give effect to the right of access to information in section 32 of the Constitution.⁵⁵⁹ Many of the battles faced by CSOs in their watchdog role have been concerned with access to important information or documents held by the state and in some cases by private bodies. The PAIA distinguishes between public bodies and private bodies. If the record is being held by a public body, the requester of the access does not have to justify why the document is required and the requester's entitlement is presumed. The requested public body is expected to furnish such access to information provided there are no grounds for refusal that applies.⁵⁶⁰ Notably, despite a ground for refusal, the information officer may grant a request for access if the disclosure is in the public interest and if such public interest outweighs the harm that might be caused to the public body.⁵⁶¹

In *President of the Republic of South Africa & others v M & G Media*, former President Thabo Mbeki appointed judges to investigate and prepare a report on the 2002 Zimbabwean national elections. In 2008, Mail and Guardian newspaper (M & G) requested for the report to be made public under Promotion of Access to information Act (PAIA). The government denied such access citing that the report contained confidential information provided by foreign officials. The government's refusal was based on sections 41(1)(b)(i) and 44(1)(a) of the PAIA which state grounds for refusal. The court ordered the government to release the report and reiterated on the importance of access to information:

The constitutional guarantee of the right of access to information held by the state gives effect to "accountability, responsiveness and openness" as founding values of our constitutional democracy. It is impossible to hold accountable a government that operates in secrecy. The right of access to information is also crucial to the realisation of other rights in the Bill of Rights. The right to receive or impart information or ideas, for example, is dependent on it. In a democratic society such as our own, the effective exercise of the right to vote also depends on the right of access to information. For without access to information, the ability of citizens to make responsible political decisions and participate meaningfully in public life is undermined.⁵⁶²

These legal provisions, supported by others from different statutes —depending on what a CSO is dealing with at that moment — are a tool that CSOs use to remind the South African public service that it is expected to act accordingly.

⁵⁵⁹ Promotion of Access to Information Act 2000 'Preamble'.

⁵⁶⁰ Promotion of Access to Information Act 2000 part 2.

⁵⁶¹ Dario Milo & Pamela Stein 'Guide: Getting to grips with South Africa's Promotion of Access to Information Act (PAIA)' *Africa Check* 29 August 2017.

⁵⁶² *President of the Republic of South Africa & others v M & G Media* 2012 (2) SA 50 (CC).

In the following segment the findings of and contributions by the Public Protector will be briefly discussed. The focus in the section is on the use of constitutional authority by the Public Protector to expose corruption and poor governance in SOEs as well as by top officials who are not necessarily managing SOEs but are custodians of state resources. Such findings are the reason for most of the CSO's recent contestations against the government. The findings by the Public Protector serve as the background to the CSO's contribution towards good governance in the public sector as will be discussed.

4.3 The Public Protector

The government of South Africa provides for the mechanisms to fight corruption and maladministration of state resources. Such mechanisms are in Chapter 9 of the Constitution.⁵⁶³ One of such institutions is the public protector's office. The public protector's office is the government institution that is independent and can effectively enforce its decisions against the other organs of state.⁵⁶⁴ In *EFF, DA v Speaker of National Assembly*, the Constitutional Court held that the mandate of the Public Protector is to investigate corruption and any state conduct that is unlawful and take appropriate remedial action to protect the public.⁵⁶⁵ Also, in *SABC v DA*⁵⁶⁶ and *EFF, DA v Speaker of National Assembly*,⁵⁶⁷ the court emphasised the importance of the legal status and enforcement of the findings and recommendations of the Public Protector as an institution that support constitutional democracy.

4.3.1 Legal Provisions for the office of the Public Protector

The Public Protector's office was established based on Chapter 9 of the Constitution. Chapter 9, section 181 of the Constitution provides that the Public Protector's office exists to strengthen constitutional democracy. The provision further states the institutions in Chapter 9

⁵⁶³ Constitution 1996 Chap 9 provides that the following state institutions strengthen constitutional democracy in the Republic: '(a) the Public Protector;(b) the South African Human Rights Commission; (c) the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities' (d) the Commission for Gender Equality' (e) the Auditor-General; and (f) the Electoral Commission.

⁵⁶⁴ Constitution 1996 s 181(2) provides that these institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice'.

⁵⁶⁵ *Nkandla case* para 51 and 56.

⁵⁶⁶ *South African Broadcasting Corporation & others v Democratic Alliance & others* 2016 (2) SA 522 (SCA) para 29

⁵⁶⁷ *Supra* note 568 para 67.

such as the Public Protector's office are independent and are only subject to the law.⁵⁶⁸ They are expected to perform their duties without fear, favour or prejudice.⁵⁶⁹ Section 3 further provides that other organs of state must protect these institutions through legislative measures and ensure their effectiveness, independence and impartiality.⁵⁷⁰ The provision on section 4, provides that there should not be any interference with the functioning of Chapter 9 institutions,⁵⁷¹ while section 5 confirms that these institutions are state instruments and therefore accountable to Parliament.⁵⁷²

The powers of the public protector are often undermined and not followed. In *EFF, DA v Speaker of the National Assembly*, the court emphasised the importance of the public protector in maintaining constitutional democracy, calling it 'one of the most invaluable constitutional gifts to our nation' and highlighted the Public Protector's role in opposing poor public governance, while also equipping the disadvantaged with 'a voice, and teeth that would bite corruption and abuse excruciatingly'.⁵⁷³ The court also highlighted that those implicated in the investigations by the Public Protector may not welcome the findings of corrupt conduct.⁵⁷⁴ The behaviour of the executive and the legislative authority does not only undermine CSOs' role against maladministration and corruption but also the Public Protector's office for its role in exposing corruption by state officials, as mentioned in the second chapter. The reaction by the government on the Public Protector's findings and recommendations undermines the constitutional status and purpose of its office.⁵⁷⁵

Section 182(1) of the Constitution outlines the powers of the public protector, the provision states that the Public Protector has powers to investigate conducts in state affair or public administration that is alleged or suspected to be improper, report on that conduct and to take remedial action.⁵⁷⁶ In *EFF, DA v the Speaker of National Assembly*⁵⁷⁷ (paras 5.1 and 5.6) the Constitutional Court stated that the powers of the Public Protector in section 6 of the Public Protector Act⁵⁷⁸ co-exist with those in section 182 of the Constitution.⁵⁷⁹

⁵⁶⁸ Constitution 1996 s 181(2),

⁵⁶⁹ Ibid.

⁵⁷⁰ Constitution 1996 s 181(3).

⁵⁷¹ Constitution 1996 s 181(4).

⁵⁷² Constitution 1996 s 181 (5).

⁵⁷³ *Nkandla case* para 52.

⁵⁷⁴ *Nkandla case* para 56.

⁵⁷⁵ Constitution 1996 s 181.

⁵⁷⁶ Constitution 1996 s 182(1).

⁵⁷⁷ *Nkandla case*.

⁵⁷⁸ Public Protector Act 23 of 1994 s 6.

⁵⁷⁹ Constitution 1996 s182.

4.3.2 Public Protector's findings on state-owned enterprises and corruption

There are several recent reports by the Public Protector in which investigations were done and findings about corruption and poor corporate governance were made against, among others, SOEs and state officials. These reports have already been introduced in the previous chapter and include, among others, *State of Capture*, “*When Governance Ethics Fail*”,⁵⁸⁰ *Derailed*,⁵⁸¹ and the *Secure in Comfort* report that showed how the former president had unlawfully benefited from state resources and upgraded his home in Nkandla, KwaZulu Natal.

First, in 2016, the public protector in the report *state capture* made serious findings that would leave the country not the same. The public protector did an investigation and made findings that the former president had contravened the Executive Members Ethics Act 82 of 1998 (the Ethics Act) and the Executive Code (the code) by allowing a certain Gupta family to be involved in the removal of cabinet ministers and the directors of SOEs.⁵⁸² The report further found that the relationship between the former president and the Gupta family allowed the Gupta family to be involved in the running of SOEs, finance and appointment of cabinet ministers as well as preferential when it came to state contracts particularly from Eskom.⁵⁸³ This clearly is in contravention of section 195 of the Constitution which requires a high level of professional ethics in public administration.⁵⁸⁴ In addition, the Public Protector found the Eskom board as being irregularly constituted and having failed dismally in its duties and recommended that the board be dissolved.⁵⁸⁵

Secondly, in 2014 in another report, “*When Governance and Ethics Fail*”, the Public Protector received complaints from the South African Broadcasting Corporation (SABC) employees and conducted an investigation into the allegations.⁵⁸⁶ The Public Protector found that the then entity's Chief Executive Officer (COO) was dishonest and had lied about his qualifications, irregularly raised his salary and that of those supporting him as well as firing those who opposed his decisions.⁵⁸⁷ The report further stated that the former COO had been allowed to operate above the law and his appointment as the permanent COO was unlawful,

⁵⁸⁰ See full discussion of this report in ch 3 s 3.10.4 above.

⁵⁸¹ See full discussion of this report in ch 3 s 3.10.3 above.

⁵⁸² Public Protector *State of Capture* op cit note 465 at 4–9. See also *President v Public Protector & others* 2018 (2) SA 100 (GP).

⁵⁸³ Ibid.

⁵⁸⁴ Constitution s 195.

⁵⁸⁵ Public Protector *State of Capture* op cit note 465.

⁵⁸⁶ Public Protector “*When Governance and Ethics Fail*” op cit note 508. *DA v SABC* 2016 (3) SA 468 (WCC).

⁵⁸⁷ Ibid.

that there was ‘pathological corporate governance deficiencies’ at the SABC.⁵⁸⁸ In her report, the Public Protector recommended that action be taken against the former COO by the institution’s board: such action included the commencement of disciplinary proceedings against the COO.⁵⁸⁹ The board never followed the recommendations and instead resolved to re-appoint the former COO at the SABC.⁵⁹⁰

Thirdly, in 2014, in another public governance failure involving the state resources, the Public Protector investigated alleged irregularities in the non-security upgrades and renovations that were done at the former president’s private residence, Nkandla in KwaZulu Natal.⁵⁹¹ The Public Protector in her *Secure in Comfort* found that the president had failed to act in accordance with his constitutional and ethical obligations by intentionally and unduly benefitting from state resources. The report directed that the president and other functionaries determine and pay a portion of the irregular expenditure to the extent that they benefitted unduly from.⁵⁹² The former president and the National Assembly failed to comply with the Public Protector’s recommendations afterwards and instead absolved the former president from liability.⁵⁹³ Fourthly, in 2015 in the report *Derailed* the Public Protector made findings of corruption on the Passenger Rail Agency of South Africa (PRASA). The report on PRASA recommended a forensic investigation into 200 questionable contracts awarded since 2012, each worth more than R10 million as well as dodgy tenders and irregular expenditures.⁵⁹⁴

Lastly, the corporate failures mentioned above did not sit well with the civil society and as a result caused a conflict between the state and CSOs, opposition parties and other organisations. The discussion in the following segment of this chapter centres around the measures that civil society organisations have taken using the already discussed legal provisions to fight poor corporate governance and corruption. A number of CSOs will be identified and their contributions in ending corruption and poor governance will be discussed. There are many other CSOs that have contributed to the fight against the poor governance of state resources and corruption that may not be mentioned or discussed in detail in the

⁵⁸⁸ Ibid.

⁵⁸⁹ Ibid.

⁵⁹⁰ *DA v SABC* case para 7-10.

⁵⁹¹ Public Protector of South Africa *Secure in Comfort: Report on an Investigation into Allegations of Impropriety and Unethical Conduct Relating to the Installation and Implementation of Security Measures by the Department of Public Works at and in Respect of the Private Residence of President Jacob Zuma at Nkandla in the KwaZulu-Natal Province: Report No: 25 of 2013/14* (2014) (hereafter Public Protector *Secure in Comfort*), available at <https://cdn.24.co.za/files/Cms/General/d/2718/00b91b2841d64510b9c99ef9b9faa597.pdf>, accessed on 20 January 2019.

⁵⁹² Ibid. at 5–6.

⁵⁹³ *Nkandla* case para 76–78.

⁵⁹⁴ Public Protector *Derailed* op cit note 497.

following segment such as the Ahmed Kathrada Trust, the Dullah Omar Institute and the Council for the Advancement of the South African Constitution, the Open Democracy Advice Centre, the Treatment Action Campaign and Section 27.

4.4 Measures taken by civil society organisation in relation to poor corporate governance of SOEs.

Civil society organisations represent the rights of the people and can challenge the state on behalf of citizens.⁵⁹⁵ They have brought cases before the court of law⁵⁹⁶ to endorse the constitutional and legislative provisions and hold the government accountable to the citizens. The democratic system allows citizens to seek recourse in the courts. This has helped many CSOs to bring the government to account through legal action. The use of courts by CSOs is increasing as it has proven to be effective.⁵⁹⁷ The cause of action in many cases brought by CSOs against the government is as a result of inefficient service delivery by the government. Initially, these cases were instituted by individuals who would be supported by but today CSOs are initiating these actions independently which has proven to be good for good governance and democracy.⁵⁹⁸ The constitutional provisions further allow CSOs to hold protests, campaigns, advocacy and other measures taken by CSOs.⁵⁹⁹ These measures uphold the freedom of expression. CSOs do not act alone but with other institutions whose role is to protect the citizens against the maladministration of state resources, one of these institutions is The Public Protector's office.

As mentioned above, there are many civil society organisations and non-profit organisations who are tirelessly challenging the government over the maladministration of state resources. The following discussion will be limited to a few CSOs and NPOs, these being the Black Sash, Corruption Watch, the Amabhungane Centre for Investigative Journalism, the Organisation Undoing Tax Abuse (OUTA), Save South Africa and Future South Africa.

⁵⁹⁵ Constitution s 38 provides that anyone acting in the public interest has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.

⁵⁹⁶ Scholte op cit note 20 at 219–223.

⁵⁹⁷ Bhekinkosi (2010) at 83–86.

⁵⁹⁸ Magongo op cit note 212 at 1–11.

⁵⁹⁹ Constitution 1996 s 17.

4.4.1 Black Sash

The Black Sash Organisation is a non-violent women's resistance organisation that was founded in 1955 by liberal white women who protested against the disenfranchisement of the Coloured voters by means of a manipulation of the constitution.⁶⁰⁰ Black Sash members demonstrated against apartheid laws that segregated the majority of the population and volunteered as defenders of those affected by the system.⁶⁰¹ When the organisation celebrated its 60th anniversary in May 2015 it shifted its focus to education, training, advocacy and community monitoring.⁶⁰²

The Black Sash advocates for human rights, focusing on social justice in South Africa.⁶⁰³ Its mission is to promote the realisation of socio-economic rights, as outlined in the 1996 Constitution, focusing on social security and social protection for the most disadvantaged with the aim of a reduction in poverty and inequality.⁶⁰⁴ The organisation believes that the implementation of socio-economic rights requires responsible governance and seeks to advance the principles of justice, integrity and dignity.⁶⁰⁵ The Black Sash has done so much in challenging the government and government officials in order to ensure reasonable service delivery to the citizens, as well as respect to the citizen's dignity. Black Sash has been doing this through legal action and other measures.

First, the Black Sash supported by the Centre for Applied Legal Studies (CALS) in the 2017 case, *Black Sash Trust v Minister of Social Development*,⁶⁰⁶ successfully filed an urgent application after it had become clear that the South African Social Security Agency (SASSA) established in terms of the South African Social Security Agency (SASSA) Act 9 of 2004 would be unable to pay social grants to 17 million social grant beneficiaries on the 1 April 2017 causing great distress.⁶⁰⁷ The Black Sash sought an order that the court exercise supervisory powers and jurisdiction over an interim contract with Cash Paymaster Services (CPS) for the payment of social grants. The Black Sash specifically asked that SASSA be

⁶⁰⁰ Black Sash Archives 'The beginning of the Sash 1955-1956', available at <https://web.archive.org/web/20150426012713/http://www.blacksash.org.za/index.php/our-legacy/our-history>, accessed on 26/03/2019.

⁶⁰¹ Robert E Miller & Rick Wilford *Women, Ethnicity and Nationalism: The Politics of Transition* (2004) at 61.

⁶⁰² Marianne Thamm 'The conscience of white South Africa': Celebrating the Black Sash, 60 years later' *Daily Maverick* 14 May 2015, available at <https://www.dailymaverick.co.za/article/2015-05-14-the-conscience-of-white-south-africa-celebrating-the-black-sash-60-years-later>, accessed on 26 March 2019.

⁶⁰³ Black Sash [website], available at: <https://www.blacksash.org.za/index.php/about-us/about-the-black-sash>, accessed on 25 June 2018.

⁶⁰⁴ Constitution 1996 s 27.

⁶⁰⁵ Black Sash [website] cit note 603.

⁶⁰⁶ 2017 (3) SA 335 (CC).

⁶⁰⁷ *Supra*.

directed to file continuous reports with the court on steps taken to ensure payment of grants from the 1st April 2017.⁶⁰⁸ The background to this case is as follows:

SASSA, the government social grant agency, entered into a contract in February 2012 with Cash Paymaster Services for the payment of social grants to 17 million beneficiaries.⁶⁰⁹ It was a five-year contract that would expire in March 2017.⁶¹⁰ In November 2013 the Constitutional Court found that the awarding of this contract was invalid because the tender process that was followed was unlawful.⁶¹¹ In April 2014 the Constitutional Court ordered that the contract be set aside and a new tender was ordered.⁶¹² The court, however, suspended the invalidity of the contract on the premise that a new five-year tender would be awarded after a proper procurement process or SASSA itself would take over the payment when the CPS contract ended.⁶¹³ SASSA filed a report with the court in which it stated that it would take over the payment on the 31 March 2017 SASSA realised in April 2017 that it would not be able to take over the payment but failed to notify the court.⁶¹⁴ Instead, SASSA sought to enter into a new contract with CPS which SASSA insisted was the only entity capable of delivering social grants at such short notice. This led to Black Sash taking legal action against SASSA in the interest of the grant beneficiaries.

The court ordered that SASSA and CPS were under a constitutional obligation to ensure payment of social grants to the beneficiaries from the 1 April 2017 until a new entity that was not CPS was able to do so and, further, that a failure to do so would infringe upon the beneficiaries' rights of access to social assistance under section 27 (1)(c) of the Constitution.⁶¹⁵ The declaration of the invalidity of the SASSA-CPS contract was suspended for the 12 months period from 1 April 2017. The overall contribution by Black Sash was that progress was made towards the implementation of the new national social security grants payment model. As from the 1 April 2017, grants were paid to beneficiaries by the South African Post Office.

⁶⁰⁸ Supra.

⁶⁰⁹ *Allpay Consolidated Investment Holdings v CEO, SASSA* 2014 (1) SA 604 (CC).

⁶¹⁰ Supra.

⁶¹¹ Supra.

⁶¹² *Allpay Consolidated Investment Holdings v CEO, SASSA* 2014 (4) SA 179 (CC).

⁶¹³ Supra.

⁶¹⁴ *Black Sash v Minister of Social Development* 2017 (3) SA 335 (CC).

⁶¹⁵ Supra.

4.4.2 Corruption Watch

Corruption Watch is a South African civil society organisation that was founded in 2012.⁶¹⁶ The advocacy organisation focuses on policy and legislation work through making submissions to Parliament for the amendment of existing laws, addressing issues concerning public education by means of outreach programmes and campaigns and raising public awareness of corruption. Corruption Watch provides a platform for citizens to report corruption. The organisation relies on the public to report corruption and uses the information to fight corruption and hold leaders accountable for their actions.⁶¹⁷ The main objective of Corruption Watch is to promote transparency and accountability by encouraging the public to fight corruption by reporting it.⁶¹⁸ Corruption Watch has achieved this through different measures such as legal actions and campaigns.

First, Corruption Watch won the South African Social Service Agency (SASSA)-Cash Paymaster Service (CPS) case in *Corruption Watch v SASSA*⁶¹⁹ in March 2018 in the Gauteng High Court. In this case the court set aside the payment of R316-million by the South African Social Service Agency (SASSA) to social grant distributor Cash Paymaster Service (CPS).⁶²⁰ CPS was also ordered to pay back the full amount, with interest, to the state.⁶²¹ The background to this case is as follows:

Corruption Watch approached the Gauteng High Court alleging irregular expenditure incurred for the re-registration of beneficiaries when the services between SASSA and CPS resumed temporarily after the contract had previously been declared invalid by the Constitutional Court. The organisation argued that the re-registration of beneficiaries was already catered for in the original contract between SASSA and CPS and there was no need for more funds to be paid to CPS. Upon giving judgement the judge said that as result of the SASSA's unlawful conduct, the state had lost a huge amount of funds intended for the vulnerable and poor citizens of the country.⁶²² This case was a victory for civil society and shows the necessity of pursuing unlawful transactions that emanate from an irregular procurement process in which public funds have been abused to benefit individual interests. The high court order sends a message to state institutions that unlawful contacts on state

⁶¹⁶ Corruption Watch [website] op cit note 259.

⁶¹⁷ Ibid.

⁶¹⁸ Ibid.

⁶¹⁹ *Corruption Watch v Chief Executive Officer of the South African Social Security Agency* 2018 ZAGPPHC 7.

⁶²⁰ Supra.

⁶²¹ Supra.

⁶²² Supra.

resources and fraudulent practices will not be tolerated and that civil society will not watch while irregular, wasteful and fruitless expenditure is unchallenged.

Secondly, Corruption Watch appeared as *amicus curiae* in the 2018 in the case of *Black Sash v Minister of Social Development*,⁶²³ previously discussed in section 1.1 and 4.4.1 above, supporting the court to order SASSA and CPS to ensure that the payment of social grants to beneficiaries as stipulated in section 27 (1) (c) of the Constitution is made.⁶²⁴ In addition, in March 2018, Corruption Watch called for the former social development minister, Bathabile Dlamini, to be dismissed for the way in which she dealt with the distribution of social grants to 17 million beneficiaries in 2017.⁶²⁵

Thirdly, in 2016, Corruption Watch appeared as *amicus curiae* in *SABC v DA*, previously discussed in section 3.6.⁶²⁶ The background to this case is that a complaint by the former SABC employee was lodged with the Public Protector. The complaint involved the irregular appointment of the acting chief operating officer, the maladministration of state funds at the SABC and the unlawful acts of the former acting COO that benefitted him and other SABC employees.⁶²⁷ The COO had increased his salary from R1.5 million to R.4 million in one fiscal year.⁶²⁸ In addition, the former COO had lied about his qualifications.⁶²⁹ The Public Protector found that the minister of communications contributed to this fraud and helped the COO and unduly interfered with the affairs of SABC.⁶³⁰ After making these findings, the Public Protector prescribed remedial actions for the SABC's board to take. These included instituting disciplinary proceedings against the COO.⁶³¹

Despite the instruction by the Public Protector to institute disciplinary proceedings against the former COO, the SABC board appointed a law firm to help it investigate and consider the findings by the Public Protector.⁶³² The law firm later cleared the former COO of any wrongdoing⁶³³ and immediately went further to appoint the former COO as the permanent SABC COO without giving effect to the Public Protector's report and the Minister approved

⁶²³ *Black Sash v SASSA* 2017 (3) SA 335 (CC).

⁶²⁴ The Constitution 1996 s 27 (1) of provides that everyone has the right to have access to (a) health care services, including reproductive health care; (b) sufficient food and water; and (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

⁶²⁵ Moho Raborife 'Corruption Watch joins calls for Bathabile Dlamini's dismissal' *News 24* 02 March 2017, available at <https://www.news24.com/news24/southafrica/news/corruption-watch-joins-calls-for-bathabile-dlamini-dismissal-20170302>, accessed 19 June 2018.

⁶²⁶ 2016 (2) SA 522 (SCA).

⁶²⁷ Public Protector "*When Governance and Ethics Fail*" op cit note 508 at 1-13.

⁶²⁸ Ibid at paragraph (iii).

⁶²⁹ Ibid.

⁶³⁰ Ibid at 10-13.

⁶³¹ Ibid.

⁶³² 2016 (3) SA 468 (WCC).

⁶³³ *Supra.* at paras 13 and 14.

this appointment.⁶³⁴ This resulted in the DA applying in the Western Cape Division of the High Court for the suspension of the former COO, the commencement of disciplinary proceedings by the board and the review of the board's resolution and the minister's decision.⁶³⁵ The DA argued that considering the findings by the Public Protector regarding the former SABC COO and the requirements for the appointment of the COO, his appointment to that position was unlawful and irrational. The court made the decision that the appointment was unlawful and irrational.⁶³⁶

Furthermore, in 2017 Corruption Watch was *amicus curiae* in *EFF, DA v National Assembly*,⁶³⁷ briefly mentioned in section 2.6. The parties brought this application on the grounds that the Constitutional Court has exclusive jurisdiction in this matter in terms of section 167(4) (e) of the Constitution which determines that only the Constitutional Court has jurisdiction in matters to determine whether Parliament or the president had failed to fulfil a constitutional obligation.⁶³⁸ In short, the parties applied to compel the Constitutional Court to hold the former president accountable for violations of his oath of office.⁶³⁹ Corruption Watch contended that there is a duty imposed on Parliament to scrutinise the conduct of the president and to require him to account for his established violations of the Constitution.⁶⁴⁰ The background to this case was the following:

The Public Protector investigated irregularities in the non-security upgrades and other renovations at the private homestead of the former president at Nkandla in KwaZulu Natal.⁶⁴¹ The Public Protector's report found that the former president had failed to act in line with certain of his constitutional and ethical obligation by knowingly deriving undue benefit from the irregular deployment of state resources.⁶⁴² The report recommended that the former president and other functionaries should determine and pay a portion of this irregular expenditure to the extent that they benefitted unduly there from.⁶⁴³ The report further directed the former president to reprimand relevant ministers involved.⁶⁴⁴ Both the former president and the National Assembly did not comply with Public Protector's report which led to the

⁶³⁴ Supra at para 14.

⁶³⁵ Supra.

⁶³⁶ Supra.

⁶³⁷ *Nkandla* case.

⁶³⁸ Constitution 1996 s 167 (4).

⁶³⁹ Supra note 612.

⁶⁴⁰ Supra.

⁶⁴¹ Public Protector *Secure in Comfort* op cit note 594.

⁶⁴² Ibid at 5 & 12.

⁶⁴³ Ibid at 68.

⁶⁴⁴ Ibid.

application by both the EFF as well as the DA for an order affirming the legally binding effect of the Public Protector's finding.⁶⁴⁵

Fourthly Corruption Watch appeared in 2014 as *amicus curiae* in *Allpay Consolidation Investment v South African Social Security Agency (SASSA)*,⁶⁴⁶ briefly mentioned in section 2.6. The case was brought to the Constitutional Court by the losing bidder All-pay which alleged irregularities during the R10-billion tender awarded by SASSA to a private company, Cash Paymaster Services (CPS) for the disbursement of social grants. The submission of Corruption Watch as the first *amicus curiae* focused on the enforcement of the law as well as upholding the rule of law. Corruption Watch further requested that SASSA provide information on steps taken to investigate irregularities that were raised in its previous submission to the Constitutional Court.⁶⁴⁷

A fifth intervention by Corruption Watch took place in September 2017. There Corruption Watch stated that it would lay criminal charges against McKinsey, the international business consulting group, before the United States Department of Justice on corruption and bribery charges for its role in the Eskom and Gupta family tender scandals.⁶⁴⁸ Further, Corruption Watch laid criminal charges against the former South African Revenue Services (SARS) commissioner and two other officials at SARS in December 2016.⁶⁴⁹ The charges related to fraud and corruption. Corruption Watch stated that the former SARS commissioner had breached the Financial Intelligence Centre Act (FICA) and the Corrupt Activities Act.⁶⁵⁰ The former SARS commissioner was suspended in March 2018 because the public had lost confidence in him to manage the country's tax affairs.⁶⁵¹

Lastly, besides the court cases above, Corruption Watch has been involved in campaigns as well as in raising awareness to promote transparency and accountability in the public sector as well as fighting corruption. Corruption Watch as a member of Transparency International, the global anti-corruption movement, joined the Protect Journalists Campaign in 2015, launched by the Reporters without Borders (RSF) and supported by a coalition of

⁶⁴⁵ *Nkandla* case at para 13.

⁶⁴⁶ 2014 (4) SA 179 (CC)

⁶⁴⁷ *Supra*.

⁶⁴⁸ Graeme Hosken 'Corruption Watch to lay charges against McKinsey' *Sunday Times* 11 September 2017, available at <https://www.timeslive.co.za/politics/2017-09-11-corruption-watch-to-lay-charges-against-mckinsey>, accessed on 4 May 2018.

⁶⁴⁹ Matsepo Chiloane 'Corruption Watch lays criminal charges against Moyane and two other SARS officials' *EWN*, 2 December 2018, available at <https://ewn.co.za/2016/12/12/corruption-watch-lays-criminal-charges-against-moyane-2-sars-top-officials>, accessed on 18 May 2018.

⁶⁵⁰ *Ibid*.

⁶⁵¹ *Ibid*.

other non-governmental organisations and media outlets.⁶⁵² The campaign called for the safety of journalists through the implementation of international laws that protect journalists. This campaign demanded that this be done through the creation of a special representative of the United Nations' Secretary-General for the protection of journalists.⁶⁵³ Fighting corruption is a dangerous task and the corrupt would go an extra mile to protect their interests. In South Africa and other countries, journalists and other people have lost their lives in the process of exposing corruption.

4.4.3 AmaBhungane Centre for Investigative Journalism

Previously the *Mail & Guardian* Centre for Investigative Journalism, the AmaBhungane Centre for Investigative Journalism (AmaBhungane) is a non-profit organisation founded in 2010 to develop investigative journalism in the public interest.⁶⁵⁴ AmaBhungane exposes state wrongdoing and state corruption and through its investigative work it hopes to advance a free media, accountability in the public sector and democracy.⁶⁵⁵

In 2017, AmaBhungane and the *Daily Maverick's* Scorpio Investigative Unit led the reporting of the Gupta Leaks story of corruption, fraud and racketeering in state enterprises as well as instances of national decision-making in South Africa by top state officials, influenced by three brothers of the Indian-born Gupta family with business interests in South Africa.⁶⁵⁶ The parties felt it was necessary that the data be released and made widely accessible to journalists, considering the extent of the wrongdoing and how implicating the facts were.⁶⁵⁷ The Gupta leaks consist of many emails and documents evidencing how three businessmen of the Gupta family captured political decision-making in South Africa, benefited from the state contracts and allegedly laundered lots of funds offshore.⁶⁵⁸

Secondly, in 2016, the AmaBhungane attorneys sent a letter to Parliament's energy portfolio committee seeking for a public briefing on the procurement of proposed nuclear

⁶⁵² Corruption Watch [website] op cit note 259.

⁶⁵³ Ibid.

⁶⁵⁴ Amabhungane [website], available at: <https://amabhungane.org/>, accessed on 24 October 2018.

⁶⁵⁵ Ibid.

⁶⁵⁶ 'Revealed: What the Guptas did to earn their kickbacks' *Daily Maverick* March 2018, available at <https://www.dailymaverick.co.za/article/2018-01-19-amabhungane-and-scorpio-guptaleaks-meet-the-money-launderers/>, accessed on 1 July 2018.

⁶⁵⁷ Ibid.

⁶⁵⁸ 'Gupta leaks released to journalists worldwide' *Mail & Guardian* 10 November 2017 available at <https://mg.co.za/article/2017-11-10-guptaleaks-released-to-journalists-worldwide/>, accessed on 14 May 2018.

power stations.⁶⁵⁹ The process of acquiring this nuclear deal was being done in secrecy despite the government promising that it would allow the procurement to be public allowing transparency and openness. Following the AmaBhungane letter to Parliament, the briefing by the department of energy was made public.⁶⁶⁰

Thirdly, on 8 November 2017, the high court judge gave the judgement in favour of AmaBhungane, ordering the Chinese Locomotives Company (CSR E Loco) to comply with the request by AmaBhungane for its share register showing the ownership of the company.⁶⁶¹ The judge referred to section 26 of the Companies Act⁶⁶² and stated that the right to access to information about who owns a company is an absolute one. This was after Transnet, a South African SOE, awarded the CSR Zhuzhou Electric Locomotive Co. Ltd a contract in September 2012 to supply electric locomotives as part of a multi-billion-rand project to renew the old locomotives.⁶⁶³ AmaBhungane requested copies of the shareholding register for CSR E-LoCo and the empowering companies.⁶⁶⁴ The disclosure clause in section 26 of the Company's Act is an important tool in enforcing commercial accountability. Transparency disclosure in the Companies Act promotes investor trust and public confidence. The judgement was a victory for corporate transparency.

Lastly, in 2012 AmaBhungane took the public works minister to the high court (the case is discussed in section 4.2.2) to coerce the minister to disclose the details of public spending at the former president's Nkandla estate.⁶⁶⁵ AmaBhungane filed a request under the Promotion of Access to Information Act for details of the procurement process by the state of the goods or services for the Nkandla estate of the president. The court ordered the Department of Public Works to furnish AmaBhungane with such information as requested and within 30 days of the court order. The application was brought in the public interest.⁶⁶⁶

⁶⁵⁹ Karabo Rajuili, 'Advocacy update: Victory for amaB and civil society in push for nuclear transparency' *Mail & Guardian* November 2016, available at <https://mg.co.za/article/2016-11-18-advocacy-amab-to-see-interdict-against-parliament-on-nuclear-secrecy>, accessed on 16 May 2018.

⁶⁶⁰ *Ibid.*

⁶⁶¹ Vinayak Bhardwaj 'High court orders CSR loco to reveal tender detail', *Mail and Guardian* 14 November 2013, available at <https://mg.co.za/article/2013-11-14-loco-winner-must-show>, accessed on 27 May 2018.

⁶⁶² Companies Act 2008 s 26,

⁶⁶³ Bhardwaj op cit note 664.

⁶⁶⁴ *Ibid.*

⁶⁶⁵ 2014 JDR 0870 (GNP). See also Phillip de Wet & Sally Evans, 'amaBhungane takes Public Works minister to court' *Mail & Guardian* 23 November 2012, available at <https://mg.co.za/article/2012-11-23-amabhungane-takes-public-works-minister-to-court>, accessed on 24 May 2018.

⁶⁶⁶ *Ibid.*

4.4.4 Organisation Undoing Tax Abuse (OUTA)

We are not your enemy. Please don't treat your critics with disdain. Try instead to walk with us and your people. We simply desire to live in a corrupt free and efficiently managed country. We will not go away.⁶⁶⁷

Organisation Undoing Tax Abuse (OUTA), a non-profit organisation which seeks to challenge the abuse of authority in South Africa, was founded in 2012.⁶⁶⁸ The organisation challenges the country's taxation policy and its regulatory environment.⁶⁶⁹ OUTA questions and challenges the corrupt and misuse of taxes. It uses effective ways to hold those responsible for the maladministration and corruption to account for their conducts.⁶⁷⁰ In the past few years OUTA has exposed corruption in SOEs, including laying charges against some of their management leaders.

OUTA laid criminal charges of corruption and fraud against the former board of Passenger Rail Agency (PRASA) in October 2017 at the Randburg police station over a locomotive contract that PRASA awarded to a local company called Swifambo in March 2013.⁶⁷¹ Swifambo failed to deliver locomotives that were fit for the purpose, resulting into a loss of state funds.⁶⁷² The loss could have avoided had PRASA not approved the bid.⁶⁷³ In 2018, OUTA further won the right to participate in a legal action to compel the Hawks who are South Africa's Directorate for Priority Crime (DPCI)⁶⁷⁴ founded on 20 February 2009 and 'responsible for the combating, investigation and prevention of national priority crimes' and the National Prosecuting Authority (NPA)⁶⁷⁵ established in 1996 'to ensure justice for the victims of crime by prosecuting without fear, favour and prejudice and, by working with their partners and the public, to solve and prevent crime,' to do their job and investigate corruption

⁶⁶⁷ OUTA [website], available at <https://www.ouata.co.za/about-ouata/our-vision-and-mission/>, accessed on 24 May 2018.

⁶⁶⁸ Ibid.

⁶⁶⁹ Ibid.

⁶⁷⁰ Ibid.

⁶⁷¹ OUTA 'OUTA lays charges against PRASA's former board' 26 October 2017, available at <https://www.ouata.co.za/prasa-board/>, accessed on 03 June 2018.

⁶⁷² Ibid.

⁶⁷³ Ibid.

⁶⁷⁴ Directorate for Priority Crime Investigation [website], available at <https://www.saps.gov.za/dpci/index.php>, accessed on 07 June 2020.

⁶⁷⁵ National Prosecuting Authority Code of Ethics Booklet at 5, available at <https://www.npa.gov.za/sites/default/files/resources/Revised%20NPA%20Code%20of%20Ethics%20Booklet.pdf>, accessed on 07 June 2020.

at PRASA.⁶⁷⁶ The public interest in the matter and the billions of funds involved motivated OUTA's intervention.⁶⁷⁷ OUTA presented its case to intervene in an application to force the Hawks and the NPA to do their jobs in investigating and prosecuting the corrupt activities at PRASA.⁶⁷⁸ OUTA stated that it was concerned that the law enforcement structures were taking too long to hold those responsible accountable.⁶⁷⁹

Secondly, in December 2016, OUTA laid criminal charges of fraud, misrepresentation and racketeering against the former SABC chief executive officer (COO) and other SABC managers for maladministration of the state resources at the SABC that had been exposed by the public protector.⁶⁸⁰ In addition, in April 2018, OUTA applied to the High Court to intervene in the SABC case against the former SABC COO. OUTA argued that SABC should be claiming more money from the former SABC COO.⁶⁸¹ The organisation filed papers to be granted *amicus curiae* status in the SABC board case against the former SABC COO. This was an existing civil lawsuit that was initially brought in the high court in September 2017 by the SABC board against the SABC Pension Fund Trust and the former COO.⁶⁸² The board argued that the former SABC COO's pension fund should be seized to cover the funds he owes to the SABC through his maladministration at broadcaster during the time he was the enterprise's COO, as found by the Public Protector in one of her reports.⁶⁸³ OUTA supported the board's claim but expected more funds to be added to the claim.⁶⁸⁴

Thirdly, in 2017 OUTA produced a *No Room to Hide* in which it presented evidence that the former minister of communications shared confidential information via email with a

⁶⁷⁶ Aidan Jones, 'Court orders Hawks to investigate alleged fraud at Prasa' Times Live, 5 May 2018, available at <https://www.timeslive.co.za/news/south-africa/2018-05-04-court-orders-hawks-to-investigate-alleged-fraud-at-prasa/>, accessed on 15 May 2018.

⁶⁷⁷ OUTA, 'OUTA in court to press Hawks into investigating PRASA' April 30 2018, available at <https://www.uta.co.za/uta-court-pressure-hawks-investigating-prasa/>, accessed on 16 April 2018.

⁶⁷⁸ OUTA 'OUTA files paper against Hawks and NPA over derailed PRASA investigation' 31 July 2017, available at <https://www.uta.co.za/uta-files-papers-hawks-mpa-derailed-prasa-investigation/>, accessed on 16 April 2018

⁶⁷⁹ 'OUTA takes on Hawks, NPA over derailed PRASA investigations' Times Live, 31 July 2017, available at <https://www.timeslive.co.za/politics/2017-07-31-uta-takes-on-hawks-mpa-over-derailed-prasa-investigation/> accessed on 15 June 2018.

⁶⁸⁰ OUTA 'OUTA lays criminal charges against Hlaudi Motsoeneng and others within SABC' December 2016, available at <https://www.uta.co.za/uta-lays-criminal-charges-hlaudi-motsoeneng-others-within-sabc/>, accessed on 15 June 2018.

⁶⁸¹ OUTA 'OUTA goes to court to increase SABC claim against Hlaudi' 17 April 2018, available at <https://www.uta.co.za/uta-goes-court-increase-sabc-claim-hlaudi/> accessed on 15 June 2018.

⁶⁸² Ibid.

⁶⁸³ Public Protector '*When Governance and Ethics Fail*' op cit note 508.

⁶⁸⁴ OUTA 'OUTA goes to court to increase SABC claim against Hlaudi', available at <https://www.uta.co.za/uta-goes-court-increase-sabc-claim-hlaudi/>, accessed on 15 June 2018.

member of the Gupta family to influence government policy.⁶⁸⁵ The emails from the Gupta Leaks collection show that the Gupta brothers influenced the then president to transfer power to the former communications minister's portfolio.⁶⁸⁶ The minister used the power to influence the permanent appointment of the former SABC COO despite the Public Protector's findings and recommendations on the former COO's corrupt dealings. OUTA later laid charges of treason and corruption against the former minister of communications and due to this report the Parliament called for its ethics committee to investigate the former minister's conduct.⁶⁸⁷

A fourth intervention by OUTA was in September 2018. OUTA laid corruption charges against the former chairman of Denel, the arms manufacturer, for his involvement in state capture.⁶⁸⁸ The former chairman fed exclusive and sensitive company information to the Gupta family and forwarded the family some of his personal bills according to the Gupta Leaks.⁶⁸⁹ The venture that involved the Gupta's was never approved by the treasury and was subject to a court application.⁶⁹⁰ On 29 August 2017, OUTA laid charges of corruption and financial misconduct against Eskom's former chief financial officer (CFO) at the Randburg police station.⁶⁹¹ OUTA's demands were based on the claims that when the CFO was in charge of ESKOM, Gupta linked-businesses benefited substantially from Eskom and further claimed that there had been huge irregular expenditure made during his period at Eskom.⁶⁹² OUTA called for the former CFO to lose his accounting practising licence and face criminal charges as well as civil action to recoup missing funds at Eskom.⁶⁹³ While on suspension, the former Eskom CFO resigned on the eve of his scheduled appearance before the Portfolio

⁶⁸⁵ OUTA 'OUTA pleased with Parliament's action against Faith Muthambi' 27 March 2018, available at <https://www.oua.co.za/oua-pleased-parliaments-action-faith-muthambi/>, accessed on 15 June 2018.

⁶⁸⁶ OUTA 'Parliament discusses OUTA's evidence on ex-Minister Muthambi', 26 March 2018, <https://www.oua.co.za/parliament-discusses-ouas-evidence-ex-minister-muthambi/>, accessed on 15 June 2018.

⁶⁸⁷ OUTA 'OUTA pleased with Parliament's action against Faith Muthambi' 27 March 2018, <https://www.oua.co.za/oua-pleased-parliaments-action-faith-muthambi/>, accessed on 23 March 2018.

⁶⁸⁸ OUTA, 'OUTA lays criminal charges against Daniel Mantsha' August 2017, available at <https://www.oua.co.za/oua-charges-daniel-mantsha/>, accessed on 23 March 2018.

⁶⁸⁹ Ibid.

⁶⁹⁰ Genevieve Quintal, 'OUTA lays charges against Denel Matsha' *Times Live*, 1 September 2017, available at <https://www.timeslive.co.za/politics/2017-09-01-oua-lays-charges-against-denels-mantsha/>, accessed on 04 June 2018.

⁶⁹¹ OUTA 'OUTA files charges against Eskom's Anoj Singh' August 2017, available at <https://www.oua.co.za/oua-files-charges-anoj-singh/>, accessed on 24 August 2018.

⁶⁹² Ibid.

⁶⁹³ OUTA 'Anoj Singh should lose accounting licence and go to jail — OUTA' January 2018, available at <https://www.oua.co.za/anoj-singh-lose-accounting-licence-go-jail/>, accessed on 22 April 2018.

Committee on Public Enterprises.⁶⁹⁴ In October 2017 OUTA further laid criminal charges against the former interim Eskom chief executive officer (CEO) who was suspended at the time of the charges.⁶⁹⁵ The interim CEO was appointed as Eskom interim CEO in 2016 when the former Eskom CEO had resigned after being implicated in the public protector's report, *State of Capture*.⁶⁹⁶ The former interim CEO faced a disciplinary hearing on charges of corruption and nepotism while he was CEO at Eskom and for assisting the Gupta-owned companies secure major Eskom contracts.⁶⁹⁷

Further, in March 2017 OUTA issued a summons against the South African Airways (SAA) non-executive director and chairperson, Dudu Myeni, to have her declared a delinquent director and called for an investigation into the behaviour of the South African Airways (SAA) director.⁶⁹⁸ OUTA believed that the director was the centre of the problems at SAA and lacked ability as a director to be part of SAA executive structures.⁶⁹⁹ In 2018, when the cabinet announced a new board at SAA, the former director, Dudu Myeni, was not part of it. OUTA supported the decision because since 2008 when Myeni was appointed to the SAA board, the government bailed out SAA with an amount of R23, 8 million.⁷⁰⁰ On 27 May 2020, Dudu Myeni was declared a delinquent director by the Gauteng High Court.⁷⁰¹ Lastly, 3 August 2017, OUTA laid charges of treason and racketeering against the Gupta brothers in connection with allegations of state capture. This followed months of evidence of corruption and state capture that emerged from the emails lifted from computers linked to Gupta companies.⁷⁰²

⁶⁹⁴ Austil Mathebula & Lameez Omarjee 'Embattled Eskom CFO Anoj Singh resigns 'with immediate effect'' Fin24 January 2018, available at <https://www.fin24.com/Economy/Eskom/breaking-embattled-eskom-cfo-anoj-singh-resigns-with-immediate-effect-2018012>, accessed on 23 August 2018.

⁶⁹⁵ OUTA, 'OUTA lays corruption charges against Eskom's Koko' October 2017, available at <https://www.oua.co.za/oua-lays-corruption-charges-against-eskoms-koko/>, accessed on 24 August 2018.

⁶⁹⁶ Public Protector 'State of Capture' op cit note 465.

⁶⁹⁷ OUTA lays criminal charges against suspended Eskom CEO' eNCA 5 October 2017, available at <https://www.enca.com/south-africa/oua-lays-charges-against-eskoms-singh>, accessed on 13 May 2018 . See also OUTA, 'OUTA lays corruption charges against ESKOM's Koko' 5 October 2017, available at <https://www.oua.co.za/oua-lays-corruption-charges-against-eskoms-koko/> accessed on 30 March 2018.

⁶⁹⁸ 'OUTA calls for an investigation into Dudu Myeni' *Business Online* October 2017, available at <https://www.iol.co.za/business-report/companies/oua-calls-for-an-investigation-into-dudu-myeni-11624348>, accessed on 24 August 2018.

⁶⁹⁹ Ibid.

⁷⁰⁰ 'OUTA calls for an investigation into Dudu Myeni,' *Business Report* 19 October 2017, available at <https://www.iol.co.za/business-report/companies/oua-calls-for-an-investigation-into-dudu-myeni-11624348>, accessed on 16 May 2018.

⁷⁰¹ *Organisation Undoing Tax Abuse NPC v Myeni* 2020 ZAGPPHC 169.

⁷⁰² Graeme Hosken 'OUTA charges Dudu, Duduzane and the Guptas with treason and racketeering' *News* 24 4 August 2017, available at <https://www.timeslive.co.za/news/south-africa/2017-08-04-oua-charges-dudu-guptas-with-treason-and-racketeering/>, accessed on 24 August 2018.

4.4.5 Future South Africa

Future South Africa (Future SA) is an organisation that was formed in 2017 and consists of civil society organisations, anti-apartheid activists and business people.⁷⁰³ It is a politically non-affiliated coalition which aims to end state capture and other maladministration of state office and resources.⁷⁰⁴ Future SA called for the removal of all cabinet ministers linked to the state capture reports in July 2017.⁷⁰⁵ In addition, in February 2018, Future SA wrote to African National Congress (ANC) president, Cyril Ramaphosa, and called on the ANC to recall the now former president Jacob Zuma as president of the Republic, after several allegations of abuse of his office by the latter emerged.⁷⁰⁶

Secondly, on the 6 October 2017, several CSOs came together under Future SA to protest outside the Sandton offices of the consultancy firm McKinsey and Company. Protestors indicated that global conglomerates like KPMG and Mckinsey were enabling corruption in South Africa.⁷⁰⁷ Among the demands was that the firm subject itself to an independent outside inquiry and that unlawful acts of employees who worked with the Eskom contract be reported to relevant authorities.⁷⁰⁸

In addition, in September 2017, Future SA called on businesses to follow in the steps of the Board of the Institute of Directors in South Africa which suspended its co-branded activities with KPMG who were involved in the Gupta saga.⁷⁰⁹ Future SA applied pressure on those implicated in the Gupta Leaks emails to be held to account, adding that the South African government had displayed arrogance by not dealing with the matter decisively. The organisation went on to call businesses to follow in the steps of the Board of Institute of Directors in South Africa that terminated the services of KPMG.⁷¹⁰

⁷⁰³ Future SA conference to discuss action against state capture' July 2017, available at <https://www.enca.com/south-africa/future-sa-conference-to-discuss-action-against-state-capture>, accessed on 24 August 2018.

⁷⁰⁴ Ibid.

⁷⁰⁵ Loyiso Sidimba #ZumaRecall: 'Captured ministers must also be removed' *IOL* February 2018, available at <https://www.iol.co.za/news/politics/zumarecall-captured-ministers-must-also-be-removed-13267914>, accessed on 24 August 2018.

⁷⁰⁶ Future SA 'FutureSA welcomes ANC's decision to recall Zuma' *Polity* 13 February 2018, available at <http://www.polity.org.za/article/future-sa-futuresa-welcomes-ancs-decision-to-recall-zuma-2018-02-13>, accessed on 15 July 2018.

⁷⁰⁷ Ziyanda Yono 'Future SA protests outside Mckinsey office' *EWN* October 2017, available at <https://ewn.co.za/2017/10/05/watch-futuresa-protests-outside-mckinsey-s-offices>, accessed on 24 August 2018.

⁷⁰⁸ Ihsaan Haffejee 'McKinsey: Future SA demands firm to be subjected to independent inquiry' *Daily Maverick* 6 October 2017, available at <https://www.dailymaverick.co.za/article/2017-10-06-mckinsey-future-sa-demands-firm-be-subjected-to-independent-inquiry/>, accessed on 22 August 2018.

⁷⁰⁹ Masa Kekana 'Future SA to continue to apply pressure on those implicated in Gupta leaks' *EWN*, 10 September 2017, available at <https://ewn.co.za/2017/09/10/future-sa-to-continue-to-apply-pressure-on-those-implicated-in-gupta-leaks>, accessed 27 June 2018.

⁷¹⁰ Ibid.

4.4.6 Save South Africa

Save South Africa (Save SA) is a campaign that was founded in 2016 in Pretoria and is made up of civil society organisations groups, South African citizens and the supporters of the founding principles of democracy.⁷¹¹ Save SA's commitment is to hold leaders accountable to the values of the Constitution and to ensure that they act with responsibility and dignity.⁷¹² Since 2016, Save SA has led protests against the former president and mobilised again after the former finance minister, Pravin Gordhan, was fired when then President Zuma shuffled his cabinet in March 2017.⁷¹³ Save SA protested, demanded that the president should resign, and that the process dealing with the state capture be commenced immediately, as was recommended by the Public Protector, as a way of regaining people's trust.⁷¹⁴

In October 2017, Save SA wrote to former president Jacob Zuma requesting an urgent meeting to discuss his ability to continue as the head of the state as well as upholding the constitutional provisions. Save SA showed concern over the state of the nation and requested the former president reconsider his position as the president. The former president resigned on 14 February 2018.

4.4.7 Other CSOs

State owned enterprises boards should not only focus on profit maximisation and service delivery but also on the impact SOEs as companies have on the environment to which they operate. To that end non-profit organisations such as Parkscape,⁷¹⁵ have contributed to environmental activism in state owned enterprises such as South African National Parks (SANPARKS). Other CSOs that have also taken on a larger role in addressing environmental problems include Just Share, Raith Foundation and Centre for Environmental Rights, Vukani Environmental Justice Movement in Action, groundWork and Earthlife Africa.⁷¹⁶

⁷¹¹ Save SA [website], available at <https://www.savesouthafrica.org>, accessed on 26/June 2018.

⁷¹² Ibid.

⁷¹³ 'Save SA release list of demands to make sure Jacob Zuma goes' *Mail & Guardian* 9 May 2017, available at <https://mg.co.za/article/2017-05-09-save-sa-list-of-demands>, accessed on 24 August 2018.

⁷¹⁴ Ibid.

⁷¹⁵ Nettalie Viljoen *People's Post News* 24 May 2021 available at <https://www.news24.com/news24/SouthAfrica/Local/Peoples-Post/review-process-starts-20210524> accessed on 7/06/2021.

⁷¹⁶ Justin Rowe-Roberts 'One up to the environment as High Court opposes Khanyisa coal-fired power station' *Biznews* June 2021 available at <https://www.biznews.com/global-investing/2021/06/04/khanyisa-coal> accessed on 07 June 2021. See also Zita Hansungule, Rico Euripidou and Promise Mabilo 'The right to breathe: Landmark legal case a fight for South African children harmed by coal's deadly air' *Maverick* May 2021 available at <https://www.dailymaverick.co.za/article/2021-05-19-the-right-to-breathe-landmark-legal-case-a-fight-for-south-african-children-harmed-by-coals-deadly-air/> accessed on 06 June 2021. Marleny Arnoldi 'Standard Bank to publish climate

For example, in 2016, SANParks entered into a lease agreement with MTO Forestry which allowed the latter to clear invasive vegetation on the Table Mountain National Park (the park) in Cape Town. Concerned by the damage on the environment the felling of trees would cause, Parkscape approached the court to interdict the felling of the trees by MTO Forestry and argued that SANParks had not taken just administrative action in terms of PAJA when taking the decision. The court decided in Parkscape's favour.⁷¹⁷

Secondly, in 2003, the Director-General (DG) of Environmental Affairs granted Eskom authorisation to construct a Pebble Bed Nuclear Reactor in Cape Town. Realising the potential risks the nuclear reactor would have on Cape Town residents, EarthLife Africa (Cape Town) applied to court for the decision by the DG to be reviewed and set aside in terms of PAJA for lack of procedural fairness.⁷¹⁸ EarthLife and other interested parties had not been given an opportunity to make submissions on the final report preceding the DG's decision. The court held that EarthLife and other interested parties were entitled to the opportunity to make submissions before the DG's decision but because such opportunity was not given, the DG's decision was fatally flawed and the flawed part should be set aside.⁷¹⁹

In addition, in 2018 EarthLife Africa Johannesburg approached the high court arguing that the Chief Director of Integrated Environmental Affairs and Minister of Environmental Affairs failed to consider climate change impacts of the proposed coal fired Thabametsi Power Station Project before granting authorisation. Earthlife urged the court to set aside the decision for non-compliance with the National Environmental Management Act of 1998. The court issued an order setting aside all governmental authorizations for the coal-fired power plant.⁷²⁰

This selection of cases clearly illustrates the importance of clear legal provisions which NPOs generally and CSOs in particular can use to call government to order where necessary.

strategy in 2022' available at <https://www.engineeringnews.co.za/article/standard-bank-to-publish-climate-strategy-in-2022-2021-05-21> accessed on 06 June 2021. EarthLife wins South Africa's first climate change case' *Mail & Guardian* March 2017 available at <https://mg.co.za/article/2017-03-08-earthlife-africa-wins-south-africas-first-climate-change-case/> accessed on 07 June 2021. Lisa Steyn 'Activists turn to global investors after Sasol rejects climate resolutions' *BusinessLive* November 2020 available at <https://www.businesslive.co.za/bd/companies/energy/2020-11-10-activists-turn-to-global-investors-after-sasol-rejects-climate-resolutions/> accessed on 07 June 2021.

⁷¹⁷ *Parkscape v MTO Forestry (Pty) Ltd and Another* 2018 (1) SA 263 (WCC).

⁷¹⁸ *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism and another* 2005 (3) SA 156 (C)

⁷¹⁹ *Supra*.

⁷²⁰ *EarthLife Africa Johannesburg v Minister of Environmental Affairs and others* 2017 JDR 0492 (GP).

4.5 Conclusion

Due to the advanced level of democracy in South Africa and given its robust human rights framework that guarantees rights of participation by way of freedom of expression, association and protestation, it is evident that CSOs have an enabling environment in which to challenge the government. Furthermore, the Public Protector's office is empowered by law to conduct investigations to determine allegations in the public's interest, as is emphasised in the cases of *EFF, DA v National Assembly*, *DA v SABC* and *President of South Africa v Public Protector* in which the courts thoroughly explained the role of the Public Protector. The Public Protector's reports without a doubt play an important role in providing a background to the different activities of CSOs against poor governance in SOEs.

Not only does South Africa have a strong legal framework with legal provisions that promote a strong respect for human rights, its courts oftentimes emphasise the importance of democracy as well as human rights. Through these actions by the judiciary as well as the introduction of new laws, the law is constantly evolving, making it easier for CSOs to have the enabling environment mentioned above necessary to end poor governance and corruption.

However, as briefly mentioned in this chapter and in the previous chapters, the problem is not necessarily the availability of these legal provisions but the resistance that CSOs encounter each time they use them. The government often undermines the mandate of CSOs. In fact, the government undermines any institution that seems to challenge it, including its own institutions like the office of the Public Protector. This behaviour takes the development of the country many steps back as it discourages the efforts of and contributions made by CSOs.

CSOs have taken many measures (as explained above and below in chapter 5 subsection 5.5.2) in their pursuit of accountability from the government including campaigns, protests and engagements. It is, however, litigation that has resulted in many great successes for civil society and has, in most cases, restored justice. However, the fact remains that CSOs do not have self-authorising legal provisions - they act on behalf of South Africa's citizenry in terms of section 38 of the Constitution. This means that they always have to prove representation in order to have legal standing in the courts of law, yet as juristic persons they are entitled to have self-authorising legal provisions. It would make a major difference if CSOs could be invested with self-authorising legal provisions without having to prove *locus standi* each and every time they commence a legal action.

In the next chapter, data collected through the empirical component of the study on how CSOs use legal provisions to advance corporate governance in state-owned enterprises in South Africa are analysed and findings are discussed.

CHAPTER 5: LEGAL PROVISIONS: A DIRECT TOOL FOR CIVIL SOCIETY ORGANISATIONS FOR RESTORING GOOD GOVERNANCE IN SOES

5.1 Introduction

This chapter reports the empirical findings on the use of legal provisions by CSOs to advance corporate governance in state-owned enterprises in South Africa. The failure by state-owned enterprises (SOEs) to meet their obligations as well as their breach of corporate governance practices has resulted in legal action and different interventions by CSOs. Their actions are aimed at advancing the corporate governance of SOEs because, as citizens' representatives, CSOs are mandated to keep the government alive to its responsibilities.⁷²¹ In doing this, CSOs encounter resistance but, nonetheless, they find avenues to make these interventions under the existing laws. Still, the fact that there is a need for a more enabling legal environment for CSOs to conduct their watchdog role on behalf of the citizens is undisputed.

The evidence presented in the previous chapters also shows that literature on how CSOs use legal provisions to advance corporate governance in SOEs or in the public sector in general is underdeveloped. The gap in the law is not necessarily that of explicit laws authorising CSOs to sue, as there are Chapter 9 institutions charged with oversight, but in the effective use of the existing law and also in the loopholes presented by certain legal provisions which detract from the legal environment by hampering the work of CSOs.

The empirical research was directed at sourcing information from institutional and organisational actors in SOEs and CSOs respectively, on the following issues:

- (i) The importance of CSOs, objectives and role played in the society to end poor governance.
- (ii) The state of the relationship between CSOs and the state.
- (iii) Legal provisions used by CSOs to carry out activities directed at addressing SOEs/the public sector.
- (iv) The loopholes and challenges in such legal provisions.
- (v) Ensuring CSO independence.
- (vi) Enabling environment (including legal environment) for CSOs to conduct their mandate.

⁷²¹ Adil Najam, *The Four-C's of Third Sector–Government Relations: Cooperation, Confrontation, Complementarity, and Co-optation* at 383-90, available https://www.researchgate.net/publication/227711700_The_Four_C's_of_Government-Third_Sector_Relations, accessed on 21 November 2017.

- (vii) The way forward for CSOs in South Africa in respect of their various roles.

The methodology adopted is described in the sections that follow, as are the limitations and governance of its application.

5.2 Methods

5.2.1 Study design

A qualitative method based on interviews was applied. Qualitative methodology was appropriate for this study because as Rossman and Rallies have noted,

There are few truths that constitute universal knowledge, rather, there are multiple perspectives about the world.⁷²²

By exploring the perceptions of different CSOs that have experience in using legal provisions to conduct their watchdog role on behalf of the citizens, it was possible to obtain multiple perspectives that deepen an understanding of how CSOs employ legal tools to hold accountable those responsible for poor governance in SOEs or the public sector. In addition, a qualitative research approach was considered the best suited research methodology for this type of research, as it allowed each participant to describe certain unique characteristics and attributes of their organisation, while also enabling the researcher to get information that is rich in detail and insight into the participants' experiences.⁷²³

Furthermore, the qualitative method of research was suitable for this study as it provided extensive information not only on how CSOs use legal provisions but also on CSOs' operational dynamics, such as the challenges they grapple with, which is critical to the objective of this study. The data from interviews was analysed to ascertain the role of CSOs and how CSOs use legal provisions to challenge SOEs. The researcher believes that the interviews provide a reliable indication of the extent to which CSOs use legal provisions to promote sound corporate governance of SOEs.

⁷²² Gretchen B Rossman & Sharon F Rallis *Learning in the Field: An Introduction to Qualitative Research* (1998) at 29.

⁷²³ Marie C Hoepfl 'Choosing qualitative research: A primer for technology education researchers' (1997) 9 (1) *Journal of Technology Education* at 49–50.

Lastly, in some CSOs, interviews were conducted with staff who are also founders of the organisation. In others the interviews engaged legal and advocacy heads of these CSOs. These participants were appropriate for the interview because those in management positions are responsible for the running of the organisation, while legal and advocacy heads are involved in the practical use of legal provisions. All these various participants were, therefore well-positioned to answer the interview questions.

5.2.2 Sampling

A variety of sampling procedures are available for qualitative research. For the purposes of this research, it was advantageous to select a sampling method that would allow for the identification of a group of CSOs with diverse experiences. This sampling involved choosing CSOs that were information rich because they have demonstrated outstanding success in using legal provisions to challenge the management of the public sector organisations by the government.⁷²⁴

In order to directly address the research question which sought to obtain information on how civil society organisations (CSOs) use legal provisions to promote corporate governance of state-owned enterprises (SOEs), it was important to choose CSOs that play a public benefit role. These are CSOs that question or challenge the governance of the public sector or CSOs that hold public officials accountable for the governance of the public sector. The selection was done, first, by identifying court cases from court registers and media reports necessary for the study. For court cases, identification was guided by the court rulings that dealt with CSOs' challenging the management of SOEs or other institutions in the public sector. This was supported by a selection of media reports which focused on cases of poor corporate governance and state corruption that caused a public outcry. Organisations that do not play a watchdog role as one of their mandates were not eligible. Following identification and initial contact, the researcher chose four CSOs, two of which are based in Cape Town and two in Johannesburg.

5.2.3 Data collection

Data collection took place from September to December 2018. The civil society organisations interviewed were: (i) the AmaBhungane Centre for Investigative Journalism, (ii) Open Secrets, (iii) Organisation Undoing Tax Abuse (OUTA) and (iv) Corruption Watch.

⁷²⁴ Michael Quinn Patton *Qualitative Research & Evaluation Methods* (3 ed) (2002) at 235.

OUTA and Corruption Watch are based in Johannesburg, while AmaBhungane and Open Secrets are based in Cape Town. Due to budget constraints, interviews with the organisations based in Johannesburg were conducted on Skype while interviews with the Cape Town-based CSOs were conducted at their offices. Prior to the conducting of the interviews, all the correspondence with participants took place through emails containing details of the research, such as the information and consent letters.⁷²⁵ On the day of the interview, the researcher verbally explained the purpose of the research to the participants, which was to ascertain how the CSOs use legal provisions to challenge SOEs. Individuals did not participate in their personal capacity but in their representative capacity as officers of the CSOs.

Secondly, the researcher used semi-structured interviews and open-ended questions. Semi-structured interviews and open-ended questions allow participants to provide information that is important but not necessarily reflected in the interview questions and this helps the interviewer understand the details of participants' experiences from their point of view.⁷²⁶ In addition, semi-structured interviews allow the researcher to probe and explore within pre-determined inquiry areas. The list of questions prepared by the researcher helped to ensure good use of the limited interview time and helped keep the interaction focused.⁷²⁷ All interviews except one (which was hand-written in a notebook because the participant refused to be audio recorded), were audio recorded with the consent of the participants. Notes were also taken. The note taking was limited to allow the researcher to focus on the participants and their answers. Each interview was scheduled for 60 minutes but some had to be scaled down to 30 to 40 minutes due to the time constraints of the participants.

5.2.4 Data analysis

LeCompte and Schensul define data analysis as the process a researcher uses to reduce large amounts of data to a story and its interpretation so as to make sense of the data.⁷²⁸ Data analysis is further described as messy, ambiguous and time-consuming, but also as a creative and fascinating process that does not proceed in linear fashion.⁷²⁹ Also, Patton indicates that

⁷²⁵ See Annexures A and B.

⁷²⁶ Sedman I, *Interviewing as Qualitative Research: A Guide for Researchers in Education and Social Sciences* (1998) at 112.

⁷²⁷ See interview questions in Annexures C and D.

⁷²⁸ Margaret D LeCompte & Jean J Schensul *Designing and Conducting Ethnographic Research: An Introduction* (2010) at 195.

⁷²⁹ Thomas A Schwandt *The SAGE Dictionary of Qualitative Inquiry* (2007) at 6.

three things occur during data analysis: data is organised, reduced through summarization and categorization, and patterns and themes in the data are identified and linked.⁷³⁰

Recorded interviews were transcribed verbatim by the researcher, except in the case of one in which the participant refused to be audio recorded. Recordings have the advantage of capturing data more accurately than hurriedly written notes and can make it easier for the researcher to focus on the interview.⁷³¹ The transcriptions were analysed using the constant comparative method, a process that compares each interpretation and finding with existing findings as it emerges from the data analysis. The transcripts were coded thematically to identify themes and patterns that emerge from it. Coding can be explained as categorisation of data,⁷³² using a word or short phrase that represents a theme or an idea and codes need to be assigned meaningful titles.⁷³³ In support of Patton, Roulston states that the ‘generation of themes via coding and categorisation is arguably the most common analytical approach taken by qualitative researchers using interviews’.⁷³⁴ In the case of this study, the coding and analysis process resulted in several themes and sub-themes that enabled the researcher to link research findings to the research aim and objectives.

5.3 Limitations

The researcher encountered limitations while undertaking this study. Initially, the plan was to interview three civil society organisations (CSOs) and three state-owned enterprises (SOEs). It was extremely difficult, however, to secure interviews with any of the SOEs identified for the empirical study. These were the Eskom, the South African Broadcasting Corporation (SABC), Telkom and the South African Airways (SAA). The reason for the failure to secure interviews with these SOEs was that the company secretaries and other staff familiar with the subject matter of the research were based at the SOEs headquarters in Johannesburg. Emails were sent to these state entities’ central offices in Johannesburg to secure Skype interviews, without response. Follow-up phone calls were not answered and in some cases, promises were made to refer the matter to the right person, but no feedback was received after further follow-up.

⁷³⁰ Michael Quinn Patton *How to Use Qualitative Methods in Evaluation* (1987) at 144.

⁷³¹ Hoepfl op cit note 722 at 53.

⁷³² John Dudovskiy *The Ultimate Guide to Writing a Dissertation in Business Studies: A Step-by-Step Assistance* (2016) at 6–16.

⁷³³ Ibid.

⁷³⁴ Kathryn Roulston 'Interactional problems in research interviews' (2014) 14 (3) *Qualitative Research* at 305.

This, however, did not affect the objective of the research as any failure to secure interviews with SOEs was partly remedied by increasing the number of CSOs interviewed. Interviewing four different CSOs instead of three proved adequate to get substantial information on how CSOs use legal provisions to advance corporate governance in SOEs.

The approach to CSOs was not without some difficulty. Some Cape Town-based CSOs which were contacted for interviews through emails did not respond. Follow-up phone calls were made but the promises of a response also never materialised, prompting the researcher to reach out to CSOs based in Johannesburg. These challenges within SOEs and CSOs could also be as a result of lack of resources and capacity within the institutions to deal with demands other than their daily activities. Nevertheless, it was the use of semi-structured interviews with available CSOs which proved to be very useful and efficient in gaining in-depth and meaningful data from the participants on their use of legal provisions to advance corporate governance in SOEs. While the findings are not completely generalisable, they do provide valuable information that addresses the research question.

5.4 Research ethics

The ethics permission was granted by the University of Cape Town's Law Faculty Research Ethics Committee on the 1 August 2018 following a research ethics application process (Annexure E). The letter conveying ethics approval was presented to all participants and they signed a consent form stating that they were willing to participate in the interview. Besides stipulating in the consent letter that anonymity and confidentiality would be maintained, the researcher informed and reassured the participants that their personal names would not be mentioned in the course of writing the report and would also not appear in the thesis or any publication. There was no video recording of the interviews.

Where it was necessary to refer to a participant for the purpose of contextualising the information the participant's organisation was mentioned instead (for example, 'the participant from Corruption Watch stated...'). No participant was asked questions about personal and confidential information. Only public information related to the organisation's activities, policies and procedures was requested. The research was not a whistleblowing exercise but a scholarly one to identify and analyse governance for public sector agencies. The findings of the empirical research are presented in the next segment.

5.5 Findings

In this section, ‘**participant**’ refers to individuals that were interviewed as officials of participating organisations while ‘**participating organisation**’ refers to the civil society organisation.

The section commences with a brief profile of the organisations used for the empirical research. Thereafter the findings are presented under the following heads:

- i. Roles and Activities of CSOs in improving governance;
- ii. Current state of governance relationship between the State and CSOs;
- iii. Enabling environment;
- iv. Legal tools and strategies for CSO activities;
- v. Clarity, ambiguity and changes in legal provisions;
- vi. Improving CSO use of legal provisions; and
- vii. CSOs’ independence.

5.5.1 Participating organisations

- (i) Participating organisation 1 is an independent non-profit newsroom based in Cape Town that conducts investigative journalism and exposes state corruption in the public interest.⁷³⁵
- (ii) Participating organisation 2 is a non-profit organisation based in Cape Town that exposes and holds the private sector and individuals accountable for economic crimes through investigative research, advocacy, and the law.⁷³⁶
- (iii) Participating organisation 3 is a non-profit organisation based in Johannesburg that questions and challenges the squandering, maladministration and corrupt use of tax funds, advocating and litigating for accountability.⁷³⁷
- (iv) Lastly, participating organisation 4 is a non-profit organisation based in Johannesburg that relies on the public to report state corruption so that the organisation can fight corruption and hold leaders accountable for their actions.⁷³⁸

⁷³⁵ AmaBhungane Centre for Investigative Journalism [website], available at <https://amabhungane.org/about-us/>, accessed on 10 August 2019.

⁷³⁶ Open Secrets [website] available at https://www.opensecrets.org.za/who_we_are/, accessed on 09 August 2019.

⁷³⁷ Organisation Undoing Tax Abuse (OUTA) [website], available at <https://www.outa.co.za/vision-mission>, accessed on 09 August /2019.

⁷³⁸ Corruption Watch [website], available at <https://www.corruptionwatch.org.za/about-us/who-we-are/about-corruption-watch/>, accessed on 10 August 2019.

5.5.2 Roles and activities of CSOs in improving public sector governance

(i) Roles and activities of CSOs in improving governance

Democracy and national solidarity do not exist without social dialogue, a proper functioning system of representation and a strong civil society.⁷³⁹ CSOs assist citizens to exercise democratic freedom through expressing their views, their ideas and engaging in public debates, and in this way citizens are given a platform to participate in decision-making.⁷⁴⁰ All participants acknowledged that exposing state corruption and holding those responsible to account are the crucial roles which their organisations play to end poor governance in the public sector. Participants' responses point to the fact that their work reduces the costs of bad governance, challenges unnecessary expenditure and mobilises civil society reaction to corruption, thereby contributing to accountable governance in the public sector.

(ii) Activities

Civil society has globally become an agency of hope to bring political and economic change.⁷⁴¹ The watchdog role of CSOs involves monitoring the government in order to advance the interests of society.⁷⁴² The effective and sustainable mechanisms between civil society and the authorities at all levels are important vehicles that are enabling the participation of all individuals and societal groups in democratic decision-making.⁷⁴³ Participants stated that they were involved in different activities aimed at addressing public sector governance such as protests, dialogue, policy and advocacy campaigns as well as litigation and making submissions to parliament. Participants further mentioned that through these activities, aimed at combating corruption and poor governance in the public sector, organisations are able to expose hotspots and patterns of corruption and ultimately show gaps

⁷³⁹ *Strategy Paper of the Government of Hungary on Civil Society* (2002) at 1–13, available at <https://www.legislationline.org/documents/id/5362>, accessed on 07 August 2019.

⁷⁴⁰ Arko-Cobbah op cit note 20 at 354.

⁷⁴¹ Habib A & Kotze op cit note 4 at 249.

⁷⁴² Zoleka Ndayi 'SA needs organisation involving all parties' *Daily Dispatch*, 29 July 2011, available at <https://www.pressreader.com/south-africa/daily-dispatch/20110729/281771330859850>, accessed on 20 December 2018.

⁷⁴³ Ivana Rosenzweigova, Vanja Skoric & Hanna Asipovich *Civil Participation in Decision Making Processes. An Overview of Standards and Practices in Council of Europe* (2016), available at <http://staging.icnl.org/wp-content/uploads/overview-participation-standards-ECNL-for-CDDG-11052016.pdf> at 7–8, accessed on 05 August 2019.

in the policy and legal frameworks intended to combat corruption. Various activities of the CSOs interviewed are discussed next.

a. Dialogue and engagement

Some participants stated that they have done advocacy work, engaging government agencies, municipalities and working with associations of civil society to encourage citizens to speak out about their grievances and demands, and assert their right to be heard by the government. For example, Organisation Undoing Tax Abuse (OUTA) is based in Johannesburg and challenges the squandering of tax funds in government departments, municipalities and SOEs in the country. It has a programme called OUTA Local Initiative which focuses on engaging with municipalities whenever there is an issue that needs to be addressed. This happens mostly when poor governance or maladministration is uncovered in a particular municipality. OUTA engages the municipality involved, presents its evidence of poor governance in such a municipality, and also suggests appropriate solutions. In some cases, OUTA may assist with rectifying the problem. In so doing, OUTA has been successful in various ways, such as the municipal manager reporting back and saying that there will be disciplinary action instituted against those responsible, that the mismanaged funds will be paid back to the public coffers or that the municipality will ensure that its governance policies are adhered to so that the same problem does not reoccur.

b. Protests

Governance becomes legitimate when it is practiced within democratic principles which include transparency, accountability, inclusivity and representation.⁷⁴⁴ Participants, whose advocacy work involves protest action, indicated that the major trigger for protests is usually a lack of public consultation and transparency by the government in critical decisions that affect the public. For example, OUTA has been involved in the ongoing protests against the establishment of electronic tolling (e-tolls) on Gauteng freeways. The organisation feels that the installation of electronic tolling (e-tolls) by the South African National Roads Agency (SANRAL) is irrational, unreasonable and not planned with the best interests of the public whose taxes will fund such an extremely costly project of upgrading roads. The organisation thinks that the project lacks transparency and citizens were not consulted. Civil society

⁷⁴⁴ Arko-Cobbah op cit note 20 at 354.

should be able to access and publish information without any limitations to enable citizen participation.

c. Advocacy

All participants indicated involvement in advocacy work addressing public sector governance. A participant from the investigative journalism organisation, AmaBhungane further clarified the organisation's unique advocacy role, explaining that, because journalists are not activists, they are expected to be independent and should not be found prescribing what people should do with the exposed information (for example protest or litigation). As a result, the organisation plays an advocacy role only when it is fighting for access to information that is being denied and they have no choice but to approach the courts to seek access to such information to enable them do their work. For example, AmaBhungane's role in the state capture allegations was simply to expose information about the capturing and weakening of state institutions by certain individuals at the expense of the citizens, not to suggest to civil society what to do with the information published.⁷⁴⁵ This journalism organisation leaves such a mandate to activist CSOs.

Another example of AmaBhungane's proactive use of legal provisions in their work is found in the case of *Mandag Centre for Investigative Journalism (AmaBhungane) v Minister of Public Works*.⁷⁴⁶ This action was filed after AmaBhungane had been denied access to Nkandla records to enable the journalism organisation do its investigative work. Nkandla is a private homestead of former South African president, Jacob Zuma, which the Public Protector in 2014 found was upgraded with public funds that were unlawfully taken from the public coffers by the former president.⁷⁴⁷ AmaBhungane wanted the Department of Public Works to grant the organisation access to all the records pertaining to the upgrading of the Nkandla homestead. The court ruled in favour of AmaBhungane and ordered the department to grant such access.⁷⁴⁸

d. Submissions

Most participants said that their organisations have contributed to public sector governance through submissions to Parliament whenever there is new legislation or amendment to existing legislation before the courts. For example, AmaBhungane played this role when the

⁷⁴⁵ Public Protector *State of Capture* op cit note 465.

⁷⁴⁶ 2014 JDR 0870 (GNP).

⁷⁴⁷ Public Protector *Secure in Comfort* op cit note 594.

⁷⁴⁸ The case was brought under the Promotion of Access to Information Act 2 of 2000 (PAIA).

Critical Infrastructure Protection Bill was introduced before the Parliament in 2017 to replace the apartheid-era legislation National Key Points Act 102 of 1980 which protects government buildings and properties around the country and which made it difficult for organisations to access information about such properties.⁷⁴⁹ The National Key Points Act was used by the former president to cover up the extent of state-funded renovations at his private rural homestead in Nkandla.⁷⁵⁰ Because journalists and the public could neither obtain any information to publish nor take pictures of the homestead, media reporting was obstructed and frustrated.⁷⁵¹ When the Critical Infrastructure Protection Bill was introduced in September 2017, some errors in the National Key Points Act were repeated in the new Bill. Participants stated that during their submissions to Parliament, they raised these red flags in regard to the Critical Infrastructure Protection Bill. These included that the Bill imposes excessive criminal sanctions on journalists and members of the public who want to photograph national key points or expose corruption in the national key points.

Another example of a recent submission by Corruption Watch was to the Standing Committee on the Auditor General (SCOAG) to address the draft Public Audit Amendment Bill that was introduced in May 2018.⁷⁵² The participants emphasised that the submissions to SCOAG had been motivated by a lack of action by the accounting and executive authorities in dealing with the maladministration of state resources which had become had been an obstacle. The amendments sought to include a provision ensuring that the Auditor-General (AG) is able to enforce its audit findings and to strengthen the provisions which hold those involved in state corruption accountable. In its submissions, Corruption Watch dealt with the referral of the Auditor General's findings of undesirable audit outcomes to the relevant bodies for investigation, as well as the recovery of wasted expenditure from the accounting authority of those audited institutions (including boards) in their personal capacity.⁷⁵³

Lastly, another example of submissions made by Corruption Watch before Parliament is in relation to the amendment of the Protected Disclosure Act (PDA) of 2017, which

⁷⁴⁹ National Key Points Act 102 of 1980.

⁷⁵⁰ 'Goodbye National Key Points, hello Critical Infrastructure Protection Bill' *Defence Web* 22 April 2016, available at http://www.defenceweb.co.za/index.php?option=com_content&view=article&id=43226:goodbye-national-key-points-act-hello-critical-infrastructure-protection-bill&catid=49:National%20Security&Itemid=115, accessed on 20 December 2018.

⁷⁵¹ Emsie Ferreira 'New secrecy bill recalls the failings of the old' 17 September 2018 IOL, available at <https://www.iol.co.za/news/politics/new-secrecy-bill-recalls-the-failings-of-the-old-17106869>, accessed on 26 December 2018.

⁷⁵² 'The Public Audit Act Amendment Bill: What's it about? Corruption Watch, 26 November 2018, available at <https://www.corruptionwatch.org.za/the-public-audit-act-amendment-bill-whats-it-all-about/>, accessed on 6 July 2019.

⁷⁵³ Ibid.

protects whistle-blowers.⁷⁵⁴ Watchdog CSOs rely on whistle-blowers for reports of corruption and poor governance, hence the interest in more protection of whistle-blowers. The amendments submitted by CSOs have not yet been passed. Furthermore, some participants think that the inadequacy of the PDA is the reason why whistle-blowers are afraid to report corruption and poor governance due to the drastic measures taken against those reporting false information. Fear of disclosing false information is likely to deter whistle-blowers from making disclosures, since some information may appear true or reliable but may, after investigation, prove to be false or unreliable. Participants added that submissions to Parliament are very important as they are aimed at strengthening government policies.

e. Tribunals and commissions

Some participants stated that their organisations have been involved in state and non-state tribunals and commissions aimed at enforcing justice and accountability. For example, a participant from Open Secrets stated that in February 2018, the organisation was the secretariat of the People's Tribunal on Economic Crimes, an advocacy tool organised by citizens in the absence of state justice and accountability. The People's Tribunal over five days examined inter alia, economic and human rights crimes against citizens during apartheid and the state capture allegations. Witnesses who included whistle-blowers and those from civil society organisations presented evidence which highlighted the link between economic crimes and inequality in South Africa.⁷⁵⁵ The recommendations after the tribunal were, among others, that the National Prosecuting Authority and the South African Police Services should investigate state capture allegations as a matter of urgency.⁷⁵⁶ There are no arrests that were made by both NPA and SAPS against those implicated in the state capture at the People's Tribunal.

f. Publishing

Participants stated that they have written stories and published books and reports as a way of addressing state corruption and poor governance in the public sector. For example, a participant from Open Secrets mentioned that its director wrote a book titled *Apartheid Guns*

⁷⁵⁴ Corruption Watch 'Get to know the amended Protected Disclosures Act' *Corruption Watch* 26 September 2017, available at <https://www.corruptionwatch.org.za/get-know-amended-protected-disclosures-act/>, accessed on 27 October 2018.

⁷⁵⁵ Open Secrets 'The People's Tribunal on economic crimes, the arms trade' *Open Secrets* 2018, available at https://www.opensecrets.org.za/site/wp-content/uploads/Final-Report-of-the-Panel_Signed.pdf, accessed on 7 August 2019.

⁷⁵⁶ *Ibid.*

and Money: A Tale of Profit which presents evidence of crimes by the private sector, exposes corruption in the government and highlights other human rights violations.⁷⁵⁷ The book reflects the poor governance in SOEs such as the dealings of the Armaments Corporation of South Africa (Armcor) and the state's aerospace and military technology conglomerate (Denel), among others. Other examples include the *No Room to Hide: A President Caught in the Act* report by OUTA which presents evidence of state capture allegations⁷⁵⁸ as well as the *Joining the Dots* report by Open Secrets which shows the timeline of the capture of state institutions by certain powerful individuals for personal benefit.⁷⁵⁹

g. *Litigation*

Most CSOs have resorted to litigation challenging provisions of the law that have been used to deny various rights both to CSOs and the segments of civil society which they represent. In countries where courts are reasonably independent and fair, litigation has proved effective in securing positive outcomes for civil society.⁷⁶⁰ Some participants stated that their organisations have been involved in litigation and while some CSOs have only appeared in court as *amici curiae*, others have actively instituted legal proceedings. Yet others have done both - instituting legal proceedings and appearing as a friend of the court.⁷⁶¹ Participants, however, confirmed that they litigate strategically, effectively and when necessary because litigation is very expensive, time consuming and a complicated activity. They stated that other avenues such as engaging, protesting and campaigns as well as awareness raising are pursued before litigation is considered. Litigation is the last resort. The rationale for this is that, depending on the challenge faced by the organisation, there are various other ways of achieving a solution.

Through litigation, participants stated that they hope that those responsible for corruption, poor governance or failure to provide access to necessary information are held accountable. For most participants, it is not only about holding people responsible but, most importantly, about also setting a precedent so that, subsequently, public office holders are

⁷⁵⁷ Van Vuuren op cit note 154.

⁷⁵⁸ OUTA *No Room to Hide: A President Caught in the Act* (OUTA) (2017), available at http://pmg-assets.s3-website-eu-west-1.amazonaws.com/170725OUTA-_State_Capture.pdf, accessed on 20 December 2018.

⁷⁵⁹ Open Secrets '*Joining the Dots*', (2018), available at https://corruptiontribunal.org.za/site/wp-content/uploads/2018/01/JoiningTheDots_sp.pdf, accessed on 20 December 2019.

⁷⁶⁰ International Center for Not-for-Profit Law 'Recent laws and legislative proposals to restrict civil society-organisations' (2006) 8 (4) *The International Journal of Not-for-Profit Law* at 1–12, available at http://www.icnl.org/research/journal/vol8iss4/art_1.htm, accessed on 8 August 2019.

⁷⁶¹ These cases where CSOs instituted legal proceedings against government institutions or appeared as *amici curiae* were discussed in chapter 4 under section 4.4.

aware of the legal consequences of corruption, poor governance or the refusal to provide needed information by an institution or individual.

Lastly, besides instituting civil proceedings, some participants stated that their organisations have, in some cases, laid criminal charges against those responsible for the poor governance of the public sector. For example, CSOs have recently laid criminal charges against a number of top officials and board members of state-owned enterprises, such as Eskom, Denel and the South African Airways, who were implicated in the state capture and other reports. Almost all of these implicated top officials have since resigned or been relieved of their appointments.⁷⁶² These activities by CSOs have not been an easy undertaking, considering that the smooth execution of appropriate executive or administrative action depends on the nature of the relationship between the government and CSOs, in relation to the citizens. The dynamics of this relationship is the focus of the next segment.

5.5.3 *Current state of governance relationship between the State and CSOs*

Habib describes the relationship between the state and civil society as mainly one of opposition with some agreement to a certain extent.⁷⁶³ This is echoed in the participants' responses.

First, participants think that the nature of the relationship between non-profit organisations generally (including CSOs) and the state, depends on the government institution that the CSO is directly dealing with at that particular moment. In some cases, the state is willing to pay attention and listen to CSOs, while in other cases, there is resistance, especially against activist organisations. The pushback by the government against activist organisations comes in many forms. For example, when a CSO arranges for meetings with the government, the government institution would either not attend or would cancel the meeting. Another example is where a civil society organisation lays criminal charges against some government officials involved in corruption or maladministration of state resources and struggles to receive feedback from the police authorities on developments in the case. Sometimes, the police authorities even fail to acknowledge receiving the docket that would have been opened. Also, CSOs have established and exposed enough evidence in their reports, books and publications about individuals implicated in the state capture allegations,

⁷⁶² These criminal charges were discussed in chapter 4 under section 4.4.

⁷⁶³ Habib *op cit* note 3 at 685-86.

yet no single arrest has been made by the prosecuting authorities. These are clear examples of the government resisting the watchdog role of CSOs.

Secondly, these obstacles between the government and CSOs may be as a result of some government actors thinking that CSOs want to take the position of the government and at the same time continue to lobby and advocate independently.⁷⁶⁴ All organisations, however, acknowledge that there are certain factions in government who are willing to listen, and who realise that valuable ideas and solutions come from the input of CSOs. This is also supported by Rantao's statement that there is usually democracy where civil society is promoted, but democracy is weak where civil society is discouraged, weakened, intimidated or harassed.⁷⁶⁵ Although the general relationship between CSOs and the state is not entirely satisfying, in a democratic environment like South Africa, it is the legal environment that is more important than all other factors. This is because an enabling legal environment with enabling laws and policies promote the respect of civil society's rights to freedom of association, freedom of assembly, freedom of expression and also protects the defenders of human rights.⁷⁶⁶

5.5.4 *Enabling environment*

CSOs have undoubtedly made government institutions answerable for their decisions, as well as taken measures on their policy approach.⁷⁶⁷ An enabling environment sets a protective framework for CSO activities and limits the ability of government to interfere with these activities, while also enabling and the social economy which CSOs represent to operate freely.⁷⁶⁸ The political and legal environment during the apartheid regime was hostile to the independent activities of struggle CSOs. The apartheid government used the law and its control over fundraising to frustrate the work of CSOs that opposed the government.⁷⁶⁹ The law was used to obstruct the activism of struggle CSOs, restraining them from participating in politics and denying them the space to operate freely.

⁷⁶⁴ Greenstein, Kola & Lopes op cit note 163 at 7–8.

⁷⁶⁵ Jovial Rantao 'All hail the reawakening of civil society' *Sunday Tribune* 20 May 2012 at 38.

⁷⁶⁶ UN Human Rights Council *Factors that impede equal political participation and steps to overcome those challenges: Report of the Office of the United Nations High Commissioner for Human Rights*, 30 June 2014, A/HRC/27/29 at 3, available at <https://www.refworld.org/docid/55c88cc24.html>, accessed on 16 August 19.

⁷⁶⁷ Scholte op cit note 20 at 217.

⁷⁶⁸ Katerina Hadzi-Miceva & Nilda Bullain 'A supportive financing framework for social economy organisations' in Antonella Noya & Emma Clarence *The Social Economy: Building Inclusive Economies* at 211–238.

⁷⁶⁹ Zane Dangor 'Government-civil society partnership in policy development: The Case of the Non-Profit Organisations Act in South Africa' in Zane Dangor *Government-NGO Partnerships: Some Emerging Lessons and Insights* 1999) at 4.

That situation has however changed in the current democratic regime. The Nonprofit Organisations Act was created to provide an enabling environment for NPO registration, regulations and general provisions.⁷⁷⁰ Registration in terms of the NPO Act is voluntary and provides NPOs with the status of a credible legal entity that is important for government funding and fundraising generally.⁷⁷¹ Registration further confers on an NPO an opportunity to gain a tax-exempt status, provided it fulfils other requirements as provided in the Income Tax Act.⁷⁷² From the above it is clear that the current NPO legal framework put in place by the Nonprofit Organisations Act of 1997 does not present many obstacles for CSOs operating in South Africa. The reverse has, however, been the case with the financial environment, as the empirical findings also show. Next is the discussion of the empirical findings on the legal environment, followed by a summation of the financial environment.

(a) Legal environment

A flexible legal environment for civil society entails the right to organise in groups or formal associations, the right to be free to decide on their internal governance and the right to participate in public governance without fear of repercussions.⁷⁷³ This is particularly relevant for watchdog CSOs.

Participants were undecided as to whether there is indeed an enabling legal environment for CSOs to conduct their duties. Most participants believe that there is a progressive legal environment to a certain extent for CSOs to conduct their work compared to that of other developing countries whose governments are authoritarian and in comparison to the environment that existed during the apartheid regime which was hostile to those CSOs that opposed it. The mixed feelings of the participants on whether there is an enabling environment for CSOs was as a result of challenges emanating from the ambiguity of the law which restricts the effectiveness of the organisations. One participant explained this in the following words:

The law was not made or created to cater for the fact that civil society will have to take things into their own hands because government is failing to do so, Laws were written with the assumption that certain people are put in government and will do what is right in carrying out their duties. There was not enough (laws to) cater for

⁷⁷⁰ Non Profit Organisations Act 1997, chap 2-5. See also Ibid at 4.

⁷⁷¹ Ada Okoye Ordor 'The South African Nonprofit Sector: Legal and Policy Environment' *Speculum Juris* (2010) 24 (1) at 129.

⁷⁷² Ibid at 118.

⁷⁷³ Rosenzweigova, Skoric & Asipovich op cit note 743 at 7–8.

those (CSOs) that would hold those in government accountable for maladministration and irregular expenditure.

Another participant believes that even although the exchange of information is not entirely satisfactory, South Africa has a very progressive Constitution when it comes to transparency. The participant went on to explain that although the outlook of the courts is evolving and they are more willing to listen to CSOs and also support the rights of people, they are still very careful not to breach the doctrine of separation of powers. It was acknowledged, however, that there has been a huge positive shift in access to courts. In the past, watchdog CSOs would have had no clear-cut *locus standi* or would face challenges just to be heard before the courts, but it is now increasingly easier to bring an application as a CSO in the courts of law, because courts have realised that CSOs as the people's representatives need to be listened to. Participants' answers also indicate that, in addition to the courts, other spheres of government such as Parliament are evolving and are also more inclined to listen to CSOs. One participant said:

I don't think we are fully enabled but we are moving towards being listened to, as courts are ready to pay attention to our grievances, something that was not quite happening in the past.

Besides regulating the registration process for NPOs, the Nonprofit Organisations Act was created to provide a regulatory framework for the operational conduct of NPOs. This aspect, however, was not the focus of the research as it has been addressed by other researchers.⁷⁷⁴

a. Financial environment

All the participants agreed that funding constraints are a given in the non-profit sector and South African CSOs cannot rely on internal funding only. Funding from foreign sources, therefore, remains key but this is not always easy to access.⁷⁷⁵ Participants were of the opinion that less bureaucratic fundraising frameworks would lead to a more enabling financial environment. One participant said that there is need for a better legislative environment that encourages transparency without imposing government control on CSOs.

⁷⁷⁴ A regulatory framework for the operational conduct of NPOs is discussed in different articles, for example, Ricardo G Wyngaard 'The South African NPO crisis: Time to join hands' (2013) 15 (1) *International Journal of Not-for Profit Law*, available at http://www.icnl.org/research/journal/vol15iss1/special_1.htm, accessed on 24 August 2019. See also Susan Steinman *An exploratory study into factors influencing an enabling environment for social enterprises in South Africa*. Pretoria: ILO, 2010 at 44.

⁷⁷⁵ Habib & Tailor op cit note 6 at 77-9.

This would make it possible for CSO to access domestic and foreign funding without the need for authorisation and formal constraints on the process.⁷⁷⁶ It further allows raising funds from the public without imposing administrative burdens.⁷⁷⁷ The funding challenges notwithstanding, CSOs are highly resourceful and have managed to carry out significant work within limited budgets. Highlighted in the next section therefore are the legal tools identified by participants as useful for their watchdog roles.

5.5.5 *Legal tools and strategies for CSO activities*

Participants agreed that the Bill of Rights, the Promotion of Access to Information Act 2 of 2000 (PAIA) and case law are the crucial legal tools in their work, followed by other statutes such as the Companies Act 2008, the Promotion of Administrative Justice Act of 2000 (PAJA), the Prevention and Combating of Corruption Act of 2013, judicial review and the Protected Disclosures Act of 2017 (PDA). Depending on what the civil society organisation is dealing with at a particular time, other subject-specific statutes are utilised.

First, participants indicated that section 38 of the Constitution, which is the enforcement of rights provision, is the fundamental legal provision which gives them legal standing in the court of law, should litigation arise. In the past, CSOs faced challenges of establishing *locus standi* but with this provision, CSOs can freely represent people and thus, the important role of CSOs has come to be recognised. Another important constitutional provision for one of the participant organisations is section 8(2) of the Constitution. This provides for holding private actors to account and is very important as it places personal liability on those implicated in state corruption, even though they may not be state officials.

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Secondly, as earlier mentioned, while carrying out their mandate, CSOs sometimes face the challenge of companies or government institutions withholding information that is needed for the CSOs to successfully do their work. In such cases, when it is a company involved in state corruption that is being pursued, a participant stated that their organisation uses the Promotion of Access to Information Act and the Companies Act to obtain access to such information. In fact, if a company is involved, the Companies Act is even more helpful

⁷⁷⁶ For CSOs to receive government funding they are required to register in terms of Section 12 (A-O) of the Nonprofit Organisations Act of 1997, meaning government cannot fund unregistered CSOs and as a result CSOs are forced to comply with this requirement in order to receive government funding. The challenge is that government's funding comes with government's control and such control may influence the independence of CSOs. See also the discussion on CSOs Independence in section 5.5.8 below.

⁷⁷⁷ Rosenzweigova, Skoric & Asipovich op cit note 743 at 8.

⁷⁷⁸ Constitution 1996 s 8.

as it is straightforward and has no grounds for exemptions from sharing such information. Section 26 of the Companies Act states that if asked for the company's share register, the company has to provide it in two weeks, otherwise it would be guilty of an offence should it refuse to give that information.⁷⁷⁹ Also, another participant added that where poor corporate governance in an SOE is the issue, the amended Companies Act helps the organisation to clarify the duties of directors in a company, as the Act is clear that directors, including non-executive directors, have a higher duty to the company. Previously, non-executive directors would absolve themselves from responsibility by saying that they were not aware of the occurrences and this would always result in those responsible for poor governance in state-owned enterprises not accounting for their actions. However, since 2008 when the current Companies Act was enacted, every director of a company, including SOEs, is presumed to be aware of such occurrences in a company.⁷⁸⁰

On the other hand, when CSOs want information from a government institution, they may use the Promotion of Access to Information Act provisions to gain access to the necessary information. As one participant observed, the PAIA helps organisations to pursue officials who have failed to execute their administrative duties. Furthermore, in terms of court cases, participants emphasised the relevance of previous court cases in setting a precedent. Such cases include those in which a company or state department involved in state corruption refuses to disclose the necessary information to CSOs, hiding behind exemptions in the PAIA Act. For example, the case of *Mandag Centre for Investigative Journalism & another v Minister of Public Works & another*⁷⁸¹ the applicant brought an application in the high court in terms of section 78(2) read with section 82 of the Promotion of Access to Information Act 2000, seeking an order declaring unlawful and unconstitutional, the decision by the respondents to refuse the applicants access to information on 6 July 2012. The records sought were in relation to the expenditure by the Department of Public Works, of at least R248 million, spent on the upgrade of the Nkandla Estate of the then President of the Republic of South Africa. The refusal was justified on grounds that information on the Nkandla Estate was protected under the National Key Points Act 102 of 1980 (the NKP Act), the Protection of Information Act 84 of 1982 (the PI Act) , the Minimum Information Security Standards (the MISS) and other relevant security prescripts of the State Security Agency . The applicant

⁷⁷⁹ Companies Act of 2008 s 26.

⁷⁸⁰ Companies Act s 77(3)(b) states that any director of a company is liable for any loss, damages or costs sustained by the company as a direct or indirect consequence of the director.

⁷⁸¹ 2014 JDR 0870 (GNP), briefly discussed in 4.2.2 and 5.5.2 above.

further sought an order directing the respondents to supply the applicants with a copy of the requested records within 15 days of granting of the order.⁷⁸²

The court ordered the respondents to furnish the applicants with such information outlined in their request in terms of the PAIA, within 30 days of the court's order.⁷⁸³ In making order, the court cited with approval, the PAIA preamble which, in part, reads:

RECOGNISING THAT-

The system for government in South Africa before 27 April 1994, amongst others, resulted in a secretive and unresponsive culture in public and private bodies which often led to an abuse of power and human rights violation;

National legislation must be enacted to give effect to this right in section 32 of the Constitution;

AND BEARING IN MIND THAT-

The State must respect, promote and fulfil, at least, all the rights in the Bill of Rights which is the cornerstone of democracy in South Africa;

The right of access to any information held by a public or private body may be limited to the extent that the limitations are reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom as contemplated in section 36 of the Constitution

AND IN ORDER TO-

Foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information.⁷⁸⁴

In addition, participants stated that laws, which give effect to section 33 of the Constitution,⁷⁸⁵ such as the Promotion of Access to Information Act, are useful to CSOs for accountability action against public officials who fail to provide an administrative service that is lawfully reasonable and procedurally fair as stipulated in the Act.⁷⁸⁶ The Prevention and Combating of

⁷⁸² Supra.

⁷⁸³ Supra.

⁷⁸⁴ Promotion of Access to Information Act 2000 'Preamble'.

⁷⁸⁵ Constitution s 33 provides that '(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair. (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. (3) National legislation must be enacted to give effect to these rights, and must - (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal; (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and (c) promote an efficient administration'.

⁷⁸⁶ Promotion of Administrative Justice Act 2000 (PAJA) sec 3.

Corrupt Activities Act of 2004 is useful to CSOs for purposes of identifying and defining the available measures to address corrupt practices, including steps to deal with reported corruption. The Protected Disclosures Act of 2000 helps with protecting those that come forward with reports of corrupt practices in their workplaces, as a result encouraging people to report corrupt activities and the maladministration of state resources.

Lastly, participants identified judicial review as a very helpful tool for their organisations. Judicial review is a process in which the court reviews the lawfulness of a decision or action made by a public body, in response to an action challenging the way in which a decision has been made. The judicial review process allows CSOs to challenge certain decisions taken by the government that are not in the public interest.

CSOs use the statutes identified in this segment to carry out activities aimed at ending poor governance in the public sector. These legal provisions are utilised in litigation, alongside other strategies such as research, investigation, protests, publication, advocacy campaigns, policy advocacy and dialogue. Sometimes however, these provisions are not very clear in application, as is highlighted in the next segment.

5.5.6 Clarity, ambiguity and changes in legal provisions

a. Clarity and ambiguity

The issues highlighted by participants' responses indicate that although the law is well drafted and clear, enforcement and implementation present a problem. Furthermore, it could be difficult to know when to use a particular provision and sometimes the lack of cohesion between various provisions and statutes leaves loopholes which offenders exploit to escape liability.

For example, all participants are of the view that the Promotion of Access to Information Act is a very useful statute, however the exemptions to the disclosure of information in the Act greatly complicate the work of CSOs. For example, section 37 that deals with confidentiality does not allow for the disclosure of information if a third party involved will be affected by such disclosure. One participant stated that although the courts have set a precedent in its rulings on this issue, CSOs still face a number of challenges such as a lack of clarity on a civil servant who presents a confidential statement from a third-party. Similarly, it is also unclear what needs to be done when the government contracts with fraudulent and corrupt private companies and these private companies, when approached for

information, use the defence that they are a private company. In such a case further steps are needed to secure information from a private company and these steps are more complex, as it can involve having to apply for a court order.

Since the PAIA says a citizen has a right to information, the expectation voiced in the participants' responses is that the public should be allowed to go through a private company's information. This is, however, not that simple in practice. On the contrary, often the private company will rely on a PAIA exemption asserting that they are a private company and that the information does not affect the public. This is notwithstanding that conducting a business transaction with the government means that the public has an interest, and is, therefore, entitled to access the information. Also, where contract tenders are involved or concluded, there is usually a standard clause requiring the contract to comply with government policies pertaining to that contract, such as complying with the Public Finance Management Act of 1999, Treasury Regulations 2005 *Government Gazette* No. 25613 and the Protocol on Corporate Governance in the Public Sector 2002. This needs to be reconciled to PAIA exemptions, and through court action on these matters CSOs help to develop the law. The PAIA's exemptions on disclosure of information notwithstanding, participants generally agree that there has been an improvement since the Act's inception in 2000, in spite of the tendency of government to withhold information.

Secondly, some participants stated that the National Key Points Act 1980 which protects certain Key Points Infrastructure presents an obstacle in that when journalists want to do their work, they are told that the place, object or information they are interested in is a key strategic point and information or pictures cannot be divulged or obtained. As earlier mentioned, an example is the Nkandla home of the former president which the former Public Protector found to have been upgraded with public funds that were unlawfully taken from the public coffers by the former president.⁷⁸⁷ While conducting their investigations, journalists were denied access to the premises and could not take pictures of the Nkandla homestead because it was declared a national key point.

Lastly, some participants think that the repercussions provided in section 9B (1) of the Protected Disclosures Amendment Act of 2017 which include conviction and imprisonment for a period not exceeding two years or a fine or both, for reporting false information under the Protected Disclosures Act 2000 discourage people from reporting.⁷⁸⁸ Not all false information reports are malicious and some information may appear accurate but after

⁷⁸⁷ Public Protector *Secure in Comfort* op cit note 594 at 427.

⁷⁸⁸ Protected Disclosures Amendment Act 5 of 2017 s 9B(1)(b).

investigation, prove to be false or unreliable. The challenges presented by these issues have led CSOs to make submissions to Parliament to make certain changes to the law. CSO dissatisfaction with existing law is discussed in the next segment.

b. CSO evaluation of existing law

The government encourages associations of civil society to register as non-profit organisations (NPOs). As earlier indicated, the registration of NPOs with the Directorate for NPOs under the NPO Act gives credibility with funders and, in some ways, increases the bargaining strength of recipient NPOs with their funding partners. This is especially so for organisations that receive funding from the government or funds channelled through the government.⁷⁸⁹ Therefore, although registration under the NPO Act is not compulsory for CSOs, non-registration places an organisation at a disadvantage in relation to accessing funding and tax benefits.

One participant was of the view that it is not a good thing to virtually force CSOs to register as NPOs as non-registration has no bearing on their work, since most of them are funded by the public and not the government. Also, registration may affect their independence, especially where these CSOs receive funds from the government, as they may not be independent enough to challenge the government who is their funder. The concern is that registering a CSO according to the NPO Act can then be used as a tool by those in authority to threaten these organisations with deregistration if they do not comply with certain requirements. This position puts an organisation at the mercy of those in authority and, as a result, CSOs may not carry out their mandate freely or independently which, in turn, affects their effectiveness. Another reason the government wants NPOs to register is to foster accountability and effectiveness within the non-profit sector.⁷⁹⁰ Registered NPOs are audited and are further required to file an organisational report with the NPO Directorate, but the law does not make it a priority for the reports to be public. One participant believes that NPO reports should be published on the Directorate's website to be seen and read by everyone.

Secondly, with regard to corporate entities, one participant expressed the view that laws should emphasise transparency in corporate conduct and that both internal and external independent oversight mechanisms must be mandatory. This can be achieved through putting in place stronger, clear and binding regulations which ensure that transparency and accountability are not merely an option, but a compulsory standard for critical organisations.

⁷⁸⁹ Ordor op cit note 771 at 121.

⁷⁹⁰ Ibid.

These laws should also provide for effective remedial mechanisms to address disputes emanating from violations by corporations, with the ability to implement outcomes.

Thirdly, another participant stated that their organisation would like to see a change in the law that regulates how wrongdoers are disciplined for their unlawful actions due to the rise in corruption. Currently, the law is not effective in terms of holding those responsible accountable. For example, most of those involved in the state capture allegations have not faced the consequences of their actions since they were exposed. Some have had no complaint laid against them, while criminal cases were opened against others, but were not completed by law enforcement authorities. Clearly, the criminal justice system is slack in implementing the law when it comes to prosecuting corrupt government officials. In expressing the view that state capture is a capture of the people in power, not a capture of the law and so should not affect the wheels of justice, a participant had this to say:

The laws are written very well. South Africa has very good legislation, yet implementation is still problematic. State capture is the people and not the law and therefore focus should be on implementing the laws that are already in existence,

Fourthly, another participant was of the view that to make the mandate of the CSOs easier, CSOs need more frameworks for engagement, participation and cooperation with the government in governance, so that they do not view each other as rivals. Fifthly, participants view the Promotion of Access to Information Act (PAIA) as a good Act but feel that it needs to be amended as its exemptions allow government discretion to refuse to share or publish necessary information. Although organisations are allowed to appeal such refusals by the government, appeals are very costly and time consuming and as a result, most organisations cannot keep up and they eventually stop pursuing the matter. Participants think that the PAIA needs to make the procedures for getting information easier. One participant described PAIA as good on paper but difficult in practice and added:

PAIA's timelines for accessing information are too long and an application based on the Act is expensive and time consuming. A lay person on the road may not be able to use the PAIA.

Lastly, most participants agreed that the Protection of Disclosures Amendment Act of 2017 (PDA) which protects whistle blowers needs further amendments, describing the Act as

good on paper but very difficult to apply. Watchdog CSOs work with whistle-blowers. Participants stated that they cannot give whistle-blowers enough protection because their organisations are not a whistleblowing platform, yet whistle-blowers are very important to their work. The challenges imposed by the PDA deter people with information about poor governance and state corruption from divulging it out of fear for their lives and their jobs. Added to this is the fear of being severely punished for reporting information that turns out to be false, as provided by section 9B PDA. Section 9B PDA states that an employee who knowingly, discloses false information is guilty of an offence and is liable to a fine or to not more than 2 years imprisonment or both. Participants further agreed that amendments are also required to the Critical Infrastructure Protection Bill to reduce the excessive criminal sanctions on journalists and members of the public who want to photograph national key points. They also felt that the Public Audit Amendment Bill must be redrafted to ensure that the Auditor-General (AG) is able to enforce its audit findings and to strengthen the provisions which hold those involved in state corruption accountable. CSOs made submissions on these amendments to Parliament as earlier discussed in this chapter.⁷⁹¹ Even with all the challenges posed by a lack of clarity in the law, CSOs still find ways to effectively use the law to end poor governance.

5.5.7 Improving CSOs' use of legal provisions

One participant stated that most of the time, the problem for most CSOs is not knowing where to find the law or how to use it while in other cases CSOs know where to find the law but cannot use it effectively.

All the organisations agreed that for CSOs to use legal provisions effectively, they need to have, in addition to internal activists or project managers, an internal legal team or an advocacy officer that will be responsible for studying and researching the law that they use most in the organisation's area of specialisation. Although having an internal legal team is expensive, it is key and very helpful. One participant further suggested that in addition to an internal legal team, organisations should have an operational team such as a stakeholder management team that does community work and a communication team that is responsible for social media and campaigns. This combination of competencies is necessary as working with communities directly is important and makes CSO work more effective and impactful.

⁷⁹¹ See the discussion on submissions to Parliament in 5.5.2 (d) above.

Another participant added that CSOs should develop a practice of perusing legislation regularly — not only when they are dealing with an issue — as this allows them to gain familiarity with the law and to be better prepared when the time comes to use these laws. Perusing legislation keeps the organisation updated and more effective. In the participant's words:

CSOs should look at (the) legislation all the time and not necessarily in the conventional way, but what is important is that while perusing (the) legislation, one will be able to find ways of holding someone somewhere accountable. Or one can find ways of coercing someone with such authority to hold a person accountable if one cannot do it themselves.

Other views that emerged were that CSOs can more effectively utilise legal provisions to promote accountability in state institutions by re-using tested laws, even though this will depend on what the organisation's mandate is. Focusing on laws that were successfully used before is promising and convenient. At the same time, CSOs should participate more in law-making processes, for example, through submissions to Parliament. In that way CSOs will be able to influence the law and, more importantly, policies that promote accountability in state institutions. As one participant observed, most challenges are as a result of policy problems rather than the law itself and engaging government influences policy.

Another way in which legal provisions can be more effectively utilised is by encouraging the public to express its outrage over corrupt practices involving the public sector. This is in the belief that the more the public expresses its rejection of corruption, the more it will encourage those with knowledge of the corrupt activities to speak out. Finally, experience, diversity and transformation among those working for the organisation are important elements for a CSO to effectively focus on its agenda and strengthen its independence.

5.5.8 *CSOs' independence*

The strength of civil society organisations' lies is in their independence, their connectedness to the citizenry and the population in general, as well as their relationship with other CSOs and individuals working in social development.⁷⁹² All these factors establish the organisation's credibility.

⁷⁹² Greenstein, Kola & Lopes op cit note 163 at 63.

As mentioned earlier, CSO registration is encouraged under the NPO Act to strengthen the credibility of NPOs, also increasing its bargaining power for funding especially for those organisations that receive funds from the government or government-channelled organisations.⁷⁹³ However, watchdog CSOs are not necessarily funded by the government but by the public, so even without being registered, their source of funds may still be available.⁷⁹⁴ One participant was therefore of the view that registration should not be forced on CSOs on account of funding, because any kind of government control can influence the independence of CSOs.

At the African National Congress (ANC) Conference in Polokwane in 2018, a resolution was passed for transparency and control over funding for all political parties and non-governmental organisations.⁷⁹⁵ In response to this, one participant maintained that while transparency in the funding of NPOs is necessary, government control over NPO funding is very dangerous for the independence and functioning of NPOs. Certainly, the NPO Act needs to encourage more transparency but not in a way that gives the government control over NPOs as such would restrain the independence of many CSOs. A funding model that is resourced from the general public or a part of it affected by a particular matter would ensure greater independence. Ensuring CSOs' independence through public funding can be achieved through staying relevant and resisting the pressure to work to the dictates of external funders.

Lastly, the findings indicate that the independence of CSOs can be ensured through their own transformation. This means ensuring that those who manage the organisation, who sometimes are its founders, are not pursuing their own agendas but are actually advancing the organisation's mandate. Where necessary, the legal framework can be used in courts of law, considering that courts have evolved greatly and are willing to pay attention to and protect the rights of the citizens who, in turn, strongly protect the independence of the CSOs. An example of this is the recent Constitutional Court judgement in *Mlungwana v State* in which the court decided that protesting without seeking permission from the authorities is not a criminal offence.⁷⁹⁶ This means that civil society can freely address shortcomings in public governance through protests. This judgement is a significant reinforcement of the

⁷⁹³ See the discussion on enabling environment in section 5.5.4 above. See also Wyngaard op cit note 774.

⁷⁹⁴ This may be so with internal private funders, especially individuals, but foreign funders do need to see evidence of some kind of registration and NPO Act registration seems to be the simplest.

⁷⁹⁵ Report of the 54th African National Congress (ANC) National Conference (2018) at 44 available at http://joeslovo.anc.org.za/sites/default/files/docs/ANC%2054th_National_Conference_Report%20and%20Resolutions.pdf accessed on 2 November 2020.

⁷⁹⁶ 2019 (1) SACR 429 (CC).

independence of the civil society sector and has become an additional tool for the work of CSOs generally and in respect of the accountability checks on state-owned enterprises in particular.

5.6 Conclusion

From the findings, it emerged that although the formal legal environment is conducive for CSOs to conduct their activities, there are a number of issues that need to be improved on or changed. Such change will require the amendment of certain legal provisions, summarised below. Other critical issues include the promotion of favourable funding conditions for CSOs, fostering an improved relationship between the government and civil society, protecting CSO independence and the introduction of easier and more expeditious ways for CSOs to bring cases to the courts.

With regard to statutory amendments, the pressing need is for the amendment of the Promotion of Access to Information Act to cure the lengthy process for appealing a denial of a request for information. Other laws such as the Protected Disclosures Act also need to be amended to give whistle blowers more protection as CSOs rely heavily on those who report corrupt activities for their watchdog role and without such protection, whistle blowers may be discouraged from reporting corruption. In addition, the submissions made by CSOs to Parliament on the Critical Infrastructure Bill which is to replace the National Key Points Act and other statutes should be implemented to allow CSOs access to necessary locations to gather the critical information that will allow them to do their work effectively.

In addition, another challenge that emerged from the findings is that of CSOs not knowing where to find the law and how to use it, or some CSOs knowing where to find the law but not knowing how to use it. This calls for proactive measures on the part of CSOs to keep up with the developments in statutory and case law, as law evolves constantly. CSOs' internal advocacy teams must also be trained to identify and utilise the laws that apply to the objectives of their organisation. Not only does this save time, it also delimits the focus of the CSOs and may lead to the finding of quicker cost-effective solutions.

Thirdly, CSOs need adequate funding to do their work effectively. From the results of the interviews, it emerged that CSOs do not have enough funding since external funds and government-channelled funds are drying up. A healthy funding environment for CSOs enables organisations to remain relevant and effective in discharging their mandate of representing the people's interest. Enduring and adaptable funding models need to be secured

in public giving and CSOs must continue to explore ways of remaining connected and relevant to the public.

Fourthly, to maintain CSO independence, it should not be a funding pre-requisite for CSOs to register with the Directorate for NPOs because such registration opens CSOs up to government control, which is disadvantageous to the independence of CSOs. CSOs' funding should not be controlled by the government, especially if the government is not the source of such funding. CSOs should however, be transparent about their sources of funding in order to maintain credibility.

Lastly, state-civil society relations can be improved through constructive communication and purposeful partnership building. In spite of their different approaches to service delivery, both parties share the common goal of providing service to the people and improving the people's well-being. The relationship, therefore, need not continue to be one of mistrust and suspicion.

CHAPTER 6: CONCLUSION

6.1 Introduction

A summary of the research, its findings, conclusions and recommendations are presented in this chapter. First, links are established between the theorisation on nonprofit organisations (NPOs) using the civil society organisation (CSO) terminology and the theorisation on corporate governance in the context of the findings of the research. Secondly, observations and conclusions on the ways civil society organisations use the law to challenge poor corporate governance in state-owned enterprises in South Africa and the role of the Public Protector in addressing poor governance will be determined. Thirdly, the conflicts between the state and civil society in tackling poor governance of SOEs are highlighted, as is a determination on whether CSOs have a sound legal platform to challenge the excesses of state-owned enterprises. Fourthly, conclusions are made on the legal environment for CSOs to perform this watchdog role. Recommendations are also made for increasing the effectiveness of CSOs in their role of pressurising the government to deliver and of holding those responsible accountable for their wrongdoings. Lastly themes that require further research are identified.

This study sought to show how civil society organisations (CSOs) make use of the law to promote good corporate governance in state-owned enterprises (SOEs). This they do by seeking public accountability in SOEs in South Africa through challenging and questioning decisions that are taken in SOEs and in seeking to hold those responsible for wrongdoing in SOEs accountable for their actions. The research question was formulated as follows: how are civil society organisations using legal provisions to advance good corporate governance in state-owned enterprises in South Africa? In other words, what are the legal tools employed by civil society organisations in their efforts to secure public accountability from SOEs in South Africa? To address this question, the first chapter of the thesis provided the necessary background to the study, including its justification as an important investigation into an aspect of public governance that has direct implications for service delivery. The second chapter explained the theories of NPO existence and the general role of CSOs in upholding good governance in the context of state-civil society relations. The third chapter discussed the theories of corporate governance, its various meanings, its regulation and the

standing of CSOs to advance corporate governance in SOEs. The chapter further identified and discussed major corporate governance failures in South African SOEs. Chapter 4 identified watchdog CSOs who have fought against poor governance in SOEs and recounted the actual interventions made by them as well as the legal provisions used for such interventions. The chapter further highlighted the contribution of the Public Protector to the role that watchdog CSOs play. Lastly, chapter 5 presented the results of the empirical component of the study on how CSOs use legal provisions to demand accountability and address poor governance in SOEs. The chapter identified and explained a number of measures taken by CSOs and further explained the challenges CSOs face. Furthermore, CSOs' perspectives on the effectiveness of existing legal provisions and the advancement of an enabling legal environment were highlighted.

The study aimed to close a gap in literature on how CSOs engage legal provisions in fighting poor governance of state entities in South Africa. This gap exists as a result of a lack of a critical study of laws that enable the intervention of CSOs in the governance of SOEs, as well as ambiguities in some of these laws. As mentioned earlier, the substantive content of this chapter starts with a discussion of the linkages between the theories of the non-profit sector and the more specific subject of CSO role in good governance.

6.2 Linkages between theories of NPOs and the role of CSOs in good governance

CSOs exist to benefit the public through providing various services to the community and in that role CSOs supplement government and market provision as gap-fillers, complement the government as a partner; or play the adversarial role as the people's watchdog.⁷⁹⁷ This supplementary role is supported by the economic theory of NPOs' existence which states that NPOs have increased in number due to the demand resulting from a reduction in government service provision, where CSOs fill in the gap that result from government failure.⁷⁹⁸ The provision of basic services like water, electricity and education is understood by citizens to be entirely the responsibility of the government that is voted in. However, the government sometimes is not able to efficiently provide these basic needs due to a lack of resources resulting from poor governance and corruption in the service delivery machinery, typically SOEs, or as a result of other limitations such as expectations to provide services in a uniform

⁷⁹⁷ See the discussion on the relationship between the state and CSOs in 2.5.1 above.

⁷⁹⁸ See the discussion on economic theory in 2.2.1 above.

way, leaving some people unsatisfied.⁷⁹⁹ CSOs exist to provide services or representation for better services to such unsatisfied or underserved groups of people.

Secondly, the economic theory points out that NPOs exist due to market failure. Here NPOs are need-fillers where the market is not able to sufficiently provide goods or services required by the majority.⁸⁰⁰ Thirdly, NPOs exist due to contract failure in cases where the consumers of goods are unable to judge the quality of the goods themselves, such as children in a creche or the aged in a care home.⁸⁰¹ CSOs are typically non-profit entities and where any profit is made, it is ploughed back into the organisation and as a result they are trusted more by the people because they do not prioritise or distribute profit, resulting in the high demand for their services.⁸⁰² This is, in part, the basis for contract failure theory. Lastly, the economic theory also points out that NPOs exist due to failure in sections of the non-profit sector itself, where certain other NPOs then partner with the government and are funded by the government to provide goods and services demanded by the people from the government. This strand of the economic theory rejects the view that NPOs are just a response to the failures of government and market but asserts that even without government or market failure, NPOs are the preferred means of providing goods and services in certain circumstances, and government partnership with NPOs in those circumstances, actually compensates for the shortcomings in the non-profit sector itself.⁸⁰³

As to its watchdog role, some CSO activities include ensuring that democracy is preserved through promoting transparency, accountability and citizen participation in policy making and service delivery, advocating for inclusivity within state institutions and opening platforms and channels for citizens to seek justice. According to the political theory, CSOs' existence is a proof of democracy in a state which is manifested in the representation of the diverse groups of people within that state.⁸⁰⁴ Also, while there is an expectation on the government to explain why it can or cannot provide services comprehensively as well as pressure to be accountable and transparent, such expectations are not required so much for CSOs and as a result of this flexibility, CSOs are able to experiment and innovate.⁸⁰⁵ Lastly, one of the characteristics of CSOs is that they are usually founded by ideologically motivated

⁷⁹⁹ Ibid.

⁸⁰⁰ Ibid.

⁸⁰¹ Ibid.

⁸⁰² Ibid.

⁸⁰³ Ibid.

⁸⁰⁴ See the discussion on political theories in 2.2.2 above.

⁸⁰⁵ Ibid.

groups including faith-based movements.⁸⁰⁶ They are also motivated by changes in society, social values and government policies as well as the diversity of populations which, in the sociological theory of NPO's existence, is a reflection of organised forms of community in old societies.⁸⁰⁷

The links between theories of NPO existence and the role of CSOs in good governance show a clear picture of the reasons for the growth of the CSO sector. They have increased in number because their role attends to the overall needs of different people in a society who are dissatisfied with government service provision. It is clear that CSOs' service provision is most visible where there are gaps in government provision and also where there is failure of accountability, transparency, inclusivity and equality. The next section summarises the discussion on the role of CSOs in the context of corporate governance of SOEs.

6.3 Linkages between theories of corporate governance and the intervention of CSOs in the governance of SOEs

State-owned enterprises are owned by the government for the benefit of the citizens and as a result, both the government and the citizens are their primary stakeholders. According to the stakeholder inclusive theory, the interests of all stakeholders should be prioritised for the well-being of the company. Including the concerns of all stakeholders promotes inclusivity in every decision taken by a company which, in turn, has a positive impact on the performance of the company.⁸⁰⁸ There is an emerging support in empirical research of the idea that companies whose managers apply the stakeholder inclusive approach can perform better than those who do not.⁸⁰⁹ This is in contrast to the shareholder theory of corporate governance which prioritises shareholders before other stakeholders by stating that the interests of other stakeholders other than shareholders can only be considered if they are in the interests of the shareholders.⁸¹⁰ In the case of SOEs, it is submitted that these two theories do not contradict each other, but rather complement each other, because while citizens are stakeholders whose interests should be prioritised in terms of the stakeholder theory, citizens are also shareholders in state-owned enterprises in terms of the shareholder-centric theory, for it is

⁸⁰⁶ See the discussion on sociological theories in 2.2.3 above.

⁸⁰⁷ Ibid.

⁸⁰⁸ See the discussion on stakeholder-inclusive theory in 3.3.2 above.

⁸⁰⁹ Ibid. See also Berman L Shawn, Andrew C Wicks, et al 'Does stakeholder orientation matter? The relationship between stakeholder management models and firm financial performance' (1999) 42 *Academy of Management Journal* .

⁸¹⁰ See the discussion on shareholder-centric theory in 3.3.1 above.

their tax funds that are used to sustain the state-owned entities and so this interest should be prioritised. In short, both theories are ultimately in favour of the citizens, meaning that CSOs serve as people's representatives in their interventions in the corporate governance of SOEs and therefore they have the identity of both the stakeholders and shareholders whose interests should be prioritised.

In their intervention as citizen representatives, CSOs reduce the costs of bad governance in SOEs and mobilise civil society's reaction to poor corporate governance in SOEs.⁸¹¹ SOEs' failure to prioritise the interests of the citizens who are both their stakeholders and shareholders equals a failure to practise good corporate governance which results in corporate scandals as explained in chapter 3 of this research.⁸¹² However, this study found that the failure to apply good corporate governance principles by SOEs is, in some cases, enabled by government policies that give SOEs certain exemptions when it comes to corporate governance practice. Examples of these exemptions include provision of tax incentives (where SOEs pay a reduced tax) and softer corporate governance requirements that do not apply to private companies.⁸¹³ It is understood that these exemptions exist to make it easy for SOEs to operate and compete with private companies. The reality is that the relaxation given to SOEs by the state when it comes to compliance with principles of corporate governance may be extending the failure by SOEs to apply corporate governance principles. This position is harmful to the management of SOEs. There is a need for further research that compares the major benefits of such exemptions to their negative effects. This structural fault or gap in the governance of SOEs has caused distrust, serious damage and strong tensions in the relationship between civil society and the state, to say nothing of the economic costs to the development of communities.

6.4 Observations and conclusions on CSOs' watchdog role in SOE's corporate governance

CSOs use various mechanisms in their watchdog role which are aimed at addressing public sector governance such as protests, dialogues, policy and advocacy campaigns as well as litigation and submissions to Parliament. Through these activities CSOs are able to expose poor governance and show loopholes in law and policy frameworks intended to address poor

⁸¹¹ See the discussion on the role and activities of CSOs in 5.5.2 above.

⁸¹² See the discussion on corporate governance failures in SOEs in 3.10 above.

⁸¹³ See the discussion on SOEs v private companies in 3.5 above. Daniel D Sokol 'Competition policies and comparative corporate governance of state-owned enterprises ' (2009) 2009 *Brigham Young University Law Review* at 1730.

governance.⁸¹⁴ South Africa is a good model for other African countries to learn about democracy, especially when looking back to a few decades ago when the former was engulfed in the throes of apartheid, a system of unfairness that saw an unequal distribution of state resources and which favoured the minority over the majority. The state of affairs during the apartheid era fuelled an adversarial relationship between the state and the majority of the population.⁸¹⁵ Under the post-apartheid dispensation, much in the relationship between the state and the citizens has changed and in many ways, it has progressed from that of absolute hostility and bitter confrontation to a relatively more constructive engagement.⁸¹⁶ This shows that a proper functioning system of representation and strong civil society is needed for democracy and national solidarity to exist.⁸¹⁷

This research found that although majority rule has altered the character of relations between the South African state and its citizens in ways that advance civil and political rights, there still remains much dissatisfaction with other areas of governance, particularly in terms of service delivery by state institutions, detracting from citizens' experience of socio-cultural rights.⁸¹⁸ Today, the lack of good service delivery by designated state machinery such as SOEs is caused by corruption and mismanagement and this has caused much damage in the relationship between the state and the people.⁸¹⁹ Instances of corporate governance failure discussed earlier in chapter 3, section 3.9 and 3.10, inform the conclusions drawn in the next section.

6.4.1 Conclusions on corporate governance failures in South African SOEs

Although there is need for some confidentiality on the part of SOEs in order for them to operate without too much interference, this research found that such confidentiality has been used as a tool to avoid transparency and accountability in decision-making. It further found that the corporate governance deficits in SOEs, apart from the issue of softer compliance allowed by the state, derives from the lack of a unified legal framework that governs all SOEs.⁸²⁰ This exacerbated by the tendency of the state to appoint SOE officials based on political affiliation rather than merit, thus accommodating office bearers who do not

⁸¹⁴ See the discussion on the role and activities of CSOs in 5.5.2 above.

⁸¹⁵ See the discussion on the role CSOs during apartheid in 2.4.1 above.

⁸¹⁶ See the discussion on the role of CSOs in the contemporary South Africa in 2.4.2 above.

⁸¹⁷ Ibid.

⁸¹⁸ See the discussion on the relationship between the state and citizens in 2.5.2 above

⁸¹⁹ Ibid.

⁸²⁰ See the discussion on corporate governance in SOEs in 3.4.2 above

appreciate the importance of corporate governance. Political representation may be necessary, but it should never outweigh merit.⁸²¹

Like the major global corporations such as Enron, Parmalat and WorldCom that crumbled due to a lack of adherence to corporate governance principles, local state-owned entities have for many years operated in ways that violate the true meaning of corporate governance. South African SOEs in the past years have become so engulfed in corruption that it has become very hard to tell that they are owned by the state and as such should adhere to the principles that apply to the governance of public sector institutions. The recent corrupt occurrences in state institutions discussed earlier in chapter 3, section 3.10 indicate a clear leadership failure in state institutions. Major SOEs such as the power utility company Eskom, the South African Broadcasting Corporation (SABC), the South African Airways (SAA), and the rail service entity (PRASA) have been entangled in serious corporate governance failures, exposed by a range of actors including the public protector, media, opposition parties, various actors as well as CSOs. The corporate failures in SOEs have been so severe that privatisation of struggling state entities has been suggested.⁸²²

The poor governance in these major SOEs included corruption and irregularities in awarding tender contracts, the faking of educational qualifications by top management officials, a squandering of public resources where the same under-qualified top officials would raise their salaries and those of the people who supported their illegitimate actions without following due process, as well as the firing of employees who did not support them.⁸²³ Also, the contents of the *State of Capture* report by the Public Protector shocked the nation, when it appeared that a certain family that had no position in government was controlling almost every state-owned entity. This was with the collusion of the then president who had a very close relationship with the same family alleged to have captured the state, and who in addition, unlawfully took funds from public coffers to upgrade his private homestead. The state capture report was discussed in chapter 4, section 4.3.2.

These corporate governance failures have occurred despite the fact that the laws that regulate corporate governance in South Africa for the business sector are well written as are the international instruments like the Organisation for Economic Co-operation and Development (OECD) Guidelines on Corporate Governance in SOEs. The only explanation

⁸²¹ Ibid. and see also, generally, in 1.1 above.

⁸²² See the discussion on corporate governance failures in 3.10 above. James de Villiers 'These are three ways SAA could go bust' *Business Insider SA* 15 November 2019, available at <https://www.businessinsider.co.za/south-african-airways-saa-strike-numsa-retrenchments-3000-airline-pravin-gordhan-tito-mboweni-2019-11>, accessed on 20 November 2019.

⁸²³ Ibid.

that applies in the case of the South African SOEs is the absence or failure of a monitoring and enforcement mechanism which is exacerbated by some state policies that are too relaxed against wrongdoers as discussed in chapter 4, section 4.4.4 and chapter 5, section 5.5.6.

6.4.2 Observations on the role of the Public Protector's Office in the governance of SOEs

CSOs need to work in synergy with other entities so that these cases of poor corporate governance in SOEs can be exposed and reported. In fact, without this support, CSOs may not be able to do their work effectively. Partnership with citizens, the media, trade unions or the institutions that protect human rights such as the Public Protector's office is essential for CSOs' effectiveness. In particular, this research found that the Public Protector's reports on massive corruption in South African SOEs have been the main trigger for civil society activism in recent years against corruption and poor governance in state institutions.⁸²⁴ The Public Protector has the authority to investigate the maladministration of state resources by the government in terms of Chapter 9, section 182 of the Constitution and also in *EFF v Speaker of Parliament* case as discussed in chapter 4, section 4.3, in which the court held that the Public Protector's duty is to shield the public from irregular conduct by the state.

First, the Public Protector's 2014 report *Secure in Comfort*⁸²⁵ shocked the nation when it found that the former president had failed to act constitutionally when he unlawfully used public funds to upgrade his private homestead. What became even more disturbing was the way the matter was handled by the National Assembly who absolved the former president from liability and the recommendations of the Public Protector were ignored. Although this did not involve a state-owned entity, it revealed the dishonest and greedy tendencies of the custodians of state resources who are expected to act ethically. Also in 2014, the Public Protector's report "*When Governance and Ethics Fail*",⁸²⁶ exposed fraud, irregular appointment and the falsification of results within the South African Broadcasting Corporation (SABC). The report found that the chief operating officer (COO) appeared to have personalised the state entity and its board of directors simply ignored the recommendations made by the Public Protector and absolved the COO of all wrongdoing.

⁸²⁴ See the discussion on Public Protector's findings in 4.3.2 above.

⁸²⁵ Public Protector *Secure in Comfort* op cit note 594. See the discussion on public protector's findings in 4.3.2 supra.

⁸²⁶ Public Protector *When Governance and Ethics Fail* op cit note 508. See the discussion on public protector's findings in 4.3.2 supra and the discussion on corporate governance failures at SABC in 3.10.4 respectively.

Furthermore, the Public Protector's 2015 report, *Derailed*,⁸²⁷ exposed the corruption at the Passenger Rail Agency of South Africa (PRASA) in relation to the many irregular contracts awarded by the entity. Then, in 2016, the *State of Capture*⁸²⁸ report made findings on the long-standing mismanagement at Eskom, the state electricity company, and implicated a family in the capture of state institutions and resources. This record of SOE maladministration has made it imperative for CSOs to have a sound legal footing to confront the debilitating problem, as the next section reiterates.

6.4.3 Conclusions on legal provisions and measures taken by CSOs against poor corporate governance in SOEs

As the people's representative, civil society organisations are well positioned to challenge poor governance of state-owned enterprises. South African CSOs have been doing just that and this role derives from legal provisions in South African legislation which specifically state the obligations that state institutions have to the citizens and the citizens' right to challenge poor state administration. First, SOEs are state-owned and, as a result, are public-sector entities subject to public-sector regulations as well. The Constitution promotes ethical conduct, transparency, accountability and inclusion in the administration of the public sector. This places an obligation on SOEs to adhere to the principles of corporate governance.⁸²⁹ This is more directly reinforced by the Public Finance Management Act of 1999 which requires transparency and accountability from the board and top management officials of SOEs.⁸³⁰ In addition, the Companies Act makes it obligatory for companies to adhere to transparency and accountability in their processes and also to observe sound corporate governance principles by appointing necessary committees and individuals in a company.⁸³¹ Furthermore, both case law and soft law such as the Kings Code have established comprehensive corporate governance principles as discussed in chapter 3, sections 3.6.4 and 3.6.5. In *SABC v DA* for example, the court emphasised that SOEs are guardians of the citizens and should deliver and account to citizens in terms of section 41 of the Constitution.⁸³² Principle 3.4 para 20 of the King IV Code and Report 2016 states that

⁸²⁷ Public Protector *Derailed* op cit note 497. See the discussion on public protector's findings in 4.3.2 supra and the discussion on corporate governance failures at PRASA in 3.10.3 above.

⁸²⁸ Public Protector *State of Capture* op cit note 465. See the discussion on public protector's findings in 4.3.2 supra and the discussion on corporate governance failures at Eskom in 3.10.1 above.

⁸²⁹ Constitution 1996 s 195. See 3.6.1 above.

⁸³⁰ Public Finance Management Act 1 of 1999 s 3. See 3.6.2 above.

⁸³¹ Companies Act of 2008 s 23-4. See 3.6.3 above.

⁸³² 2016 (2) SA 522 (SCA) para 2.

accountability is satisfied through disclosure of information. Lastly, in *South African Broadcasting Corporation (SABC) v Mpofu*, the court urged directors of SOEs to include the value of ubuntu which is based on serving humanity into their decision making.⁸³³ The value of ubuntu is clarified in part two of *King IV*.⁸³⁴

Equally important for CSOs are the legal provisions that not only place an obligation on the state but also allows CSOs to access the relevant information that enables them to do their work, such as the Promotion of Access to Information (PAIA) Act and the Promotion of Administrative Justice Act (PAJA).⁸³⁵ These legal provisions give CSOs permission to apply to state institutions to provide the information they need to do their work, as well as to hold them accountable for any failure to do so.

Clearly, there is a variety of legal provisions that may be used by CSOs to scrutinise the corporate governance practices of SOEs. These they continue to use in combination with a number of other strategies. First, CSOs continue to engage government institutions through public dialogue channels such as the formal media, open correspondence and social media whenever there is an issue of concern. CSOs have also engaged other CSOs as well as citizens to find quicker solutions to pertinent problems.⁸³⁶ Secondly, CSOs have been involved in organising and supporting public protests triggered by a lack of transparency and public consultation in critical decisions by the government.⁸³⁷ Thirdly, CSOs have been involved in advocacy campaigns and submissions to Parliament whenever a new legislation is being introduced or where there is an amendment of existing legislation.⁸³⁸ In addition, CSOs have appeared as witnesses in tribunals and commissions aimed at enforcing justice and accountability, including unofficial tribunals convened by the civil society community.⁸³⁹ Also, CSOs have written books, stories and reports that are aimed at exposing corruption in SOEs. Lastly, CSOs have instituted legal proceedings or appeared as *amici curiae* in the courts of law where they have had high successful outcomes.⁸⁴⁰ Understandably, due to its costs and time-consuming nature, litigation is used as a last resort, although it has proven to be very effective, particularly with regard to unclear and ambiguous provisions.

⁸³³ 2009 JDR 0608 (JSJ) para 62–64.

⁸³⁴ *King IV Report* part 2 op cit note 284 at 24. See 3.6.4 above.

⁸³⁵ Promotion of Access to Information Act of 2000 part 2 and Promotion of Administrative Justice Act of 2000 sec 3. See 4.2.4 and 4.2.3 respectively.

⁸³⁶ See the discussion on role and activities of CSOs in 5.5.2 above.

⁸³⁷ *Ibid.*

⁸³⁸ *Ibid.*

⁸³⁹ *Ibid.*

⁸⁴⁰ *Ibid.*

6.5 Conclusions on the legal environment for CSOs

The research found that although many legal provisions are in place to check SOEs, they are not easy to navigate and CSOs find it difficult to establish their standing to pursue cases before the courts. Often, they have to rely on constitutional principles of representativeness in order to demonstrate their standing since other laws are not clear on this. Nonetheless, this research found that the legal environment has been improving as courts are now openly willing to listen to CSOs because they have recognised them as the representatives of the people. Examples of these cases as discussed in chapter 4, section 4.4 include *Black Sash v Minister of Social Development*,⁸⁴¹ *Corruption Watch v South African Social Security Agency (SASSA)*⁸⁴² and *Mandag Centre for Investigative Journalism v Minister of Public Works*⁸⁴³ Such improvement is clear in the increasing number of successful cases where CSOs represented people against the state.⁸⁴⁴

Secondly, CSOs are faced with the problem of a lack of enforcement of the law, making it easy for wrongdoers to escape accountability. While some of the wrongdoers in SOEs have lost their positions due to the exposure of their illegitimate acts in the media, hardly any have faced the legal consequences of their actions, despite the fact that appropriate laws exist to prosecute offenders.⁸⁴⁵ This is problematic because when laws are not enforced, wrongdoers will continue to engage in unethical behaviour knowing that they will not be facing any consequences for their wrong conduct. It also leads to the citizens losing trust in their leadership and laws that were put in place to prevent such wrongdoing. Where SOEs are concerned, such lack of enforcement of the law against wrongdoers cripples the economy and human development as corruption has negative effects on the economy and on service delivery.

Failure of enforcement or poor enforcement of laws against wrongdoers also results from lack of effective governance policies and disciplinary mechanisms in SOEs. Laws and policies that regulate SOEs must be mandatory and emphasise transparency and accountability in both internal and external mechanisms. This will ensure compliance with corporate governance principles and reduce corruption in SOEs. To achieve this, there is need for binding SOE regulations which provide clear procedures for corporate governance

⁸⁴¹ 2017 (3) SA 335 (CC). See 1.1 above for case discussion.

⁸⁴² 2018 ZAGPPHC. See 4.4.2 above for case discussion.

⁸⁴³ 2014 JDR 0870 (GNP). See 5.5.5 above for case discussion.

⁸⁴⁴ See the discussion on enabling environment in 5.5.4 above.

⁸⁴⁵ See the discussion on clarity and ambiguity in legal provisions in 5.5.6 (b) above.

violations by SOEs. This may be done by updating existing corporate governance legislation to accommodate the unique characteristics of SOEs.

Thirdly, when it comes to the challenges of CSOs making use of certain legal provisions, the Promotion of Access to Information Act (PAIA) 2000 is a valuable Act that allows CSOs to pursue the information they want. However, the problem with the PAIA is that it provides key exemptions, which gives room for government officials to escape, hide, or refuse to provide key information required by CSOs for their work. Although CSOs are allowed to appeal the refusal of such access to required information, this is an expensive route for organisations that are already facing funding challenges.

In addition, the National Key Points Act of 1980 that protects certain national infrastructures poses challenges to CSOs as they are barred from collecting information from or on the protected national infrastructure. It becomes more complicated where the infrastructure is involved in a corruption case and CSOs want to gather more information or investigate further, as was the case with former president Zuma's Nkandla homestead. Without access to the protected infrastructure, it was hard to successfully gather enough information for CSOs. Most corruption cases in South Africa in recent years have occurred in state institutions such as SOEs and laws such as National Key Points Act and the exemptions in PAIA make it difficult to access the records of such institutions for the purposes of conducting investigations since they are state-owned. This leads to most reported cases of corruption or poor governance going cold without anyone facing any consequences due to lack of evidence. Better access to such records will allow CSOs, media and other parties to do their work as well as gather necessary information.

Furthermore, the Protected Disclosures Act (PDA) Amendment Act of 2017 needs to give enough protection to whistle blowers so that they can feel safe during and after the reporting of corruption. In a country whose public sector is plagued by corruption, it is essential that those who expose such corruption and unethical behaviour by state officials are protected. Such protection is crucial for two reasons, first to protect the whistle blowers as citizens who are constitutionally entitled to such state protection and secondly and most importantly, to encourage more whistle blowers to come forward with reports of corruption. Failure to protect whistle blowers has a huge impact on the measures put in place to curb corruption since potential whistle blowers may just decide not to report any suspicious discovery as a way of protecting themselves and their jobs.

Lastly, the Nonprofit Act is applied in a way that is geared towards controlling CSO activities, as it is more concerned with CSO regulation and compliance than with their

operations and sustainability.⁸⁴⁶ For example, CSOs are required to register with the Directorate of Nonprofit Organisations which subjects them to government control and, as a result, restricts their independence.⁸⁴⁷ Government officials in some cases exploit these legislative loopholes to undermine CSOs. While registration may create room for excessive government interference especially where a CSO is funded by the government, registration remains the best means to establish the existence and credibility of a CSO with funders and beneficiaries. Registration also improves the bargaining strength of a CSO regardless of who is funding the organisation. Non-registration places an organisation at a disadvantage in relation to accessing funding and tax benefits. However, to minimise the problem of interference by the government, CSOs whether registered with the government or not, must endeavour to source their funding from the public.

It needs to be said that while it is clear from the information above that CSOs' legal environment is quite robust, in spite of the issues identified, the same cannot be said about their financial environment where funding is drying up. Both government and external funding for CSOs is insufficient and this affects the choices made by CSOs when they consider options for responding to poor governance issues in SOEs.⁸⁴⁸ The next section presents recommendations for improving the legal environment for CSOs in the discharge of their watchdog role.

6.6 Recommendations

Various ideas have emerged in this thesis as ways of addressing the research question and this section ties them together. The table below shows a summary of the legal provisions that CSOs use in their watchdog role, the problems in the identified provisions that are a hinderance to CSOs and the recommended solutions. The table is further explained in detail throughout the section.

Provision	Problem/s	Recommendations
1. Section 37 - Promotion of Access to Information Act 2 of 2000 (PAIA) – Protection of confidential information of third parties.	Gives room for state officials to refuse to provide information about a third party required by CSOs for their work where a third party was involved with the government.	Exemptions given to government and organisations need to be amended to reduce the flexibility so that CSOs can access the information they need to do their work.

⁸⁴⁶ See discussion on CSO contributions to governance in 2.4.3 above.

⁸⁴⁷ See discussion on clarity and ambiguity in legal provisions in 5.5.6 (b) above.

⁸⁴⁸ See discussion on CSO funding in 2.4.4 above.

	When the government contracts with fraudulent and corrupt private companies, such private companies rely on the provision, asserting that they are a private company and that the information does not affect the public.	The PAIA needs to clarify the position of third parties and private companies and their obligations to the public where they have partnered with the government. The provisions of PAIA and the Companies Act of 2008 on this point need to be reconciled to address the lack of cohesion between both Acts.
2. Section 10 - National Key Points Act 1980 (NKPA) – Limits, prohibits and criminalises access to certain National Key Points Infrastructure.	Presents an obstacle to journalists wanting to do their work on national key points.	Critical Infrastructure Bill which is to replace the National Key Points Act, should reduce excessive criminal sanctions on journalists and the public who obtain information about the national key points.
3. Section 9B - Protected Disclosures Amendment Act of 2017 (PDA) - Conviction and imprisonment for reporting false information.	Discourages people from reporting corruption as not all false information reports are malicious and some information may appear accurate but after investigation, prove to be false or unreliable.	More protection for people who report poor governance and corruption in SOEs and a reduction of sanctions to encourage more people to bring reports of poor governance forward and help CSOs.
4. Chapter 3 - Non-Profit Organisations Act of 1998 - Registration of Non-Profit Organisations	NPO Act virtually forces CSOs to register as NPOs, resulting in CSOs not carrying out their mandate freely or independently.	The NPO Act should be amended to not only regulate but empower CSOs by authorising them to execute their watchdog role independently.
5. Public Audit Amendment Bill - Auditor-General to take remedial action and investigate state corruption.	The Bill is taking long to become a Law	The Bill should be passed into law to empower the Auditor-General and recover public sector losses. Delaying these amendments prolongs the burden on the citizens who are taxpayers.
6. Sections 84-94 Companies Act of 2008 - Enhanced Accountability and Transparency	Corporate governance provisions in the Act are geared more towards the regulation of private companies and less on state-owned enterprises which are unique companies in nature. The Act does not define corporate governance.	There is a need for binding corporate governance regulations in SOEs by way of a dedicated SOE corporate governance code, given the uniqueness of this class of entities. The Companies Act should be amended to include a provision defining corporate governance.

6.6.1 Recommendations on civil society organisations

The study revealed that while the legal environment for civil society organisations (CSOs) is evolving, there is a need for the closing of gaps in existing law through the introduction of new laws and the amendment of existing laws to empower CSOs. First, the CSOs' role in the governance of state-owned enterprise is not defined. To close this gap that restricts the role of CSOs as watchdogs, a law that clearly defines the role of CSOs in the governance of SOEs should be enacted so as to end this uncertainty. To empower CSOs in their role that is often contested due to uncertainty, there is need in existing laws for express provisions specifically authorising CSOs to challenge the actions of SOEs. The current legislation regulating CSOs, such as the Nonprofit Organisations Act is directed towards controlling CSOs rather than empowering them as its provisions regulate rather than authorise. For example, NPO registration which is imposed on CSOs by the government to encourage transparency and provision of other benefits such as tax exemptions and credibility for funding is used as a tool for controlling CSOs.⁸⁴⁹

The NPO Act should be amended to not only regulate but empower CSOs by authorising them to execute their watchdog role. The NPO Act should not regulate CSOs in a way that gives the government control over CSOs, as it interferes with CSOs' independence. Government control of CSOs is not beneficial for CSOs' autonomy and, as a result, CSOs should not be forced to register in order to maintain their independence. Although there is no direct compulsion for any organisation to register under the NPO Act, registration confers credibility, tax benefits, funding and other benefits, while non-registration places a cloud of suspicion around a CSO. Additionally, to maintain its independence, CSOs should aim to source its funding from the public whose agenda is aligned to that of CSOs. In this case, even if CSOs lose benefits that come with registration such as tax exemptions and government funding, they will not be severely affected since their funding will be from the public.

Secondly, amending the NPO Act to empower CSOs as mentioned above creates channels for CSOs to participate in governance, partner and cooperate with the government and for government to listen to CSOs. Empowering CSOs through amendment of existing laws includes amending and putting to use, the submissions made by CSOs in Parliament on different laws. Furthermore, submissions on exemptions in the Promotion of Access to Information Act (PAIA) of 2000 that are given to government and organisations need to be

⁸⁴⁹ See discussion on legal provisions used by CSOs in 4.2.1 above.

amended to reduce the flexibility given to institutions so that CSOs can access the information they need. For example, when government outsources a service to a third party or a private company, this makes it difficult for CSOs to access or approach such third party, private company or to request information pertaining to such third party or private company from the government because they are protected by third party or private party confidentiality.⁸⁵⁰ The problem of refusal, hiding or losing information by government does not advance the democratic values provided in the Constitution. Reducing PAIA exemptions will also reduce costly and time-consuming appeals by CSOs, which are in any case, not guaranteed to succeed. This loophole is problematic, yet by virtue of partnering with the government, the third party or private company steps into the shoes of government and consequently, has an obligation to the public to act ethically.

It is recommended that the PAIA Act be amended to clarify the position of third parties and private companies and their obligations to the public where they have partnered with the government. Furthermore, the lack of cohesion between the PAIA and the Company's Act concerning exemptions leaves loopholes which are used by offenders to escape liability.⁸⁵¹ For example, while confidentiality exemptions are stringent in the Companies Act against companies that refuse to disclose information, in PAIA the exemptions are flexible, leading to companies using the PAIA to circumvent the request for information. It is recommended that PAIA exemptions be amended to allow CSOs to access information easily. Also, submissions on the Protected Disclosures Act (PDA) of 2000 on the provision of more protection for people who report poor governance and corruption in SOEs and a reduction of sanctions for those who report false information under section 9B of the PDA (Amendment Act),⁸⁵² have to be effected immediately as this will encourage more people to bring reports of poor governance forward and help CSOs.

In addition, the Critical Infrastructure Bill which is to replace the National Key Points Act, should be passed as law and the amendments should be made to reduce excessive criminal sanctions on journalists and the public who obtain information about the national key points.⁸⁵³ Furthermore, the Public Audit Amendment Bill should be passed into law as it seeks to give the Auditor-General the power to enforce its audit findings and ensure that

⁸⁵⁰ See the discussion on clarity and ambiguity in 5.5.6 (a) above.

⁸⁵¹ Ibid.

⁸⁵² Ibid.

⁸⁵³ Ibid.

losses suffered by the state in the public sector are recovered.⁸⁵⁴ Delaying these amendments prolongs the burden on the citizens who are taxpayers.

Thirdly, in respect of CSOs' lack of knowledge of existing laws and how to use legal provisions, it is submitted that ongoing workshops facilitated by other local, continental and international NPOs and CSOs that have been in existence for a while, such as the South African Human Rights Commission (SAHR Commission), Lawyers for Human Rights in South Africa (LHRSA) and the Institute for Democracy which have more experience on advocacy, legal intervention and governance and international affairs would be of tremendous value. General legal training should also be provided on how to navigate the legal landscape which will include how to keep up with new laws, to focus on necessary provisions within the existing laws or laws that were used before which are promising and convenient, the application of the law and how to make use of available public or private legal services without having to spend a lot of funds. For example, there are highly successful legal institutions such as the Lawyers for Human Rights that are willing to take on matters *pro bono* for the public benefit. CSOs should keep up to date with the new laws, cases and updates in public governance.

It is further recommended that CSOs must have an internal legal team or an advocacy officer that is responsible for researching and studying the laws as well as parliamentary submissions, a stakeholders management team that is responsible for community work and also a communication team responsible for social media and campaigns. The teams help the organisation with the current updates on law, cases and trending issues in public governance. It is acknowledged that these teams can be costly for CSOs that are already facing funding challenges. However, CSOs can partner and coordinate with other CSOs and benefit from each other without needing extra resources. Where it is time consuming, CSOs can cooperate and form another CSO or launch an initiative that directly deals with whatever issue they want to solve, for example the Right to Know campaign was formed by different CSOs to promote access to information.

A fourth recommendation is in relation to CSO transparency. CSOs should adopt the practice of publishing their reports on the NPO Directorate website even though it is not currently a legal requirement. This will be easy for upcoming CSOs and others to see how other CSOs are successfully doing things within their organisations. Books written by CSOs

⁸⁵⁴ Ibid.

or individuals on corruption should be made public or distributed to the public or made available online by such CSOs for the information of the public.

A fifth recommendation deals with litigating strategically. It emerged that although litigation is very expensive, it is effective.⁸⁵⁵ To address this, CSOs need to be strategic whenever they face cases of poor governance. Not every case should be taken to court directly before other measures are considered, such as negotiations, dialogues and engagements with those involved. Investigations showed that measures other than litigation are very effective in finding solutions, are less costly and save resources and time.

A sixth recommendation is on an enabling environment. Government must ensure the environment is enabling as it not only allows CSOs to operate but opens more platforms in its processes for citizens to pursue justice through such measures as reporting corruption, socio-economic representation and access, exposing information on poor governance and maladministration of public resources such as tax funds. For example, Corruption Watch, the Black Sash, AmaBhungane and OUTA, as discussed in chapter 5, provide such platforms. This is a way of strengthening democracy by condemning poor service delivery and unethical behaviour in SOEs.

A seventh recommendation is on the dual role of CSOs. The research found that some CSOs neglect their watchdog role in favour of their service delivery role alone out of fear of government reaction, which may cost them their funding.⁸⁵⁶ CSOs need to maintain their dual role as provider of services and watchdog in a way that ensures that both roles co-exist productively. This can be achieved when CSOs remain independent from the government. A lack of independence from government results in CSOs abandoning their watchdog role as they fear criticizing the government. Independence can be achieved when CSOs are not coerced to register, as such registration may be used against them by the government and when they receive funding from the public.

Lastly, based on the conclusions, there is the need for improved communication and partnership between the state and CSOs to strengthen their relationship. This can be achieved through giving CSOs attention and opportunities to participate more effectively in policy and law-making platforms such as submissions to Parliament and parliamentary debates on socio-economic challenges. Through these platforms, government can update CSOs on its plans,

⁸⁵⁵ See the discussion on litigation in 5.5.2 (g) above.

⁸⁵⁶ Greenstein, Volkhart & Naidoo op cit note 196 at 67-70. See the discussion on the challenges faced by CSOs in 2.4.5 above.

while on the other hand, CSOs engage government in respect of the latter's policies and programmes.

6.6.2 Recommendations on state-owned enterprises

First, as discussed earlier, government tends to feel threatened by CSOs' activities and their operational strategies such as legal action, protests and vigorous enquiries, follow-ups and other measures taken in challenging poor governance in SOEs which results in substandard service delivery.⁸⁵⁷ It is submitted that a proper paradigm within which government sees CSOs as citizen representatives who are doing what is required of them needs to be established and importantly, the legal measures recommended in 6.6.1 will contribute to that. However, government itself needs to implement a programme of re-orientation of its leadership and staff to understand that it is government that serves the people and as such it owes CSOs a duty to listen, engage and account within reasonable circumstances. SOEs can respond to CSO 'threats' by demonstrably improving their service delivery standards, but these standards can be improved only when the maladministration of state resources in SOEs is addressed, because squandered resources means no delivery to the citizens.

It is further recommended that the government must develop an ongoing framework for dealing with the problem of state capture which presents a pervasive challenge and a threat to the well-being of SOEs. This will entail developing a plan for the implementation of recommendations of commissions of enquiry such as the Judicial Commission of Inquiry into Allegations of State Capture (also known as the Zondo Commission). State capture can be solved when power is not centralised in one person or office because a concentration of more power is likely to lead to its abuse and an indulgence in activities that benefit the select and favoured few. For example, the capturing of Eskom involved the then president, a cabinet minister and the board of Eskom — and one specific family that benefited from many Eskom contracts and tenders.⁸⁵⁸

Secondly, the Public Protector's office was undermined by government's failure to implement its recommended remedial actions at South African Broadcasting Corporation (SABC) in 2016. These recommendations were that the SABC board ensure that the former SABC COO faces disciplinary action for his irregular activities and dishonest practices at the

⁸⁵⁷ Greenstein, Kola & Lopes op cit note 163 at 91–95. See the discussion on the challenges faced by CSOs in 2.4.5 above.

⁸⁵⁸ Public Protector *State of Capture* op cit note 465. See discussion on Eskom corporate governance failures in 3.10.1 supra.

SABC.⁸⁵⁹ The Public Protector's office is a constitutionally created government institution and the government should not feel threatened by what is its own initiative. Instead, government must empower the Public Protector's office by effecting the remedial actions recommended by that office in the past and in the future, making them binding and not merely advisory or optional. Failure to abide by such recommendations by any government institution should be taken as an offence and there should be legal repercussions for such failure.

Thirdly, in view of the growing culture of lack of accountability by the current government,⁸⁶⁰ it is submitted that effective participatory governance requires not just the principle of elected representatives and broad policy consultation forums such as the National Economic Development and Labour Council (NEDLAC), but the direct inclusion of civil society in highlighting the impact of key decisions of SOEs at the deliberation stage. Civil society participation in decision-making persuades government to justify its actions while the enforcement of the law, including the implementation of duly constituted commissions of inquiry ensures that government officials face the repercussions of their wrongdoing. When wrongdoers do not face the consequences of their actions, a precedent of lawlessness is set, as demonstrated by the line of cases discussed in 3.10. It is recommended that the National Prosecuting Authority and the South African Police Service should develop a system for investigating cases of poor governance reported by CSOs and promptly lay charges where appropriate.

For example, no prosecutions have been made so far, following the allegations that were made before the ongoing Judicial Commission of Inquiry into Allegations of State Capture (Zondo Commission), the People's Tribunal on Economic Crimes and the Public Protector's reports such as *State of Capture, Secure in Comfort*, "*When Governance and Ethics Fail*" and *Derailed*. Successful prosecutions will place potential offenders on notice and curtail the proclivity towards corruption-induced poor governance in the public sector since wrongdoers will know that there are consequences to their actions and wrongful omissions. The government needs to be accountable in order to improve the relationship between state and society. If findings from tribunals and commissions aimed at enforcing justice and accountancy are rarely enforced, such platforms are a further waste of public

⁸⁵⁹ Paul Herman 'SABC ignored Public Protector's remedial actions – Mkhwebane' News 24 7 July 2016, available at <https://www.news24.com/SouthAfrica/News/sabc-ignored-public-protectors-remedial-actions-mkhwebane-20161207>, accessed on 23 July 2018. See also discussion on SABC corporate governance failures at 3.10.4 above.

⁸⁶⁰ Akinboade, Mokwena & Kinfaek op cit note 15 at 467.

resources. Therefore, it is further recommended that mechanisms for enforcing the findings of tribunals and commissions be put in place, so that they can serve their purpose of upholding justice and accountability.

Fourthly, the research showed the continuous corporate governance failures in SOEs that are mitigated by continuous government bailouts from taxpayers' funds.⁸⁶¹ Undoubtedly SOEs are failing dismally and the bailouts by government are not helping either the struggling SOEs, the economy or the taxpayers. For example, the recent South African Airways (SAA) strike on 15 November 2019 cost the government R200 million for the four-day period that it lasted, and SAA needed R2 billion by the end of the month to stay afloat. In December 2019, SAA was placed under Business Rescue which will cost the government about R16 billion.⁸⁶² For some of the struggling SOEs, a partial privatisation is suggested. Partial privatisation brings private shareholders with commercial objectives, leading to increased efficiency and profits since there will be competitive incentives. Government will be the majority shareholder, serving social objectives.

Although partial privatisation may reduce the scope of the social benefits that SOEs offer, political interference that has proved to be a problem in SOEs will be limited, while some social objectives will continue to be served. Unlike Eskom which provides less expensive electricity and PRASA which provides less expensive transport as well as other SOEs that are vital to the less privileged, privatising SAA will have no serious effect on the majority of people as it is used mainly by people who may still be able to afford it and who in any case, have other options. Telkom is a good example of why partial privatisation is a good idea. The Telkom SOE was partially privatised in 1997 and is well managed. This is clear from its high levels of adherence to corporate governance principles and financial solvency.⁸⁶³ A further reason for poor governance in SOEs is that their financial models are based on the profit motive which is at odds with the social function that must be served through service delivery. Given that SOEs are commercialised, their regulations are more tailor-made for private companies than for SOEs, without the accompanying corporate governance controls applicable in the private sector. This could be addressed by partial privatisation.

⁸⁶¹ See the discussion on corporate governance failures in SOEs in 3.10 above.

⁸⁶² Heiberg op cit note 491. See also Antony Sguazzin 'SAA business rescue gets green light after all conditions met' *IOL* 28 July 2020 available at <https://www.iol.co.za/news/politics/saa-business-rescue-gets-green-light-after-all-conditions-met-9a069684-282c-45f6-9281-223f0a0b5762> accessed on 2/11/2020.

⁸⁶³ Ray Mahlaka, available at <https://www.dailymaverick.co.za/article/2019-05-28-telkoms-turnaround-shows-potential-for-privatising-tax-guzzling-soes/>, accessed on 21 November 2019.

A fifth recommendation is in terms of the exemptions in the application of corporate governance principles to SOEs. The latitude allowed to SOEs by the government through these exemptions should be reviewed. If the government expects SOEs to yield good results in terms of service delivery and sustainability, then there is a need to limit these. They should be regulated just like the private companies that offer similar services.⁸⁶⁴ This will enhance quality assurance, probity and sustainability.

A sixth recommendation is on SOE legislation. There is a need for clear, strong and binding corporate governance regulations in SOEs. In other words, it is recommended that a clearly defined operational framework, which sets out a threshold of mandatory corporate governance requirements for SOEs be created. This could be by way of a dedicated SOE corporate governance code perhaps modelled after the King IV Code on Corporate Governance (King Code). However, it must be noted that although the King Code sets out strong principles, adherence to it is only voluntary. The importance of addressing the lack of a uniform framework governing all SOEs is underscored by the findings of this research. Solutions to this include, passing legislation that regulates SOEs independently of private companies, as the circumstances and objectives of SOEs are, to a certain extent, different from those of private companies. Such legislation should define corporate governance in SOEs exclusively, while taking into consideration the unique nature of SOEs. In the meantime, in consideration of the importance of corporate governance in the management of companies, the Companies Act should be amended to include an amendment defining corporate governance.

Also, greater adherence to existing corporate governance principles can be secured by creating internal independent oversight mechanisms as well as external mechanisms to monitor such adherence as well as clear policy structures to preserve good governance. For example, establishing a supervisory committee to govern board of directors in SOEs and better protect the interests of stakeholders. CSO representation on such a supervisory committee could be a way of addressing the third recommendation on CSO participation in SOE governance. The supervisory committee mechanism is working well for Chinese SOEs.⁸⁶⁵ In addition, the application of stronger corporate governance principles, for example, requiring a mandatory compliance with King Code ‘apply and explain’ principle or

⁸⁶⁴ See the discussion on SOEs v private companies in 3.5 above.

⁸⁶⁵ Deloitte China *Solutions: Board of Supervisors and Stakeholders*, available at <https://www2.deloitte.com/cn/en/pages/risk/solutions/cg-supervisory-committee-and-shareholders.html>, accessed on 05 December 2019.

its SOE equivalent would be appropriate to check SOE's excesses. The *King Code* 'apply and explain' principle already applies to private companies.⁸⁶⁶

Lastly, although there is a need for political representation in SOEs for policy-making reasons, political representation in SOEs should not outweigh merit. A lack of merit in SOE appointments leads to incompetence and poor decision-making. The cabinet ministers' centralised power as sole shareholder, regulator and policymaker of SOEs is the cause for unchecked political representation in SOEs. The minister's power needs to be reviewed as centralised power results in an abuse of power. The economic costs of appointing inappropriate individuals as board members of SOEs and CEOs which leads to looting in SOEs can be addressed if the minister and the board are compelled to demonstrate that prospective appointees are qualified, experienced, competent and ethical individuals, as this is critical to SOEs. The appointed individual must possess relevant competencies that meet the needs of the SOE. Also, board appointment processes must be transparent and should include media and other kinds of public representation to gain public trust. In addition, as proposed by the South African Chamber of Commerce, there should be a structure similar to that of the Judicial Service Commission that is established to handle the appointments of board members in SOEs.⁸⁶⁷ As with the appointments of judges, this should be done via public hearings. To address the twin issue of a lack of qualifications or the presentation of fake qualifications by SOE officers, there should be a set of minimum qualifications criteria as well as a stringent verification of presented qualifications with the institutions they were obtained from. The government should also facilitate the training of new directors on their professional responsibilities in SOEs by professional bodies such as the Institute of Directors (IoD).

The synergy of these recommendations can help empower CSOs and strengthen SOEs in order to check corruption, poor decision making and maladministration of public resources.

⁸⁶⁶ Institute of Directors South Africa *Understanding King IV and What It Is Intended to Do*. 6 March 2018, available at <https://www.iodsa.co.za/news/389613/Understanding-King-IV-and-what-it-is-intended-to-achieve.htm>, accessed on 05 December 2019.

⁸⁶⁷ 'SACCI calls for SOE board appointments to be done via public hearings' *IOL, African News Agency* 21 June 2019, available at <https://www.iol.co.za/news/politics/sacci-calls-for-soe-board-appointments-to-be-done-via-public-hearings-27060138>, accessed on 21 November 2019.

6.7 Concluding remarks

Without a doubt, CSOs have fought tirelessly against poor governance in SOEs using various legal provisions. Although the measures that CSOs take in confronting poor governance are sometimes not expressly written in legal provisions, CSOs use their authority as the people's representatives to navigate through this unclear territory. This research examined the legal provisions that CSOs use and how they use them despite the challenges. The research further established that there is a need for the reform of the legal environment for CSOs.

It is hoped that this research has succeeded in highlighting the legal environment in which CSOs operate in South Africa in order to fight poor governance in SOEs as well as corruption in the public sector generally. Most of the research in this area focuses on the economic consequences of poor corporate governance and not much is written on the extent to which poor SOE governance contravenes human rights, such as the right to dignity, equality, health and many others. Future research is necessary on the impact of poor corporate governance in SOEs on socio-economic rights. This will sum up the purpose for the CSOs' hard work against poor governance.

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APPENDICES FOR EMPIRICAL STUDY

ANNEXURE A

CSO-CONSENT FORM

NAME OF RESEARCHER: Julieth Gudo

TITLE OF RESEARCH PROJECT: The use of legal provisions by civil society organisations in advancing corporate governance in State-Owned Enterprises in South Africa.

Tick box with X.

1. I have read the information in the letter explaining the research and I agree to participate in this research project.

Yes	No
-----	----

2. I agree to my responses being used for education and research on the condition of anonymity, and my responses can only be used in a way that I cannot be personally identifiable.

Yes	No
-----	----

3. I understand that the interview will be audio recorded and will take about 60 minutes and no payment or reimbursement will be involved.

Yes	No
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4. I understand that my participation during the interview is voluntary. The choice to participate is mine alone. If I choose not to participate, there is no penalty involved and if I choose to participate, I may stop at any time, or skip any questions I do not wish to answer, without any consequences.

Yes	No
-----	----

5. I understand that I am under no obligation to take part in this project and that I have the right to withdraw from this project at any stage.

Yes	No
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6. I understand that this research might be published in a research journal or book. Since this is for a doctoral thesis, the document will be available to readers in a university library in printed form, and in electronic form as well.

Yes	No
-----	----

Name of Participant : _____

Signature of Participant : _____

Date : _____

ANNEXURE B
RESEARCH INFORMATION FOR PARTICIPANTS

Dear Manager/Director

RESEARCH ON THE SERVICES OF CIVIL SOCIETY ORGANISATIONS (CSOs)

Greetings,

My name is Julieth Gudo, I am a postgraduate student in the Department of Commercial Law at the University of Cape Town and I am doing this research for the purpose of attaining a PhD degree.

I am researching on: how civil society organisations, also referred to as non-profit organisations, use legal provisions to advance corporate governance in state-owned enterprises in South Africa. In other words, I am studying the legal tools employed by civil society organisations/non-profit organisations in their efforts to secure public accountability from state-owned enterprises (SOEs) in South-Africa.

SOEs provide important services, products, employment and capacity building for the public and so they are critical to the economy and must be properly managed through good corporate governance. As an independent sector representing the interests of the public, CSOs/NPOs are well positioned to draw attention to questionable SOE activities and press the government for change.

Having researched, compiled and read your organisation's contributions to governance and democracy in South Africa particularly through legal action against some of the government's institutions, I realised it would be necessary to discuss these issues with you in an interview, so that they can form part of the research that would benefit the public at large.

This interview will take about 60 minutes. There is no penalty for refusing to take part. And if you choose to take part, you may stop at any time, or skip any questions you do not wish to answer. No costs or payments are involved during or after the interview. Should you agree to be interviewed by me, please complete and sign the consent form attached. I look forward to being granted permission to conduct an interview with you. Thank you very much for your time.

Yours sincerely

Julieth Gudo

email: gdxjul002@myuct.ac.za

If you have concerns about the research, its risks and benefits or about your rights as a research participant in this study, you may contact the Law Faculty Research Ethics Committee administrator, Ms Lamize Viljoen, at +27 (0) 21 650 3080 or at lamize.viljoen@uct.ac.za. Alternatively, you may write to the Law Faculty Research Ethics Committee Administrator, Room 6.29, Kramer Law Building, Law Faculty, UCT, Private Bag, Rondebosch 7701.

ANNEXURE C

I. OUTLINE OF CSO QUESTIONS

1. CSOs/NPOs are different from the private companies in that their motive is not profit making but service delivery. Where profit is made, it is channelled back into the organisation. Furthermore, the role of CSOs in promoting good service delivery by the government in South Africa is shaped by the country's history.

Questions will seek to establish:

- The objectives of the CSO/NPO
- The role of the CSO/NPO in the society, in service provision and fighting poor governance of the public sector

2. Besides service provision, another role CSOs/NPOs play is that of being watchdogs for the citizens.

Questions will seek to identify:

- Cases where the CSO/NPO exposed corruption or criticised corrupt officials and institutions.
- Whether there is an enabling environment for CSOs/NPOs to act as watchdogs for the citizens.

3. CSOs have made the government answer to the decisions as well as measures and procedures taken on its policies approach. CSOs have further made sure that transparency and accountability remain an objective of governance in South Africa, because transparency is a very important principle when administering the public sector.

Questions will seek to determine:

- Provisions that legally authorise CSOs/NPOs to interfere with the governance of state institutions and to hold the management accountable.
- Whether there is clarity in the provisions.
- Cases that CSOs/NPOs challenged the government on, in the courts of law.
- If there are other ways in which CSOs/NPOs can more effectively utilise legal provisions to promote accountability in state institutions.

4. In their capacity as representatives of the citizens, CSOs have pursued or provided platforms or channels through which citizens can pursue justice when their rights are contravened by those in authority.

Questions will seek to determine:

- Whether CSOs/NPOs need self-authorising laws.
- Sustainability of CSOs/NPOs independence.

5. A democratic government does not always provide a favourable environment for CSOs/NPOs to effectively conduct their mandate.

Questions will seek to determine:

- Challenges that CSOs/NPOs meet in fulfilling their mandate.
- Ways to improve these challenges.

6. CSOs/NPOs often confront resistance from government when the latter feels that CSOs/NPOs want to usurp government's roles, but at the same time continue to be independent.

Questions will seek to determine:

- Why the role of CSOs/NPOs in ensuring that state institutions are held accountable is undermined by the government.
- Ways of improving the role of CSOs/NPOs in ensuring that the government is held accountable.

7. Some CSOs/NPOs have failed to maintain dual role of watchdog and service delivery. These CSOs/NPOs decided to focus on their service delivery role only because they do not want to tarnish their relationship with the government by being watchdogs for the citizens.

Questions will seek to establish:

- If CSOs/NPOs are good role models.
- If there is coordination among CSOs/NPOs.
- Transparency and Accountability in CSOs/NPOs.

8. Involving citizens in governance promotes good decisions, good governance and positive state-society relations, all of which contribute to the sustenance of democracy.

Questions will seek to determine:

- If the state is encouraging and promoting cooperation with CSOs/NPOs, such as being consulted during the policy and decision making process.
- Accessibility of information by CSOs.
- If CSOs/NPOs are informed about government anti-corruption work and bodies and their role.

ANNEXURE D

II. CIVIL SOCIETY ORGANISATIONS' ACTUAL INTERVIEW QUESTIONS.

1. What are your organisation's objectives?
2. How is the organisation effectively playing a role in the society to end poor governance of the public sector?
3. Has your organisation been involved in any activity directed at addressing public sector governance?
4. From the experience of your organisation's work, what would you say is the current state of the relationship between NPOs/CSOs intermediaries and the state in relation to the governance of state institutions?
5. Do you think there is an enabling environment for an effective role for NPOs? If yes/no, why?
6. What legal provisions have you found to be useful in the work of your organisation?
7. How do you make use of these provisions? (Through litigation, advocacy, protestation, occupation etcetera).
8. What other legal provisions do you think CSOs can use; not just your organisation?
9. Do you consider these provisions to be clear and unambiguous?
10. Has your organisation used litigation in its work?
11. If so, could you please share the details?
12. How do you think CSOs can more effectively utilise legal provisions to promote accountability in state institutions to citizens?
13. Are there changes you would like to see in the law to make CSOs more effective in representing people?
14. How do you think the independence of CSOs should be sustainably ensured?

ANNEXURE E

**Faculty of Law****Research Ethics Committee**

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E-mail: lamize.viljoen@uct.ac.zaInternet: www.law.uct.ac.za**01 August 2018****Ms JULIETH GUDO (GDJUL002)***c/o Department of Commercial Law*

Level 5, Faculty of Law

Kramer Law Building, UCT

Contact informationEmail: juliethgudo@gmail.com or Mobile: 078 541 9340

Dear Ms Gudo

Re: Clearance Process Report for L0073-2018: "The use of legal provisions by civil society organisations to advance corporate governance in state owned enterprises in South Africa"

Thank you for your revised application submitted. The Law Faculty's Research Ethics Committee very much appreciates the considerable effort put into the documentation.

This study has been carefully considered and confirm that all ethical issues have been adequately addressed.

Ethics clearance is hereby granted as of 31 July 2018 for a period of 12 months and is subject to renewal for another 12 months.

Please note that any material changes to the proposal will need to be cleared as an amendment.

*Please do quote the reference number above on all communication regarding this study to the committee.***Sincerely,**

Signature Removed

DR KELLEY MOULT**REC: CHAIRPERSON***cc: Associate Prof A Ordor (Supervisor: CML Dept, UCT)*